

STATE SELF HELP UNDER INTERNATIONAL LAW:
THE AMERICAN INVASION OF PANAMA

BY

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DECLARATION

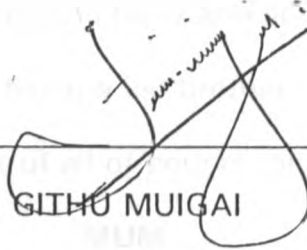
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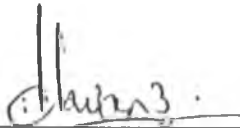
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DEDICATION

FOR THE ABERRAS

For **Dad**; for being a role model,
and **DOC**; for keeping body and soul together,
and **Tommy**; for being a kid brother and a friend,
but most of all of course for you,

MUM

ACKNOWLEDGEMENT

It is traditional, indeed candidates might feel that it is incumbent upon them to acknowledge their supervisors. But it is without regard to tradition and all sincerity of my heart, that I would like to express my heartfelt gratitude to my supervisors, **Mr. Githu Muigai**, and **Professor Kivutha Kibwana**, without whose efforts this thesis would not have seen the light of day.

My deepest appreciation to **Windle Charitable Trust** for financing part of my scholarship for the programme.

For lack of adequate words I limit myself to merely saying thank you to **Mukami Rimberia**, for undertaking to not only type but edit my pathetic first draft.

May I conclude by acknowledging, those who made the intense two years I spent in Nairobi seem a pleasure; beside others, **Mr. & Mrs. Horrox** and the unforgettable, **University of Nairobi Tennis Team**.

ABSTRACT

In December 1989, a contingent of American Navy, Airforce and Marine Commandos numbering 24,000 invaded the tiny Central American Republic of Panama and in a matter of few hours knocked out the superficial resistance offered by the Panamanian forces. General Antonio Manuel Noriega, who sought refuge in the Vatican Embassy in Panama, was persuaded to give himself up to United States authorities after a two week negotiation period, flown to the United States, was charged with money laundering, racketeering and drug trafficking. He was convicted and is currently serving a life sentence. A few hours before the American invasion, Guillermo Endera, who was considered to have won a landslide victory in the presidential elections, was sworn into office by a Panamanian judge in an American base in Panama. The invasion drew widespread praise in Panama and the United States, but the rest of the international community, with the exception of Great Britain, was unanimous in its condemnation.

The action of the United States is unprecedented in international law. Admittedly the United States, armed with the Munroe doctrine and the so called, "Gunboat diplomacy", intervened with impunity, in what is now traditionally considered the Third World in the second half of the 19th century and the early years of the 20th century. However, the charter of the United Nations and of the Organization of American States, (of which both Panama

and the United States are members), coupled with numerous resolution of both the Security Council and the General Assembly and the practice of states since 1945, leave no uncertainty as to the intent of international law regarding the use of force; that states are only allowed to resort to force in self defense. Against this benchmark of the overwhelming evidence of international law, how could the American invasion be justified?

The United States State Department provided four justifications for the American invasion of Panama;

- i. To protect American lives in Panama
- ii. To restore democracy
- iii. To combat drug trafficking
- iv. To protect the integrity of the Panama Canal.

The first chapter of this thesis will explore the evolvement of the law regulating the use of force from the so called "Model of Westphalia" to the present and the accompanying state practice. The second chapter will be a detailed investigation of the legality of the 4 justifications provided by the State Department for the invasion of Panama. The last chapter will inquire into the implication of this invasion for the future of international law, new trends and developments of the practice and attitudes of state regarding state self help and the role that can be played by the super powers and the United Nations in discouraging state self help and encouraging the rule and efficacy of international law in the post Cold War era.

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INTRODUCTION

INTRODUCTION

The apparent wish of men and women is to survive collectively because they wish to live individually. An indispensable prerequisite for this is social order. This requires regularity and predictability in the behaviour of society's members. Such behaviour cannot be created by the spontaneous or rational decision of each member but by social action through various instruments, one of these being law.(1)

The goal and major function of law is to create social order by commanding requisite behaviour. Law therefore appears whenever men coexist in contact. But it may not be simple to discover the law. There are societies, like primitive societies and, to an extent, the international society, whose institutions are quite undifferentiated. They may lack specific organs for creating, interpreting and applying law. They never lack binding rules for social behaviour, however. It may merely be difficult to discover where and exactly what the rules are.(2)

The international society, as a human organization, is based upon, and coordinated by, the interests, motivations and capabilities of the people composing it. The society has to compete with other forces to assert its laws. The main one being national sovereignty.

A state is legally sovereign when there is no higher authority directing its behaviour; when it is free to make its own political decisions. Whether in fact a state has such

freedom, is very difficult to discover, because it is nearly impossible to find out what influences affects its decisions. The theory of legal sovereignty is well expounded by Dionisio Anzilotti, in the customs regime between Germany and Austria. "Sovereignty can be lost only", he decided in a "relationship of superiority and inferiority between states, namely when one state is legally compelled to submit to the will of another"(3). Where there is no such relations, it is impossible to speak of dependence within the meaning of international law. It follows that the legal conception of independence has nothing to do with a state's subordination to international law. States agree that they are both sovereign and bound by international law, without being worried over possible inconsistencies between sovereign independence and subjection to international law.

Social co-existence under the conditions of voluminous international interaction obviously requires a different behaviour by states than was required in the hey day of sovereignty. The necessary limitations upon the freedom of national action are not easily conceded by surviving nationalism. It resists the growth of legal regulations and controls which inevitably accompany increasing interaction. The division of labour among states, subsequent mutual sensitivities among them, and the development of the world into one action area inexorably, leads to a diminishing independence and augmenting of international law. Much subject matter formerly protected by sovereignty, or not existing at all, (such as freedom of air and protection of the biosphere) become internationalized and subject to international regulation. The common welfare of the international community has meant a corresponding restriction of the sovereign power of individual states.(4)

Situations of conflict between sovereignty and legal obligations become openly acute when a compromise between the two has to be achieved. A striking example of such a situation, involving not just the more frequent political but also legal problems, was the Soviet Union's doctrine of limited sovereignty, which declared that Czechoslovakia's independence could be tolerated only if it remained a socialist state. Also the "Munroe doctrine", openly declared that the United States has the right and corresponding duty to intervene unilaterally to put an end to a chronic wrongdoing in the neighbouring republics. To that end the United States intervened no less than 60 times between 1875-1930, in Central and South America. This regional perspective was later to assume a global perspective under the Reagan doctrine.

Under the regime of National Sovereignty common institutions for the authoritative, binding regulations of social order are either absent or under developed. The performance of the institutions, usually governmental functions, is diffused across the international society. The foundation of social order is precarious because its instruments are unsuitable, political power remains in the hands of individual members, or lack in efficacy, eg the law. This organization of the international society and the welfare of nations does not necessarily require the welfare of the international society. This most frequently manifests itself in the use of force.

The right to resort to force for the enforcement of a right had been through history one of the most, if not the most, important element of sovereignty. But ever since the mid

seventeenth century, when independent entities recognizing no superior authority over them, there has evolved in Europe, in order to form the international community, an attempt to put a limit to this unrestrained element of sovereignty. More emphatically the two World Wars have demonstrated that putting a voluntary restraint on this aspect of sovereignty would be more beneficial than one single, isolated national advantage obtained through its resort. To that end, a body of international rules evolved gradually, limiting the right to resort to force. This culminated in the charter of the United Nations which totally prohibited the use of force except in self defence. But deleterious consequences of international law and its diffusion across international society, is most eloquently demonstrated in this aspect of sovereignty. When nation states consider that the welfare of the nation does not require the welfare of the international society, or when it goes against it or when this norm fails to enforce a vital national interest, they would most readily break it. This underscores our other assumption, that the unanimous consensus among the international society is that the maintenance of nations is more important than the maintenance of the international society.

But social order, both national and international, requires better consistency and predictability. These preconditions are shattered when members of the society, unilaterally create, apply and break the law. Thus the enforcement of a right, however legitimate, reasonable and rational, should not violate that preemptory rule of international law, the ban on the use of force. This assertion finds a strong rejoinder in the decision of the International Court of Justice in the Corfu Channel case. The claim

of Great Britain in forcefully violating the territorial integrity of Albania, however justified, for clearing an international strait of mines planted by Albania, was rejected as lacking legitimacy. Although admitting that international law did not, in principle, allow such operations, Great Britain asserted *inter alia*, that, it was justified by the need to secure possession before possible removal, of the *corpora delicti* the presence of which raised questions of Albanian responsibility. To conduct such an operation was merely to protect the evidence of its right to reparation and to aid the administration of justice. But the court rejected the theory that the minesweeping was a valid exercise of intervention, that the alleged right of intervention was the manifestation of a policy of force, "... such as cannot ... find a place in international law". An alternative theory of "self protection", or self help", was summarily dismissed.

"..Between independent states, respect for territorial sovereignty is an essential foundation of international relations.. To ensure respect for international law.. the court must declare that the action.. constituted a violation of Albania's sovereignty.." (5)

The international community has continued to attempt to discourage, through various media of cooperation, unilateral actions of states, that lack legitimacy. This has been done not only by rendering these unilateral actions unnecessary through resort to international organizations to right a wrong or vindicate a right, but also by creating international sanctions against offenders. Understandably, those that resort to force to

enforce or vindicate a right, are those who are in a position to do so. When doing so, "state self help" rarely manifests itself in a pure form. Often it is undertaken under the guise of "self defense", "self preservation" or "necessity". The United States of America being, the most powerful force in the world, has engaged repeatedly in such unilateral actions in pursuance of actual or perceived national interest, an example being the 1989 invasion of Panama.

The charter of various international organizations, along with the charter of the United Nations and the numerous resolutions of the Security Council and the General Assembly coupled with state practice since the coming into existence of the charter, provide adequate evidence of the existence of an "opinio juris" among the international community on the ban on the use of force and proof of its inderogability. Against the bench mark of this overwhelming evidence of international law, the State Department of the United States provided four justifications for the 1989 American invasion of Panama. This dissertation will investigate the legitimacy of these justifications against the charter of the United Nations and against the rules regulating the use of force that were not envisaged by the charter but which since then, have come to life through state practice.

Consequently, the first chapter will set out in detail to investigate and trace the evolvments of the rules regulating the use of force from the heyday of sovereignty, when the princes waged war unhindered for a number of reasons to the first international attempt to put a limit to this aspect of sovereignty, the peace of Westphalia and then to the peace of Paris, covenant of the League of Nations Briawnd kellogg pact and eventually the collective vow taken by the international community at San Francisco to prohibit not only the use of force, but even the threat of it.

This aspect of Sovereignty rarely appears in its brute unrestrained form. Often it manifests itself under the guise of what is generally considered acceptable under international law. Hence the American state department provided for justifications under international law that legitimized the invasion of Panama and the capture and subsequent extreadition of Noriega to face charges in the U.S.A. The second chapter will investigate the legality of this justifications against the benchmark of general international law.

But the tragedy of the Noriega affair, as in the words of John Weeks and Andrew Zimbalist is that,

".. Antonio Manuel Noriega, accused murderer, election fixer, ex C.I.A. agent, drug trafficker, managed, with the help of the Reagan and Bush Administrations, to transform himself into one of the national heroes of Latin America..(6)

The third chapter will investigate the legal limits on the use of force at the end of the Cold war and justifications, if any, for revising the so called "Model of Westphalia. For few areas of international law display such divergence of opinion as does the use of force and sharpening the edges of the normative content of the system presents the real challenge for promoting legal observance.

CHAPTER ONE

THE EVOLUTION AND CURRENT LEGAL REGIME REGULATING THE USE OF FORCE IN INTERNATIONAL LAW

A. EVOLUTION OF INTERNATIONAL LAW REGULATING THE USE OF FORCE

a) Pre 1648 (Peace of Westphalia)

The birth of modern international law could accurately be traced to the birth of the modern state and the disintegration of the Holy Roman Empire. The empire, with two poles of authority, the Pope as head of the Catholic Church and the emperor as the head of the Holy Empire was set up as early as 800 A.D by Charlemagne encompassed most of Europe. But by the 14th Century the Pope had lost a good deal of his power and his authority. The emperor's hegemony was eroded little by little. So much so that by the 16th century the authority wielded by both the emperor and the pope was more formal than real. But the fact still remains that the modern state, in order to emerge as independent, had to fight against three powers; the church, the emperor and the authority of the trade guilds.

The necessary premise for the development of the present international community was the rise of modern national states between the 15th and 17th centuries. The phenomenon was encouraged by the discovery of America in 1492 and the dissemination of Protestantism after the Reformation. Western countries like England, Netherlands, Spain, France and Sweden, as well as the Ottoman empire, Japan and China, increasingly started regarding themselves as independent states and independent of central authority. The struggle for political and military hegemony of Europe also began.

It is interesting to note that the origin of the modern international community in its present structure and configuration, is identified by many legal scholars, as belonging to a peace treaty banning, or at least limiting, the use of force. This was the Peace of Westphalia (1648), which concluded the ferocious and sanguinary war among European powers for political and military supremacy. This does not at all mean that international interactions between groups and nations had not taken place earlier. From time immemorial, diplomatic and consular relations, treaties of war and peace and treaties of alliances have taken place. Treaties going back to approximately 3100 B.C have come to light. They are concluded between Ennatum, victorious ruler of the Mesopotamian city state, and the representative of Umma, another Mesopotamian city state in Summerian language (2) What is more, towards the end of the middle ages, a body of law on the conduct of belligerent hostilities had gradually evolved. Yet as such, the state, in the modern sense of the word, had not matured fully. Thus the necessary premise for the rise of modern international community is the rise of modern national states between the 15th and 17th century. (3) The Peace of Westphalia, in bringing to an end the bloody 30 Years War among European powers, also became the milestone in international resolution of conflict and for the first time in the history mankind, attempted to condemn war of aggression as an international delict.

The treaty also testified to the rapid decline of the church and the disintegration of the Roman Empire. It also recorded the birth of the international system, based on the pluralism of the independent states, recognizing no superior

authority over themselves. The treaty made an attempt at a collective system of self defense for restraint of force. The treaty also stated that after a states right has been violated or is being threatened with violation, the victim state would not automatically be entitled to the right of the use of force or retaliation. (4) Instead the victim state should exhort the aggressor to immediately stop hostilities and submit the dispute to a neutral third party state. A cooling off period of up to three years was imposed at the expiry of which, the injured state was then entitled to go to war. The treaty also required all the contracting parties to come to the assistance of the injured state as a paramount duty of neutral states including the prohibition of passage for troops and supplies. In short the dramatically premature treaty established:-

- (a) a sweeping ban on the use of force
- (b) a prohibition of self defense until the expiry of the cooling off period
- (c) a collective self defense upon the expiry of the cooling off period and failure to reach a compromise.

It would not be too taxing to imagine the pathetic failure of the treaty to regulate armed hostilities. The absolute prohibition of the use of force, including the right of self defence, a full 300 years before the coming into existence of the Charter of the United Nations, which had a very limited

success of prohibiting or limiting the use of force even after two world wars, is, to say the least, a head of its time. Instead the unfettered right of individual states to resort to war upon their discretion and will, and the complete lack of system of the collective self defence, started to becoming the international norm regulating the use of force.

All the same, the treaty was a watershed in the evolution of modern international relations for many reasons

- (a) It recognized and legitimized the existence of states based on the Calvinist or Lutheran faith. Thus the tacit recognition of the independence of the church and the state was initiated.
- (b) It granted members of the Holy Roman Empire, the status of *just federation*, that is the right to enter into alliances and pacts with foreign powers and to wage war, provided those alliances or wars were neither against the empire or against peace of the treaty. Thus a number of small countries were granted the status of members of the international community with sovereign status.
- (c) The treaty also crystallized the political distribution of power in Europe which lasted for almost a century. France, Sweden and the Netherlands were recognized as new emerging powers.

Switzerland and the Netherland were given a neutral status, while Germany was split into a number of relatively small countries.

Nevertheless attempts to regulate the use of force had not started with the Peace of Westphalia. Examination of ancient societies, which had achieved high degree of civilisation, show that, both attempts to regulate the use of force, and the readiness to resort to arms, had always been present.

Ancient Indian rulers did not go to war on the issue of mere territorial gain.(5). China under Chun Chiu, considered war to be a legal institution that could exist only among equal states and not between Chinese families and other "barbarians".(6) The Babylonian Talmud drew a distinction between the violent wars conducted against an enemy attacking Israel and against the seven Nations inhabiting Canaan.(7) Greek literature indicated that a cause must be assigned for starting war and a leader who started illegal war would face trial. The literature also indicates that the Greeks used to enter into pacts and treaties of non aggression.

The Roman approach to war was that of informal legality. *Iustum Bellum* was war commenced in accordance with the existing law with the full approval of the College of Fetials, It also demanded that war be "pium", that is be in accordance with religious sanctions and the express or implied command of the

gods. Cicero argued that no war was just unless an official demand for satisfaction had been ignored a formal declaration had taken place.(8)

Early Christian doctrine completely outlawed all kinds of war and Christians were not allowed to enlist . Saint Augustine (354-430 A.D) sanctioned the doctrine of a just war. Having condemned conquest, he defined a just war to mean, " that which avenges injury, which the nation or city which against warlike action is to be directed, has neglected either to punish a wrong committed by its own citizens, or to restore what has been unjustly taken by it , ". (9) Islam, like Christianity, also up drew criteria for a just war which included the defense of the Koran, the punishment for apostasy and the jihad. Some prominent thinkers of the time, most notably St. Thomas Aquinas (1225-1274), considered war to be just only if it fulfills these three preconditions;

- (a) the authority of a sovereign by whose command it is to be waged
- (b) that those who are to be attacked should deserve to be so
- (c) the belligerent must have the right intention, that is, the advancement of good and the avoidance of evil.

Similar views were shared by other writers of the thirteenth century.

The first modern attempt to examine the legality of the use of force was made by Giovanide Lognano in his *Tractus De Bello* (10) Lognano considered war to be an inevitable extension of sovereignty or even a divine remedy, as long

as it is declared by an authority recognizing no superior or de facto authority above them. Wars between two independent princes must be fired by a just cause. But the pope may wage war against infidels . Similarly Martino da Lodi, Tamasco Da Via and Cardinale Cajetanus made the distinction between just and unjust wars. War is lawful if a warning is given and no other remedy for the settlement of the dispute can be found. Whoever is responsible for declaring unjust wars is to be held responsible and is to return all booty.(11)

Contemporary Spanish theologians and thinkers, concerned with Spanish expansion into Latin America and with the relation of the Native Indians and the Spanish conquerors, displayed a highly refined circumscription of war. The most prominent of them all, Solomonca, a Dominican friar, considered that only perfect states, those not forming part of another community but not exclusively those with a superior Lord could wage war. Other petty rulers have no right to wage war. Differences of religion, extension of an empire, or the pursuit of personal glory, would not justify to resorting to war. The only excusable reason for starting a war was, wrong received. War must be proportional to the wrong received. Good faith, mistakes or ignorance of one's rights for commencing war are excusable vices. He also acknowledged the decline of the Holy Roman Empire when he stated that a prince would have the right to declare war ,when the emperor no longer provides redress.(12)

Between 1494, when France invaded Italy, and 1648, the Peace of Westphalia, two important developments took place on the international scene:-

- a) Balance of power, one of the three major mechanisms responsible for the maintenance of world peace started to emerge
- b) large well defined monarchies and political units which were nationalist, secular and colonizing, started replacing small ill defined fiefdoms led by independent princes which were feudal in structure and owing allegiance to pope and church.

A new body of rule on the use of force, fashioned by prominent social scientists of the time like Alberto Gentili, an Italian protestant, Francisco Suarez, a Spanish Frier and Hugó Gratius , a protestant Hollander, who used naturalist and secular natural law basis for their theories of law, began to emerge. Gertilli was the first writer to develop a system of norms for state relations on secular and legal basis. He sharply diverged with former doctrines of just wars when he declared that;

"... it is the nature of wars for both sides to a conflict to maintain that, they are supporting a just cause. In general, it may be true that; in every kind of dispute, neither of the two belligerents is unjust. If it is evident that one party, is contending without adequate reasons, that party is practicing brigandage and not waging war... but if it is doubtful on which

side justice is, neither can be called unjust.."(13)

Suarez considered injuries received as a licenses for unleashing force which included seizure of another's property and refusal to give it back, denial without reasonable cause of the common rights of nations, which includes innocent passage and grave dishonor to name and reputation. Suarez also acknowledged the right of resorting to force when the Pope is unwilling to provide relief or redress.(14)

Hugo Grattius, widely considered the father of modern international law, in his own words largely borrowed the theories he expounded on legal and illegal wars from the prominent progenitors which include Lognano, Arios, Ayala and Gentilli and the Bible. His conclusion, like many writers of the era, was that war was judicial punitive procedure for redress of wrongs suffered. Grattius also distinguished public war from private war but he rejected Gentilli's assertions that war could be just on both sides(15).

WESTPHALIA 1648-1815

The primary intention of the Peace of Westphalia was the creation of a stable and permanent international system resting on the concept of European public peace and public law, and the formal recognition of the end of violent religious and political wars as well as the disappearance of the papacy and the Holy

Roman Empire, which, at the time, was neither Roman, nor holy nor an empire.(16)

Even though, the most intense international transactions were between European powers, these powers had limited interaction with other non-western entities which seemed to exist on the periphery of the international scene, for example, China, Japan, Persia, India, Burma, the Ottoman Empire, Siam, Ethiopia, Liberia and Haiti. Nevertheless, the central, most active members of the International community, were the European states, joined by the United States in 1783 and the Latin American States in the nineteenth Century. Paraphrasing Hegel's description of the role of the Greeks and the Italians in the past, one might say of this period, "...Europe was the theatre of world's history and the world spirit found its home..."(17)

The common feature of all these states was that they were all Christian absolute monarchial systems that gave way to parliamentary, free market economic systems. Even though non-Christian countries like India, Persia, Burma and Siam interacted on a limited scale with the rest of the European powers, they always lived on the margin of the international community. Anyway, the industrial revolution had created such a big gap between them and their European contemporaries that they easily fell prey to their conquests(18)

The western states tended to develop two kinds of distinct form of relationships with the outside world:-

- a) with those they considered states in the proper sense of the word, for example Japan, China the Ottoman Empire, their relationship was that of subjugation, capitulation and eventually colonization. This was demonstrated by the treaty between France and the Ottoman Empire. The main feature of this relationship was that subordination without according vice versa treatment to the other party. The treaties entered into usually would carry enormous advantages to the European powers and little reference to the other parties. Consensus also prevailed in Europe that, caucasians were the only race with a divine blessing chosen to enjoy the fruits of the world. There was a strong opinion that Europe was not forcefully repatriating what was not its own but justly claiming its divine gifts.(19)
- b) with the communities lacking any certain authority or any state like structure or governing local authority, the Europeans were more blatant. The policy was geared towards quick annexation and for example the Americas, Asia and later Africa.

International law greatly facilitated the conquest by Europe. The acquisition of territory as *res nullius* was duly sanctioned. Effective occupation and *de facto* control with the intent to appropriate, became a sufficient test for appropriation of new territories.(20)

The period between 1648 and 1815 was characterized by the relegation of the just war doctrine to the realms of morality, since, in deference to public opinion, governments frequently took pains to provide adequate excuses for waging war, which would give the action some colour of righteousness (21)

The ideas of Bodin and Grotius appeared in works of prominent thinkers like Bacon(22), Hobbes(23) and Spinoza(24). Two other writers marked the beginning of a long line of positivists. Samuel Roche (1628-91) asserted that war must have a just cause and be necessary, to be legal. It is not to be permitted if satisfaction or reparation is offered. Similarly Johann Wolfgang (1638-1701) stated that the only instances war would be deemed to be just was a series of grievances suffered and refusal of restitution.(25) The doctrine seems to have found acceptance as witnessed in the attempt, however crude, by Frederick the Great too defended his invasion of Saxony as an anticipation of an attack. The eighteenth century also witnessed the invasion of Silesia, of Saxony and the partition of Poland.

The Age of Enlightenment which brought radical improvement on the moral and

intellectual climate, also lent a hand in circumscribing the use of force. Strong pacific sentiments appeared in the works of Montesque, Voltaire, Saint Simon, Kant, Bentham, Diderot.(26) Rousseau produced his treaties on perpetual peace.(27) The French constitution of 1891 prohibited the pursuance of aggressive wars 1815-1914 , (The customary law of the period)

In spite of the intense political and military struggle for hegemony in Europe, no dominant power emerged. France, the United Kingdom, Spain, Portugal, the Netherlands, the United States, Russia, Austria and Prussia all, at one time or other, strongly attempted to emerge as regional superpowers. The European settlement of 1814 and 1815 and the final act of the Congress of Vienna, established what was to be termed as, the Public Law of Europe, the principle of balance of power which highlighted the maintainance of the status quo and suppression of liberalization. The rise of nationalist sentiments and sanction for cooperation in support of the repression of rebellion, saw the intervention in 1820 & 1821 to suppress the uprising in Sicily.(28)

The success of Napoleon in conquering a substantial part of Europe and the radical revolutionary ideals floated during the French Revolution, deeply shook the existing principles. The victors were of the opinion that the time had come to protect the European monarchy and to this end to devise a system capable of putting a straight jacket on new ideas which were urging equitable

distribution of wealth and the dismantling of the aristocratic privileges. A new system was set up in a series of treaties which rested primarily on three principles.

a) Declaration of principles embodied in the Treaty of Paris in 1815 between Austria and Prussia and which later came to be adhered to by majority of European states except England and the Ottoman Empire. The contracting parties undertook to adopt precepts of the Christian faith in their internal and external relationships. They also undertook to help each other with a view of preserving Christian religion, peace and justice and to consider themselves part of one Christian family.

b) Military alliances were concluded between Prussia, Austria and Russia and England and France acceded in 1818. These alliances were geared towards forestalling any recurrences of Bonapartism that would upset the existing order and establishment. It was also designed to combat the emergence of any revolution which was likely to overthrow European monarchies. In case a revolution broke out the state would be expelled from the alliances and would not only not be recognized but might face military intervention with a view to thwarting the revolution (29)

- c) New procedures for settlements of political disputes was envisaged by an article of treaty of Paris. It promised a meeting of all sovereigns to regularly discuss great interests in common, peace and tranquility based on periodic summit meetings.(30)

Eventually when the absolute monarchies of Europe were overthrown or replaced by parliamentary constitutional monarchies, balances of power revived their tendency to exercise hegemony endeavoring not to trespass upon respective spheres of influences. The United States extended its sphere of influence over Latin America replacing Spain and Portugal.

A number of interventionist law principles were the product of this period. These were rules for the acquisition of territory whereby each state has exclusive right and control over its own territory airspace, and sea space. The law of the high seas, immunity of envoys and consular staffs, norms regulating reprisals and war, standards for the purpose of placing restraint on the most inhuman aspects of conduct in war were elaborated during this period.

Efforts to limit the super power dominance, however timid had also started. The Latin American Countries started inserting clauses in their concession contracts with other states, stipulating that, in case of disputes arising out of the contract, foreign states relinquish the right to request diplomatic and judicial protection. However, the attempt was illfated. A number of international courts and claims commissions, rejected the clause as legally ineffective in that it

could not deprive states of the right of protection as the later derived from international law only.

Another attempt at limiting super power dominance was the attempt to limit the unfettered right of states to resort to force recover payment due. Three European countries made use of this right. Italy, United Kingdom and Germany demanded from Venezuela that it make good the damages they had sustained during the civil strife that raged within the century between 1889 and 1900. But Venezuela insisted upon submitting the claim to local arbitration which partly reduced and partly rejected the claim. After an ultimatum, the three European powers sunk a Venezuelan ship, bombed the locality of Puerto Cabello and imposed a naval blockades, whereby Venezuela gave in.

Venezuela bitterly protested against the action as contrary to the Monroe doctrine in particular and to international morality in general, as financial troubles and debts is no justification for foreign military intervention. The protest received lukewarm reception in the United States . In 1907 when Latin American countries attempted to pass a resolution forbidding the use of force for the collection of debts, the clause was watered down by the United States delegation, who suggested that force should be resorted to when the debtor country explicitly rejects the claim. Even that was rejected by the European countries.

Meanwhile, the conquest and annexation of territories continued full swing. Denmark were seized by Prussia, Alsace and Lorraine by Germany, Philippines and Cuba by the United States and large parts of Asia and Africa, by Russia, Great Britain and France. The annexations came to be accepted as legitimate as the century was characterised by unrestricted right of war and recognitions of conquest. Even though, the Treaty of Paris had a provision for peaceful settlement of disputes which settled disputes involving major powers, like the Alabama claims, the Baring Sea Fisheries disputes, the British Guyana boundary dispute. War was still considered litigation between states. Many contemporary works of authority considered war as judicial means of settlement of disputes of last resort and that the question of resorting to war was considered a moral and policy question and not a legal one.(31) Even though the Permanent Court of Arbitration was set up in 1898 and the Central American Court of Justice in 1907, the effect of the move towards arbitration and conciliation must not be exaggerated. Major clashes of interest and treaty obligations were rarely submitted to arbitration and obligations were vitiated by the doctrine of non-justifiability of certain categories of disputes, for examples those concerning vital interests, national honor, non legal disputes and political disputes.(32)

FROM PEACE OF PARIS TO THE FIRST WORLD WAR

The legal regulations created in this period have two salient features.

- a) The international rules and principles of the period were the product of western civilization and bore the imprint of Christian ideology and free market and *laissez faire* outlook. (33)
- b) International rules and principles were mainly formed by the great powers of the time engaged in expansionism and colonialism, and to that end the threat or use of force was no restriction. Two important qualifications must be born in mind at this stage:
- (i) Big powers were forced to make concessions to smaller weaker ones . A good example is the concession won by weaker coastal states over their 3 miles of territorial waters, over naval powers like Britain, France, Netherlands who were advocating for absolute freedom of the high seas. This of course was compromised by the evolution of right of innocent passage. Nevertheless the influence exerted by minor states, albeit to a limited extent, on formation of international rules, is explained by needs of powerful states to take into consideration the demand and aspiration of smaller ones.
 - (ii) A number of treaties were dictated by humanitarian demands that met the exigencies of all members of the international community, for example, slave trade and some international agreements placing restriction on the

use of weapons causing inhuman suffering, treaties on diplomatic and consular immunities and norms of non neutrality.

The right to resort to war was accepted as an aspect of sovereignty, subject to the doctrine that a means of last resort in the enforcement of legal rights and, that some attempt was made in restricting the right to go to war to cases of direct and immediate danger. Statesmen of the period used self preservation, self defence and necessity interchangeably as a license to go to war. The period also yielded customary rules regulating reprisal, intervention or any action short of war, as the declaration of war was a cumbersome process involving the severance of economic ties and ensuring political embarrassment. American naval operation against France (1798, 1801) the battle of Navarino between Turkey and United kingdom, (1827), the collective intervention in China during the Boxer uprising and the blockade of Venezuela were all undertaken without the declaration of war on neither side.

Self preservation, self defence and necessity were all accepted as legal justification for resorting to arms. Besides self preservation or self defence other instances of lawful intervention were also recognized, which included intervention by virtue of treaty right and collective intervention.

Much confusion reigned in the classification of wars by writers. The result was a dislike by government for open reliance on ordinary rights to go to war. So the practice was to rely on vaguely defined grounds to justify the use of force.(34)

From 1918-1945

The First World War marked two essential features on principles of law governing the international community.

- (a) the deep factual inequality and widespread relation of dominance among various members of the international community and among the community itself no longer become accepted as the norm. Before the war, the spiritual superiority of one group of people over other was readily taken for granted. As the concept of inequality was succinctly and painfully expounded in 1773 by Dr. Johnson.

"...mankind are happier in a state of inequality and subordination, were they to be in a state of equality, they would soon degenerate into brutes; they would become Monboddo's nation and they would grow tails.. All would not have any intellectual improvement"(35)

Despite the widespread existence of colonialism, the subordination of one nation by the others began to be regarded as a moral aberration and no longer taken for granted. But until the war, Johnson's philosophy widely influenced the relationships of the international community.

- b) Gradual but definite imposition on the use of force started to emerge in the principles of law governing the international community. Though, nowhere near the magnitude of devastation that was to follow during the Second World War, nevertheless, the war, for the first time assumed global proportions. The U.S.S.R also emerged as an ideological antagonist of West, that had traditionally enjoyed global dominance of the international community. The end of the war also witnessed what is called the passing of the European age and entrance of the United States and the U.S.S.R as the main players in the International Community. The stern conviction that the optimum means of forestalling new horrors and devastation is by forcing restriction on the right of states to engage in military hostilities, gave birth to the League of Nations in 1919.

Both world wars engendered other two rather contradictory forces.

- a) The first was a heightened euphoria of nationalism and patriotism.
- b) The second was hatred of all wars and a commitment to prevent them.

The horrendous result of the failure to maintain peace by a system of alliances and the enormous loss of life and property, created a favourable climate for new approaches. The experience of the war, the existence of a number of peace plans and President Woodrow Wilson's significant contribution, signalled the apparent possibility of the beginning of a new era in international politics.

The war in Europe had scarcely ended when groups were organized in several European countries and the United States for specific purposes of planning how to maintain peace in the postwar era. In the beginning President Woodrow Wilson displayed reluctance to 'identify with the ideals of an organization committed for the enforcement of peace. But by 1917, Wilson, in his address to Congress, expressed his support of the League for Peace backed by a collective security system.(36)

On January 1919, the peace conference that has been convened in Paris passed a resolution stating that a plan for a global League of Nations would be part of the peace treaty. Immediately a commission consisting of representatives of all contracting states was formed which designated Woodrow Willson as its president. Eleven days later, the commission had come

up with a draft covenant which it submitted to contracting parties and neutral states for comment.

The final draft of the covenant was laid down before a plenary session of the peace conference in April 1919 and was adopted the same day. All except 3 of the 45 named states in the annex to the covenant deposited the necessary notices of ratification by early thec 1920s and became original members of the League. It is very ironic that the United States Congress failed to ratify the covenant after president Wilson had played a key role in its drafting.

The failure of the covenant of the League of Nations to avert not only the impending world war that engulfed the planet merely twenty years after its coming into existence, but also countless aggressive war is not entirely to be blamed on poor draftsmanship but on the remnant ambitions of some powers of world dominance that has been a distinguished factor of the nineteenth century. The League of Nations not only failed to embrace arguably the most powerful nation in the world at the time, but also expelled the U.S.S.R for it's invasion of Finland in 1939.

The covenant's circumscription of resort to war was not in many instances novel. Cooling off period before a resort to force, obligation to use peaceful means of settling disputes before the resort to war, were obligations that were already common and to be found in many treaties.(37)

War as a means of settling disputes was accepted and the customary rule of right to resort to war upon failure of peaceful settlement of disputes was preserved. States only undertook not to go to war before making use of other machineries available within the covenant (art. 15). The right of member states to take any action as they shall consider necessary for the maintenance of right and justice, if the council fails to take any action and fails to make a unanimous report was recognized. (art. 7) But it is important to remember that states that resorted to force did not use the covenant but relied on either denial of existence of war or talked in terms of necessity and self defense or outrightly ignored to give any explanation.

A significant contribution of the covenant to international law regulating the use of force was in making hostilities between two states a matter of international concern in article 11.

Articles of the Covenant regulating the use of force display two outstanding elements

- (a) An obligation to use the procedures for peaceful settlement of disputes and conferment of certain power in the council to this end.
- (b) Organized sanction against a state going to war in violation of articles 11,12,13,14 and 15. A new formal criteria also emerged

for classifying legal wars on the basis of compliance to the procedures for pacific settlement of disputes. The covenant also outlawed wars of conquest and requisition of territory, self help and enforcement of rights. Sanction on states that renegaded this obligation was also provided.

Gaps in the covenant

The most serious gap within the covenant is the term, "resort to war", with no attempt to define or explain what it means or what consists of waging war. The term, "armed force", was used elsewhere indicating that ambiguous term is not a result of poor draftsmanship or oversight. States, on the other hand, exploited this ambiguity by denying that they were actually waging war. For example after Japan attacked China, all victims, aggressor and other interested third parties denied that they had breached the obligations of the covenants as war had not been declared by any party.

Article 15 provides that members can take the law into their own hands if a demand for satisfaction has been made and no satisfactory reply obtained and the council had failed to take action within three months. The nature of the demand remains unclear. On this assumption wars of conquest and other illegal acquisition of right do not seem to be permitted.(38)

Another Achilles heel of the Covenant was article 10 which stated that member states undertake to respect and preserve as against external aggression, the territorial integrity and existing political independence of all members of the League. But what infringement of what obligation is not particular clear. The covenant also fails to expound on the meaning of, "territorial integrity", and, "political independence".

Two points that are pertinent for the article under discussion are:-

- a) The attitude of members in the council and assembly during discussion of the Manchurian crises would suggest that they did not accept the view that article 10 was violated if the aggressive state only annexed the territory of the victims state.
- b) Reference to the article was not entirely constant. Thus it does not appear in the documents relating to the Italo-Ethiopian dispute and eventual conflict.(39)

Practice of States (1920-45)

The Covenant of the League of Nations along with customary law would safely lead us to conclude that war was considered *prima facie* illegal. Consensus reigned that a war, that is not in self defence was illegal. The peaceful settlement of disputes by conciliation, mediation and arbitration also appeared

in numerous treaties of the time. Notable amongst them;

- a) The Geneva Protocol for pacific settlement of international disputes (1924), which provided for mutual guarantee against aggression
- b) The Locarno treaties (1925) treaty of mutual guarantee between Germany, Belgium, France, Great Britain and Italy.
- c) The Resolution of the League Assembly (1925) and (1927) a resolution adopted by the sixth International Conference of American States (1928) which was reaffirmation of the Covenant of the League of Nations.
- e) Of course, the most significant of these is the General Treaty for the Renunciation of War or also known as the Briand-Kellogg Pact or the Paris Pact.

The diplomatic origin of the pact is a proposal of 6th April 1927 by Mr. Briand, the Minister for Foreign Affairs of France, to Mr. Kellogg, the Secretary of State the United States, for the mutual renunciation of all kinds of war. The United States replied that, instead of limiting the initiative to bilateral agreement, a more significant contribution to world peace would be achieved if all principal powers could join in the effort to renounce all wars as an instrument of national policy. In its acceptance letter, France suggested revising the term, "war as an instrument of National policy", to, "aggressive war". The United States replied

in proposing to having every kind of war declared illegal. But the French version, which was submitted to other parties, retained the right of self defense with in the framework of existing treaties. This was provided in a separate reservation clause.(40)

The instrument, which had been adhered to by 63 states and is still in force contains no provision for renunciation or lapse of time. Subsequently many treaties came into existence which reaffirmed their commitment to the Briand-Kellogg pact.

The Pact just like others before it did not, "drop from the sky". For sometime there was a movement in the United States towards outlawing every kind of war, supported by the works of S.O Levinson, C.C Morrison, James Shotwell and Senator Boron. The rejection of the United States Senate of the Covenant of the League of Nations and the perceptions by many Americans of the isolation of the United States from the International arena, strengthened this tendency.

The treaty stated in article 1, "The high contracting parties solemnly declare, in the name of their respective peoples, that they condemn recourse to war for the solution of international controversy and renounce it as an instrument of national policy and their relation with one another ..." Article II similarly stated,

"...The high contracting parties agree that the settlement or solution of all disputes or conflicts, of what ever nature and of whatever origin they maybe which may arise among them, shall never be sought except by pacific means.."

An important issue to consider here is the legal value of the Pact. A number of legal thinkers have expressed their opinion that the Pact has no legal significance. Terms like, "condemn" and, "renounce", have a moral and not a legal value. As the Pact also lacks sanction clauses, either in mutual economic cooperation or military enforcement, its legal consequence has become questionable. It is important to note that, both the negotiators and signatories of the Pact fully intended it to have full legal consequence. Whats more, no state subsequently questioned the validity of the Pact. State practice and treaties also proved that the Pact was intended to have legal consequence.(41)

In general it must be assumed that the treaty must be construed together with the reservation made by the signatories which is in accordance with international law. Kellogg was originally of the opinion that the reservation would weaken the Pact. He soon understood that the general ban on the use of force without a right of self defense would totally antagonize the majority of contracting parties and defeat the Pact.

Whether the Pact has allowed hostilities short of war is now academic, as the Pact is to be interpreted in light of the Charter. Both Oppenheim and Brierly (43) were of the opinion that, the Pact has prohibited the use of force and not merely war. But the best guide to the meaning and interpretation of the pact is the subsequent practice of states, and that leaves no doubts as to the general ban on the use of force by the Pact. Thus when the U.S.S.R and China were taxed with the obligation under the pact to explain the conflict between them in 1929, they did not try to justify their actions by pointing to the absence of a formal state of war between them. Also, though threats to use force are not prohibited by the pact, it could be argued that, they do not constitute peaceful means within the meaning of article II.

The pact had been criticized for its lack of provision of collective security enforcement and failure to provide compulsory jurisdiction. However, the inclusion of a collective security machinery system might have caused its demise at the time(44). The significant achievements of the Pact is the qualitative prohibition of war. To its credit, it has survived a world war and been accommodated into a fresh post war system of international law. The Pact has also been criticized for being violated often and lacking the necessary machinery for its enforcement. But to question the validity or effectiveness of the Pact, in accordance with its observance by states, is to measure validity of international law by its effectiveness. The validity of both the Covenant and the

Pact should be measured by their provision for the pacific settlement of disputes and their utility in avoiding war. True, nations have in the past, and will continue to do so in the future to flaunt the international law of the time. Notably the British and French gave a go ahead signal to Mussolini to annex Ethiopia and recognized the annexation after the invasion. But it is to be remembered that states obey international law whenever it serves their national interest. Britain and France did not feel ready to risk the antagonism of Mussolini and his ally, Adolf Hitler. To sacrifice Ethiopia and later Czechoslovakia to appease powerful Italy and Germany at the time looked both reasonable and in line with national interest. But, it is not to be forgotten that, the Pact and the League were responsible in reversing the right to go to war in favour of the *prima facie* illegality of resort to force.

f) The Chaco Declaration (1932), where 19 American States refused to recognize any territorial settlement not obtained by peaceful means, nor the validity of territorial acquisition which may be obtained through occupation or conquest by force of arms.

g) The Anti War Treaty of Non Aggression and Conciliation (1933), the Seventh International Conference of American States for the Maintenance of Peace (1933), the Inter American Conference for the maintenance of peace (1936), 8th International Conference of American States. All these treaties displayed

commitment within the American continent to the condemnation of wars of aggression and the peaceful settlement of disputes, non-recognition of territorial or other advantages that have been obtained by force and the non interference in the private affairs of states.

h)The period between 1925-1935 was rife with a series of multi-lateral instrument and declaration which condemned aggressive war.

States practice, 1938-1942

Looking at state practice in isolation, it would be possible to argue that the Briand-Kellogg Pact had not conclusively established the illegality of war except in the case of self defense. A notable example here is the Italian annexation of Ethiopia in 1935 and the subsequent recognition of the illegal occupation by Britain and France. But this merely proves that some states do not consistently apply the general principles of international law to practice. The condemnation of the German invasion of Czechoslovakia and Albania, the expulsion of the U.S.S.R for its invasion of Finland, coupled with other diplomatic practises of the time clearly prove that every state at one time or another considered the use of force, with the exception self defense, to be illegal. The period 1928-45 provides adequate evidence of a development of customary law prohibiting the use of force as an instrument of national policy, other than necessity or self defense. The Briand-Kellogg Pact, along with other instruments and diplomatic

correspondence and instruments relating to non-recognition of rights required illegally, is adequate proof of the *prima facie* establishment of illegality of the use of force. Minority of states who violated the law contested the actual fact and not the substantive law. Most of the time, violence was accompanied by legal apology. Germany even claimed that the invasion of Denmark, Norway, Holland, Greece, Yugoslavia and Belgium could be said to be necessary to forestall a breach of neutrality of those states by the Franco-British forces. Nevertheless, states, who could afford to condemn German's action did so. By 1942, Germany and her allies were regarded by many government to be practicing aggression and lawlessness.(44)

The Birth of the United Nations.

During the war period, as Europe overrun by the Axis powers and facing the possibility of annihilation by the constant ravage of bombing was in no state to plan for a post war world organization. The responsibility largely fell on the shoulders of the United States and it was enthusiastically taken up. Consequently, a large number of private and public groups started throwing ideas back and forth for a post war world organization, amongst them, the Department of State Specialized Commission, The Federal Council of Churches of Christ Committee for Solving Post war International Problems with headquarters in the World Peace Foundation, Boston. A select group of people

with background in international organizations, led by Judge Mainly O. Hudson published in 1944, a comprehensive design for the charter of a general international organization.

All the above groups, and others among private groups in the United States, attended the first official meeting and formulated the plans made public in the form of the Dumbarton Oaks Proposal in the Fall of 1944. The high degree of interest of concerned citizens, acting through private organizations, was sustained throughout the period.(45)

The impetus of a post war organisation has not limited exclusively to the United States. A group in Great Britain, led by Lord Cecil, published a proposal for an international authority closely parallel to the League of Nations. Private groups also developed a proposal for an international coordinating agency of mutual economic cooperation.

A joint United States-Canadian series of discussions attended by lawyers, professors, judges and government officials came up with a report in the form of international law of the future. The second joint American-Canadian discussion, sponsored by the Canadian Bar Association in 1943, came up with a blueprint for the International Court of the United Nations Organization. The initiative and leadership roll taken by the United States in establishing a post

war international organization is in sharp contrast to the hesitation and cynicism it displayed towards the League of Nations.

Even though the State Department of the United States began work on the post war international organization right after the beginning of the war, the effort was intensified after the U.S joined the war against the Axis powers in 1942. President Roosevelt initially favoured a decentralised system of agencies and advocated for great responsibility for curbing aggression. This bolstered the International Bank for Reconstruction and Development in Bretton Woods.

In August 1941, President Roosevelt and Prime Minister Churchill met on board a ship, off the Coast of Canada in Newfoundland and agreed on, what came to be known as, the Atlantic Charter, which was promulgated before the United States entered the war.

In January 1942, representatives of 26 nations signed the Declaration of the United Nations in Washington D.C. This was to be the first time that the name "United Nations," was used to refer to the global institution. The signatory pledged to be bound by the principles of the Atlantic Charter as their war and peace aims in addition to cooperation in defeating the Axis powers.

On October 1943, the foreign ministers of the U.S.A, the U.S.S.R, Britain and

and China issued a joint declaration in Moscow, for the first time pledging their efforts for the establishment of a general international organization. In November of the same year, President Roosevelt, Premier Stalin and Prime Minister Churchill, meeting in Tehran, announced in their final communique.

"...we recognize fully, the supreme responsibility resting upon us and all the United Nations to make peace which will command the goodwill of the overwhelming masses of peoples of the world and banish the scourge and terror of war for many generations ... we shall seek the cooperation and active participation of all nations, large and small, for the elimination of tyranny, slavery, oppression and intolerance..."(46)

From the wording of the above declaration, it was apparent that by 1943, leaders were committed to the establishment of post war General Organisation. By mid 1944, Britain, U.S., U.S.S.R and later China had come up with the fundamental framework of the United Nations. The conference primarily addressed itself to the maintenance of security of the postwar period. To that end, the conference resolved for the establishment of a Security Council within the United Nations. It also agreed on the working procedures of the Council, including the right of veto and permanent membership. The discussion were further cemented when Roosevelt, Churchill and Stalin met in Yalta, Crimea to carry on the discussions. The Yalta Conference further

worked out the question of trusteeship and mandate territories and the date of the general conference for launching the new organization.

The San Francisco conference invitations were accepted by all invitees, even though later a concerted complaint on the substantive and procedural privileges of the veto powers was launched by smaller states led by Australia. Later a compromise was worked out by increasing the powers, of the General Assembly to discuss any matter. Provisions on trusteeship and colonial dependencies were also negotiated in San Francisco which came to be known as the "declaration regarding non self governing territories or bills of rights of politically dependent peoples."

The charter provided that it was to come into effect upon ratification by the five permanent members of the Security Council and by the majority of other signatories. The charter was signed by all contracting states on June 26, 1945. After the required number of notices of ratification had been deposited by October 24, 1945, the charter came into force.

(B) The Current Legal Regulation on the use of Force

The ban on the use of force

The untold suffering and misery brought to human kind during the Second World War on worldwide magnitude, forcefully united the international community in revising both, the international norms and enforcement machinery of the use of force, and right to resort to war. States aimed at achieving a condition where the absence of war was the norm, although they realized that they could not do away with armed clashes. They set out to build a system designed to keep armed clashes, within the bounds of the exception and to control the use of force by the means of institutionalized international cooperation.(47)

The dropping of the atomic bomb towards the end of the Second World, not only openly started the atomic era, but also marked a painful realization for humanity, that mankind has now the capability to destroy the planet. Thus, when the international community assembled at San Francisco in 1945 and gave blessing for the Charter of the United Nations, it was not the council of idealists and lofty philosophers who contributed to some high luxurious ideals that will make life more pleasing but rather it was an assembly of practical people realizing that in the nuclear era, the ban on the use of force is a precondition for life itself.

The ban on the use of force in the Charter of the United Nations.

At the heart of the charter of the United Nations lies article 2(4), the primary reason which necessitated the convergence of the international community at San Francisco, to take an oath of abstinence not to resort to the use or threat of force. Thus article 2(4) states that:-

"All members shall refrain in their international relations, from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."

Failure of the League system was the primary reason for the establishment of the United Nations and the founding fathers hoped that the phraseology of the ban on the use of force will achieve the maximum effect on members, thus guaranteeing the territorial integrity and political independence of "smaller" and "weaker" states. A number of points to note in article 2(4) include :-

- a) "Force", as used in the sub-article means, military force, otherwise as Robert Tucker pointed out, "any attempt to extend the meaning of force to encompass all measures of reprisal is difficult to take seriously in view of the consequences to which they might lead" (48) Also from the practice of the United Nations, it seems reasonable to conclude that, while various forms of economic and political coercion may be treated as threats to the peace and as

contrary to certain of the declared principles of international law, they are not to be regarded as coming necessarily under the prohibition of article 2(4) which is understood to refer to military or armed forces. (49)

- b) The force must be directed against the territorial integrity and independence of a state. This phrase has its roots in article 10 of the covenant of the League of Nations, by which members undertook to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League. The charter embraced this principle and asserted against the territorial integrity or political independence of a state. Consequently, the main argument of Great Britain in the Corfu Channel case, was that her actions of sweeping mines was restricted to international maritime passageway and affected neither the territorial integrity nor political independence of Albania and hence not unlawful.

The article further extends the ban on the use of force to any manner inconsistent with the purposes of the U.N. This begs the question, what forms of use of force would justify legitimate armed retaliation? Would the inclusion of the phrase "... in a manner inconsistent with the purposes of the UN ..." justify the armed retaliation to the use of force other than an armed attack?

The Briand-Kellogg Pact for the renunciation of war in 1928 contextualised self defense to include response to attacks in form of non violent, but illegal impairment of interests. But in the light of the United Nation' s charter and especially the existence of article 51, which explicitly limits the right of self defense as a response to armed attack, the concession of the right of self defense to non-violent impairment of interest seems irreconcilable.

This is strongly contested by prominent international legal thinkers. For example Stone, asserts that the mere presence of article 51 should indicate to the presence of other implicit inherent rights to self defence other than a response to armed attack. Once article 2(4) conceded an exception to the ban in the use of force, the way should be open where compelling national interests would justify the use of armed force.

"We do not deny that, as a matter of exegesis, the extreme view of the prohibition of force in article 2(4) is possible, but we do question whether, even in terms of exegesis, it is the only way possible, or even the more likely view and whether in light of the absurdities and injustices it could lead, it must be regarded as incomplete one ... we refer particularly to the steady and repeated stress on the requirement of justice on respect for obligation of treaties and international law on the principles of sovereign equality of members states" (50)

Though in light of the repeated violation of article 2(4) and for the sake of interpreting the provisions of the charter feasibly, the argument of stone sounds plausible, there are two major flaws in his reasoning.

- a) There are other options available for a state aggrieved due to violation of its right by a non violent means.
- (b) The liberal interpretation of this article would plunge the international community back to the pre-war era, when it can least afford it.

The existence of unusable weapons like nuclear or neutron bombs would not allow nothing short of strict interpretation of the ban on the use of force. Any war, however unthreatening involves the macro risk of developing into a full blown nuclear war and in turn to mutual or possible global annihilation. In light of the stakes involved, where nobody can afford to lose, it is safer to opt for the strict interpretation of the charter. Also, even if article 51 has conceded the right of self defense it does so, only upto, the time the machinery of the Security Council is set in motion. Any further action beyond the recommendations of the Security Council is classified as illegal. Following this line of argument, it would be difficult to see, how the use of force to protect and enforce the violation of rights by non violent means, could be justified. As the final document of the first special session on disarmament stated,

"... Existing arsenals of Nuclear weapon alone are more than sufficient to destroy life on earth.

We live in a period in which technology has made weapons unusable... The prohibition of the use of force is the logical consequence of that dilemma, it is in the vital and paramount interest of every state that this rule be observed.."(51).

In conclusion, any admission of the right to use of force beyond defense, against armed attack would lead to the abuse of the rule. On this point the world needs a clear and simple prescription. This means a rule without exception or loopholes (52).

The Sovereign Equality of States:

The bar on the use of force is based upon the sovereign equality of states, the non interference in the domestic affairs of member states and on the principle that every state is a master of its own destiny and should pursue its own political and spiritual maturity independent of the wishes or interference of other states. Article 2(1) of the Charter states that "The organization is based upon the sovereign equality of all its members"

The principle of sovereign equality might be difficult to reconcile with the permanent status and veto power of certain members in the security council. Thus defining sovereign equality, the technical committee of San Francisco enumerated four principles;

- (a) States are juridically equal
- (b) Each state enjoys the rights inherent in full sovereignty
- (c) The personality of a state, along with its territorial integrity and political independence, is respected
- (d) That all states should comply faithfully with their international obligations.(53)

State sovereignty, defined in the widest and crudest form, appears incompatible with the function of an international organization, as it denies the possibility of limiting the freedom of action of a state. But the Charter, however is based on the assumption that, states in the exercise of their sovereignty may accept legal limitation on their freedom of action and they are not free to disregard this restrictions as long as they remain members.

The Charter also stated the inadmissability of the interference in the domestic affairs of member state neither by the organization, nor by other member states. Complimenting, the Charter the 20th session of the General Assembly declared that;

- (a) No state has the right to intervene directly or indirectly for any reason whatsoever in the internal or external affairs of any other state. Consequently armed intervention and all other forms of interference or attempted threats against the personality of the state and against its political, economical and cultural elements are condemned

- (b) Each state has the right to freely choose and develop its political, social and cultural systems. Thus both the Charter and the General Assembly repeatedly refused to acknowledge the existence of, "inferior" social, cultural or political systems and their replacement through instigation of "Superior" independent system.

Article 2(7) which affirmed the right of non-interference in the domestic affairs of member states, inherited the principle from the covenant of the League. The Covenant stated that, if a dispute between two parties is found by the Council, to arise out of a matter which by intentional law is solely within the domestic jurisdiction of one party, the Council shall so report and make no recommendations as to its settlement: (54).

At the Dumburton Oaks conference, mainly through the effort of the United States of America, it, was decided that the settlement of disputes by the Security Council should not apply to, "...situations or disputes arising out of the

matters which by international law, are solely within the domestic jurisdiction of the state concerned...". This was met by stiff resistance, notably by smaller nations, which expressed their concern that, in the absence of any assurance, to the contrary, the principle as stated would be interpreted arbitrarily for purely political purposes.(55) Though the efforts of the United States pushed through this proposal, the United States, in the post war, era was to emerge as the principal culprit in disregarding this international obligation of non interference.

1. Exceptions to the Ban on the Use of Force.

(A) The Exception of Self Defense [Article 51]

Article 51 of the Charter, which authorizes the use of force in self defense as the only exception to the ban on the use of force, is clear and straight forward. On the one hand, the individual state forfeits the right of resort to force unilaterally, because it is a delict, while on the other hand a collective power to use force in response to this delict is created and vested exclusively on the United Nations. Thus the use of force, consequent to the Charter is either lawful, [performed at the request of the Council (art 42), and authorized by either article 51 or 53] or unlawful, which will entail a reaction by the U.N.

The article acknowledged that the right of self defense is inherent "...Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain the international peace and security...". Measures taken by the member states in exercise of this right of self defense shall be immediately reported to the Security Council and in any way shall not affect the authority and responsibility of the Security Council, under the present charter to take at any time, such action as it deems necessary, in order to maintain or restore International Peace and Security... ". Thus, by admitting the residual right of states to resort to force in self defense, the article conceded that it is recognizing and not creating the right. This cannot be extended too far. The Charter recognized the council as the legitimate body to right a' wrong but until the Security Council sets in motion its painfully slow enforcement machinery, the aggrieved state will be entitled to act.

The identification of use of force as a legitimate self defense poses a problem. Though in theory it would appear that it might involve the mere determination of the precedence of an attack and labelling whichever preceded as the aggression, and what followed as the legitimate defense. In practice, it is more complicated. In the first place, once the hostilities have broken out, there is no means of determining which the war of aggression and which the legitimate

defense is. Both parties are going to engage in violent means, delivering a quick *coup de grace* to the other. Nowhere is the English expression "All is fair in love and war", more meaningful than here. (Of course within the paradigm of what is considered lawful in { "*jus un Bello* ") In the second place, almost in all instances of armed attack, states have accused each other of starting the armed hostilities and the Council is thrown into a dilemma of which account to accept. For example, France launched an armed attack against city of Bizerte in response to a Tunisian attack on French troops. On the occasion, both parties claimed the right of self defense. The Security Council, totally undecided about the facts of the case, didn't even make an attempt at the deliberation of the case . India and Pakistan in the various clashes over Kashmir, have both claimed the right of defense. In fact in an escalating series of acts going from an insignificant local action of a nervous NCO, to a full scale army offensive, it will be difficult to pick out the one which oversteps the bounds of legality and it will almost always be possible for one state to see in the previous conduct of, another an antecedent which justifies its own.(56)

The question of identification of armed attack is also not as naive as it sounds. Is armed attack meant to denote the general use of force, envisaged in article 2(4) or is restricted to acts of aggression as stated in article 39? In a surprising and considerable extension of the definition of armed attack, resolution A/3314

included the deployment, but not necessarily the use of force, to amount to armed attack. Consequently, armed blockades would justify the lawful use of force within the paradigm of self defense.

Resolution 2625 prohibited the use of force to violate international lines of demarcation. Thus the Israeli incursion into, Lebanon and Jordan in 1969, was condemned by the Security Council as illegal in spite of the claim by Israel of self defense in light of repeated terrorist attacks it suffered from P.L.O guerrillas.

Can a state legitimately invoke article 51, after resorting to the use of force in the expectation that the other state is preparing to attack it? Or can a state legitimately resort to anticipatory self defense? From the point of view of article 51, this does not seem to be allowed. The article very narrowly sanctions the right of self defense for an act that has already materialized and not to that is expected to materialize. This was demonstrated by the condemnation of Israel by the Security Council for its attack on the nuclear reactors at Osiraq, Iraq, in 1981 on the basis that the conditions of imminent danger were not present. The condemnation of Egypt for the closure of the Suez Canal to Israel bound Ships, followed the same reasoning. The Council stated that the closure ,
"..cannot be justified in the present circumstances on the grounds that it is necessary for self defense as there is no evidence that Israel is preparing for an attack". (57)

The requirement is not only for the imminence of the attack, but the response must also be immediate and proportionate. Self Defense cannot include retaliation. For example, the repeated incursion of South Africa into neighbouring states, the U.S. aerial bombardment for attack of the North Vietnamese torpedo bombs on its naval ships at the Gulf of Tonkin and the aerial bombardment of U.K of Yemen as a response to Yemen attacks on United Arab Federation though all were claimed under right of self defense, were all condemned as being delayed and excessive. Consequently, the response to armed attack must come immediately after the attack has occurred and must not be a cynical revenge, but a mere optimum attempt at the maintenance of status quo until the Security Council acts. However, this might sound too idealist and proves almost always unfeasible in practice.

B: ARMED REPRISALS (THE EXCLUSION OF)

The absolute ban on the use of force by article 2(4) has made acts of armed reprisals unlawful, evidenced not only from the repeated condemnation of armed reprisals by the Security Council, but also by the resolution of General assembly which passed a blanket prohibition on 24th of October in resolution 2625, permitting no exceptions, to the ban on the use of force and affirmed the duty to refrain from acts of reprisal involving the use of force. More recently, resolution 36/103, passed in December 9th 1981, declared the inadmissibility

of intervention and interference in the internal affairs of states. It further stated "... the duty of a state to refrain from armed intervention, subversion, military occupation or any militancy interference in the internal affairs of another state including acts of reprisal involving use of force. (58) The condemnation of armed reprisals had not been confined to the General Assembly and the Security Council. The judicial arm of the United Nations, namely the International Court of Justice, has upheld the illegality of armed reprisal in the Corfu Channel case, declaring as contrary to International law, "... any form of forcible self help to obtain redress for rights already violated."(59)

Contrary to such universal condemnation, armed reprisals are gradually gaining tolerance mainly due to two reasons

- (a) The increasing inefficiency of the Security Council has influenced states to take the law in their own hands and seek self redress,
- (b) the frequency of the violation of the ban on the use of force mainly through armed reprisals, and the apparent incapacity of the Security Council to coerce state to abate from such practice, but rather to incline to partial acceptance, has contributed to fostering the theory that, "reasonable," and "proportional," reprisals are tacitly allowed.

If this line of argument is to be followed and the legality of, "reasonable" and "proportional" reprisals, is to be accepted, it can only be so, for two reasons, that armed reprisals have either survived the ban on the use of force of article 2(4) or subsequent to the ban, customary law was developed legalizing or at least tolerating armed reprisals.

The problem with accepting armed reprisals as principles of law recognized by nations and hence tolerating their legality, happens to be that, they have consistently been practiced by one group of the international community, the Western states, including Israel, United States, United Kingdom, South Africa, Portugal and France. Even though, those who practice it acknowledged that their actions were reactions to rights already violated, [ex U.S aerial bombardment after the Gulf of Tonkin incident and the Israeli Commando attack against Egyptian installations in the Nag Hamadi area], they merely admitted this as a political statement and not as a legal one. (60)

The Western representatives have themselves expressed the concern of their respective government when "... any state, specially, but not necessarily, member of the United Nations, takes the law into its own hands through reprisals and retaliation. Presenting their joint drafts resolution after the Lake Tiberias incident in 1962, the U.S and U.K, declared that in their opinion, "... there could be no justification for a policy of retaliation". (34). The French

delegate, on two separate occasions in 1968, said that "...the very idea of military reprisal is unacceptable to the French Government"(61). Moreover, the United States state department explicitly rejected and severely criticized, Professor Rostow's proposal, that the United Nations endorses, the right of reprisals as a measure of self help "when a state cannot or will not, fulfil its international obligation to prevent the use of its territory for unlawful exercise of force (62)

In conclusion, not only is there absolutely no sign of *opinio juris* in the conduct of states in question, but there is evidence of an awareness of the unlawfulness of reprisals and there has not been any state that, in reacting to rights that have been already violated, it is pursuing its lawful right under international law. Only few states, belonging to one group of the International community, the West, have repeatedly resorted to this action. Even the culprits have refused to classify their actions as retaliations and sought to label it as self defense. They have also repeatedly condemned armed reprisals. There has not been any proof that third party states have accepted or acquiesced to this action by Western states. Thus the essential element of the formation of customary law, namely widespread resort to the conduct in question is notably absent.

On the other hand, a reasonable interpretation of the right to resort to armed reprisals has been gaining more influence, affirming that, while the Security Council restating the principle of the illegality of armed reprisals, shows a clear reluctance to condemn certain reprisals. The principal organ of collective security, aware of its own incapacity to prevent resort to force, have started moving in the direction of partial acceptance reprisal. This theory has been prompted mostly by failure of the Security Council to condemn Israel's attack of Jordanian village of Nathalin, Israeli attack of Safeeit-sidi-Youssef in 1950: Israel bombing of civilian targets in Nag Hamadi in 1968.

Closer scrutiny of the debate that took place at the Security Council reveals that this has not been the case. In the incident of the Israeli attack on the Jordanian village of Nathalin, the Jordanian representative claimed that, he was not empowered to represent his government or take part in the discussions. (63) Paragraph 2 of article 35 concerning the possibility of a complaint being presented by a non member state can be applied only if the state, in advance undertakes to accept the obligation of the recommendation of the Council. Jordan, a non member at the time, refused to recognize the binding decision of the Council and hence withdrew the case before its commencement.

The case of the Israel commando attack at Safeet-Sidi-Youssef of 1958, was withdrawn because the Council decided to adjourn the meeting, in order to allow parties to avail themselves of the good offices offered by the U.S and U.K governments.

Similarly on the occasion of the Israeli bombing of civilian targets in Nag Hamadi in 1968, the Security Council accepted the U.K suggestion to adjourn the discussion, since the foreign ministers of the parties concerned were at the time engaged in discussion.

In conclusion, it is clear that the Council at no time took into consideration the reasonableness of reprisals. There is no indication in the debate of the Council that it tacitly condones reasonable reprisals. There is in effect no discrepancy between the formal principles of the illegality of armed reprisals and the actual practice of the Council. The Council may be condemned of inefficiency but not of inconsistency (64).

Humanitarian Intervention

On the one hand the intervention of the United States in the tiny state of Grenada in 1983 was justified by the United States government as being necessary for,

"Stopping an authentic reign of terror, assisting in the establishment and restoration of democratic institutions, particularly when they have been cruelly and violently destroyed, and to rescue others from bloodshed and turmoil and to prevent humankind from drowning in a sea of tyranny."(65).

Though, one cannot help but be impressed by such lofty motives, the apparent incompatibility of the use of force, no matter for what noble reasons, with article 2(4), leaves one to wonder about the existence of justifications for this kinds of intervention.

Verwey, writing on humanitarian interventions has defined it as;

"The protection by a state or a group of states, of fundamental human rights, in particular the right of life of nationals residing in other states, involving, the use or threat of force, such protection taking place neither from authorization by the relevant organs of the United Nations nor upon invitation by the legitimate government of the target state." (65)

Modern international law from the very early ages has not only condoned but explicitly permitted armed interventions for humanitarian purposes. Gratius, regarded the maltreatment by a sovereign of his subjects *a iusta causa* for war. Similarly, Vattel recognized the right of intervention against a government upon

the request of an oppressed people. Publicist, has stated that

"...Humanitarian interventions by a number of powers to prevent a state from committing atrocities against its own subjects or suppressing religious liberties, such as happened in the Turkish Empire in the 19th century was recognized by the international law."(66).

The Charter of the United Nations, made it apparent that the ban on the use of force was total, as to leave no doubt as to the existence of any exceptions, save for those explicitly stated out, though the world on more than one occasion has witnessed situations where the right of life and physical integrity are violated on such a massive scale that non intervention by other states might be so immoral as to undermine the most basic principles, if not the very idea, of law. A very good example of our times would be neighboring Somalia. On the other hand, any effort, to declare any use of force to be lawful which is not explicitly referred to by the Charter or is not authorized by the competent organs of the United Nations, bears in it, the potential of opening the Pandora's box.(67) The world, tied down by the principle of non intervention in the domestic affair of states, has watched, and it is watching not only a nation being wiped off the map of the earth, but the horrific and unimaginable suffering of its people. The 1974 intervention of India to carve out the state of Bangladesh out of Pakistan was an illegal use of organized armed forces and intervention in the affairs of another state. Pakistan was dealing with what is

considered under the international law, the domestic jurisdiction of a state, but doing so in manner which provoked the charge of genocide and widespread moral repulsion and outrage and lent considerable support for India's actions to prevent the continuing slaughter of Bengals. Thus we have a case of discrepancy between the formal law of non intervention in the affairs of another country and the moral law of human concern. What was, in the formal terms an illegal action, was morally acceptable. The discrepancy under international law of actions considered moral by the International Community and the quest for harmonizing the two, would form the back-bone of our final chapter. Consequently, at this stage, let's merely draw attention to the need of distinguishing between legally and morally justifiable acts under International Law.

The repeated outrageous violation of human rights has led to the evolution of the theory that in case of genuine humanitarian intervention, the law would have to yield to superior principles of morality. Thus, an intervention to put a stop to barbarous and abominable cruelty, is a high act of policy and beyond the domains of law. (68).

There are two problems in the theory ;

- (a) International law has its roots in the International morality. The bald admission of the incompatibility of morality and legality, would erode the

theory advocating the evolvement of the law from morality.

- (b) It accepts the supremacy of moral principles to legal principles. The rejection of the theory on the other hand would lead us back to the original quest for finding a solution for morally necessary, and factually sincere cases of humanitarian intervention without upsetting the Charter.

Fontyne, has suggested the amendment of the charter by inserting a provision legalizing humanitarian intervention. He argues that a clear cut rule which confines the legality of humanitarian intervention to certain well circumscribed situations would be better alternative than a principle prohibition which could be circumvented under exceptional but undefined circumstances. (69) Frey Wouters on the other hand, has cautioned on the legalization of force, for whatever genuine humanitarian purposes may heighten the expectation of violence within the international system and concomitantly erode the psychological constraints on the use of force. (70) However, Wouters, ultimately concedes that the sacrifice on the ban on the use of force should be risked as a factor of constraint to give meaning to international law, even though the amendment of the charter legalizing humanitarian intervention might not be discernable. She notes that if international law cannot accommodate, genuine unselfish, morally obligatory, last resources of humanitarian intervention, it will loose control of, and become irrelevant in, some of the most dramatic situations.

Rolling, himself a staunch supporter of legality of humanitarian intervention, acknowledges the existences of exceptions to the ban on the use force;

"...Principally because a legal rule without exceptions does not exist. In some domestic law cases as here envisaged, are covered by the notions of duress, *Force Majeure* and I consider this notions as a general principle of law recognized by civilized Nation. It is impossible to formulate law in such a way that the most extreme rare situations will be dealt with".(71)

Thus for the purpose of humanitarian intervention therefore, it will be wise to limit the principle to those situations for which the doctrine was originally developed and not to allow the concept to be politicized or ideologized for whatever purposes and to keep its application confined to situations in which fundamental, non political human rights are at stake. For otherwise, as B.V.A. Rolling elegantly, put it;

"...Nothing would be a more foolish footnote to man's demise than if his final destruction was occasioned by a war to insure human rights".

(72)

Use of Force and State Consent.

Though armed intervention by state consent, is accepted as being not unlawful and falls into one of the exceptions to the general ban on the use of force, there are a number of requirements before it can be conceded as legal.

- (a) The consent of intervention must be given before the Commission of International wrong.
- (b) It must be given by an authority which is considered to have expressed the will of the local state.
- (c) The local state's will must be valid and not vitiated.
- (d) The action by the intervening state must be kept strictly within the limits of the consent given by the local sovereign.
- (e) The intervening state must not violate an *erga omnes* obligation, which has been defined by the Vienna Convention on the Law of Treaties in article 53, as a rule of peremptory international law, which has been accepted by the International Community and has produced general consensus by the International Community as to its inderogability. (73)
Thus armed intervention by state consent precludes not only ex post facto state consent but it also requires the action of the intervening state from violating internationally accepted interrogable rules of law.

Vietnamese intervention on Kampuchea (present Cambodia), Tanzanian intervention in Uganda, Soviet invasion of Afghanistan, were all examples of genuine or alleged state intervention by consent. Though all three attempted to justify their intervention on the basis of state consent, the reaction of the United Nations and the International Community has been varied on all three cases. Let us see why.

The Soviet Union invasion of Afghanistan was widely condemned by the International Community because the consent was given after the disposal of the sovereign making it an *expos facto* consent and hence illegal. The U.S.S.R invaded Afghanistan in 1979. The operation was concluded a few days later with the killing of President Amin and his replacement by B. Karmal. The Amin Government had not consented to the intervention and the consent the U.S.S.R obtained from the puppet government it had put in Afghanistan would be null and void. Thus the invitation of the Karmal government couldn't cancel out the illegality of Soviet action.

In 1978, Vietnam invaded Kampuchea. Along with the invading Vietnamese were members of the so called United Front for the salvation of Cambodia. The Vietnamese relied on the consent of the newly created regime to justify their action. But as the regime was a mere creation of Vietnam and not a representative of the Cambodian people, the action was widely condemned.

In 1979 when the Tanzanian regular army invaded Uganda, it was followed by the Uganda National Liberation Front, who, with the help of the Tanzanian army disposed of the brutal and tyrannical regime of Amin and formed a government. The reaction that followed from International Community was very different from that followed the invasion of Afghanistan and Cambodia. In the case of invasion of Uganda it is evident that humanitarian consideration played

a decisive part in forming the judgement by the International Community, considering the brutal suppression by Amin of human rights.

C. THE BAN ON THE USE OF FORCE IN OTHER INTERNATIONAL INSTRUMENTS. The Ban on the Use of Force in the O.A.S Charter.

The fundamental instruments regulating the Charter of the Organization of American States are; the 1948 Charter of Bogota as amended in 1967 by the Buenos Aires Protocol and the Inter American Treaty of Reciprocal Assistance or Treaty of Rio as amended in 1975 by the Protocol of San Jose, Costa Rica, article 1 of the charter which states that:-

"Within the United Nations the organization of American States is a regional agency". On the basis of this premise, the member states of the Organization of American States established a norm system consistent with the charter. In particular the fundamental instruments of the O.A.S are almost exactly identical and complimentary to the United Nations Charter specially on the regulation on the use of force.

The general prohibition of use of force of article 2(4) is matched by article 18 and 20 of the charter of Bogota and article 1 of the Inter American Treaty of Reciprocal Assistance. The article stated that,

"The high contracting parties formally condemn war and undertake in their international relations not to resort to threat or use of force in any manner inconsistent with the provisions of the United Nations Charter or this treaty"(74)

Article 51 explicitly permits self defense, individually or collectively. The terms " collective" or" self defense" were included in the Charter with the intention of making possible, the working of the Regional Security System as envisaged by the Charter of the U.N.

Making a specific reference to article 51 of the U.N. Charter, article 3 of the Inter American Treaty of Reciprocal Assistance establishes a two stage system of collective self defense. In the first stage, the member states of O.A.S are duty bound to give assistance to any American state which has suffered an armed attack and requests their help. The decision as to the measures to be taken is left to the discretion of individual member states, which are entitled, should they deem it expedite, to use armed force.(75) The freedom to resort to the action at one's own discretion comes to an end when the Organ of Consultation has decide which of the collective measures foreseen in article 8, intends to make use of. This is the start of the second stage of the Inter American System of collective self defense.

After the discussion in the council, member states are required to implement the measures adopted by the Organ of Consultation. Article 20 stipulates that the decision adopted by the Organ of Consultation requiring the application of the measures listed in article 8, are binding with only one exception. No state shall be required to use armed force without its consent.

The Inter American Treaty of Reciprocal Assistance (I.A.T.R.A) also requires that measures taken by the O.A.S must be brought to the attention of the Security Council of the United Nations and must cease as soon as the later has taken measures necessary to maintain international peace and security.

It is evident that the Charter of the O.A.S and the U.N correspond identically as regards to the regulation on the use of force. But the points of outstanding differences exists between these otherwise complementary Charters

- (a) Self defense is not the only case in which the O.A.S can resort to war.(76). The Organ of Consultation must meet to decide on measures to be taken whenever the inviolability or the integrity of the territory or the sovereignty or political independence of any member state is endangered by an aggression which is not necessarily confined to armed attack or by an extra continental or an inter continental or by an any other fact or situation which might endanger peace of America.
- b) The U.N Charter states that regional enforcement action must obtain the prior approval of the Security Council (52). On the other hand, the Charter of O.A.S does not require the submission of any collective enforcement measures to prior Security Council authorisation.

- c) The O.A.S Charter limits the options of collective self defence to mere information to the council.

THE PRACTICES WITHIN O.A.S

The issue of the compulsory need for the prior X authorisation of the Security Council features prominently in the 1962 Cuban crises. On October 22, the U.S upon being informed of Soviet ships heading with missiles to Cuba, quarantined Cuban waters. The next day, October 23, the Organ of Consultation of the O.A.S voted 20 to 0 to recommended that member states use whatever means necessary, including the use of force, to ensure that Cuba did not continue to receive missiles from the U.S.S.R. Also the O.A.S authorized the intervention of regional security enforcement task in Cuba on the basis of article 6 of treaty of Rio, which legalized armed intervention in situations that might endanger the peace of the continent It was considered that the installation of Soviet missiles in Cuba amounted to threat to the peace of the continent.

During the debate in the Security Council, the Ghanian delegation objected to the lack of the prior authorisation of the O.A.S recommendations by the Security Council. The U.S.A. delegate countered with the argument that, the resolution of the O.A.S, organ of Consultations are mere recommendations and not binding on the member states, thus, the prior authorization of the Security Council would not be compulsory for mere recommendations.

There are two problems with this argument;

- a) the Organ of Consultations of the O.A.S is not entitled to pass resolutions binding on member states. Thus the resolutions of the Organ would never be subject to the prior authorization of the council,
- b) the adverse recommendation of the council at any resolution of the Ogan can always be blocked by the veto vote of the U.S.A.

The recommendations of the Security Council and the organ of consultation has directly antagonized each other in the Falkland Island case. After Argentinean troops invaded the Falklands in April 20, 1982, all the Latin American countries supported Argentina and recognized Argentinean rights to the islands and required Great Britain to bring an immediate end to the hostilities. In May, after the United States formally sided with U.K, the Security Council passed a resolution stating that it is, "... deeply disturbed at reports of an invasion in April 2, 1982, by the armed forces of Argentina and called for the immediate withdrawal of all Argentinean forces from the islands."

In conclusion, the only major point of incompatibility between the O.A.S. and U.N Charter is the requirement of compulsory authorization. The O.A.S. has repeatedly challenged the need for this authorization in the abstract and has consistently attempted to evade the obligation by giving an extremely narrow interpretation of the notion of enforcement action. (77)

THE USE OF FORCE UNDER THE O.A.U CHARTER.

The Organization of African Unity is a product of the Pan African Movement not only across Africa, but across Europe and the United States after the conclusion of the Second World war and more particularly in the 1950s. The nationalists movements that sprouted demanding independence from European colonial powers and the realization by the rest of independent African countries, of the need to lend this movements a hand, not only materially but also politically as well, and the realization of the independent states themselves of the need to create a united block committed to fight against colonialism and for the total independence of Africa resulted in a regional organization that came to be known as O.A.U.

As the historical exposition of the O.A.U and the Pan African movement is outside the scope of this dissertation, it is sufficient to say that, the Charter of the O.A.U was a compromise document between the Casablanca group, led by Kwame Nkrumah, pressing forward for fast political union of the continent, and the more conservative Monrovia group, advocating closer economic ties and loose political alliances. After the Casablanca group boycotted the Lagos Conference, and when the birth of this union seemed doubtful, the adroit diplomatic policy pursued by the late Emperor of Ethiopia, Haile Selassie, persuaded the Casablanca group to compromise in key issues and the

Organization came into existence on May 22, 1963 at the summit conference of the Heads of Independent African States in Addis Ababa, Ethiopia.

That the founding fathers fully intended the Organization to operate within the framework of the United Nations has never been in doubt. To this end, the summit Conference in Addis Ababa passed the following resolutions, which preamble read as follows:

"Believing that , the United Nations is an important instrument for the maintenance of peace and security among Nations and for the promotion of economic and social advantages of all peoples...persuaded that the Charter of the United Nations and the Universal Declaration of Human Rights to the principles of which we reaffirm our adherence, provide a peace foundation for peaceful and positive cooperation among states..."

Even in stronger terms the resolution states that "... the African states reaffirm their dedication to the purposes and principles of the United Nations Charter and the acceptance of all obligations contained therein ..." Consequently the question of the derogation of the O.A.U principles or purposes or practices from the United Nations has never been at issue, including the issue of the use of force. But as the main purposes and objectives of the two organizations (the U.N and the O.A.U) are different in nature, it was inevitable that the wording and emphasis on the prohibition of the use of force would be different.

Unlike the United Nations Charter, the Charter of the O.A.U. does not explicitly state in uncertain term the overriding objective of the organization. Rather a number of objectives and principles have been stated, which are:-

- a) the defense of the sovereignty territorial integrity and political independence of African States.

To achieve these objectives the charter enumerates a number of principles which include;

- a) non interference in the internal affair of member states
- b) sovereign equality of all member states
- c) peaceful settlement of disputes by negotiation, mediation, conciliation and arbitration
- d) respect for sovereignty and territorial integrity of each state and for its inalienable right to independence
- e) unreserved condemnation of all political assassinations as well as subversive activity on part of a neighbouring state or any other state
- f) absolute dedication to the total emancipation of Africa and the territories which are still dependent

On the other hand the Charter of the United Nations has in no uncertain terms stated its main objective and principle, " .. to save succeeding generations from

the scourge of war, which twice in our lifetime has brought untold sorrow to mankind..."

And for these ends "To unite our strength to maintain international peace and security"

Even though the repeated reaffirmation by the members of the O.A.U would lead us to conclude that the principles and practices of the United Nations as regards to the use of force would be upheld in the O.A.U, slight discrepancies appear when we examine the documents and practice of the two organizations.

- a) the main objective and purpose of the United Nations as stated clearly in article 1(1) is the "... maintenance of international peace and security .."

Thus peace as far as the Charter is concerned is an end in itself, a sufficient goal. On the other hand, the preamble of the charter of the O.A.U. states

"...convinced that it is inalienable right of all people to control their own destiny...convinced that in order to translate this determination into a dynamic force in the course of human progress, conditions of peace and security must be established and maintained ..."

Thus from the wording of the preamble, it looks apparent that the main objective of the O.A.U appears to be decolonization for the purpose of human progress. In order to achieve this goal, the main maintenance of peace and security has been noted. Thus the maintenances of peace and security appear to be the means to an end, rather than an end in itself which leads us to the second discrepancy.

- b) Before the establishment of the O.A.U, it was widely recognized that solving the problem of colonisation and apartheid was to be a prerequisite for the maintenance of peace and security in the territories concerned.(78) The Charter of the O.A.U has the decolonization of peoples as an overriding objective. Hard fought lobbying within the United Nations by the African block managed to push a resolution through in 1966, stating that, "...people subjected to colonial oppression are entitled to seek and receive support in their struggle which is in accordance with the purpose and principle of the Charter" It is to be recalled that Article 1(2) of the charter of the United Nations has stated as one of the purposes the organisation is "...to develop friendly relations among nations based on respect for the principle of equal rights and self determination of peoples and to take appropriate measure to strengthen universal peace, ..." But the controversy stems from the problem of reconciling this principle, that is vigorously

assumed to have sanctioned the use of military force by African and Third World countries on one hand, with the ban on the use of force. On the other hand, the issue came to light prominently during the 1961 Indian invasion of Goa and the 1982 Argentina and British hostilities over the Falkland islands. The outcome of the debate depicting state practice in both cases was different, reflecting the changing nature of international law and the attitude of states towards it.

In 1961, India invaded the Goa enclave, under Portuguese administration, annexed the territory and population of Goa, which it considered ethnically and geographically one with the rest of India. Though Portugal appealed to the Security Council for the condemnation of India's action and the immediate withdrawal of Indian Troops from the territory in the face of the violation of article 2(4) of the Charter, the resolution was defeated by the veto of the U.S.S.R. But the stand taken by states could help us evaluate the legality of the use of force in the fight for self determination.

The Indian representative, supported by Liberia, argued that colonisation is a permanent aggression and that no international delict could be considered committed and since Portugal's occupation was illegal, there can be no question of aggression against one's own people whom one liberates. (79)

The majority of Western states as expected took an opposite view in the Security Council, along with Turkey and nationalist China. The United States representative stated that whether the issue was a colonial one or not, what matters is the use of force by one independent state against another, contrary to article 2(4) of the Charter without making use of the machinery for peaceful settlement of disputes provided by the Charter.(80) This view was shared by other Western States.

On the other hand two Latin American Countries, Chile and Ecuador, while condemning the use of force by India, recognized India's claim over the territories. The Chilean representative stated that, "... Neither historical possession (Portugal) nor violent possession (of India) should prevail but the express wishes of the inhabitants of the disputed territories.(81)

U.A.R and Ceylon based their argument on the self determination of people and failed to condemn India, regarding the action as an inevitable development of Portugal's conscious boycott of India's diplomatic overtures.

From the debate, four views could be highlighted;

- a) the condemnation by the Western States, of the use of force for the completion of the process of decolonization

- b) the view supporting India's intervention as protection of one's own nationals thus precluding it from falling under international delict,
- c) the view supporting India's intervention as support for the self determination of people, a principle sanctioned by the United Nations charter
- d) the view forwarded by the Soviet Union stating that the matter fell within the internal jurisdiction of India thus placing it outside the scope of the United Nations.

The variety of different legal principles referred, to added to the fact that the majority of states taking part in the debate recognized the principle of self determination, make it possible to formulate the following hypothesis. If other situations similar to the Goa affair were to arise, with similar outcomes and if similar arguments were to be put forward to justify the use of force with increasing consent, an exception to the ban on the use of force of art 2(4), entirely unforeseen in 1945, could in practice be created. (82) The opportunity to verify, this hypothesis was materialised during the more recent Falkland crises.

The background is very briefly as follows. In 1835 Britain occupied the Falkland Islands which Argentina had formally inherited from Spain at its independence in 1910. After almost 150 years Argentina forcefully occupied the islands and expelled British authorities. Britain, hence forth, immediately dispatched a fleet to recapture the islands and at the same time summoned the Security Council.

Argentina claimed that no provision of the Charter could be taken to mean the legitimation of situations which have their origin in wrongful act, carried out before the existence of the Charter. The representative also pointed out that Argentina had been forced to take the action due to its frustration to reach at a diplomatic compromise with Britain. The only other country that supported the position of Argentina in unqualified manner was Panama. But the position forwarded by the Panamian representative delivered by its foreign minister made it clear that the support was for political rather than legal reasons.

The United States, France and Japan as expected condemned the use of force by Argentina in no uncertain terms. While Jordan, Uganda and Zaire, while condemning the use, of force, recognized Argentina's claim over the islands. The only countries that failed to condemn the action of Argentina were the U.S.S.R, China, Poland and Spain. Nevertheless, the Council managed to pass a resolution calling for the withdrawal of Argentinean forces and an immediate ceasefire.

In conclusion, we can venture to state that the founding fathers of O.A.U expected it to operate within the purposes and principles of the Charter of the United Nations. This had been repeatedly reaffirmed by resolutions adopted at different times. To this end the general ban on the use of force remains the guiding principle of both organizations. But, as the purposes that initiated the formation of both organizations, are different, inevitably the attitude of the organizations specially towards the use of force for the liberation of former colonies, is different.

Towards the beginning of the 1960s, when many countries were still under European colonisation, the African and other Third World countries were in the process of pushing forward a new customary law that precluded the wrongfulness of use of force for the completion of process of decolonization. This had been witnessed in the Goan affair when the majority of states recognized the principle of self determination even in the face of the apparent violation of article 2(4).

On the other hand, at the beginning of the early 1980s, the attitude of states has considerably changed. As the process of decolonization has been largely completed, the need of returning to the general ban of the use of force resurfaced. This has been demonstrated by the attitude taken by many Third World countries including, Zaire and Uganda, in condemning Argentina's use of force during its hostilities with Great Britain over the Falkland islands.

THE 1974. UN. DEFINITION OF AGGRESSION

The overriding global necessity of the ban on violence led to a deeper interest worldwide in the abstract and practical concept of aggression and a desire to identify the concept more precisely by definition.(83), Furthermore, a consensus existed that the adoption of the definition ought to have the effect of simplifying the determination of the existence of aggression. Though the action of aggression must be separately considered in light of all the circumstances of each particular case, it nevertheless became desirable to formulate basic principles as guidance for such determination.

The question of speaking of the "breach of the peace" and speaking of the act of "aggression" is one of great uncertainty. One may be justified in thinking that both cases involve the use of force. But would an act of aggression necessarily involve the use of force? The General Assembly declared in its resolution 2074 of December 1965, that the annexation of Namibia by South Africa is an act of aggression, thus conceding that the presence of troops can amount to an act of aggression. But it is evident from the definition given that, it concerns itself only with military activities.

The definition negates the equating of all illegal use of force as aggression. The preamble states that aggression is the most serious and dangerous form of illegal use of force. Aggression, according to the definition must also be the

use of force and not merely the threat of it. Immediate threat to resort to war, for example, short term ultimatums, have been contested by some states to amount to aggression, thus justifying retaliation. But some powerful states, notably the U.S.S.R opposed this view, apparently out of fear for the legalization of preemptive attack. (84)

War of aggression, condemned in the definition as international crime, was defined as the most serious and dangerous form of illegal use of force. This excluded, as mentioned above, the lumping together of all acts of armed attack as acts of aggression. In a sense, the definition has in no way made the identification of wars of aggression any clearer. In some ways it has even made it more muddled. The question of aggression remains open as to what comprises this illegal use of force which is of less serious and of a less dangerous form that it cannot be considered to be aggression, even though still prohibited by article 2(4) of the charter. The fate of the "threat" to use force, which is prohibited by the Charter but not by the definition, remains undecided as well.

The heart and the main purpose of the definition lies in article 5, which clearly establishes the prohibition of a military reaction to non-military violence and reaffirms the illegality of the initiation of violence.

THE UNITED NATIONS DECLARATION ON FRIENDLY RELATIONS.

The culminating of many factors including

- a) the inadequacy of the charter to regulate all possible cases of the use of force
- b) the increasing demand by some newly independent states, which were unrepresented during the drafting of the charter, to have a say in the legal regulation on the threat or use of force.
- c) the need to expound principles of the Charter and consolidate it with the practice of state since the coming into existence of the charter, led to the declaration on friendly relations, or resolution 2625.

Taken as a whole, the declaration has considerable political significance. The fundamental principles it contains are formulated in such a way as to serve as "rules of plan", agreed by the international community in its entirety at a particular stage of its evolution. (85)

The declaration affirmed the principle that states shall refrain from threat or use of force against the territorial integrity or political independence of any state or in any other way inconsistent with the principles of the Charter. The declaration also recognized the inherent right of the self determination of people. It also reiterated on the obligation of state not to recognize situations brought about

by an unlawful use of force. It also made an attempt at resolving the problem of illegal, non-violent, non-armed, intervention on the territorial integrity or political independence of a state, by providing non-violent collective reaction as a solution. (86)

Considering the differences and disparities of interest, represented by contracting parties, the consensus reached on the condemnation of violence was admirable.

The main interest of Afro-Asian countries seemed to be

- a) to continue to push for the process of decolonization
- b) to have a freely chosen political and economic system of their choice, but enjoying the benefits of international cooperation and assistance
- c) to guarantee respect for their own sovereignty.

On the other hand the socialist states pushed for the recognition of the existence of two ideologically opposed camps, while at the same time accepting certain rules of co-existence. The Western states attempted not to, "rock the

boat" too much, ensuring that this transformation takes place without prejudice to their own interest.

The legal effect of the declaration is more difficult to evaluate. The provisions of the resolutions could be divided into two;

- a) Those that reiterated existing principles and law
- b) Others are innovative approaches to existing principles.

On the first group of principles and laws, there is no debate. Their binding effect is already accepted.

The second group may be divided into two:-

- a) Those that have been unanimously accepted.
- b) But the legal fate of the others, the wordings which are at best ambiguous due to last minute compromise, can only be determined by future practice which develops in conformity or contrary to them.

CHAPTER TWO:

JUSTIFICATION OF THE STATE DEPARTMENT

FOR THE INVASION OF PANAMA:

FACTS OF THE CASE

FACTS OF THE CASE*

United States's grand juries indicted Noriega on February 1988, on charges of providing protection to international drug traffickers and allowing drug profits to be laundered through Panamanian banks. On January 4th, a U.S. Federal Judge in Miami, denied a motion by Noriega's lawyer to dismiss charges against Noriega of racketeering and drug trafficking. Later that month, President Eric Arturo Delvalle, who four years earlier had been installed by Noriega as President after the forced resignation of Nicolas Ardito Barletta dismissed the General as head of Panamanian Defense Forces. This attempt to assert civilian authority failed and that evening Delvalle, was himself removed from office by a rump session of the National Assembly and replaced by a Noriega crony, Manuel Solis Palma.

The Reagan administration reacted to these events by giving sanctuary to Delvalle and continuing to recognize him as President and refusing to recognise the Solis Palma's government on the grounds that it had taken power illegally. (It is to be remembered that as late as 1986, Noriega was a valued ally of the U.S Army's Southern Command, an undercover collaborator of the U.S Drug Enforcement Administration and a long standing asset of the C.I.A.) In March and April 1988, White House executive orders, froze Panama's dollar accounts within U.S jurisdiction, blocked dollar transfer from the United States to the

Solis Palama government and ordered U.S Companies to pay taxes and other revenues owed to the Panamanian government into special accounts in the Federal Reserves Bank of New York. In addition to these measures, revenues for the use of Panama Canal, amounting to \$17 million a month, were placed in an escrow account, foreign aid to Panama was suspended and Panama's sugar quota was terminated.

Panama's currency is the U.S. dollar and because Panama's banks have always kept their balances in the United States, the cumulative effect of these events was devastating. By May, 1988, the offshore banking industry, Panama's financial mainstay, virtually shutdown and seven major banks closed their offices. Foreign branches of banks and other corporations and tax shelter companies, fled to the British Virgin Islands, Cayman Islands and Netherlands Antilles. Between March 1988 and May 1989, Panama suffered a capital flight of more than US\$ 23 billion. Panama's gross National Product, according to estimates by American Economists, fell by at least 17% and by an additional 8% by 1989. Unemployment rose close to the vicinity of 40%.

Between March 1988 and December 1989 the United States brought every kind of political pressure to bear on Panama and other Latin American States, to force Noriega's departure. In 1988, through the persuasion of the United States, the group of 8 Latin American States, which included hemisphere

leaders like Argentina, Brazil, Mexico and Venezuela, "condemned" the method by which the Solis Palma government attained power. In May, 1989, after Noriega's "dignity battalions" had beaten up opposition candidates and his electoral commission had annulled the presidential elections, the O.A.S passed a resolution condemning electoral "abuses" and appointed a delegation including 3 Latin American Foreign Ministers to persuade the Solis Palma-Noriega government to transfer power to democratically elected government. But beyond this condemnation, the O.A.S would not go, as the principle of non-intervention was so deeply embedded in Latin American political thinking and in the explicit language of the O.A.S charter.

More dubious were the U.S Government's efforts to deny politically recognition to the Solis Palma government. As noted above, after Delvalle's dismissal, the United States continued to recognise him as the legal president of Panama. This continued recognition became the basis for the executive order and treasury regulations freezing Panama's dollar accounts and diverting it's revenues into the Federal Reserve Bank. Non-recognition later became the basis for depriving Noriega of his sovereign immunity when captured.

By the end of 1989, Noriega's open display of dictatorial power and outspoken defiance of the United States had put the prestige of President George Bush on the line. According the U.S Southern Command there were more than 1,200

incidents of harassment of U.S military personnel by the Panamanian Defense forces in the 15 months prior to May 1989. Nonetheless, the Solis Palma-Noriega regime continued to scrupulously avoid any interference with the operation of the Panama Canal, which under the terms of the 1977 treaties would have justified a U.S military intervention.

In September 1989, when the terms of the Solis-Palma government were over, the National Assembly of District Leaders took over and appointed a new President, Francisco Rodriguez. On October 3, the abortive coup attempt by Noriega's security guards, resulted in an outcry in the United States at the apparent inaction of the U.S in aiding the coup plotters. On December 15, the national Assembly declared Noriega to be a "maximum leader" of the Panamanian government and announced the existence of a state of war, between Panama and the United States. On December 16, off duty, U.S military personnel who attempted to run a Panamanian Defense Forces roadblock, were shot at and Marine Lieutenant Roberto La Paz was killed. A couple in the same car were taken to the headquarters of the PDF and tortured. The American Southern Command claimed that all four were off duty personnel who got excited and tried to run the roadblock, when surrounded by intimidating members of the PDF. The Panamanian Government countered that they were engaged in surveillance and espionage. On December 18th, another American Marine shot and wounded a member of PDF. The marine claimed that, he reacted when he was approached cryptically by a man who seemed to reach for his gun.

On December 20th, at one o'clock in the morning, 24,000 marine, airforce and army troops were ordered into Panama. The Panamanian defense forces melted away and what little resistance was offered by the "dignity batallions" quickly evaporated in the face of superior American firepower. Noriega took sanctuary in the residence of Pala Nuncino of the Vtatican Embassy. Fifteen days later, Noriega in full military uniform, walked out of the Vatican Embassy and surrendered to the U.S forces and was flown to the U.S. He was then arrested, turned over to the agents of the Drug Enforcement Agency and appeared before a Federal Court on the charges listed in the 1988 indictment.

The U.N strongly deplored the invasion by a vote of 75-20 with 40 abstentions; the O.A.S condemned it by a vote of 20-1. Popular public support as indicated by opinion polls both in Panama and the United States was an overwhelming support for the invasion. (*)

The United States State Department provided four justifications for the invasion, namely;-

- i) The protection of American lives in Panama
- ii) The restoration of demoncracy
- iii) The enforcement of international criminal law
- iv) The safeguarding of the integrity of the Panama Canal.

This chapter would explore the legality of these justifications against the benchmark of general international law.

**THE UNITED STATES INVASION OF PANAMA
FOR THE PROTECTION OF NATIONALS**

(i) Historical Development

Jurists of the 19th century considered the right of extra-territorial protection of nationals as an element of state sovereignty. The generous and liberal intervention practises coupled with the assumption by majority of states that they are in possession of the right if and when the situation arises made the consideration inevitable. (1) The theory behind this is that the extra-territorial protection of a national is part of self preservation, self defense or one of the several instances of intervention justified as necessity. The nationals were considered as the extension of the state itself, a part as vital as state territory and the *raison d'être* of the state.

During the American intervention Cuba in 1896, President McKinley said the following in justifying the American action: _

" ..we owe it to our citizens in Cuba to afford them that protection and indemnification for life and property which no government there can, or will afford, and to that end to terminate the condition that will deprive them of legal protection.."(3)

Also during the American intervention during the Boxer uprising in China in 1892-1901, the action was justified for,

".. the cause of humanity and the need to put an end to the barbarities that are now existing there, the very serious injury to commerce, trade and business of our people and the constant menace to peace..."(4)

It is interesting to note that, the intervention of the time for the protection of nationals abroad, even though had other ulterior motives, are couched in high sounding and humanitarian motives, just like today. Some of the interventions had as their objective, not only the protection of their nationals in immediate danger, but also the establishment of a guarantee of security to their nation for the future, if necessary by effecting a change of government in the state concerned; for example, the intervention of Great Britain, Spain and France in Mexico in 1861. Some have besides, the protection of their nationals, the punishment and reprisal for an alleged wrong they have received, as a primary motive example, the bombardment of Greytown by United States war vessels in 1858, British occupation of Corinto, Nicaragua in 1895 and the British blockade of Greece in 1850.

In April 1864, Italy, France and the United Kingdom dispatched a naval squadron to the Bay of Tunis fearing for their nationals living in the region. In 1871, during the insurrection of Tabil tribes in Algeria, Italy sent a naval frigate, fearing for the lives of its nationals, in case France was unable to protect them. In 1876, Italy and Austria dispatched an armed naval task force with an order

to land, off the coast of Thesalonica, in case Turkey failed to protect their nationals in present day Greece. Between 1813 and 1927, the United States had intervened no less than 60 times under the pretext of, besides other reasons, the protection of the lives of its nationals in Central and Latin America.(5)

Though the Covenant of the League of Nations and the Briand-Kellog Pact considerably circumscribed the situation, the unilateral armed intervention for the alleged protection of nationals, continued unhampered. For example, the United States intervention in Nicaragua, the Japanese intervention in Manchuria, the American intervention in China, all amply demonstrate the flagrant defiance of the covenant which limited armed intervention and the Pact which prohibited it. Some writers were also of the opinion that, though the Pact prohibited armed intervention and the use of force for the protection of nationals abroad, it falls within the parameters of self defence, although it has not been made illegal.

A growing concern, in the American continent to outlaw the very frequent interventions in the region led to the coming into existence of the Protocol of Non Intervention in December 1936. Eventhough, the Protocol failed to define aggression, it was a major progressive development, as its cause and effect led to unqualified renunciation of intervention by the United States, the main

offender (6). The protection of nationals abroad through intervention was reserved by the United States as it's inherent right, despite strong pressure from the Latin American countries to do away with it. To sum up, the 1933 Montevideo Convention on rights and duties of states is supposed to have made political intervention impossible, but it could not have been regarded as forbidding the right of international protection of nationals through the use of force. (7) The vocal and express reservation of the United States, to the ban on this right by unilateral intervention, also indicates that the major power in the region, considers it to be acceptable within the paradigm of international law.

2. Protection of Nationals Abroad After the 1945 UN Charter.

The Charter of the United Nations, for reasons discussed in the first chapter made it apparent that the ban on the use of force was to be absolute and it was not impressed with lofty motives provided for armed intervention. Frequent resort by states to this excuse for their unilateral armed interventions has forced legal scholars to find a compromising appeasement and save the charter from frequent incidents of embarrassment. Some like Bowett, have argued that from reading the draft of the Charter, one is left in no doubt that the drafters intended, to maintain what is considered as legitimate self defense in customary law to be retained in the charter as the only exception to the

general ban on the use of force. Bowett proceeds to point out that the extraterritorial protection of Nationals was a legitimate element of self defense in customary law. (8) But it can also be argued that the charter has produced a new and fresh restriction on customary law of legitimate self defense. Others have argued that although the Charter has outlawed every kind of use of force, subsequent practices have modified it and a new customary law legalizing the use of force for protection of Nationals abroad, has emerged since the coming into existence of the Charter. Others, also conceding that the ban on use of force is without exception argue that, the protection of nationals abroad, is a further exception to article 51 (9). An obvious weakness of this argument is in introducing exceptions to the ban on use of force that has been succinctly, and forcefully banned in article 2(4). Therefore, the requirements that preclude the use of force for the protection of nationals abroad ought to be sought outside the charter and in subsequent state practice.

Though neither the United Nations General Assembly's definition of aggression, nor the declaration on friendly relations condemn or outlawed the use of force for the protection of nationals abroad, the mere omission from what is considered illegal would not provide an authoritarian guideline for its test of legal rectitude. Still others have argued that the protection of Nationals abroad could not constitute legitimate self defense, as self defense was intended to constitute a limited and proportional reply to an armed attack directed against

the territorial integrity of the victim state. Though the nationals of a state constitute an inalienable part of its constitution, the essential requirement, that is, the sustenance of an attack on the territorial integrity of a state is lacking and hence the argument fails to be viable. (10)

Before we proceed to examine the customary law of protection of nationals abroad as manifested in state practice after the coming into existence of the charter, it will be important to discuss some main features of the protection of nationals abroad.

- (A) The practice to be examined is not the protection of one's own nationals in one's own territory or high seas. Further-more the practice to be examined does not include that which has been sanctioned by the territorial state or by the United Nations. but the unilateral or collective action of a state or a group of states directed against a third state without its will or consent.
- (B) It is important to draw a distinction between whether the situation that warranted the intervention emanated from private or non state groups over which the state had no control and those situations where the state actively or tacitly participated in the situation giving rise to the action. It becomes important to make such distinction, not because it alters the

fundamental right to protect one's nationals, but it alters the legal basis of justifying such intervention. When the situation was precipitated not by the action of the government or its agents, but by groups acting independently of the control of the government, for example mobs, terrorists, mutineers, and hijackers, the intervening state must rely on the plea of necessity. This is largely for the technical reason that the act is not per se breach of international law, and there is therefore no delict in response to which a state can invoke its right of self defence. Moreover, as there was no will on the side of the state to commit a delict, the intervening state cannot subsequently be entitled to claim damages (11).

- (C) The number of nationals to be protected is unimportant and would in no way affect the legal basis of the argument. It could range from thousands of nationals in case of the American intervention in the Dominican Republic, to 53 in case of the Israeli commando rescue at Entebbe.
- (D) The intervening state may rescue other nationals besides its own during the mission, as was the case in the Belgian intervention in the Congo. The reason for intervention is humanitarian, even though the primary aim of the intervention must strictly be the protection of one's own

nationals, elementary considerations of humanity dictate that it is entirely reasonable to rescue every human life in danger, including those nationals of the territorial state. This, of course, presupposes that the primary purpose must manifest itself as the rescue of one's own nationals and the rescue of others must appear merely incidental.

- (E) The intervening state may receive assistance from others whose own nationals are in danger or who have provided the assistance through humanitarian considerations. In such a case, the defense employed by the intervening state would extend to cover such states (12).
- (F) Consent of the territorial state is not necessary if the intervention is strictly for the protection of nationals.
- (G) Some states have tried to justify their intervention on the basis of protection of property. For example, Britain attempted to justify its intervention in Iran and in the joint Anglo French operation in Suez Canal in 1956, on the basis of the protection of lives and property after the expropriation of Anglo-Iranian Oil Company. The United States operation in Cambodia in 1975 had as one of its objectives, the rescue of the detained vessel, *Moyoguez* (13). Yet state practice in this regard is extremely limited as to warrant the argument of the evolvement of

customary law since 1945. Not only does there exist a strong reservation in attaching equal value to property and life, but also there is considerable resistance to not returning to the military intervention to protect foreign investment that was prevalent in the 19th century. Moreover, if one is to concede that international law has sanctioned armed intervention for the protection of nationals abroad, after the Charter of United Nations, it is to be understood that it has done so grudgingly, and under a very strict and limited circumstances. The extension of the protection of property would be stretching an already thin defense a bit too far. But of course when nationals are evacuated it is natural to expect to bring with them their goods and possessions. Further more one can postulate cases where the forced usurpation of an object of value would, would be arranged by armed intervention for its repatriation as the object is irreplaceable or could not be compensated in kind.

- (H) Distinction should be made between armed intervention for the protection of nationals and armed intervention for humanitarian reasons. In the case of the later, the nationality of the people to be rescued is immaterial and the intervention need no have protection of one's own nationals as the main object of intervention.

(I) The practice of rescuing nationals abroad is very limited since the coming into existence of the Charter for a number of reasons

(i) The abuse of foreign nationals is itself very limited.

(ii) Few states have the material and military power to intervene in another state to rescue their nationals. Such a few isolated cases become too insufficient to warrant the assertion or refutation of the existence of customary law that has evolved since the Charter.

(A) Selected Cases of Armed Intervention for the Protection of Nationals Abroad.

The Belgian Intervention in Congo the (1960)

A week after independence the Congo, a state of anarchy reigned in different parts of the country as the army mutinied and a number of atrocities were committed both against Belgian citizens and others. Consequently Belgian paratroopers were flown in and rescued a number of expatriates living in the country. In the United Nation's debate following the intervention, Tunisia and the USSR condemned the action of Belgium as an "... unwarranted act of aggression and violation of both the territorial integrity and political independence of the Congo ..." (13) On the other hand, Great Britain and Italy retorted that

the Belgian action was prompted by humanitarian reasons which everyone should be grateful.(14)

The United States intervention in the Dominican Republic (1965)

In April 28, 1965, a 400 strong force of American Marines landed in San Domingo in the midst of a deadly civil war. The President of the Republic was overthrown by the so called Constitutional Party. The supporters of the President, after having formed the so called National Construction Party invited the United States to intervene. It was apparent to everyone that by the time the United States marines landed no one was in control. The United States at least initially attempted to justify the intervention by stating that it was carried out only after being informed officially that the police and military officials in the Republic were no longer in a position to guarantee the safety of American citizens in the .(15) Eventhough, the United States attempted, in the beginning, to justify the intervention on the basis of an invitation recieved, the United States itself admitted implicitly that the invitation came only from one of the factions, which could not, by any stretch of the imagination have been taught to have exercised reasonable control in the country.

The reaction to the ,intervention in the Security Council and the General Assembly was as expected. The states that traditionally accepted and exercised

armed intervention to protect their nationals abroad approved of the action and states that have regarded armed intervention for the protection of nationals abroad as illegal under international law, most notably the socialist and a section of Afro-Asian countries, condemned it.

Great Britain, whole heartedly supported the action and proceeded to thank the United States for rescuing her nationals during the intervention. The Netherlands appreciated the humanitarian aspect of the intervention which led to the saving of lives. France was more cautious. While asserting the initial intervention's legality under international law, the French delegation proceeded to warn that the continued presence of American Marines in the island, in an attempt to assist one of the factions in the conflict, would amount to aggression. Further more the déléation pointed out that the legality of the action under international law would depend on its limitation in space and time. The action should be proportionate reply directed strictly against the cause of danger and not against territorial integrity or internal political affair of the territorial state. It should immediately come to an end when the threat to the lives of the nationals passes or the operation manages to rescue them. (16)

The USSR condemned the intervention as a blatant disregard of the national integrity of the Dominican people. She went further to assert that the United States, in using the protection of its citizen's as a pretext to interfere in the

internal affairs of the republic and to influence the outcome of the political constitution in her favour. (17) It is important to note here that the Soviet Union did not at any time during the debate, state categorically, that the right of intervention to protect one's nationals abroad is illegal under international law. This right was challenged by Cuba, who went ahead to extensively question and reject the legality of using force to protect one's nationals abroad. The Cuban delegation stated that the Charter had no intention, whatsoever and had made it explicitly clear that the use of force was to be exercised under very limited conditions which have been succinctly stated in the Charter. The introduction of other exceptions to the ban on the use of force, alien and contrary to the spirit of the Charter is a challenge to the tenets of international law and order established since 1945 (18). Uruguay, Jordan, Malaysia and Cote'd' Ivoir censored the action of the United States without giving the reason why.

The Israeli Raid on Entebbe (1975)

The 1975 Israeli raid on Entebbe offers a very important precedent in respect of the protection of one's nationals abroad under international law. Eventhough, by Israel's own admittance, the action is the extreme end of self help, the extent of its scrutiny, not only for its reliance and daring of execution, but due to the both positive and negative passion it unleashed in the United

Nations General Assembly, had forced nations to take a stand on the issue. The ensuing debate had assisted in determining the evolvement or devolvement of customary international law of protection of one's citizens abroad.

The facts of the case are as follows. On June 27th, 1976, a French aircraft enroute from Tel Aviv to Paris was hijacked by four Palestinians, who forced it to land in Libya and ultimately to Entebbe, Uganda whereupon they were joined by a further 6 terrorists. The hijackers consequently freed all non Israeli passengers, but apprehended the remaining 96 Israeli nationals as hostages and demanded the release of several Palestinians, who were serving prison terms for terrorist activities in several countries. When attempts by Israel and other countries to resolve the crisis diplomatically failed, Israeli commandos landed in Entebbe, without the authorization of Ugandan Government, executed the Palestinian hijackers and took the hostages back to Israel. During the operation, 10 Ugandan soldiers were wounded and 10 aircrafts destroyed.

At the debate in the Security Council, the Israeli delegation's representative asserted the right of protecting one's nationals in mortal danger. This, the delegation claimed, is supported by several legal writers and also by state practice. The delegation further claimed that the operation was at no time directed against the territorial integrity of the Ugandan people and that it was limited in space and time. Proportional force was deployed that enabled to bring

the threat to an end and was duly withdrawn as soon as the circumstances allowed. Consequently, Israel had committed no international delict (19).

During the debate both at the Security Council and the General Assembly, the United States became the only Country to fully and unreservedly endorse the action of Israel. The delegation stated that

"... The Israeli action is a temporary breach of the Ugandan territorial integrity. Yet it is a well established fact that the right to use limited force for the protection of one's nationals from eminent danger, is recognized in international law, when the territorial state is unable or unwilling to do so ..."(20)

Other western states were cautious when giving their blessings. The United Kingdom, traditionally a vociferous supporter of armed intervention for the protection of one's nationals, curiously delivered an ambiguous statement understandably uneasy for many of her nationals in Uganda. Others like France, Japan, and Sweden while censuring the action as a *prima facie* violation of international integrity, and political independence of Uganda, acknowledged that the motive of intervention is not, *per se* the violation of territorial integrity and political independence of Uganda, but merely the saving of human lives: They also drew attention, to the fact that, while article 2 of the definition of aggression defines *prima facie* elements of what constitutes aggression, it

leaves the act itself open for subsequent determination in the light of other relevant factors to determine whether aggression has actually been committed.(21)

Uganda, in its turn retorted that it had at no time committed acts of complicity with the terrorists. Infact, at the time of the intervention it was trying to use its good offices to bring the crisis to a peaceful end. Thus the argument that, "... the unwillingness or the failure of the territorial state to give the necessary protection..." did not apply.(22)

The former USSR as usual condemned the action as a flagrant violation of the Charter, specially article 2(4). Whereas Panama pointed out to the fact that, the only incidence whereby force is sanctioned by the charter is for self defense, which Israel could not claim in this instance. Eventhough the protection of one's nationals is not illegal it must be pursued through peaceful means and not at the expense of "weaker" nations (23). The rest of Socialist and Third World Countries were almost unanimous in censuring the Israeli action. But no resolution was passed at the Security Council due to the USA's veto against the condemnation.

The United States Attempt to Free American Hostages Held in Iran (1980)

Another recent example of American intervention in the Third World for the protection of American nationals abroad is the abortive attempt to free the American diplomatic and consular staff held inside the American Embassy by radical Iranian muslim students in 1979-1980. After the Iranian revolutionaries forced the Shah into exile, they accused the United States of continuing to host him. The crisis was worsened by the entry of the Shah into the United States for medical treatment. In November 4th, 1979, a group of Iranian students raided the American embassy in Tehran and held the diplomatic and consular staff hostage along with other American nationals seized outside the embassy. Soon after, they released 13 of the hostages but continued to hold the remaining 48. Later, the United States managed to push through a resolution in the Security Council condemning the action and the continued active support or tolerance of the Iranian Government for the radical students. The resolution also called on the Secretary General to utilize his good office in persuading the Iranian Government to bring the crisis to an end. The resolution also emphasized the need of exercising utmost restraint by both governments. This resolution was ignored by the Iranian Government (21)

On December 31, 1979, a resolution requesting the government of Iran to release all the hostages was passed at the Security Council. While the Security Council was seized of the matter, the United States continued to look for other ways of bringing the threat to the lives of her nationals to an end. In November 26, 1979, the United States instituted a proceeding against Iran in the International Court of Justice. The Court subsequently issued an order calling for the release of all hostages and urging both parties to refrain from any action, which might aggravate the situation between them. This was also ignored by the Iranian Government.(24)

The United States continued to exert pressure with all the means at its disposal. The United States froze all the Iranian assets which were in the possession or control of persons in the United States. She also managed to persuade the EEC (European Economic Commission) to adopt a similar sanction against Iran.

In April 4-25, United States commandos landed in Tabas, Iran, with the objective of reaching Tehran and freeing the hostages. The operation was aborted due to the collision of two aircraft.

The United States claimed in the Security Council that the mission was undertaken

"... In exercise of its inherent right to self defense with the aim of extrication of American nationals who have been and remain victims of the Iranian armed attack on our Embassy..."(25)

The United Kingdom and others, who have traditionally exercised and claimed as inherent, the right of protecting nationals abroad, fully endorsed the action of the United States. Italy stated that it has traditionally opposed the use of force to free hostages, but assented to the existence of serious breach of international law by the Iranian Government.(26)

The reaction of states, specially western states, strengthens Reisman's theory that the Charter does not abrogate the right of self help, which is traditionally part of customary law. It merely suspends the right to resort to armed self help until the Security Council acts. When the Council is paralyzed due to various reasons, the right to resort to self help is retained in international law. (27) This is confirmed by the reaction of the governments from the EEC, Japan, Israel, Australia, Egypt and Canada which censored the action of hostage taking and affirmed their solidarity with the action of the United states.

States that traditionally regard the use of force for the protection of one's nationals abroad as illegal were consistent in condemning the action. These included the USSR, China, Cuba, Pakistan and India.

Though the judgement of the International Court of Justice on May 24, 1980 would have provided an important precedence on the legality of the use of force for the protection of nationals abroad under international law, it loses its significance, when we consider the fact that ICJ passed judgement, albeit only in form of *obiter dictum*. The court stated from the outset that it is not its duty to settle the question of the legality of the operation of April, 1980 under the Charter or any possible question of responsibility following from it.(26) The Court made a reference to the military operation because the raid took place while the case was being adjudicated. The Court conceded that, the United States might have been frustrated by the long detention of the hostages, but it clearly stated that it cannot fail to express its concern at the United States incursion into Iran. The judgement of the Court did not contain any reference to judicial status of protection of Nationals abroad through the use of force.(28)

(ii) Evaluation of State Practice.

An Examination of the reaction and response by states to an armed intervention for actual or alleged protection of nationals abroad, reveals some features of the international community with this regard.

- (A) All the western countries consider the use of force for the protection of nationals abroad as legal under international law. An important exception to this is the Egyptian raid on Larnacea, Cyprus, to free Egyptian

hostages held by Palestinian terrorists. Subsequently, after the abortive American attempt to free the American hostages in Iran, Egypt, a Third World Country and a traditional opponent of the use of force for the protection of nationals abroad, staunchly and vociferously defended the American action. Save for this exception, only one component of the international community, the western states, have consistently practiced and claimed the right of protection of one's citizens abroad through force.

- (B) Where these western states actually exercised the right, they claim to have done so on the basis of autonomous right of protection vindicated by the use of force, justified on the basis of article 51 of the Charter. For example, the United Kingdom intervention in Egypt was justified on the basis of the right of protecting one's citizens. The United States claimed both the inherent right of protection and self defense during the Mayaguez incident. Belgium claimed the right of protecting one's nationals and force majeure, during the Congo intervention. The United States gave the excuse the fact of the existence of state of anarchy and request for intervention by one of the parties for its intervention, in the Dominican Republic.

Third States that Support the Protection of Nationals Abroad through the Use of Force.

During the Belgian intervention in Congo, several Latin American States affirmed the existence of the inherent right to defend one's citizens under the international law. During the United States intervention in the Dominican Republic, support came from fewer states, understandably so because the continued American presence could not be justified and portrayed the United States as partisan towards one of the parties.

During the Israeli raid on Entebbe, the United States came out as the only country to have endorsed the action without reservation. The other countries took nebulous stands, neither condemning nor supporting the action. But France, Canada, the Netherlands, the United Kingdom and Australia dispatched congratulatory telegraphs after the successful completion of the mission.

The United States justifying the Israeli action, stated that the protection of nationals abroad through the use of force is a right of self defense as an exception to the general ban on the use of force but it is distinct from self defense. States may have recourse to this right whenever faced with an imminent danger of injury or death of nationals and the local sovereign is unable, or unwilling, to safe guard the lives of the nationals. The memorandum

from the State department also points out that, such use of force may be proportional to the threat and should come to an end as soon as the danger disappears. The memo implies that such use of force becomes illegal when it is used for other purposes, for example to punish or exact compensation.(29)

(ii) The Problem of Determination of Legality of Protecting Nationals Abroad through force by the practice of States.

The determination of the survival of the rule of protection of nationals abroad through force, becomes difficult for a number of reasons.

(A) The number of states that have practiced , supported or asserted their right to the protection of nationals through force provides no clear cut indication as to its legality 'under international law, for as many states have renounced the action as violation of the spirit of the Charter and international law.

(B) Another angle of argument would be to start from the opposite premise and declare that the use of force for the protection of the nationals abroad is contrary to the spirit of the Charter and excluded as an exception to the ban on the use of force. But subsequent state practice has given rise to new customary law legalizing the use of force for the protection of nationals.

Admittedly, a section of the international community, namely the United States, Great Britain, France, Belgium, Israel and Egypt have resorted to this practice. Others like Italy and the Netherlands, though not having resorted, to the practice have expressly assented to the existence of the right for the protection of one's citizens abroad. Others have consistently objected and renounced the unilateral armed intervention for the protection of one's nationals. These include the former USSR, Panama, Mexico, Guayana, Cuba, Romania, Cyprus, India, and Sweden. Others for example the Congo, the Gambia, Uganda, Tunisia, China, Mauritania, Benin, Tanzania, Cote D'Ivoire have, at one time or another condemned the use of force for protecting one's nationals abroad without dwelling on the legality or illegality of the action under international law.(30)

It would be safe to conclude here that a section of the international community has consistently asserted its right and resorted to the practice. This practice is supported by the *opinio Juris* of those states which justified resorting to armed intervention for the vindication of a right. Others have not actually resorted but approved and explicitly asserted to the existence of the right. Others have explicitly opposed it as contrary to both the charter and general international law. Still others have opposed it without mentioning any reason, but they could not have been said to, have tolerated or accepted it.

Thus an important and vital element in the making of customary law is conspicuously missing, the *opinio juris* of the international community as to the existence of this right. Thus, the argument that the new customary law has emerged since the Charter suffers an obvious weakness. This practice followed by small group of the international community, and opposed by others, lacks the ingredient to have been considered as the manifestation of the emergence of new customary law.

(B) Theories that Justify the Legality of Use of Force for the Protection of Nationals Abroad.

Art 2(4)Does Not Contain an Absolute Prohibition

Some authoritative legal scholars have asserted that the ban on the use of force is not absolute. Of these two groups emerge

- (a) The school of thought that bases its their argument on the literal interpretation of the Charter. The School asserts that for force to be illegal under the charter it must not only be directed against territorial integrity and political independence of a country but it must also be contrary to the spirit of the Charter and the purposes of the United Nations. But the protection of nationals abroad, if confined within what

has been traditionally accepted under international law, would then not be inconsistent within the purposes of the United Nations. The school argues that the United Nation's General Assembly resolution makes it evident that the UN desires to condemn those unilateral interventions that give undue advantage to the intervening state and not lofty motives of intervention as saving of human lives.(31)

- (b) The theory which attempts to justify the lawfulness of the use of force for protection of nationals abroad by interpreting the United Nation's Charter according to the necessities of the present day international system deserves more attention. The incapacity of the United Nations to intervene collectively on a timely basis was noted by Phillip Jessup as early as 1949. Jessup noted that the bureauracritic and cumbersome process of mobilizing the UN military commissar staff and pledged national contingents to be on state of readiness to intervene briskly.(32) Consequently, in case of danger for the lives of nationals abroad, the unilateral intervention of a state might provide the only relief, when the United Nations is hampered in its desire to the act speedily.(33)

Reisman noted that the general ban on the use of force is outmoded and went on to point out that, only in most exceptional cases, will the United Nations be in a position to function as an international peace enforcer. In the vast majority

of cases, the conflicting and diverse interests of the community will paralyse its attempt to act as an organ. In the meanwhile a rational and contemporary interpretation of the Charter must include that article 2(4) suppresses self help in so far as the organization can assume the rule of the enforcer of the peace, failure to do so must revive the prerogative to self help (34)

The Use of Force for the protection of Nationals abroad as an exception to the Ban on the Use of Force.

Legal scholars have attempted to justify the use of force for the protection of nationals abroad as an exception to the ban on the use of force alongside article 51 and consisting as an integral part of it. Thus they have given several reasons for this argument.

- (a) Nationals are part of a state and far more important than its territory. If international law sanctions the use of force as a response to an armed attack on the territorial integrity of a state, afortiori it would do so for the protection of Nationals (35)
- (b) Reparation will never reinstate adequately the loss suffered by the victim, loss of lives or permanent injury (36)

(c) Others have argued that the protection of nationals abroad is part and parcel of humanitarian intervention. Though the ban on the use of force is general, every state has an overriding duty to protect its nationals abroad is part and parcel of humanitarian interventions. Though the ban on the use of force is general, every state has moral obligation to protect its nationals, which outweighs the ban on the use of force (37) The intervening state may also validly point out that it has been caught in the middle of two conflicting obligation, one of which is the respect to the territorial integrity of another state and the other which is the obligation of protecting one's citizen's.

Other Theories that Justify the Use of Force for Protection of Nationals Abroad.

Other theories state that at the time when the international society is moving towards a wider and more effective acceptance of basic human rights, it will be distinctively unreasonable to deny the continuing validity measures to protect nationals. Additionally, the government would be placed under extreme political pressure to act to protect the safety of Nationals abroad when they have the capacity to do so. A government must necessarily be sensitive to the reaction of its people. People have certain expectations from their governments; the protection of life, being one of the them. A government cannot waive off lightly these expectations when action lies within its powers.

Criticism of the Doctrines.

As we have seen above, attempts have been undertaken to justify the use of force for the protection of ones Nationals abroad. When we break these various theories down to the main components, two approaches emerge.

- (a) The ban on the use of force expounded by article 2(4) of the charter is not absolute.
- (b) The protection of Nationals falls within the exceptions to the ban on the use of force (38)
- (c) The argument that the ban on the use of force is not absolute is expounded mainly for two reasons
 - (i) the textual interpretation of the charter
 - (ii) Interpretation which takes into account the failure to implement collective security system.
- (i) When we look at the first the first argument that flows from the textual interpretation of the charter, it proceeds to assert that the use of force for the protection of one's nationals is neither directed at the territorial integrity or political independence of a state. Consequently is neither a violation of the charter nor of international law.

A major weakness of this argument is that it fails to properly define what territorial integrity is. The charter prohibited armed intervention directed against the territorial integrity of a state. Territorial Integrity is nothing but territorial inviolability. But armed intervention to protect ones nationals presupposes the violation of the territory of a state. Thus the argument fails to be tenable.(39)

- (ii) Similarly the view of teleological interpretation of the charter is not acceptable to the is not acceptable to the majority of legal scholars. This view centres on the assumption that, the tenability and viability of article 2(4) remains with the efficient functioning of the collective security system, upon which failure would result in freedom of states to resort to self help. This view, though supported by respected clique of legal scholars suffers from 3 main defects.
- (a) The conflict between the great powers is not exclusively the result of the post charter cold war confrontation. But even during the drafting stage of the charter,,it looked apparent that the world is going to be locked into two ideological camps that have no pretension of sympathy for each other. Fully aware of this developments, the founding fathers explicitly banned the use of force for the consequences of not doing so were shockingly staggering.

(b) The international court of justice in 1949, when the cold war was at its height and the inefficiencies of the collective security system has become apparent made an important decision, during its judgement of the Carfu Channel case "... The non existence of the right of a particular form of self help which consists of the territorial sovereign in order to vindicate one's rights..." The court further added that such an intervention is unacceptable and inexcusable, whatever the shortcomings that exist in the United Nations System.(40)

(c) States had plenty of opportunity to declare their stand on article 2(4). Neither in the drafting stage nor at the United Nations regulation of the definition of aggression nor in the declaration on friendly relations, nor in the numerous General Assembly's and the Security Council's debate has the ban on the use of force been linked to the success or failure of the collective security system.

(C) Criticism Against Theories That Classify Use of Force For the Protection of Nationals Abroad Among the Circumstances Precluding Wrongfulness

The failure of this theory largely lies on three reasons:

- (a) Article 51 releases a victim of armed attack from the obligation of the ban on the use of force. But the identification of and determination of the existence of armed attack in this case, the victim of the attack is not very easy. (41) Would attack on one's nationals abroad constitute armed attack? Before the charter came into force, that is, under customary law, the attack or abuse of nationals would have been a valid reason to respond in kind. After the charter's ban on the use of force, the right does not seem to have survived; the attack must have occurred on these elements - that clearly represents the victim's state, and are symbols of sovereignty, for example, ships on the high seas with flags, armed forces legally stationed in sovereign territory, diplomatic envoys, organs of states (42) Piontithi also states that in order to be able to react in self defense, the attack must be originated from a subject of international law or be accessible to it by virtue of norms regulating state responsibility (42)

(b) Can the protection of nationals abroad be justified on the basis of necessity?(44) Now while it could be argued that the protection of nationals abroad is one of the essential interests of the intervening state, it is impossible to say that state necessity excuse the violation of the territorial sovereignty of another. To make such view acceptable it would have to be shown that contemporary international law, regards not only self defense but also necessity as the exception on the ban on the use of force.

The Practice as an Element Capable of Giving Birth to New Rule of Customary Law.

The evaluation of the law of the use of force leads one to conclude that the charter has not envisaged the admission of use of force for the protection of nationals abroad. On the other hand the practice of states subsequent to coming into existence of the charter would strongly indicate a gradual movement towards the enlargement of the exception to include the use of force for the protection of Nationals abroad. The failure of the charter to accomodate and respond to growing crises around the world would also support this view. The view also finds support also due to other factors including:

- (a) The use of force for protection of nationals abroad is practiced and actively claimed by the most important (powerful) component of the international community, western nations.
- (b) The use of force for the protection of nationals abroad is rejected by the so called "Third World" because it is invariably linked to colonialism and "Gunboat Diplomacy" of the 1920's and 1930's. Yet Egypt a leading opponent of the practice resorted to it during the Larnaca raid and defended its right of doing so during the security council debate. Thus, third world countries have a tendency of claiming their right of protecting their nationals abroad through the use of force when it suits them and when the council fails to provide any solution (45)
- (c) The practice of the use of force for the protection of nationals abroad existed before the coming into existence of the charter. States claiming the right to resort to the use of force for protecting their nationals claimed that they are resurrecting an already existing principle to fulfill the gap created by the charter and not creating a new principle.
- (d) Practice has demonstrated that when a state wrongfully intends to use armed coercion it goes about doing so in either of the two methods:
- (i) Attack on the territorial integrity of the victim state.
 - (ii) Attack on the citizens of the victim state located inside the territory of the aggressor.

The appropriate and legal use of force is sanctioned by the charter for attack on territorial integrity. The question that begs now, would be, the remedies available for a member state whose nationals are in mortal danger by action of the aggressor? The proportional and limited use of force seems to be the only remedy available.

(f) A substantial number of the members of the "third world" have at no time condemned the use of force for the protection of nationals abroad. There had of course been spirited debates both at the assembly and the council as to the facts of the case, but rarely as to the existence of the actual right itself. The security council itself has at no time condemned the use of force for protection of nationals abroad, which has led legal writers to conclude that, armed action to safeguard life is tolerated in the current framework of the international legal system.(46)

(C) The Main Features of Would be Rule Permitting Intervention fo the Protection of Nationals Abroad.

From the above, we may conclude that the use of force for the protection of Nationals is not a breach of charter regulations or current internation law-even if not explicitly sanctioned by the charter. Additionally the exclusion from condemnation by the General Assembly's definition of aggression, and

declaration on friendly relation of the use of force for the protection of nationals abroad is a good pointer to its accommodation in current framework of international law. This view finds support by report of the international law commission.(47) The commission on article 33 of the draft of resolution on state responsibility pondered on whether the action of protecting Nationals abroad would be classified as act of aggression and came up with the following conclusions:

- (a) The use of force for protection of nationals abroad is not a breach of peremptory rules of international law, banning the use of force.

Vienna convention on law of treaties states that:-

"A peremptory norm of international law is a norm accepted and recognized by international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by subsequent norm of general international law having the same character..."(48)

The generality of the rule, that is, its obligatoriness for all members of international community is an essential element.

- (b) Existence of an *Opinio Juris*, that is, feeling by international community to have been bound by it. Thus eventhough the ban on the use of force as a peremptory rule of international law, consensus, however fragile, exists that the use of force for saving lives is no international delict.

Essential elements of the practice

Once We have conceded that the use of force for the protection of nationals abroad is not a delict under international law, an essential question would be what essential elements should an operation using force on a sovereign state have in, order to preclude it from the condemnation of agresiion or wrongfulness under international law?

- (a) The use of force for the protection of nationals abroad must not be used as a reprisal, for rights already violated (47) As stated suring the debate, after the Egyptian raid in Larnacea, "... the given facts are too uncertain to conclusively establish whether the operation is intended to save lives or punish terrorists..."(49)
- (b) The local sovereign must be incapable as was the case in the Dominican republic, or itself an accomplice as was the case in Iran or unwilling as was the case in Uganda, to provide adequate protection. Also the

sovereign itself could be held accountable for failure to provide the necessary protection (The choice of resorting to force or diplomatic and peaceful means should of course rest in the prerogative of the sovereign). Article 3 of the international convention against taking of hostages state that "...the local sovereign shall take all measures it considers appropriate to ease the situation of the hostages and in particular to secure their release..."

- (c) The intervention must be limited in space and time, having as its sole purpose the protection of nationals. The United States supported the Entebbe raid by Israel because "...the Israeli military action was limited to extricating the passengers and crew and was terminated when the objective was accomplished.(50) France criticised the American intervention in the Dominican Republic because it went far beyond the rescue of American Nationals.
- (d) The violence directed at the foreign Nationals must be real, must be unjustified and not just flimsy threat.
- (e) Attempt to diffuse the danger diplomatically and peacefully should be given ample chance if possible at all. As stated by the international court of Justice during the Tehran-American hostages crises "... a state cannot

resort to the use of force even to protect its nationals abroad while the case is pending in court, waiting the peaceful resolution of the matter..."(51)

- (f) The consent of the sovereign, must first be sought if the circumstances allow.

(3) EVALUATION OF THE JUSTIFICATION OF THE INVASION

As we noted at the beginning of this chapter, one of the objectives mentioned by the American government for the invasion of Panama in 1989, is the protection of American lives in Panama, after the Panamanian General Assembly stated that a state of war existed between the two countries. From what we have discussed above and from the following analysis of the facts, was the American intervention in Panama for the protection of Americans abroad justified under international law?

On December 15, 1989, a day after the Panamanian General Assembly declared General Noriega, to be "Maximum Leader" and asserted that a state of war existed between Panama and the United States, four unarmed US servicemen travelling in a private car, were stopped at a roadblock outside the Panamanian forces headquarters in Panama City. After being surrounded by some civilians

and members of the Panamanian defense forces, they attempted to drive away. But marine Lieutenant Roberto La Paz, an American marine officer was shot and killed.

A couple in the same car were taken to the Panamanian defense forces headquarters and tortured while the lady was threatened with rape and severe harassment. Subsequently on December 18, a United States officer shot and wounded a member of Panamanian defense forces near US installation offices. The officer claimed that he felt threatened after the corporal cryptically approached him and seemed to reach for his gun. The Panamanian government claimed that the incident that saw Marine Lieutenant Roberto La Paz shot was illegal reconnaissance mission, while the American government refuted the claim and said that the servicemen were off duty, but lost their direction entering Panamanian Defense forces headquarters. It is to be recalled that the previous day, the Panamanian General Assembly had declared that a state of war existed between Panama and the United States. It is also important to note that, the protection of American lives was asserted by the United States as the primary and most important objective of mounting an invasion in Panama. In the words of President George Bush "... I ordered the invasion in Panama after obtaining reliable intelligence report indicating that Noriega was considering launching an attack on various United States installations and citizens inside Panama..."(52)

From the discussion above, our view of whether the saving of lives would preclude wrongfulness of the general ban on the use of force is by now, we hope, clear. That the charter has not envisaged the admission of the use of force for protection of nationals abroad is at no time denied. We have also stressed that the existing international conditions prevalent at the time the charter came into existence, and the main function of the charter in attempting to preserve the fragile peace that existed during the immediate post war era. The charter was a result of an explicit recognition by all major players in the international scene, of the consequences of the failure of maintaining peace and order. On the other hand, the partial or complete failure of the charter in providing quick and effective remedies to the aggrieved parties, the complicated and cumbersome process involved in mobilizing the security machinery of the United Nations to redress wrongs, have forced member states to develop certain practices after the coming into existence of the charter. Thus factors already discussed in this section, including

- (a) The active resort to the use of force for protection of one's nationals abroad by the most powerful component of the international community, the western states,
- (b) Inconsistent stands taken by some of the most vociferous opponents of the practice, for example, Egypt, in some times violently opposing it and the other times actively resorting to it,

- (c) The concious evidence of the actual right to resort force for protection of nationals in international law, by the majority of the so called third world states,
- (d) The existence of the right to resort to force for protecting nationals abroad, before the coming into exixtence of the charter and absence of any explicit prohibition about it in the charter (article 51),
- (e) Absence of any remedy within the framework of the charter and the United Nations for a state whose nationals through no fault of theirs find themselves in mortal danger in a foreign territory with an impotent or hostile local sovereign, all point out to the fact that a viable and strong opinio juris now exists as to the legality of the use of force for the protection of ones nationals abroad. Indeed it would be both unscholarly and naive, to blindly assert the general ban on the use of force except those, explicitly allowed by the charter, in the face of such overwhelming evidence to the contrary.

Consequently it is the view of this writter, that the right of the United States to mount an invasion of Panama, strictly to protect her citizens would not fall under international delict. During the unanimous condemnation of the action of the United States, both by the organization of American States and the United

Nations, the actual right of the United States to resort to force to protect her citizens outside the territory of the United States was at no time challenged. The unanimous condemnation resulted from the assesment of the facts and their failure to strictly fall under the rules of international law regulating the protection of nationals abroad.

- (a) The use of force for alleged protection of national must not be used as a cover for reprisal. Eventhough after the murder of Marine Lieutenant Roberto La Paz by Panamian defense forces, consensus existed within the lower and higher rank of the millitary for a quick strike, there is no evidence to support that the invasion was mounted as a reprisal for the unwarranted action.

- (b) Obtaining the consent of the sovereign was clearly out of question. There is ample evidence to support that the local sovereign was either a passive supporter or an active culprit of the alleged threat on American citizens in Panama. Relations between Panama and United States had considerably worsened between 1988 and 1989. In light of the very hostile war of words flying between Panama and Washington, the United States could not have been expected to obtain the consent of the sovereign. What is more, General Manuel Noriega was fully in control of the country and his forces, the alleged threat could reasonably have been expected to come to an end upon the wish of Noriega. Consequently, obtaining his consent for the impending intervention would not have made any sense.

(c) Another point that need to be looked into when considering the legality of the invasion for the protection of American lives would be, whether the violence or threat of violence directed at Americans in Panama was actual and real or whether it is merely an excuse to accomplish another objective.

On December 14, 1989 the Panamian National Assembly the highest national legislative organ declared that a "state of war" existed between Panama and the United States. The meaning of existence of war or the official reponse by the government was not elaborated by the assembly. The United States had engaged in economic warfare against Panama, eversince the allegations of electrol fraud and Noriega's involvement in particularly revolting political murders were levelled against him by the Reagan administration. The administration refused to recognize Noriega as the legitimate Panamian leader, gave sanctuary to Delvalle', who was believed to have won the 1988 general elections by a landslide margin. The United States, by a white house executive orders, froze Panama dollar accounts within th United States jurisdiction, blocked dollar transfers from the United States, and ordered companies to pay rtaxes and revenues owed to the Pnanamian government into special accounts in the federal resrve bank of New York. In addition to these measures, Panamian revenues from the use of Panamian canal, amounting to 7 million a month, were placed in a an ecrow account. Foreign aid to Panama was

suspended and Panama sugar quota was terminated. As could be expected, all these was to have a devastating effect on Panama's economy. By 1988, Panama's offshore banking industry has virtually shut down. Between march 1988 and may 1989, Panama suffered capital flight of more than 23 billion dollars. Panama's gross national product, according to estimates by American estimates fell about 24% in 1989. Unemployment rose to 40%.

In the light of the above, the General Assembly's declaration of the existence of state of war might be a mere recognition of a state of fact. On the other hand, such kind of statements might have been interpreted as a go ahead signal to Noriega's strong arm people to harass US citizens within Panama, as proved by the tragic killing of Marine Lieutenant Roberto La Paz by members of Panamian defense forces and the torture of another couple in the same car, the day after the declaration of the existence of state of war. Bush's statement that he ordered the invasion of Panama after obtaining reliable intelligence report indicating that Noriega was considering launching an attack on US citizens inside Panama is more dubious. It is unlikely that intelligence reports would amount to actual and real danger on the 35,000 American citizens in Panama. But it is also to be remembered that the United States southern command had recorded 1,200 incidents of harassment of US military personnel by the Panamian defense forces in the 15 months prior to may 1989.

(d) But the greatest obstacle to recognizing the American invasion of Panama comes from the test limiting the operation in scope. The invasion not only saw the capture of a leader in his own capital, but a change of government. The invasion cannot be by any standards be thought as has having as its sole purpose the protection of nationals. The United States, itself, supported the Israeli Entebbe raid because "...the action was solely limited to extricating passengers and crew and was terminated when the objective was accomplished..."(53) The United States state department also had acknowledged that the invasion had other purpose above and beyond the saving of lives.

(e) Genuine attempts to diffuse the situation diplomatically have not been undertaken by the United States. Besides the economic sanctions, the United States has engaged in economic warfare against Panama between march and december 1989. Having refused to recognize Noriega's government after the alleged election farud of 1988, the United states also pushed a resolution in the OAS condemning the methods by which the Solis Palma government attained power. During this time the danger paused to the lives American citizans in Panama was never discussed.

In conclusion, the right of the United States to intervene unilaterally in Panama to save lives of her citizens was never denied. Though the charter has not foreseen the legalization of the use of force other than those it has explicitly legitimised, subsequent state practice followed by the most important and most powerful components of the International community has forced the incorporation of this practice into the main frame of international law.

If at all one is to concede as to the legality of the use of force outside the charter of the United Nations, one has to do so under very strict circumstances. The United States invasion of Panama went far and beyond the saving of lives, even if the existence of genuine threat to Americans inside Panama was said to have existed after the declaration of existence of state of war and the killing of Marine Lieutenant Roberto la Paz. Indeed the invasion ended with a change to American instilled government and the capture and deportation of the legitimate Panamian leader. In light of this, the limited scope test for the protection of nationals abroad seems to have been utterly frustrated and consequently one would find it difficult to give legitimate recognition to the invasion on this ground.

II. THE UNITED STATES INVASION OF PANAMA FOR THE RESTORATION OF DEMOCRACY

- A. The concept of Domestic Jurisdiction
- B. Current legal constraints on Intervention
- C. Evaluation of the Invasion

A) THE CONCEPT OF DOMESTIC JURISDICTION

The relative recent rise of international organization amidst a general consensus on the need to place limitations upon a formerly absolute sovereign of the state brought about a series of problems as to the determination of the exact scope of the reserved domain of the state. The idea that vital interests of states require some degrees of protection was widely consented. The question was definitely the jurisdiction of those "vital interests" that would remain inherently as part of international concern.

Before the 18th century, states would intervene unhindered in each others affairs with all the tools of intervention available without constraints. As traditional law developed to regulate the relationships between states, principle of sovereignty evolved in theory and in practice to preserve their sovereignty.

The concept of intervention appeared around the 18th century at the time of emergence of basic international law.() Until the time, no difference had been made in theory between the concept of war and that of intervention. They were synonymous of one and same phenomenon, which was a violent armed action designed to fully or partially subordinate a state to the will of another state or group of states.

The French traditional schools of thought including Sibert(), Rousseau , Dupuy , Delbez , attributed intervention to the narrow concept of the actual use of force or arms. This narrow definition of intervention was also shared by German thinkers of the 19th century including Mosler (), and Menzel .

On the other hand, the works of writers specially between the two wars widened the concept. Jessup considered intervention as instance of genuine interference but not revolutionary groups, refusal of international legal recognition and economic pressure. Friedman included besides the use of force, instances of modern psychological warfare radio propaganda, economic boycott, exclusion of certain states from economic privileges as instances of intervention.

The French writer Covarc, also rejected the narrow definition of intervention and asserted that the prerequisite for intervention is an aim to impose one's will on the victim of intervention. In so doing Covarc distinguished intervention from mediation and good office but pointed out that, it was essential that the intervention should execute his designs making use of any means including armed force when necessary,.

The covenant of league of Nations affirmed the obligation of states to refrain from interfering in the internal affairs of other states. Article 10 stated that,

".. members of the League undertake to respect and preserve as against external aggression, the territorial integrity and existing political independence of all members of the league.."

Similarly, the 1933 multi lateral accord on rights of states signed in Montevideo stated in article 3, that,

"...The state has the right to defend its integrity and independence as it sees fit, to legislate its interest and to administer its services..." to compliment this multilateral accord in addition protocol; declared in article 1,

'The high contracting parties declare inadmissible the intervention of any one of them, directly or indirectly for whatever reason, in the internal or external affairs of any one of the contracting parties."

Thus treaties were essentially targeted at the United States of America, the primary offender of the rule of non intervention which intervened in Latin and Central America no less than 60 times between 1900-1935, to thwart what it termed chronic wrongdoing. The Munroe doctrine and its Roosevelt corollary banished European colonial ambitions from the Western sphere and declared the United States as a regional power defending the integrity and democracy of the Americas. The doctrine elevated the United States executives as a holly office overseeing the implementation of good governance and being the sole interpreter if the meaning of wrongdoing.

The Dumbarton Oaks proposal failed to delict the jurisdiction of the organization against the jurisdiction of the states. This resulted in anxiety by smaller and non-permanent members of the organization, that the super powers would utilize the security council to intervene in the internal affairs of member states. This proposal spearheaded by the Australian delegation finally met approval and paragraph 7 of article 12 was banished which restrained the organization from interfering affairs of member states.

The survey of many legal scholars' works provide evidence that there is no strict judicial answer to the problem of identification of jurisdiction of internal affairs. Some of the theories for the identification of domestic jurisdiction are:

- a) some matters by their nature belong to the domestic jurisdiction of states,
- b) some matters are prima facie domestic by nature but later due their import reach international level,
- c) All matters may become the object of international recognition by means of treaties and whenever this happens they cease to belong to the domestic jurisdiction of states. Welsen, Ross, Jimnez and Waldock, adhere to the view that whether international law has or has not made the matter an object of regulation depends on the domain of the states (12) while Lauterpacht favours the international law criterion for the determination of the reserve domain.(13)

Rolin and Vendross have visualized different spheres of jurisdiction or certain distribution of competence seemingly to maintain that there are matters which fall, per se, within the reserve domain of states.(14)

Preus on the other hand considers that, international law reserves the right to hand out selectively matters that does not fall under it (15). While Brierly, fully concurs by stating that the state has only that jurisdiction which is granted to it under international law.(16) Opposite view is taken by socialist legal scholars like Koretski, Tunkin and Levin, who proclaimed that, the sphere of international jurisdiction exists independently of international law and is not its product.(17)

In recognition of the existence of such a sphere and domain of no-interference in the matters which by their nature fall under the jurisdiction of a state, international law only acknowledges a truly existing fact which is corollary of sovereign states. The principles of non-interference in the internal jurisdiction of any state constitute a means of strengthening and safeguarding state sovereignty in international law. The question of internal organization of a state enters the field of their internal jurisdiction for as long as there are states and by the same token international law itself.(18) But as observed above, there is no unanimity in legal theory as to what the scope of domestic jurisdiction is and legal scholars were hesitant to go into detailed enumeration of areas falling under domestic jurisdiction.

The task of defining intervention has not been any easier. The question what constitutes intervention and what are the tools of intervention has resulted in a number of attempts to define it, Oppenheim and Lauterpacht had given a modern and relatively complete definition of intervention. "Intervention according to these authors must be dictatorial interference and not an intervention without the use of force. Similarly Briery is of the opinion that every act of interference in internal affairs of a state is not automatically intervention, for an essential element of interventionism, is interference backed by imperative force (19) Hyde also sanctions the view that force must be involved to qualify the interference as intervention as distinguished from simple interposition.

On the other hand Schroeder, considers intervention as "...The purposeful and calculated use of political, economic and military instruments by one country to influence the domestic or foreign policy of another..."(20)

Schroeder notes four aspects of this phenomenon;

- a) intervention is seen as a purposeful and calculated, underscoring the intentional nature of the act,
- b) intervention entails a wide choice of instrument ranging from the extension of military aid to economic sanctions,
- c) attempts to influence a state's domestic or foreign policy need not be restricted to efforts to change that policy but they may also be attempts to insulate and protect it from change,

- d) intervention need not be construed as attempt to change or maintain the domestic policy of the object of the intervention, but also could be aimed at changing or maintaining the foreign policy.

For the purpose we have in mind, we are going to adopt the narrow definition of intervention and restrict ourselves to intervention by the use of armed force to change the policy of the object of intervention.

B. CURRENT LEGAL CONSTRAINTS ON INTERVENTION

Even though, consensus does not exist and judicial determination of domestic jurisdiction is conspicuously absent, three broad defined spheres of domestic jurisdiction are recognized by the general principles of law evidenced by practice of states (21);

- a) every state has the right to freely choose and conduct its socio-political system. Whether changes in socio-political systems are made legally within a state that is, through organs of government authority or illegally, through revolutionary movements by the people, external interference of whatever nature should be prohibited. Any such interference would violate the principle of self determination of peoples and (or) the principle of state sovereignty. (22)

- b) The sphere of system of government, unless determined and carried out without an external interference, defeats the sovereign equality of states (13).

- c) The prerogative of political, economic or other forms of cooperation between states rests with them. This covers respect for the personality of the state the right to conclude international treaties and to ratify them, right to maintain diplomatic and consular relation with all states, maintenance and development of economic relations, admission, membership and activity in international organizations..."(24)

The charter of the United Nations' has recognized the importance of restraining the organization from interfering in what is generally recognized the internal affair of member states. This resulted from awareness that member states jealously guard from outside interferences, matters they consider their domestic jurisdiction. To this end article 2(7) puts restraint on the power of the organization. Sohovic, is of the opinion that article 2(7) by analogy operates not only as restraint of the organization from meddling in the internal affairs of member states, but also as a restraint on member states from interfering in each others affairs. (25) This argument is further strengthened when article 2(7) is read jointly with other major principles of the organization.

The charter's major principles states in no uncertain terms the obligation of member states to refrain from interfering on each others affairs. Article 1 paragraph 2 proclaims equal rights and self determination of peoples. Article 2 paragraph 4 prohibits the use of force for the settlement of disputes, article 2 paragraph 1 reaffirms the sovereign equality of states and article 2 paragraph 1 protects member states from undue interference from the organization.

All this leading principles of the organization are a clear indication that the charter does not recognize the superiority or inferiority of neither political, economic or social systems. The charter also recognizes the inherent right of people to freely choose their politico-socio-economic systems and to change it at will without fear or favour.

The 1947 inter American treaty of reciprocals assistance signed in Brazil, reiterates that obligation of non interference laid down in the charter of the United Nations and endorses the principle on the ban on the use of force laid down in the charter.

The O.A.S charter in article 18, states that "...no state or group has the right to intervene directly or indirectly for any reasons whatsoever in the internal or external affairs of any other state. The forgoing principles prohibited not only the use of armed force but also any other form of interference or attempted threat against the personality of the state or against political, economic or cultural elements..."

Similarly, the charter of the O.A.U contains provisions that restrain member states from intervening in the affairs of others. Article III states that "...The member states in pursuit of the purposes, stated in article II solemnly affirm and declare their adherence to the following principles;

1. Sovereign equality of all member states,
2. Non interference in the internal affairs of states,
3. Respect for the sovereign and territorial integrity of each state and for its inalienable right of independent existence,
4. Unreserved condemnation in all its forms, of political assassination as well as subversive activities on the part of neighbouring state or any other state"

The covenant of the Arab League states that "...Every member state of the League shall respect the form of government obtaining in other states of the League and shall recognize the form of government obtaining as one of the rights of those states and shall pledge itself not to take any action tending to change that form"

Against all the overwhelming evidence of existence a universally recognized rule of non-interference in the domestic affairs of states, the rule continued to be one of the most widely and frequently violated, which necessitated the General Assembly's endorsement of a resolution, defining more clearly, elements that

constitute friendly relations and the obligation of the abatement from the interference on the domestic affairs of member states.

The 1965's General Assembly declaration on the inadmissibility of intervention in the domestic affair of member states and the protection of their independence and sovereignty stated that;

1. "No state has the right to intervene directly or indirectly for any reasons whatsoever in the domestic affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political and cultural elements are condemned"

2. "No state may encourage the use of economic, political or military measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights, to secure from it advantages of any kind" (26)

The United Nations General Assembly Declaration on Principles of International Law Concerning Friendly relations resound the above declaration verbatim. The resolution (2131), came to condemn not only armed intervention but also any violation of territorial, integrity and political independence, direct or indirect, open or covert intervention. The resolution went on to list, the other prohibited

acts of intervention, including invasion, armed attack, organizing and financing and assisting and instigating secret activities, terrorism and fermenting civil strife. The resolution also condemns the deprivation of the national identity of people which it says constitutes a violation of their inalienable rights. The genesis of this provision shows that the sponsoring countries wanted it to apply to the cases of the division of colonial peoples to racial discrimination and apartheid. (27)

But the penultimate provision in the formulation of the principle of non-intervention relates to the prohibition of interference in the inalienable right of every state to choose its political, economic and cultural system. It goes without saying that such measures fall within the internal competence of each state and prohibition of any outside interference is understandable. (28)

A point for future ponderance is the legality of intervening to assist people who have been thwarted in their bid to change a system. Laucherpacht states that, the right to democratic, moral and majority rule is yet a positive law of international law (29). But when will it be? We will in part examine it in the third chapter.

C) EVALUATION OF THE JUSTIFICATION OF THE INVASION

As it can be recalled, another of the justifications, the department of state has provided for the United States invasion of Panama is the restoration of democracy.

In June 1987, ex-president Eric Aruti Delvalle, who four years ago, had been installed by Noriega as President after the forced resignation of Nicolas Arditi Barletti was removed from office by a rump session of the National Assembly and replaced by a Noreiga crony, Manuel Solis Palma. The Reagan administration reacted to these events by giving sanctuary to Delvalle and continued to recognize him as president. The 1988 general elections were annulled by Noriega, and Guillermo Endara who was thought to have won the elections by a landslide victory was chased out of the country. On December 15, the General Assembly of Panama's highest legislative organ declared Noriega to be a "maximum leader".

The United States government efforts to deny political recognition of the Solis Palma's government, the least to say is highly dubious. From purely political standpoint, the United States was entitled to recognize Delvalle as president even though he was in hiding and only in control of the Panama Embassy in Washington. This was not the first time the U.S administration had withheld

or extended recognition on arbitrary basis. For 16 years, the United States refused to recognize the Bolshevik seizure of the power in the former U.S.S.R. After the 1949 triumph of the communist forces of Mao Tse Tung, the United States conducted a 30 year charade of pretending that the refugee nationalistic regime in Taiwan was the legitimate government of **China**. The United States had refused to recognize the government of **China** 16 years after the entry of communist forces in Saigon.

Reduced to essentials, international law, as accepted by the overwhelming majority of state, prescribes only two tests, that a government must meet to make it eligible for recognition. effective control of the national territory and ability and willingness to meet its international obligations. The means by which a government takes power and maintains itself in power are irrelevant. Any other position would allow one government to pass judgement on the internal affairs of another, thereby violating the principles of sovereign equality of states (30).

In the case of Panama, the dismissal of Delvalle by the national assembly and the installation of president Solis Palma was so potently and exclusively internal matter that its legality in international law seems unchallengeable. There was never any doubt that Solis Palma government backed by Panamian forces and Noriega had sole control of the national territory. Nor was there any indication that Solis Palma's government was not going to meet its international obligations including the Panama Canal treaties.

The United States has persisted in legitimizing its interventionist policies on *de facto* presidential doctrines. The United States interventionist policy remains motivated more by perceived national necessity and political expediency than by international responsibility and legal rectitude. This observation does not mean that the U.S interventionist practice is a profound aberration, but merely that like many other countries, the U.S obeys international law when it serves its national interest. (30)

III. THE UNITED STATES INVASION OF PANAMA TO ENFORCE
INTERNATIONAL CRIMINAL LAW

- A. Origin and Development of International Criminal Law
- B. Essence and Meaning of International Criminal Law
- C. The Theory and Justification of Punishment under international
Criminal Law
- D. Evaluation of the invasion

(A) THE ORIGIN AND DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW

For centuries, international law recognized its *raison d'être* and confined itself to the relationship between sovereign states. Even today, the number of scholars of considerable stature, including Schwarzenbuger, who vehemently deny the existence of international criminal law is not unsubstantial. As Kelsen deridely refers to the subject, "... international criminal law exists, they teach about it in law schools".

The origin of the practice of holding the individual responsible under international law is as controversial as the subject itself. There is in the first place no agreement on the date of origin of International criminal law. The medieval period up to the end of the 16th century witnessed a moral order imposed by the Roman Catholic church on the Western World. Consisting of principles that were scarcely questioned. Although Christian Monarchs were in principle bound by the moral dictate of the church, infraction were numerous and crimes atrocious (1) In many cases the norms which the order was based were sanctioned by those who exercised temporal power. Excommunication was the supreme punishment and was reserved for those guilty of crimes against natural order and was justified by divine law (2).

The reformation transformed the Western World into an entity of independent powers. The sovereign supremacy of people as declared by Rousseau was gradually imposed at the end of the 18th century in all major Western countries. The bloody confrontations of national sovereigns in the second half of the 19th century which culminated in the last two wars, which that the consequences of the breakdown of the natural order based on a certain consensus concerning the morality of the conduct between sovereign national states could be disastrous. Consequently, the end of the 19th century witnessed the gradual development of international law and its sub branch, international criminal law.

Customary international law, towards the end of the 19th century recognized only two categories of conduct as criminal, slave trade and war crimes. But International attempt neither to refine these concepts, nor to create international cooperation was conspicuously lacking.

Towards the beginning of the 1920s, the first suggestion for formal creation and recognition of international criminal law was mooted. (3) A major obstacle, as yet as insurmountable one was of course, the roll and power of international criminal tribunal in the direct enforcement of international criminal law. As history of public international law clearly and convincingly demonstrates, direct enforcement in a community of mutually competing and unequal sovereigns has rarely occurred. (4) Rarely, when it has been imposed, it has been so, by the

will of sovereign states cooperating for a specific purpose either on a basis of mutual assistance or through adherence to a treaty or convention.(5)

Proposals for an international criminal code started being advanced this century with Professor Quintilano Saldano and Hague lectures in 1925 and Professor Yespasion Pello in a seminal study published the very next year.(6) Further impetus towards the development of international jurisprudence was provided by the Latin American so called, Bustimente codes in 1928, which has been in force since 1936 in 15 Central and South American countries. A high point of the development of the trend, toward an international criminal law came in 1937 conference held in Geneva, Switzerland, sponsored by the League of Nations, occasioned by the dual assassination of the Yugoslavian King and French Foreign Minister in Marseilles 3 years before. After the conference, convention for the prevention and punishment of terrorism was adopted by the resolution of the council of the league of Nations on May 27, 1937. The American secretary of state stated at this point in no uncertain terms, that without an international criminal court, there could not exist an international criminal code and without an international criminal code, the attempts to create an international criminal court are futile.(7)

Towards the end of the second world war, one of the consequences of the Moscow declaration became the creation of an international military tribunal at

Nuremburg. The disastrous consequences that followed the second world war and the barbarious atrocities committed by Japan and Germany, not only united the whole international community to make a collective vow that the situation will never again be allowed to devastate mankind, but also it created the political will to bring the individual responsible before an international criminal tribunal which promulgated its own procedural and substantive laws.

Kelsen's argument that as the state is the only subject of international law, only the state, has the right and corresponding duty to appear as plaintiff and defendant before an international tribunal, was quashed at Nuremburg.(8) The tribunal expressly stated that irrespective of the fact that a guilty state may also be culpable under international law, the individual offender of wars remained answerable. The Nuremburg and Tokyo trials are the real point of departure, in their respective judgement in recognizing the responsibility of the individual under international law did accept, in certain identified and limited circumstances, the notion of individual criminal responsibility.

Brief look at the first major attempt to expand the body of international criminal law after the creation of the Nuremburg jurisprudence shows that, broadly speaking the development of international criminal law, proceeded on two parallel trends.

- a) Creation of criminal offenses, which due to the serious nature of the conduct on the part of offenders, are to be dealt by the international system, which also prescribed, punishment for the wrongdoer, and,
- b) the eventual creation of international tribunals, but in the meantime adjudication in the domestic tribunal of the state which had territorial jurisdiction over offenses in question.(10)

If the result of the utter shock of the consciences of the international community, by the Nazi atrocity provided the impetus and political will for the Nuremburg and Tokyo trials, then the lack of consensus to create an international criminal tribunal plagued the period after the war. After considerable debate a list of Nuremburg principles appeared as a prototype in international retributive model but never managed to emerge from the proposal level.(11) Efforts by the United Nations in 1951 and 1953 yielded the convention for the prevention and suppression of genocide and Apartheid which again provided for the establishment of international criminal tribunal.. In 1955, the United Nations sponsored the first global congress on the prevention of crime and the treatment of offenders which was held in Geneva, Switzerland and was to be followed by several other congresses on the subject on a quinquennial basis.(12) Eventually, this effort resulted in a United Nations crime prevention branch located in Vienna, placed under the direction of a noted authority in the field of international criminal law.(13)

American recognition for the international criminal law could be construed as being achieved in 1956 with the adoption of that classification by the index to legal periodicals.(14) By mid 1970, the prominent Soviet Jurists, S.I Tunkin modified his earlier position and unequivocally recorded the concept of international criminal law declaring it to consist of "... the greatest violation of international law ..."(15) Though Tunkin failed to give the definition of an international crime, he cited as an example war of aggression and colonialism.(16)

The issue of whether or not to recognize genocide as a international delict of peremptory nature has resulted in a hot debate. E. Edwards strongly asserts the IUS Cogens character of the ban on genocide(17) On the other hand, the violation, derogation and outright flaunting of this rule by such atrocious regimes like Amin, Pol Bot, Alfredo Strossner and Ali Murtapo and their due recognition by both U.N and the Principal powers and the lack of condemnation of any kind by the international body, of the actions of this government will make it difficult to reconcile Edward's argument. Indeed Genocide had been attempted or practiced so often in so many places during the post century that, some critics maintain that international barbarism in a point of fact, has replaced the legal fiction of a world community bound by law.(18)

Despite the famous Eichman trial or because of it, the United Nations General Assembly, declined to include international criminal jurisdiction as an agenda on its 23rd session in 1968. The Eichman case became the last of Nuremburg's dying conscience.

The Essence and meaning of international criminal law.

Before going into the essence and meaning of International criminal law, it would be appropriate to highlight the debate on whether it exists at all or whether it is legal fiction which has no separate existence apart from public international law.

After posing the question "does international law really exist?" to himself Schwazenberg gives an emphatic no. He argued that ".. in the present state of world society, international criminal law does not really exist.(19) But at present, it would be difficult to deny the existence of crimes, which are purely municipal, but which have been criminalized on the international level because when viewed by the world community context, they are such outrageous acts. Admittedly, international criminal law does not exist in a sense of municipal criminal law. There are no martials or enforcement agencies or courts of jurisdiction. But to deny the existence of international criminal law, due to lack of a system of enforcement as understood in the municipal sense is to deny the existence of public international law. That international law has its own unique

forms of self expression is obvious to any serious student of international law. But it must be conceded that the dim twilight zone between no international criminal law and a fully developed international criminal law grows dimmer due to the lack of enforcement system.

For centuries, international law confined itself to inter state matters. Since international law refused to recognize the individual as a subject, it consequently failed to place any responsibility on him with only two exceptions, before Nuremberg trials, Piracy and Slave trade. Charles Cheney, justifying the responsibility of the individual in international law for piracy in 1945, stated that'

"...piracy derives its international illegal character from the will of the international society. That society by common understanding reflected in the practice of states generally, yields to each of its members jurisdiction to penalize any individual who, regardless of their nationality commit certain acts within certain places... National authorization of commission of the piratical acts could not free them from their international illegal character..."(20)

Two points could be observed from Cheney's comment;

- a) Proscription of piracy apparently came from the will of the international community. Accordingly if the will of the international community could be attached to other group of reprehensible crimes, then the possibility of recognizing the existence of international criminal law becomes stronger,
- b) By delegating the power of trying piracy, to the state that is able to acquire personal jurisdictions over the offender, the international community is acknowledging various jurisdiction for the prosecution of same crime.

After Schwarzenberger's emphatic no, as to the existence of international criminal law, a second group of legal scholars who are mainly American approached the issue in a less hostile but cautious and tentative manner. One, ignored the concept completely and stated that international criminal law consists of specific violations of international law or human rights and the related criminal process and lumped the subject as to be part of public international law in its general function, shying away from the international criminal law concept, preferring to substitute in its place the concept of recognition of crimes under public international law.(21)

A third group of legal scholars, consisting mainly of European jurists emphatically asserted not only as to the existence of international criminal law, however crude and primitive, but as to its being a historical phenomenon, firmly rooted in the past and continuously expanding into the present and the future.(22)

The most sweeping definition of international criminal law was provided by Bossioni, when he defined it as "...that branch of international legal system which represents one of the strategies employed to achieve in respect to certain world social interest, with the aim of achieving greater degree of compliance and conformity with the goals of the world community of prevention, preservation and rehabilitation.(23) Quincy Right adopts a simple approach. He begins his hypothesis with the assertion that the existence of international law is unchallenged. He continues by saying that the existence of some crimes that have an international character, due to the fact that their effect spills over to more than one jurisdiction is undoubted. Consequently, the existence of international criminal law is evident.

Friedlander asserted as to the existence of international criminal law as being recognized by many different legal systems in one form or another to be applicable to a variety of proscribed activities of one type or another, regulated by numerous treaties, seeking to establish one specific standard or another.

Bassiounis' definition of international criminal law, though in contradiction with Friendlander's takes into account the institution of enforcement.(24)

"..International criminal law is product of the convergence of two different legal disciplines which have emerged ostensibly along different paths to be complimentary but extensive and separate. These are the criminal aspects of international law and the international aspects of criminal law. The criminal aspect of international law consists of a body of international proscriptions which criminalise certain types of conducts irrespective of particular enforcement modalities and mechanisms which include; (24)

- a) Direct enforcement schemes which recognize the establishment of international criminal courts,
- b) Indirect enforcement schemes which include judicial assistance, extradition and prosecution. (obviously, Bassiounis's first scenario, that is, the direct enforcement scheme, through an international criminal tribunal is yet to see the light of the day.)

Articles dealing with objective criminal law examine subjects which unite and potentially divide us most in this world of conflicting values. For example, Anglo-Saxon scholars prefer the term, international penal law rather than international criminal law. The difference in emphasis not only in terminology

but also in focus. Common law is more concerned with substantive criminology while civil law is more concerned with penalty and punishment.(25) Professor Shupilo's article demonstrates that in the wake of policy-making of the United Nations and its non-Governmental Organizations, specially the international association of penal law, the world scholars have come a long way in developing mutual understanding and common joint or parallel approach to problem solving in matters of international law. For example, the convention for the extradition of offenders sentenced to deprivation of liberty to serve punishment in the state of citizenship of August 27, 1979.

Another important point of agreement is the exclusion of political offenses from the extradition rule agreed by nearly all leading scholars, including Skelding and Shupilov. The interface of political foreign policy and judicial consideration which overshadowed the formula and implementation of extradition policies are far removed from anything which can be called positive international criminal law.(26) In countries where extradition decisions rest primarily with the executive, foreign policy considerations tend to predominate and exonerate international sensibilities for one nation's freedom fighter is another is terrorist, which brings us to the most dangerous type of contemporary international offender, the terrorists. But how does international criminal law deal with the terrorists, before even being in a position of having to decide on trial and extradition?

Professor Cooper, provides three alternatives.(27)

- a) The simplest methods of dealing with this kind of problem is the development of standards defining the responsibility and obligation of the host government towards hostages, in terms of due care, to be exercised for their benefit. For example, providing for their protection and release and ensuring them compensation for negligence,
- b) The second alternative seems to entail more complications and its implementation would almost certainly destabilise the delicate international peace and harmony. It envisages the creation of an international anti-terrorists team dispatched at the scene at a moment's notice with the assent of the security council. Cooper is not clear whether or not prior permission is to be obtained from the host government and if not how this could be reconciled with the charter's obligation.
- c) The third alternative is to hold hostage takers, whether insurgents, terrorists or criminal *luari causa*, to a minimum standard, for the treatment of their hostages. There is of course considerable reluctance to extend the benefit of the Geneva Convention to incidents of this sort for fear of thereby giving recognition and legitimacy to criminal enterprises. But of course, it is doubtful that those who have already shown contempt for law, national

and international, will be influenced by additional, criminal or civil liability for unfair treatment of their victims. But the concept of hostage takers is a very broad one ranging all the way from predatory criminal to quasi head of government, aiming at the establishment of independence and dignity of theretofore subjugated nation. Yet if the United Nations can record any major accomplishment it is this. While 1/3 of its founding membership has to shed blood in streams in order to gain sovereignty, the 2/3 who joined subsequently had to shed blood, if at all only in rivulets. It is a search for a means to differentiate between those who seek dignity and independence within the confines of the United Nations charter and those who are intent on exploiting international divergence *luari causa*. The standards which Professor Cooper envisages clearly can be made to govern the former. It is fruitless to expect the later to comply.

The arguments in favour of the existence of international criminal law did not confine itself to the theory justifying to holding the individual guilty under international law. The doctrine of state responsibility became the legacy from the aftermath of the 2nd World war. The concept implies that international misconduct by the Nations State, if it involves gross violation of prevailing legal norms may be considered a criminal act which will incur criminal liability.(28)

Though it is obvious that states, though subject of international law cannot be held liable because, there is no criminal liability without guilt and the state as a whole cannot be placed in the dock.(29) But the General Assembly definition of aggression which was passed by consensus, in December, 1974, after more than a quarter of a century of debate and disagreement, repeats in article 5 section 2, the prior prohibition "... A war of aggression is a crime against international peace, aggression gives rise to international responsibilities."

Article 19 of international law commission draft articles on state responsibility completed in August 1970, entitled international crimes and international delict. stated in paragraph 1 of section 2 "...An international wrongful act which results from breach by a state of an international obligation, so essential for the protection of fundamental interests of the international community, as a whole, constitutes an international crime.." (30) What makes the draft code of offenses against peace and security of mankind, which was developed through active United Nations contribution is, unique in that even though article 2, criminalises aggression in a similar fashion, article 1, makes all offenses against peace and security of mankind, "crimes under international law, for which the responsible individuals shall be punished.(31) This leads us to an important consideration here, which is collective responsibility under contemporary international law. Though the German state was held criminally responsible after both wars, the concept is still very blurred and uncertain at the moment.(32)

The study of the evolution of international penal law reveals the emergence of 3 categories of crimes that are dealt by international instruments,

- a) International instruments that criminalise state and authorities due to their reprehensible and atrocious characters, for example, the genocide convention,
- b) Those that regulate areas of evolving international concern, for example, acts of terrorism against civilian targets, protection of envoys and diplomats, hostage taking, kidnapping,
- c) Those that are directed towards offenses analogous to domestic criminal law. For example drug trafficking, (even though this category of crime is increasingly assuming an international character), theft of national treasures, causing transnational environmental hazards, engaging in slave trade.

Bassiouni prefers to classify the categories of international crime according to four categories based on;

- a) Existing, international conventions which consider the act in question an international crime,

- b) Consensus under customary international law that such conducts constitute international crime,
- c) Consensus under general principles of international law that such conduct is deemed to violate international law and about which there is a pending draft convention before the United Nations,
- d) Prohibition of the conduct by international convention though not specifically international crime but recognized as such by international law scholars,(33)

Such crimes as compiled by Bassiouni include, aggression, genocide, apartheid, slavery, torture, unlawful medical experimentation, piracy, hijacking, kidnapping of diplomats, taking of civilian hostages, unlawful use of mails, drug offenses and trafficking in drugs, falsification and counterfeit, theft of archaeological and national treasures, bribery of public officials, interfering with marine cables and international traffic in obscene publications.

The very nature of these acts and their definitions makes very clear that there is no common or specific doctrinal foundation that constitutes a legal basis for including a given act in the category of international crime. But scrutiny of the above mentioned twenty categories of crimes that are elevated to the international level establishes two observations,

- a) A given conduct must contain an interantional or transnational element in order to be included in the category of interantional crimes. In other words, the conduct in question must either rise to a level where it constitutes an offense against the world community, example genocide, apartheid so much so that it shocks and testest the world community as in *delicto jus gentium* or,
- b) The commission of the act must affect the interest of more than one state, for example, traficking in drugs, trafficking in obscene publications (34) Another point of agreement is that, empirical or experimental observatio supports the conclusion that an interantional crime is any conduct which is designated as a crime in a multilateral convention recognised by a significant number of states. But it must be observed that lack of effort or political will to create a direct enforcement system has forced all international criminal conventions to rely on the indirect enforcement system, which presupposes the cooperation of all signatories to prosecute, punish or extradite offenders. As the brillinat, father of international law, Hugi Gratius has envisaged more than 400 years ago, *aut dedere aut punire*, (either punsih of extradite)

Textual analysis of some relevant treaty provisions in the 20 categories of international crimes reveals that the objective of international law are;(35)

- a) To explicitly or implicitly declare certain conducts a crime under international law,
- b) To criminalise conducts under national law,
- c) To provide for the prosecution or extradition of alleged perpetrators,
- d) To cooperate through various modalities,
- e) to establish a priority in theories of jurisdiction,
- f) To exclude defenses of superior orders.

Since the 1970s, the tendency to include short provisions usually towards the end, regarding the modality procedure of enforcement has also been noticeable. This matters include issues of prosecution, extradition, jurisdiction and judicial cooperation. Nevertheless, even though, while the development of a pattern and similarity of languages would be more helpful in establishing an international custom, consistency in terminology would not suffice in providing the specific necessary to enforce penal provisions on a manner that produces uniform application in the different legal systems of the world.(36) Another problem in the uniform application of penal provisions is the independent development of the regulation of each category of international crime, through international cooperation, convention and instrument and international institutions.

It could be observed through textual security of international instruments that, they in most cases lack specificity the question of duties and obligations of states with jurisdiction. (Where there are more conventions on particular subject, the likelihood is greater than the terminology embodying specific legal obligations on states of jurisdiction is more specific). The significant recurrent use of explicit or implicit duty to prosecute or extradite and lack of global direct enforcement system, has raised the question whether the Latin term *aut dedere aut punire* has now become a peremptory rule of international law?

Even though after the 2nd World War hopes and expectations for the development of a direct control system involving the creation of an international criminal justice were high and the first experiment in the direct enforcement system in Nuremberg and Tokyo were a success, no further efforts towards that direction has been accomplished. The direct enforcement system was predicted on a vision of world order which sought to transcend political and ideological barriers. But lack of that ideological and political consensus forces most experts to adopt a more states approach, focussing on jurisdiction and procedures which derive their competence from treaties, conventions reciprocity and inter state cooperation.

Even though after the 2nd World War hopes and expectations for the development of a direct control system involving the creation of a direct control system involving the creation of an international criminal court and international machinery of criminal justices were high and the first experiment in the direct enforcement system in Nuremburg and Tokyo were a success, no further efforts towards that direction has been accomplished. The direct enforcement system was predicted on a vision of world order which sought to transcend political and ideological barriers. But lack of that ideological and political consensus forces most experts to adopt a more stern approach, focussing on jurisdiction and procedures which derive their competence from treaties, conventions reciprocity and inter state cooperation.

In theory, international criminal law represents aspects of both municipal criminal and international criminal system. As envisaged now, this finds expression strictly on domestic legal system and therefore to domestic rules and procedures. The main problem in ascertaining the availability of such comparison is lack of effective enforcement system on the international level.(37) Sanction, mechanism are totally lacking except the precatory language of some treaties and conventions, stating the *aut dedere aut punire* principle. During the past century more than a 100 treaties and conventions have been promulgated dealing with criminal law in the international context,. Though at first glance this points to attempt to codification, no such endeavor

appears likely at least in the immediate future. this void has led a leading scholar on the subject to question, the foundation and justification of international criminal law.(38) But obviously, such pessimistic approach would not help in attempting to develop international system of direct or indirect enforcement system to regulate the rising international crime.

The Theory and Justification of punishment under International criminal law.

As the existence of international law is still under question and virtually a virgin territory, exploring the theories for justification of punishment pose a problem. Though reprisal has often been undertaken by one state over another frequently, the objective of international criminal law seems to transcend retribution. Dr. Hossan Bossiouhi though without rejecting the rehabilitation and retribution element of any criminal punishment, asserts the *raison d'etre* of punishment in international criminal law to be deterrence(39) Nevertheless, Bassiouni conceded that retribution has played a major role in the sentences of many sentences in international criminal law, including the banishment of Napoleon to ST. Helena Island, the death sentence in the Nuremburg and Erichman trials, He also notes the problem in attributing deterrence to sentences in international crime cases more than municipal ones is that its moral psychological leverage clouded by the illustration of a permanent and invincible poor. Consequently a good case be made for basing international

crime sanctions on primarily on other justifications including retribution and vindication, reformation and incapacitation although not certainly to exclusion of deterrence.(40)

A comparative analysis of different legal system reveals that by far the most widely advocated justification for punishment is deterrent(41) leading objective of deterrence is of course maintenance of social control, by making an example of delinquents. As in the words of Bentham,

"..Punishment must be object of dread more than the offense is object of desire."

Though despised by modern criminologists and psychologists, retribution continues to play a diminishing but important role in criminal sentences.(42)

Another important component of criminal sentences, that is popular among modern criminologists is rehabilitation, where the punishment is tailored to fit the criminal and not the crime. The aim in rehabilitative sentences ought to be, the treatment of the person in a way that the propensity to commit the wrongful act in the future could be eliminated.(43) Hassan emphatically denies the existence of any role played by rehabilitation or reformatory consideration in international criminal sentences.

He argues that as there are no citizens, governments or educational systems on the international level, the consideration of improving the moral character and rehabilitating an offender, to convert him to a reformed citizen, so that he can contribute positively to development of society does not arise. There are no international citizens, there is no international society or international government. But Bosioni completely fails to put into consideration, the minimum standard of treatment of a person by virtue of his being a human being, recognized not only by many conventions but also as a positive rule of international law. What obstacles could prevent the extension of his principle to cover international offenders? We leave this question open for future exploration and investigation.

D) The American invasion of Panama for the enforcement of International Criminal Law.

In February 1988, federal grand juries in Miami and Tampa returned indictments against Noriega charging him with participation in a conspiracy to smuggle drugs into the United States and with taking 4.6 million in bribes from Medellin drug cartel for the use of Panama as a way station. Would this indictment which amounts to nothing but formal charge, suffice to authorise the United States to unleash a posse of 24,000 men to capture a foreign leader in his own capital? This investigation would not go into the details of the actual trial of

Noriega and the subsequent sentence. It will also not question the manner in which he was captured.

There remains the question of Noriega's seizure and forcible removal to the United States. The constitutional and criminal law issues raised by this unprecedented action against a foreign leader are beyond the scope of this article, but since the US government's case against Noriega rests in part on its validity in international law, those aspects deserve consideration.

Leading international law scholars agree that chiefs of state, together with their ministers and diplomatic representatives are immune from civil and criminal process at the hands of other governments.(44) The classic opinion of chief Justice Thon Marshall in the 1812, *The Schooner Exchange Vs McFaddon* specifically includes the person of the sovereign in its exemption from arrest or detention.

".. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its rights within the jurisdiction of another, can be supposed to enter a foreign territory only under express licenses, or in the confidence that the immunities belonging to his independent soyereign station, though not expressly stipulated, are reserved by implication and will be extended upon to him..."(45)

It is helpful to distinguish 2 principles on which sovereign immunity rests. The first expressed in the *parem non habet jurisdictionem*, is concerned with the status of equality attaching to the independent sovereign, legal persons of equal standing cannot have their disputes settled in the courts of one of them. The other principle on which immunity is based is that of non intervention in the internal affairs of other states.(46)

The rule of authority for the immunity of a sovereign from criminal action is more dubious. The most logical explanation would be to extend diplomatic immunity. The Vienna convention on diplomatic relations states on article 29 that,

".. Person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity..."

Article 31, provides in simple terms and without qualification that a diplomatic agent shall enjoy immunity from criminal jurisdiction of the receiving state. But article 32, relieves the host state if the privilege is waived by the sending state. The convention also makes a distinction between private and official acts without dwelling on the distinguishing differences. In case of official acts the

immunity is contingent and supplementary and ceases when the individual concerned leaves his post. But in case of official acts, the immunity is permanent and unrevokable.

[The United States government, of course contends that the installation of the Rodriguez Government in 1989 and in effect the declaration by the National Assembly of Noriega's being a "maximum leader" were done in violation of the Panamanian constitution.] If there were an effective law of nations and a supreme international tribunal with powers of enforcement, these arguments would be to no avail. Noriega's status to the outside world as a "maximum leader" of Panama was legally no different than that of Haiti's Prosper Avril, Chile's Augusto Pinochet, Paraguay's Alfredo Stroessner, the Burmese military Junta or any number of third world states. Both the legality of the national Assembly and the election of Noriega, were no different from their counterparts throughout the world also recognized by the United States. While there is nothing to prevent the United States from arbitrary recognizing or not recognizing a government as it sees fit, these are purely political matters and have no bearing on legality. For at the present systems of international law, no state can sit in judgement on the internal government process of another.

True, the 1962 convention on narcotic drugs calls on signatory states to cooperate in impounding the illegal trafficking of drug's, exchange of information and the extradition or prosecution of offenders by the state of jurisdiction. [Both Panama and the United States have ratified the treaty]. But if Panama opts to renege on this agreement, the option the United States would have seems to be confined to resorting to sanctions that are available under public international law. Without doubt, the United States could resort to the cause and effect theory. Though Noriega had not committed the offenses, he was indicated for in the United States, his actions had spilled over the Panamian border and directly affected the United States. During the trial, the prosecution used the classical law school example to illustrate this problem, a man firing a canon from inside one territory across another. The crime also qualifies to be labelled international crime, as the conduct has affected the interest of not only Panama, but the United States as well. But international law has not come up with a solution in case the state with jurisdiction refuses either to surrender or prosecute the culprit. The issue further becomes complicated when the offender is personified in the head of state or as in high ranking official.

Even Eichman trial which entailed widespread condemnation failed to answer the question of a state unwilling to extradite or prosecute an international offender. The court justified the forceful capture of Eichman by stating that

"..the jurisdiction of states under international law is not coffered as in municipal law. It is for anyone who denies that a sovereign state may exercise jurisdiction over a person held by its authorities, on charge that state's substantial and legitimate interests to show that some rules of international law forbid such exercise..."(47) Followed to its logical conclusion, the Israeli's court decision would lead to an international chaos of untold magnitude. In effect it is justifying the forceful eviction an international offender to face charges at any court of jurisdiction, under whatever manner possible.

Though some prominent jurists, have still not revised their stand in rejecting the existence of international criminal law, what is clear is cooperation, including, rendition, extradition, exchange of information and the international criminalisation of certain conducts exists today. As in words of Professor Mueller, we stand in the twilight zone of fully developed criminal law and no criminal law. If criminal law is to achieve the stature of municipal law, there must be an international cooperation through the only vehicle in existence, which fosters such cooperation, the United Nations. This effort should be directed at the containment of National and international criminality by the various mechanisms of existing United Nations policy and legislative bodies, principally the committees on crime preventions and control.

The apparatus for a just world crime prevention system cannot be accomplished in a day or week. The maintenance of law and order in a municipal pluralistic democracies is increasingly getting difficult whereby the strong defeats the weak and the smart defeats the naive. Thus the maintenance of law and order has come to depend too much on good faith of protagonists. In such circumstances, it is not surprising that international criminal law cannot boast of spectacular achievements and that in some contexts it does not exist at all. There is no universal consensus in the first place as to its existence on subject of international law. The guilty are rarely punished.(48)

What is criminal and permissible may depend upon the mind of the beholder, with ideology playing an important role in determining the wrongful conduct. Considering the impact of ideology upon current world politics, the attempt to infuse socio-political doctrines into international criminal model might have disastrous effects. Harmonizing domestic legal systems, the Anglo Saxon and continental system is also a problem difficult to overcome.(49)

Just as the general welfare of citizens and the supreme need of maintaining the social order in domestic scene are considered paramount, the need of ensuring the sanctity of the most fundamental values of the international community also demands that potential violators be forewarned from breaching

international law. Though deterrence is the major basis of theory of punishment under international criminal law, International political considerations have prevented the trail of international offenders.(50)

The prognosis for the establishment of international criminal court are bleak. The immediate future can envisage little more than further adhesion to international instruments and above all a willingness to participate in joint exercises for conducting the criminal justice systems and cooperation in trying to contain the world crime rates. In absence of an international criminal tribunal, enforcement possibilities are weak and will remain so in the foreseeable future.

But this depressing situation has not discourages the international community which within the framework of governmental or scientific organization continues the long and arduous quest for the construction of an international judicial institution endowed with enforcement mechanisms. A few years later states may be equipped to take the next step, a joint and coordinated effort through an international system of law to control man's last uncontrollable plague, crime,(1) The peace keeping forces of the United Nations and the anti-terrorists pacts of Europe might be contributing to the creation of law armed with sanctions.

Consensus is almost unanimous that, whatever Noriega's status may be, the United States was not entitled to organize a task force to capture him outside the United State's jurisdiction. The situation become complicated when considering that Noriega, whether or not accepted by the United States was the rightful if not constitutionally elected leader of Panama at the time of invasion.

As Canada claimed in 1973, when imposing pollution standards on its 200 miles territorial waters (51), the United States may also claim that it is creating international law. But by whatever stretch of the imagination, the unleashing of a posse of 24,000 men to capture a foreign leader in his own capital, is not complying to existing rules and standards of international law.²

IV. THE UNITED STATES INVASION OF PANAMA TO GUARANTEE THE
NEUTRALITY OF THE PANAMA CANAL

A. Consent as a Circumstance Precluding wrongfulness

B. Treaties Establishing Permanent Right of Intervention

C. Evaluation of the invasion

A). CONSENT AS A CIRCUMSTANCE PRECLUDING WRONGFULNESS

Customary law recognizes the extraterritorial use of force by the Consent of territorial state as one of the circumstances precluding wrongfulness. (1) This, besides being accepted by many writers, has been incorporated in the draft articles on state responsibility adopted by the international law commission. Article 29 states that,

- a. The consent given by a state to the commission, by another state of a specified act not in conformity with an obligation of the later states towards the former state precludes the wrongfulness of the fact in relation to that state to the extent that the act remains within the limits of the consent,
- b. paragraph one doesn't apply if the obligation arises out of preemptory norm of general international law. () For the purpose of the present draft articles, a preemptory rule of general international law is a norm accepted and recognized by the general international community of states as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

From the terms of paragraph one, five criterias should cumulatively concur for a consent to operate as circumstance to preclude wrongfulness.

- a. the consent should be given prior to the commission of international wrong. Thus the claim by the former USSR that it intervened in Afghanistan by the invitation of the local authority lacks validity because the consent was obtained after the intervention had occurred and the local authority was in fact the product of the forceful eviction of the legitimate state power. The justification of Vietnamese intervention in Kampuchea (Cambodia), the Tanzanian intervention in Uganda, the American invasion of Grenada are discredited on similar ground,

- b. the consent must be given by the authority which can be said to express the will of the local state. Care here should be taken in that "the authority which can be said to express the will of the local state" might not be what is known as popularly or democratically elected government. The test here, just as in the criteria for recognition of states should be in "whether the purported local authority has effective control over the population". Thus for example, former President Aristide of Haiti, though democratically elected and ousted by an unpopular military coup-d'etat, would have no powers inviting the United States or other regional powers, to intervene forcibly in Haiti.

- c. The local state's will must not be vitiated or suffer from what are known as *vices de volente*. The consent must be freely given without fear or favour or any kind of intimidation.
- d. The action by the infringing state must be kept strictly within the consent given by the local authority. Anything above and beyond that consent, lacks mandate and hence is defective.
- e. The infringing state must not violate *en erga omnes* obligation.() It must be noted that conduct which violates a peremptory norm remains unlawful even if the injured state had consented to the infringement. Thus consent to enter into a territory to commit atrocities or gross violation of human rights remains an international delict. This is because, the act remains unlawful, whether it is considered a bilateral agreement between the consenting state and the state which commits the unlawful act.

When force is used in a foreign territory, two peremptory rules may be infringed. (The definition given by article 53 of Vienna Convention of 1969 for a peremptory rule contains two ingredients) :-

- i) the generality of the rule, that is, the fact that it is binding on all members of the international community

- ii) the fact that the international community is convinced not only of the binding nature, but also that it is not subject to derogation. Thus besides feeling bound, the international community must have an *opinion iuris* on its inderogability. Thus, when force is used on a foreign territory, the rule banning the use of force and the principle of self determination might be infringed.

Armed intervention into a foreign territory is undoubtedly breach of article 2(4) of the charter. The state using force commits an international delict, even if consent is given. Article 53 of Vienna Convention on law of treaties and draft rules of state responsibility on article 29, give an example on agreement in breach of peremptory rule as "... treaty contemplating an unlawful use of force contrary to the principle of the charter. (2) The international practice since the convention have confirmed the peremptory character of the prohibition. The United State delegate to the United Nations General Assembly, commenting on the Soviet draft treaty on the no-use of force in international relations said the following,

"... Today that clear and direct rule on the prohibition on the use of force, is universally recognized by all states as a peremptory norm of international law binding on all and not subject by a unilateral declaration or bilateral agreement."(3) ,

As the ban on the use of force both by the charter and other instruments have at length been discussed in the first chapter, it would suffice here to say that the law is recognized internationally as the most important principle regulating the relation and interaction of the international community. This leads to an important question; Is the ban on the use of force incorporated in article 2(4) of the charter identical to the peremptory rule prohibiting the use of force in international relations? (It is to be remembered that a peremptory rule is sum of state conduct which the international community considers effectively forbidden by a ban from which derogation is absolutely not permitted.) Even though, the international community has at no time challenged the validity of article 2(4), a number of states have indicated by practice that besides self defense, instances unforeseen by the charter could legitimately be claimed to have justified the use of force without an international delict being committed. The Western states as discussed in the first section of the chapter, have traditionally claimed the legality of the use of force for the extraterritorial protection of their nationals. Both Western and third world countries have at one time or another upheld armed intervention for humanitarian reasons to be legal. African and some Asian countries, for example India, consider the use of force by people under colonial dependency in pursuit of their legitimate freedom, to constitute of no wrong. Consequently as, article 2(4) suffers from many such punctures, it will lead us to conclude that the ban on the use of force under article 2(4) and under peremptory rule of international law is not identical, which leads us to the second conclusion; treaties that allow armed intervention by a force of power, though not foreseen by article 2(4), have not been outlawed by peremptory rules of international law regulating the use of force.

B) Treaties establishing a permanent Right of Intervention

Though in tradition, states may lawfully confer by treaty to another state a right to intervene under certain circumstances, the validity of treaties conferring wide reaching rights of intervention in foreign territory is open to debate.(4) As discussed above, the consent given must also operate free from any vice and the consent must be conferred on the intervening government by the legitimate representative of the territorial state. Thus, the German contention of Austria's free incorporation into Germany was rejected on the grounds that, Germany intimidated Austria into the incorporation. The Japanese argument before Tokyo Tribunal that the Japanese invasion of French IndoChina was sanctioned by the Vichy government was rejected on the grounds that, the Vichy government was not a legitimate representative of the French people, as its ascension to power was initially illegal under international law. In October and November 1956, Soviet forces intervened on two occasions, in the civil strife in Hungary. The first invitation for intervention was administered by a government generally presumed to be in control of the population. The later intervention which took place a week later and superseded the Nagy government was more doubtful and its existence seemed to be connected with the intervention it had requested.(5)

As mentioned above, classical international law has always recognized that a right to intervene by force on the territory of another state could properly be confirmed by treaty.(6) Such treaties might be multilateral or bilateral, the object of intervention might or might not be a party to the treaty.

In 1903, the Cuban government confirmed the right of intervention on the American government to preserve Cuban independence and government, to adequately protect life, property and individual liberty and for discharging of obligations.

Another type of treaty confirming on a state permanent right of intervention is that guarantee a dynasty or a form of government of a particular state. Thus, article 3, of treaty of London in 1863, between Great Britain, France and Russia, provided that "...Greece under the sovereignty of Prince Williams of Denmark and the guarantee of the three courts, form a monarchical and independent state"(7) Between 1915 and 1917, the three countries intervened in Greece with the purpose of reestablishing a constitutional government in accordance with the treaty.

Treaty of protective friendship between France and Monaco of July 1918 provides for a unilateral French intervention in article 4, upon either an agreement between the two states or in case of emergency, upon France's sole prerogative. Similarly, the treaty of friendship between the former U.S.S.R and Persia of 1921 provides in article 6,

".. if a party should attempt to carry out a policy of usurpation by means of armed intervention in Persia or if such power should desire to use Persian territory as a base of operation against Russia or if a foreign power should threaten the borders of Russia or those of its allies and the Persian government cannot put a stop to this menace after having being called to do so by Russia,

Russia would have the right to advance her troops into Persian territory for the purpose of carrying out the military operation necessary for its defense. Russia, however, undertakes to withdraw her troops as soon as the danger has been removed.. " (8) This treaty though denounced twice by Iran, is still upheld as valid by the former Soviet Union.

In March 1935, the United States and Panama signed a pact allowing the unilateral intervention of Panama in case of certain circumstances. (It is to be recalled that the original version of the treaty was one of the justifications provided by the State Department for the invasion of Panama) The treaty stated on article 10 that

" In case of an international conflagration or the existence of any threat or aggression which would endanger the security of the Republic of Panama or the neutrality or the security of the Panama Canal, the United States of America and the Republic of Panama would take such measures of prevention and defenses as they may consider necessary for the protection of their own interests. Any measure in safeguarding such interests, which it shall appear essential to one government to take and which may affect the territory under jurisdiction of the other government will be subject of consultation between the two governments .."(9)

The unilateral and lavish conferment of right of intervention started becoming constrained after the covenant, the Briand-Kellogg Pact and of course more recently, the charter outlawed the use of force of whatever nature on a foreign territory. The principle on the ban on the use of force, equality of states and self determination of people made provision of treaties an armed intervention somewhat incongruous. Use of force came to be considered a matter of international concern and not a private contract. Nevertheless, as mentioned above, the ban on the use of force as peremptory rule of international law does not regard treaties confirming right of intervention as illegal. Without doubt, a considerable alteration has taken on the regard of legality of such provisions by international law. At this stage it would be interesting to discuss the ingredients that give credit to the legality of such treaties in modern international law, analyzing the treaty of guarantee between Turkey, Greece, Cyprus and Great Britain that provided joint unilateral intervention of all or any of the contracting parties on Cyprus' territory in the event of another attempt to change the constitutional structure of either Greece or Turkish Cypriots.

- a. The use of force in a foreign territory though a breach of article 2(4) of the charter is not a breach of peremptory rules of international law.(10) This, of course is subject to the objective of the intervention. If the objective is in violation of established principles of international law, for example, aggression, maintenance of colonial administration or commission of atrocity, then the intervention is illegal. Thus, treaties which guarantee status and political stability

are illegal as they would constitute as an infringement of the universally recognized sovereignty and self determination principles. In this case, an agreement to guarantee the maintenance of balance between the two communities is perfectly legal..

b. The territorial government of the time must be a party to the treaty, as the treaty should not be consented to through intimidation of any kind. It would be superfluous to say at this stage that consent should not suffer from any vice. On the other hand, intervention could take place against the wish of the territorial state as consent was given once and for all. The marked qualification here is that, there should be a breach of a peremptory international law on the side of the territorial state, that it is unable or unwilling to put an end to. Consequently it follows that with or without the existence of the treaty, the territorial state already stands bound by international law to do or not to do an obligation that justifies the intervention. In this case, the disruption of the constitution of either the Greek or Turkish Cypriots by either genocide or banishment constitutes an international delict.

c. When the case came up for mention in the security council after Turkey intervened and created what became known as Federal State of Cyprus, the United Nations, recognized the legality of intervention to enforce a treaty obligation (with the exception of Czechoslovakia) Resolution 353 of July 1974

affirmed the legality of "... the necessity to restore the constitutional structure of Republic of Cyprus established and guaranteed by international agreements.."(11)

(C) Evaluation of the Invasion

In August 1, 1977, 13 years of negotiations between the United States and Panama resulted in the revision and extension of the Panama Canal treaties between the two countries. The treaty upon coming into force terminated the Isthmian canal treaty and treaty of friendship and cooperation, signed in 1936 and also treaty of mutual understanding and cooperation of 1955.

Under the treaty, Panama granted the United States of America, the right necessary to regulate the transit of ships to regulate, manage, operate, maintain, improve, protect and defend, the canal and guaranteed, the peaceful use of the land and water areas which has been granted for use for such purposes, pursuant to this treaty and related agreement.

The treaty guaranteed the permanent neutrality and operation of the canal.

Article 1: "The Republic of Panama declares the canal to be an international waterway which shall be permanently neutral in accordance with the regime established in this treaty.."

Article 2: The Republic of Panama declares the neutrality of the canal in order that both in time of peace and time of war, shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality so that there will be no discrimination against any nation or its citizens or subjects concerning the conditions or charges of transit or for any reason and so that the canal, and therefore the Isthmus of Panama, shall not be the target of reprisals in any armed conflict between other nations of the world..."

Article 3: For the purpose of security, efficiency and proper maintenance of the canal, the following rules shall apply. Vessels of war and other auxillary vessels of all Nations shall at all times be entitled to transit the canal, irrespective of destination or international operation, means of propulsion, origin, or armament without being subjected to, as a condition of transit to inspect, search or surveillance.

Article 4: The United States of America and the Republic of Panama agree to maintain the regime of neutrality established in this treaty, which shall be maintained in order that the canal remains permanently neutral, notwithstanding, the termination of other treaties entered to by the two contracting parties.

The treaty in no uncertain terms sanctions the unilateral intervention of the United States in case certain conditions threaten the neutrality or smooth operation of the canal. Moreover, the right of innocent passage, without discrimination of any party at any given time, guaranteed by a regional power is to the advantage of the international community and falls within the ambit of treaties guaranteeing the right of intervention recognized by customary law. But the failure of the materialization of the circumstances legalizing the American intervention in Panama, makes the justification of intervention on this ground provided by the state department lacking in genuity. The treaty language probably could be stretched to include limited measures to assure the security and stability of the canal's political environment. Against this rational is the fact that Noriega scrupulously avoided any pretext for the United States to invoke the treaty and even in his most demagogic flights never once threatened the operations of the canal.(12) Based on the facts, any stretch of the imagination would find it difficult to justify the existence of a genuine threat to the neutrality or smooth operation of the canal.

CHAPTER THREE

THE USE OF FORCE AND STATE SELF HELP:

PRE AND POST 1989

A: THE SUFFERING GRASS

We hope, at this stage, that our position as regards to the legality or illegality of the American invasion of Panama under international law is clear. The justifications provided by the State Department for the invasion violate international law, partly because they lack precedence either in customary international law, and partly because the circumstances preceding the invasion would not constitute circumstances envisaged by international law that would preclude the violation of that peremptory rule of international law, the ban on the use of force. But the tragedy of the Noriega affair, in the words of John Weeks and Andrew Zimbalists, is that,

"..Antonio Manuel Noriega, accused murderer, election fixer, ex CIA Agent, drug trafficker, managed with the help of the Reagan and Bush administrations to transform himself into one of the national heroes of Latin America. From an unsavory tyrant condemned to a blackspot in history books of Panama, Noriega was converted by the Reagan and Bush administrations into a pivotal figure in the struggle for Panamanian Nationalism and national respect. Even if Noriega was forced to abandon his command, humiliated, he had left on his terms after forcing U.S to flagrantly violate international law..."(1)

The irony of international law is that a rogue, and an immoral tyrant, bereft of all moral authority to govern, who is subjecting not only his people to misery and destruction but who threatens to destabilize the region, continues to draw legitimate recognition. Under international law, non interference in the domestic affairs of a state, the general ban on the use of force and state sovereignty have given a welcome shelter to governments and regimes around the world that have no moral authority to govern.

The American invasion of Panama of 1989 was by comparison with most other recent instances on the international use of force, of relatively little global political consequence. Unlike the Grenada affair, when the academic community had differed sharply in evaluating the legality of the American action, the intervention in Panama drew a preponderantly large number of condemnations. Few areas of international legal doctrine display such a divergence of opinion as does the field of the use of force and although there might be a general consensus on the core norms prohibiting the use of force, many alleged international violations fall within the penumbra of doctrinal uncertainty.(2) Under this profile the real challenge for promoting legal observance lies in the sharpening of the edges of the normative content of the system. This opportunity, it is hoped, has arrived with the end of the Cold War.

Governments like that of Siad Barre of Somalia, Mengistu Haile Mariam of Ethiopia, Pol Pot of Cambodia, have continued to destabilize their respective regions long after their departure. Thus, the objective of this thesis at this ancillary stage, is to understand what are the implications of the American invasion of the Panama for the post Cold War international community and more particularly, to the Third World. Had President Mitterand nullified constitutional elections in France, engaged in international drug trafficking, threatened the lives of Americans in France, America would almost certainly have refrained from intervening in France and consequently France would not require the protection of international law. But a plethora of small weak and Third World countries that are of little consequence in the arena of international politics do require probably more than ever, the active protection of international law.

The trumpets sounding the end of the Cold War made many walls to come tumbling down, not just in Berlin but in many chancelleries around the world where ideology and the accompanying stereotypes of communists or anti communists zeal had stratified shibboleths about conflicts to the exclusion of more reasonable approaches of cooperation and negotiation.(3) Nowhere is this fact more evident than in Third World.

The demise of the Cold War has removed the likelihood of a direct superpower nuclear confrontation, a likely scenario in the past. Also, on the positive side, there has been a noticeable willingness, both on the side of the United States and the former U.S.S.R to lean on allies to workout acceptable compromises to end hostilities. Efforts at multi-lateral diplomacy have been more impressive. The growing demand for United Nations peace-keeping and peace making efforts under great power leadership has also been encouraging.

These generalizations were already valid prior to the invasion of Kuwait by Iraq. The weight of the international consensus against the aggression resulted in a coordinated, multilateral, diplomatic and military response that emphasizes the difference of the attitudes of states's to the previous era.

The euphoria over the end of the Cold War did not extend uniformly to all Third world countries. Pessimism and fear surfaced, especially from regimes whose very existence owed much to playing the super-powers against each other.(4) With the waning of the cold war, the super-powers would no longer feel obliged to contain communism. The former Soviet Union would no longer sustain the vision of spreading the proletariat revolution around the world. Neither super power has had an intrinsic interest in the Third World. Consequently aid and investment formally given to the Third World is being channelled to the former U.S.S.R and Eastern Europe which appears, at least

in the short term, to be of more strategic importance. The sorry victims of the end of the Cold War are already too evident in the Horn of Africa, Angola, Cuba, and Middle East. The end of the Cold War, was also regarded with uncertain unease because of possible resurfacing of United States' adventurism of the so called, "gunboat diplomacy", and its intervention in the Third World with impunity. Fear that, perhaps this would manifest itself under the ruse of collective security as was the case during the Gulf War, was also rife. The U.S.S.R was in the words of one Arab diplomat "...no longer a credible counter force at the United Nations". Thus did the feeling grow in the Third World that its governments and inhabitants were suddenly at risk of being ignored and left to rot by the ruins of conflicts once fuelled by Cold War animosities or being singled out by the United States, suddenly undeterred by Soviet Power, for arbitrary intervention, conquest and humiliation. Thus, as in the old Swahili saying, "whether the elephants make love or make war, it is the grass that suffers" The grass undoubtedly suffered when the "two elephants" trampled international law with impunity for promotion of national interest. It is evident that the two Northern Behemoths are entering into an unprecedented period of cozy relationship. It is also evident that there is only one "elephant" left. Our discussion here would center on the suggestion and recommendation that that "elephant" should tread lightly on the grass and on the disadvantages for both the grass and the elephant in upholding and conforming to standards of international law. The chapter would also highlight emerging trends on state

practices that are relevant to the use of force under international law and the growing involvement of certain international institutions in areas traditionally considered to be within the international jurisdiction of states.

Opinion polls indicated that 85% of the American people and 90% of the Panamanian people wholeheartedly approved of the American invasion of Panama.⁽⁵⁾ This writer is of course careful to avoid the assumption that man's ultimate truths are written in political opinion polls. The legality or illegality of an action cannot be evaluated in the light of its virtues or vices both under municipal or international law. On the other hand, the world is witnessing new unexpected international political development at an unprecedented pace. The influence of politics on law and albeit of international politics on international law, will be discussed below. It would be sufficient at this stage to observe that this new political development will also provide us with an opportunity to formalize the desires and the aspirations of the international community into binding norms. The ancillary, and hence the secondary utility of law in fulfilling and achieving human aspirations and goals, is duly conceded. But when the primary and main locomotive for achieving these aspirations, politics and power, have arrived at a consensus and a convergence of interest, then the law should quickly cease the opportunity to formalize and translate such aspirations to binding legal norms. For although, along with the pessimists, this writer notes the potentially explosive current situation of the world, he feels the

convergence of interest not only among superpowers, but among the superpowers and the people of the Third World should provide an unprecedented opportunity in history, to formalize these interests to provide the United Nations with powers it never possessed or exercised, to discourage taking the law in one's own hands and to organize a coalition of sanctions that thoroughly discourage disregarding or violating this international consensus.

B. DYNAMICS OF INTERNATIONAL LAW AND INTERNATIONAL POLITICS.

Law is an instrument of politics. Politics decides who is the law maker and what the formulation of the law should be. Law formalizes these decisions and makes them binding. Law is a result of political decision made by men(6). The prime mover of social change is politics. Only occasionally is law formally used to produce social change. Even then it is likely to be a tool of politics and politicians. For example, democratic constitutional law in Japan was born as a dead letter after the second World War but gradually became alive later.

Members of society, have different, and often contradicting interests, which they endeavor to have incorporated into law. No legal system can cater for the pursuit of such contradicting interests by members of the society. The efficacy of the legal system depends on how well it can cope with some basic aspects of the human nature, and some of these aspects which are mutually exclusive, defy the efficacy of the legal system.(7)

The first of these aspects is the urge to be free from restraint. The paradox here is that freedom for any member of a society is possible only by some restraint on defined action. Law is one such restraint. The second aspect, which also impinges on international law, is that men have competing and different interests. Because these interests can never be fully satisfied, politics and law arise. Politics then settles who gets what, when and how. Law turns the settlement into obligatory behavior. The third aspect is the inequality of men.

The theory of the relationship between society, law and politics is not much different in the international arena. The relationships between states have become so voluminous, steady and intense that mankind has created an international society. Like all societies, it requires regular and predictable behavior of its members in order to harmoniously survive and exist.

The inevitability of law in undoing modern states' attempts to be their own highest authority is in almost direct proportion with their increased mutual needs and interactions. However, sovereignty and law have contradictory aims. It cannot be evaded that sovereignty expresses the wish not to be bound by any higher authority and that law is a restraint upon such behavior. The ultimate end of sovereignty is anarchy. But states have seen it fit to limit the validity of their own legal order within their frontiers, thus making international law

possible and necessary. They have granted some legal principles universal and some even peremptory status. But essentially states, on the majority of issues, continue to be masters of their own destiny and state sovereignty continues to be one of the basic principles regulating the relationship between states and between state and international organizations like the United Nations.(8)

The horizontal organization of politics and political process in the international society means negatively, the absence of central government. Positively, it means the diffusion of making and executing social decisions among all states. Experience shows that national interests clash so much, that their adequate satisfaction by orderly and peaceful means, is difficult or sometimes impossible. In such situations power becomes a very important factor. The magnitude and application of power by each state determines, as a rule, the outcome of the conflict of interests. Law at best is relegated to the background. This arrangement lend to power a totally different role, or at least makes the power factor considerably more important. Essential and simply states must be preoccupied with building up a power potential as a significant, and in some cases vital, guarantee of their existence.

Legal restraints upon a state's use of power potential are generated more by modern developments. The increasing over-lap of interest among states is causing more confrontation but is also enhancing more cooperation. Fundamentally and ultimately, the absence of a binding decision making body on the international scene is responsible for making power a determinant factor

in the political process and social behavior. This fact has made law and legal rectitude in determining the legality and illegality of an action in consequential. But having said that, the importance of international law is undeniably growing, mainly because of two factors:-

- a) some elements of power, that have unfavorably been affecting the efficacy of law in the past, have lost their previous values because of many reasons. One reason is that with rise of economics to importance in the power potential, there have emerged interest groups with influences upon the making of foreign policy, quite accustomed and conditioned to legal way of doing things. The enormous growth of international law in the last few decades indicates that these conclusions are based on discernible trends and not on utopian dreams. The state as an international actor, is today no longer what it used to be in the nineteenth century, when the primary, and often only action, used to be dictated by national interest at whatever expense. Today the state is more amenable to law and legal rectitude partly because internally the constitution of the groups that influenced it in decision making have changed and partly because, not that it wants to be, but it is forced to be.

- b) The changing volume and content of international relations of states as a result of the growing interest on different issues, have convinced them that the satisfaction of these interest requires a growing interdependence and the evolvement of common interests as opposed to merely national ones. The growing effectiveness of international law tends to the increasing volume of shared interests.

One of the major problems facing international legal systems is the adaptation of new social and political developments. From broader perspective the adaptation of law and legal systems is typical of the manner in which states have always handled new and sometimes not so new, problems facing the international society. For example, environment and terrorism. International society, like other societies, conceives of these conditions as part of the social dynamics to be integrated into existing system and treated within the framework of establishing principles and norms. Because they do not always fit very well, this approach has not always been successful. The impatience with the delayed reaction of the legal system to new conditions is probably, in part due to the contrast within the rapidly changing social system. Restraint upon national behavior, resulting not only from the need of coexistence, but also positive desires for the satisfaction of national interests, would hopefully provide the incentive, for restraint on basis of selfish consideration and holds the promise for an improved efficacy and utility of international law.(9)

In conclusion, the international society is not yet, and not likely to be a coherent body in the foreseeable future. Emotions of people across the globe remain tied to the state or possibly smaller units. However, the intertwining of relations worldwide makes behavior based on sovereign independence and splendid isolation of states, extremely costly.(10) There is at any rate an alternative possibility for an effective international legal system to grow. It may lack the completeness of a community, yet, it may be adequate for peaceful and orderly relation among states. It is to be remembered that states are in contact because their interest dictates that they be so. A multitude of overlapping interests could become a functional equivalent to a communal law, based upon the satisfaction derived from complementary behavior among states, and little upon the member states loyalties to the international society.(11)

That international law is weak and inadequate is the result of neither an unawareness of the need for it. Nor an unwillingness to obey it, nor is it because a comprehensive value system among states is lacking. The weakness primarily stems from the absence of one unifying interest that could almost by itself guarantee an efficacious international legal system.(12) Formal legal order cannot create peace or justice. Only politics can do that. Quality of politics and what it achieves, in turn depend upon the attitude of people and the interest they develop, these are essentially social welfare and material well being.

Werner Levi, writing in 1976 on lack of international political will to make international law more effective, laments that the state of the world provides no ground for undue optimism.(13) The diffusion and contradictory nature of interest, especially among the major power blocks that are most consequential in the carving and influencing international decisions, continue to hamper the efficacy of international law. But it is the position of this writer, that major developments have taken place since the end of the Cold War that give rise to optimism. The nature and evidence of such developments would be investigated elsewhere in this chapter. At this stage, it is sufficient to note that, the contemporary status of international law, and especially the direction of its future development indicates the importance of the fulfillment of the welfare of the international society for purely national interest. At present, this recognition is reflected more on rhetoric than practice. The point is fast being approached, in the growth of international society, at which states are convinced that the support of overlapping and even contradictory national interests will guarantee the fulfillment of most other interests. At that stage, the day will have come when, states are willing to create political and legal systems comparable to the national system in which the efficacy of international law is reliably guaranteed.

C) THE USE OF FORCE BY STATES 1945-1989 RETURN TO WESTPHALIA?

The *raison d'être* for the establishment of the United Nations was the maintenance of international peace and security. This section would analyze;

- i) the success and failure of the United Nations in maintaining peace and security,
- ii) discernible state practices that have given rise to new principles and concepts unenvisaged by the Charter, but that are incorporated into the mainstream of international law between 1945 and end of the Cold War symbolized by the fall of the Berlin wall in 1989.

The law regulating the use of force at a time of what has been called, the model of Westphalia rested on four fundamental tenets.(14)

- a) The unfettered freedom of states to use force either to protect their interests or to enforce their rights
- b) Complete licenses to resort to force without a previous authority from an international body
- c) Absence of solidarity links between states authorizing intervention to protect the interests and rights of other states. War was deemed as a private matter between states
- d) Lack of an international agency regulating and coordinating the use of force

The convergence of interest in 1945 between major powers, resulted in the creation of the United Nations. Also the maintenance of peace became a public affair, a matter of general concern and consensus was reached that no country would be allowed to shatter this international consensus.

The new edifice of the United Nations charter rested on three pillars:-

- a) The prohibition of the use of force, measures short of war, or even the threat of the use of force
- b) The conferment of power on the Security Council of the United Nations to right any wrongs upto the extent of the use of force and to that end the prohibition of the use of any action by any aggrieved state from taking the law into its own hand.

The key provisions of the United Nations Charter are paragraph 3 and 4, which contain the principles that bind the organization and its members. The significance of the Charter as a land mark, is almost unanimously recognized by all leading international scholars. But the period between 1928-1945 is often not sufficiently appreciated by writers. The provisions of the Charter were preceded by the Briand-Kellogg Pact, which together with its reservations and relevant state practice, prefigured the regime of the Charter to a considerable degree. The Charter was thus the beneficiary of a considerable quantity of diplomatic and legal experience. The landmarks leading to the Charter are as follows:-

- a) The 1919 covenant of the League of Nations, which placed certain restrictions on the resort to force
- b) The 1928 Briand-Kellogg Pact which outlawed the use of force for settlement of disputes
- c) March 1932. The Assembly of the League of Nations adopted the following resolution "...The assembly declares that it is incumbent upon the members of the League of Nations not to recognize any situations, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or Pact of Paris"
- d) The 1945 United Nations Charter prohibited the use of force except in self defense
- e) The 1949 observation of the International Court of Justice on the, "...manifestation of a policy of force" in its judgement of the Corfu Channel case(15).

Loopholes and Areas of Controversy Within the Charter and Practice of the United Nations Concerning the Use of Force.

- a) The most controversial debate on the provision of the Charter of the United Nations has revolved around the article 51 and finding an acceptable definition for the concept of, "self defense" Some writers have argued that article 51 has incorporated traditional customary law

of self defense(16). Others, including Bowett (17) & McNair (18), have embraced a more moderate approach and have conceded that article 51 is not identical with what traditionally constitutes self defense for the protection of state territory against direct forms of armed attack and blockades of ports or coasts. They further concurred on the legality of use of force to protect nationals abroad as a vital element of self defense. But, they were careful to note that the incident of protection of nationals abroad is hardly ever faced in its pure form, and in many occasions the justifications are discounted by the admitted facts. Hence, the United States operations both in Grenada and Panama, as discussed above, went well and above the protection of nationals.(19)

Another significant controversy has been the issue of anticipatory self defense. A number of highly reputable opinions have supported the right of anticipatory self defense on the basis of Charter provisions. Secretary of State Daniel Webster of the United States, said in 1842, during the correspondence of the Caroline case, "...the necessity of self defense must be instant and overwhelming, leaving no choice of means and no moment for deliberation. The burden lies with the authorities of the Canadian government to show that, even if the necessity of the moment authorized them to enter the territory of the United States at all, it did nothing unreasonable or excessive since the act justified by the necessity of self defense must be limited by that necessity and kept strictly within it.."(20)

The practice of those countries that rely on this defense has been inconsistent. The Israeli attack on Egypt in 1967, the Iraqi attack on Iran in 1980, failed to drag a wide spread condemnation because of the view that the peremptory counter attack left no choice of action whatsoever to them. On the other hand, the Israeli attack on the Iraqi nuclear reactors in 1981 and the American Bombardment of Cambodia in 1970, were widely condemned because the necessity of urgency was lacking.

b) A second area of controversy has been the issue of humanitarian intervention. Clearly the charter has not envisaged the legality of such a kind of intervention. State practice after 1945, on this basis, has also been, inconsistent, scanty and isolated. The American invasion in the Dominican Republic and the intervention in the Congo could be argued to have originated, at least partly, by invitation from the local sovereign. The policy behind the concept of humanitarian intervention calls for careful examination. The very idea of the use of force within the territory of another state for humanitarian purposes involves an obvious paradox. On the index of human rights policies, followed by the major powers ability to impose sanctions, humanitarian intervention would be highly selective and nearly always distracted by political and strategic interests.⁽²¹⁾ The major powers would also not intervene into the affairs of their political allies, except when threatened. Fear also abounds that

humanitarian intervention would give rise to old fashioned hegemonial intervention.(22)

c) The veto power: The functioning of the new system was dependent upon the continued political agreements of the super powers. Both at the time of the establishment of the United Nations, and even now, there is no alternative to this dispora. The United Nations has been unable to prevent the Korean War, the Congo crisis, the Vietnam war, the two Arab Israeli conflicts, the invasion of Afghanistan and the Iran-Iraq war. Since its creation more than 100 conflict have claimed the lives of 20,000,000 people. In all this, the main crippling effect had been the veto. Since its creation, the United Nations had to contend with 279 of them (23).

d) Traditional international law rest upon the consent of states. The United Nations Charter makes an attempt to move away from unfettered sovereign rights to duties based on solidarity compressing previous enormous latitudes of states. The problem here is that the international community in 1945 was not much different from the community that from evolved the Peace of Westphalia. The only difference was that in 1945, the war had created a political will to make certain changes in the international system. Though there was an attempt to limit sovereignty,

the jealously guarded feature of statehood soon resurfaced. This undermined the collective security system envisaged by the Charter as the security system was built upon the collective security system of states and not an institutionalized joint command.

e) The charter, in effect, was not an experiment in radical innovation. The power of the major power blocks was hardly affected. Before 1945, a lack of an international restraining institution on the use of force, was a tacit confirmation that major powers were the overlords of the international system. The charter went a step further than that. It confirmed and recognized this tacit fact. The charter did not choose, (for it could not), between sovereignty and some new values proclaimed along with the authority of the new organization. The founding fathers did not "cross the river" but remained at the "ford". History and political conditions were not ripe for any bolder step.

f) Intervention by consent, though not explicitly allowed or disallowed by the charter, has become almost universally recognized as one of the circumstances precluding wrongfulness. Infact, it has become the most frequent justification for intervention since 1945.

(ii) Major Trends in the Practice of the United Nations and of States since 1945

Before we indulge condemnation or praise of the achievements or failures of the United Nations and the conduct of states either in conforming to or renege of the rule of law since 1945, it would be important to note that no state has yet radically questioned the Charter system of the use of force. It is apparent from state practice that, all members of the world community formally upheld the Charter system and do not intend to depart from it. Attempts at deviating from the Charter occur at the interpretative level and not at the normative level.

Soon after the establishment of the United Nations, as the collective security system it immediately jammed due to the East-West rift, as demonstrated by the Korean War two major trends soon became noticeable.

- a) The collective security gradually turned from an enforcement mechanism to substantive conciliatory, hortatory, or condomatory system. Although the United Nations mounted peace keeping operations, its power of intervening was substantially curtailed by either the objects of the intervention or the veto. Thus the authority of the United Nations was substantially eroded and correspondingly replaced by state sovereignty.

- b) States have tended to reappropriate the rights and power they had lost as the result of the creation of the United Nations.

In conclusion, the international community has witnessed a partial return to the Model of Westphalia. States gradually have attempted to repossess what they had lost. Though the system is disregarded with impunity, it has not yet broken down into chaos. The provision of the Charter are partially weak and partially inadequate. The various and sometimes contradictory interpretations provided for articles 2(4) and 51, none so absurd as to be rejected outright, make the general ban on the use of force weak. Some glaring areas become too obvious when considering the issue of nuclear warfare. Is self defense using nuclear weapons legal? What about an anticipatory nuclear attack?

The Charter provisions are also too rigid. The question of the use of force for the protection of nationals abroad, humanitarian intervention, support given by one state for armed attack to another state and allowed to infiltrate the territory of other states, and large scale subversion masterminded from abroad, are not regulated. To resolve this issue, a more flexible less ambiguous, more vigilant and less politicized Security Council is essential.

The unsatisfactory nature of the Charter provisions follow from the fact that the founding fathers were confident that, it would be polished by the Security Council.(24) Indeed, it stands to reason that, to become operational, legal prohibitions need the support and enrichment of judicial and quasi judicial bodies. The Security Council was, however, unable to develop coherent case law. Having lamented the failure of the Security Council, A. Casse, writing before the conclusion of the Cold War, noted that the current continuing rift among states makes it highly unlikely that major powers will sit around a table and agree upon a better, more detailed and upto date legal regulation of the use of force. Casse, does not hide his skepticism about this taking place in the immediate future.

D) THE LEGAL LIMITS ON THE USE OF FORCE: POST 1989

Approaching the 21st century and having witnessed the need of the cold war with a collective sigh of relief, the international community has already started wondering, what limits on the use of force now? Can the international world order hope to look beyond the much derided charter system?

Unlike the limited restraints in the covenant of the League and the provisions of the Briand-Kellogg pact, the charter prohibitions on the unilateral use of force were to apply universally. Members were bound by it, they were to see to it

that non members also complied. For the first time, nations tried to bring within the realm of those ultimate political tensions and interests that had long been deemed to be beyond control of law. They determined that even sincere concern for national "security" or "vital interest" should no longer warrant any nation to initiate war. They agreed in effect to forgo the use of external force to change the political status quo. Nations would be assured their fundamental independence, the enjoyment of their territory, their freedom in a kind of right to be let alone. With it of course came the corresponding duty to let others alone, not to use force to resolve disputes, or vindicate one's 'rights'. Changes other than international change through internal forces would have to be achieved peacefully, by agreement. Henceforth, there would be order, an international society would concentrate on meeting better the needs of justice and welfare.(25)

Thus, realists, pointing out the jamming of the collective security system, and lawyers questioning the legal validity of the charter in accordance with the principles the "*rebus sic stantibus*" when the assumptions on which it was based have failed, when the circumstances in which it was made and those for which it was contemplated have radically changed, both emphasize on the non-viability or even the undesirability of the charter.

That, the charter has failed in establishing the United Nations as a effective international police system providing machinery for peaceful settlement of disputes cannot be disputed. But the root cause of this failure is not that international law is wanting but that nations are unwilling to apply it. As Henkin observes in *How nations behave*,

"..For me, the changing facts and faces of international law have not detracted from the validity of the validity of the charter and have only reinforced its desirability. Consider foremost, the argument based of the failure of the original conception of the United Nations: it has not established an effective international police system, it has not developed and maintained machinery for peaceful settlement of disputes. (making self help unnecessary and undesirable) But the draftsmen of the charter were not merely seeking to replace "balance of power: with collective "security system". They were determined according to the preamble, abolish "the scourge of war" All evidences is persuasive that they sought to outlaw war, whether pr not the U.N Organizations succeeded in enforcing the law or in establishing peace and justice. And none of the original members, nor any one of the many new members, has ever claimed that the law against the use of force is undesirable now that the U.N is not what it used to have been intended (26)"

Therefore the international community cannot for it need not look beyond the charter system. The ban of the use of force imposed by the charter had limited restraining effect on states. Now, that the super-power confrontation has dissipated, there is ever reason to hope that a less politicized security council will provide the necessary sanction to enforce this rule. If the limits on the use of force imposed by Nations after the 2nd world war have not provided the necessary limits, there is no reason to change them now, when every indication points to the fact that they likely will.

International law cannot, at this stage in time hope to progress further than the charter system. As the charter did not choose (for it could not) between sovereignty and some values proclaimed along with the authority of the new organizations, the post cold war community has little choice but to join the founding fathers at the ford of the river and hope that somewhere in the future the gap would be bridged. For at the moment, the assumptions we made in the beginning, that the perception by states that the maintenance of the international society and that the welfare of Nations does not necessarily require the welfare of the international society, remain planted as strong if not stronger than ever. State action, at least in the foreseeable future will remain motivated by perceived national interest rather than legal rectitude. Though contemporary status of international law on especially the direction of its future development indicate that a general recognition that the fulfillment of the

welfare of international society would be important for the fulfillment of purely national interest, the stage where states are convinced that support of one will guarantee the welfare of the other has not been reached and is not to be so in the immediate future. For now, sharpening the normative restrictions on the use of force and nurturing the life and validity of international principles through concert of power with the requisite power and reciprocal accountability to enforce it, that discourage and render self help unnecessarily, seem to be the optimum alternative.

(i) The use of force and self determination

We stand at an extraordinary period of history. The 1991 Persian Gulf War is according to President Bush more than "...The protection of one small country, it is a big idea, a new world order with new ways of working with other nations, controlled arsenals and just treatment of peoples..."(27) Some analysts have equated the end of the cold war with the victory of liberal, democratic capitalism. The euphoria over this victory is still rebating from Europe to America. The euphoria has given rise to some sweeping conclusions by analysts like Charles Krauthammer who stated that the period is going to witness the beginning of Pax-Americana in which the world will acquiesce in a benign American hegemony.(28)

Freedom house lists 75 countries that have attained political freedom at the end of 1991, 10 more than a year earlier. By any standard democracy has won the great ideological battle. The global expansion of democracy continues at an amazing pace with more than 30 countries in transition to democracy.

The global trend is gratifying but the roots are pitifully too shallow. Many of these democracies have instituted only the rudiments of democratic institutions. Of more than 40 countries that have made the transition to democracy since 1973, only Spain, Greece and Portugal can be considered fully consolidated. Lack of effective control over the military, continues to plague these countries with the continuous threat of coup d'état. The legal institutions are poorly financed and equipped to effectively protect human rights. Also missing is a typical cultural and civic infrastructure of democracy, a strong commitment towards this by the elite majority and citizens and a variety of associations and interest groups autonomous from the state and an independent pluralistic media. In much of Africa and Asia, economic collapse threatens these infant democracies.. It is against this background that Reisman has launched his audacious and revolutionary approach on the use of force.(29)

He argues that the use of force by a foreign country to oust a repressive government cannot anymore be unlawful than a military assistance to a government without a base of popular support. Reisman attempts to

circumvent the ban on the use of force by finding justification for this kind of use of force in policy rather than provisions of the charter. He argues that the enhancement of the on going right of people to self determination is a recognized principle of international law. Expounding this thesis, Reisman makes other interesting observation:-

- a) Article 2(4) does not stand by itself, but rather is a part and parcel of complex security system implying thereby that article 2(4) cannot remain as an implied principle.

- b) that article 2(4) must be interpreted in terms of the postulate of political legitimacy in the 20th century, namely the ongoing self determination. That the critical quest in the interpretation of article 2(4) is not whether there has been the use of force , but whether it has been applied in support of or against community order and policies.(30)

Schacter vehemently denounced the interpretation of Reisman both in law and policy.() He argued that followed to its logical conclusion, the interpretation of Reisman would weaken the minimum world public order essential for peace and security. He further argued that the views of Reisman are devoid of either empirical support or philosophical analysis. Indeed, Schaechter found it astonishing to hear that article 2(4) is only a means for the enhancement of self

determination. Rather, he was of the view that, it is a means for the maintenance of peace and prevention of aggression. Schachter then counters the first argument of Reisman by saying in effect that the failure of the collective security system does not validate the use of force in a foreign country to bring about on going self determination.

Schechter is clearly against the extension of the interpretation of the charter to include intervention to oust despotic government on the pretext of "assisting the ongoing principle of self determination. He pleads that this is no time for lawyers to weaken the principal normative restraint against the use of force. Indeed he concludes by warning that the world will not be made safer for democracy by the barrel of the gun. Reisman on the other hand justifies his interpretation in terms of policy rather than rules as prescribed by the Vienna Convention of law of treaties.

In a strong condemnation of Reisman and a rejoinder to Schechter, Nawaz, though highlighting the declaration of the principles of international law concerning friendly relations that posit the duty of every state to promote self determination in accordance with the provision of the charter and to render assistance to United Nations in carrying out the implementation of the charter and that people resisting foreseeable action are titled to seek and receive support in accordance with the purposes and principle of the charter, this would not include the use of force (31).

The conclusion of Reisman rests on evaluating the use of force from the points of view of whether it enhances or undermines world order. The problem with this is that it would introduce a new normative basis for recourse to war that would give more powerful state an almost unlimited right to overthrow government they dislike and history is but a witness to the fact that states have employed every armour in their arsenal for the advancement of self seeking interests.

All the same, the argument of Reisman demonstrates that when the opportunity provided by the end of the cold war is joined together with ostensible lessons of the Gulf War the result is greater disposition to intervene in the developing world by the remaining super power. A new formula for going to war seems to have been fastened in which American casualties are minimized and protracted engagement avoided, that requires the massive use of American fire power and speedy withdrawal from the scene of destruction. The formula is getting very popular as it ensures quick American success that allows America to walkway from the scene without feeling guilty of the destruction it has caused. International propriety and legal rectitude might not pose a great constraint for this approach.

ii Emerging Trends of International law and State Practice

The end of super power confrontation and the relative decline of the threat of nuclear war should not be a cause of undue optimism. The world does not need to be reminded that it exists in a formal state of anarchy. There is still no international government, no sufficient division of labour among states to transform the international system into a social system. Though liberal democratic capitalism has triumphed in the cold war, it has still got considerable competitors that threaten to plunge the world into chaos which include the indigenous Neo-Marxist movements, like Peru's Shinning Path, the many variants of Islamic fundamentalism and the rise of ethnic nationalism (32). In a sense the world has become more dangerous, today than ever before. The world is also loosing the war on drugs. The drug traffic world wide accounts for 300 billion dollars currently. The war on drugs has already replaced anticommunism as a new American national security doctrine. The Geographic, economic and social dimension of the drug trade are enormous and growing. But the danger of intervention even if legitimized by war on drugs is that it still provokes the wrath of nationalism. The lesson of Panama said one political observer is that although "...Electoral fraud, murder and drug trafficking are crimes in Panama as elsewhere and Panamians believe Noriega to be guilty of the crimes he is accused of, Panamians consider collaborating with the United States a greater crime.."(33)

Thus at this stage what we should pose to consider is, what prints the invasion of Panama should leave on the international legal order? What can we learn from the mistakes that were committed? Shouldn't a state intervene to protect its nationals when their lives come under genuine threat and the local sovereign is either unwilling or unable to provide that minimum protection? Shouldn't international law provide for genuine cases of intervention to put chronic abuses of human rights to an end? What about the promotion of democracy and the question of self determination? African and third world countries that vigorously defended the use of force for wars of liberation are either conspicuously keeping mum or in sharp twist of their previous view are drumming about sovereignty and non-interference. What about the question of an international criminal offender that is being harbored by a government refusing to either prosecute or extradite him? From Mogadishu to Bosnia Herzegovina from the Southern Sudan to Haiti, the call for novel approaches to old problems appearing in the "new world order" have been vigorous. The question is what the nature of this novel approach of international law should be that would nurture and accommodate this new world order and prevent the remaining super power from intervening with impunity in the third world and provide protection for the third world from being victimized by the super power under various presidential doctrines. In short, what should the new international order constitute to discourage or render unnecessary state self help? The end of the cold war which vindicated democracy and sharply

diminished the threat of super power confrontation should be seen as an opportunity to create a putative universal alliance against aggression enforced by super power military power(34). In previous eras, three methods have been exercised, by which the world is prevented from plunging into anarchy.

- (i) The balance of power which characterized most of the 19th and early 20th century witnessed a considerable number of shifting alliances that plunged the world into world wars.
- (ii) The balance of power is a mechanism employed to discourage or prevent war, that constitutes of building up power blocks through alliances powerful enough to convince a potential culprit from plunging the world into war. Balance of power proved phlegmatic and unpredictable. It didn't prevent Napoleon from defeating reluctant states which waited for the other to take the lead against the disruptive state and were reluctantly drawn into the conflict. Almost an identical situation was repeated in 1939. Britain and France could not save Romania and Poland for they did not believe they would succeed in a military offensive that would bridge the Rhine and smash the German Westwall. Hitler, reasonably expected that Britain and France would back once he reached agreement with Russia. The mystery is not that why Britain and France took so long before they went to war but that they dared to. There was little they could have done unless they were attacked.

In sum, the history of so called balances of power, is a history of either weakness or misperceived strength. As a method of regulating international behavior and conflict, it either did too little or too much, but did not generally deter hostile military action. (35)

(ii) The second mechanism, bipolar nuclear deterrence, though more costly, was more effective. It rested on tangible credibility that replied with an "eye for an eye" response to actual or imagined threat of aggression. Nuclear weapons added an element of stability but the world veered uncomfortably on at least three occasions, Yom Kippur war, Berlin and Cuban crises. Credibility is an essential element of this mechanism, which bolstered super power intervention in the third world with impunity. To enhance this credibility, the United States threatened the invasion of Cuba, intervened in Grenada and Panama, the Soviet Union invaded Hungary, Czechoslovakia and waged a proxy war in Angola, Mozambique and Ethiopia.

(iii) The last mechanism, concert of power or central coalition was exercised only briefly from 1815-1822, where post Napoleon France was allowed to join Britain, Russia, Austria and Prussia to prevent the rise of a regional hegemony that threaten the world peace. These European

powers fundamentally concluded that revision of the social change had caused the war and if this could be contained war could be prevented. They also agreed that the task of war prevention is more important than gains for any one player. The main reason for the collapse of the mechanism after short experimentation is the isolation of Great Britain and the ideological rift between the conservative and liberal members of the coalition. (36)

If this mechanism is to replace bipolar nuclear deterrence, today its success rests upon acceptance by the major powers of the renunciation of war and territorial expansion. A clear cut conviction shared among the major power blocks that the use of force would not compensate disadvantages of shattering would peace is also necessary. (37) If such cooperation occurs, the balance of power begins to operate in reverse. Once strong group has been consolidated, others will not try to balance against it. They will become members of the balance. The psychological sanction of going against a world consensus, alongside with the practical dilemma of lacking the strength to overcome the alliance would strongly deter aggression. Central coalition is also much cheaper and effective than both balance of power and deterrence.

B) Promoting democracy does not mean exporting it. Along with Nawaz (38) and Schechter (39), this writer would like to record a strong exception to Reisman's theory of the legality of the use of force to overthrow oppressive regimes. Beside the violations of that peremptory rule of international law, the ban of the use of force, this would open the door to countless abuses.

Throughout the world, people have come through bitter experience to a new appreciation of political freedom as ends in themselves. Promoting democracy would constitute a formal recognition of the right of democratic rule as a positive rule of international law. The right of self determination is already recognized as an inherent right of mankind, thanks to the bitter struggle of people under colonial yoke. Now, a second generation is also battling despotic and dictatorial regimes for the benefit of democratic rule. The greed of recruiting client states having been redundant by the end of the cold war, the super powers now might be free from the constraint of patronizing despotic regimes.

Democracy cannot be imposed where it does not exist. To mount a military intervention to create democracy is another source of enormous disorder (40) Degree of intervention can range from limited economic measure at the low end of the spectrum to a full fledged military intervention. Promoting democracy means offering moral, political, diplomatic and financial support to individuals

and organizations that are struggling to open up authoritarian regimes. There are a number of reasons why the international community and more particularly the more powerful members should promote democracy:-

- (i) The community has a moral obligation to assist people in their quest to democratic rule as it did during the liberation movements from colonialism.
- (ii) Prevention of the proliferation of nuclear armament and weapons of mass destruction, undeniably should be in the interests of the international community. This is less likely to happen in a democratic state.
- (iii) The economic wellbeing of member states would directly impinge on the economic wellbeing of the community. Prosperity of a member state would open up new markets, would assist in the protection of the environment and halt the flow of refugees. Democracy in most cases will enhance this (41)
- (iv) The community's real interest should lie in promoting the creation of secure, stable and democratic world. Terrorism, drug trafficking and threats to the lives of nationals abroad, is likely to

flourish in despotic, oppressive regimes at brinks of civil war and revolution.

- (v) Democratic countries do not arbitrarily go to war against one another, they are more reliable, open and enduring trade partners more likely to honor international obligations, because they respect civil liberties and rules of law.(42)

Such orientation is not only morally appealing and strategically compelling, but it is also politically sensible. A democratic focus promises a bipartisan foreign policy, synthesizing liberal concern for human rights and concern for environmental and global order. It rejects the exclusively realistic view of promoting interest at the expense of principles. It is also one of cheapest and most cost effective ways of promoting national interest.(43)

C) Resurrecting the United Nations peace keeping forces: Dag Hammarskjold, the former Secretary General of the United Nations described peace keeping as chapter six and half, falling somewhere between the chapters dealing with peaceful settlement of disputes and enforcement. An effective peace keeping force would mean a more effective U.N. The United Nations role and possibly an extension of activities to combating terrorism and drug war.

During most of ex-president Ronald Reagan's years, unilateralism dominated, the United States' foreign policy and outright hostility towards the United Nations replaced traditional American support of the Organization. Moscow also became increasingly hostile, to United Nations peace keeping forces and contended that, it is actually a weapon in the West's arsenal against the Soviet bloke and its allies and cited Congo and Korea as an example. While Moscow was rarely explicitly obstructionist, it was hardly supportive of peace keeping.(44)

A careful look at recent history demonstrates that multilateral peace keeping under, the United Nations auspices, although certainly no panacea, can be more successful than unilateral and bloke related efforts to dampen military conflicts, because unilateral acts lack legitimacy. Peace keeping works best when it is widely perceived to be impartial, eschews violence, enjoys broad international support and implements rules established by world community, interpreted by the security council or the General Assembly, which although imperfectly symbolize the rightful representative of the international community.(45)

The United Nations peace keeping forces can be central and dynamic in the transition to a warless world, because it reminds us of the difference between police enforcement and military activity. This force could also become the executive arm of the resolutions of the security council and the General Assembly. Although this force has demonstrated limited utility in the past most notably in the Middle East, Cyprus and elsewhere, it suffers from some glaring

institutional weaknesses;

- (i) Some states have been reluctant to apply and respect United Nations forces because of suspicion of ad hoc forces that contain contingent drawn from other national armed forces taught to promote national interests.
- (ii) The Secretary General may not be able to win a quick security council approval to dispatch United Nations forces and some situations might be too critical and may not afford to await the slow and cumbersome deliberation in a politicized council
- (iii) Financing this force strains the resources of the organization.

From observation of emerging trends, a number of solutions have been forwarded;

- i) The creation of a permanent United Nations force that is adequately trained, managed, coordinated and organized than an ad hoc force whose loyalty fluctuates between the U.N and member states and which is more likely to be hampered by fluctuating goals of government politics as Ecomog forces amply demonstrated in Liberia.
- ii) Obtaining the United Nations Security Council approval on each and every crises is an unnecessary constraint. Blanket approval over well

defined and limited problems could sanction the rapid deployment of such forces. The veto privilege for permanent members of course remains intact, if they so decide afterwards. This would avoid the dilemma, the United States seems to have found itself in its recent intervention in Somalia and the considerable reluctance to commit troops in the former Yugoslavia. This would also enable the deployment of U.N forces in anticipatory crises. Thus instead of trying to clean up the mess, the U.N would now be able to prevent it. It would not be difficult to imagine the psychological constraint a few blue berets would have imposed on the forces of Saddam Hussein if they were already in Kuwait at the time of the invasion. This would also sanction the deployment of the force in difficult domestic crises, providing some necessary guarantee to all factions of the dispute.

A permanent U.N police force could perform a worldwide educational role as vital as its coercible role. The establishment of such a force would nurture in people's minds that is indeed possible to have the enforcement of international rules that must govern all people if our species is to survive.(46) The utility of such force in combating international terrorism, the protection of the lives of foreigners caught in hostilities outside their territories and as a humanitarian interventionists task force is also noted.

A standing U.N force would enable U.N protected countries to become a realistic possibility. This is not a fanciful possibility, but many small countries

are unable to protect themselves. The rapid annihilation of Quaita defense forces during the Gulf crises underscores this fact. Rather than spending enormous amounts of money on their National forces, that are unable to protect them, these countries could contribute modest amount to the cost of the maintenance of the U.N permanent forces. As U.N role in war prevention among small states is strengthened, the temptation for unilateral super power intervention is reduced. A permanent police force would also decrease the seemingly unquenchable thirst for arms purchase and ,military training.

Support in the United States for a revised role of the United Nations peace keeping forces is high. Equally important , third world countries have traditionally displayed a better record of support for this force. Signs of a growing interest to revitalize and enhance multilateral armed force is also very evident in the United Nations. Lion Yufar, the deputy permanent Chinese representative to the U.N has called upon members "...to respond favorably to a universal demand for strengthening the peacekeeping capabilities of the U.N.."(47)

The vigorous support of the United States, Western countries, the former USSR and the third world had provided an unprecedented opportunity to revise revitalize and enhance the role of the United Nations peace keeping forces.

D) The evolvement of a more vigilant, less politicized, more effective, security council. The security council system of the United Nations had, jammed soon after the formation of the world body. Nowhere is this more apparent than in the security council, whereby 279 vetoes since its creation continue to paralyse it. A more efficient security council would act swiftly to avert potential crisis. It would be appropriate to mention at this stage that the charter should show a little more flexibility. Accommodation for the use of force to protect nationals for humanitarian interests preferably on a multilateral basis should be accommodated. A General Assembly resolution as that which had defined aggression and elements of friendly relation would suffice. The recent recommendation floated by the Russian republic to increase the number of permanent members of the security council to include Asian and African countries would serve an enormous purpose in refuting the traditional suspicion shared by the third world that the council is a Western institution. This suspicion would inevitably deepen as the Russian Republic plagued by severe economic crisis and China increasingly strengthening her trade bond with the West give the impression of no loner having the power or political will to mount an effective counter balance to the Western coalition in the council.

E) The time for the establishment of an international criminal court which derives its competence from an international criminal code, also seems to have arrived. States would feel a lot easier surrendering offenders to an international

judicial body, that is free from political pressure. Even though after the 2nd World War hopes and expectations for the development of a direct control system involving the creation of an international machinery of criminal justices were high and the first experiment at Nuremburg was a success, political and ideological barriers have not yet made this possible. Would the new development give us reason for optimism? The recognition of international crimes adjudicated and enforced by an impartial international judicial body would discourage states from taking the law into their own hands.

In conclusion, the breakup of the former USSR "the liberations" of Eastern Europe, the Gulf War, the rapprochement between the United States and Russia have lent the world with a new concert of powers and hopefully more efficacy to much deride international law. Without adequate norms and strong institution to uphold them today's pluralism might degenerate into unrestrained disorder and violence. International law is a living entity that requires continued nurturing and these is best provided not by some abstract system of collective security by a concert of power with requisite power and reciprocal accountability to enforce the law and often enough to keep alive its under lying normative principles.(48) The conduct and action of the United States would be a most crucial influence in shaping this post cold war era. Large scale U.N efforts like the repulsing of Iraq will continue to require the active participation of the world's largest power. The U.N is the sum total of its members and

United States by far is the largest member, But the United States must rightly want to stop patronizing the world and find a correct balance of doing too much and too little. The invasion of Panama was a showcase of super power jingoism. On the other hand the hasty and uncomfortable withdrawal of the United States from Somalia recently, demonstrate the uneasy position the world's largest power has found itself in. Recommitment to multilateral institutions that have failed into abeyance in the cold war might provide part of the answer. The world in our time is likely to be one in which only the United States would remain a military force worldwide and the evolvement of new principles that are universally recognized by international law that enhance and nurture the aspirations of mankind are a largely to be dependent on the goodwill of this world power for law is merely an instrument of politics. The prime mover of social change is politics and the outcome of political decisions depend on the distribution of power. All the same, it would be to the enormous advantage of everyone if the United States foreign policy of the 1990s embraces the Carter approach, which asked American people to think as citizens of the world with an obligation towards future generations. Carter failed because the clamour of the cold war was too much for him. (49) But now American foreign policy makers can start to hope to succeed.

The evolvement of international law is gratifying. In 1965, the American law institute defined international law as rules and principles dealing with the conduct of states and international organizations. More recently, the institute's lawyers added the more revealing words. '...as well as some of their relations

of their relations with persons"(50) Individual and minority rights are starting to be treated more than just national concerns.

The "new world order" whatever it is supposed to mean has arrived. It is messy and unstable. It is threatened by regional bullies, ethnicism and economic depression. Much details about the new functions of the U.N, the concept of domestic jurisdiction and various other matters need to be worked out. But ideas considered Utopian in the not so distant past are now distinct possibilities. Among the staunchest defenders of the old system are poorly integrated, despotic and undemocratic states. The new arrangement might deeply shake areas traditionally considered beyond reach. The new system must also endeavor to appease those urging to go too fast and cynics not wanting to move at all. Liberals must understand that the evolvement of international law beyond the model of Westphalia is a matter of decades and not days. Realists must recognize that traditional definition of power and order in purely military terms miss the changes and opportunities taking place in the world.

CONCLUSION

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Mankind, ever since the birth of the modern international community, has been trying, with varying degree of success, to circumscribe and limit the right to resort to force to vindicate a right, to retaliate or punish or to right wrong received. The Roman law demanded that war be "pium", early Christian doctrine completely prohibited it, and the Greeks held leaders who started illegal wars personally responsible. Social Scientists of the so called Dark Ages of Europe like St. Aquinas, Saint Augustus, Lognano, Gentilli, Solomonnca and Suarez, Gratius displayed a highly refined and morally sound circumscription of war for their time. They demanded that war be just, and that it be waged after the refusal of a demand for satisfaction. They rejected the use of force for the advancement of personal glory, the conquest of new territory and gain of undue advantage.

Despite the radical improvement in the moral and intellectual climate brought about by the Age of the Enlightenment and the strong pacific sentiments that appeared in the works of Voltaire, Montesque, Saint Simon, Kant and Bentham, international law started greatly facilitating the conquest of new territories by Europe. It also drew two distinct test of standards for evaluating the legality of a state action. One between European states and the other between European states and those entities that seemed to exist on the periphery of the

international community. The industrial revolution had created such a wide gap in the economic and military capabilities that the rest of the world fell easy prey to the expansionist tendencies of Europe. The struggle for the hegemony of Europe also resulted in numerous conflicts and wars. Contemporary international law of the period reflected principles of Western civilisation and bore the imprint of Christian ideology and the free market, *laissez-faire* outlook. The rules and principles of the period were framed by the great powers engaged in expansionism and colonialism and to that end the threat or the use of force was no restriction.

The realisation of the horrendous results of the failure to maintain peace by a system of alliances and balance of power at the end of the First World War, the existence of a number of peace plans and President Woodrow Wilson's significant contribution, signalled the apparent possibility of the beginning of a new era in international politics. The Covenant of the League of Nations introduced a novel approach in making conflicts between two states a matter of international concern. Crippled at the outset by terms like "condemn" and "renounce", that have no legal significance and by the absence of the prohibition of, "measures short of war", and the failure of the United States to ratify the covenant, the successes of the organisation in circumscribing war, were to be abysmal. The Briand-Kellogg pact made a partial attempt in correcting the shortcomings of the covenant.

The annihilation of Nagasaki and Hiroshima towards the end of the second World War by the dropping of the atomic bomb and the untold suffering and misery brought to human kind during the war, convinced the international community that a sweeping ban on the use of force is not some lofty ideal that will make life more pleasing **but is a precondition for life itself.**

It is gratifying that no state has yet come to question the fundamental tenets of the charter of the United Nations on the ban on the use of force. Members of the world community formally uphold the charter system and do not intend to depart from it. Attempts at deviating from the charter occur at the interpretative and not at the normative level. The incorporation of traditional customary law of self defense, the protection of nationals abroad through the use of force, humanitarian intervention, and anticipatory self defense continue to provide a source of controversy between conservatives that do not want to expand the definition of self defense and liberals that favour the interpretation of the charter to accommodate new emerging situations and trends. Despite the ban on the use of force by the charter, there still exists a considerable tendency by states to repossess that very essential aspect of their sovereignty that they have surrendered to the new organisation, the right to resort to force. To that end the international community has witnessed a partial return to what has been known as the Model of Westphalia. A good example is the 1989 American invasion of Panama.

The United States had been born from expansionist and tenacious tendencies of its citizens and ideals of liberty, and freedom (1). These ideals continue to dictate national and foreign policies. The entrance of the United States as a new and ambitious power into the international community in the nineteenth century witnessed the dominance of the Munroe doctrine in the interventionist policy of the United States which posited that the "United States may intervene unilaterally in the affairs of neighbouring Republics to thwart chronic wrong doing". This doctrine of regional perspective and later Reagans's doctrine of global perspective did not draw their validity from any international treaty instrument or general principle recognised by the international community.

The American intervention in the Third World is not merely a manifest of simple and selfish pursuance of National Interest but like challengers of their frontier pioneers, Americans have a tendency to believe that special virtue accompanies their ambitions.

Sad to say, the American interventionism in the Third World intensified, when the former U.S.S.R posed a distinct challenge to America's goals and security in an intense ideological competition that came to be known as the Cold War. The American economy ever since the end of the second World War had also become dependent on exports more than ever, to maintain levels of business activity to which the economy has become accustomed. Consequently American economic and military intervention were concentrated in areas where it would be most essential in building world political and economic stability, in

promoting human freedom and democracy and in fostering liberal trade policies. A notable example is the zeal and commitment the United States displayed in evicting Iraq out of Kuwait.

The so called, "Vietnam syndrome", deeply questioned not only the invincibility of the American military machine, but also the, "quick fix", foreign policy and the patronising attitude of the American policy makers towards the Third World. (2). Unfortunately the 1980's under Reaganism witnessed a gradual retreat to the so called "gunboat diplomacy". The invasion of Panama would squarely put American foreign policy at the heart of the Munroe doctrine.

The legality of the American invasion of Panama does not, in all probability, appear justified even for the adroit State Department lawyers that concocted the legal justification for the invasion weeks before the actual event. In the light of this, the almost unanimous condemnation that followed the invasion from the international and academic community is hardly surprising. The American interventionist policy remains motivated more by perceived national necessity and political expediency rather than legal rectitude. But this is not to say that, the United States has consistently flaunted international law when it serves its national interest. This realisation underscores the fact that states make, apply, enforce and break international law when it suits them. International law in the most part is not wanting in its content but states are unwilling to apply it.(3)

History demonstrates that an external stimulus that brings devastating destruction upon mankind has always provided the impetus for changing the international system. The Napoleonic wars resulted in new concert of powers to discourage aggression. The two World Wars yielded the League of Nations and the United Nations which, for the first time in history, outlawed aggressive wars and provided a collective security system. Our time is no different. Though the cold war claimed relatively fewer lives in comparison to the arsenal of destruction we have in our hands, it would be sobering to remember that 20,000,000 lives have perished in the 48 years after the charter that introduced the sweeping ban on the use of force, came into existence. At the moment, international law is desperately struggling to accommodate the new changes taking place in the world.

State self help has traditionally, as could be expected, been limited to those that can help themselves. On the other hand, the restraining power of international law, becomes sadly defused, when states take the law in their own hands. Even if this would serve a short term national interest, more and more States are becoming convinced that the world is becoming a global village. Many shared interests require the evolvement of peaceful, more prosperous and stable environment.

Politics is the prime mover of society, but law is merely its instrument. But when political consensus is achieved to alleviate the problems and suffering of mankind and fulfil human aspirations, law should quickly seize the opportunity and formalise this decision to make them binding. The United Nations had limited success in fulfilling the aspirations of the founding fathers in avoiding the use of force. The political condition did not allow it. The post Cold War world organisation, it is hoped, will have more success. To this end, the abatement of unilateral actions by the major powers and their recommitment to international institutions that fall into abeyance during the cold war is most essential.

The collapse of the Soviet Empire and the recession of the threat of nuclear war coupled with the increased democratic and nationalist movements around the world, may provide the United States with new found freedom of frolic on, what has been traditionally, the arena of super power confrontation, the Third World. The call for recommitment to upholding the integrity and efficacy of international law and consideration of the welfare of the global community would yield tremendous advantages that would profit the national interest of the not so distant future of the super-power.

FOOTNOTES

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Appendix II

Table of Abbreviations

1. C.I.A. Central Investigation Agency
2. D.E. A.; Drug Enforcement Agency
3. I.A.T.R.A; Inter American Treaty of Reciprocal Assistance
4. I.C.J; International Court of Justice
5. N.C.O.; Non Commissioned Officer
6. O.A.U; Organization of African Unity
7. O.A.U; Organization of American States
8. P.C.I.J.; Permanent Court of International Justice
9. U.A.R.; United Arab Republic
10. U.S.S.R.; The former Union Soviet Socialist Republic
11. U.N.; The United Nations

Appendix III

Table of International Instruments

1. The Bogota Charter (1930)
2. Briand - Kellogg Pact (1929)
3. Charter of the O.A.U. (1963)
4. Charter of the U.N. (1945)
5. Covenant of the League of Nations (1919)
6. Convention for the Suppression of Genocide (1951)
7. Convention on Narcotic Drugs (1965)
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