THE PRINCIPLE OF NON-INTERVENTION: THE RAMIFICATIONS OF THE NICARAGUA CASE

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DECLARATION

Certified that the dissertation entitled "THE PRINCIPLE OF NON-INTERVENTION: THE RAMIFICATIONS OF THE NICARAGUA CASE" is submitted by Ms. Sangeeta Kalra in partial fulfilment of the requirements for the award of the degree of MASTER OF PHILOSOPHY of this University. This dissertation has not been submitted for any other degree of this University or any other University and is her own work.

We recommend that this dissertation may be placed before the examiners for evaluation.

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The judgement delivered by the International Court of Justice, in favour of Nicaragua, has been a topic of many a discussion, especially in relation to the principle of non-intervention. In this dissertation I have made an effort to highlight the ramifications of the Court's decision in relation to non-intervention principle. However, the real credit of making this effort possible goes to Dr. B.S. Chimni, who has not only been my friend, philosopher and guide, but has actually been my mentor, shaping my thought processes without which it would not have been possible to work upon this subject. I would also like to thank Professor R.Khan and Professor R.P.Anand for showing extreme consideration and patience, and actively encouraging me in this work. Lastly, I would like to emphasize, that I bear all responsibility for any discrepancy or mistakes, which emerge in the dissertation.

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CHAPTER I

INTRODUCTION

I THE SETTING

The Principle of non-intervention is an established norm of international law and accepted both by the developed and developing states. But there is a hiatus between theory and practice as far as the developed states are concerned: while they have accepted the norm in principle they have justified interventions, on various occasions, through carving out illegitimate exceptions to the general principle. In response to this attitude of the developed states the developing nations have stressed the need to interpret the principle of non-intervention strictly, except in the colonial context.

The contrast in the attitudes of the developed and the developing states can be traced to their different historical experiences. Most of the developing countries in the region of Asia and Africa were under colonial domination which prevented these countries from participating in any way in the development of customary international law and later in the establishment of the United Nations with the result that international law reflected essentially Western interests. Their subsequent effort to preserve their sovereignty, integrity and independence by a strict interpretation of the principles of non-use of force, non-intervention, sovereign equality of states and self-

determination of the peoples is also sought to be disregarded by the Western World. The Latin American countries have had a distinct history of their own. Although free of the colonial yoke by the early 19th century, the 'big brother' next door did not understand the meaning of non-intervention and set upon a course of interventionary activity to carve out zones of influence. Thus, in the wake of colonialism came the 'Monroe doctrine'. The same type of interventionary activity was also experienced in Eastern Europe but here the role of United States was played by the Soviet Union which intervened in Hungary, Czechoslovakia and Poland and justification for which was offered by way of "Brezhnev Doctrine"[1] This period of interventionary activity by Soviet Union as also of the United States, should be seen in the context of "cold-war" (the period from World War II onwards); the rivalry between the two super powers was not conducted through open confrontation but the modus operandi was to carve out zones of influence. Thus, the poor Third World states became a battle ground of super power power politics to which considerations of international law were secondary. The big powers interpreted the law as they pleased, to suit their

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1 20 Current Digest of the Soviet Press, No.46, pp.3-4; December 4, 1968

interests. In fact the whole framework of imperialism rested on the edifice of intervention making it necessary to carve out exceptions to the non-intervention principle.

The nineteen sixties, it may be recalled, saw a spurge of anti-colonial activities, movements and wars of national liberation and inspite of brutal suppression of these by imperialist powers witnessed the birth of new states and the independence of the old ones, announcing the arrival of the "Third World" lobby in international relations. The fact that these states desired to develop their political, economic and social structure without interference from the former Metropolitan Powers is therefore understandable. The newly independent states made the United Nations, in particular the General Assembly, their forum to air their grievances and try and bring a halt to the interventionist policies of the developed states. Hitherto, their voice had been ignored in the development of international law but now they vociferously claimed their right of participation. This change was manifested in the quality and quantity of resolutions passed in the General Assembly since the 196Øs, onwards amongst which was Resolution 2131 (XX) on "Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty"

which was passed on 22nd of December 1965.[2] In 1970 the General Assembly passed the Landmark declaration on Principles of International Law Concerning Friendly Relations and Co-operation amongst States in accordance with the Charter of United Nations.[3] codifying and developing seven principles of international law, non-intervention being one of them.Though the resolution was passed by consensus the same was based on the compromises achieved in the Special Committee constituted in 1965,[4] where divisions between developed states and developing states were more than evident. Yet it was a big step forward because the developed states did accept the strict interpretation of the non-intervention principle with the exception to it in respect of colonial situations even though the negotiations of such a resolution took nearly nine years of hard work and non-intervention principle was the last one to be formulated. At the same time, it perhaps needs to be added, that compromises have a tendency to fall through and even though the developed states accepted resolution 2625 in principle, they continued to violate it

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2 General Assembly Resolution 2131(XX), General Assembly Official Records, 20th Session , Supplement 14, p.11.

3 Resolution 2625 (XXV), 188 3rd Plenary Meeting, 24th October, 1970.

4 See Generally, M.Sahovic, ed., Principles of International Law concerning Freindly Relations and Cooperation (Oceana Publications, Dobbs Ferry, New York, 1972).

in practice, the most blatant recent cases of unlawful intervention being Afghanistan (1979), Grenada (1982), Nicaragua (1981-84) and Panama (1989). These interventions were however sought to be justified through self-serving interpretations of the principle of non-intervention. In this background the Nicaragua case decided by the World Court assumes special significance for the Third World countries. For it unequivocally endorsed the perspective of the developing countries by emphasizing that Declaration 2625, enshrining the broad formulation of the principle of non-intervention represents the opinio-juris of the international community, thus, underlining the fact that both customary law and the United Nations System did not boast of exceptions to non-intervention principle, interpreting it strictly. The Nicaragua decision, in other words, offers an authoritative interpretation of the principle of non-intervention. In fact, the decision of the International Court of Justice (I.C.J.) on Military And Paramilitary activity of The United States, in and against Nicaragua (Nicaragua Vs. United States, 1986)[5] is a milestone in the jurisprudence of the principle of non-intervention. However, this landmark decision has not received adequate attention of Third World students of international law. The present dissertation seeks to fill this gap in a modest way.

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5 I.C.J. Reports, 1986.

The background[6] of the Nicaragua case is well known but a brief summary of events would not be out of place here. Nicaragua is a Central American state having common borders with El Salvador, Costa-Rica and Honduras. The country was in the throes of civil war between the Marxist government of Nicaragua under the leadership of General Ortega, representing the Sandinista forces (who had himself acquired the reins of the country, in the aftermath of a popular revolt, overthrowing the corrupt Samoza regime) and the "Contras" (allegedly representing the forces of democracy) when the Nicaraguan Government lodged its complaint, on 9th of April, 1984, with the I.C.J. accusing the United States of violating international law principles of non-use of force and non-intervention by financing, aiding, organizing, arming and controlling the Contra forces. Nicaragua also complained of certain direct acts of intervention and use of force by the United States; the acts constituted of over-flights by the United States government for the purpose of intelligence and food supply to Contras, bombing certain objectives like oil-installations, and mining of certain harbours.

The United States contended that the Court under Article 36 para 2, of the I.C.J. had no jurisdiction to resolve this dispute interalia on the ground that the

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6 Ibid., paras, 18-25, pp.20-23; paras 167-171, pp.88-92.

that the Vandenberg reservation[7] in its declaration to Article 36 para 2 of the I.C.J. statute prohibited the Court to proceed, unless all parties to the treaty; the United Nations Charter in this case effected by decision were also parties in the case before the Court. The Court accepted this argument and even barred the construction of the O.A.S. Charter as this would also have lead to the examination of the United Nations Charter. It however observed that treaties were not the only source of international law and that customary law was an equally important source which could be applied in the present case, the content of the customary law except for minor deviations being the same as that of the Charter law. And moreover, the Court noted, any progressive development in the United Nations law could be assimilated in the customary law. It then proceeded to make, Declaration 2625 as the basis of its decision, as in its opinion it represented the opinio-juris of the international community. The United States however refused to participate in the proceedings of the Court at the merit stage. So, the Court proceeded ex-parte guided by Article 53 of the Statue of the Court.[8] But it may be noted that at the

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7 Ibid., paras, 26-31, pp.23-26.

8 Article 53 of the statute of the ICJ:
"1. Whenever one of the parties does not appear before the court or fails to defend its case, the other party may call upon the court to decide in favour of its claim.
2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with articles 36 and 37, but also that the claim is well founded is fact and law."

jurisdictional stage itself the US had argued that its actions were justified in exercise of the right of collective self-defence with E1 Salvador because of Nicaraguan aggression and armed-attack against E1 Salvador, Costa Rica, and Honduras.[9] It claimed that Nicaragua had armed the Salvadorian rebels and had undertaken direct incursions against Hounduras and Costa Rica. However, the Court did not accept the plea of collective self-defence and found United States guilty of violation of customary law principles of (1) non-use of force[10] and (2) non-intervention in the internal affairs of Nicaragua[11].

II. OBJECTIVE OF THE STUDY

The Nicaragua decision touches on practically all aspects of the principle of non-intervention. To begin with, the Court stressed the derivative character of principle of non-intervention from three other basic principles of international law - sovereign equality of states, self-determination and non-use of force. In demonstrating the relationship of these principles, the Court significantly relied on the Friendly Relations Declaration passed by the General Assembly in 1970.[12] But

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9 Ibid., para 126, p.70.

10 Ibid., para 238, p.123.

11 Ibid., paras 242,249, pp.124, 127.

12. Ibid., para 202, p.106; para 212, p.11; para 252, p.128.

the Court did not spell out in detail the ramifications of the inter-relationship of the various principles. Thedissertation will therefore attempt to explore these at some length. An analysis of the inter-relationship is important in order to clarify the content and implications of the non-intervention principle as contained in General Assembly Declaration 2625 of 1970 for this inter-relationship is invoked in prohibiting all political, armed and economic interference, directly or indirectly, in the internal and external affairs of states as well as all assistance to the rebels in civil strife.[13]

The Court then went on to consider the exceptions which the United States submissions proposed, explicitly or implicitly, to the principle of non-intervention. As noted earlier, it however refused to carve out these exceptions to the principle confirming that its meaning and scope is the same as described in Declaration 2625 which makes it an absolute concept. For instance, according to the Court, it eliminated any possibility of pro-democratic invasion: it categorically rejected the United States view that intervention is valid in the affairs of a third state for reasons connected with the domestic policies of that country-in pursuance of human rights or on grounds of promoting for "self-determination", identified with the

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13 Ibid., para 205, p.108.

forces of "democracy".[14] A detailed analysis of the view which permits intervention for "self-determination" and "human rights" is however called for and will be taken up in the present dissertation.

In summary, the objective of the present study is to analyse the Nicaragua decision and draw out its implications for the principle of non-intervention. However, it is perhaps important to emphasise that in an important sense the objective of this dissertation is broader: the Nicaragua decision is herein made the occasion to consider doctrinal debates which have occurred around the principle of non-intervention. That is to say, the dissertation seeks to consider the Nicaragua decision only through situating it in the wider context of controversies surrounding the principle of non-intervention. At times therefore it explores issues which a formal analysis of the decision would not have permitted.

III. SCOPE OF THE STUDY

The scope of the present study thus revolves around analysing the Nicaragua decision in relation to diverse aspects of the principle of non-intervention. The dissertation will not however deal with collective intervention of states under the auspices of the United Nations.

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14 Ibid., para 206-208, pp.108-9; paras 257-268, pp.130-5.

Keeping in line with the objective and the scope of the study, the dissertation is divided into six chapters, i.e., including the introduction. Chapter II traces the origin of the principle of non-intervention. While Chapter III deals with its theoretical aspects of highlighting its meaning and inter-relationship with other principles of international law in the light of the Nicaragua decision. Chapter IV underlines the significance and implications of the Nicaragua decision with respect to the impermissible exceptions to the non-intervention rule in the back-drop of Chapter III. Chapter V further elaborates the ramifications of the Nicaragua decision in relation to nexus between intervention and self-defence, and, finally Chapter VI briefly states the general conclusions of the study.

CHAPTER II

DEVELOPMENT OF THE PRINCIPLE OF NON-INTERVENTION IN CONTEMPORARY INTERNATIONAL LAW

I. INTRODUCTION

The task of tracing the evolution and development of the principle of non-intervention in international law assumes importance in the light of the Court's decision in the Nicaragua case which is the focus of this study. Although the Court based its decision on the customary law source of international law it also referred to the development of the law under the United Nations Charter and the Charter of the Organisation of American States (O.A.S.), without construing the validity of the United States acts under either of the documents. It noted that "in this respect the Court must not loose sight of the Charter of the United Nations and that of the Organisation of American States, notwithstanding the operation of the multilateral treaty reservation. Although the Court has no jurisdiction to determine whether the conduct of the United States constitute a breach of those conventions, it can and must take them into account in ascertaining the content of the customary international law which the United States is also alleged to have infringed".[1] The reason can be found in the Court's argument that far from having constituted a marked departure from a customary international law which still exists unmodified, the (United Nations) Charter gave expression in this field to principles already present in customary international law, and that law has in subsequent

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1 I.C.J. Reports, 1986, para 183, p.97.

four decades developed under the influence of the (United Nations) Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it. The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations. The differences which may exist between the specific content of each are not, in the Court's view, such as to cause a judgement confined to the field of customary international law to be ineffective or inappropriate, or a judgement not susceptible of compliance or execution".[2]

By the above statement, the Court implied, firstly, that the sources of international law are interrelated therefore, the content of one may not be much different from the other. Thus, in the construction of one source of international law, the construction of the other is inevitable. And secondly the content of principles under construction are effected equally by the developments in the other sources of international law and therefore, while studying the content of the principles within one source it essentially requires assimilation of the development of the principle in the other sources also. Hence, if the development of the principle of non-intervention within the United Nations Charter regime represents opinio-juris (as

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2 Ibid., para 181, pp.96-97.

the Court stressed its importance for the customary law) and of the basic principles of international law within the state-practice, it can also be used to explain the contentcustomary law source. In this respect, the Court pointed to the Friendly Relations Declaration of 197Ø as representing the opinio-juris of the international community,[3] and therefore thought it justified to base its decision primarily on the said Declaration, for it reflected the codification and progressive development of law within the United Nations Charter regime as well as the customary law.

Thus, in order to understand the content, legal basis, meaning and scope of the principle of non-intervention in contemporary international law, it is necessary to examine its development in various sources of international law, as no source can be studied in isolation of the other. Besides, the development in all sources are interlinked. However, it is pertinent to point out that the development of the principle of non-intervention cannot also be viewed in isolation from certain other basic principles of international law, namely, the principles of non-use of force, self-determination of peoples and sovereign equality of States. As the Court, for instance, remarked, "the essential consideration is that both (United Nations) Charter and the customary international law flow from a

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3 Ibid., para 188, pp.99-1ØØ.

common fundamental principle outlawing the use of force in international relations". In other words, it is self-evident and inevitable that the other basic principles are the off-shoots of the principle of the prohibition of the threat or use of force in international relations.

According to Article 38 para 1, of the I.C.J. Statute, "the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;

(b) international custom as evidence of a general practise accepted as law;

(c) the general principles of law recognised by civilised nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determinations of rules of law".[4]

The paragraph above, thus, mentions four major sources of international law, namely-treaties, customary law, general principles of law and judicial decisions and teachings of the publicists. The starting point of the

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4 Statute of the International court of Justice.

present discussion will have to be the customary law source of international law because of the various treaties, the most important of which being the United Nations Charter, codifies the customary law with respect to the principle of non-use of force, and the principle of non-intervention appeared as an offshoot of the prohibition on threat or use of force.

II. CUSTOMARY INTERNATIONAL LAW AND THE PRINCIPLE OF NON-INTERVENTION

The Principle of non-intervention originated as a by-product of the prohibition on the state's absolute sovereign right to go to war, and later to use "force", to emerge as a separate, established principle of international law.

Initially there was a presumption of the legality of war as an instrument of national policy, as a form of self-help, emanating from the concept of unrestricted sovereignty of the state.[5] In the latter part of the period between 1815-1914, new trends in favour of pacific settlement of disputes appeared, trends which while they left the customary international law of the times basically unchanged deserve notice as a preparation for the Covenant of League of Nations and as beginnings of a process of eroding the "right of war". Terms like "aggressors" and "aggression"

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5 See generally, I. Brownlie, International Law and the use of Force by States (Oxford University Press, London, 1963).

started appearing, and states made constant use in the nineteenth century of various restricted forms of coercion in place of war giving rise to a body of legal doctrines on reprisals, pacific blockade, self-defence and intervention besides other measures of coercion. All these measures thus became other ways (besides war) of self-help which were employed for limited purposes. Thus, the first restrictions on the concept of use of force and limitations on unrestricted state sovereignty appeared. States undertook these measures to preserve any of their legal interests based on the theory of self-preservation or on the basis of doctrine of necessity, which is a much wider term than self-preservation and thus, a measure taken on its basis may not be restricted just to the protection of the legal interest of a state. Both these concepts either were asserted parallel to each other or some considered self-preservation as a form of doctrine of necessity. Self-defence, self-preservation and necessity were used as more or less interchangeable terms. Some even regarded self-defence as an instance of self-preservation. Hence, confusion was rampant in the institutions of the customary law of the period. One thing was clear however, that in spite of the fact that war had started acquiring a bad name, war could still be resorted to as a sovereign prerogative. In many works of the nineteenth century there is an untidy enumeration of grounds of intervention, which overlap the

customary international law developing on hostile measures short of war and does not reserve the term intervention for cases in which no formal state of war is created. By the last quarter of the nineteenth century the term intervention started covering forms of action which did not easily yield to classification either as self-preservation or under the doctrine of necessity, for example, intervention based on treaty rights, collective intervention and "humanitarian" intervention.

After the establishment of the League of Nations in 1919, the first limitation was brought in the "Jungle-Law" of the use of "force" (closely identified with the armed force) by regulating "war", in the shape of Article 1Ø, Articles 11-15 of the Covenant of the League. The Covenant made it incumbent on the member-states to not to go to war except in self-defence and if a state had to go to war first it had to exhaust the means of pacific settlement of disputes. No doubt, the customary right to go to war still existed but resort to war, or other types of force, was not justified in this period as a full blooded right to go to war, inherent in general international law. Further curbs were brought to the right to go to war, with an emergence of the concept of collective or unilateral sanction by states on report from the Council (although the Council did not itself have the power to impose such sanctions so, it had to be through the medium of states) if there was an "illegal

war", categorised as such, if means of pacific settlement of disputes were not exhausted. One can easily perceive the novel attempt by the Covenant to regulate war and forecast the United Nations system. One of the more significant changes, which the Covenant affected, was to make any war between states a matter of international concern. War was no longer to have the aspect of private dual but of a breach of peace which affected the whole community.

The Covenant referred only to "War" and "threat of war" but, apart from the limiting effect of such terms, war was not merely used in a technical sense, these words provided a general basis for determining an aggressor; the criterion for determining the aggressor was whether the Procedure for pacific settlement of disputes had been employed or not and, whether the war was in self-defence or not. Thus a trend to prohibit use of "force" or "aggression", rather than just only "war", was discernible whether that force amounted to reprisal, preemptive strike, naval blockade or intervention. The Covenant thus nourished the view that the use of force was illegal, not only when directed to conquest and unjustified acquisitions but also, as a means of enforcing rights, that is, self-help undertaken for self-preservation was restricted. One can say that Article 10 states a general principle that aggression was unlawful but, the states used the term "war" in the Covenant to suit their interest as to when war was to be understood only is formal,

techincal sense or when as aggression. The Covenant of the League in the year 1919 stood against the customary law by providing a qualification on the right to resort to war (even if taken in formal technical sense), which was exceptional, in the background of the general feeling that war was still an absolute prerogative of a sovereign state, and that is perhaps one of the reasons why the Covenant failed. Nevertheless, one can not negate the truth that the Covenant was the source of and inspiration for later developments which in sum destroyed the presumption in favour of the lawfulness of war and use of force, thus, changing the content of customary law in the period between the two World Wars to the extent that in 1945 at Nuremberg and Tokyo it was possible to argue that unilateral resort to any type of aggression (the extreme case of which was the war) in 1939 and the following years was illegal unless a necessity for self-defence was proved. It can easily be perceived, from the development so stated, that as a necessary corollary to the principle of non-use of force the principle of non-intervention, sovereign equality of states and the self-determination of the peoples would follow and, non-intervention would be a prerequisite to the concepts of sovereign equality and self-determination. Thus, development of one principle of non-use of force led to the establishment of the other principles- a remarkable step forward from the time when war was considered a sovereign

prerogative. However, this phenomenon initiated in 1919 developed slowly starting from the Treaty of Mutual Assistance, Geneva Protocol of 1924, Locarno Treaty (1925), resolutions passed in the League Assembly in1925 and 1927 and also, resolutions passed in the conference of American States (1928) and the high water-mark was the General Treaty for the Renunciation of war signed on August 27, 1928, more commonly known as "The Pact of Paris".

The 1928 Pact of Paris, popularly known as the Kellogg-Briand Pact, prohibited war as an instrument of national policy (Article I), not only in its technical and formal sense but also in its legal connotation and, even armed measures short of war, which were primarily measures of self-help like armed intervention and reprisal, except for self-defence, too were prohibited. The subsequent practice of parties to the Pact leaves little room for doubt that it was understood to prohibit any substantial use of armed force. Brownlie substantiates this and asserts that even the threat to use force was prohibited under the Pact.[6] Only war allowed was one in self-defence as is evident by various reservations to the Pact. Thus, the world community consensus outlawed the use of "force" as an instrument of national policy and just not "war".

The Kellogg-Briand Pact contributed to the progressive development of the customary law, as the instrument was

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6 Ibid., Chapters V and VI.

ratified or adhered to by sixty three states and, in order to bring the pact into force between the states of Eastern Europe, a protocol with the object was signed at Moscow in 1929 and thus the pact was of unreserved legal obligation, since only four states, international society as it existed before World War II, were not bound by its provisions. More important was the fact that even United States joined the pact, which is much more than can be said for the universal membership of the League. Thus, the pact portrayed the legal obligation on states to renounce force and, this had considerable effect on state practice also. In the years that followed numerous treaties were concluded which affirmed the pact obligation. The Stimson doctrine of non-recognition (1932) rested on the Covenant of the League and the Pact. It also provided a legal basis for the Tokyo and Nuremberg trials. Its obligations although disregarded by some (Japan and Germany), were repudiated by none. State practice confirmed the opinio-juris sive necessitis represented in the Pact. But, it took another World War for the new principles of customary law, which had been in a state of flux, to crystallize, be sorted out in the Nuremberg and Tokyo trials and finally be adopted in the United Nations Charter.

III. THE UNITED NATIONS CHARTER

The United Nations, established in 1945, evolved in its Charter a collective security system the backbone of which were the principle of non-use of force,[7] sovereign equality of states,[8] non-intervention[9] and equal rights and self-determination of people.[10] All measures of self-help in 1945 were transferred to the Security Council [11] and prohibition of such self-help by states were couched in terms of duty leaving only the unilateral action of self-defence with the member-states. [12]

The Charter, in brief, codifies the customary law principles of non-use of force, non-intervention, self-determination of peoples and sovereign equality of states, as they evolved over a period of time from the establishment of the League. Even if this is refuted still the addition of these principles in the Charter represents the opinio-juris of the international community and since all the members of the international community as existing at that time, joined the United Nations except for the enemy states;

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7 United Nations Charter Article 2, para 4.

8 Ibid., Article 2, para1.

9 No express mention of it is there in United Nations Charter, except in Article 2, para 7.

10 United Nations Charter, Article 1, para 2.

11 Ibid., Chapter VII, Articles 39-50.

12 Ibid., Article 51.

the universality of the Organisation was established demonstrating enough state practise to make the principles embodied in Article 2 of the Charter as the general international law. The difference between the principles embodied in the Charter and customary international law is that of a mere technicality. The Charter forms the essential juridical basis of the world legal order and of world peace. The United States at the jurisdiction stage of the Nicaragua case asserted that the Charter subsumes and supervenes the principles of customary and general international law.[13] However, the Court pointed out that Nicaraguan claims could not be dismissed under the principles of customary and general international law simply because such principles have been enshrined in the texts of conventions relied upon by Nicaragua "the fact... principles recognised as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and apply as principles of customary law. Principles such as those of non-use of force, non-intervention, respect for the independence and territorial integrity of states and the freedom of navigation continued to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated".[14] The Court reiterated the same at the merit

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13 I.C.J. Reports, 1986, paras 172-173, pp.92-3.

14 I.C.J. Reports, 1984, para 73, p.424.

stage of the proceedings.[15] Consequently, with prohibition of the use of force enshrined in Article 2 para 4 of the Charter even intervention as a form of self-help was abrogated and together with the regime of self-determination of peoples and sovereign equality of states, it was established as a fundamental norm of the United Nations system (besides being so of customary law) although it has not been expressly mentioned in the Charter regime. However, it is generally agreed that Article 2 para 7[16] of the Charter incorporates the principle of non-intervention because if the Organisation which has the responsibility of maintaining international peace and security is prevented from interfering in the domestic matters of the state it is obvious that such a duty exists on the states as well under the United Nations system and the customary law, as already seen. However, according to the United States (special committee, 1965) Article 2 para 7, of the Charter just refers to the delimitation of jurisdiction between the

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15 I.C.J. Reports, 1986, paras 174-178, pp.93-6.

16 Article 2, para 7 of the United Nations Charter reads, "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

United Nations and the member states.[17]

General Assembly Resolutions:

Till now we were dealing with the aspect where the Charter codifies the customary law, but the Charter also leads to the progressive development of the customary law, a fact acknowledged by the Court. The evidence of such progressive development under the Charter can be found in the resolutions passed in the General Assembly, as it represents the international community. Therefore, for the above reasons, the Court was guided by Resolution 2625 (XXV) of 1970 in arriving at its decision, as it represents the opinio-juris of the states. The same is based, in so far as non-intervention is concerned on Resolution 2131 (XX), of 1965-"Declaration of Inadmissability of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty".

However, Resolution 2131 cannot be said to represent the opinio-juris of the states because, the United States, one of the leading members of the developed world, although voting for it added a reservation to the effect that it was a mere statement of its political intentions and did not have any legal validity. No such reservation was attached

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17 T. Mitrovic, Non-Intervention in Internal Affairs of a state in M. Sahovic, ed., Principles of International Law concerning Friendly Relations and Cooperation, (Oceana Publications, Dobbs Ferry, New York, 1972), pp.219-75 at p.226.

by the United States to the Friendly Relations Declaration and moreover, it was passed by the developing and the developed states in unanimity by consensus.[18]

However, it can be argued that the General Assembly resolutions are merely persuasive and thus, have no binding effect, and therefore, are of a doubtful legal validity. One cannot however negate the importance of these resolutions as they are an effective evidence of the state practice and, in the light of the Nicaragua case they also represent opinio-juris, which transforms their persuasiveness into producing a legal effect. The fact does not need underlining, that the Court based its decision mainly on the contents of the Friendly Relations Declaration (197Ø).

From the above discussion one can conclude that the principle of non-intervention has a firm legal basis in the customary law and the law of the United Nations. It is pertinent to mention here that the principle of non-intervention has universal legal basis as it is equally enshrined in various other treaties and given its due importance in judicial pronouncements too.

IV. TREATIES BESIDES THE UNITED NATIONS CHARTER

There are various treaties - multilateral and bilateral which impose non-intervention as a duty upon the states. The United Nations Charter discussed above is of universal

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18 I.C.J. Reports, 1986, para 2Ø3, p.1Ø7.

application but the principle is also found in regional treaties.

(A). Regional Organisations:

The most notable being the Charter of Organisation of American States where Article 18 reads as follows: "No State or group of states has the right to intervene directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the state or against its political, economic and cultural elements".[19]

The Charter of Organisation of African Unity also refers to the non-intervention principle in Article 3 para 2.[20] So does the Covenant of the Arab League which states.

> "Every member state of the League shall respect the form of government obtaining as one of the rights of those states and shall pledge itself to take any action tending to change that form."[21]

(B) Bilateral Treaties:

Several bilateral treaties also refer to the non-intervention principle but special mention needs to be made to the 1954 treaty between India and China which later came

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19 Mitrovic, n.17, p.254.

20 Ibid.

21 ibid.

to be known as "Panchsheel" Principles. The principles enumerated are:

(1) Mutual respect for each other's territorial integrity and sovereignty;

(2) Mutual non-aggression;

(3) Mutual non-intervention in each other's internal affairs;

(4) Equality and Mutual benefit;

(5) Peaceful co-existance.

All these treaties assert that the principle of non-intervention constitutes a basic postulate of contemporary international law.

V. JUDICAL DECISIONS

Judicial pronouncements of the International Court of Justice have been perceptive of the changing currents of international thoughts and have censured all interventionary activity by categorical pronouncemnts like in the Corfu Channel case where following the dispute between Great Britain and Albania the Court stated -"the Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past given rise to most serious abuses and such as cannot, whatever be the present defect in international organisation, find a place in international law".[22]

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22 I.C.J. Reports, 1949, p.35.

The I.C.J. affirmed the impermisibility of intervention in Haa De La Torre case in the context of the right to grant diplomatic asylum. The Court observed: "the decision to grant diplomatic asylum implies derogation of the soverignty of the states in which the refugees had committed his crime; This decision permitted the criminal to escape punishment by the state and constitutes intervention into a domain which falls exclusively within the jurisdiction of the teritorial state. Such a derogation of territorial soverignty be admitted unless its legal basis was established in every single case.[23]

Thus, non-intervention is equally a legal principle of customary law, as of the United Nations system or treaty law generally. In fact the origin of the non-intervention principle lies in customary law, where it is inseparably related to the principles of self-determination, non-use of force and sovereign equality of states. But, no discussion of any one source can take place in isolation of the other, as the development of the principle in any one source has been mutually affected by the development in the other sources, as seen above. Therefore, the Court rightly referred to the U.N. and O.A.S. Charters, without pronouncing upon the validity of the United States actions under them, while construing the customary law principle of non-intervention.

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23 Mitrovic, n.17, p.258.

CHAPTER III

PRINCIPLE OF NON-INTERVENTION: THEORETICAL ASPECTS

I. INTRODUCTION

The task of establishing non-intervention as a fundamental principle of contemporary international law has already been undertaken in Chapter II. But, there still lies the arduous task of clarifying its theoretical aspects: meaning, theoretical or legal basis, contents. It is necessary to perform this task for only once its theoretical aspects are clear will we be able to identify the ramifications and operation of the principle of non-intervention. The I.C.J. undertook this task while delivering the judgement but its major focus was in pointing out the ramifications of the principle. Thus, the present chapter will be devoted to examining in detail the theoretical aspects of the principle of non-intervention and see how far the Court has endorsed these aspects, in whatever little attention it has devoted to this aspect, Also, the attention devoted is mostly confined to the field of intervention in the internal affairs of a state with respect to the situation of civil strife and the role of the third-state in encouraging and abetting an internal rebellion against the government. Moreover, although the Court's decision is based on the customary law source, (these conclusions are in line also with other sources) yet as the Court itself remarked, "the differences which may exist between the specific contents of each are not, such as to cause a judgement confined to the field of customary

international law to be ineffective or inappropriate, or a judgement not susceptible of compliance or execution".[1] Besides, the basis of all the discussions of the Court was the Friendly Relations Declaration (1970), which reflects the development of the law in the United Nations System as well as the customary law, the two major sources of the contemporary law; Thus the Nicaragua decision rightly reflects the theoretical aspects and to that extent, event the ramifications or scope of the principle of non-intervention in the contemporary law. This conclusion is further substantiated by the submission in the previous chapter, that all the sources of law are interrelated and the development in any source cannot be to the exclusion of other sources; Thus, the content of one necessarily reflects the content of the same principle in other sources also.

Since the basis of the Court's decision was the Friendly Relations Declaration (1970), the present study will also be undertaken in the light of the same resolution. Rightly so, as already said, it represents the opinio-juris and the development of the law in the United Nations regime, and it was passed unanimously by consensus between the developing and the developed states.[2]

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1 I.C.J. Report, 1986, para181, p.97.

2 M. Sahovic, "Codification of the legal principles of Co-existence and the Development of Contemporary International Law", in M. Sahovic ed., Principles of International Law concerning Friendly Relations and Cooperation (Oceana Publications, Dobbs Ferry, New York, 1972, pp.9-50.)

II. INTERVENTION : MEANING

The definition or meaning of the term non-intervention has been ever elusive. Scholars try to define non-intervention by first trying to clear the concept of "intervention". In this chapter, therefore, the endeavour will be to clarify the concept of "intervention" through understanding the legal basis of the principle of non-intervention in contemporary international law. In fact the legal or theoretical basis of non-intervention principle establishes, not only its meaning but also its content and ramifications.

Definition of 'Intervention' : A Problematic Task

There are several difficulties in defining the term "intervention". One of the chief obstacles, apart from the misconception about its genesis, is the lack of consensus on the meaning and essence of the term intervention in the modern context. According to Moore, [3] "this consensus can not be achieved due to intellectual confusion in theorising about intervention". The principle sources of this confusion, according to him, are terminological confusion and contextual fallacy.

Terminological confusion, according to Moore, arises because the term "intervention" is used in several senses. Either has broad or too narrow a connotation is given to the term or subjective stand overehadge the understanding of the

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3 J.N. Moore, Law and Indo-China War (Princeton University Press, Princeton, New Jersey, 1972), pp.118-9.

term. The damage, which such confusion can cause is illistrated by Moore with respect to the broad definition adopted by Talleyrand. Talleyrand defined non-intervention as "a mysterious word that signifies roughly the same thing as intervention".[4] According to this definition, all participation in international affairs would amount to intervention. Such definitions lead to two problems. Firstly, their all encompassing nature can hardly make them useful tools for analysis and decision-making. Secondly, as Rosenau points out, "such a conception, for example, leads to the absurd conclusion that the United States avoidance of the conflict in Indo-China (Vietnam) in 1954 and its extensive involvement in that part of the world a decade later both constitute intervention".[5] Thus, such broad definitions fail to help discern an interventionary situation from among diverse situations.

On the other hand, by contextual fallacy Moore means that a determination of intervention is made without referring to the relevant contexts. That is to say, the context might justify an act of intervention and the failure to recognise such contexts is the contextual fallacy. In other words, the contextual fallacy is the failure to indicate the several conjunctures which can occasion intervention or a situation where intervention is alleged. And therefore, studying the context is important as it helps

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4 Ibid., pp.122-3.
5 Ibid., p.123.

a state to define its national policy in line with the community interest, reflected in these contexts.

Thus, only if the diversity of issues and contexts are recognised can common policy questions be raised and answered in relevant terms, according to Moore. An instance of contextual fallacy is the strict interpretation of the non-intervention principle by the absolutists like Hall.[6] Oppenheim's definition of intervention shows how meaningless a generalized definition is. He defines intervention as a "dictatorial interference by a state in the affairs of another state for the purpose of maintaining or altering the actual condition of things". This definition does not specify the various situations of intervention, requiring different and varied responses from the international community. Moreover, this definition is too narrow, for it encompasses (apparently) only acts involving use of armed force. Brierly made an effort to avoid terminological confusion but, there still remains the pitfall of contextual fallacy and adoption of narrow definition. He writes that, "every act of interference in the internal affairs of a state need not automatically imply intervention. For intervention it is essential that the act of interference must have an imperative form: it must be either forcible or backed by the threat of force", wherein the term "forcible" implies only the use of armed force".[7]

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6 See Chapter IV.
7 J.L.Brierly, The Law of Nations, (Oxford, 1958), p.308.

The reason for a narrow conception (terminological confusion, contextual fallacy and identification of force with armed force) of intervention were threefold:

(1) The conception of intervention as an exclusively military (armed) means was due to the fact that force had always meant armed force and, it was generally manifested in three basic cases: intervention in civil strife in other states (the most drastic form of intervention), armed intervention in a war in progress among other states and the various forms of "humanitarian interventions". All these were in fact armed and military interventions, so it followed that intervention only occurred in the event of the use of force or threat of use of force.

(2) The narrow concept derived from the idea that intervention could only take place in mutual relations among states, since at that time there was no organized international community and the question of delimitation between domestic and international jurisdiction had not as yet become an important issue.

(3) The legal basis of non-intervention were not traced to inter-relationship of various principles of non-use of force, self-determination of peoples and sovereign equality of states. This aspect is not only ignored by the publicists who adhered to the narrow conception of the term intervention, but also by publicists like

Hall, who adopt an absolute approach, and therefore, commit contextual fallacy.

The context in which intervention is possible signifies certain values. But, there exist divergent value-systems, which are manifested in the normative systems[8] recommended by certain publicists - Moore, Farer, Falk - to the international community to curb interventionary activity, this creates further difficulties in establishing a clear concept of intervention or non-intervention principle. For instance, Moore, speaking contextually, recommends a normative system which like the traditional law lays an undue emphasis on the established government.[9] But, Farer[10] and Falk[11] do not. Similarly Moore allows intervention in the context where promotion of human rights is warranted but, Falk does not. These anomalies can only be explained in terms of the perception of values preferred by a scholar. Also, even if the values preferred are the same, the

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8 See Chapter IV.

9 J. N. Moore, "Towards an applied Theory for the Regulation of Intervantion" in J.N. Moore ed., Law and Civil War in the Modern world (The John Hopkins University Press, Baltimore 1974), pp.3-37.

10 Farer, "Harnessing Rougue Elephants: A short discourse on Foreign Intervention in Civil Strife, Havard Law Review, vvol.82, (1969), pp.511-541. Also see T. FArer, Columbia Law Review, vol.67, (1967), pp.266-79.

11 R.A. Falk, "The Legal Status of the United States International Law of Civil War, (The John Hopkins University Press, Baltimore, 1971), pp.224-323. See pp.227-30; 311-312.

specification of such values would be different with respect to different publicists. For instance Moore foresees self-determination in reference to the pro-democratic forces, whereas Farer and Falk, to promote self-determination, at the first instance, prescribe non-intervention and if intervention has to be undertaken for the purpose of self-determination it would be in support of wars of national liberation or anti-aparthied movements, a context which has community consensus. In spite of the above mentioned discrepancy, both sets of publicists proclaim that the values chosen maximise community interest and therefore in context of such values intervention should be allowed. Thus, the problem of contextual fallacy is further complicated by the fact that, the values chosen to condone intervention might be different, that is, value perception might be different,and, even if the same, the specifications of the values might be altogether different.

In the opinion of the publicists, the values chosen tend to maximise the interests of the international community but, they do it essentially with their national interests in mind. An equilibrium point which maximizes both these sets of interest in a given situation is generally sought to be reached. This search for equilibrium gives rise to difference because each publicist has his own perception of both community and national interests. However, as already noted most American publicists largely

share each others perception about international community interest and national interests (even though the specifications of the values proposed by them are different). They often tend to treat the two as identical. This is not to deny that sometimes acute differences exist between the Western publicists themselves, but these differences are not value-based.

The Third World publicists have basic differences with Western writers. Their perception of both national and international community interests do not converge with those of their Western counterparts. Basically they prefer a strict interpretation of the principle of non-intervention except in the context of self-determination of the colonial people and like situations-a value that according to them, is of community interest. The context thus is restricted primarily to a single value of community interest of course this value can change and more can be added in (course of time if community consensus is there), unlike their Western counterparts who would allow intervention in several contexts like that of human rights-context not considered right for intervention by the Third World States.

Given the differences in value perception, it is understandable that divergent understandings of certain basic principles of international law will also exist. For instance,the Western understanding of the first principle of sovereign equality of states is not shared by the Third

World. Western publicists "water-down" this principle whereas third world writers consistently uphold to the Third World countries, the principle of sovereign equality of states is an instrument to protect themselves from the interventionary activity of the imperialist countries. Therefore, they interpret it strictly.

The fundamental principles of international law like sovereign equality of states, self-determination, prohibition of the threat or use of force, and non-intervention are closely linked to one another in their content with each other, and therefore the understanding of one reflects necessarily on the other. In fact this inter-relationship forms the theoretical or legal basis of the principle of non-intervention which reflects the meaning, content and scope of the non-intervention principle, as said earlier; Thus, differences in the understanding of these interlinked principle would ultimately result in the differing perceptions of the content of the principle of non-intervention.

Initially, most of the developed states, as the debates in the special committee, dealing with the formulation of the non-intervention principle in the Friendly Relations Declaration (197Ø), show, did not favour a broad formulation of the principle of non-intervention (same for the other principle also) therefore they opposed the majority effort to create a theoretical basis based on the interlinkage of

self-determination, sovereign equality of states and non-use of force for the broader formulation of the non-intervention principles by emphasising that no express provision of the non-intervention principle existed in the United Nations Charter and that, the basic provision of the Charter concerning the said principle was contained in Article 2 para 4, dealing with the principle of non-use of force, thus trying to narrow down the legal basis of the principle, which was done more so, as the Western understanding of the term force, within Article 2 para 4, is associated with armed force. [12]

On the other hand, the Third World and Socialist states did not deny that non-intervention derived from the principle of non-use of force as represented under Article 2 para 4 of the Charter, but its real basis in modern law lay in sovereign equality of states and self-determination of peoples, besides the principle of non-use of force. Thus, it was inevitable that the principle of non-intervention would have a broad formulation.[13] The linkage between the various international law principles has been adequately highlighted in the 1970 Friendly Relations Resolution - Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States, in accordance with the Charter of the United Nations. This

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12 T. Mitrovic, "Non-Intervention in the Internal Affairs of States" in Sahovic, n.2, pp.219-75, See pp.226-7.

13 Ibid., pp.233-6.

resolution relied upon by the Court, to specify the meaning, content and scope of the principles of non-interference deals specifically with seven principles of the United Nations Charter, namely prohibition of the threat or use of force, peaceful settlement of disputes, non-intervention, duty to cooperate in accordance with the Charter, equal rights and self-determination of the peoples, sovereign equality of states, and the duty to fulfill in good-faith obligations assumed under the Charter.[14] According to Sahovic,[15] the discussions at the United Nations, that form the travoux preparatories of the Declaration, reveal that the principles formulated in the United Nations declaration purport to be interdependent. He asserts,that "it was soon realised that it was difficult to separate their component part", therefore Article 2 of the General part of the Declaration was adopted in the following terms:

> In their interpretation and application the above principles are inter-related and each principle should be construed in the context of other principles.

In the special committee of 1965, the question of interdependence of the diverse principles, especially in the context of the principle, of non-intervention,was raised time and again. As already observed, the developed states were not in favour of identifying the legal basis of the

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14 See Resolution 2625 (XXV) of 1970.

15 Sahovic, n.2, p.145.

non-intervention principle with this inter-linkage. American delegates refused to accept this understanding of linkage alleging that this conception of the principle of non-intervention was relevant only within the framework of regional Latin American Law. But, by the end of nine years of hard work in formulating the other principles enshrined in formulating the other principles enshrined in the Resolution there emerged the understanding that the scope and content of the principle of non-intervention should only be perceived in the light of its co-relationship with other principles of international law embodied in the Declaration. For the scope and the content of the principle of non-intervention could not be determined without such inter-relationship or inter-linkage being its basis, and therefore, it was the last one to be formulated after compromises on others, with respect to their contents, was achieved.[16] So, the next step is to highlight the inter-relationship which exists between the principle of non-intervention and those of self-determination, sovereign equality of states and non-use of force, all considered as the basic principles of the contemporary international law. This task will be undertaken in reference to the Friendly Relations Declaration (197Ø).

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16 Mitrovic, n.12, pp.219-23.

III. THEORETICAL BASIS OF THE PRINCIPLE OF NON-INTERVENTION

Explaining the inter-relationship between the principles of non-intervention, self determination, non-use of force and sovereign equality of states would go a long way towards clarifying the theoretical basis of the principle of non-intervention, broadly acceptable to the international community today, more particularly to the Third World countries. The inter-relationship between the principles of non-intervention, self-determination of people, non-use of force and sovereign equality of states was also pointed out by the Court.[17]

The principle of non-intervention is the corollary of the principles of sovereign equality of states, self-determination, and the prohibition of the threat or use of force (non-use of force) as it is amply demonstrated in the Nicaragua decision.[18] To begin with, first the principle of sovereign equality of state would have to be the object of our discussion.

(A) Sovereign Equality of States:

As already said in Chapter II basically all norms flowed from the principle of non-use of force in the customary law. Therefore it is obvious that all principles

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17 I.C.J. Reports, 1986, para 212, p.41, para 252, p.128.

18 Ibid., para 202, pp.106-7, paras226-252, pp.117-28.

are inter-linked and the more adequate understanding of sovereignty will have to be related to a discussion of the principle of the prohibition on threat or use of force, which modifies the content of the principle of sovereignty as understood traditionally.

Traditional international law neither knew nor understood the concept of sovereign equality of states. As pointed out in Chapter II the order of the day was the rule of the thumb that the right to go to war and other measures of self-help like intervention were the sovereign prerogative which none could encroach. However slowly and steadily this concept changed and the trend was evident from the beginning of the twentieth century, with the establishment of the League of Nations. Thus, with the curbs brought on the use of force, whether war, intervention, preemptive strike or any like measure except for self-defence, sovereignty became a relative concept as primarily these measures were adopted to respect the sovereignty of the other states. This change, if viewed in the historical background was due to the fact of the emergence of modern nation-state, as a by-product of the French Revolution and the American War of Independence; disintegration of feudalism and birth of Capitalism. Thus, in the feudalistic stage sovereignty was an absolute concept but with the rise of a nation-state it slowly evolved into a relative concept.

The concept of respect for the sovereignty of other states ruled out any possibility of intervening in the affairs of the other states or violating the territorial integrity or political independence of the state. There prevail two schools of thought the "absolutists" represented by Hobbes, Hegel and Austin, who viewed sovereignty as absolute and, the "relativists" like Kelsen, who view the concept of sovereignty in relation to the sovereignty of other states. Be that as it may, the United Nations Charter accepted this trend of respect of sovereignty of other states, which really pointed towards two separate concepts: (1) the idea of equality, and, (2) the idea of sovereignty, with the result that the term "sovereign equality of states" emerged under Article 2 para 1, of the Charter; Thus, the concept of unrestrained sovereignty of the states was curbed both in customary law and the law of the United Nations by the emergence of the concept of sovereign equality of states, the essential ingredient or corollary of which is non-intervention. But, in the special committee debate one could perceive that most of the Western States regarded sovereign equality of state as a jurisdictional term, that is, sovereignty existed in law (all states have equal rights and duties before law and the law would regard them alike) but in actual fact their could not be sovereign equality because factually the powerful developed states, on basis of their strength, had more of rights and duties in

international relations than the smaller states (the idea behind this argument was to adopt a narrow formulation for the principle of sovereign equality of states, which would narrow down the contents of the principle of non-intervention, non-use of force and self-determination considering, that they are inter-related, and thus, carve out greater exceptions to these principles, providing more freedom of action to the developted states). This argument, however, was rejected by the majority[19] and it was established that sovereign equality of states exists both in fact and law, thus validating respect for the sovereignty of the other states in the customary law and addition of the term equality offer the term sovereignty in the United Nations Charter. Moreover, this also demonstrates that there is no antinomy in addition of the term equality after sovereignty, because, previously sovereignty was a an absolute, all pervasive concept but now sovereignty has become relative and is seen in relation to the sovereignty of other states. Thus, it cannot be said that there is an antinomy between the two terms adopted in the Charter-sovereignty and equality of the states.

(B) Principle of non-use of force

As emphasised in Charter II and above, it is very

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19 A. Magrasevic, "The Sovereign Equality of States" in Sahovic, n.2, pp.171-218, see pp.175-9.

difficult to separate the fundamental principles of international law - self-determination, sovereign equality of states, non-intervention and non-use of force, as their development and understanding are so linked to each other that talking of one essentially leads to the other. This is more true of the principle of non-use of force and sovereign equality of states. It is very difficult to say whether the principle of sovereign equality of state emerged prior to the principle of non-use of force or vice-versa. It is right to say that the development took place simultaneously as the roots of both are in the development of the phenomenon of the nation-states and the rise of Capitalism, thus, binding the two inextricably as evidenced through Bryan Treaties (1899), Kellogg-Briand Pact (1928) and the United Nations Charter (1945). In between lies the principle of self-determination of the peoples as basically the self-determination of the peoples lead to establishment of the sovereign equality of states, where sovereignty lies in the people and is not just attached to its territorial limits. An Nincic has observed the sovereign equality of the states is the higher manifestation of the self-determination of peoples.[20] The corollary or the by-product, of the principle of non-use of force, sovereign equality of the states and self-determination of peoples, is

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20 Djura NInic, The Problem of Sovereignty in the Charter and in the Practice of United Nations, (Martinus Nijhoff, The Hague, 1970), pp.78-9.

the principles of non-intervention. The interrelationship between the principles of sovereign equality of states, non-use of force and non-intervention is evident in the contents of the principles of non-use of force and sovereign equality of states under the Friendly Relations Declaration (197Ø), where the principle of non-use of force prohibits intervention directly undertaken for war of aggression (after stating the general principle) and propaganda for such wars, forcible intervention in the existing international boundaries of another state or as a means of solving international disputes or to violate international lines of demarcation (example armistice) or for reprisals or to deprive peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determine and freedom and independence or for military occupation or for acquistion of territory.

Further, the principle prohibits even indirect form of forcible intervention by stating that every state has the duty to refrain from organising or encouraging the organisation of irregular forces or armed bands, including mercenaries for incursion into the territory of another state and, by requiring every state to refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organised activities within its territory directed towards the commission of such acts, when the acts

referred to involve a threat or use of force. The above contents reflect that due respect to the principle of sovereign equality of states is paid to and unless force is not used, nor intervention undertaken, sovereign equality of states can not be maintained.

The only intervention allowed is for the maintenance of international peace and security (also taken note of under the principle of non-intervention) and for self-defence as is evident in the principle of non-use of force, para 12: "nothing in the foregoing paras shall be construed as enlarging or diminishing in any way the scope of the provision of the Charter concerning cases in which use of force is lawful". Since the use of force as collective action of states is taken care of in allowing the maintainence of international peace and security under the United Nations umbrella, this provision refers to unilateral forcible intervention by the states which is allowed only in self-defence as contained in Article 51 of the Charter which enshrines the customary law of self-defence.

There are two principal standpoints on interpretation of the provisions of the Charter and customary law with respect to principle of non-use of force and self-defence. One view-point is in favour of interpreting the provisions of the Charter and customary law with a view to ensuring a broad freedom for the states to resort to force by giving a narrow interpretation to the term "force" under Article 2

para 4 of the Charter or customary law identifying it with only armed force and at the same time allowing all types and forms of force in self-defence and not restricting the concept of armed-attack. The reason is that its proponents believe in the "watered-down" version of the principles of non-use of force, non-intervention and sovereign equality of states and self-determination, in spite of agreeing that they are inter-linked unlike the propogonists of restrictive freedom view. The other view-point is in favour of interpreting them with the view to restrict the freedom of the state,by giving a wide interpretation to the term "force" under Article 2 para 4 and customary law, at the same time restricting the concept of self-defence to armed-attack, in customary law, as Article 51 of the Charter also refers to the customary law in relation to self-defence.

(i) Broad Freedom View:

Most of the Western States contend that the term "force" is understood in terms of armed-force, thus, giving a narrow construction to the principle of non-use of force under customary law and as codified under the United Nations Charter in Article 2 para 4, "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations".

Publicists like Julius Stone [21] and Bowett [22] subscribe to the above view giving a broad right of forcible self-defence (the only permissible unilateral use of force under the customary international law and the Charter) and as Bowett contends Article 2 para 4, of the Charter leaves the customary law right of self-defence, mentioned in Article 51 of the Charter, intact. These publicisits therefore do not restrict the right of self-defence to armed actions.

(ii) Restrictive Freedom View:

On the other hand, the developing states insist, substantiated by publicists like Brownlie [23] that, "force" has to be understood in the broadest sense of the term whether under the customary international law or Article 2 para 4, or the United Nations Charter. Consequently, prohibition of force includes all types of force-political, economic and armed. Thus, use of force in self-defence is given a narrower meaning, against armed-attack alone. The Friendly Relations Declaration (197Ø) in its Preamble recalls that, "the duty of state to refrain in their

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21 J. Stone, Legal Controls of International Conflict (Stevenson & Sons Ltd., LOndon, 1959) Second edition, p.244.

22 D.W. Bowett, Self-Defence in International Law (Manchester University Press, Manchester, 1958), Second edition, pp.24, 182-6.

23 I. Brownlie, International Law and the Use of Force by States (Oxford University Press, London, 1963) Second edition, p.273.

international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any state"

(C) Principle of self-Determination:

The principles of non-intervention and self-determination, as already said, are inter-related. The fulfillment of the latter rests on the affirmative assertion of the former. A country can not determine its internal or external affairs if other countries, more powerful and stronger were permitted to intervene in its affairs. The principle of non-intervention, therefore, derives its rationale as it were, from the principle of self-determination. This means that the principle of non-intervention and its ramifications would become clear, with an adequate understanding of not only the principle of sovereign equality of states and non-use of force (as already seen) but also the principle of self-determination. It is therefore, necessary to briefly examine the principle of self-determination.

The principle of self-determination, like sovereign equality of states and prohibition of threat or use of force, is a pillar on which contemporary international law rests. Again, like the principle of sovereign equality of states, the origin of the idea of self-determination of peoples has to be traced to the revolution of late

eighteenth and early nineteenth century in Western Europe which ended feudalism and lead to the emergence of nation-states. Impetus was given to it by the French Revolution and the American War of Independence. How the process of self-determination manifesting in state sovereignty evolved can be explained by the fact that the rise of the nation-states led to the emergence of the principle of nationality. The principle of nationality was that each nation should be recognised to enjoy the right to form its own state and thereby determine its own future. Basically a political principle, it became a legal principle of traditional international law, by the recognition of the right of secession. However, the principle was not incorporated in the Covenant of the League of Nations due to British and French opposition, reason obviously lay in the protection of their colonial interest and imperialistic policies. After the second World War (at the insistence of the Soviet Union, some Latin-American and Arab States) the principle of self-determination was adopted in Article 1 para 2[24], and Article 55,[25] of the United Nations

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24 Article 1 para 2, of the United Nations Charter reads, "To develop friendly relations among nations based on the respect for the principle of equal rights and self-determination o f peoples, and take other appropriate measures to strngthen universal peace ...".

25 Article 55, of the United Nations Charter reads, "With a view to the creation of conditions of stability and well-being whichh are necessary for peaceful and friendly relations among nations based on respect fo the principle of equal rights and self-determination of peoples ..."

Charter. No one can doubt the legality of the principle of self-determination of peoples whether under the United Nations Charter or customary law in the present day international law especially now that it has been formulated in Friendly Relations Declaration, which the Court considers as the opinio-juris of the international community. However, initially when the principle was adopted in the Charter of the United Nations publicists like Kelsen [26] had doubted its binding effect on the member-states. Firstly, because of the belief that only states are the subjects of international law, and therefore peoples can not be given a standing the international law as it would be in derogation of state sovereignty. And, secondly, colonialism by this period had not ended and in view of the rebellions in the colonial states, colonial powers like Britain could not accept such a concept and publicists like Kelsen essentially reflect that system. On the other hand, there are scholars like Quincy Wright [27], who asserted otherwise.

Irrespective of the controversy, the principle of self-determination is one of the fundamental principles of self-international law, largely due to the efforts of the Third World Countries.

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26 H. Kelsen, The Law of the United Nations, (New York, 1950), pp.51-3.

27 Q. Wright, "Recognition and self-determination", Proceedings. American Society of International Law, vol. 48, (1954), p.30.

The Friendly Relations Declarations, (197Ø) defines the principle of self-determination of peoples in its first paragraph, "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development. "However, for its complete elaboration, the said provision can be read together with Article 1 of the Covenants of Human Rights which reads as,"

(1) All peoples have the right to self-determine. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

(2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudices to any obligations deriving out of international economic cooperation based upon the principle of mutual benefits and international law In no case may a people be deprived of its means of subsistence.

(3) The states parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the

United Nations".[28]

The above provisions emphasise that the principle of self-determination necessarily means both external independence and internal autonomy, where external independence refers to the right of peoples to freely determine their political status which is the right of independence and statehood, and internal autonomy refers to the right of peoples to adopt a social, economic and cultural system of their choice including the form of government and establishment of foreign relations. Thus, self-determination is a continuous process, the external and internal aspects being the two sides of the same coin, the unity of which is the essence of the principle of self-determination. Moreover, to achieve the internal or external self-determination, it is required that the state should respect this right (first para, principle of self-determination, the Friendly Relations Declaration) which, necessarily entails non-intervention in internal and external affairs of a state (para 1, principle of non-intervention, Friendly Relations Declaration) where internal affairs refer to a right of internal self-determination and external affairs refer to a right of external self-

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28 I. Brownlie, Basic Documents of International Law, (Clarendon Press, Oxford, 1983), third edition, p.259.

determination, and the principle of non-use of force.

Kelsen has sought to confine self-determination to its "internal" aspects concluding that people exercised their right of self-determination only within already established nation-states thus equating self-determination with sovereignty. In the special committee, the Third World States showed the same inclination, asserting that there can be no external self-determination in already independent states. [29] The extreme of this view-point was expressed by states who sought to limit it to its "external" aspect alone, laying a lop-sided emphasis on the anti-colonial aspect of self-determination.[30].

The provision that was adopted in the Friendly Relations Declaration is: "Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race,

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29 Sukovic, "Principle of equal of euqal rights and self-determination of peoples" in Sahovic, n.2, pp.323-73.

30 Ibid., p.345.

creed or colour".[31] Further, "every state shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other state or country".[32]

The correct position, it is submitted in view of Friendly Relations Declaration is that self-determination means internal and external aspects taken together but external aspects operates in the situation where the independent state distinguishes between the race, creed or colour of the people within the states, otherwise only self-determination with respect to internal autonomy prevails. Thus Friendly Relations Declaration compromises on the view of the Third World States.

However, those opposed to the view presented above, like Kelsen and Third World countries argue that the above view leads to a contradiction between the principle of self-determination and sovereign equality of the states. They contend that if the right of external self-determination is available even in an independent state then state sovereignty will not be preserved. Therefore, territorial sovereignty would have to prevail in order to avoid international anarchy, and self-determination would

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31 Para 7, Principle of Self-determination, Friendly Relation Declaration, 1970.

32 Para 8, ibid.

have to operate Within the former's confines.[33] However, in reality there is no contradiction, firstly, sovereignty ultimately lies in the people and not in state's territorial limits, which in any case are not inviolable. And, secondly, this view shears self-determination of its external aspects, especially the right of secession, which is recognised under international law. Thirdly, one can not ignore that sovereignty is a concept constituted through self-determination, it is an expression of self-determination and therefore sovereignty is not attached to any territory but peoples.

As already reiterated time and again, self-determination requires non-intervention and non-use of force for its fulfillment, but it is asserted that this principle in the context of international community providing material assistance to peoples fighting for national liberation (or against colonial power) violates the principles of non-intervention, non-use of force and sovereign equality of states. However, this is an incorrect notion because assistance of this kind is allowed under international law- an exception to the above principles was accepted by the international community as is evident in Resolutions 1514 (XV), 2131 (XX) 1965 and para 5 of the principle of self-determination under Friendly Relations Declaration which states, "Every state has the duty to refrain from any

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33 Sukovic, n.29, pp.341-47.

forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determine and freedom and independence. In their actions against resistance to such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and the principles of the Charter".

Thus, although self-determination requires principles of non-intervention and non-use of force should be operative and the state sovereignty should not be violated but in a colonial context the principles need not be observed because it is a value of community consensus and in such a case material assistance is allowed, as in Namibia. In this respect the Bangladesh instance can be quoted, because East Pakistan consisted of people (Bengalese) who were culturally, socially and geographically different from the people of West Pakistan and they were economically deprived and force was used to brutally suppress them. Thus, they firstly, had a right of secession as an expression of external self-determination against Pakistan as Friendly Relations Declaration shows and. India had a right to provide material assistance to forces of rebellion because the cultural, economic and social diversity between East and West Pakistan showed the domination of the Western Pakistan over the Eastern Pakistan by use of force-an

essential ingredient of a colonial situation. And, secondly, although the Third World States might deny external self-determination in an independent state yet, if the government distinguishes between the people on the grounds of race, creed and colour, this right of external self-determination is available, an inference drawn from the wording, "nothing shall be constructed as authorising or encouraging any actions which would dismember or impair-sovereign and independent state-possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour". Therefore, the Eastern Pakistanis had a right to secede and India's assistance can be seen from the angle of providing material assistance to the people fighting against "neo-colonialism". However, it is right to mention here that the right of secession as part of the principle of self-determination has a dubious status as far as the Third World States are concerned as shown in the Friendly Relations Declaration but if secession takes place it is recognised under international law.

Ultimately, the inter-relationship between the principle of self-determination on the one hand and principles of non-use of force, sovereign equality of states and non-intervention lies in the fact that firstly, self-determination in its communion with sobereignty for which all intervention and use of force by other states, is

rebellion takes place or secession occurs, is recognised under international law, and, secondly, in a colonial context material assistance to peoples fighting for national liberation is allowed, as it is accepted as an exception by the states to the principles of non-intervention, non-use of force and sovereign equality of states,to promote self-determination in such context.

Thus, the contents of the principle of non-intervention are inextricably related to the other three fundamental principles - non-use of force, self-determination and the sovereign equality of states of international law, which forms the legal basis of the non-intervention principles, emphasising that no unilateral intervention can be undertaken by a state, as it erodes the other fundamental principles of international law.

IV. DOMESTIC JURISDICTION UNDER THE UNITED NATIONAL CHARTER

Having explained the legal or theoretical basis of the principle of non-intervention under international law, Article 2 para 7, of the United Nations Charter may be adduced as further evidence to support the contention that unilateral interventions are impermissible under the United Nations Chater. According to Article 2 para 7, "Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the

members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII".

Thus, what is true of the relationship between the Organisations and the member states will be largely true of the relationship between the states themselves. An act of intervention prohibited on part of the Organisation would necessarily be prohibited on part of the member-states also. Developed states, most specifically United States, contended that the above provision referred to the delimitation of competences between the United Nations and the member-states and did not enshrine the principle of non-intervention, and would not form the basis of non-intervention principle within the Charter regime.[34] This argument was dismissed in the special committee primarily on the assumption that Article 2 para 7, of the Charter is within the basic principles of international law enumerated in Article 2 of the Charter and therefore, can not be anything except prohibition of intervention.[35]

The concept of domestic jurisdiction is no doubt, difficult to define but, it can not be ignored and in fact definition of its concept and scope is the crucial issue, whether for Article 2 para 7, of the Charter or the customary law.

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34 Mitrovic n.12, p.237.

35 Ibid., pp.240-41.

There are different approaches, in the theory of international law, in explaining the concept of domestic jurisdiction, whether under the Charter or the customary law. This diversity in conception is only a reflection of the different doctrinal concepts in international law about the principle of non-intervention.

Normativists like Kelsen believed that any object is within the framework of domestic jurisdiction until such time as it had been made subject to international regulation on the basis of a norm of international law. As soon as a question becomes the object of any international treaty, ipso-facto it leaves the area of domestic jurisdiction. Consequently there are matters which are regulated by general and regional international law and others which still remain within the internal competence of states.[36] According to Brierly, a state has only that jurisdiction which is granted to it under international law. Within this sphere it may be free to act according to its own will and this sphere represents its domestic jurisdiction[37] (these theorists are imposing the primacy of international law over the municipal law). However, this view is not held by all namely, the Soviet writers who believe that the sphere of the internal jurisdiction of states exists independently of international law and is not its product. In recognising

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36 Ibid., p.237.

37 J.L. Brierly, "Matters of Domestic Jurisdiction" British Year-Book of International Law, vol.6, (1925), p.8.

the existence of such a sphere and demanding non-interference in matters which by their substance fall under the internal jurisdiction of states international law only acknowledges truly existing fact, which is the corollary of the sovereignty of state. The principle of non-interference in the internal jurisdiction of any state constitutes a means of strengthening and safeguarding state sovereignty in contemporary international law. The question of internal jurisdiction for as long as there are states and by the same token international law itself.[38] The champions of the primacy of international law consider that domestic jurisdiction is in fact a delegated jurisdiction. The supporters of the primacy of internal law also defend the thesis of "delegated jurisdiction", but is a jurisdiction which states delegate to international law.

Nincivc[39] strikes the right note between the two extremes, "domestic jurisdiction or domain reserve is that legal sphere, that complex of relationships whose regulation falls within the undivided (according to some, exclusive) jurisdiction of a state. The pre requisite for the appearance of the concept and problem of domestic jurisdiction is the existence of international jurisdiction if even still embryonic, that is, of an already definite tendency for some categories of question, which states had

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38 Mitrovic, n.12, p.238.

39 Ibid., pp.238-39.

previously dealt with themselves, to be resolved jointly, to be at least partially transferred from the sphere of domestic into the sphere of international regulations, to be transferred from the field of internal to the field of international law. Domestic jurisdiction issued from that tendency or perhaps more precisely from the opposition to it by the traditional concept of sovereignty". Now, Nincivc points to two things to be taken note of whether with respect to United Nations or customary law. Firstly, that he takes a Kelsenian kind of an approach but on the point that the object becomes as subject of international law on the basis of international law norm, Nincivc points out that a matter is an object of international law because of the voluntary action or decision of the sovereign states (and not on the basis of an international law norm), the only pre-requisite is that there should be some kind of an international jurisdiction prevailing. In other words, Kelsen was right in his proposition except, that a matter becomes an object of international law because of the voluntary action of the sovereign state rather than the primacy of the international law over the sovereign state. Moreover, for such a voluntary decision, there should be some kind of a structure of international law existing. In view of the voluntary action of the state no interpretation of domestic jurisdiction, should be preferred, that violates the voluntary nature of such an action of states. This

statement is not only true for all sources of international law but, more so for the United Nations System because it is a voluntary association of sovereign states. So states have voluntarily acted to jointly submit certain matters to be regulated by the Organisation and therefore no interpretation of domestic jurisdiction should be preferred, which violates this "voluntary" nature of the association. Secondly, if we agree that whether the matter is within domestic jurisdiction or international jurisdiction is decided by the voluntary action of the sovereign states, then domestic jurisdiction becomes a concept conditioned by sovereignty and therefore its development and evolution (whether the content of sovereignty is broad or narrow) have to be seen in relation to the development of the principle of sovereignty. The emergence of international organisations saw an attempt to delineate competences between the international organisation and states; the first organisation to make a deep inroad in the domestic jurisdiction was the League of Nations. This trend was closely linked with the endeavour to modify the concept of absolute sovereignty and its corollary of a right to go to war, as can be gathered from the fact that during such times domestic jurisdiction was a very broad concept. This trend has gained validity in the United Nations Charter through the prohibition of the threat or use of force which, to reiterate, prohibits all forms of force including self-help,

one of which being intervention. Since the United Nations Charter adopted the principle of sovereign equality of states, the domestic jurisdiction of the state has not been given a broad connotation (due to voluntary action of the state) like before, where war was the concept within the domestic jurisdiction. Thus, the concept of domestic jurisdiction is limited but within this limit broad freedom of action is given to the state in its internal and external affairs and the third-state is prohibited from intervening.

Viewed in this background, the term 'intervene' in Article 2 para 7, of the United Nations Charter can be defined. Essentially there are two view-points:[40] first view point gives a restrictive or a techincal meaning to the term intervention as can be gathered from Lauterpacht's submission that dictatorial interference amounts to intervention. But, this deprives the prohibition on intervention, of its very essence, because under the Charter all measures which can be described as dictatorial interference can only be taken by the Security Council under chapter VII of the Charter, which in any case has been exempted from the domestic jurisdiction. The second view point expounded by Goodrich, Ninvic and Pollux amongst others is to attribute a broad meaning to the term 'intervene' and thus, not to restrict it to a technical connotation.

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40 Ibid.

The above discussion emphasises that the United Nations can not intervene in the matters internal to the states and thus the states are prohibited more so. The United Nations intervenes in matters, only if there is a community consensus and so should the states acting unilaterly.

V. NON-INTERVENTION : MEANING AND CONTENT

Now that the theoretical basis of the principle of non-intervention is clear it will be easier to comprehend its meaning and enumeration of its contents, avoiding terminological confusion, contextual fallacy and the problem of differing value perceptions. As pointed out earlier Friendly Relations Declaration (197Ø) adequately emphasises the theoretical or legal basis of the non-intervention principle. It is submitted that the said Declaration's formulation of the principle of non-intervention comes closest to stating the essence of the term intervention, as the international community understands it today. The Declaration indicates the situations which would constitute intervention. The formulation of the Declaration was adopted by the Court in Nicaragua decision. The principle of non-intervention as stated in the Friendly Relations Declaration reads,

> "No state or group of states has a right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference

> of attempted threats against the personality of the state or against its political, economic and cultural elements are in violation of international law.
>
> No State may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no state shall organise, assist, foment, finance, unite or tolerate subversive, terrorist or armed activities directed towards the violent over throw of the regime of another state, or interference in civil strife in another state. The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention. Every state has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state. Nothing in the foregoing paragraph shall be construed as effecting the relevant provisions of the Charter relating to the maintenance of international peace and security".

It offers a general definition of intervention in the first paragraph. The definition is all embracing and wide but there is no terminological confusion or contextual fallacy because the general definition is qualified by the situations where unilateral actions by the states will be considered as intervention. These situations are based on the theoretical basis (as analysed earlier) of the principle of non-intervention, which lies in the inter-relationship of the principles of self-determination of peoples, sovereign equality of states and the non-use of force, all of which not only give meaning and content to the principle of non-intervention and define its goals, but also broadly indicate

situations which constitute impermissible interventions. Thus, all acts of third-state are not considered as intervention and the context in which an act will be termed as intervention is taken care of.

The situation where a third party interference will be termed as intervention are:

(1) threats against the personality of the state or against its political, economic and cultural elements.

(2) use of economic, political or any other type of measures to coerce another state in order to obtain from it subordination of the exercise of its sovereign rights and advantages.

(3) organising, assisting, fomenting, financing, encouraging subversive or terrorist or armed activity to the violent overthrow of the regime of another state.

(4) interference in civil strife in another state (since the enumeration does not refer to civil war it means unilateral action of interference whether at the stage of rebellion,insurgency or belligerancy is prohibited if undertaken).

(5) use of force to deprive peoples of their national identity (categorically refers to the principle of non-use of force and implies a restrictive freedom of states to use force).

(6) interference in the right of a state to choose its

political, economic social and cultural system (particularly refers to the principle of self-determination-internal aspects).

The next step is to analyse whether the formulation of the principle of non-intervention does not suffer from any contextual fallacy. However, this aspect of the content of non-intervention principle will be dealt within Chapter IV and V dealing with the ramifications of the principle of non-intervention. It would suffice to say that, in reference to certain contexts unilateral actions of interventions by a third-state will not be considered as unlawful. However, for this premise the contents of the principle of non-intervention have to be read in reference to the content of the principles of sovereign equality of states, non-use of force and self-determination of the peoples, as all these principles are interrelated, this interrelationship forms the theoretical basis of the principle of non-intervention, thus it is obvious that even the content of the said principles would be inter-related. Thus read intervention is allowed in three contexts:

(1) Intervention for self-defence (para 13 of the principle of non-use of force, under the Resolution).

(2) Intervention for maintenance of international peace and security under the United Nations aegis (para 5 of the principle of non-intervention and para 12 of the principle of non-use of force).

(3) Intervention to provide material assistance to the people fighting wars of national liberation against the colonial powers (principle of equal rights and self-determination of peoples, para 2 read with para 5 of the same principle).

For our purpose the first and the third exceptions are relevant as they allow unilateral intervention. However, the enumerated exceptions will be dealt within the following chapters which expound on the ramifications of the principle of non-intervention whereas intervention for self-defence will be dealt within Chapter V, intervention in colonial context would be dealt within Chapter IV of the present study.

V. THE VIEW OF THE COURT : PRELIMINARY REMARKS.

Now it remains to be seen how far the contents of the principle of non-intervention as enshrined under the Friendly Relations Declaration (1970) is endorsed by the Court. The Court begins with the affirmation of the theoretical basis of the principle of non-intervention in order to relate its definition and content. "The principle of non-intervention involves the right of every sovereign state to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent", As the Court has observed: "between

independent states, respect for territorial sovereignty is an essential foundation of international relations",[41] and international law requires political integrity also to be respected. It (non-intervention principle) has moreover been presented as a corollary of the principle of sovereign equality of state. A particular instance of this is General Assembly Resolution 2625 (XXV), the Declaration on the principles of International law concerning Friendly Relations and Co-operation Amongst States".[42]

The Court proceeded to answer the question that "what is the exact content of the principle so accepted". In this respect it noted that "in view of generally accepted formulations, the principle forbids all states or group of states to i ntervene directly or indirectly in internal or external affairs of other states. A prohibited intervention must accordingly be one bearing on matters in which each state is permitted, by the principle of state sovereignty to decide freely. One of these is the choice of political, economic, social and cultural system and formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion defines, and indeed forms the very essence of, prohibited intervention,

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41 I.C.J. Reports, 1949, p.35.

42 I.C.J. Reports, 1986, para 202, p.106.

is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed acitivities within another state.[43] Thus the I.C.J endorsed the content of the principle of non-intervention as the Court made it clear that it will define only those aspects of the principle which appear to be relevant to the resolution of the dispute (before it). Since the dispute before the Court concerned the Nicaraguan charge against the United States' organising, assisting, training, and financing the Contra activity the aim of which was to over throw the Nicaragua government, among other charges, the Court rightly observed, "if one state with a view to the coercion of another state, supports and assists armed bands in that state whose purpose is to over-throw the government of that state, that amounts to an intervention by the one state in the internal affairs of the other, whether or not the political objective of the state giving such support and assistance is equally far-reaching."[44]

The Court, therefore, rightly found that the support by the United States to contras by financing, training, supply of weapons beside other assistance constituted a clear breach of the principle of non-intervention. The interpretation by the Court is in line with Resolution

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43 I.C.J. Reports, 1986, para 202, p.106.

44 Ibid., para 241, p.124

2625 which reiterates that "no state shall organise, assist, foment, finance, unite or tolerate subversive terrorist or armed activisties directed towards the violent overthrow of the regime of another state, or interference in civil strife in another state" (para 2 of the principle of non-intervention).

However, it is not clear why while explaining the content of the principle on non-intervention the Court failed to pronounce on certain acts of the United States which Nicaragua considered as acts of "economic intervention". The acts complained of, by Nicaragua were cessation of economic aid in April 1981, the ninty per cent reduction in the sugar quota for the United States imports from Nicaragua in April 1981, and the trade embargo adopted on 1st May, 1985. The Friendly Relation Declaration categorically mentions in the opening line of para 2, with respect to the principle of non-intervention, "No state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind ...".

In view of t he fact, that the Court has not approved the contents of the said Declaration, but has made it the basis of its decision and also categorised it as representing opinio-juris it is disconcerting to read the

remark of the Court that, "at this point, the Court has merely to say that it is unable to regard such actions on the economic plane as is here complained of as a breach of customary law principle on non-intervention."[45] This remark by the Court looks more incongruous in view of its earlier remark that, "the essential considerable is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations. The difference which may exist between the specific content of each are not, in the Court's view, such as to cause a judjement confined to the field of customary law to be ineffective or inappropriate, or a judgement not susceptible of compliance or execution.[46]

The Court endorses the approach of the Friendly Relations Declaration as far as it was relevant for solving the dispute before it. Thus, emphasisng the formulation adopted in the Declaration sufferred neither from terminological confusion nor contextual fallacy. However, the part where the Court dealt with permissible grounds of intervention will be dealt within the next chapter on the ramifications of the non-intervention principle.

In the light of the Nicaragua judgement one can easily reject the two criticism lined against the Friendly

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45 Ibid., para 245, p.126

46 Ibid., para 181, p.96-7.

Relations Declaration (1970) that (1) it embodies a "catch-all" definition (this was levied by Falk against Resolution 2131 since Resolution 2625 incorporates Resolution 2131, so objections against Resolution 2131 would also be valid against Resolution 2625) and, (2) it is highly ambiguous and purposeless. The Court by referring to the Declaration was able to categorise the particular acts of United States as violating non-intervention principle. Thus it is neither catch-all definitions nor is it ambiguous or purposeless, as the court clearly referred to it in forming its judgement.

CHAPTER IV

RAMIFICATIONS (I): IMPERMISSIBLE EXCEPTIONS

I. INTRODUCTION

Traditional international law allowed intervention at the invitation of the incumbent government.[1] However, in course of time international law developed two approaches to non-intervention principle, namely, (a) the absolute approach[2], and (b) the contextual [3] approach. The "absolutists" consider all unilateral intervention into civil war situations as impermissible. The rule originally formulated by Hall[4] has been endorsed by others like Wright[5], Barnett[6] and Corbett[7]. But, the "absolutists" fail to perceive that the legal basis of the principle of non-intervention lies in the "inter-linkage between the principles of sovereign equality of states, equal rights and self-determination of peoples and non-use of force thus, its meaning, content, scope or ramifications will have to be in line with and derive its substance from the contents of the other three principles, thus ruling out any possibility of

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1 B.S. Chimni, "Towards a Third World Approach to Non-Intervention: Through the Labryinth of Western Doctrine", Indian Journal of International Law, vol.19, (1979), pp.244-64. See pp.243-245.

2 Ibid., pp.247-48.

3 Ibid., pp.248-61.

4 Cited in Chimni, n.1, p.247.

5 Ibid.

6 Ibid.

7 Ibid

non-intervention principle being absolute. One such universally accepted exception, representing community interest and consensus, is providing material support to peoples fighting for national liberation against colonial dominance.[8] This fallacy has been avoided by the "contextualists".

The contextual approach attempts to take into consideration the diverse contexts, that is, the values in relation to which the principle of non-intervention is made operational. J.N.Moore,[9] Tom Farer[10] and Richard A. Falk[11] represent the sum total of all the prevailing Western doctrines on non-intervention principles. All three prescribe a basic norm of non-intervention and then carve out exceptions in context of which unilateral action can be taken, as these "values" or "contexts" reflect community interest.

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8 See General Assembly Resolution 1514 (XV) of 14 December, 1960; General Assembly Resolution No:(XX) of 21 December, 1965; General Assembly Resolution 2625(XXV) of 24 October, 1970.

9 J.N. Moore,"Towards an Applied Theory for the Regulation of Intervention", in J>N> Moore, ed., Law and Civil War in Modern World (John Hopkins University Press, Baltimore, 1974), pp.3-37.

10 T. Farer, "Harnessing Rogue Elephants: A short Discourse on Foreign Intervention in Civil Strife", Harvard Law Review, vol.82, (1969), pp.511-41 and T. Farer, Columbia Law Review, vol.67, (1967), pp.227-323.

11 R.A. Falk, "Legal Status of the United Satates Involvement in the Vietnam War", in R.A. Falk ed., International Law Civil War (The John Hopkins University Press, Baltimore, 1971), pp.227-323.

The values which Moore enumerates in the decision to initiate intervention are[12]: (1) minimum world order, (2) self-determination of peoples, (3) maintenance of basic human rights, and (4) promotion of modernisation. He also advocates intervention at the invitation of government. Similarly, the primary values which Farer proposes are[13]: (a) self-determination, (b) minimum human rights, (c) minimum public order, and (d) modernisation. Falk, however, keeps the contexts, for legitimate unilateral intervention, wide open.[14] His only guideline is that, only those values which effectuate community interest should be chosen for unilateral enforcement. Thus, such a context can be any and be chosen at any particular point of time, as long as the context promotes community interest. A fallacy common to all the "contextualists" is that although they base their approach on the premise that the legal basis of non-intervention principle lies in the inter-linkage between the principles of non-use of force, sovereign equality of states and self-determination of peoples yet, they believe in a "watered-down" concept of this inter-linkage denouncing the "statist" conception of the Third World advocates, hence the tendency to carve out too many exceptions to non-

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12 Moore, n.9, p.19

13 T. Farer, "Harnessing Rogue Eliphants: A short Discourse on Foreign Intervention in Civil Strife", n.10, pp.513-526.

14 Falk, n.11, Introduction, p.28.

intervention principle.

On the other hand, the Third World protagonists prefer a strict interpretation of the principle of non-intervention except in the colonial context. It would be fair to point out here that Farer and Falk, in contrast to Moore, recommend values for unilateral action not only reflecting community interest but also backed by community consensus. Thus, the values proposed by them, even though similar to Moore, have different specifications and come closer to the Third World view. Thus, it is very much doubtful that either would propose a unilateral action for self-determination unless in a colonial set-up or that Falk would prefer unilateral intervention to promote human rights.

In any case, a brief review above of the cross-section of Western scholars primarily point to three basic exceptions to the principle of non-intervention canvassed by the Western States:

(1) Intervention at the invitation of the government;

(2) Intervention for "Self-determination";

(3) "Humanitarian" Intervention.

As a considerable length of judgement is devoted to the discussion of exceptions or modifications to the principle of non-intervention in reference to these contexts an attempt will be made in the present chapter to see how far the Court in its decision has accepted or endorsed these exceptions to the principle of non-intervention.

II. INTERVENTION AT THE INVITATION OF THE "GOVERNMENT"

The traditional doctrine of non-intervention had a particular abhorence for all types of revolutionary activity therefore, even though it prescribed to the principle of non-intervention, yet it prescribed external support for the incumbent government against the insurgent.[15] Thus, the traditional doctrine was "status-quo" oriented and the reason is not far to seek because this was a world in which colonialism and the principle of non-intervention were not irreconcilable. Thus the Western States identified as colonial power or government used to aim to crush all revolutionary movements, even with outside help; it was considered legitimate to allow intervention at the invitation of the incumbent government. In fact, the traditional doctrine divided internal conflict into three types of situations-rebellion, insurgency and belligerency and the incumbent government could receive external aid to suppress the insurgents. It is only when insurgents achieved belligerent status that rules of neutrality come into play. But, in a decentralised international community, lacking any mechanism of third party judgement, belligerent recognition may be difficult to come by. This discretion, which rests with the individual state, could be abused to make subjective judgements of fact and law. But, the changing international system has rendered these doctrinal

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15 Chimni, n.1, p.245

rules obsolete. International law recognises the right of rebellion, it is an expression of self-determination of peoples, which cannot be crushed and self-determination is considered very much a legal principle of international law. Moreover, the theoretical basis of the principle of non-intervention, lie in the interrelationship of the principles of self-determination, non-use of force and sovereign equality of states, therefore intervention at the request of the incumbent government cannot be allowed. This conclusion is further strengthened through state-practice. Friedmann emphasis that "revolution is a time-honoured way of effecting political and social change."[16] Also as Falk notes, the categorisation of situation as rebellion, insurgency and belligerency are an outdated concept, gone with the War of Independence of United States and the Spanish Civil War, so where lies the idea that aid to the incumbent government is valid.[17] Therefore, any aid given to the incumbent government at its invitation is a ground that no more holds good in international law jurisdiction. In fact, state-practice demonstrates that even if aid was given to the incumbent government it was more a matter of political expediency, and it was political expediency which dictated all acts of recognition, whether as rebels, insurgents or belligerents. However, we find Moore, Farer

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16 Cited in Chimni, n.1, p.245.

17 Ibid.

and Falk allowing intervention at the request of the incumbent government reason being, firstly, intervention at the request of government is legitimate under international law - a fact even if abhored has to be accepted and can not be ignored, and secondly, most of the Western publicists believe in the "watered-down" version of the theoretical basis of the principle of non-intervention, However, Farer and Falk promote the interest of the Third World States in spite of this "watered-down" version by confining intervention only for community interest and on community consensus; in spite of the fact that, there might be a request of assistance to a third state by the incumbent government. Thus, they do not treat invitation of the "government" as a separate ground of unilateral action. Both Farer and Falk can not shy away from the fact that the contemporary law allows the incumbent government to ask for assistance from the third-state (Falk had to modify his earlier proposition of counter-intervention in the light of this fact[18]), but, they have counter-balanced this reality by also allowing assistance at the request of the rebels. Falk, at the first instance, allows intervention at the request of the incumbent government within prescribed

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18 Earlier, Falk proposed a complete non-intervention in the internal affairs of a state. If this rule was violated, then to maximise the values in danger of being suppressed, he allowed a right of counter-intervention, either on the side of rebels or the incumbent government, depending on whose side, earlier intervention had taken place, See Falk, n.11, pp.227-8.

limits.[19] If these limitations are violated he allows a right of counter-intervention on the side of rebels. However, if rebels are getting outside assistance, he allows a right of counter-intervention on the side of the government, beyond the earlier prescribed limits. If rebels have acquired the status of belligerents, Falk allows assistance to either side, to maximise community interest.

The reason for Farer and Falk to allow intervention on the side of rebels is obvious. They are aware of the fact that assistance to the incumbent government might retard the maximisation of a certain community - interest values, thus, they allow for the possibility of intervention on the side of rebels, besides assistance to the government. However, they propose certain thresholds beyond which assistance to either parties to the conflict would be illegitimate. This is primarily to curb the scale of violence and to geographically limit the conflict. Farer allows assistance in the form of money and weapons. The only limit which Farer proposes is of non-violence of "tactical threshold", that is, a flat prohibition of participation in tactical operations either openly (that is deployment of foreign

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19 According to Falk, "Foreign assistance should no include direct participation in combat operations. For another it should not attempt to bear more than a fairly small percentage, certainly under fifty percent of the increased military requirements created by the domestic uprising. And finally, the external assistance should not be conditional upon increased influence in the process of decision - making within the recipient country". Ibid., p.311.

troops) or through the means of advisors.[20]

On the other hand, Falk's "threshold thesis" is as flexible as his choice of values which promote community interest.[21] Like Farer, he prohibits the use of foreign personnel in civil wars and recommends that boundaries of states should be observed and the nuclear threshold should not be violated. That is to say depending from situation to situation Falk lays down different thresholds and therefore does not recommend any particular threshold like Farer, although he considers the "nuclear threshold" as more important than the rest.

Moore, unlike Farer and Falk allows assistance to a widely recognised government (which he considers as a sepereate ground of unilateral action) prior to insurgency and emphasises that when a conflict becomes an insurgency it is impermissible to increase but permissible to continue the pre-insurgency levels of assistance.[22] However, we find that Moore after rejecting the traditional doctrine falls back into the same trap and indicates a "status-quo" approach to the non-intervantion principle by prescribing aid to the incumbent government prior to insurgency but prescribing any

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20 T. Farer, "Intervention in Civil Wars: A Modest Proposal", n.10, p.275.

21 Falk, n.14, pp.22-8.

22 Moore, n.9, p.24. Also see J.N. Moore, Law and the Indo-China War (Princeton University Press, Princeton, N.J>, 1972), p.175.

aid to the insurgents at any point of the struggle. He also accepts the retrogade distinction of rebels, insurgents and belligerents. Moore particularly rejects the traditional standard because it may be used to justify suppression of indigenous revolutionary movements (as a self-expression of self-determination, a right recognised under international law) and yet he too advocates the same approach. Moreover, Moore's proposal in giving aid to the incumbent government raises several questions - Firstly, he goes back to the three-fold classification of traditional doctrine of rebellion, insurgency and belligerency but who is to determine when the insurgency level has been reached so that a freeze on military or other assistance could be applied. Even Bowett rejects this classification as he finds it too subjective and also rejects the pre-insurgency level doctrine as that is also too subjective.[23] Moore, to be fair to him does lay down the criteria for determining whether civil strife has reached the insurgency level, namely, [24]

(1) the internal conflict must be an authority oriented conflict, aimed at the overthrow of the recognised governments and its replacement by a political organisation controlled by the insurgents;

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23 D.W. Bowett, "The Inter-relation of Theories of Intervention and Self-Defence", in Moore, n.9, pp.38-50. See pp.42-43.

24 J.N. Moore, Law and the Indo-China War, n.22, p.201.

(2) that the recognised government is obliged to make continuing use of most of its regular military forces against the insurgents, or a substantial segment of its regular military forces have seized to accept orders;

(3) that the insurgents effectively prevent the recognised government from exercising continuing governmental authority over a significant percentage of the population;

(4) that a significant percentage of the population supports the insurgent movement, as evidenced by military or supply assistance to the insurgents, general strikes, or other actions.

But, Moore fails to realise that subjective assessments of the same can be used as a guise to render any kind of assistance with apparent legitimacy. Since the present international law community lacks any means of collective recognition, any suggested criteria come handy for convenient unilateral determinations. It is surprising that Moore slips into the same mistake for which the traditional standard has been subject to scathing criticism. However, again to be fair to him, his understanding follows logically from his plea not to place exaggerated emphasis on the talk of any third-party judgement in the international system and the normative relativism which accompanies it.[25] But this

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25 Moore, n.9, pp.12,19.

view-point is erroneous given the decentralised nature of the international society and the dangers of auto-interpretation - a fact asserted by Falk.[26]

Secondly, it does not seem meaningful to say that the level of assistance should not be increased after rebels attain the status attain the status of insurgents, because the level could be certainly increased enormously at the first sign of rebellion itself. In any case, under the circumstances, it would be an uphill task for the rebels to reach the insurgency level, in particular given the permissibility of the assistance provided to the incumbent government. If, nevertheless, the rebels attain the insurgency level and such a recognition is granted to them, a third state could give further assistance to the incumbent government on the ground that assistance which was being provided by someone else to the rebels. In other words, the assistance now provided was only to neutralise assistance given to the insurgents. Moore's reasoning here is now based on equality of parties which he earlier deprived the rebels of, when he recommends aid to the insurgents.

Thirdly, we come to the problem of widely recognised government. What does Moore mean by widely recognised government. Moore seems to be emphasising that consent legitimises what would otherwise be illegitimate. This premise, of Moore and those who consider, intervention at

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26 R.A. Falk, "Comment I", in Moore, n.9, p.543.

the invitation of a legitimate, incumbent or a widely recognised government as valid, is basically unsound and even a conservative like Bowett realises this. Its unsoundness stems from the subjectivity or recognition, which leads to two types of arguments Firstly for example, during the years the United States did not grant recognition to main land China, it means China was not a widely recognised government till 1979. Similarly Russian Communist government was not a widely recognised government till 1949. Secondly, an intervening state is free to recognise as the "widely recognised government" (even if it is not, especially in view of the fact if United States intervention can presume Chinese and Russian communist government were not widely recognised governments, so a narrow majority government can be taken as a widely recognised government) which ever faction in an internal struggle it wishes to support and which will request intervention. Examples are not far to search-Soviet Union entered Hungary,[27] Czechoslovakia[28] and later on Afghanistan,[29] on the same plea which Moore considers a legitimate violation of non-intervention principle. So why condemn Soviet Union, as it was invited by a "widely

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27 U.N. Special Committee on the problem of Hungary, General Assembly official records, 11th Session, Supplement 18.

28 Current Digest of Soviet Press, vol.2Ø.

29 See Keesings Archives, P.3Ø229.

recoginsed" government. In fact, Moore's first qualification seems to be a justification more for the United States policies as in Dominian[30] Republic and Grenanda[31] but they also suffer from the defect of subjective view of "widely recognised government".

Thus, Moore's theory of intervention at the request of the government has been rejected by Farer and Falk who allow intervention both at the request of the incumbent government as well as, rebels but, have only cut-off points in the case of former is the "tactical threshold" and in Falk's case it depends from situation to situation and the prescribed threshold in each case is different which may be geographical in one or nuclear or tactical in another, depending from conflict to conflict the idea being to contain the interventionary activity so that there is no escalation of violence and no spill over in the territories of the neighbouring countries-a point which Moore seems to ignore.

Friendly Relations Declaration (1970) contents (chapter III) show that it neither supports intervention at the invitation of the incumbent government nor rebels.[32] Since

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30 U.S. Department of State Bulletin, vol.50.

31 A.D. Mato, "Intervention in Grenada: Right or Wrong", New York Times, October 30, 1983, p.E18, column 3.

32 Principle of Non-interference, para 1 reads No state or group of states has the right to intervene directly or indirectly for any reason whatever, in the internal civil strife in another state".

intervention is prohibited on both sides therefore, it hardly matters whether rebels have achieved the stage of insurgency, rebellion or belligerency to allow intervention or not, as Moore comprehends. The reason lies in the theoretical basis of the non-intervention principle, based on the inter-relationship of the principles of non-use of force, sovereign equality of states and self-determination of peoples. So, if intervention is allowed it would lead to the violation of these principles, essential to the international society and at the same time erode to the international society and at the same time erode the basis of the principle of non-intervention. Thus, whether revolution or not, whether civil war or not, all third party intervention in the internal or external affairs of the state, in the situations[33] mentioned under the Friendly Relations Declaration, is prohibited.

This is however in contrast to the Nicaragua decision where the Court states: "..the principle of non-intervention derives from customary international law. It would certainly loose effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another state- supposing such a request to have actually been made by an opposition to the regime in Nicaragua in this instance. Indeed, it is difficult to see what would remain of the

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33 See Chapter III.

principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a state, were also to be allowed at the request of the opposition. Such a situation does not in the Court's view correspond to the present state of international law".[34]

The question which comes to the mind is that, is the Court going back to the doctrine of traditional international law minus its division of rebels, insurgents and belligerents, which would be more dangerous, as any minor opposition would mean that the incumbent government can ask for help from a third party thus totally crushing the process of self-determination. The Court itself asserted that the theoretical basis of the principle of non-intervention lay in the inter-relationship between the principles of self-determination, non-use of force, and sovereign equality of states which requires the observance of the principle of non-intervention. However, one has to accept that intervention at the request of the legitimate government of a state is a reality of international law, in spite of its dubious character, and an exception accepted by the Court.

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34 I.C.J. Reports, 1986, para 246, p.126.

III. INTERVENTION FOR "SELF-DETERMINATION"

Moore, Farer and Falk refer to the value of self-determination for which intervention is possible as it maximises community interest. Moore, to achieve this end refers to certain pre-conditions [35] namely:

(i) a genuine invitation by the widely recognised government or, if there is none by a major faction;

(ii) relative neutrality among factions with particular attention to neutrality in military operations;

(iii) immediate invitation of a compliance with the decision machinery of appropriate regional organisations;

(iv) immediate full reporting to the Security Council and compliance with United Nations determinations;

(v) a prompt disengagement consistent with the purpose of the action, and;

(vi) an outcome consistent with self-determination. Such an outcome should be one based on internationally observed elections in which all factions are allowed freely to participate on an equal basis, which is freely accepted by all major competing factions or which is endorsed by the United Nations.

Similarly as seen above, Falk and Farer too recommend intervention on the side of the incumbent government and also rebels, for such a purpose. But there are several

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35 Moore, n.24, pp.280-82.

problems with the proposition, that intervention is allowed for self-determination.

Firstly, the problem is of different specifications of the value of self-determination. Moore would propose the suppression of popular movements as aid only to the incumbent government is recognised under international law according to him. Whereas Farer and Falk favour self-determination on community consensus to promote assistance to the people fighting against colonialism or aparthied policies. Secondly, be that as it may, whether Farer, Falk or Moore, the whole idea of intervention for self-determination sounds an antinomy. Reisman is a staunch proponent of intervention for self-determination and justifies it on the ground that since the collective security system under the United Nations Charter is jeopardised due to veto-power of the permanent members of the Security Council therefore self-help in spite of the principle of non-use of force in situation of self-determination is valid.[36] However since the theoretical basis of the principle of non-intervention lie in the inter-linkage between the three fundamental principles of self-determination, non-use of force and sovereign equality of states, thus making all these principles inter-related,

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36 W.M. Reisman, "Coercion and Self-Determination: Construing Charter Article 2(4)", American Journal of International Law, vol.78(1984), pp.642-45. Also see O. Schachter, "The Legality of Pro-Democratic Invasion", American Journal of International Law, vol.78, (1984), pp.645-52.

violation of the non-intervention principle would lead to the violation of the rest. In reality self-determination requires non-intervention rather than intervention. At one point even Farer and Falk realised that rebellion is an expression of self-determination and recognised by the international community and therefore there should be no interference in the expression of self-determination. Only in the context of colonial situation they allow intervention because it has community consensus but that intervention is also hedged by threshold limits.

However, Moore's is the most mixed up view point. He prescribes intervention for restoring the orderly process of self-determination but at the request of the legitimate government. So, his statement firstly suffers from the drawback of intervention at the invitation of the incumbent government. Secondly, he represents an antinomy between intervention and the concept of self-determination, which requires the observance of the principle of non-intervention. Thirdly, he prescribes intervention to restore the orderly processes of self-determination and not for self-determination. Thus it falls on the intervening state to restore the "orderly process" of self-determination (whatever he means by orderly process) and then the people can exercise the right of self-determination. But, the question arises can self-determination be actually expressed in presence of foreign troops who have restored the orderly

process because, the party who restores such orderly process will also control it and, it is understood that the result will be in its favour, the position will be like that of American presence in South Vietnam may be this is the instance Moore is trying to justify. Moreover as Farer notes in the case of secessionist it is even difficult to fix up the electorate without at the same time laying down the result of the election.[37] Hall is right in asserting, "(if intervention is) directed against rebels, that fact that is has been necessary to call in foreign help is enough to show that the issue of the conflict would without it be uncertain, and consequently there is a doubt as to which side would ultimately establish itself as the legal representative of the state. If again, intervention is based upon an opinion as to the merits of the question at issue, the intervening state takes upon itself to pass judgement on a matter which, having nothing to do with the relations of state, must be regarded as being for legal purposes beyond the range of its vision"[38] Hall's criticism holds good with respect to any intervention at the invitation of the government, and not only with respect to intervention on invitation, to restore orderly process of self-determination. The invitation to restore orderly

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37 T.Farer, "Comment 2 on Professor Moore's synthesis" in Moore n.9, p.556.

38 Cited in Chimni, n.1, p.254.

process of self-determination is like inviting a bull into China- shop and as Falk notes the "bulls are sometimes "invited" (often the invitations are arranged) into ill administered China shops which are on the verge of bankruptcy".[39] Farer is right in assuming that Moore has inherent aversion to any change by rebellion.[40] However, Moore asserts that it is not the change to which he has the aversion, but he believes that change should be peaceful and non-violent and therefore he advocates intervention to restore the orderly process of self-determination.[41]

Fourthly, Moore's "orderly process" refer to the institutions of democracy. So, obviously his self-determination refers to democratic forces too and thus acquires and ideological tinge, besides political motives to carve out influence zones or to establish the edifice of "neo-colonialism"(in any case his latest work[42] does not contain intervention at the invitation of the government to restore the orderly process of self-determination, so even Moore has his own doubts about the validity of this ground),

The identification of self-determination with the pro-democratic institutions is a fallacy not restricted to Moore. In fact, intervention for self-determination, to

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39 Falk, n.26, p.544

40 Farer, n.37, p.556.

41 J.N.Moore, "Comment 3, on Professor Farer's Need for a synthesis: A reply", in Moore, n.9, p.566.

42 Moore, n.9.

carve out zones of influence and establish "neo-colonialism" is a malaise common to all Western developed States. Usually we find that the Western states are the ones to intervene for "self-determination" and for promoting "human rights" -terms having a very western origin but self-determination in course of time has acquired a universal meaning and application - because the Western developed states believe that self-determination and human rights are linked to democratic concepts, they believe no self-determination or human rights are possible in a socialist or communist regime as it is totalitarian an aspect of ideological differences, besides other reasons which have been mentioned above.

In conclusion one may say whether it be Vietnam or Grenada, the Western States have never been able to cite a truly objective case of intervention for self-determination, reason being (1) it can not be cited, as there is antinomy between the unilateral action of intervention and the concept of self-determination ; (2) only possibility of promoting self-determination through unilateral action is in case of colonial situations, as community interest legitimises such action but, in which the western states are not interested; (3) intervention for self-determination is for the selfish motives of these Western states, which may be economic, political or ideological or a mixture of all three a proposition valid for intervention to promote human

rights also.

Some publicists[43] regard self-determination as an aspect of human rights therefore they contend intervention to promote human rights would enhance both the values of self-determination and human rights. But, somehow they have got hold of the wrong end of the stick because if grounds of intervention for self-determination are not so secure same is true for even "humanitarian" intervention where intervention, as already said is for the interest of the intervening power rather than for humanitarian purposes. In fact the very concept of "humanitarian" intervention is debatable. The Court's view on the subject of intervention for "self-determination" can only be considered after a quick review of the exception to non-intervention propagated on "humanitarian" grounds, as the Court dealt With the two exceptions together.

IV. "HUMANITARIAN INTERVENTION"

Brownlie states that the term humanitarian intervention is used in the contemporary law both for protection of the nationals of the intervening state and also for the protection of human rights of nationals of other state in which intervention takes place. He states, "unless the context clearly requires a different interpretation, "humanitarian intervention" in my usage is the threat or use

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43 F.R. Teson, "Le Peuple C'est Moi! The World Court on Human Rights" American Journal International Law, vol.81, (1987), pp.173-83.

of armed force by a state, belligerent community, or an international organisation, with the object of protecting human rights. It must be emphasised that this usage begs the question of legality and stresses function or objective. In diplomatic usage, the term "humanitarian intervention" has been used more widely to describe diplomatic intervention de bene esse on behalf of non-nationals or on behalf nationals in matters which are in law within the domestic jurisdiction of the state of his residence or sojourn".[44] Brownlie opines that those writers who assert humanitarian intervention as a legal right have a very heavy burden of proof.[45] Moore allows intervention for the protection of human rights in his postulate but, just like intervention for "self-determination", he hedges it with certain pre-conditions,[46]

(a) an immediate threat or genocide or other wide-spread arbitrary deprivation of human life in violation of international law';

(b) an exhaustion of diplomatic and other peaceful techniques for protecting the threatened rights to the extent possible and consistent with protection of the threatened rights;

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44 I. Brownlie, "Humanitarian Intervention", in Moore, n.9, p.217.

45 Ibid., p.213.

46 Moore, n.9, p.25.

(c) the unavailability of effective action by an international agency, regional organisation or the United Nations;

(d) a proportional use of force which does not threaten greater destruction of values than the human rights at stake and which does not exceed the minimum force necessary to protect the threatened rights;

(e) the minimum effect on authority structures necessary to protect the threatened rights;

(f) minimum interference with self-determination necessary to protect the threatened rights;

(g) a prompt disengagement consistent with the purpose of the action;

(h) immediate full reporting to the Security Council and any appropriate regional organisation and compliance with Security Council and applicable regional directives.

Moore's argument that, if the basic human rights have to be maintained some right of unilateral intervention would have to be granted, is supported by Lillich, [47] who comes out as a more staunch propogonist of "humanitarian intervention" as a legal right. He argues that state practise, the United Nations Charter, the policy

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47 R.B. Lillich, "Humaitarian Intervention: A reply to Ian Brownlie and a plea for constructive Alternatives", in Moore, n.9, pp.229-42.

perspectives and the number of publicists holding the same view, are adequate enough to discharge this burden or proof. He asserts that enough evidence can be found in the pre-charter state practise to conclude that humanitarian intervention was in some form permissible. However, he cites Stone to emphasise that, at that time it was not a clearly distinguishable legal category [48] and also ramifications of such a concept were not clearly identified. He further asserts that post-Charter practice has provided enough evidentiary basis to show the legality of such actions.

To support this contention, Lillich firstly, cites the stanleyville operation[49] and India's intervention in Bangladesh among others.[50]

Secondly,Lillich, Stone, Reisman and others [51] argue that it is Article 2 para, 4 of the United Nations Charter which is most relevant to the present inquiry because it prohibits, 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. They argue that humanitarian intervention does not violate either territorial integrity

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48 Ibid., p.234.

49 Ibid., p242.

50 Ibid., p.241.

51 Ibid., p.239

nor political independence nor is it inconsistent with the purposes of the United Nations for it actually helps promote one of its basic purpose, that is,the protection of human rights.

Thirdly, they argue that since there is no effective collective mechanism to protect gross violations of human rights, unilateral action stands legitimtised for this purpose.[52]

Fourthly, the publicists in favour of this right are very many and cited by Lillich- namely- Mc-Dougal, Reisman, Stone, Goldie, Lauterpacht, Moore, Nanda, Thapa, Verziji.d[53]

However the evidence cited above and the arguments favouring "humanitarian" intervention can be balanced with equally effective counter-arguments supported by publicists like Brownlie. Human rights like the right of self-determination is a very subjective concept and any interpretation is possible, as already said before, even for self-determination. United States intervened in countries like Cuba [54] and Grenanda [55] besides others for protection

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52 Ibid., p.239.

53 Ibid., p.241.

54 M.S. McDougal, "The Soviet-Cuban Quarantine and self-defence", American JOurnal of International Law, vol.56, (1963), p.597.

55 C.C. Joyner, "The U.S. Action in Grenada: Reflections on the Lawfulness of Invasion", American Journal of Internal Law, vol.78, (1984), p.144 and "International Lawlessness in Grenada", American Journal of International Law, vol.78, (1984), p.174.

of human rights, whether of its won nationals or of the nationals of these states. But rather, its intervention caused the escalation of conflict with the result that more human rights were violated than protected. Moreover, just as in case of self-determination, Western belief in case of human rights is more strong that, communism is a totalitarian system where no human rights can exist. In all the places mentioned above United States intervened in the internal affairs against the communist forces. Also as said earlier, intervention for human rights is a Western imperialist concept. Besides, the standards which they impose can not be met in the Third World arena which should have their own yard-stick as they have their special problems which the Western developed states have not faced nor are likely to face as they have not been the ones to be under the colonial yoke and also the Third World states have neither reached that stage of development, of developed states not do they have the privileges enjoyed by the developed states. So to judge human rights from one standard will allow any amount of "humanitarian" intervention in the Third World countries. As far as the state practise is concerned, Brownlie concludes:

(1) the role of humanitarian intervention, even before the first attempt at regulating resort to war in the League Covenant was dubious, and the practise did not present a constant and uniform usage. He describes the

instance cited by the proponants of the principle of "humanitarian" intervention either as examples of "expost factoism" or examples of "altruistic action".

(2) the practise of the League period can not be said to assist the somewhat derelict doctrine although a number of writers, especially prior to the Kellogg-Briand Pact, continued to give its support".

(3) the practise in the period of the United Nations Charter is totally inadequate to the task of establishing an interpretation in terms of subsequent conduct of the parties favourable to intervention to protect human rights.[56]

Brownlie's above conclusions are endorsed by a survey of the state-practise in reference to pre-charter and the post-charter ear. The state practise of the pre-Charter era is:

(1) The intervention of France, Great Britain and Russia against the Turkish massacres and suppression of the Greeks which resulted in Greek Independence in 1830:

(2) The pre-emptory demands of Austria, France, Italy, Russia and Prussia (1866-68) on the Ottoman Empire for the institution of positive action leading to the betterment of the lot of the persecuted christian population of Crete:

(3) The Russian intervention against Turkey (1877-78) on

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56 Brownlie, n.44, p.222.

the occasion of insurrections resulting from Turkish mis-rule and from the outrageous persecution of the christian population of Bosnia, Herzegovnia and Bulgaria.

(4) The intervention of Austria, Russia and Great Britain, Italy and France in Turkey as a result of insurrections and mis-rule in Macedonia (19Ø3-8).[57]

Lillich referring to above mentioned pre-Chapter practise seems to ignore the fact that these were big power interventions in the decaying and hopeless Ottoman Empire.[58] The real politik of these forces and their expansionist designs can be ignored only by a jaundiced reading of history. The role of the European big powers in the disintegration of the Turkish Empire hardly needs recapitulating, and even a cursory glance of European history bears testimony to it. Lillich seems to have by passed Ganji's own conclusion (which Lillich cites for pre-Charter practise) that "the doctrine of humanitarian intervention does not seem to claim the authority of customary rule of international law".[59]

The proponents of "humanitarian" intervention give examples of the Stanleyville operations, the interventions in Dominician Republic and the Bangladesh crisis as evidence

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57 Lillich, n.47, p.232.

58 W. Friedmann, "Comment 4", in Moore, n.9, p.577.

59 Cited by Lillich, n.47, p.232.

of post-Charter practise where intervention was possible on humanitarian grounds. Falk gives a balanced account of the Stanleyville operation but finds it hard to categories the unilateral action of Belgium and United States as humanitarian because it seemed it was more in the nature of installing the candidate of their choice who would serve their interests or those of the whites.[60] United States was blamed of racism. Belgian intersts in Katanga were more of the economic type rather than ecclesiastical. Moore, Lillich and Nanda [61] lay down certain yard-sticks to judge whether an intervention is for humanitarian purposes or not-namely-humanitarian intervention should not have a real effect on authority structure and minimal interference with self-determination-firstly, in general opposition to this rule, it is not possible to adhere to this criteria as this type of intervention can lead to further involvement and also how can it be judged before the actual action that whether effect on the authority structure and self-determination would be minimal or not. Anyway in Stanellyville there is hardly any evidence to prove that this yard-stick is maintained or not. Lillich states that this action although generally deplored in the Security Council was not

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60 R.A. Falk, Legal Order in a Violent World (Princeton University Press, Princeton, New Jersey, 1968), pp.324-36.

61 V.P. Nanda, "The United State Action in the 1965 Dominician Crisis: Impact on World Order, Denver Law Review, vol.43, 1966.

condemned. But this is no evidence that the action was approved by the Security-Council.

Intervention by United States in Dominician Republic in 1963 and 1965 was a clear case of an illegal unilateral act.[62] United States stated its reasons of interventions to be to protect its nationals and intervention for self-determination, that is preserve the forces of democracy against the threat of communist takeover. But the government had never said that the lives of American nationals were in danger, in fact the landing of American marines put their life into jeopardy. Although there were no signs of communist threats and even if there were, it was an internal matter; history and international law records the right of revolution based on self-determination. The real reason for American intervention was the United States private investments. So was the case with United States intervention earlier in Cuba and later in Guatemala. Although intervention was proclaimed on humanitarian grounds the real reason lay in American self-interest of carving out zones of influence and for ideological interest. In such cases no big power has though about the sensitivity of the states in which they are undertaking such activity.

Bangladesh is cited as a prime example of "humanitarian" intervention especially, if United Nations is

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62 M. Gurtov, The United States against the Third World: Anti-Nationalism and Intervention (Praeger Publishers, New York, 1974), pp.111-26.

paralised to act. However, it was a case of self-determination in the colonial type of set-up as expailned in chapter III. So India's role should be seen as material aid supplied to peoples fighting against colonialism. The peoples of Bangladesh are culturally, socially and geographically far removed from the people of Pakistan and West Pakistan (as it was then called) economically deprived them and brutally suppressed them by the use of force. Thus, the Bangladeshis were fighting a war of national liberation based on self-determination.[63]

Next, we take a look at the United Nations Charter where nowhere has it been mentioned that any form of unilateral action is possible for enforcing human rights. Friedmann is right in noting that, "there is a link between those who under the guise of Article 51 or for some other reason, advocate a widened right of individual or collective self-defence for state, and those, who like Lillich, Reisman, and others, plead for the recognition of a right of humanitairian intervention by individual states in the affairs of the other states".[64] Another common point is that, they want a decentralised enforcement of collective security system.

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63 R. Khan, "Legal Aspects", in K. Ayoob, ed., Bangladesh: A Struggle for Nationhood, (New Delhi, 1971), M.K. Nawax, "Bangladesh and International Law", vol.11, 1971, no.2, pp.251-67.

64 Cited in Chimni, n.1, p.258.

From the view point of policy perspectives too, opposition to the concept of "humanitarian" intervention can be substantiated. No doubt the violation of human rights is of central concern to the international community but if unilateral actions are permitted then given the decentralised nature of the international society, and the hazards of auto-interpretation, it would be impossible to stop the abuse of any such doctrine.

Further, states are required to chose a policy in furtherance of right of unilateral action for protection of human rights because United Nationals is paralysed in action. Now this is a retrogressive argument. Sometimes United Nations thinks that in subjective situations like human rights violation it is best not to intervene but to create world opinion against such violations, which is more effective. Thus United Nations promotes human rights rather than leads to further mass-scale manslaughter, which would be the result of any intervention in such a situation, so rather than promoting human rights it will lead to their derogation.

Finally Brownlie has listed, if counting heads is most effective way to show that humanitarian intervention undertaken is illegitimate or not, several publicists who do not recognise any right of humanitairian intervention- Brierly, Castren, Jessup, Arechaga, Briggs, Goodrich, Hambro

and Simons, Friedmann, Waldock, Bishop amongst others.[65]

V. THE COUNT'S APPROACH

A. Rejection of Traditional Grounds of Non-Intervention:

Now, let us see how far the Court has supported the context of human rights and self-determination, for which unilateral action can be undertaken. But, before that a word about the Friendly Relations Declaration (1970). The said Declaration does not prescribe intervention for promoting "human rights" or "self-determination". As already said the content of non-intervention principle has to be read in the light of the principles of sovereign equality of states, non-use of force and self-determination of peoples, which allows intervention only on the grounds of:-

(1) Supplying material assistance to peoples fighting against colonialism;[66]

(2) Intervention for self-defence.[67]

United States at the jurisdiction stage had alleged

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65 Brownlie, n.39, p.244.

66 Resolution 2625(XXV), (1990), Principle of Self-determination, para 5, reads, "such peoples are entitled to seek and to receive support in accordance with the purposes with the purposes and principles of the Charter".

67 Ibid., Principle of Non-use of force, para 13, reads, "Nothing in the foregoing paragraphs shall be construed as enlarging of diminishing in any way the scope of provisions of the Charter concerning cases in which the use of force is lawful.

that the Nicaraguan government had violated certain assurances undertaken by its predecessors and thus United States had a right to intervene.[68] The assurances undertaken by the Nicaraguan government towards O.A.S. on coming to power were:[69]

(1) Immediate and definitive replacement of Somoza regime;

(2) Installation of a democratic government.

(3) Respect for human rights of all Nicaraguans without exceptions.

(4) The holding of free elections as soon as possible leading to an establishment of a truly democratic government.

U.S. argued that these assurances were violated by the Sandinistas by [70]

(1) no longer including the democratic members of the government of national reconstruction in the political process;

(2) was not a government freely elected under conditions of freedom of press, assembly and organisation and was not recognised as freely elected by its neighbours, Costa-Rica, Honduras and El-Salvador;

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68 I.C.J Reports, 1986, para 126, p.70.

69 Ibid., para 167, p.89.

70 Ibid., para 169, pp.90-91.

(3) had taken significant step towards establishing a totalitarian communist dictatorship, including the formation of FSLN neighbourhood watch-committee and the enactment of laws that violate human rights and grant undue executive power

(4) had committed atrocities towards its citizens as documented in the reports by the Inter-American Commission of Human Rights of the Organisation of American States.

(5) had aligned itself with Soviet Union and Soviet allies including G.D.R., Bulgaria, Libya and P.L.O.

(6) had committed and refuses to cease aggression in the form of armed subversion against its neighbours in violation of the Charter of United Nations, besides Charter of the Organisation of American States, the Inter-American Treaty of reciprocal assistance and the 1965 United Nations General Assembly Declaration on Intervention and,

(7) has built an army beyond the needs of immediate self-defence at the expense of the needs of "Nicaraguan" people and about which the nations of the region have expressed deep concern.

United States asserted that these grounds validated that act of unilateral intervention which otherwise would be in contravention of the principle of non-intervention. The

Court rejected this argument.

It posed the question for itself: "it has to consider whether there might be indications of a practice illustrative of a belief in a kind of general right for states to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another state, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention"[71]

It continued, "states have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition. The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foeign state for reasons connected with, --the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy and not an assertion of rules of existing international law"[72]

"In particular as regards the conduct towards Nicaragua which is the subject of the present case, the United States has not claimed that its intervention, which is justified in

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71 Ibid., para 206, p.108.

72 Ibid., para para 207, pp.108-9.

this way on political level, was also justified on the legal level-alleging the exercise of a new right of intervention regarded by the United States as existing in such circumstances the Unites States has, on the legal plane justified its intervention expressly and solely by reference to - collective self-defence against an armed attack, Nicaragua, for its part, has often expressed its solidarity and sympathy with the opposition in various states, especially in El-Salvador. But Nicaragua too has not argued that this was a legal basis for an intervention, let alone an intervention involving the use of force".[73]

"However the assertion of a commitment raises the question of the possibility of the state binding itself by agreement in relation to a question of domestic policy. The Court can not discover-any obstacle or provision to hinder a state from making a commitment of this kind".[74] However the Court did not find any legal commitment in such assurances undertaken by Nicaraguan government and it asserted that "even if it was a legal commitment it could not have justified the unilateral American action to enforce it because it was a commitment made not directly towards the United States but towards the Organisation, the latter being alone empowered to monitor its implementation. The Court can see no legal basis for the "special responsibility"

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73 Ibid., para 208, p.109.

74 Ibid., para 259, p.131.

regarding the implementation of commitments made by the Nicaraguan government which the United States considers itself to have assumed in view of its role in the installation of the current government of Nicaragua. Moreover, even supposing that the United States was entitled to act in lieu of the Organisation, it could hardly make use for the purpose of method which the Organisation could not use itself, in particular, it could not be authorised to use force in that event of its nature a commitment like this is one of a category which, if violated, cannot justify the use of force against a sovereign state"[75]

"The finding of the United States Congress also expressed the view that the Nicaragua Government had taken "significant steps towards establishing a totalitarian Communist dictatorship" - adherence by a state to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of state sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social economic and cultural system of a state. Consequently, Nicaragua's domestic policy options, even assuming that they correspond to the description given of them by the congress finding, cannot justify on the legal plane the various actions of the respondent complained of. The Court cannot contemplate the

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75 Ibid., para, 261-2, pp.132-3.

creation of anew rule opening up a right of intervention by one state against another on the ground that the latter has opted for some particular ideology or political system"[76]

"The Respondent state has always confined itself to the classic argument of self-defence and has not attempted to introduce a legal argument derived from a supposed rule of "ideological intervention", which would have been a striking innovation. The Court would recall that one of the accusations of the United States against Nicaragua is violation of "the 1965 General Assembly Declaration on Intervention", by its support for the armed opposition to the government in El Salvador. It is not aware of the United States having officially abandoned reliance on this principle, substituting for it a new principle of "ideological intervention" the definition of which would be discretionary"[77]

"Similar considerations apply to the criticisms expressed by the United States of the external policies and alliances of Nicaragua - it is sufficient to say that state sovereignty evidently extends to the area of its foreign policy and that there is no rule of customary international law to prevent a state from choosing and conducting a

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76 Ibid., para 263, p.133.

77 Ibid., 266, p.134.

foreign policy in coordination with that of another state".[78]

The idea behind this long narration of the Court's judgement is to produce verbatim the Court's view to show that the contexts of self-determination and human rights can not be regarded as appropriate grounds for unilateral state action in the affairs of the state, that is, it does not render an unlawful intervention, in violation of non intervention principle, as a lawful act.

Thus the Court upholds the strict interpretation of the principle of non-intervention except for firstly, the colonial context which is implied in its statement that, "there has been in recent years a number of instances of foreign intervention of forces opposed to the government of another state. The Court is not here concerned with the process of decolonisation --.[79] Although, this statement is in line with the Friendly Relations Declaration yet the Declaration allows intervention for colonial people on the basis of regarding it as an international situation,[80]

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78 Ibid., para 265, p.133

79 Ibid., para 206, p.108.

80 Resolution 2625(XXV) of 1970, Principle of self-determination, para(6) reads, "The territory of a colony or other NON-Self-Governing territory has under the Charter, a status separate and district from the territory of state administering it; and such separate and district status under the Charter shall exist until the people of the colony of Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter and particulary its purposes and principles".

however the statement of the Court implies that it is an internal situation. Secondly, the Court allows intervention at the request of the government of the state, which as pointed out earlier is a retrogressive step, an exception not implied by the Friendly Relations Declaration.

(B) Panama : United States at Cross-roads:

Although, the Court categorically rejected intervention on the grounds of "self-determination" and preservation of "human rights" yet, United States officially forwarded the same grounds to defend the landing of American troops in Panama in December 1989.[81] In January 1990 President Bush declared that he had accomplished all the four objectives for which he had ordered the American troops into Panama. Among the four, relevant for our purposes are the objectives to "safe guard the lives of American citizens, to help restore democracy--".[82]

The United States office was supported in this stance by various Western publicists, the most notable among them being Anthony D `Amato. [83] He supported the American action

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81 V.P. Nanda, "The validity of United States Intervention in Panama under International Law", in Agore: US Forces in Paname: Defenders, Aggressors or Human Rights Activists, American Journal of International Law, vol.84(1970), pp.494-503, at p.494.

82 Ibid.

83 Anthony D'Amato, "The Invasion of Pana was a wawful Response to Tyranny", in Agora: US Forces in Panama: Defenders, Aggressors or Human right Activists, n.81, pp.516-524.

primarily on the ground of protection of "human-rights" by denouncing the Third World propogonist and the Court's approach as "views conditioned by a statist conception of international law that they seem unable to see through the abstraction that we call the "state" to the reality of human beings struggling to achieve basic freedom".[84]

However, whether intervention for "self-determination" or on "humanitarian" grounds is a permissible exception or not to the principle of non-intervention, is a debate open only in certain Western minds. The Court has pronunced upon this issue categorically and scholars like Farer [85] and Nanda[86] have not only denounced the American action in Panama but supported by publicists like Falk[87] and Brownlie[88] have long considered these grounds as "impermissible" for unilateral action as they are neither for community interest nor backed by community consensus. The debate would have been still open if the court's ruling would have stood in isolation to the other sources of international law. In fact, the court has taken note of the

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84 Ibid., p.516.

85 T. Farer, "Panama: Beyond the Charter Poradigm", in Agora: US Forces in Panama: Defenders, Aggressors or Human Rights Activists, n.81, pp.503-15.

86 Nanda, n.81, pp.494-503.

87 Falk, n.11, pp.494-503.

88 I. Brownlie, International Law and the Use of Force, by states (Oxford University Press, London, 1963) Second edition, pp.281-302, 338-49.

changed content of the contemporary international law. Thus, constant canvassing for action on these grounds will not make it legitimate.

In contrast to the United States action is that of the Soviet Union, it has not only pulled out its forces from Afghanistan, Czechoslovakia, Poland, Hungary and Romania besides others but has also dissolved the Warsaw Pact, confirming to the present development of contemporary law which rules out intervention on any political or moral grounds-a trend confirmed and upheld by the Court.

Thus, United States stands at a cross-road. On the one hand, it is being universally accepted, as demonstrated by the Nicaragua decision, that self-determination and preservation of human rights can not be a legitimate exception to the principle of non-intervention and on the other is the beaten traditional track of United States, permitting intervention on these universally rejected grounds. May be even the United States does not believe in these grounds of intervention and Farer is right in concluding --

> "Even those inclined to give President the benefit of the doubt may wonder whether Alan Morehead's final explanation of the British descent on Ethiopia is not, after all a fit, epitaph in Panama, "the British sought no gain of any kind, and they had no quarrel with the Ethiopian people--The whole vast expensive operation was nothing more nor less than a matter of racial pride: Thedore (King of Ethiopia) had affronted a great power and now he has to be punished".[89]

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89 Farer, n.85, p.315.

CHAPTER V

RAMIFICATIONS (II): NEXUS BETWEEN SELF-DEFENCE AND INTERVENTION

I. THE UNITED STATES JUSTIFICATION

The United States, at the jurisdiction stage, asserted (against the Nicaraguan complaint of use of force, intervention and violation of Nicaraguan sovereignty by the United States) that assistance to Contra rebels was in pursuance of individual and collective self-defence, in response to request from El-Salvador, Honduras and Costa-Rica, against aggression and alleged attacks by Nicaragua against these states.[1] According to United States, Nicaragua had supplied arms besides other types of assistance to the Salvadorian rebels, and had undertaken military attacks against Honduras and Costa-Rica.[2]

Since not much evidence was available with respect to Nicaraguan incursions against Honduras and Costa-Rica,[3] the Court primarily had to examine:

(1) Whether acts of intervention can be pleaded in self-defence, as United States did to justify assistance to the contras. In other words, is intervention in self-defence a permissible exception to the principle of non-intervention;

(2) Whether Nicaragua in aiding El-Salvador guerrillas

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1 I.C.J. Reports, 1986 para 126, p.70, para 130, p.72.

2 Ibid., para 128, p.71.

3 Ibid., para 231, pp.119-20.

committed any aggression or armed-attack to require self-defence.

The question here required the Court to decide on two issues:

(a) Whether assistance to rebels, that is, intervention amounts to a mere use of force or armed-attack;

(b) Whether self-defence is available against armed-attack only or also against any type of aggression.

As is obvious the questions here are inter-related. There can be a nexus between intervention and self-defence only if intervention is permissible in self-defence and self-defence is available against aggression or/and armed-attack.[4] Thus, a brief survey of the literature pertaining to this "nexus" or "link" between self-defence and intervention is much called for, before embarking upon the Court's approach to the traditional justifications advanced by most Western States in any interventionary situation.

II. INTERVENTION AND SELF-DEFENCE NEXUS

The only permissible unilateral action in international law is the use of force in self-defence. This unilateral intervention is not considered as violative of any of the

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4 Ibid., para 130, p.72.

basic principles of international law - namely, self-determination of people, non-intervention in domestic affairs, non-use of force and sovereign equality of states. However, if beyond this perspective, force is used, it violates all these basic tenets as they are inter-related.[5] Since, this inter-relationship forms the basis of the principle of non-intervention publicists, as seen in the last chapter, have carved out various grounds (or contexts) of exception to the principle of non-intervention, so that the use of force in these contexts is not considered as violative of the other principles, especially the principle of non-use of force, where the intervening states, if there is no justification for the unilateral use of force, would be held responsible for a delictual act and thus incur state responsibility and if the action amounted to an armed-attack this responsibility would be more grave. However, the use of force by an intervening state on the grounds excepted under the principle of non-intervention, under certain circumstances may lead to a "link" or a "nexus" between the right of self-defence and intervention.

The Western publicists believe that a "nexus" between self-defence and intervention can occur in three circumstances:

(A) <u>When Intervention amounts to an armed-attack:</u>

An armed-attack in a situation of civil or internal

Ibid., para 212, p.111, para 252, p.128.

strife can occur by the third-party assistance to rebels requiring self-defence-individual or collective-in response. The major proponents of this view are certain "contextualists" like Farer [6] and Moore [7] and "absolutists" like Hall .[8]

Since Farer beleives that assistance to rebels can amount to an armed-attack depending upon the scale and degree of assistance, it is this very reason, besides curbing the escalation of violence and geographically limiting the conflict, that Farer prescribes a "tactical threshold" beyond which no assistance should be provided, especially to the rebels.[9] To make it more clear, to promote certain values Farer proposes unilateral intervention in a civil war setting either at the request of the "incumbent" government (because that is sanctioned under international law, even if an unsavoury fact) or at the request of the rebels (to promote values like "self-

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6 T. Farer, "Harnessing Rogue Elephants: A Short Discourse on Foreign Interventin in Civil Strife", Harvard Law Review, vol.82, (1969), pp.511-41; and T. Farer, "Intervention in Civil Wars: A Modest Proposal", Columbia Law Review, vol.67, (1967), pp.266-79.

7 J.N. Moore, "Towards an Applied Theory for the Regulation of Intervention", in J.N. Moore, ed., Law and Civil War in the Modern World, (The John Hopkins University Press, Baltimore, 1974), pp.3-37 at p.26.

8 A.P. Higgins, Hall's International Law (Oxford) University Press, London, 1927) eighth edition, p.347.

9 T. Farer, "Drawing the Right Line", American Journal of International Law, vol.81, (1987), pp.112-16. See pp.112-113.

determination"). However, he is aware that if no threshold is observed in the case of assistance to the "incumbent" government it may lead to the suppression of values required to be maximised and, in the case of the rebels third party assistance already has the effect of converting an internal conflict to an international one, thus violating the principle of non-use of force, if force is involved in intervention thus if no threshold is observed such assistance may amount to an armed-attack, if it already is not so.[10] Therefore, Farer proposes a "tactical threshold", that is non-deployment of foreign troops and advisors. He considers that assistance to rebels through money and weapons may violate the prohibition on threat or use of force but it will not amount to an armed-attack, which requires the active participation of foreign troops. Irrespective of the degree of assistance that will convert a third-party assistance to rebels into an armed-attack, one can easily perceive Farer's belief that the concept of "armed-attack" includes assistance to rebels.

Falk, on the other hand, does not recognise that any degree of assistance to rebels can ever amount to an armed-attack.[11] According to him, such assistance may be

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10 T. Farer, "Intervention in Civil War: A Modest Proposal", n.6, pp.271-277.

11 R.A. Falk, "The legal Status of the United States Involvement in the Vietnam War", in R.A. Falk ed., International Law of civil War, (The John Hopkins University Press, Baltimore, 1971), pp.224-323. See pp.229-38.

aggression but certainly not an armed-attack to require self-defence. His reasons, for such an assertion, are two:

(1) The concept of armed-attack relates to action which is overt and is a direct use of military force by a third-state across an international boundary - whether between two independent identities or states. Assistance to rebels, however massive in scale through arms, ammunitions, advisors, planning, organisation, that is, indirect aggression can never have the effect of an armed-attack which has to be directly or substantially be attributed to a state. Attack implies outside origin. Falk, further, rejects the idea that armed-attack can possibly include action through armed bands, volunteers or infiltrators.[12] And

(2) A civil war is basically an internal conflict thus, third party assistance to rebels can not change it to an international one. Therefore, no armed-attack and self-defence concepts are possible in an interventionary situation, as self-defence and armed-attack are concepts available only in an international conflict.[13]

For the above two reasons, Falk holds that really no nexus between intervention and self-defence can be established. However, as far as Falk's second reasoning

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12 Ibid., pp.236-38.

13 Ibid., pp.229-34.

goes, he is aware that by the third state interference the internal conflict has adopted a part international character, therefore, he prescribes his "threshold thesis", where he proposes observance of geographical, nuclear or any threshold depending from situation to situation, to maintain some kind of proportionality, a requirement of international conflict and inherent in the concept of self-defence not applicable, according to him, in an interventionary situation.[14]

To get a right perspective of Falk's "threshold thesis", in relation to his second reasoning it is necessary to recount briefly his theory of "counter-intervention.[15] According to Falk, there are four types of situations. Type IV is a situation where action is conducted under the United Nations authorisation, Type III[16] envisages an internal civil war situation where except for a minimal assistance [17] to the incumbent government, no assistance to the rebels can be provided. However, if the limits of this minimal

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14 Falk, n.11. See Introduction, pp.22-8.

15 Ibid., pp.227-44; 271-2; 286-314.

16 Initially Falk prohibited intervention both on the side of rebels and the incumbent government.

17 The limits recommended by Falk are, "Foreign assistance should not include direct participation in combat operations ... it should not attempt to bear more than a fairly small percentage under fifty percent of the increased military requirements created by the domestic uprising... the external assistance should not be conditioned upon increased influence in the process of decision-making within the recipient country". ibid., p.311.

assistance to the incumbent government are violated then, there exists a right of counter-intervention on the side of rebels. This if Falk's Type II situation. If the restraints are respected with respect to aid furnished to the incumbent, then substantial aid to instigate or sustain an insurgency also shifts the conflict into Type II situation, providing a third-state of a right of counter-intervention on the side of the incumbent government. If the uprising succeeds in establishing control over a substantial portion of the area and population of the country, then a condition of defacto dual sovereignty exists, such that third parties can furnish assistance to the insurgents on the same basis as the incumbent, forming a part of Type III situation. However, if substantial assistance is provided to anyone side the conflict is shifted to a Type III situation, providing a right of counter-intervention on the other side. Type I situation, proposed by Falk is where direct and massive military force is used by one political entity, like independent states, across the frontier of another - a right situation for the operation of the concept of armed-attack and self-defence.

Relevant for the present purpose is the Type II situation, where Falk proposes a right of counter-intervention whether on the side of government or rebels and limits such a right of counter-intervention firstly, by his

threshold thesis and; secondly by proscribing intervention beyond the territorial limits of the state where prior intervention takes place.

(B) When Intervention occurs as a form of aggression:

According to Bowett, the right of self-defence essentially regulated by the customary international law (as the United Nations Charter also refers to the customary law in this respect[18] and Article 2 para 4[19] leaves such a customary right unaffected), is available to protect four substantive rights of the state, namely (a) political independence of the state, (b) territorial integrity (c) lives and property of the nationals abroad, and, (d) economic independence of a state.[20] Thus according to him, any form of aggression that, violates any or all of the four substantive rights of the state, allows the exercise of right of self-defence. Hence, the right of self-defence is

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18 Article 51, of the Charter reads, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed-attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and Security..."

19 Article 2 para 7 of the Charter reads, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any othr manner inconsistent with the purposes of the United Nations".

20 D.W. Bowett, "The Interrelation of Theories of Intervention and self-defence", in Moore, n.7, pp.38-50, see pp.39-41.

not only available against an armed-attack but also against any aggression. And, if aggression takes the form of intervention,the nexus between self-defence and intervention is established.[21] However, he holds that the security of all the states involved in the exercise of the right of collective self-defence should be threatened or else the action of the states aiding the victim will amount to intervention.[22] Bowett substantiates his proposition by asserting that if self-defence can take the form of intervention (direct and indirect and be extra-territorial) then, self-defence can also be available against intervention.[23] Thus, Bowett expresses two types of links between self-defence and intervention:

(a) when aggression is in the form of intervention, and

(b) when self-defence is in the form of intervention.

Bowett is highly skeptical of Falk's theory of counter-intervention in a civil war situation. According to him, there are only two types of conflicts-national and international. Third-party intervention changes an internal conflict into an international one, where a right of self-defence is available not only against armed-attack but also against any form of aggression thus, dismissing Falk's type II situation and his theory of counter-intervention.

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22 Ibid., pp.46-50.

23 Ibid., pp.39-41.

Further, Bowett rules out Falk's threshold thesis to control the scale of violence and geographical spill-over of a civil war by third-party assistance, by maintaining that "proportionality" is inherent in self-defence.[24]

In other words, even Bowett believes that assistance to rebels may not amount to armed-attack but, it definitely amounts to aggression against which the right of self-defence is available and that is how the nexus between self-defence and intervention is established. Bowett further complicates the matter by assessing that self-defence is available against imminent danger.

Brownlie radically differs from Bowett in two respects- Firstly, he states, "that self-defence is available only against an armed-attack. An armed-attack strongly suggests a trespass, it is very doubtful if it applies to the case of aid to revolutionary groups and forms of annoyance which do not involve offensive operations by the forces of a state. Sporadic operations by armed-bands would also seem to fall outside the concept of an armed-attack. However, it is conceivable that a coordinated and general campaign by powerful bands of irregulars, with obvious or easily proven complicity of the government of a state from which they operate would constitute an armed-attack".[25] Secondly, he

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24 Ibid., p.40.

25 I. Brownlie, International Law and the Use of Force by States, (Oxford University Press, London, 1963), second edition, pp.278-79.

asserts that, right of collective self-defence is available-

(a) if there is a prior treaty existing for this purpose, or,

(b) when the state assisting is also a victim of such attack, or,

(c) at the invitation or the request of the "government of the victim state. [26]

Thus, Brownlie rules out any possibility of the right of self-defence being available against all forms of aggression. In this respect he supports Farer and Falk that self-defence is available only against an armed-attack but, unlike Farer he does not consider that at a certain point assitance to rebels cab be included in the concept of armed-attack. Borwnlie also differs from Falk in perceiving that aid to armed-bands, irregulars or mercanaries can amount to armed-attack, if they are controlled, managed and are responsible to the third-state and such third-party control is obvious or its complicity is easily proven. Brownlie gives a wider base to the right of collective self-defence and rejects any possiblity of the exercise of self-defence against imminent danger[27] - in direct contrast to Bowett.

Thus, from Brownlie's position only two types of link between intervention and self-defence can be concluded:

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26 Ibid., pp.328-31.

27 Ibid., pp.257-261; 275-78.

(a) Intervention for self-defence against an armed-attack conducted by regular armed-forces of a state;

(b) Aid to rebels can amount to armed-attack only if it is proved or is obvious that the third-state controls and manages the rebels and they form the organ of the intervening state,like regular armed forces. It would be right to point out that this would be a remote possibility and normally it seems Brownlie does not favour the proposition that aid to rebels, whatever be the degree of third-party assistance, constitutes armed-attack.

(C) <u>When intervention is for the defence of nationals abroad:</u>

Not much attention is paid to this kind of a nexus between intervention and self-defence, because it is considered as a part of the concept of "humanitarian intervention", rejected by anumber of publicists.[28] However, one of the major proponents of intervention for defence of nationals abroad is Bowett.

Bowett asserts that intervention undertaken for the defence of nationals is not violative of the principle of non-use of force because it is for a temporary period, proportionality is observed, it neither violates territorial integrity nor political independence and if seen within the scope of Article 2 para 4 of the Charter, it is not even

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28 See Chapter IV.

inconsistent with the purposes of the Charter in any way.[29] As already said earlier, he maintains self-defence can be undertaken to protect four substantive rights of the state, one of which being, self-defence to protect the lives and property of nationals abroad.

The Court although it did not refer to the debate existing on the subject of the "nexus" between intervention and self-defence (to reiterate-(a) assistance to rebels amount to an armed-attack requiring self-defence, (b) self-defence is available against aggression, and (c) self-defence can be in the form of intervention) yet, it was very much aware of the views prevalent on the matter and therefore, tackled the problem in such a way as to clarify and put a rest to all the controversy that has prevailed over a period of time.

III. THE COURT'S APPROACH

The I.C.J. started with the premise that the acts of intervention and the use of force, complained of by Nicaragua against United States, could be justified in self-defence, if self-defence is proved.[30] Hence, the implication is that intervention in self-defence is possible, provided the pre-conditions of self-defence are

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29 Bowett, n.20, pp.12-13, 152.

30 I.C.J. Reports, 1986 para 127, p.71, para 227.

met with-which according to the Court are:[31]

(a) there be an armed-attack which has occurred or is actual (since the issue of imminent threat was not raised, the Court did not pronounce upon it).

(b) proportionality and necessity of action be there,

(c) the state exercising the right of collective self-defence should also be the victim of such attack or there be a request or an invitation by the victim state to the third-state ready to help the victim-state in it's exercise of right of self-defence and, the victim-state should also declare that it has been attacked but such a view should be formed by the victim-state itself and not by a third state,

(d) report of the measures undertaken in self-defence should be submitted to the Security Council - an additional requirement under the Charter but, which is not important under the customary law, at the same time, if it is fulfilled it points to the lawfulness of the action taken in self-defence.

The conditions enumerated above for the exercise of the right of self-defence are governed by the customary international law, a fact acknowledged by the Charter and reiterated by the Court.[32]

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31 Ibid., paras 194-200, pp.103-6.

32 Ibid., Ibid., para 193, p.102.

The United States fulfilled none of the conditions mentioned above thus, it could not be said that there was lawful exercise of the right of individual and collective self-defence exercised by United States in concert with El-Salvador.[33]

Thus, the Court's stance validates the proposition that in self-defence it is possible to intervene in the other states and its affairs. Bowett is right to assume that intervention for self-defence is possible but, as the Court pointed out, provided all the factors above are met with. However, as logic it can be asserted that covert and indirect action, like the American assistance to Contras, can never by its nature be an action in self -defence. It will never qualify the test of necessity and proportionality. Falk rightly says, "we are hardly prepared to endorse a conception of legitimate covert operations that validates state-sponsored terrorism characterised by its user as "defensive"[34] and that this conclusion can neither be drawn nor presumed from the Court's verdict and this could not be what the Court had meant. Bowett's propostion, that besides armed-attack, self-defence is available against all types of aggression including intervention, is not vindicated by the court nor is his assertion that the right

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33 Ibid., paras 227-38, pp.118-23.

34 R.A. Falk, "The World Court's Achievement", American Jounal of International Law, vol.81, (1987), pp.106-12, at p.111.

of collective self-defence is exercisable only when the security of the aiding state is also threatened. Since, self-defence is available only on armed-attack there is no question of a nexus between self-defence and intervention if aggression is in the form of intervention as the right of self-defence can not be exercised against it.

Futher, the Court considered the acts that constitute armed-attack. The Court propounded: "armed-attack is action by regular armed forces across an international border or the sending by or on behalf of a state of armed bands, groups of irregulars or mercenaries who carry out acts of armed-force against another state of such gravity as to amount to an actual armed-attack, conducted by regular forces or its substantial involvement therein".[35] But the Court does not believe that the concept of armed-attack includes not only acts by armed bands, where such acts occur on a significant scale but also assistance to rebels in the form of provision of weapons or logistic or other support. Such assistance may be regarded as a threat or use of force or amount to intervention in the internal or external affairs of other states"[36]

To put it more clearly, the Court's definition of armed-attack includes:-

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35 I.C.J. Reports, 1986, para 195, p.103.

36 ibid., para 195, p.104.

(1) Action by regular armed-forces of a state, which cross an international border; such action should be overt;

(2) Grave acts, of the scale and manner of a regular army, carried out by armed bands, irregulars or mercanaries sent by or on behalf of a state, or,

(3) Substantial involvement of a state is there in organising, training, controlling and execution of grave acts, of the calibre of a regular armed-force, carried out by armed bands, irregulars or mercenaries.

Thus, the essence of armed-attack outlined by the Court is that grave acts, whether carried out by the regular armed forces or irregulars or mercenaries or armed bands, should be attributable to a third-state through outside management, control and origin of such forces from the state of intervention. Even if the origin can not be traced to an outside source from the state of intervention, in the case of armed bands, mercenaries and volunteers, still the assistance given by a third-state, that is, its involvement should be such that these bands could not easily have survived without such assistance. Thus, such assistance controls and conditions their acts to the extent that these bands, volunteers or mercenaries can be identified as an organ of the third-state, just like a regular armed force. This conclusion is strengthened by the fact that the Court categorically excludes assistance to rebels in the form of weapons or logistics or other support from the concept of

armed-attack, as primarlity "rebellion" implies internal origin, control, management and leadership, even if assistance involves not only material support to rebels but also organising training and activities of similar nature. This conclusion is further supported by the fact that although United States organized, trained and substantially aided the contra activity in Nicaragua, yet the Court found United States guilty of violation of the principles of non-use of force, non-intervention and, independence and sovereign equality of states and did not hold United States responsible for armed-attack, by its assistance to the Contras.[37] The reason for such an attitude of the Court can only be found in the argument that Contra forces were essentially of internal origin and pre-dated the beginning of United States activity in Nicaragua and, as the Court found out while examining the factual evidence, the United States did not control the Contra forces, even though it trained, financed, organised them and also provided them with logistics and weapons. The Court itself confirmed that the Contras could not be identified as "organ" of the United State's government and United States was not controlling Contra forces although its position in relation to contras had an element of potential control.[38] Following the same line of thought one can understand the Court's

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37 Ibid., para 238, p.123; para 242, p.124; para 252, p.128.

38 Ibid., paras 98-115, pp.58-64.

assertion that even if there would have been evidence of Nicaraguasupplying arms to Salvadorian rebels it could not be considered as armed-attack but only violation of the principle of non-intervention and where it involved force then, violation of the principle of non-use of force.[39] Thus, aid to rebels of whatever nature or degree, can not be considered as included in the concept of armed-attack because armed-attack is a concept which requires outside control and management of forces or irregulars from the state of intervention, unlike in the case of rebels.

The Court's conclusion corresponds to Brownlie's definition of armed-attack. The nexus between self-defence and intervention, that can be drawn from the Court's definition of armed-attack, is:

(1) If Intervention is for self-defence, on armed-attack carried out by regular armed-forces;

(2) If internal strife is created by armed-bands or group of irregulars, or mercaniaries sent by or on behalf of a third-state or a third-state is substantially involved there in;

To a certain extent even Falk's argument is in line to the Court's, where he claims that armed-attack can be only by regular armed-forces of a state, across an international boundary and is an overt action and does not include action of aiding the rebels and therefore, no nexus between

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39 Ibid., paras 230, p.119; para 205, p.108.

intervention and self-defence can be established, by aiding rebels. However, his argument that assistance to volunteers, mercenaries, armed bands or sending of infiltrators can not be considered as an armed-attack has not been validated, as seen above. In fact from the Court's argument to reiterate, one gleans that if grave acts are carried out by such bands sent by or on behalf of a third-state or its substantial involvement in carrying out such acts is proved it amounts to an armed-attack. In the light of the Court's verdict Falk's other argument that self-defence and armed-attack concept can not exist in an essentially internal situation is also rejected. in fact, he concedes in view of the court's decision that "in some circumstances action taken to overthrow another government might qualify as an armed-attack"[40]

Thus, in view of the Court's clarification one cansay that there can not exist any nexus between self-defence and intervention in the situation where assistance to rebels is given, as assistance to rebels is not included in the concept of an armed-attack a contradiction of Farer's belief. Farer however, asserts, "conflict has raged particularly around the following issues (1) what forms and degrees of assistance to rebels constitute an armed-attack within the meaning of Article 51 of the Charter authorising individual and collective self-defence --, on the one hand,

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40 Falk, n.34, p.110.

the Court concludes that there are circumstances where aid to rebels can be deemed an armed-attack with all the attendent legal consequences. On the other it categorically rejects the claim that a state crosses the armed attack threshold by arming the rebels. Nor does it appear that arms plus advice and sanctuary for rebel leaders suffice to transform illegal intervention into an armed-attack. What will suffice, if I understand the Court correctly, is a level of collaboration exemplified by the Bay of Pigs, that is where the rebels are organised, trained, armed and then launched by their patron in assault of such dimension that if it were carried out by troops of a foreign state, there would unquestionably be an armed-attack. Presumbly the dimension can be measured overtime, in other words multiple infiltration by small units can equal a single mass border crossing".[41]

Farer, as the above para shows, still maintains that aid to rebels can amount to armed-attack depending on degree and form of assistance given to rebels. His statements clearly imply that aid to rebels can amount to armed-attack, only the Court has raised the threshold of assistance, that can still be termed as armed-attack. Farer seems to have misunderstood the Court because the Court did not mean that aid to rebels constitute an armed-attack in any circumstances at all because the term "rebels" imply origin

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41 Farer, n.9, p.113.

internal to a state and not outside the state, opposition to the government exist within the state primarily, and the assistance is given to such rebels and this assistance howsoever massive cannot be termed armed-attack. In this context, it can be pointed out that actions of the United States is aiding Contras, were not categorised as armed-attack by the court. The court could have passed a verdict to that effect but it did not. Farer, on the other hand, categorises United Satates assistance to Contras as armed-attack.[42] Thus, there is no increase in threshold for armed-attack, as Farer implies. In fact, Farer by pointing out Bay of Pigs incident negates his own stand because the essential element in the Bay of Pigs episode was that the Cuban rebels or volunteers were launched by the United States, which indicates an outside origin and control of the rebellion and points to a substantial involvement of the United States.

It would be pertinent to point out here, that even if assistance to rebels had been included in the concept of an armed-attack or an attack in the terms, as defined by the Court had existed still there could have been no nexus between the right of self-defence and intervention because, except in the case of intervention of the government (a ground endorsed by the Court), the contexts in reference to which intervention is claimed, namely - self-determination

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42 Ibid.

and human rights - are rejected by the Court.[43]

However, before closing down the discussion on armed-attack it is fair to point out that, Judge Schwebel in his dissenting judgement considers Nicaraguan aggression, through providing material support to rebels, an armed-attack. He further said, "that the question whether a state is justified in reacting in self-defence against acts not constituting or tantamount to an armed-attack was not engaged", but if it was he believes that customary law give such a right of self-defence,[44]

The Court did not have to pronounce upon the right of intervention for defence of nationals abroad but given its definition of armed-attack and the conditions required for the exercise of the right of self-defence, it would not have supported such a type of intervention.

The only aspect that remains to be seen, in the light of the Court's decision is the right of counter-intervention, as proposed by Falk. The Court was not required to decide upon the right of counter-intervention. But, what the Court considered was, "when dealing with the rule of the prohibition of the use of force, the Court considered the exception to it constituted by the exercise of the right of collective self-defence in the even of an

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43 I.C.J. Reports 1986, paras 206-209, pp.108-10; paras 257-268, pp.331-47.

44 Ibid., dissenting opinion of Judge Schwebel, paras 154-171, pp.331-47.

armed-attack. Similarly, it must now consider the following question if one state acts towards another state in breach of the principle of non-intervention, may a third state lawfully take such action by way of counter-measures against the first state as would otherwise constitute an intervention in its internal affairs? A right to act in this way in the case of intervention would be analogous to the right of collective self-defence in the case of an armed-attack, but both the act which gives rise to reaction, and that reaction itself, would in principle be less grave.[45]

"For one state the use force against another, on the ground that, that state has committed a wrongful act of force against the third state, is regarded as lawful, by way of exception, only when wrongful act provoking the response was an armed-attack, Thus, the lawfulness of the use of force by a state in response to a wrongful act of which it has not itself been the victim is not admitted when this wrongful act is not an armed-attack. In the view of the Court, under international law in force today - whether customary international law or that of the United Nationa system-states do not have a right of "collective" armed response to acts which do not constitute an "armed-attack".[46]

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45 I.C.J. Reports, 1986, para 210, p.110.

46 Ibid., para 211, p.111.

"The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that state, could only have justified proportionate counter-measures on the part of the state which had been the victim of these acts, namely El-Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third state, the United States, and particularly cound not justify intervention involving the use of force".[47]

From the above statements, Falk infers that the Court is validating its proposition of right of counter-intervention and its territorial limitations.[48] However, to gather from the Court's statement, that it was pronouncing upon the right of counter-intervention, is not a right inference. What the Court means to analyse is that just like the occurence of an armed-attack permits collective self-defence, similarly, whether intervention also permits some kind of a collective measure against the intervening state. The answer of the Court, as said, was in the negative. The Court really was not concerned with deciding upon the legitimacy of the act of third-party intervention in a state, where alreasy prior intervention had taken place. Thus Falk's inference from the statements above must go unchallanged because, it is unknown what would have been the court's response to the right of counter-intervention.

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47 ibid., para 249, p.127.

48 Falk, n.34, p.110.

However, in spite of all the altruistic motives canvassed in intervention for self-determination, theCourt has rejected such grounds of intervention, except in the colonial situation (impliedly). In view of this fact, the right of counter-intervention may not have been acceptable to the Court.

In conclusion it would be right to say that the link between self-defence and intervention is of a very tenuous kind. It exists only if, firstly, there is an armed-attack, and secondly, if armed-attack is carried out by regular armed forces of a state across an international border or grave acts of the dimension of a regular armed force are carried out by armed bands, irregulars or mercenaries sent by at on behalf of a third-state or its "substantial involvement therein", is proved. Assistance to rebels cannot establish such a nexus.

The way the Court has handled the argument of the United States should put a rest to all the controversies of the definition of armed-attack leading to a debatable nexus between intervention and self-defence claimed over a period of time. Thus, in conclusion one can assert that intervention in self-defence is an impermissible exception to the principle of non-intervention unless there is an armed-attack but the concept of armed-attack does not include assistance to rebels.

CHAPTER VI

CONCLUSIONS

I. RULE OF LAW UPHELD

The Court, by upholding a strict interpretation of the principle of non-intervention (except in the context of the wars of national liberation against colonial dominance.[1]) endorsed the Third World perspective as embodied in the Friendly Relations Declaration, 1970. In the process the Court clarified the meaning, scope, content as well as the legal basis of the principle. It significantly pointed out that since the legal basis of the principle of non-intervention lay in the inter-linkages of the principles of sovereign equality of states, non-use of force and equal rights and self-determination of peoples, exceptions could not be carved out of the non-intervention principle on any "political" and "moral" grounds, implying that the Western justification for intervening to promote "self-determination" and "human-rights" is unacceptable.[2] The I.C.J. went a step further in pointing out that intervention for self-defence is also an impermissible exception to the principle in point unless there is an "armed-attack" but the concept of armed-attack certainly does not include assistance to rebels.[3] In brief, no more can Western states legally justify broad exceptions to the principle of non-

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1 I.C.J. Reports, 1986, para 206, p.108.

2 Ibid., paras 206-208, pp.108-9; paras 257-269; pp.130-35.

3 Ibid., paras 194-195, pp.103-4; paras 229-238, pp.119-23.

-intervention reading self-defence or on political and moral grounds, as the United States had sought to do in the case of Nicaragua.[4] To put it differently, the Court look a giant jurisprundential step forward in upholding the rule of Law in international affairs.

However, the critics of the Court's verdict have been many. Vociforous among them are Anthony D'Amato[5], Thomas M.Franck[6], Edward Gordon[7] , J.L.Hargrove[8], F.L.Kirgis Jr [9], W.M.Reisman[10] and R.F.Turner[11]. They all argue that international law allows intervention to promote "human rights" and "self determination", as those are contexts which promote community interest. Also Armed Attack includes

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4 Ibid., para 126, p.70.

5 A.D'Amto, "Thrashing Customary International Law", in Appraisals of the ICJ's Decision: Nicaragua V. US (Merits), American Journal of International Law, vol.81, (1987), pp.77-183, see pp.101-5.

6 T.M. Franck, "Some Observations on the ICJ's Procedural and substantive Innovations", ibid., pp.116-21.

7 E. Gordon, "Discretion to Decline to exercise Jurisdiction", ibid, pp.129-35.

8 J.L. Hargrove, "The Nicaraguan Judgement and the Future of the Law of Force and Self-Defence", ibid, pp.135-43.

9 F.L. Kirgis Jr, "Custom on a sliding scale", ibid, pp.146-51.

10 W.M. Reisman, "The Other Shoe Falls: The Future of Article 36(1) Jurisdiction in the light of Nicaragua", ibid, pp.166-73.

11 R.F. turner, "Peace and the World Court: A Comment on the Paramilitary Activities Case", Vanderbilt Journal of Transnational Law, vol.20:53, (1987), pp.53-79.

the concept of indirect aggression like that of Nicaragua against El-Salvador, and the Court by excluding it from the concept of armed-attack has deprived a weak country to call a friendly state for help against its ambitious and aggressive neighbour. In other words, intervention for self-defence is a permissible exception to the principle of non-intervention. The arguments here are in line with the dissenting judgements of Judges Schwebel[12], Oda[13] and Jennings.[14] But as Falk[15] and Farer[16] testify, the Court accomplished a remarkable feat in leaning over backwards to give as much credence to the arguments of the United States as possible but still did not find them acceptable.

II. AREAS OF UNCERTAINTY

To begin with, as pointed out in the text of the analysis, the Court considers colonialism as an internal situation, where intervention is allowed to facilitate the opposition forces against the government[17]. Considering that providing material assistance to the colonial people

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12 I.C.J. Reports, 1986, Dissenting opinion of Judge Schwebel, pp.259-527.

13 Ibid, Dissenting opinion of Judge oda, pp.214-258.

14 Ibid, Dissenting opinion of Judge Sir Robert Jennings, pp.528-46.

15 R.A. Falk, "The world Court's Achievements", in Appraisals of the ICJ's Decision: Nicaragua V. US (Merits), n.5, pp.106-12.

16 T. Farer, "Drawing the Right Line", ibid, pp.112-6.

17 I.C.J. Reports, 1986, para 206, p.108.

has community consensus, it does not matter whether such a situation is categorised as an internal situation or a territory having an international standing. But it makes substantial difference to the people under colonial dominance because as shown in the special committee debates, the idea to make it a separate territory was that a third state could provide assistance to these peoples in the nature of the right of individual and collective self-defence against the colonial power, if it used force against such peoples, nature of which would qualify as an armed-attack.[18] In fact, the Western states in the special committee did make a palerva about considering such territory as a separate international entity but ultimately had to accept the Third World point of view; the Resolution was passed by consensus. Since the Friendly Relations Declaration was passed in these terms[19] and the Court made it the foundation stone of its decision it should have taken

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18 O.Sukovic, "Principle of Equal Rights and Self-determination of Peoples", in M. Sahovic, ed., Principles of International Law Concerning Friendly Relations and Cooperation, (Oceana Publication, Dobbs Ferry, New York, 1972), pp.323-73, see pp.363-68.

19 According to para(6) of the Principle of equal rights and self-Determination of Peoples, "The territory of a colony or other Non-Self Governing territory has under the Charter, a status separate and distinct from the territory of state administering it; and such separate and distinct status under the charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles".

note of it. Also, after the Court mentioned the colonial situation it implied that intervention on behalf of rebels on this ground was permissible, it could have gone ahead and categorically affirmed it, rather than merely implying that it validates intervention on behalf of such people. The Court lost the opportunity of doing so.

Secondly, the Court validated intervention at the invitation of the government.[20] To reiterate, the Court formed the basis of its decision the Friendly Relations Declaration (1970) which does not allow intervention at the invitation of either the government or the rebels, thus promoting self-determination.[21] The Court itself confirmed that the Declaration reflected opinio juris. If so, intervention at the invitation of the government has been rejected not only under the United Nations system, but also under the customary law and yet the Court endorsed this as a valid ground of intervention. The fact that the Court supported such a state-practise is not very heartening. Morever, the Court seems to have taken a "status-quo" kind of an approach of the traditional doctrine of international law, although, it does go as faras the traditional doctrine,

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20 I.C.J. Reports, 1986, para 246, p.126.

21 principle of NOn-Intervention, para 1, states, "No State or group of states has the right to intervene, directly or indirectly for any reason whatever in the internal or external affairs of any other state ...", read with para (2) of the same principle, "No state may ... interfere in Civil Strife in another state".

to have an aversion against rebellions.

Finally, the Court while explaining the principle of non-intervention, rightly affirmed that economic intervention was as unlawful as any form of armed intervention.[22] However, it is odd that instead of pronouncing upon the facts of economic intervention as alleged by Nicaragua against United States, it concluded that "at this point, the Court has merely to say that it is unable to regard such action on the economic plane as complained of as a breach of the customary law principle of non-intervention".[23] This conclusion of the Court seems strange, in particular under because it regarded the Friendly Relations Declaration as representing opinio juris[24] and the Resolution categorically prohibits intervention in all forms.[25]

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22 I.C.J. Reports, 1986, para 205, p.108.

23 Ibid., para 245, p.126.

24 Ibid., paras 202-203, pp.106-7.

25 Principle of non-intervention in para reads, "... armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political economic and cultural elements are in violation of internaltional law". Para 2 of the same principle reads, "No state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it subordination of the exercise of its sovereign rights and to secure from it, advantages of any kind".

III. A TASK WELL ACCOMPLISHED

These drawbacks, however cannot undervalue the judgement and its importance in the contemporary international law. In the words of Falk, "even if conceived of only as a legal text, the array of judicial opinions contained in Nicaragua versus United States constitutes an extra-ordinary document. It represents a fascinating attempt through judicial inquiry to assess convincingly the relevance of law to an on-going armed conflict".[26] And as he further observes, "what is more impressive, perhaps, is the contribution made by the judgement to the proper exercise of judicial function in an institutional setting of diverse cultures and ideologies. No other World Court judgement is as satisfying in the quality of its legal reasoning, building persuasively its main conclusions on general principles of analysis that enjoy wide support and grapple sensitively with the complicated and elusive factual background of controversy. The implicit legal hegemony of Western approaches and scholarship is no where evident, nor, it should be added is there any swing, latent or manifest, to Third World or Marxist view points. As such, the majority opinion is of great help to all sectors of World public opinion seeking to comprehend the contours of minimum world public order or matters of war and peace. The possibility of legal

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26 Falk, n.15, p.106.

universalism has been powerfully validated".[27]. In conclusion we may state that it is difficult in any way to disagree with Falk.

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