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HUMANITARIAN INTERVENTION MISSIONS

ELEMENTARY CONSIDERATIONS, HUMANITY AND THE 'GOOD SAMARITANS'

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A certain man fell among thieves that stripped him of his raiment, and wounded him, and departed leaving him half dead. But a certain Samaritan came where he was: and when he saw him, he had compassion on him, and went to him, and bound his wounds, pouring in, oil and wine and set him on his own beast, and brought him to an inn, and took care of him.[1]

I. INTRODUCTION

During the 78-day bombing campaign by the North Atlantic Treaty Organisation (NATO) against Yugoslavia in 1999, in particular against Serbian tanks and other armoured vehicles in Kosovo, American A10s are reported to have fired 31,000 rounds of depleted uranium (DU).[2] They landed on 112 sites in Kosovo, mainly in the south, and on ten sites in southern Serbia in the Presevo Valley area. This is not the first time that NATO forces had used depleted uranium shells (DUS). From 1991-1999, NATO forces are reported[3] to have fired 70,000-100,000 DUS covering a huge expanse of territory across Kuwait, southern Iraq, Bosnia and Yugoslavia.

DUS' unique radiological and toxicological properties raise the question whether it is appropriate to use them in any future-armed humanitarian missions. DU is a radioactive, pyrophoric, heavy metal approximately 1.7 times the density of lead ($19g/cm^3$ vs $11.34g/cm^3$). It is used by the military primarily as armour and as kinetic energy penetrators to defeat armoured vehicles. It is a bi-product of the enrichment process for reactor and weapons grade uranium (^{235}U).[4] In essence, DU munitions are a category of nuclear weaponry. For this reason, the use of DU munitions by NATO forces in Kuwait, Iraq,

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[1] Luke 10:30-4.

[2] "Four enemies took brunt of uranium shells", The Times, 15 January 2001 at 4.

[3] Ibid.

[4] McClain and ors, "Biological effects of embedded depleted uranium (DU): Summary of Armed Forces Radiobiology Research Institute research", (2001) 274:1-3 The Science of the Total Environment 115, 116.

Bosnia and Yugoslavia opens up yet another ulcer in the controversial doctrine of humanitarian intervention in international law.

This article examines the limits of the legal and moral arguments that subsume the claimed right of armed humanitarian intervention in breach of the fundamental principle of international law that prohibits intervention in the internal affairs of States.[5] In the wake of recent armed humanitarian intervention missions, the nascent customary international law right to intervention in the affairs of States[6] should impose upon intervening States a duty during such intervention not to use materials or procedures that consequently endanger the welfare of the target State. This applies both during and after the intervention has achieved its political objectives.

This is what the International Court of Justice (ICJ) described as the principle of elementary considerations of humanity in *Corfu Channel.*[7]

II. INTERVENTION IN A STATE'S INTERNAL AFFAIRS

The duty not to intervene in the internal affairs of States is of some antiquity in customary international law and treaty law. It is evident among the original fundamental building blocs upon which the international legal system was raised. In what is commonly referred to as the 'classical period' of international law, three rules of customary international law countenanced it.[8]

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[5] For a discussion on the right under international law of the target State to consent to the intervention of other States in its internal affairs, see Jennings R and anor (editors), Oppenheim's International Law (1992, Longman, London) 435-439. For a discussion on intervention premised on the exercise of this right, see Chigara, "Operation of the SADC Protocol on Politics, Defence and Security in the Democratic Republic of Congo", (2000) 12:1 African Journal of International and Comparative Law 58-69. Note the tension that arises from the exercise of this right where the principle of self-determination of peoples, ascribed with the status of jus cogens, is at issue: see Chigara, "The SAD Community – A litmus test for the United Nations' resolve to banish oppression", (1999) 11:3 African Journal of International and Comparative Law 522-528.

[6] See Zacklin R, "Beyond Kosovo: The United Nations and Humanitarian Intervention", The Josephine Onoh Memorial Lecture (2000, Hull University Press, Hull) 14.

[7] (United Kingdom v Albania) [1949] ICJ Reports 41.

[8] Cassese A, International Law in a Divided World (1986, Clarendon Press, Oxford) 143.

The first rule prohibits a State from encroaching upon the internal affairs of another State. This rests on the principle of the equality of States. According to Professor Lassa Oppenheim:[9]

> No State has supreme legal power and authority over other States in general, nor are States generally subservient to the legal power and authority of other States. Thus, the relationship of States on the international plane is characterised by their equality and independence and, in fact, by their interdependence.

In his separate opinion in *Austro-German Customs Union,* Anzilotti J described independence as:[10]

> really no more than the normal condition of States according to international law; it may be described also as *sovereignty (suprema potestas),* or *external sovereignty*, by which is meant that the State has over it no other authority than that of international law.

Therefore, a State is not allowed to exact pressure on the national institutions of another State, including the judiciary, legislature and other enforcement agencies since this would be an attack on the latter's sovereignty. In fact, three doctrines of judicial restraint, namely, State immunity, act of State and non-justiciability have evolved to countenance the rule that a State is not bound by foreign laws and institutions within its own territory. *A-G (UK) v Heinemann Publishers Australia Pty Ltd*[11] held that common law courts have no jurisdiction to entertain an action to give effect to the laws of a foreign State and neither will they seek to enforce beyond their own territory the laws of their own sovereign.[12]

The second rule enjoins a State to refrain from instigating, organising or officially supporting the organisation of activities inimical to a foreign State on the latter's territory. The ICJ stated in *Corfu Channel*[13] – the first case it considered after its creation in 1946 – that a State has

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[9] Ibid.
[10] Advisory Opinion [1931] Permanent Court of International Justice Reports, Series A/B, No 41 at 57-58.
[11] (1988) 165 Commonwealth Law Reports 30, 41.
[12] Per Lord Denning MR in A-G (New Zealand) v Ortiz [1984] Appeal Cases 1, 21.
[13] [1948-1949] ICJ Yearbook 57.

a duty under international law not to knowingly allow its territory to be used for acts contrary to the interests of other States.[14] Measures taken in the diplomatic field include the expulsion of foreigners who take advantage of the asylum status granted to them to conspire against a foreign State and the imposition of restrictions on the trafficking of arms and ammunitions.[15]

The third rule enjoins a State to refrain from assisting insurgents whenever and wherever civil strife breaks out. The significance of this rule lies in this. If rebels seize independence by force with the assistance of another State contrary to Article 2(4) of the United Nations, the final result appears to turn on the quality of the rebellion prior to the intervention of a third State.[16] This provision prohibits a State from threatening or using actual force against the territorial integrity or political independence of another State, or in any other manner inconsistent with the purposes of the United Nations.

Illegal intervention in support of the independence and self-determination[17] of a unit does not, as a matter of law, reduce the status of the local unit. As Professor James Crawford suggests:[18]

> [W]here a State illegally intervenes in and foments the secession of part of a metropolitan State, other States are under the same duty of non-recognition as in the case of the illegal annexation of territory. An entity created in violation of the rules relating to the use of force in such circumstances will not be regarded as a State.

These rules, still in force, were for the most part subject to the interest of State doctrine. This gave rise to what Antony Carty refers to as the ineffectual guarantee of the *status quo* in that they were to be complied with so long as a State did not consider that its interests overrode

[14] Ibid 61.

[15] See Cassese A, International Law in a Divided World (1986, Clarendon Press, Oxford) 144.

[16] See Harris DJ, Cases and Materials on International Law (1998, 5th edition, Sweet and Maxwell, London) 105-113.

[17] On self-determination, see ibid at 113 especially; Carty A, The Decay of International Law? (1986, Manchester University Press, Manchester) 108.

[18] Crawford J, The Creation of States in International Law (1979, Clarendon Press, Oxford), cited in Harris DJ, Cases and Materials on International Law (1998, 5th edition, Sweet and Maxwell, London) 112.

them.[19] As soon as the interests of the State were affected, the State was entitled to disregard them and intervene in the domestic or external affairs of States by the threat or the use of force.[20]

III. PROHIBITION AGAINST THE USE OF FORCE

The appearance of treaties that elevated pacific settlement of disputes over resort to war galvanised the prohibition on intervention in the internal affairs of States. The 1919 Covenant of the League of Nations and the 1928 Kellog-Briand Pact of Paris demonstrated a significant dissuasion of resort to the threat or use of force in the relations of States with one another. Articles 12, 13, and 15 of the 1919 Covenant subjected any resort to war to a three-month cooling-off period. If a dispute was submitted to the League of Nations Council, the Permanent Court of International Justice (PCIJ) or another arbitral tribunal, a State could resort to war only after three months had elapsed following the Council report or the judicial or arbitral decision.[21] This condition was aimed at prohibiting wars from being waged against States that began to comply with the decision of the League Council, PCIJ or arbitral tribunal. However, this dissuasion did not prohibit threats to use force nor did it prohibit resort to all forcible measures short of war.[22]

Two decades later, the international community took the opportunity presented by the end of the hostilities following World War II to review and aggregate the strength of opinion against intervention in the internal affairs of States. The effect of this was to proscribe the threat or use of force – itself a corollary of the principle against intervention in the internal affairs of States. The Charter of the United Nations (the Charter), at times regarded as the new constitution of the international community, prohibits in Article 2.4 both the threat and use of force against the territorial integrity or political independence of any State. Further, States cannot act in a manner inconsistent with the purposes of the United Nations. Thus, this development entrenched in international law the principle of non-intervention in the internal affairs of States.

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[19] Carty A, The Decay of International Law? (1986, Manchester University Press, Manchester) 88.
[20] Cassese A, International Law in a Divided World (1986, Clarendon Press, Oxford) 145.
[21] Ibid 60.
[22] Ibid 145.

Further, two declarations of the United Nations General Assembly – the main deliberative organ of the United Nations comprising representatives from all member States, each with one vote – reaffirm this view. They are the declarations on Non-Intervention (1965) and the Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (1970). They state in absolute terms that a State has no right whatsoever to intervene in any way in the internal affairs of another State. The United Nations Assistant Secretary-General for Legal Affairs writes:[23]

> [T]he principle of non-intervention in the internal affairs of States [is] a customary principle which in the overwhelming majority of international lawyers has the character of *jus cogens,* that is to say it is a peremptory norm from which no derogation is permissible.

However, in spite of the absolute clarity of this principle, state practice shows that it is perhaps more admired for its aspirations than for its achievements. The reason is that since the Charter was adopted in 1945, the landscape from then to the present is littered with ugly violations of this principle. A possible explanation for this is that the rule against intervention in the internal affairs of States as a peremptory norm of international law is premature, or the right to humanitarian intervention is itself a later peremptory norm of international law. However, only later norms of a similar quality may revise norms of *jus cogens* (assuming that the rule against intervention is one).[24] A better possible explanation is that the rule against intervention in the internal affairs of States is subject to the United Nations Security Council's qualification, which may authorise intervention in only two situations.

The first is in exercise of the inherent right of individual or collective self-defence if an armed attack occurs against a United Nations member pursuant to Article 51 of the Charter. An example is the United States' bombing of Iraq on 26 June 1993, allegedly resulting from Iraq's foiled assassination of the former President of the United

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[23] Zacklin R, "Beyond Kosovo: The United Nations and Humanitarian Intervention", The Josephine Onoh Memorial Lecture (2000, Hull University Press, Hull) 12.
[24] Article 53 of the 1969 Vienna Convention on the Law of Treaties.

States during his visit to Kuwait in 1993.[25] Another example is the April 1986 bombing of what the United States alleged were terrorist facilities and military installations in Libya.[26]

The second falls under Chapter VII of the Charter, which authorises the Security Council to take military enforcement action against member States if a prior determination that a threat to the peace, breach of the peace, or act of aggression has been made. However, this results in an unresolved tension between the operation of the norm prohibiting intervention on the one hand, and the emerging norm of humanitarian intervention, on the other hand. As a result, even those interventions qualifying for beatification as justified and necessary humanitarian interventions in breach of the prohibition against intervention in the internal affairs of States now risk contamination. This assumes the form of the unjustifiable breach of the same principle where incalculable misery and diminution of the dignity of the population are caused directly by the intervener or interveners using materials and strategies that damage, degrade and pollute their environment. Practically speaking, this is merely in exchange for the misery and impoverishment being meted out by their errant government.

Blurring of the distinction between what might be labelled 'justifiable' interventions from 'unjustifiable' interventions attacks the legitimacy of humanitarian interventions. They have a lot to do with the universal culture of human rights unleashed by the 1948 Universal Declaration of Human Rights, developed upon by multilateral and regional treaties, national legislative actions and the globalisation of citizenship.

As a result, this article will next consider briefly the developments and their potential impact on the legitimation of humanitarian interventions as justifiable exceptions to the general principle of international law prohibiting intervention in the internal affairs of other States.

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[25] For an assessment of the legality of this action under international law, see Kritsiotis, "The legality of the US missile strike on Iraq and the right to self-defence in international law", (1996) 45 International and Comparative Law Quarterly 162.

[26] Ibid; Reagan, "The fight against terrorism: US foreign relations with Libya", Speech delivered to the American People, 14 April 1986 at <www.labelletrial.de/specials/fightagainst.htm>.

IV. THE TRIGGER FOR ARMED HUMANITARIAN INTERVENTION

It has now become arguable that the way a government treats its own citizens is a legitimate matter of international scrutiny.[27] This has affected the extent to which armed humanitarian intervention can occur without the consent of the target State. As such, the enforcement of the elementary considerations of humanity in such missions would strengthen the case for the emerging right to intervene in the internal affairs of States for the purpose of protecting individuals from abuse committed by their own governments. This is what Lord Browne-Wilkinson referred to in *Pinochet No 3*[28] as the "unofficial acts of governments"[29] that are prohibited by international law.

Armed humanitarian intervention missions in the affairs of States connote the moral and ethical superiority of the intervening party over those of the target State. This is problematic because in the law of nations there is no such superior, all States being deemed to be equals legally. However, this moral and ethical, and some may even claim legal authority is premised on the emerging universal code of international human rights law.[30] Often the protection of minorities or sections of the population from abuse committed by the *unofficial acts of their own* governments is cited as the legal justification for military armed intervention in the affairs of a sovereign State. That abuse refers to the violation of internationally recognised basic human rights of individuals or minorities.

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[27] Wheeler, "Humanitarian vigilantes or legal entrepreneurs: Enforcing human rights in international society" in Caney S and anor, Human Rights and Global Diversity (2001, Frank Cass Publishers, London) 139-140.

[28] R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte No 3 [1999] 2 Weekly Law Reports 827.

[29] Ibid 846.

[30] For a commentary on the emerging universal code of international human rights law and its impact on the development of international law in general, see inter alia, Glen JM, The Universal Declaration of Human Rights: a History of its Creation and Implementation, 1948-1998 (2001, UNESCO Publishers, Paris); Dwyer, "Beyond a boundary? 'Universal human rights' and the Middle East", (1997) 13:6 Anthropology Today 13-18; Shestack, "The philosophic foundations of human rights", (1998) 20:2 Human Rights Quarterly 201-234; Williams, "The ethical basis of humanitarian intervention, the Security Council and Yugoslavia", (1999) 6:2 International Peace-keeping 1-23.

The population is supposed to benefit from intervention that is premised on these superior moral and ethical standards. However, to enjoy this, the population may be required to suffer from the incalculable damage and loss caused by the intervening party using materials and procedures that injuriously degrade and pollute their environment. If so, perhaps international law should impose on the right to armed humanitarian intervention the corollary duty to apply only those strategies and to use only those materials that do not endanger the target State's population during and after the intervention. The common moral justification for humanitarian intervention is that the intervening 'good Samaritans' should seek immediately to restore the basic individual human rights of a population perceived to be already under attack from its own errant government. An often-cited practical justification for humanitarian intervention is that it serves to limit crises to the local area of origin.[31]

However, in today's world, significant political decisions of any one State will have immediate consequences for others. Where decisions of a government lead to governmental acts prohibited by international law and gross violation of human rights against sections of the population occur, armed humanitarian intervention without the consent of the target State often appears to be the most expedient means to restore peace and security of individuals. Bringing with them social unrest, sickness due to poor living conditions and refugees, humanitarian crises often threaten to or overflow into neighbouring States. However, there is no justification whatsoever for replacing suffering and inhumane experience of one type with humanitarian intervention that results in suffering and inhuman experience of another type caused by the 'good Samaritan' using harmful materials and strategies.

The subsidiary or 'unforeseen' effects of NATO's 1999 bombing campaign of Kosovo suggest that unless humanitarian intervention conforms to the requirement not to use materials or procedures with extreme adverse effects, armed humanitarian interventions and their legacies will be unjustifiable. As seen below, the legacy will degrade

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[31] For an analysis of the question whether humanitarian intervention is an exception to the general rule on prohibition of intervention in the internal affairs of other States or a right on its own, and a discussion on the policy objections to this practice, see for example Kritsiotis, "Reappraising policy objections to humanitarian intervention", (1998) 19:4 Michigan Journal of International Law 1005, 1014-1020.

and pollute the target State's environment, children will be infected with leukaemia, birth deformities will be linked to military hardware pollution, and livestock will be contaminated with depleted uranium dust entering the food chain. Such developments will diminish any semblance of legitimacy of the right of armed humanitarian intervention without the consent of the target State.

V. GLOBALISATION OF CITIZENSHIP AND 'INTERNAL AFFAIRS' RE- DEFINED

Estain Calitz writes that modern economic globalisation is the latest manifestation of an erratic pattern of economic integration which has occurred in leaps and bounds over the years.[32] In Roman times, monetary integration was far more advanced than in modern Europe, when the dinarius was used as a currency in an area that today covers parts of more than 40 countries in Europe, North Africa and Asia.[33] More recently, in the period 1870-1930, the pound sterling was the currency of a part of the world that today represents more than 50 countries, including India which has a population of one billion – almost one quarter of the world population.[34]

The latest surges towards greater economic globalisation have significantly impacted upon State monopoly over citizens, elevating the debate on citizenship. As a consequence, regional and multilateral structures are constantly being created or improved in order to ensure the accountability of States and individuals. This development necessarily invites the question of what remains under the 'territorial jurisdiction' of the State, and what has passed to regional/international jurisdiction or become the subject of shared jurisdiction between the State and other regional or international bodies.

Two developments seem to threaten the emergent cosmopolitanism. One is the ascendancy of neo-liberalism and its rejection of political

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[32] Calitz, "Fiscal implications of the economic globalisation of South Africa", (2000) 68:4 The South African Journal of Economics 564, 565.

[33] Ibid; see also Blanken JC, "Coinage of Amphipolis", IAXS project #411, 1998 at <www.whoosh.org/issue18/blanken1.html#dinars> (visited December 2001).

[34] Calitz, "Fiscal implications of the economic globalisation of South Africa", (2000) 68:4 The South African Journal of Economics 564, 565; see also Davies G, A History of Money from Ancient Times to the Present Day (1996 revised edition, University of Wales Press, Cardiff) 1996.

measures that constrain market forces.[35] The other is the resurgence of nationalism, the assertion of cultural or religious identity, and the demands of indigenous peoples and ethnic minorities for autonomy and the right to preserve their own heritage and customs.[36] Nonetheless, strategies developed in the last 50 years to ensure that the individual's human rights are protected seem to have brought a unique, loose collectivisation of the world's peoples into one community. This seems to be based on the realisation that all human beings are legitimate beneficiaries of rights that inhere in the status of being human.

Globalisation of human rights has in this sense fomented against the idea of a monolithic sovereign State and global citizenship. Ian Clark has stated that "[g]lobalisation is not itself a substantive activity, but a quality, condition and form that facilitates particular behaviour".[37] However, on the contrary, globalisation is a substantive activity in the sense of institutional treaties, conventions, declarations and governmental legislative activity that combine to recognise the positive human rights of individuals. It is also a quality in the sense that the particular conduct of governments towards their subjects is sanctioned or proscribed by the former.[38]

The globalisation of citizenship that derives from this substantive activity and quality appears inevitable because it is encapsulated in the essence of 'being'. Aristotle writes that "[a] man who is incapable of entering into partnership, or who is so self-sufficing that he has no need to do so...must be either a lower animal or a god".[39] However, characterisation of global citizenship as inevitable compels disregard for patriotism and its easy sentiments. Defenders of patriotism and State monopoly of the individual argue that they are not citizens of the world because:[40]

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[35] Thompson, "Community, identity, and world citizenship", in Arhibugi D and ors, Reimaging Political Community: Studies in Cosmopolitan Democracy (1998, Polity Press, Cambridge) 179.
[36] Ibid.
[37] Clark I, Globalisation and International Relations Theory (1999, Oxford University Press, Oxford) 6.
[38] Ibid.
[39] Cited in Brown, "Cosmopolitanism, world citizenship and global civil society", in Caney S and anor (editors), Human Rights and Global Diversity (2001, Frank Cass, London) 7.
[40] Ibid 9.

1. they are not even aware that there is a world such that one could be a citizen of;
2. no one has ever been offered global citizenship, or told of its naturalisation process, or enlisted into the world's institutional structures, or given account of its decision making procedures (hopefully they are democratic); and
3. no one knows of the benefits and obligations of citizenship, or of its common celebrations and commemorations of its citizens.

Therefore, the use of the term 'global citizenship' is misleading in that the requirements listed above cannot be satisfied. What this argument does not consider is the fact that the criteria of citizenship have been deduced from, and point to, citizenship that States themselves have defined only when they have seen fit to do so.

Rejection of the idea of global citizenship on this basis shows bias since citizenship is regarded only from the States' viewpoint. It compels the thought that membership of a State is the only possible and, indeed, the only acceptable definition of citizenship. This view of citizenship may even be said to hanker for existence premised on monolithic sovereignty, the kind that is hard to find today. While the benefits of State structures should not be down played, the assertion that State sovereignty is monolithic and sacrosanct is no longer tenable.[41] In fact, while the sovereign State may have had a good run over 350 years as an organising unit, and while it is in no imminent danger of disappearing, there is no reason to expect that it will exist for another 350 years in the form we know it today.[42]

Thus, what evidence may be adduced to rationalise what may at first glance appear to be a prophetic claim? Reference to 'global civil society' has become commonplace[43] and the literature on global

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[41] See Monshipouri and anor, "The search for international human rights and justice: Coming to terms with the new global realities", (2001) 23:2 Human Rights Quarterly 370, 373.

[42] Ibid, citing Cusimano.

[43] See Szerszynski and ors, "Mediating global citizenship" in Allen S (editor), The Media Politics of Environmental Risks (1999, UCL Press, London); Wapner P, Environmental Activism and World Civic Politics (1996, State University of New York Press, Albany); Walzer M, Toward a Global Civil Society (1995, Berghahn, Providence); Held D, Democracy and the Global Order (1995, Polity Press,

citizenship points to and acknowledges the existence of a globalised or, at least, an internationalised economy upon which global civil society rests. Attempts to justify global citizenship by relying on market culture have not been very successful. Globalisation is simply not about industrial culture; neither is it the ideology of mass culture within capitalism. If it were, it would be subject to opposition for the same reasons suffered by the concept of mass culture within capitalism.

For example, the cultural praxis of designating the third world as a place of aggregative self-representation and collective nemesis has been the subject of much criticism.[44] Further, aggressive competition (instead of the mutual support for the economic agents of established supranational bodies[45] and support for the economic agents of aspiring supranational bodies[46]) indicates a constricting effect on third world economies, not on developing ones. This only hinders the promotion and development of the notion of globalisation premised on economic cohesion because constricted economies will always seek to reconcile their political independence with economic activity/independence.[47]

Therefore, discourse that exaggerates emphasis on economic liberalisation as the crucible in which globalisation of citizenship occurs is problematic. This is not because one wants to reject outright any role of economic activity in the globalisation of citizenship. Economic liberalisation that facilitates globalisation of citizenship initiated under the aegis of human rights is evident particularly in the application of International Labour Organisation (ILO) standards. As citizens across the world press for the enjoyment and improvement of the consumer, employment and environmental standards, they forge

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Cambridge); Falk R, "The world order between inter-state law and the law of humanity: The role of civil society institutions" in Archibugi D and anor, Cosmopolitan Democracy: An Agenda for a New World Order (1995, Polity Press, Cambridge); Archibugi D and ors (editors), Re-imagining Political Community: Studies in Cosmopolitan Democracy (1998, Polity Press, Cambridge).

[44] See Jameson F and ors, (editors), The Cultures of Globalisation (1998, Duke University Press, London) 202-206.

[45] For example, the European Community.

[46] For example, the Southern African Development Community (SADC) and the Association of Southeast Asian Nations (ASEAN).

[47] See Chigara, "Trade liberalisation: Saviour or scourge of supranational aspirations of the Southern African Development Community (SADC)" (2002) 10:1 Miami Journal of International and Comparative Law (forthcoming).

and reinforce a universal yearning that, in turn, reinforces the notion of a universal identity supported by what is now commonly referred to as global civil society. For example, Chris Brown writes that discourse on this subject is important as it points to four factors central to the notion of global citizenship:[48]

1. the existence of an extensive network of inter-governmental organisations that provide a framework for global governance;
2. the existence of informal, non-State, transnational pressure groups, most frequently to do with environmental issues, but also encompassing human rights, trade and employment issues and so on;
3. cross-cultural global trends in consumption, entertainment and infotainment; and
4. a normative foundation for these factors, possibly the human rights regime, a view manifest also in a recent study on how the work of transnational human rights non-governmental organisations (NGOs) influences global political and social change.[49]

Global civil society means "that set of non-governmental institutions, which is strong enough to counterbalance the State, and, whilst not preventing the State from fulfilling the role of keeper of the peace and arbitrator between major interests, can, nevertheless, prevent the State from dominating and atomising the rest of society".[50] It is different from 'international society' in that the latter commonly refers to the norm-governed relations of States.

Of the non-governmental institutions with some responsibility to counterbalance public authority across the world, none seems as potent in numerical strength and effectual practice as human rights

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[48] Brown, "Cosmopolitanism, world citizenship and global civil society", in Caney S and anor (editors), Human Rights and Global Diversity (2001, Frank Cass, London) 9-15.

[49] Smith and ors, "Globalising human rights: The work of transnational human rights NGOs in the 1990s", (1998) 20:2 Human Rights Quarterly 379.

[50] Brown, "Cosmopolitanism, world citizenship and global civil society", in Caney S and anor, (editors), Human Rights and Global Diversity (2001, Frank Cass, London) 12.

organisations.[51] To achieve and sustain a functional interdependence, a right balance has to be struck between the State that is strong enough to preserve order and enforce the law but not too strong to overwhelm civil liberties and the autonomy of non-State institutions. It has been said that "[t]here is very little margin for error here – if the State is too extensive it will strangle civil society [and] private institutions will compete for its role as provider of order".[52]

The struggle for the determination of this balance requires some levelling-off that is most needed in two cases. The first is where the State is no longer under the control of a political organisation that has the capacity to establish its authority over the population and maintain peace and order. The second is where the political organisation in effective control overwhelms civil institutions and threatens or abuses the civil liberties of all or sections of the population. In either case, at stake are human rights standards that the international legal system has recognised and seeks to uphold. Their breach offends all of humanity. The need to end the widespread violation of the basic human rights of peoples by their own governments increasingly seems to be a unifying force around the world.

National and regional human rights regimes amplify and seek to enforce human rights norms and aspirations enunciated first in the 1948 Universal Declaration of Human Rights and later in the two 1966 Covenants.[53] Increasingly, the ILO is affecting the way supranational and national labour standards are set and enforced.[54] References are commonplace, from national and regional judicial decisions to the jurisprudence of the United Nations Human Rights Committee, the body established to monitor the State Parties' compliance with their obligations under the 1966 International Covenant on Civil and

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[51] For a discussion on international human rights NGOs, see Smith and ors, "Globalising human rights: The work of transnational human rights NGOs in the 1990s", (1998) 20:2 Human Rights Quarterly 379, 381-382.

[52] Brown, "Cosmopolitanism, world citizenship and global civil society", in Caney S and anor, (editors), Human Rights and Global Diversity (2001, Frank Cass, London) 13.

[53] Namely, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

[54] See International Labour Office, Report of the Committee of Experts on the Application of Conventions and Recommendations: General Report and Observations Concerning Particular Countries (2001, International Labour Office, Geneva).

Political Rights. Slowly, the work of human rights bodies established to monitor their members' compliance with their obligations under multilateral human rights treaties is impacting on the life experiences of individuals across the globe.[55]

These developments point to cosmopolitanism in the Kantian sense. This premises global citizenship on the existence of a universal moral law including the idea that it is possible to create or move towards a world society where this moral law becomes the basis of international law and world political organisation where it governs relations between all individuals.[56] The United Nations Assistant Secretary-General for Legal Affairs writes:[57]

> Today, it is frequently observed that human rights are no longer the exclusive concern of the sovereign State, that they have become a core concern of the international community and that obligations to respect such rights are *erga omnes*.

Rules *erga omnes* are not constrained by procedural rules fashioned for purely inter-State litigation.[58]

VI. *JUS COGENS* AND THE EMERGING CUSTOMARY LAW RIGHT OF HUMANITARIAN INTERVENTION

The prohibition on the use of force that R Zacklin describes as "comprehensive in nature"[59] and the prohibition on intervention in the internal affairs of States appear to exclude from international law any

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[55] For a discussion on the work of these treaty bodies, see Chigara B, Amnesty in International Law: Legality under International Law of National Amnesty Laws (2002, Longman, London) Chapter 6.

[56] Summarised in Thompson, "Community, identity, and world citizenship" in Arhibugi D and ors, Re-imaging Political Community: Studies in Cosmopolitan Democracy (1998, Polity Press, Cambridge) 180. See also Archibugi, "Principles of cosmopolitan democracy" in Arhibugi D and ors (editors), Re-imaging Political Community: Studies in Cosmopolitan Democracy (1998, Polity Press, Cambridge) 198.

[57] Zacklin R, "Beyond Kosovo: The United Nations and Humanitarian Intervention", The Josephine Onoh Memorial Lecture (2000, Hull University Press, Hull) 13.

[58] See separate opinion of Weeramantry J in Gabcikovo-Nagymaros (Hungary v Slovakia), Judgment of 25 September 1997 at <www.icj-cij.org>.

[59] Zacklin R, "Beyond Kosovo: The United Nations and Humanitarian Intervention", The Josephine Onoh Memorial Lecture (2000, Hull University Press, Hull) 11.

scope for meddling with matters falling within the territorial jurisdiction of the State. Antony Carty[60] agrees and describes the comprehensiveness as "absolute". However, the Charter in Chapter VII has penetrated the defence based on the territorial integrity of the State, instead allowing individual and collective self-defence measures under Article 51. The United Nations Secretary-General observed:[61]

> Emerging slowly, but...surely is an international norm against the violent repression of minorities that will and must take precedence over concerns of State sovereignty.

Weeramantry V-P referred to this approach in *Gabcikovo-Nagymaros*[62] when considering issues of environmental protection that were not detached from human rights concerns. He stated:[63]

> We have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. In addressing such problems, which transcend the individual rights and obligations of the litigating States, international law will need to look beyond procedural rules fashioned for purely *inter partes* litigation.
>
> When we enter the arena of obligations which operate *erga omnes* rather than *inter partes*, rules based on individual fairness and procedural compliance may be inadequate. The great ecological questions now surfacing will call for thought upon this matter. International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.

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[60] Carty A, The Decay of International Law? (1986, Manchester University Press, Manchester) 88.

[61] Address to the United Nations Human Rights Commission in April 1999, cited in Zacklin R, "Beyond Kosovo: The United Nations and Humanitarian Intervention", The Josephine Onoh Memorial Lecture (2000, Hull University Press, Hull) 13.

[62] The judgment in this case was delivered on 25 September 1997 at <www.icj-cij.org>.

[63] See para C(c) of his judgment, ibid.

Therefore, it is correct to premise the emergence of the latest limitation on the norm against intervention in the internal affairs of States on the protection of the human rights of minorities or some section of the wider community. Whatever the quality of this norm, the emerging norm on humanitarian intervention appears to be equal to it. In fact, several are now the exception to the prohibition on internal intervention and the survival of this norm can no longer be guaranteed.

As citizens across the globe reap the benefits of their efforts over the years to gain the governments' recognition of their rights and their governments' insistence that governments elsewhere respect the rights of their own citizens, the momentum of the universalisation of human rights is more likely to get stronger. In addition, the norm on humanitarian intervention is more likely to crystallise into a more immediate customary international law if this has not happened so far. In the *North Sea Continental Shelf Cases*[64] the ICJ stated:

1. *even without the passage of any considerable period of time,* widespread and representative State practice might suffice of itself, provided it included that of States whose interests were specifically affected;[65]
2. an indispensable requirement would be that *within the period in question, short though it might be, state practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform*...and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.[66] *(emphasis added)*

According to Ralph Zacklin, the Secretary-General's reference in 1999 to the emerging norm of humanitarian intervention provoked lively debate among the 51 member States that participated in discussion.[67] Their positions reflected the same pattern observed in the nascent stage when norms of customary international law evolved – advocates,

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[64] North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) [1969] ICJ Reports 4.
[65] Ibid 42.
[66] Ibid 43.
[67] For a detailed discussion, see Chigara B, Legitimacy Deficit in Custom: A Deconstructionist Critique (2001, Ashgate, Aldershot).

objectors and evaluators.[68] The evaluators or those waiting to cast their vote on the issue were in the majority. The advocates were the smallest group because of the obvious reaction of most African, Asian and Latin American States. They perceived that the intervention would mostly occur in their backyards, for political instead of humanitarian reasons.[69]

Developments suggest that the norm on humanitarian intervention is crystallising and not melting away. One example is the international community's wake up call on September 11 to fight international terrorism. Notwithstanding the tremendous efforts of many, including Australia, Britain and the United States to build an international coalition against terror, this was almost the first time that international consensus on what would have been a few years ago a potentially divisive issue was arrived at with reasonable ease.[70]

Perhaps this signals the yet untold strength of opposition amongst the peoples of the world of their deep-seated revulsion to abuse of human rights following the international community's education campaign during the past half century. The other is the growing appeal and aspiration to democratic governance all over the world. Indeed, some writers[71] talk of the emerging customary international law right to democratic governance, while others are already considering whether democracy is possible among States themselves.[72] The expectations generated by such appeal and aspiration warm up to humanitarian intervention rather than condemn it. It is for this reason that humanitarian intervention authorised by the United Nations Security Council after a prior determination by itself of a threat or breach of the peace must be seen to work in tandem with and not in opposition to the human rights ethos of the United Nations.

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[68] Ibid.

[69] For a discussion on this aspect of humanitarian intervention, see Kwakwa, "Internal conflicts in Africa: Is there a right of humanitarian intervention?" (1995) African Yearbook of International Law 9.

[70] McAllister, "Tony Blair", Time, 31 December 2001-7 January 2002 at 76.

[71] See Marks S, The Riddle of all Constitutions: International Law, Democracy, and the Critique of Ideology (2000, Oxford University Press, Oxford).

[72] See Archibugi, "Principles of cosmopolitan democracy" in Arhibugi, D and ors, Re-imaging Political Community: Studies in Cosmopolitan Democracy (1998, Polity Press, Cambridge) 198, 205.

VII. THE CASE AGAINST USING DEPLETED URANIUM MUNITIONS

This question must be asked: should the use of materials and processes that degrade and pollute the environment be prohibited during humanitarian intervention missions?

DUS are high-density bullets made of low-level radioactive waste left over from the manufacture of nuclear fuel bombs. A United Nations report leaked in May 1999 described DUS as nuclear waste whose use is "very dangerous and harmful".[73] However, DUS are used for two reasons. Strategically, their use can significantly cut short the time of what would otherwise be prolonged conflicts. First used during the Gulf War, DUS proved to be unmatched tank slayers.[74] Secondly, the manufacture of DUS enables the United States to give away its 1.2 billion pound stockpile of radioactive waste to weapons manufacturers.[75] Be that as it may, the risks of using these weapons far outweigh their benefits and scientific reports on human risk from exposure to DU recommend that human beings should not be needlessly exposed to it.

The risk from exposure to DU after the Boeing 747-258F crash in Amsterdam in 1992 has been evaluated.[76] The study has reported that bystanders may be exposed to airborne uranium oxide by inhalation, external irradiation and ingestion.[77] This is worrying because there is evidence that when DU smashes into a hard target, a DUS pulverises into breathable depleted uranium dust (DUD) that remains radioactive for 4.5 billion years and it can travel at least 26 miles.[78] However, the consequences of uranium inhalation depend on the chemical properties of the uranium and more than 98% of ingested uranium compounds are removed from the body relatively rapidly due to its high solubility

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[73] Ibid.

[74] "Depleted uranium haunts Kosovo and Iraq" (Summer 2000) 215 Middle East Report 14.

[75] M2 Presswire via Contex, United Nations: Terrorist Use of Nuclear Weapons, Biological Weapons Convention Review, 31 October 2001.

[76] de Haag and ors, "Evaluating the risk from depleted uranium after the Boeing 747-258F crash in Amsterdam, 1992" (2000) 76:1 Journal of Hazardous Materials 39.

[77] Ibid para 7.

[78] "Depleted uranium haunts Kosovo and Iraq" (Summer 2000) 215 Middle East Report 14.

(excreted through the urine). Although in a few days the period of exposure is not as important as the chemical toxicity of the uranium,[79] by the time it is excreted by the body, sufficient damage to diminish the victim's quality of life may have occurred.

In reality, the situation is worse for the civilians of Kosovo and other places where DUS have been fired. Because the Kosovars are constantly exposed to DUD, their bodies are continuously processing DU in the sense that while they are excreting it, at the same time they are ingesting it. This is due to the DU's radioactive life span and the large volume deposited on their homeland. DU has therefore become a part of their lives as much as oxygen and they are perpetually being assaulted by it.

Since the nations that use DUS in combat are reluctant to disclose information about the quantities used, they are unlikely to disclose the levels of toxicity involved. This makes it difficult for anyone interested in the treatment of victims and in cleaning up the environment to direct their operations effectively. Science shows that it is possible for DU pollution to enter the food chain through terrestrial plants and therefore affect others nowhere near the places of contamination.

The uptake and upward mobility of DU in black oak trees *(Quercus velutina)* have been investigated by measuring the isopotic composition of tree rings in two mature oak trees and the findings have been published.[80] The study detected DU and its mobility in the annual rings of black oak trees, in the sapwood region and past the sapwood/ heartwood boundary. The study showed in part that terrestrial plants such as oaks readily take up uranium and can be used as bioindicators of uranium contaminated ground water.[81] It appears, therefore, that the use of DU munitions carries the added risk that ground water, and subsequently, the food chain, will be contaminated and risk lives.

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[79] de Haag and ors "Evaluating the risk from depleted uranium after the Boeing 747-258F crash in Amsterdam, 1992" (2000) 76:1 Journal of Hazardous Materials 39.

[80] See Edmands and ors, "Uptake and mobility of uranium in black oaks: implications for biomonitoring depleted uranium – contaminated ground water", (2001) 44:4 Chemosphere 789.

[81] Ibid.

A recent study by DE McClain and others showed that although more still needs to be learnt about the effects of exposure to DUD and DU, internalisation of DU intimately exposed sensitive tissues and enhanced its potential chemical and radiological hazard.[82] The study found DU to be mutagenic, transforming human osteoblast cells to a tumorigenic phenotype. It altered the neurophysiological parameters in rat hippocampus, crossed the placental barrier, and entered foetal tissue. In short, once ingested and depending on its toxicity and radiology levels, DU can speedily affect key sections of the brain and respiratory and reproductive organs. The results are not difficult to imagine including loss of memory, general poor brain function, sterility, involuntary abortions and abnormal childbirths.

Using DU in combat presents several routes for its internalisation:[83]

> [W]hen a DU penetrator breaches a vehicle there is a spalling of metal that can introduce high-velocity shards into the vehicle interior, thereby producing shrapnel wounds. DU dust produced by the impact can also be inhaled and ingested, and small particles produced by penetration can contaminate open wounds.

Perhaps any future use of DU munitions should be considered a crime against humanity because of the incalculable hardship resulting from their use. People are placed on high risk of contamination of one form or another. Ground water is polluted and terrestrial plants are contaminated. Subsequently, livestock and wild life are contaminated also. Real harm, the extent of which is yet to be fathomed, bedevils the objects of contamination. The need to slay armoured tanks in battle and shorten wars pales into insignificance when the cost of the use of DU munitions in armed humanitarian missions is counted.

In *Legality of the Threat or Use of Nuclear Weapons,*[84] Bedjaoui P's casting vote determined the ICJ's advisory opinion. He stated:[85]

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[82] McClain and ors, "Biological effects of embedded depleted uranium (DU): Summary of Armed Forces Radiobiology Research Institute research", (2001) 274:1-3 The Science of the Total Environment 115, 116.
[83] Ibid.
[84] [1996] ICJ Reports 66.
[85] See his Separate Opinion: ibid.

> [T]he threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of *humanitarian law*...However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

Since DU munitions are nuclear weaponry in every sense and their effect on the communities in which they are used is devastating and as yet incalculable, perhaps the United Nations should immediately proscribe their use in any future armed humanitarian missions.

VIII. CONCLUSION

This article examined the limits in the wake of the recent armed humanitarian intervention mission in Kosovo, and of the legal and moral arguments that subsume the right of armed humanitarian intervention in breach of the fundamental principle of international law prohibiting intervention in the internal affairs of States. It showed that the right is controversial because it connotes the moral and ethical superiority of the intervening party over those of the target State. This is problematic because no such superior exists among nations. On the contrary, States are deemed to be legal equals regardless of their varying backgrounds.

Nevertheless, an argument may be made to strengthen the case for the controversial but noble nascent norm of customary international law on intervention in the internal affairs of States. To protect minorities or sections of the population from abuse committed by the *unofficial acts of their own* governments, the international law principle of elementary considerations of humanity should be enforced against all humanitarian missions. The ICJ inaugurated this in *Corfu Channel.* This case attached international responsibility in future humanitarian missions to the party using materials or procedures that polluted and degraded the environment and caused injury to the local population.

Should our fellow human beings, already unfortunate to be governed by violently oppressive and abusive regimes, be subjected to the cloud

of DUD for 4.5 billion years, even in the name of humanitarian intervention? Is this what the citizens of intervening States want their governments to do in the name of humanitarian intervention? Although scientific evidence is inconclusive on the question of the exact damage to humans caused by DU munitions, as seen earlier, there is sufficient evidence to show that their use, especially in humanitarian intervention missions, opposes the moral, ethical and legal justifications of humanitarian pursuits. Consequently, the results are tragic.

In conclusion, more still needs to be learnt about the effects of exposure to DUD and DU. Meanwhile, it is recommended that the United Nations ban the use of DU munitions in any future humanitarian intervention missions because they serve only to compound the problems of the target population. When this happens, it obscures the purpose of humanitarian intervention and detracts from what is otherwise a noble intention on the part of the 'good Samaritans'.