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LL.M Dissertation:

# *"JUSTIFICATIONS FOR THE USE OF FORCE UNDER CONTEMPORARY INTERNATIONAL LAW – THE NATO AIR STRIKES IN KOSOVO"*

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# Summary

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# INTRODUCTION

Events and ideas in the 1990s have given greater prominence than ever before to the problems of international humanitarian assistance. In the immediate aftermath of the Cold War era there were great expectations of a new era of international co-operation, of a 'New World Order', and of the United Nations Organisation as its foundation. The apparently definitive dissolution of the contest between the ideologies of the West and of the Soviet bloc seemed to show that democracy – understood essentially as parliamentary democracy – and the market economy had triumphed and should be the principles of the new international order. But the euphoria which many felt in 1989/90 was short-lived. It very soon became apparent that the divisions of the Cold War had only overlain social tensions which usually have much more to do with ethnicity, nationalism and the politics of identity than with the politics of class.

There is a deadly new pattern to the world's armed struggles, in which civil wars are escalating into regional conflicts. At least 110 000 people were killed last year in armed conflicts around the globe.[1]
In the 12 months to August 1 1999, only 10 international wars were counted, while it recorded 25 intra-state conflicts over the same period – many of which had already been under way for a decade or more.[2] These wars, sometimes the outcome of structural crisis in the global economy, have contributed to the creation of 'complex emergencies', characterised by combinations of multiple causes: civil and ethnic conflict, famine, displacement of people, disputed sovereignty and the breakdown of national government.[3] Such emergencies give rise to immense human suffering and the growing impact of media coverage motivates a corresponding sense of need for humanitarian assistance. But as the numbers and the intensity of complex emergencies have increased, the limitations of the 'international system', centred on the United Nations (UN), have become all too apparent.
Expectations that the UN could maintain international peace and security have led to increased demands being made upon it which have been unrealistic and, inevitably,

[1] International Institute for Strategic Studies (London), *The Military Balance*, 1999/2000, pp.1
[2] R Norton Taylor & O Bowcott, *Deadly Cost of New Global Warfare*, Mail & Guardian, October 29 to November 4 1999, at 20
[3] Human Development Report 1994, <http://www.undp.org/hdro/e94over.htm>

disappointing. The sense of optimism about international relations has been crushed, by the strife of ex-Yugoslavia, by the menace of the many conflicts in Africa, and latterly by the evident paralysis of the international community in East Timor and Sierra Leone.

The Economist argued that: "Two omnipresent facts confront one another. First, there is no satisfactory alternative to collective action by the UN. Second, the UN is no longer equipped militarily or financially to deal with the world's explosions."[4] The statement reflects the assumption that the UN is the one authoritative organ for controlling and authorising the use of force. But the reluctance and inaction of the UN in some recent emergencies in Liberia, Haiti and Kosovo has accentuated the weaknesses and limitations of the United Nations Organisation as never before.

In this context it is the purpose of this paper to have a closer look at the recent status and development of international law regarding the use of force. The collective military response by NATO in Kosovo can be used as an instructive example in this regard. Therefore I will not only focus on the justifications expressly invoked by NATO officials but on a wider range of possible explanations. The advantage is that one is able to address issues which are of general concern for this kind of ethnic conflict.



The first part gives a short introduction to the history of the area revealing the roots of the ethnic conflict and showing the series of events taking place into the national and international arena culminating in the NATO air strikes. Although it might be interesting at this stage to ask how foreign influence contributed to the violent outbreak[5] and the alternatives that would have been available to prevent the eruption of violence, these questions, however, are not subject to my examination. Nevertheless the research in this field of conflict prevention and –solution will have a big influence on the debate about forcible intervention under international law, because the principle of peaceful settlement not only enjoys priority under the UN Charter but also under the aspect of humanity. As will be seen, the Kosovo crisis is

[4] *Unhappy Birthday,* The Economist, June 24th 1995, at 21

[5] An interesting article focusing on international law and international institutions that facilitate economic restructuring suggests that the IMF structural adjustment, stabilisation and later shock therapy programs have contributed to a number of conditions that fuelled the republican nationalist

one of the cases where this principle proved to be rather ineffective. Therefore the international community finally had to make a decision between the "let the conflict burn itself out"-strategy or to take consequent military action against the perpetrators.

Because of the growing importance of law in international relations the question was raised whether the NATO attacks were in conformity with the relevant body of international law.

The second part explores some of the legal issues related to the international *jus ad bellum.* It describes the legal framework and identifies the principles enshrined in the UN Charter which are at stake in this discussion: the principle of non-intervention and the principle of non-use of force.

It is crucial to define the scope of these principles and to examine the possibility of exceptions to the rule. In ascertaining whether states are permitted in law to exercise forcible intervention in another state it is necessary to establish the normative convictions of states. State practice and the law-determination mechanism within the United Nations carry a significant share of importance in venturing an account of the legal status of those norms. Therefore a major part of this work deals with practical examples of state interventions respectively their justifications.



My argument is that with the end of the Cold War there has been a shift in interventionary diplomacy from purely geopolitical interventionism in the direction of support for humanitarian claims to alleviate human suffering. This shift also influences the evolution and development of international law gradually eroding traditional principles of state sovereignty and non-intervention.

Although it must be said that the real potential of the United Nations has foundered in key instances because it was based on a shallow commitment of resources and will. The refusal of the UN to take a lead in the struggle against gross human rights violations triggers the search for alternatives, that is to say the revitalisation of the doctrine of forcible unilateral or multilateral intervention.

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dynamic leading to the genocide. A Orford, *Locating the International: Military and Monetary Interventions after the Cold War,* 38 Harv.Int'l L.J. (1997), at 443

# PART I: THE KOSOVO CONTEXT

## 1. The Heart of Serbia

The history of the territory known for the better part of the 20th century as Yugoslavia is a history of trying to amalgamate what nature seems determined to fragment – to "balkanise." Modern Yugoslavia arose after World War I from the ashes of millennia of conflict and two great empires: the Austro-Hungarian empire and the Ottoman empire. Neither empire ever exerted full control over the various ethnic and national groups in the Balkans: during the Middle Ages both Serbia and Bulgaria dominated large portions of the Balkan land mass; Croatians, Albanians and Bosnians all had relatively short-lived states.[6]

After World War I, the Allies created the Kingdom of the Serbs, Croats and Slovenes, uniting all of the Serb population of the area in a single state. Yugoslavia was one of the most concrete manifestations of President Woodrow Wilson's vision of bringing democracy and self-determination to Europe.

### *1.1. The Vision of a Multiethnic State*



Tito's Communist state, which evolved after World War II in 1944, was built as a federation with six republics: Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia. The internal borders (which remained until the country's break-up in 1991) did not attempt to consolidate populations along ethnic lines; indeed, it appeared that Tito (a Croat) intentionally sought to limit the Serb's clout by the way he drew the administrative divisions. Thus the borders of Serbia did not embrace all areas with large Serb populations; Bosnia, Croatia and Kosovo contain large Serb enclaves.

At least in theory, most of the Slavs who lived in the first two Yugoslav states – the original one created in 1918, and the communist one born in 1944 – had freely opted to join "the land of the Slavs". But not the Kosovo-Albanians, who are not Slavs, do not speak a Slavic language, and are mostly Muslim by religion. Yet in 1914 Kosovo nevertheless became part of Yugoslavia by virtue of the fact, that during the Balkan

[6] B Jelavich, *History of the Balkans,* pp.4-36

wars of 1912, Serbia had re-conquered this territory which, for more than 500 years, had been part of the Ottoman empire.[7]

Many people are puzzled that the Serbs claim this land is holy to them[8], when hardly any Serbs live there. The explanation is straightforward. During the Middle Ages, Kosovo was the heartland of the Serbian kingdoms, the vast majority of its people Serbs. But then Murad I won that famous battle in 1389, and over half a millennium of Ottoman rule changed the demography: Serbs moved out, and Albanians moved in. Despite these migrations, Kosovo – home to countless Serbian churches and monasteries – retained a powerful grip on Serbian emotions. For the Serbs who stayed there, the return of the Serbian army in 1912 was a liberation, for Kosovo's Albanians it was a conquest, one that denied them the chance to join the emerging Albanian state.

Throughout the years between the two world wars, Kosovo was a sullen place. The Serbs put down Albanian rebellions, and sent settlers to push up their share of the population.

Things began to change in the late 1960s, when Yugoslavia's Marshal Tito started to allow the Albanianisation of the province. The Constitution of 1974 decentralised Yugoslavia further, giving the republics greater autonomy and recognising two key national/ethnic groups that the division of Yugoslavia into six republics did not reflect. It created two new autonomous regions, on of them the Albanian Muslim Kosovo in the Southern part of Serbia. Although technically a province of Serbia, it had its own parliament and police, and largely ran itself.[9]



While Tito was still alive, the seeming looseness of the Yugoslav policy did not matter: Tito had the authority and the charisma needed to hold Yugoslavia together. Tito's death in 1980 led to the creation of a new governmental structure, designed to balance the competing ethnic groups and interests by rotating the Yugoslav Presidency among the six republics. The post-Tito arrangement in effect contained the seeds of its own destruction. The prosperous Catholic republics of Slovenia and Croatia resented sharing their economic good fortune with their poorer Muslim and

[7] M Vickers, *Between Serb and Albanian*, pp. 83

[8] Interview with Slobodan Milosevic, President of the Republic of Serbia, in Belgrade (Dec. 1995) cited in: D Phillips, *Comprehensive peace in the Balkans: The Kosovo question*, 18 HRQ (1996), at 822

[9] M Vickers, supra note 7, pp.178

Orthodox compatriots, while Serbs, embittered by the fetters imposed by Tito, chafed under the new structure, which in their view, denied them their due. During the 1980's the relatively successful Yugoslav economy came under growing strains in part as a result of mismanagement. Nationalist movements gained strength throughout the country. Rumblings also began again in Kosovo. Students called for the province to become a full republic, an equal to Serbia itself – and entitled to dream, at least, of total independence.

### *1.2. Chronicle of a Bloody Conflict*

In Serbia in 1986, a group of intellectuals prepared a memorandum through the Academy of Arts and Sciences calling for a Serbian nationalist awakening. Slobodan Milosevic, who became the Serbian leader in 1987, seized on the ideas.
Just ten years ago, not long after he had become President of Serbia, he stripped the province off its autonomy. This action had spectacular consequences. His re-imposition of direct rule over Kosovo hastened the death of the old Yugoslavia because most of the other republics feared that he would try to put them, too, under Belgrade's control. Partially in response to growing Serbian nationalism and fuelled by growing anti-communism, independence movements in Croatia and Slovenia gained momentum in the late 1980's.

The Yugoslav Communist Party collapsed in January 1990, and leaders in Slovenia and Croatia began to push for constitutional negotiations to reconfigure Yugoslavia into a loose confederation of sovereign republics, a move that Serbia and its allies resisted. Serbian President Milosevic warned in June 1990 that the internal borders of Yugoslavia were predicated on the continuation of a federal state, and that moves to break the country up into constituent parts would open the question of redrawing the borders.[10]
The deadlock over a negotiated approach accelerated the movement toward unilateral steps leading to referenda in favour of independence for Slovenia in December 1990 and Croatia in May 1991. A constitutional crisis precipitated the final break.[11] The last thread holding the federation together had been broken, and in June 1991,

[10] J Gow, *Deconstructing Yugoslavia*, 33 Survival (July/June 1991), at 291
[11] Under the system of rotating presidency, a Croat was due to become president, but Serbia blocked his appointment. Ibid.

Slovenia and Croatia declared their independence, triggering a conflict, which led to the break-up of the country.

### *1.3. The Kosovo Question*

In Kosovo itself, with the end of one-party rule across Yugoslavia, Albanian political life came to be dominated by the Democratic League of Kosovo, led by a writer called Ibrahim Rugova. His aim at first was merely the restoration of Kosovo's autonomy. But, when the old Yugoslavia broke up in 1991, Mr. Rugova declared the province "independent". So far as they could, Kosovo's Albanians boycotted Serbian institutions: they set up their own schools and health care, and no longer voted.[12]
The cautious Mr. Rugova, however, stayed in Kosovo, and stayed pacific. He argued that it would be mad to attempt an uprising against the Serbs. Mr. Rugova believed that, since there were so few Serbs in Kosovo (barely 10% of a population of 1,8m), and as that proportion was falling, independence was bound to come in the end. So he argued for passive resistance, and rejected calls from Croatia and Bosnia to begin an uprising against Serbs. Although some Kosovar politicians criticised him, most ordinary Kosovo Albanians went along with him.
Disaster struck in 1995. Kosovo's Albanians were shocked when the Dayton peace conference, which ended the war in Bosnia, did not put Kosovo on the agenda. Worse followed when the countries of the European Union recognised the new Federal Republic of Yugoslavia (FRY), comprising Serbia and Montenegro, with Kosovo as a part of Serbia.[13] Anger grew: Mr. Rugova's policy, it was said, had failed.
At first, the problem for disillusioned Kosovars was that, even if they wanted to abandon Mr. Rugova's peaceful tactics, it was hard to bring any significant quantities of weapons into landlocked Kosovo. But that changed in 1997, when the Albanian State fell apart in the wake of a series of fraudulent "pyramid" investment schemes. The Albanian army dissolved, the police ran away, and their armouries were thrown open. The Kosovars in Germany and elsewhere raised money to begin buying guns for the guerrillas of the fledgling Kosovo Liberation Army (KLA), which had been founded in 1993.

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[12] D Phillips, supra note 8, at 824
[13] N Malcolm, *Kosovo: A Short History,* p.29

At the end of February 1998, Serbian policemen whose patrols had come under attack killed a number of people connected with the KLA, sometimes whole families. To their dismay, and to the surprise of the KLA, which at the time numbered barely a couple of hundred men, Kosovo exploded. The KLA found itself swept along by an uprising which it tried to control and organise. Shocked, the Serbs at first fell back, misleading the KLA's commanders into the belief that they were winning. They were not. Last summer, the Serbs hit back. Their counter attack sent 250.000 civilians fleeing for their lives. The KLA, melting into the hills, suffered hardly any casualties.

### *1.4. Human Rights – A Bitter Account*

The uprising not only resulted from the violent attacks of the Serbian police, but also from a systematic and inhuman suppression of the Albanian population in all spheres of social life.

Since their autonomous status was revoked in 1989, Kosovars complained about a campaign of "quiet ethnic cleansing" which is making life increasingly miserable.[14] Bujar Bukoshi, Prime Minister of the self-proclaimed Republic of Kosovo, compared the conditions in Kosovo to apartheid in South Africa. In response to the absence of political rights, stagnant economic opportunity, and grossly degraded physical environment, Kosovars expressed their deep frustration living as a "captive nation" within Serbia.



Despite Milosevic's assurance, that Serbs didn't have any kind of conflict with the Albanians[15], UN findings describe systematic discrimination of ethnic Albanians for which there is an ample body of evidence. Resolutions and reports of the UN General Assembly,[16] the UN Human Rights Commission,[17] the Special Rapporteur on Human Rights in the Former Yugoslavia,[18] and the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities[19] have voluminously documented the deteriorating human rights situation in Kosovo.

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[14] *Kosovo. On the Brink,* The Economist, November 1st 1997, at 17

[15] Interview with Slobodan Milosevic in Belgrade on December 7, 1995, cited in: D Phillips, supra note 8, at 822

[16] U.N. Doc. A/51/619/add.3 (1996); U.N. Doc. A/Res51/111 (1996)

[17] U.N. Doc. E/1994/24 (1994)

[18] U.N. Doc A/49/641-S/1994/1252 (1994)

[19] Draft Resolution on the Situation in the Former Yugoslavia, U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Agenda Item 6, U.N. Doc. E/CN.4/Sub.2/1995/L.24 (1995)

Human rights violations included random acts of violence by Serbian authorities, routine harassment and intimidation of the local population, and arbitrary arrests. There is evidence of police brutality, arbitrary searches, seizures, detentions, forced evictions, torture, and ill-treatment of detainees. The administration of justice was discriminatory. In addition, local self-government and civil society institutions had been suspended. Ethnic Albanian civil servants from the police and judiciary had been dismissed while political party and civic leaders were imprisoned. Journalists had been arrested, and the Albanian language media shut down.

The situation got worse in February/March last year, when special police forces attacked villages in the Drenica region, known for its KLA presence.

This was the beginning of a large-scale offensive against the KLA and an open war between Serbian police and military forces and the national liberation army of the Kosovars.

The government offensive was an apparent attempt to crush civilian support for the rebels. Government forces attacked civilians, systematically destroyed towns, and forced thousands of people to flee their homes. The majority of those killed and injured were civilians. At least 300.000 people were displaced, many of them woman and children now living without shelter in the mountains and woods. In October, the UN High Commissioner for Refugees (UNHCR) identified an estimated 35.000 of the displaced as particularly at risk of exposure to the elements. Most were too afraid to return to their homes due to the continued police presence.[20]



## 2. International Response

Triggered by appealing pictures in the world media international organisations, states like France, the UK, Germany and the United States[21] and several NGO's (inter alia Amnesty International, the Society for Threatened Peoples Germany and Human Rights Watch)[22] condemned the Serbian attacks as genocide and ethnic cleansing.

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[20] Human Rights Watch - Worldreport 1999 at <http://www.hrw.org/worldreport99/europa/yugoslavia>

[21] <http://www.defense.gouv.fr/actualites/event/kosovo/index.html>; <http://www.mod.uk/newskosovo/atrocoties.htm>;<http://www.auswaertiges.amt.de/6_archiv/index.htm>; <http://www.usembassy.de/policy/dindex.htm>

[22] <http://www.amnesty.org/ailib/aipub/1998/eur/47003298.htm>; <http://www.gfbv.de/dokus/kosovo.htm>; <http://www.hrw.org/worldreport99>

The international community became gravely concerned about the escalating conflict, its humanitarian consequences, and the risk of spreading to other countries. President Milosevic's disregard for diplomatic efforts aimed at peacefully resolving the crisis and the destabilising role of militant Kosovar Albanians forces was also of concern.

### *2.1. Security Council (Non-) Resolution*

The United Nations Security Council reacted through the adoption of Resolution 1199, which expressed concern about the deteriorating human rights situation of civilians and refugees and expressly condemned "the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav army". But altogether the underlying notion of the document was the rejection of all acts of violence by any party and the emphasis for a peaceful resolution of the Kosovo problem. Nevertheless the Security Council concluded "that the deterioration of the situation in Kosovo, constitutes a threat to peace and security in the region".[23]
The Council demanded the cessation of hostilities, a cease-fire, as well as immediate steps by both parties to improve the humanitarian situation and enter into negotiations with international involvement. The FRY was requested to implement a series of measures aimed at achieving a peaceful solution to the crisis. In conclusion the Council "decided, should the concrete measures demanded in this resolution not be taken, to consider further action and additional measures to maintain or restore peace and stability in the region".
During subsequent weeks, however it became clear that Russia would veto any Council resolution containing a mandate or an authorisation to employ threats or the use of force against the FRY.[24] On the other hand it was equally clear that the just quoted reference to eventual further Council action in Resolution 1199 was not sufficient in itself to provide a legal basis for the use of force by UN member states or regional organisations. Thus, the Security Council was in no position to take the logical further step of following up on Resolution 1199 (called a "springboard

[23] U.N.Doc S/RES/1199 (1998) at <http://www.un.org/peace/kosovo/98sc1199.htm>
[24] Russia's policy on Yugoslavia seems rather emotional than practical: first it chiefly reflects a dislike of Nato's growing influence and second Russia feels threatened itself by the bombing of its protégé Serbia. "It has nothing to do with Yugoslavia, and everything to do with Russia, and Russian security, and Russian relations with the West," says Yegor Gaidar, former Russian Prime Minister. *A Toothless Growl,* The Economist, May 1st 1999, at 30

resolution" by the German Foreign Minister Kinkel) and finally authorising enforcement action if the situation did not improve.

### *2.2. NATO's Role – Saviour or Perpetrator?*

At this point NATO took over, as it were. Its members gave the organisation the go-ahead for military action if the FRY did not comply with the Council resolutions. On 12 June 1998, the North Atlantic Council at Defence Minister level, asked for the assessment of possible measures that NATO might take with regard to the developing Kosovo crisis. This led to consideration of a large number of possible options, including military actions.

On 13 October, following a deterioration of the situation, the NATO Council authorised Activation Orders for air strikes. This move was designed to support diplomatic efforts to make the Milosevic regime withdraw forces from Kosovo, co-operate in bringing an end to the violence and facilitate the return of refugees to their homes. The principal legal basis for such action was to be the concept of "humanitarian intervention", linked as closely as possible under the circumstances to the UN Charter in order to further gain legitimacy. The NATO position was summarised at this point in the following terms by Secretary-General Solana on 9 October 1998. Firstly, the FRY has not yet complied with the urgent demands of the International Community, despite UNSC Resolutions 1199 of 23 September 1998, both acting under Chapter VII of the UN Charter. Second the very stringent report of the Secretary-General of the United Nations pursuant to both resolutions warned inter alia of the danger of a humanitarian disaster in Kosovo and the continuation of a humanitarian catastrophe, because no concrete measures towards a peaceful solution of the crisis have been taken by the FRY. Third, the fact that another UNSC Resolution containing a clear enforcement action with regard to Kosovo cannot be expected in the foreseeable future. Forth, the deterioration of the situation in Kosovo and its magnitude constitute a serious threat to peace and security in the region as explicitly referred to in the UNSC Resolution 1199.

On the basis of these points, he concluded that the Allies believe that in the particular circumstances with respect to the present crisis in Kosovo as described in UNSC

Resolution 1199, there are legitimate grounds for the Alliance to threaten, and if necessary to use force.[25]

This announcement appears to have made a certain impression on the FRY. At the last moment, following further diplomatic initiatives including visits to Belgrade by NATO's Secretary General Solana, US Envoys Holbrook and Hill, and the Supreme Allied Commander Europe, General Clark, President Milosevic agreed to comply and the air strikes were called off.

In the spirit of UNSCR 1199, limits were agreed for the number of Serbian forces in Kosovo, and for their scope of operations, following a separate agreement with Generals Naumann and Clark. It was agreed, in addition that NATO would establish an aerial surveillance mission parallel to the Kosovo Verification Mission (KVM) by the OSCE. In support of the OSCE, the Alliance established a special task force to evacuate members of the KVM, if renewed conflict should put them at risk. This task force was deployed in the former Yugoslav Republic of Macedonia under the overall direction of NATO's Supreme Allied Commander Europe.

On 24 October 1998, the UN Security Council returned to the scene again, reacting to the conclusion of the Holbrooke agreements with the adoption of Resolution 1203 (1998). Acting under Chapter VII, the Council formally endorsed and supported the two agreements concerning the verification of compliance by the FRY and all others concerned in Kosovo with the requirements of its Resolution 1199, and demanded a full and prompt implementation of these agreements by the FRY. It affirmed that the unresolved situation in Kosovo constitutes a continuing threat to peace and security in the region.[26]



After the situation in Kosovo deteriorated further at the beginning of 1999 after the escalation in the Serbian offensive against Kosovo Albanian, renewed international efforts were made to give new political impetus to finding a peaceful solution to the conflict. The six-nations Contact Group established by the 1992 London Conference on the Former Yugoslavia met on 29 January. It was agreed to convene urgent negotiations between the parties to the conflict under international mediation. NATO supported and reinforced the Contact Group efforts by resuming on 30th January to the

[25] Letter from Secretary-General Solana, addressed to the permanent representatives to the North Atlantic Council, dated 9 October 1998, cited in: *Javier Solana. NATO's master-builder*, The Economist, October 17th 1998, at 20

use of air strikes if required, and by issuing a warning to both sides in the conflict. These concerted initiatives culminated in initial negotiations in Rambouillet near Paris, from 6 to 23 February, followed by a second round in Paris, from 15 to 18 March. At the end of the second round, the Kosovar Albanian delegation signed the proposed peace agreement, but the talks broke up without a signature from the Serbian delegation.

Immediately afterwards, Serbian military and police forces stepped up the intensity of their operations against ethnic Albanians in Kosovo, moving extra troops and modern tanks into the region, in a clear breach of compliance with the October agreement. Tens of thousands of people began to flee their homes in the face of this systematic offensive.

On 20 March, the OSCE Kosovo Verification Mission was withdrawn from the region, having faced obstruction from Serbian forces to the extent that they could no longer continue. Ambassador Holbrooke then flew to Belgrade, in a final attempt to persuade President Milosevic to stop attacks or face imminent NATO air strikes. Milosevic refused to comply, and on 23 March the order was given to commence air strikes.[27]



Right from the start there was confusion about NATO's precise purpose and legal justification. As the bombs started falling, President Bill Clinton said the raids were intended to demonstrate NATO's "opposition to aggression"; to deter further attacks on civilians; and "if necessary" to damage Serbia's capacity to make war.[28] In other words, the first wave of bombs was intended as a warning – and only if it were ignored would NATO start seriously destroying the Yugoslav arsenal.

Mr. Solana, for his part, suggested that Serbia was being punished for its refusal to accept a settlement in Kosovo and let NATO police it.[29]

As the bombings continued the official aims were explicitly: a verifiable stop to all military action and the immediate ending of violence and repression; the withdrawal from Kosovo of the Yugoslav military, police and paramilitary forces; the stationing in Kosovo of an international military presence; the unconditional and safe return of

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[26] U.N.Doc. S/Res/1203 (1998) at <http://www.un.org/peace/kosovo/98sc1203.htm>

[27] Historical overview at <http://www.nato.int/kosovo/history.htm>

[28] President Clinton, Address to the Nation, Washington, D.C. March 24, 1999, <http://www.state.gov/www/policy_remarks/1999/990324_clinton_nation.html>

[29] *The West versus Serbia,* The Economist, March 27th 1999, at 29

all refugees and displaced persons; and credible assurance of Milosevic's willingness to work on the basis of the Rambouillet Accords towards a political solution for Kosovo in conformity with international law and the Charter of the United Nations.[30]

It is important to note that NATO did not insist on independence for Kosovo as a sole road to peace, but emphasised that people of all ethnic groups and religions should be free to live in peace in Kosovo, and that the Serbs should have access to their holy places.

## PART II: EVALUATION OF THE NATO ACTION WITH REGARD TO *JUS AD BELLUM*

Whether or not NATO's bombing of Serbian targets made military and political sense, was it legal?

The United States and Britain claim it was, arguing that the use of force to prevent an overwhelming humanitarian catastrophe – especially one caused by a dictator manifestly pursuing undemocratic goals, as Slobodan Milosevic is doing in Kosovo – is permitted under international law. This claim has provoked a lively debate among legal experts. There is little dispute that the government of Mr Milosevic, and President Milosevic himself, have broken many international laws. The behaviour of Serb forces in Kosovo is a breach of the Geneva Conventions and, taking in account the ethnic cleansing, arguably the Genocide Convention of 1948.[31]

There is no unanimity as to whether the crimes committed by the Serbian forces amount to genocide as described in the Genocide Convention. For instance the report by the U.S. Department of State provides a chronology of atrocities and massacres against the Kosovar Albanians and represents a partial account of the ethnic

[30] NATO's objectives at <http://www.nato.int/kosovo/history.htm>

[31] Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, reprinted in: G Melander & G Alfredsson, *The Raoul Wallenberg Compilation of Human Rights Instruments*, pp.575

cleansing.[32] The term "ethnic cleansing" entails the systematic and forced removal of members of an ethnic group from their communities to change the ethnic composition of a region. According to Article 2 of the Genocide Convention genocide only means certain "acts committed with *intent to destroy*, in whole or in part a [...] ethnical group, as such." Since the violence also included summary executions targeting intellectuals, professionals and community leaders, the thin line between ethnic cleansing and genocide seems to depend on the evidence. Here it is important to note that the International Criminal Tribunal for the Former Yugoslavia (ICTY) suggested that,

> "The intent which is peculiar to the crime of genocide need not be clearly expressed. (...) The intent may be inferred from a certain number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in Article 4 [of the Statute], *or the repetition of destructive and discriminatory acts*. The intent may also be inferred from *the perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundations of the group – acts which are not in themselves covered in the list of Article 2(4) which are committed as part of the same pattern of conduct."*[33]

Genocide can therefore be recognised as organised and planned elimination as part of a path of political realignment through ethnic violence. It is difficult to conceive Milosevic's use of nationalism, references to historical martyrdom, politics of cleansing adjacent lands of other ethnicities and exhortations for Serbian 'Lebensraum'[34] as conceptually different. This rhetoric has been official government discourse since 1989.[35] To come to full circle, then, it is this textual background to the Kosovo violence which colors it as genocide.[36]



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[32] Report by the U.S. State Department, *Erasing History: Ethnic Cleansing in Kosovo*, at <http://www.state.gov/www/regions/eur/rpt_9905_ethnic_ksvo_exec.html>

[33] *Prosecutor v. Mladic and Karadsic*, Review of the indictments pursuant to Rule 61 of the Rules of procedure and evidence, Case No. IT-95-5-R61, 11 July 1996, para.94, cited in: M Roberge, *Jurisdiction of the adhoc Tribunals for the Former Yugoslavia and Rwanda over crimes against humanity and genocide*, <http://www.icrc.org/icrceng.nsf/c1...c77c3412565ad0051ca57?Opendocument>

[34] e.g. the Resolution on the Renewal of the Population and the Warning about the Demographic Problems in Serbia adopted at the Second Congress of the Socialist Party of Serbia (SPS), October 23 and 24, 1992 at <http://www.sps.org.yu/engleski/kongreski/k2-resolucija.html>

[35] S Maliqi, *The Albanian Movement in Kosova*, in: D A Dyker & I Vejvoda, YUGOSLAVIA AND AFTER, p.142

[36] The charge of genocide is notably absent from the indictment of Slobodan Milosevic by the ICTY, see <http://www.jurist.law.pitt.edu/indict.htm>

Additionally Milosevic's government has repeatedly defied resolutions on Kosovo by the UN Security Council, which all UN members are supposed to obey. But do the Yugoslav crimes make the bombing legal?

There are strong voices amongst scholars and critical media condemning the NATO action as illegal due to the lack of Security Council authorisation. The strongest and most confident protest is articulated, of course, by the FRY itself – Yugoslavia instituted proceedings before the International Court of Justice against ten NATO Member States, accusing these States of bombing Yugoslav territory in violation of international law. In its applications, Yugoslavia maintains inter alia that these States have committed

> "acts by which they have violated their international obligations not to use force against another State, not to intervene in [that State's] internal affairs" and not to violate its sovereignty", "the obligation to protect the civilian population and civilian objects in wartime, the obligation "regarding fundamental rights and freedoms; and the obligations not to use prohibited weapons and not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group".[37]

As the legal basis for its claims, Yugoslavia cites the obligations not to use force against another state and not to intervene in its internal affairs; the provisions of the Geneva Conventions of 1949 and of the Additional Protocol No. 1 of 1977 on the Protection of Civilians and Civilian Objects in Time of War; the International Covenant in Civil and Political Rights; the 1966 International Covenant in Economic, Social and Cultural Rights; the Convention on the Prevention and Punishment of the Crimes of Genocide and Chapter VII of the UN Charter.

A closer look at this application shows that it addresses two different issues: first it is concerned with the question whether it was lawful to forcible intervene at all. This question is part of the area of international law which is known as *jus ad bellum* and comprises rules and doctrines regarding the justified use of force in international relations. Secondly the question is asked whether the way and manner of the use of force, i.e. the warfare itself was compliant with international law. Here one has to

[37] ICJ Press Communique 99/17 from 29 April 1999 at <http://www.icj-cij.org>

look at the relevant law under the heading *jus in bello,* which is also referred to as humanitarian law.

In the following part I am going to answer the first question, determining whether the forcible intervention by a state or group of states into another state can be justified under certain circumstances as a matter of principle.

## 1. The Pre-Existing Framework

The international system is going through a period of revolutionary change. But despite dramatic political transformations, the essential features of a structure of independent states are likely to remain relatively stable. Moreover, the UN Charter does express enduring values worthy of preservation even as the system evolves to meet new challenges. An understanding of the pre-existing framework will help shed light on the present problems.

The UN Charter reflects two clusters of values, which intersect with each other and may sometimes work at cross-purposes.[38] In a cluster which we may call "state system values" are principles inherent in a system of separate states, including non-use of force, political independence of states and sovereign equality. In a cluster which we may call "human rights values" are principles relating to the fundamental rights and freedoms of human beings. These two clusters of values interrelate with two types of objectives relevant to international legal rules on intervention: objectives of conflict prevention or containment and objectives of realisation of autonomy.[39] Because of the overriding importance of containing conflict, the international legal system has sought to restrain states from projecting military power into one another's territory; for similar reasons, traditional international legal doctrine has aimed at restraining states from instigating or exacerbating civil strife in other states.

[38] L F Damrosch, *Introduction,* in: L F Damrosch (ed), ENFORCING RESTRAINT, p.8

[39] As Article 1(1) and (2) of the UN Charter suggest, the primary purposes of the United Nations are: "(1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace"; and "(2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."

Underlying the traditional rules against intervention (even though they were widely ignored) was the idea that outside involvement in internal strife would risk widening and escalating the conflict.[40]

The autonomy value is sometimes formulated in terms of the political independence of a *state* but the underlying value is the human rights of the people within state boundaries to organise themselves into political communities and to create their own political institutions. Along with such related principles as self-determination, the norm of non-intervention aims at securing the rights of people within a state to exercise political freedoms without external domination.

These values of conflict containment and autonomy are at the heart of the international legal system's commitment to a norm against external involvement in internal strife.

After having characterised the general structure of the international legal system with regard to outside intervention it is necessary to examine in detail possible violations of international norms.

The character of the NATO air strikes as forcible intervention indicates the violation of two basic principles in international law – the principle of non-intervention and the prohibition of the use of force. Examining the literature on forcible intervention it becomes clear that there is no unanimity about the relationship and interdependence of these two principles. Some authors only put emphasis on the violation of state sovereignty through intervention in internal conflict[41], while others start with the prohibition of the use of force and the underlying principle of non-violence.[42]

That there is a distinction between these two principles is out of question. The principle enshrined in Article 2(4) is part of a system of war prevention, which draws its significance from being the most direct effort to prevent forcible violence in inter-state relations. Non-intervention on the other hand forbids more generally interference with internal or external affairs of another state. Armed intervention is then singled out for particular mention as a violation of international law, which coincides with the cardinal provision of Article 2(4) of the UN-Charter. But the principle of non-intervention as constructed also outlaws "the use of economic, political or any other

[40] R Thode, *Das Gewaltverbot des modernen Voelkerrechts*, in: K Ipsen, VOELKERRECHT, p.447
[41] V Lowe, *The Principle of Non-Intervention: Use of Force*, in: V Lowe & C Warbrick (eds), THE UNITED NATIONS AND THE PRINCIPLES OF INTERNATIONAL LAW, pp.66

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."[43] The emergence of an international society has led to a remarkable weakening of the non-intervention norm and its corollary the sovereignty of states.

### *1.1. The Doctrine of Non-Intervention*

The first major concern arises with the notion, that the fighting in Kosovo was a purely internal matter of the Federal Republic of Yugoslavia, which should be solved by the parties concerned themselves. As a representative of Yugoslavia said,

> "My country had not threaten any other country or regional peace and security; it had been attacked because it had sought to solve an internal problem and had used its sovereign right to fight terrorism and prevent the secession of a part of its territory, which had always belonged to Serbia and Yugoslavia."[44]

International law, as it has developed since 1945, positively protects the power of a state represented by its government to rule its sphere of jurisdiction without foreign intervention.[45] The precise scope of the prohibition of intervention is highly contested in general international law, in particular where 'economic intervention' is concerned. The prohibition of state-sponsored interference directed against an established state is based on various grounds. It is inherent in the general principles, which define the international system, such as the doctrines of sovereignty, the sovereign equality of states and of self-determination of people. It forms a constitutive of the collectivity of the international society of states, in which states have established by dialogue and consent common rules and institutions for the conduct of their relations, and recognise their common interest in maintaining those arrangements.[46]

In the post–1945 United Nations Charter it was only the United Nations itself which was banned from unauthorised intervention in Article 2 (7):

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[42] O Kimmenich, *Der Mythos der humanitaeren Intervention,* 33 AVR (1995), at 430
[43] GA Res.2625, U.N.Doc A/8028 (1970), reprinted in 9 ILM (1970), at 1292
[44] Security Council, Press Release SC/6657 24 March 1999 at <http://www.un.org/plweb-cgi/idoc>
[45] *Military and Paramilitary Activities in and against Nicaragua,* ICJ Report (1986), at 106
[46] O Ramsbotham & T Woodhouse, *Humanitarian Intervention in Contemporary Conflict,* p.38

"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."

For the application to individual states it could only be deduced from other UN Charter articles: in particular, Article 1 (2), which enjoins 'respect for the principle of equal rights and self-determination of peoples'; Article 2 (1), which emphasises 'the principle of the sovereign equality' of member states; and Article 55, which also stresses respect for the principle of equal rights and self-determination of peoples.[47] Subsequently the concept was elaborated in a series of UN General Assembly resolutions, notably the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Protection of their Independence and Sovereignty of 21 December 1965 (Resolution 2131) and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the UN Charter of 24 October 1970 (Resolution 2625).[48]

Sovereignty and the accompanying corollary of the equality of states have been termed "the basic constitutional doctrine of the law of nations."[49] Sovereignty is the cornerstone of international rhetoric about state independence and freedom of action, and the most common response to initiatives which seek to limit a state's action in any way is that such initiatives constitute an impermissible limitation on that state's sovereignty.



At the same time, however, the content of the term "sovereignty" is at best murky, whatever its emotional appeal.

"For the practical purposes of the international lawyer sovereignty is not a metaphysical concept, nor is it part of the essence of statehood: it is merely a term which designates an aggregate of particular and very extensive claims that states habitually make for themselves in their relations with other states. To the extent that sovereignty has come to imply that there is something inherent in the nature of states that makes it impossible for them to be subjected to law, it is a false doctrine which the facts of international relations do not support."[50]

[47] Ibid.
[48] U.N. Doc A/6014 (1966), reprinted in 5 ILM (1966), at 374; GA Res.2625, supra note 43
[49] I Brownlie, *Principles of Public International Law*, p.287

At least part of the difficulty in defining sovereignty lies in the fact that sovereignty traces its historical roots to sovereigns, in whose hands 'absolute' spiritual and temporal power rested. Since the time of the American and French revolution, the idea of princely sovereignty has given way to the idea of popular sovereignty, and the resulting principle of national self-determination, however problematic, is now unassailable, and has been the most important modification to the idea of international society since its inception. So, if particular governments lose inner legitimacy, because they are not popularly based, do they by the same token lose their outer legitimacy within the society of states?

The Declaration on the Inadmissibility of Intervention refers to the 'personality' of the state and mentions 'political, economic and cultural elements', which shows how it is the 'inner' integrity of the state which underpins and justifies the non-intervention norm.[51]

But under current international law the answer is simply that whether the government was actually representative of the population whose interests it purported to embody is regarded as irrelevant. Sovereignty is a consequence of statehood and the definition of a 'state' requires not a certain degree of civilisation or democracy - the decisive criterion is the effectiveness of state power.[52]



Yet history testifies that actual restrictions were placed on a sovereign's treatment of its own citizens even before the classical period of international law – and these were dutifully recognised and recorded in the work of Hugo Grotius.[53] That sovereignty has traditionally admitted such formal limitations is partially explained by the fact that the world is composed of a proliferation of states: the world has become one of competing and co-existing sovereigns and not of a single state or a monopolistic sovereign.[54] Whatever outrages upon humanity occur in this community presuppose a common set of values that are (potentially at least) worth defending or protection. Even Article 2(7) of the UN-Charter stipulates that the principle of non-intervention shall not prejudice any enforcement measures taken in accordance with Chapter VII of the Charter. Here we have a clear prioritisation of community will (as expressed in

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[50] J L Brierly, *The Law of the Nations*, pp.48-49
[51] O Ramsbotham and T Woodhouse, supra note 46, p.39
[52] D J Harris, *Cases and Materials*, p.143
[53] H Grotius, *De jure belli ac pacis libri tres*, pp.139
[54] O Ramsbotham and T Woodhouse, supra note 46, p.58

the determinations of the Security Council) over and above individual claims of 'sovereignty' to give effect to the notion of international peace and security.

Part of the doctrine of sovereign authority exercised by governments is also the principle of consent in the establishment of obligations binding upon a state. It is uncontroversial that an obligation, once it is established by treaty, custom or general principle of law, is indeed binding and cannot be revoked unilaterally. If a state is subject to an international obligation, the matter regulated by that obligation is no longer considered to warrant the claim to exclusivity of national jurisdiction.

Human rights are part and parcel of both conventional and customary international law. Human rights can aim to protect individuals, groups, minorities and entire peoples. At least some fundamental human rights norms are regarded as part of international *jus cogens* (rules from which no derogation is permitted), including the prohibition against genocide.[55] In this case interference by another state could be seen as an alternative means of realising the obligation to 'prevent' genocide – a view which was contemplated in the Sixth Committee during the ninth session of the General Assembly.[56]

However, fulfilment of human rights and elementary principles of humanity are obligations *erga omnes*, i.e. all states have a legitimate interest in their implementation. Therefore it is clearly legitimate for international bodies to consider the human rights situation in any country, as human rights cannot be said to fall 'essentially within the domestic jurisdiction' of a state within the meaning of Article 2 (7) of the UN Charter.[57]

In his last annual report in the autumn of 1991, the outgoing UN Secretary-General, Javier Perez de Cuellar, wrote:

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[55] see, e.g. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Report (1951), at 23; Restatement (Third) of the Foreign Relations Law of the United States, para.702

[56] The precise wording of the obligation of this Convention is instructive: according to Art.1, the High Contracting Parties "confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to *prevent* and to punish." See also I Brownlie, *Humanitarian Intervention,* in: J Moore (ed), LAW AND CIVIL WAR IN THE MODERN WORLD, p.217

[57] "The Charter was issued in the name of the peoples, not the governments. Its aim is not only to preserve international peace, but also to reaffirm faith in fundamental human rights, in the dignity and worth of the human person. The Charter protects the sovereignty of peoples – it was never meant as a licence for governments to trample on human rights and human dignity." J Solana reflects on 'Intervention' in 35th Annual Ditchley Foundation lecture, Press release SG/SM/6613/Rev.1 26 June 1998 at <http://www.un.org/plweb-cgi/idoc>

"It is now increasingly felt that the principle of non-interference within the essential domestic jurisdiction of states cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity. The fact that in diverse situations the United Nations has not been able to prevent atrocities cannot be accepted as an argument, legal or moral, against the necessary action, especially when peace is threatened."[58]

Developments that have been seen in recent years have demonstrated an acceptance of a far broader conception of justified outside intervention into certain purely internal matters, thus constraining further the scope of Article 2(7) and the exclusive jurisdiction of states. Claims that states have the right to intervene (forcibly) to put an end to serious or extreme human rights violations are validated by recent UN practice.

1.2.1.Somalia

The Somali crisis was touched off by the power vacuum created when President Siad Barre, the country's long-time dictator, fled the capital city of Mogadishu in January 1991. Barre's departure split the opposition. As various clan militias turned on one another, the country was effectively divided into 12 zones of control.[59] A so called "reconciliation conference" between the warring factions was held in Djibouti in July 1991 resulting in the selection of Omer Arteh Qhalib as interim Prime Minister. In reality, however, Qhalib held no perceptible authority over the Somali faction leaders. By November 1991, the struggle between the warring factions had escalated to a full-scale civil war.[60]

The Security Council's evaluation of the situation in Somalia resulted in Resolution 794, which found that the unfolding human rights crisis in Somalia and the obstacles to the delivery of humanitarian assistance constituted threats to international peace and security.[61] Accordingly the Resolution authorised all necessary means to establish a secure environment for relief efforts. The causes and effects of the crisis in Somalia appeared to be entirely internal, a fact reflected in the language of the Resolution and the statements preceding its adoption.[62] Although regional instability was cited as a justification for intervention, the thrust of the Resolution and the rationale supporting

[58] UN Doc. A/46/1
[59] J Clark, *Debacle in Somalia: Failure of Collective Response,* in: L F Damrosch, supra note 38, pp.207
[60] Ibid. p.211
[61] S.C.Res.794, UN SCOR, 47th Sess., 3145th mtg., at 3, UN Doc. S/RES/794 (1992)
[62] Ibid., and UN Doc.S/PV.3145

the use of force centred on Somalia's internal human rights crisis and the impediments to humanitarian assistance efforts. This finding and the authorisation to use force under Chapter VII represent a turning point in the legality and legitimacy of outside intervention.

Given the absence of any centralised authority in Somalia, some may challenge the validity of this precedent. But, the fact that there is no government does not mean that there is no *state*. No one denied Somalia's status as a state and the Somalis right to their own state; indeed this point was expressly underscored by the Security Council. The intervention, however, punctured the sovereignty of Somalia as a state.[63] In addition, this was a case of a civil war, a domestic situation in which foreign intervention is traditionally banned. Finally, it is important to emphasise that 'humanitarian law' is no more than the body of human rights principles that must be respected by all parties in an armed conflict.[64] Therefore, an intervention to put an end to violations of humanitarian law is an intervention to uphold human rights – the human rights that parties in a war, civil or international, are bound to honour.

In Resolution 794, human suffering took precedence over state sovereignty, which is precisely the policy that underlies humanitarian intervention.



1.2.2.Rwanda

In another striking example of the changing winds in the United Nations, the Security Council approved France's proposal to intervene in Rwanda in June 1994.

The crisis in Rwanda was triggered in April 1994, when the President of Rwanda was killed when his plane was shot down while approaching the Rwandan capital of Kigali. Although the source of the attack has not been pinpointed, extremist Hutus are widely suspected of having carried out the attack.[65] The Hutu-dominated Rwandan military, however, blamed the incident on the minority Tutsis, who constitute fifteen percent of Rwanda's population. Within hours, Hutu militiamen, known as *interhamwe*, began slaughtering innocent Tutsis and moderate Hutus by the thousands. The Tutsi-dominated Rwandan Patriotic Front (RPF) reacted by quickly restarting its dormant civil war against the Rwandan government.[66]

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[63] F R Teson, *Collective Humanitarian Intervention,* 17 Mich.JIL (1996), at 353

[64] Ibid.

[65] R Bonner, *Shattered Nation; A Special Report: Rwanda now faces Painful Ordeal of Rebirth,* New York Times, July 16, 1994, at A1

[66] Ibid.

In early May, when the Security Council realised that the killing continued unabated, it began to discuss sending a United Nations force of 5.500 African troops to Rwanda, but obtained no commitments from member nations to provide such forces.[67] With evidence of the scale of the atrocities in Rwanda mounting – a United Nations report estimated that three million Rwandans were displaced internally and more than two million had fled to neighbouring countries[68] - the French government sent the Security Council a proposal for unilateral intervention to halt the bloodshed and establish safe havens for the hundreds of thousands of fleeing refugees.[69]

By June 22, three days after the Security Council approved the French intervention, 2.500 French troops were in Rwanda and neighbouring Zaire establishing safe havens for refugees near the border. French troops helped distribute relief supplies and patrolled the countryside in tanks and armoured vehicles.

There is little doubt that the UN-authorised French mission is best described as a case of legitimate intervention on humanitarian grounds.[70] The United Nations Resolution authorised the use of force, and while there were references to a 'threat to international peace and security', it is quite obvious that the purpose of the mission was to stop the atrocities taking place in the Rwandan civil war.

To summarise this chapter the following observation can be made. Since the building up of international law on sovereignty has been carried on by governments of states, it is not surprising that there has been a shift over time in the definition of the object to be protected from outside intervention from 'the will of the people' (the wording of an early resolution of the General Assembly of the UN) to the abstraction of the 'state'. But due to the development of human rights the privileging of this abstraction has increasingly come into question. In other words, the absurd argument that the abstract concept of the state can render immune from international action a government or authority, which exterminates those whose corporate identity constitutes the 'state' is hardly tenable. The rights of states are no longer assumed to have priority over the rights of individuals.

[67] S.C.Res.918, UN SCOR, 49th Sess., 3377th mtg., UN Doc.S/RES/918 (1994)
[68] Report of the Secretary General on the Situation in Rwanda, at <gopher://gopher:undp.org:70/00/uncurr/sgrep/94_06/640>
[69] Letter Dated 20 June 1994 From the Permanent Representative of France to the United Nations Addressed to the Secretary General, UN Doc. S/1994/734 (1994)
[70] F R Teson, supra note 63, at 365

Reasons for this modification are the changing perceptions amongst states and parallel their increasing willingness to implement the concern for human rights in foreign countries into actual policy and practice. This again is due to the rise of transnational group empathy, spurred by the mobility of peoples and the globalisation of the mass media. Furthermore selfish national interests join idealism as propellants of a public policy more sensitive to slaughter occurring beyond national frontiers. Refugees from murderous domestic conflicts display an unparalleled awareness of and ability to reach distant safe havens. In their growing numbers they bear heavily on the social fabric, as well as the resources, of host countries.

### *1.2. The Prohibition of the Use of Force*

While the duty to refrain from intervention is only to be derived from the UN Charter by analogy and therefore open to a human rights friendly interpretation, the obligation not to resort to *armed* subversion can be extrapolated directly from it.
It is Article 2 (4) of the Charter, which rules out the threat or use of force against the 'territorial integrity' or 'political independence' of a state. Taking into account the military nature of the NATO action the core problem of the analysis lies exactly here – the lawfulness of forcible intervention depends on the interpretation of Article 2 (4) and the possibility or impossibility to grant exemptions for certain moral or just reasons.
This Article, the most frequently named candidate for the status of *jus cogens*, reflects the strong presumption of illegality whenever force is used.[71] Its predominant significance has been emphasised by authors who labelled it 'the corner stone of peace in the Charter[72] or the 'basic rule of contemporary public international law'.[73] But it must be said that the status, content and scope of the prohibition of the use of force in contemporary international law are highly controversial, resulting from the, undoubtedly ambiguous, wording of this provision.[74]

[71] See generally I Brownlie, *International Law and the Use of Force by States,* p.340 and M Pomerance, *Self-Determination in Law and Practice,* p.48
[72] D Scheffer, *Introduction: The Great Debate of the 1980s,* in: L Henkin & others, RIGHT V. MIGHT p.3
[73] L Henkin, *The Reports of the Death of Article 2(4) are Greatly Exaggerated,* 65 ALIL (1971), at 544

A very basic question of interpretation is presented by the peculiar structure of the Article. It is generally presumed that the prohibition was intended to preclude all use of force except allowed as self-defence or authorised by the Security Council. Yet the article is not drafted that way. The last words contain qualifications. The article requires states to refrain from force or threat of force when that is 'against the territorial integrity or political independence of any State' or 'inconsistent with the purposes of the United Nations'. If these words are not redundant, they must qualify the all-inclusive prohibition against force. Just how far they do qualify the prohibition is difficult to determine from a textual analysis alone.

The Charter is, as often stated, a living instrument.[75] It is like every constitutional instrument, continuously interpreted, moulded and adapted to meet the interests of the parties. This process is ensured by the generality of language, the broad range of the Charter purposes and principles and the inevitable ambiguities. It is also influenced by the raw facts of international life: the great differences in power and wealth, the technologies of destruction and the misery and frustrations of the masses of people. These factors, and others, have an impact on how we construe and give effect to the Charter. The Charter sets forth ideals which nearly all can accept but it operates in a non-ideal world of clashing interests.



What I want to make clear is that in order to pin down the content of Article 2(4) within a realistic framework it is necessary to examine the growing bank of state practice regarding forcible intervention which has accumulated in recent times. These responses are the result of specific normative decisions made by states when faced with conflicting priorities of conventional and customary international law.[76] So state practice can even proof that the prohibition of the use of force in the UN-Charter is, under certain circumstances, not as absolute and strict as it might seem.

In the following part I will focus on all possible exceptions which could be invoked as justification for the NATO bombings in Kosovo. Its outcome is highly dependent on the method and flexibility of interpretation and the above mentioned state practice as

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[74] J F Murphy, *Force and Arms,* in: C C Joyner (ed), THE UNITED NATIONS AND INTERNATIONAL LAW, p.101

[75] O Schachter, *International Law in Theory and Practice,* p.118

[76] D Kritsiotis, *Reappraising Policy Objections,* 19 Mich.J.Int'l.L. (1998), at 1045

a support for a change in the legal position that the use of force is not regarded as unlawful *per se*.

## 2. Exceptions to the Prohibition within the UN Charter

### *2.1. Self-Defence*

The law of the UN Charter provides two exceptions from the prohibition expressed in Article 2(4) (the mechanism of the so-called "enemy-state-clauses"(Articles 53 and 107) should be left aside as it is now unanimously considered obsolete). The first exception, embodied in Article 51 of the Charter, is available to states which find themselves to be victims of aggression.

As the Charter reference to collective self-defence, Article 51 constitutes the legal foundation of the Washington Treaty by which NATO was established – Article 5 of the NATO treaty bases itself expressly on the Charter Article 51.

According to the UN Charter, then, individual or collective self-defence through the use of force is permissible in the case of an "armed attack". This clearly was not the case between Yugoslavia and the neighbouring states. Like Article 2(4), Article 51 has become the subject of certain broadening interpretations, most of them put forward during the Cold War when the Security Council regularly found itself in a state of paralysis.[77] Against such attempts to turn a clearly defined exception to the Charter ban on the threat or use of force into a convenient basis for all sorts of military activities, it should be emphasised that Article 51 unequivocally limits whatever far-reaching right of self-defence might have existed in pre-Charter customary international law to the case of an "armed attack".[78]

As long as the humanitarian crisis do not transcend borders, as it were, and lead to armed attack against other states, recourse to Article 51 is not available. The mass exodus of refugees into Macedonia, Albania and other neighbouring states does not qualify as an armed attack.

[77] J F Murphy, supra note 74, p.103
[78] O Kimmenich, supra note 42, at 436

Another point to be considered under the aspect of self-defence is the doctrine of anticipatory self-defence. In the case of Kosovo NATO could have argued that the Serbian military attack posed an imminent threat to neighbouring countries (i.e. Turkey as NATO member) therefore necessitating an instant self-defence.
In international law there is no consensus over the point in time from which measures of self-defence against an armed attack may be taken.[79] An anticipatory right of self-defence would be contrary to the wording of Article 51 ("if an armed attack occurs") and assuming the existence of a customary right of self-defence it should be confined to the wording of Article 51.[80] The reason for this being that the alleged imminence of an attack cannot usually be assessed by means of objective criteria, any decision on this point would necessarily have to be left to the discretion of the state concerned. The manifest risk of an abuse of that discretion which thus emerges would *de facto* undermine the restriction to one particular case of the right of self-defence. It is thus permissible only after the armed attack has already been launched.

### *2.2. Security Council Enforcement Actions (Chapter VII of the UN Charter)*

With regard to the second exception to the Charter ban on armed force, Chapter VII constitutes the very heart of the global system of collective security.
According to its provisions collective action can be taken 'with respect to threats to the peace, breaches of the peace and acts of aggression', under Chapter VII of the UN Charter. If, under Article 39, the Security Council determines that there is such a threat, it may decide upon coercive measures short of the use of force, such as economic sanctions, under Article 41. Or, by Article 42,

> "...should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air , sea or land forces as may be necessary to maintain or restore international peace and security."

[79] A Randelzhofer on Art.51, in B Simma (ed), THE CHARTER OF THE UNITED NATIONS – A COMMENTARY, p.675
[80] Contrary, Schachter refers to the *Caroline* case and the acceptance of its formulation by several delegates of the Security Council. He supports the view that there is a continued validity of an "inherent" right to use armed force in self-defence prior to an actual attack but only where such an attack is imminent "leaving no moment for deliberation", "no choice of means". Although he admits it cannot be said that the formulation reflects state practice. O Schachter, supra note 75, pp.151

As a textual matter, the Charter requires the Security Council to approve affirmatively of non-defensive use of force. Thus, the monopoly to determine both cases of aggression and the necessary counter-measures is vested in this body, which is composed of five permanent members (China, United Kingdom, France, Russia, United States) and ten members periodically elected by the General Assembly. A respective resolution of the Security Council, however, requires the consent of at least all five permanent members (Article 27(3)) and at least nine votes of the full Council. So each permanent member holds an effective veto against those resolutions.

*2.2.1. Threat to or Breach of the Peace*

During the Kosovo crisis the Security Council adopted Resolution 1199 in September 1998 stating expressly that the situation in Kosovo constituted a 'threat to peace and security' in the region.[81] This already involves considerably controversy over whether the Council possessed authority under Chapter VII to exercise compulsory authority unless a threat to *international* peace could be shown.[82] Yet in two cases arising long before the present wave of internal conflicts – the case of Rhodesia and South Africa – the Council did take an inclusive view of the concept of 'threats to peace' in order to act under Chapter VII with respect to situations that were essentially internal.[83] In both cases, of course, the crux of the matter was apartheid; transboundary elements were present, but were distinctly secondary to the grievances that prompted the Council to act. Now the threat of expansion of warfare across an international boundary can easily be classified as a threat to peace; the proposition that flows of refugees into neighbouring states may also be a sufficient threat is achieving greater (but not universal) acceptance.[84] Thus, in Resolution 1199, the Security Council referred to the possible spreading of the conflict to Macedonia and the flow of refugees into neighbouring states as a threat to the peace and aggravation of what was already a highly unstable situation.

[81] Supra note 23
[82] J Frowein on Art.39, in: B Simma (ed), p.609; D Kritsiotis, *The Legal Travails of Kind-Hearted Gunmen*, 62 Mod.L.R. (1999), at 947
[83] J F Murphy, supra note 74, p.109
[84] W Kapinga, *The United Nations System and Collective Uses of Force*, 5 ASICL (1993), at 16

But the Council kept silent after the further deterioration in January/February 1999. One reason being that the Security Council was paralysed by Russia and China, who were strongly opposed to take military action against Yugoslavia. Secondly, because it felt generally reluctant to do anything substantial, not wanting to contravene the principle of non-intervention or to set 'a dangerous precedent that could open the way to diverting the Council away from its basic functions and responsibilities for safeguarding international peace and security'.[85]

Nevertheless, after the air strikes had began, the Security Council rejected a draft resolution, sponsored by the Russian Federation, Belarus and India, who called for an immediate cessation of the NATO bombings and affirmed that such unilateral use of force constitutes a flagrant violation of the UN Charter, in particular Articles 2(4), 24 and 53.[86] One representative thereby invoked the habitual principle that the Council had chosen to remain silent at times when regional organisations sought to remove regional threats to peace and security.

Another point in favour of a positive reply is the remarkable degree of 'satisfaction', as it were, expressed by the Council in its Resolution 1203 (1998) as well as in the Presidential Statement of January 29, 1999 with the Holbrooke agreements and the subsequent successes of the Contact Group – results casually linked to the NATO threat of imminent air strikes. These signs of political approval could, at any stage, have been prevented by the opposition of any permanent member of the Council.

This and already the Iraqi inspection dispute raised the question whether Security Council ambiguity, acquiescence, approving statements or even silence suffices to provide authorisation for the use of force.[87] Governments and scholars have argued with regard to various international incidents involving the use of force that it was lawfully employed pursuant to implied authorisation by the Security Council.

[85] Yemeni representative arguing against Security Council Resolution 688 on April 1991, which addressed a similar situation, U.N.Doc. S/PV. 2982, 28-30

[86] Press release SC/6659, <http://www.un.org/plweb-cgi/idoc>

[87] U.S. officials have argued that the mere invocation of Charter Chapter VII with regard to the Kosovo situation is sufficient to authorise a resort to force. See J Goshko, *U.S. Allies Inch Closer to Kosovo Intervention; UN Council to Vote on Key Resolution,* Wash. Post, Sept.23, 1998, at A21

*2.2.2. Claims of Implied Authorisations of Force*

The inability of the Security Council to authorise force when some believe it to be clearly needed propels the search for implied authorisations. Some argue that diplomatic and political reality may preclude the Council from publicly authorising actions that its members privately desire or at least would accept.[88] When a group of states act to enforce a Security Council resolution that the Council itself is unwilling to enforce – as was arguably the case in the Kosovo crisis – the argument can be made that those states are not acting unilaterally, but on behalf of a clearly articulated community mandate.

The general political pressure to find implied authorisation in Security Council acquiescence or ambivalence rests on construing the purpose of the United Nations to maintain international peace and security as requiring forceful action to remove threats to the peace. Thus in absence of effective UN sanctions, world order requires that individual states or regional organisations provide an effective remedy. As one commentator notes, "Art. 2(4) was never an independent ethical imperative of pacifism" but can be understood only in the context of an organisation premised on the "indispensability of the use of force to maintain community order."[89]

The validity of these claims of implied Security Council authorisation must be determined in the light of the relevant state practice.



For instance in 1962 the United States, admitting that it was not explicit, argued that it had implied Security Council authorisation to interdict Soviet ships en route to Cuba.[90] The key factors supporting this alleged implied authorisation were that the Council, by general consent, had not voted on the Soviet resolution disapproving the U.S. action and had encouraged a negotiated settlement.[91] This case seems strained. In fact, the Council had also refrained from acting on an U.S. draft resolution that would have expressed approval of the U.S. action.[92]

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[88] "There is a subtle interplay of politics and acquiescence that renders any demand for 'unambiguous authorisation' unrealistic.", see A D'Amato, *Israel's Air Strike upon the Iraqi Nuclear Reactor*, 77 AJIL (1983), at 584

[89] M Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AJIL (1984), at 642

[90] L Meeker, *Defensive Quarantine and the Law*, 57 AJIL (1963), at 522

[91] Ibid., at 522

[92] W Hummer/M Schweitzer on Art.52, in: B Simma (ed), supra note 79, p.710

Moreover, if failure to adopt a resolution condemning the use of force is dispositive, what, if the Council votes to condemn by a wide margin, but the resolution is vetoed by a permanent member? At a minimum, the analysis calls for a deeper understanding of why the resolution was not enacted. But such an analysis will be often impossible, since we can never know what motivated each Security Council member.[93]

In 1961 India seized Goa from Portugal, arguing inter alia, that it was enforcing UN resolutions against colonialism. One author rejected this reasoning, which he considered to be a claim based upon an implied authorisation.[94] While a majority of the Security Council opposed India's claim, many newly independent states in Africa, as well as the Soviet Union, believed that colonisation was such an evil that the use of force against it should be tolerated. This political view led to the United Nation's de facto acquiescence in India's takeover of Goa, which might be perceived as an implicit, after-the-fact authorisation.

Professor D'Amato's claim that the Israeli 1981 air strike against the Osiraq nuclear reactor was an example of implicit Security Council approval of an armed conflict takes the 1962 U.S. argument to the extreme.[95] In this case, the Security Council was not silent but "strongly condemned" the air strike.[96] Yet for Prof. D'Amato the condemnation was pro forma because it contained no sanctions against Israel. He relies on this failure to claim that it is often politically expedient for the community to condemn a forceful initiative in explicit terms, yet to approve of it in fact by stopping short of reprisals against the initiator.

The 1991 effort by the United States, the United Kingdom and France to provide safe havens to the Kurdish refugees in northern Iraq and to enforce no-fly zones in both northern and southern Iraq has been justified on the ground that these actions were implicitly authorised by UN resolutions.[97]

[93] L Meeker, supra note 90, at 523
[94] Q Wright, *The Goa Incident,* 56 AJIL (1962), at 629
[95] A D'Amato, supra note 88, at 586
[96] SC Res.487 at UN Doc.S/INF/37 (1981)
[97] J Stromseth, *Iraq's Repression of its Civilian Population: Collective Responses and Continuing Challenges,* in: L F Damrosch, supra note 38, pp.77

On April 5, 1991, the UN Security Council adopted Resolution 688.[98] It was an attempt to respond collectively to the urgent humanitarian needs of displaced Iraqis in the aftermath of the Gulf War and to halt Iraq's repression of its civilian population through diplomatic pressure and the involvement of humanitarian relief agencies under UN co-ordination. Yet the Resolution did not address inter alia one issue. It did not expressly authorise the use of military force to protect Iraqi Kurds and Shi'ites from Saddam Hussein: the debate preceding the Resolution's passage gave no indication that military force was contemplated by its "appeal to all Member States ... to contribute to these humanitarian relief efforts."[99] The Iraqi case thus reveals the Security Council's clear reluctance to explicitly authorise the use of military force to stop a state from repressing its own citizens. Reaching agreement simply on ordering Iraq to open up its territory to humanitarian relief organisations and co-operate fully with them was hard enough.[100] Britain, France and the United States decided quite sensibly, however, that allied military protection was critical to assisting the Kurds and protecting them from Saddam Hussein's military attacks.

Although the former Secretary-General argued that the allied military action needed more explicit authorisation,[101] allied officers saw the matter differently. In their view, Resolution 688 was sufficiently open-ended to provide a legal basis for the allied action.[102] The Resolution did not expressly mandate Operation Provide Comfort, they acknowledged, but it did call the situation in Iraq a threat to peace and security, and it appealed to member states to assist the humanitarian relief effort. It also demanded that Iraq allow immediate access to those in need. Allied officials argued that this demand, together with the fact that Iraq was already subject to enforcement action under Chapter VII (Operation Desert Storm to liberate Kuwait from the Iraqi forces), provided adequate legal authority for allied military assistance to the relief effort. Security Council members opposed to a more direct legal approach did not challenge this view.

In other words, Resolution 688's open-endness was both a necessity and a virtue – a necessity because of the unwillingness of the Security Council to provide a more

[98] SC Res.688, <gopher://gopher.undp.org:70:00/undocs/scd/scouncil/s91/5>
[99] R E Gordon, *Humanitarian Intervention by the United Nations: Iraq, Somalia and Haiti,* 31 Texas Int'l LJ (1996), at 50
[100] J E Stromseth, supra note 97, p.85
[101] J F Murphy, supra note 74, p.115
[102] See e.g. P E Tyler, *10,000 American Troops to Build Camps over a 2-Week Period,* New York Times, April 18, 1991, at A1 and A 16

definitive authorisation, and a virtue because it permitted the allies to take action during this period of evolving norms while not forcing the hand of the Chinese and others who were willing to tolerate actions de facto that they would not authorise de jure. Likewise, few States raised legal objections when the United States, Britain and France invoked Resolution 688 in imposing the southern no-fly zone.

Such an approach has worked acceptably with respect to Operation Provide Comfort and Operation Southern Watch. Indeed, had the Allies not committed troops to northern Iraq in April 1991 or monitored Iraqi airspace, Saddam Hussein's brutal military attacks against innocent civilians undoubtedly would have continued unabated. Nevertheless, several Gulf War Allies admitted that taking military action under an UN 'umbrella' without clear authorisation poses certain risks.[103] In circumstances not linked so directly to prior UN enforcement action, the use of force without clear Security Council authorisation could damage the legitimacy of the operation. Moreover, as the Secretary-General concluded in the Iraq case, the UN cannot deploy or police forces on a state's territory unless the Security Council mandates them under Chapter VII of the Charter or unless the parties and the Security Council give their consent.

In short, the unusual manner in which Resolution 688 was implemented – safe havens guarded by allied forces replaced by UN presence on the ground in northern Iraq, and allied air umbrellas in both the north and the south – worked effectively in this case, but cannot be seen as widely supported by the international community as legally authorised.[104]

In sum this brief survey of state and Security Council practice on implied authorisation suggests three propositions:

(1) that the occasional attempts to justify uses of force under this theory do not amount to a systematic, unbroken practice;
(2) that most of these claims have been strongly contested and
(3) that the difficulty of determining whether an authorisation has been implied and the resulting uncertainty for world order counsel caution in adopting any such reading of Security Council actions.

[103] France, Russia and Turkey expressed unease about some allied military actions taken in January 1993 in response to Iraqi defiance of the no-fly zones. See S Waxman, *France Criticizes Attack on Iraq*, Washington Post, January 21, 1993, at A 18

*2.2.3. Why favour explicit Security Council authorisation?*

Indeed the examination cautions against this approach because of the difficulty of determining when an action has been impliedly authorised, the uncertainty in the law and the potential for abuse.

Implied Security Council authorisation to use force is often inferred form the Council's condemnation of a nation's action as a threat to the peace. But making that interference is unwarranted; it contradicts the Charter's requirement that the Security Council must determine both that a threat to the peace exists and that peaceful means cannot resolve the situation. But what if the Security Council is dysfunctional or paralysed by the veto? At times an authorisation is hard to obtain, when China, India, Russia and occasionally France balk at what they consider an inappropriate use of force. In the context of the outbreak of violence in Kosovo, the claim has been made that it would be "absurdly legalistic to act on the Security Council's say-so" given the possible Russian veto.[105]

Assuming that a majority of UN members have a positive attitude towards military intervention on humanitarian grounds[106] the solution lies not in the construction of an implied authorisation, but in the examination of possible deficiencies in the UN Charter system and the reformation and adaptation to the changing modern world. It must be asked if it would not be wiser to seriously think of a reform of the Security Council, with the aim of avoiding, for the future, situations where one of the permanent members can block a international military action for purely political reasons. In other words: would it not be more reasonable that the UN Charter should provide a possibility for a certain number of non-Council members to override a veto by a permanent member?

Because in the long-term interest of world order, it is imperative that the Security Council be actively engaged in determining whether force ought to be employed by the international community. A rule that allows acquiescence to constitute authorisation would encourage the Security Council to avoid deciding when the use of force is necessary and appropriate.

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[104] J Lobel & M Ratner, *Bypassing the Security Council,* 93 AJIL (1999), at 133

[105] *Intervene and be damned?* Economist, July 4-10, 1998, at 14

[106] See the statements of a majority of member States in the Security Council concerning the condemnation of the NATO intervention in Kosovo, for instance Netherlands, Slovenia, U.S., United Kingdom, Malaysia, Bahrain, France, Canada etc., Press Release SC/6659, supra note 86

## 3. Exceptions to the Prohibition outside the UN Charter

A current challenge to the Charter's emphasis on non-use of force has come from the concern with human rights. These challenges fall into two categories: one justifies armed force in the cause of national liberation and the struggle against alien domination and racist regimes and a second justifies force to end atrocities such as mass killings and large-scale deprivations of the necessities of life. These two categories fit into the broader concept of human rights. However, they select different rights and they have different supporters, often strongly antagonistic to each other.[107] In the one category "intervention to facilitate self-determination" a group is fighting against the established regime in order to implement the right of self-determination of a people. By contrast, humanitarian intervention seeks not the creation of a new state *per se,* but only the protection of human rights within an existing state. Moreover, while humanitarian intervention requires that inhuman and cruel treatment take place within the target state prior to any use of force, "intervention to facilitate self-determination" has not such prerequisite.[108]

Yet they tend to share a common legal argument directed against the interpretation of the Charter that the prohibition of the use of force is absolute.
One leg of their argument is essentially textual, addressed to the peculiar construction of the Charter's prohibition against the use and threat of force. That provision, they emphasise, does not prohibit the unilateral recourse to force in general. It only prohibits force against the political independence and territorial integrity of a state or in any manner inconsistent with the purposes of the United Nations. It is then argued that when force is used to protect human rights, it is not directed against the political independence or territorial integrity of a state nor is it inconsistent with the purposes set forth in the Charter itself inasmuch as respect for human rights is a Charter aim. But what must be realised is that an issue of this magnitude cannot be definitely answered by analysis of text alone, nor should it be. It is important to consider the

[107] C Bowett, *The Interrelation of Theories of Intervention and Self-Defence,* in: J N Moore (ed), supra note 48, p.123

[108] Indeed, such intervention is construed as a kind of collective self-defence on behalf of a people fighting for liberation and does not take humanitarian considerations, that is the conditions in which the administering authority keeps the people being denied self-determination, into account. N

ends and values that are at stake in this controversy. For no text adopted by governments can or should foreclose choices imposed by changing conditions and by new perceptions of ends and means.

### *3.1. Assistance to Facilitate Self-Determination*

The principle of self-determination of peoples plays an important role in the regulation of armed conflict. The widespread oppression of minorities in world politics and the emergence or, better still, the increased importance of ethnicity in internal conflict have lead to claims for self-determination for such entities, as was the case with the Kosovar Albanians. During a debate on the right to self-determination within the UN Commission on Human rights a spokesman for International Educational Development claimed that the people in Kosovo had a right to self-determination and that's why the current NATO campaign on behalf of the Kosovars was a just one.[109] Examining the history of the Albanian enclave in the Former Yugoslavia another author concluded that the Kosovar Albanians not only belong to the Albanian people but also might be recognised as having their own right to self-determination as a separate nation.[110] Although NATO never officially invoked the principle of assistance to facilitate self-determination for the Kosovo Albanians it seems appropriate to address the issue, which has become a common feature of modern conflicts.[111]

The case for intervention for facilitating self-determination was upheld by Afro-Asian and Communist States during the decolonisation process. They considered colonialism to be permanent aggression and the armed fight of people under colonial domination as a kind of self-defence. According to this point of view, intervention for facilitating self-determination constitutes the exercise of the right of collective self-defence.[112]

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Ronzitti, *Rescuing Nationals Abroad Through Military coercion and Intervention on Grounds of Humanity*, p.XVII

[109] Press release HR/CN/885 at <http://srch1.un.org:80/plweb-cgi/fastweb...%28%28$q>

[110] F Muenzel, *What does Public International Law have to say about Kosovar Independence*, at <http://jurist.law.pitt.edu/simop.htm>

[111] Human Rights Development Report 1994, supra note 2

[112] N Ronzitti, supra note 108, p.XVI

This notion, however, contains several problematic features. First of all, what is the content and nature of a right to self-determination? Is it a right in a legal sense? Who is the right-holder with the authority to claim implementation? What means do they have for the enforcement of this right? And last but not least, are third states allowed to provide assistance in those cases, and if, does it include armed intervention?

*3.1.1. The Right to Self-Determination*

The idea that members of a community should choose for themselves a form of political organisation, and that they should be free to conduct their internal affairs and their external relations as they see fit, is a principle as old as the study of politics itself. The principle of self-determination has undergone a metamorphosis, largely in the last forty years, from a political thought to a right in international law. Pivotal events like the passage of the General Assembly Resolution 1514 in 1960 (Declaration on Colonialism) or the signing of the 1977 Protocols are evidence of this change and are often the codification of less noticeable changes which have taken place over many years.[113] There is now a fairly strong consensus that, even if the content of the legal principle is not entirely clear, there is a right of self-determination in international law.[114]



It is in fact a very elusive concept, because there are numerous and at times conflicting interpretations of self-determination.[115] Their common notion, however, is that it is defined as the right of people to determine their international status, which does not always mean that the group using this right may establish its own state.[116]

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[113] H Hannum, *Autonomy, Sovereignty, and Self-Determination – The Accommodation of Conflicting Rights*, pp.27

[114] See for all A Eide, *Sovereign Equality Versus the Global Military Structure: Two Competing Approaches to World Order*, in A Cassese, THE NEW HUMANITARIAN LAW OF ARMED CONFLICT, Vol.1, p.22

[115] Self-determination can refer to the right of the population of a state to determine their international status and to self-government. It can also refer to the similar right of the population of a colonial territory or to the right of 'peoples', whether or not they comprise the entire population of a state or colonial territory. See H Quane, *The United Nations and the Evolving Right to Self-Determination*, 47 ICLQ (1998), at 537

[116] "The establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination of that people." Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations. GA.Res. 2625 (XXV), U.N. Doc A/8082 (1970) principle (e).

The group also may claim autonomy, independence or union with another state.[117] But as stated in the *Aaland* case[118] out of the right of self-determination results a right to secession "as a last resort, when the state does not have the will or the power to give and ensure just and effective guarantees" for the rights of the group entitled to self-determination.

Another controversial question relates to the nature of the principle. If the contention is made that self-determination grants a right *stricto sensu*, this right would obviously presuppose the existence of a subject of international law. It is difficult to identify this as an inherent right of a 'people', because a people is an entity which is somewhat vague in character. Moreover, were such an entity easily identifiable, there would still be the difficulty of conferring full international legal personality upon it. This difficulty is only one aspect of the more general problem of the international legal subjectivity of entities other than states and international organisations.[119] It is not a problem which could be solved by conferring legal personality upon the national liberation movement representing the people entitled to self-determination. In fact, even though there have been many examples of national liberation movements carrying out "generally recognised" legitimate struggles against their colonial or alien opponents, the formation of movements calling themselves "national liberation" does not automatically guarantee that they are representatives or that the people they claim to represent are in fact entitled to self-determination.[120] Non-recognition by the

[117] The conciliation between the people's right to self-determination and the principle of territorial integrity could be precisely the granting of autonomy to peoples inside a multinational state. A Kiss, *The People's Right to Self-Determination,* 7 HRLJ (1986), at 173

[118] Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Island Question, cited in A Cassese, *Self-Determination of Peoples. A Legal Reappraisal,* p.31

[119] The concept of international law as a body of rules binding only states is no longer valid. That it is possible for non-state entities to be the recipients of rights and duties under international law does not explain how a non-state entity may gain such status, nor how their rights and duties differ from those of states. M N Shaw, *International Law,* pp.138

[120] In general, the United Nations has deferred judgement on the representative character of particular liberation movements and has relied upon recognition by the regional intergovernmental organisation concerned. The criteria used by those regional organisations have a certain judicial formalism, but are open to wide interpretation. The two major requirements are that the movement be representative of the people of a territory and that it be engaged in an armed struggle of unspecified intensity. There is a general reluctance to recognise a movement as the legitimate representative of a people when this claim conflicts with the territorial integrity. For further reading see H A Wilson, *International Law and the Use of Force by National Liberation Movements,* pp.137

competent international organisations does not mean, conversely, that the corresponding people are not entitled to self-determination.[121]

With regard to the Kosovo Albanians this problem can be solved quite easily, since in practice Albanians in Kosovo were seeking to establish a parallel public life in the margins, with an assembly and a government-in-exile, and with parallel institutions within Kosova.[122] The 1992 multiparty elections for the (Alternative) Kosova Assembly strongly indicate its legitimacy and support their claim to represent the people in Kosova.

*3.1.2. Who is the 'Self'?*

The UN Charter establishes that 'peoples' are the selves to whom self-determination applies.[123] This choice of subject was used in the Declaration on Colonialism, the 1977 Protocol as well as the vast majority of other resolutions, declarations, decisions and agreements regarding this topic. The subjectivity of defining 'peoples' who enjoy this right is one of the more common criticisms of any legal right of self-determination.[124]

State practice as well as opinion expressed through the political organs of the United Nations suggests that the 'self' is not an ethnic or religious group, but a territorial one. 'Self-determination', according to Rosalyn Higgins, 'refers to the right of the majority within a generally accepted political unit to the exercise of power.' In other words it is necessary to start with stable boundaries and to permit political change within them.[125]

In general the principle applies to those territories which are separate political units. The right of peoples to self-determination attaches most clearly to trust and mandated territories established under Article 22 of the League of Nations Covenant, and

[121] A Tanga, *Foreign Armed Intervention in Internal Conflict,* p.103

[122] S Maliqi, supra note 35, p.139

[123] Some authors regard this as the 'external' right to self-determination which is exercised through achievement of independence (secession). According to this view minorities have an 'internal' right to self-determination and are therefore seen as a distinct form of 'selves'. See T Schilling, *Zur Rechtfertigung der einseitigen gewaltsamen humanitaeren Intervention als Repressalie oder als Nothilfe,* 35 AVR (1997), at 442; The distinction can also refer to the concept of a nation (synonymus for a state) and a people inside the state. A Kiss, supra note 117, at 170

[124] W Jennings, *The Approach to Self-Government,* p.56

[125] R Higgins, *The Development of International Law Through the Political Organs of the United Nations,* p.104

Chapters XII and XIII of the UN Charter. The decisions of the International Court in the *Namibia* and *Western Sahara*[126] cases reaffirmed the responsibility of the administering power to promote the 'progressive development towards self-government of independence' of these territories.[127]

Secondly, the right to determine freely one's economic, cultural and political destiny, applies to non-self-governing territories referred to in Chapter XI of the Charter (Article 73). The meaning of 'territories whose peoples have not yet attained a full measure of self-government' is not entirely clear. At least, the wording of Chapter XI suggests that the principle applies only to 'territories' whose 'peoples' are not fully self-governing and therefore it does not apply to minorities within a state. 'Member States are bound in their behaviour towards minorities not by Chapter XI,' but 'by the more general human rights provisions of Chapter IX, and in particular by Articles 55 and 56'.[128] Article 74 of Chapter XI suggests that there is a distinction between territories 'to which this Chapter applies' and 'metropolitan areas' of the State, but the difficulty of identifying a non-self-governing territory solely on the basis of the Charter's wording remains. Resolution 1541 of the General Assembly[129], passed the day after the more famous Declaration on Colonialism, adopted the view that Chapter XI applies prima facie 'in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.' Principle V of the Resolution further explains that,

> Once it has been established that such a *prima facie* case of geographical and ethnic or cultural distinctness of a territory exists, other elements may be brought into consideration. These additional elements may be *inter alia,* of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan state and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73e of the Charter.[130]

The territories qualifying as non-self-governing were originally determined by replies to a letter from the Secretary-General of 29 June 1946 requesting information in non-

[126] International Status of South West Africa, Advisory Opinion, ICJ Report (1971), at 16; Western Sahara, Advisory Opinion, ICJ Report (1975), at 12
[127] I Brownlie, supra note 49, p.594
[128] J Crawford, *The Creation of States in International Law,* p.359
[129] UN GA Res.1541 (XV). 15 Dec.1960, GAOR 15th Sess., Suppl. 16, at 29
[130] Ibid.

self-governing territories. Resolution 1541 stated that Chapter XI was to apply only to territories, known as colonies at the time of the passing of the Charter. Although Article 73 is not that restrictive, United Nations' practice has conformed with this interpretation.[131]

*3.1.3. The Grey-Zone between 'Peoples' and 'Minorities'*

A more controversial category of possible repositories of the right to self-determination are people of a national component of a multinational state.[132] Support for this view can be derived from the drafting history of the ICCPR,[133] in particular the references by Western States to the right to self-determination of the Soviet Republics and by the Soviet Unions statement that the term 'peoples' includes nations and ethnic groups.[134]

Further support can be found in Resolution 2625 of the General Assembly,[135] which recognises the right of 'all peoples'. The Declaration does not attempt to define 'peoples', but some indirect guidance on the question can be found in paragraph 7. This paragraph suggests a dual test for defining 'people'. The reference to the 'whole people belonging to a territory' suggests a territorial concept, but the inclusion of the phrase 'race, creed or colour' highlights the relevance of personal criteria. Secondly respect for the territorial integrity of a state is dependent on the state possessing a government representing the whole people. It suggests that there is a right to secede if the state fails to comply with this requirement.[136]

Paragraph 7 was seen as contributing to the progressive development of international law in this regard and not as codification of already existing customary law norms.[137]

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[131] With one exception: the Declaration contained in Resolution 1747 that Southern Rhodesia was a non-self-governing territory, which had less to do with the constitutional relationship between the Smith regime and the United Kingdom than with the denial of human rights in Rhodesia. UN GA Res.1747(XVI), 28 June 1962, cited in: H A Wilson, supra note 120, p.80

[132] A Cassese, supra note 118, at 108

[133] However, caution must be exercised since a considerable number of states, including those which submitted proposals for expansive definitions, noted that there was no right to secede. M J Bossuyt, *Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights*, pp.44

[134] H Quane, supra note 115, at 540

[135] Supra note 116

[136] C Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AJIL (1971), at 713

[137] 25 GAOR Supp.No.18, p.51

Its current legal status depends on the extent to which subsequent state practice complies with the provision.[138]

3.1.3.1.Nigeria and the Congo

Two strong examples, where self-determination has not been supported, are the Katangan secession from the Congo (1960-3) and the Biafran secession from Nigeria (1967-70).

Throughout the entire period of UN operations in the Congo there was no support from any quarter for any Katangan right of self-determination. Anthony Verrier notes that,

> "Not only for the week of 9 to 15 July, but for the entire period of ONUC's operations, the Third World as a whole and the 'African Group' in particular believed in forceful measures to preserve the Congo's unitary constitution."[139]

The African leaders were certainly conscious of their own vulnerability, and were eager to point out that self-determination is not a right of secession from a self-governing state.[140] The case of Katanga indicates that it is widely believed that different ethnic or cultural groups within an established state have a right to self-determination in that they have a right to participate in the government of that state. Such a group, even if living together in a particular territory or province, does not have a right to sever its ties with the established government solely because they are ethnically, culturally or linguistically different. There must also be an element of neglect, denial of equal rights.

The Biafran secession and civil war raised similar issues and is often used as an example of the inconsistent application of self-determination, thus casting doubt on its character as a legal right. There, after more than a year of internal disturbances and the exodus of Ibos from the Northern Region and from Lagos to the Eastern Region, the military governor of the Eastern Region, announced the secession of his Region

[138] The success of the claims in Czechoslovakia, Eritrea and the former Soviet Union don't necessarily affirm this principle, because there the presence of consent was decisive.

[139] A Verrier, *International Peacekeeping: United Nations Forces in a Troubled World,* p.50

[140] Pressure by these African leaders led to the adoption of SC Resolutions on 21 February and 24 November 1961 which gave UN forces the approval of the Council to end the Katangan secession by force if necessary. Ibid. at 67

and the formation of the Republic of Biafra. Given the concentration of Ibos in the region and the history of disturbances in the country, one might have expected some support for the fledgling state based on the right to self-determination. But the OAU passed a resolution which reaffirmed respect for the 'sovereignty and territorial integrity of member states', condemned secession, and accepted that the solution of the crisis was 'primarily the responsibility of the Nigerians themselves'.[141] Similarly, the United Nations remained aloof, encouraging the OAU in its mediatory efforts, providing some humanitarian relief to the area, but consistently supporting the territorial integrity of Nigeria.[142]

3.1.3.2.Bangladesh and Yugoslavia

On the other hand there are some admittedly contentious examples of peoples in such territories which may have a right to self-determination.

East Pakistan had never been considered a non-self-governing territory under the Charter. However, conditions in what would become Bangladesh were such as to convince many that East Pakistan should have a right to self-determination. It was geographically separate and culturally distinct from West Pakistan.[143] The worsening relationship between the two areas culminating in the independence of Bangladesh was generally accepted as a legitimate act of self-determination and Bangladesh was rapidly and widely recognised as a state, even though a large number of states condemned Indian intervention in East Pakistan in 1972.[144]

The reasons for the international community's response are unclear. According to one view, this was a situation where a 'distinct political-geographical [entity] subject to a "carence de souverainete" was entitled to self-determination.[145] This implies that the inhabitants of these entities have a legal right to self-determination and that the international community's response to East Pakistan's secession recognised this fact. This would broaden the meaning of people' considerably and would be one of the

[141] O Schachter, *The United Nations and Internal Conflict,* in J Moore, supra note 56, p.419

[142] The Nigerian Civil War was never placed on the agenda of the General Assembly or the Security Council. Ibid. p.419

[143] Several authors have supported the right to self-determination in cases such as Bangladesh, where a region not formally considered a non-self-governing territory under the Charter has many of the characteristics described in UN GA Resolution 1541. See e.g. V P Nanda, *Self-determination in International Law,* 66 AJIL (1972), at 321

[144] T M Franck and N Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force,* 67 AJIL (1973), at 277

[145] H A Wilson, supra note 120, p.83

most significant developments of the legal right to self-determination.[146] It is difficult to sustain this interpretation in view of the very limited state practice on the subject. Furthermore, the international community's response to East Pakistan's secession can be attributed more to a configuration of political and humanitarian considerations[147] than to international law. Arguably, it represented an ad hoc approach to a conflict rather than any development of the legal right to self-determination.

The most recent example of a successful secession occurred in the former Federal Republic of Yugoslavia. Yugoslavia rejected declarations of independence by four of its constituent republics and used force to prevent them seceding. The escalation in fighting and the widespread human rights violations led to the involvement of the international community first at a regional level and then at an international level. The international community's overriding objective was to broker a peaceful settlement of the conflict and this seems to have dictated its response to the declaration of independence.

Initially, the international community favoured a negotiated settlement that would maintain Yugoslavia's territorial integrity.[148] When this was not possible, it indicated its willingness to recognise the republics but only within the framework of an overall settlement. When this was unsuccessful, the European Community indicated its willingness to recognise the republics provided they satisfied the "Guidelines for the Recognition of New States in Eastern Europe and the former Soviet Union". As previously noted these Guidelines required a state seeking recognition to undertake a range of commitments designed to maintain peace and protect human rights. Once the republics gave the necessary undertakings they were recognised by the Community and subsequently by a large number of states. The recognition of these new states might be interpreted as broadening the concept of people to include the population of the highest constituent units of federal states[149] in the process of dissolution. But it seems questionable to conclude a general motivation because it is possible to identify a number of features unique to the situation in Yugoslavia that justify the international community's accepting secession. These are inter alia the constitutional coup by

[146] Ibid.
[147] L C Buccheit, *Secession: The Legitimacy of Self-Determination*, p.74
[148] M Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AJIL (1992), at 570

Obviously considerable confusion surrounds the legal principle of self-determination. This confusion is due, in part, to a failure to appreciate the particular context in which the principle emerged. The cases of minority secession from a state raise the most obvious conflict – the principle of territorial integrity versus the right to self-determination. In many of these contentious cases there are two or more principles in conflict, or there are two competing claims for self-determination.

State practice during the decolonisation period consistently affirmed the right of peoples everywhere to self-determination. This led to the mistaken belief that the principle was intended to be universally applicable. When groups in non-colonial states unsuccessfully invoked the right, the international community was accused of double standards and the existence of a legal right to self-determination was denied on the grounds of this perceived inconsistency. However, when many states affirmed the right of peoples everywhere to self-determination they did not intend to affirm the universality of the right as commonly understood. For them, peoples in independent states had already exercised the right to self-determination. By affirming the universality of the right, they were seeking to extend its application to peoples who had not yet exercised it.



At present, international law adopts a purely territorial concept of people. The term "people" refers to the entire inhabitants of a state or colony. Attempts to define people on the basis of personal criteria such as ethnicity or language have been unsuccessful and the international community has consistently denied a legal right to self-determination for ethnic, linguistic and religious groups within states.[153] The refusal to extend the right to self-determination to these groups has been counterbalanced to a certain extent by the adoption of international instruments on minority rights.[154] This reflects the international community's preference for resolving inter-communal

[152] Arguably, no rules of customary international law currently exist on the matter. Secondly, the Commission relied on a principle developed during the decolonisation period. Ibid., at 590

[153] In the post-Gulf War Crisis illustrated again the international community's clear preference for approaching a crisis as a humanitarian problem, side-stepping more contentious political questions of self-determination. Allied leaders repeatedly stated that they were creating a humanitarian safe haven zone in northern Iraq, not a political zone, and they took no position on the issue of Kurdish autonomy or self-determination. Similarly, Resolution 688 focused on the urgent humanitarian needs of the refugees, expressing "hope" that "an open dialogue" would be possible "to ensure that the human and political rights of all Iraqi citizens are respected." J Stromseth, supra note 97, p.98

[154] Cf. The Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities adopted by the UN General Assembly in 1992

conflicts within a human rights framework rather than within the framework of self-determination.

If one applies the current international law principles regarding self-determination to the case of the Kosovar Albanians, the deficiencies and impracticalities of this approach become all too apparent.

Starting point for an objective examination is the assumption that the underlying idea of a right to self-determination is the free and genuine expression of the will and wishes of the people concerned. According to the Yugoslav constitution of 1974 Kosovo had the status of a fully-fledged federal unit, with the Kosovo Assembly having the right of veto *vis-à-vis* the Federal Assembly and the Presidency of the former Yugoslavia. But in 1990 with the suspension of Kosovar autonomy, Serbia promulgated, on the pretext that there was an imminent danger of secession, a series of sectarian acts: closing down the Assembly, abolishing the government of Kosovo and introducing a system of direct rule in the region. This was a clear unconstitutional annexation, attacking Kosovo's autonomy on all fronts and imposing a complete political and military occupation.[155] The only way to find a new basis for inter-community relations was the establishment of democratic institutions in the region. But the crux of the problem was and is precisely the absence of any prospects of establishing democratic institutions under the circumstances of absolute mistrust and unwillingness to live together. In this situation, it can be argued, the denial of the internal right to self-determination (expressed through free and democratic elections of a people) evolved into a legitimate claim for external self-determination as the only means to re-establish a majority decision-making process.

The strategy of the international community to insist on negotiations and to seek a solution exclusively within the framework of safeguards for human and national rights and guarantees of the autonomy of Kosovo within Serbia came too late. International mediation rather appeared like an emergency operation. There were no incentives for negotiations to both sides, the only pressure being the threat of the use of military force by NATO. After all, the most striking fact was the final break-up of the Rambouillet negotiations forfeited by the refusal of the Serbian delegation to sign

[155] S Maliqi, supra note 35, p.149

denial of the right of self-determination'. The Declaration on Friendly Relations[158] and the 1974 Definition of Aggression[159] reflect this state of affairs.[160]

What is the position as far as third parties are concerned? Although it is clear that third states must refrain from doing anything likely to encourage or induce the state to use repressive measures against peoples, it is unclear to what extent third states are entitled to aid liberation movements and exercise force on their behalf. All states have the right to demand that a state depriving a people of the right to self-determination comply with the relevant international rules; after all, the duty to grant self-determination is a duty *erga omnes.* The accused state must fulfil this duty. It cannot claim that the matter falls within its domestic jurisdiction and is not of international relevance. Nevertheless, is a state permitted to do more than enter protest and make diplomatic representations? There seems to be agreement that while states may give military equipment and financial or technical assistance, they are prohibited from sending armed troops.[161]

Even if one characterises the forcible denial of self-determination as a 'crime of state' falling within the scope of Article 19 of the ILC Draft Convention on State Responsibility – as has been argued[162] – the conclusion remains the same: state practice and the spirit of the UN Charter's basic provisions on the use of force do not allow third states to go so far as to send troops to assist peoples invoking their right to self-determination.[163] The rationale for this conclusion is the need to avoid abuses in a community lacking central organs entrusted with the task of establishing the facts and pronouncing on the law and to contain force as far as possible, by preventing possible

[158] Supra note 116

[159] GA Res. 3314 (XXIX), 14 December 1974

[160] Some authors hold the view that liberation movements have a right proper to resort to force against the oppressive Power, i.e. possess a *jus ad bellum.* See e.g. O Schachter, supra note 75, p.119

[161] O Schachter, ibid. A more restrictive view has been taken by Judge Schwebel in his dissenting opinion in the *Nicaragua case* (merits). He stated that 'it is lawful for a foreign state or movement to give people struggling for self-determination moral, political and humanitarian assistance; but it is not lawful for a foreign state or movement to intervene in that struggle with force or to provide arms, supplies or other logistical support in the prosecution of armed rebellion.' Supra note 45, at 351

[162] M Mohr, *The ILC's Distinction Between 'International Crimes' and 'International Delicts' and its Implication,* in: M Spinedi & B Simma (eds), UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY, p.128

[163] M N Shaw, supra note 119, at 797. See also the opposite remarks of E Jimenez de Arechaga, *International Law in the Past Third of a Century,* 159 HR (1978), at 98

escalations of violence as a result of the involvement of third states in conflicts where one or more peoples are pitted against the state.

The same is true if one considers the numerous pronouncements issued by both states and international organisations supporting the view that states may oppose a state that grossly infringes a people's right to exercise self-determination by recourse to actions short of force that are otherwise prohibited by international law. Thus, as far as third states are concerned, the actions permitted in the case of civil wars (lawfulness of military and other aid to the incumbent government, unlawfulness of any assistance to rebels) have been narrowed down and reversed. In the case of wars for self-determination, third states must refrain from helping the state but are authorised to provide assistance (short of sending military troops) to national liberation movements. Therefore the conclusion can be drawn that even if one can establish a right to self-determination of a people, it does not legitimise the forcible intervention by an outside power.

In other words the forcible intervention by NATO cannot be justified on the grounds of assistance to facilitate self-determination for the Kosovo-Albanians, because under current international law NATO lacks the legitimacy to provide military assistance to any people fighting for self-determination.



In practice, this conclusion again undermines the efficiency of the international legal system. The recognition of the right to self-determination in the war-like situation of Kosovo amounts to nothing if there is no enforcement action envisaged. Evidence is provided by the horrific outcome of the war in Croatia and Bosnia-Hercegovina, where the (eventual) recognition triggered a brutal genocide.

If the magnitude of human suffering leads to a new concept of self-determination for the Albanians in Kosovo, it also requires adequate enforcement measures involving the use of force to prevent the further escalation of the conflict.[164] Therefore I suggest that once the existence of the right to self-determination has been established, the international community must be able to take the necessary steps (including the use of military force) for the realisation and implementation of the right.

[164] Because the humanitarian situation is initially the reason to recognise the right to self-determination (if one agrees with the concept to grant the right to self-determination in cases of its

### *3.2. Humanitarian Intervention*

The main justification of NATO to threaten and then take military action against FRY has been the humanitarian crisis. The official grounds adduced by NATO were, that the authorities of FRY had carried out massacres and other gross breaches of human rights as well as mass expulsions of thousands of their citizens belonging to a particular ethnic group, and that this humanitarian catastrophe would most likely destabilise neighbouring countries such as Albania, Bosnia and Herzegovina and the Former Yugoslav Republic of Macedonia. But even a humanitarian disaster within Yugoslavia may not be enough to justify intervention. The issue of whether and when humanitarian intervention is permissible under international law is hotly disputed.[165] The fact that NATO's action were unauthorised by the United Nations Security Council renders a claim of justified humanitarian intervention all the more precarious. To evaluate whether the NATO intervention qualifies as a justifiable humanitarian intervention it is first necessary to define what actions qualify as "humanitarian intervention."[166] Having defined the term, the question remains when, if ever, is humanitarian intervention acceptable under international law.

#### *3.2.1. Defining the Term*



One of the problems in discussing the doctrine of humanitarian intervention is that difficulties abound in the first step of attempting to formulate a precise definition. One commentator even despaired, "there is little use in defining the doctrine of humanitarian intervention" because of the number and breadth of definitions.[167] Others have noted that a usable definition of humanitarian intervention would be extremely difficult to formulate and apply rigorously.[168] Even the UN has neither agreed upon nor promulgated a definition despite several attempts.

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forcible denial), the justification of the use of force to facilitate the right becomes more and more indistinguishable from the doctrine of humanitarian intervention.

[165] Compare M Akehurst, *Humanitarian Intervention,* in: H Bull (ed), INTERVENTION IN WORLD POLITICS, p.95, with D J Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention,* 23 U. Tol. L. Rev. (1992), at 253

[166] See M Akehurst, supra note 165, at 111

[167] M I Bazyler, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethopia,* 23 Stan. J. Int'l L. (1987), at 547

[168] T M Franck & N S Rodley, supra note 144, at 305

In a frequently used definition, humanitarian intervention was believed to be "the theory of intervention on the ground of *humanity* ... that recognises the right of *one state* to exercise an international control by military force over acts of another regard to its internal sovereignty when contrary to the law of humanity."[169] A contemporary Argentinean scholar defines humanitarian intervention as " the proportionate trans-boundary help, including forcible help, provided by governments to individuals in another state who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government."[170]
Thus, to qualify as "humanitarian", the primary objective of the intervention must be either to end or prevent human rights violations, and it must be unilateral, that is, unauthorised.

Some authors support a wider definitional scope referring to interventions for humanitarian purposes by international organisations.[171] But, such organisations actions are significant, from a legal standpoint, only if the humanitarian impulse is the sole authoritative basis for the action in question. The preferred approach is to regard interventions authorised by the Security Council for humanitarian purposes as *casus foedris* which, as such, properly fall for consideration as precedents under Chapter VII of the UN Charter because that is where their legal basis is located.
NATO constitutes an international organisation on the basis of Article 51 of the Charter. The only enforcement action envisaged in this Article is collective self-defence.[172] The Kosovo crisis widened the scope of its activities beyond "Article 5 missions".[173] NATO hereby left the area of relative freedom of action granted by Article 51 of the UN Charter and becomes fully subjected to the legal limits established by the Charter intended to contain or prohibit any other kind of coercion or enforcement by military means that is the doctrine of humanitarian intervention.
For the purpose of this paper the adopted legal definition of humanitarian intervention is that provided by Prof. Wil D. Verwey. Humanitarian intervention is

[169] See e.g. D J Scheffer, supra note 165, at 264
[170] F R Teson, *Humanitarian Intervention: An Inquiry into Law and Morality, p.5*
[171] O Kimmenich, supra note 42, at 430; G Ezejiofor & E Quashigah, *The United Nations and Humanitarian Intervention in the Contemporary World Situation,* 5 ASICL (1993), at 53
[172] "...each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the UN Charter will assist the Party or Parties so attacked..." Art.V of the North Atlantic Treaty (NATO Charter 1949), see <http://www.vm.ee/nato/docu/basictxt/treaty.htm>

"the protection by a state or group of states of fundamental human rights, in particular the right to life, of nationals of, and residing in, the territory of other states, involving the use or threat of force, such protection taking place neither upon the authorisation by the relevant organs of the United Nations nor upon invitation by the legitimate government of the target state."[174]

*3.2.2. The Question of Legality*

Though the protection of human rights, of justice and human dignity dates back to antiquity, real attention to the problem began to be given only on the 17th century. Writers began to consider the validity of intervention by a state in the affairs of another for the protection of those rights.[175] Thus Grotius, while admitting that a state's form of government was its own concern, maintained

"if a tyrant...practices atrocities towards his subjects which no just man can approve, the right of human social connection is not cut off in such a case."[176]

At this time there appeared a practice among states to provide in their respective constitutions and other national instruments for the protection of certain fundamental rights to be guaranteed by the sovereign. But in this context the protections of such rights remained the concern of the sovereign guaranteeing them and not the concern of other states.[177]



Later bilateral and multilateral treaties evolved giving the right to a group of states to interfere in the affairs of another for the collective protection of the rights of minorities.[178] The basic criterion of these treaties remained the protection of the religious or the ethnic minorities. But the protection of these rights in practice remained chiefly the concern of the powerful states. From 1860 to 1861, France intervened with the deployment of 6.000 troops when Turkish rule in Syria led to the massacre of thousands of Maronite Christians. In the 1870's, Russia intervened to

[173] See pp.25
[174] W D Verwey, *Humanitarian Intervention,* in: A Cassese (ed), supra note 157, p.57
[175] Inter alia Thomas von Aquin (*Summa Theologica)* and Hugo Grotius (*De jure belli ac pacis*) cited in: F De Lima, *Intervention in International Law,* p.142
[176] H Grotius, supra note 53, p.145
[177] F de Lima, supra note 175, p.142
[178] e.g. Article 2 of the Treaty of Peace between Sweden, Poland, Austria and Brandenbourg (1660) provided that the Protestant rulers should guarantee the other signatories to treat Catholics on an equal footing with the Protestant majorities, and the first treaty guaranteeing the rights of Christians living within Turkey's provinces was contracted by Turkey with Russia in July 1774. Ibid. p.105

protect Christians in Bulgaria, Turkey, Bosnia and Herzegovina. International jurists accepted this practice as legitimate.[179]

After World War I, however, the protection of such minority rights, acquired under treaty provisions, became the chief concern of the League of Nations. During this period, reliance for the solution of disputes concerning this matter began to be placed on the judicial procedure.[180] Because of the weaknesses and limitations of this system states still resumed the right to intervene to protect minority rights. Nevertheless, it remained a double-edged sword, which is evidenced by Hitler's intervention in Czechoslovakia in 1938 on the ground to protect the German minority.

For this reason the UN Charter tried to centralise the authority for the use of force[181], thus establishing a collective enforcement mechanism to safeguard the most important objectives of international peace and security. The following section discusses the problems linked with the ambiguity of the Charter provisions and the impact of changing realities and perceptions on their interpretation.

3.2.2.1. The 'Restrictionist' Theory

Is 'humanitarian intervention' legal? Certainly, a modest number of prominent scholars have argued that states may lawfully undertake humanitarian interventions.[182] Notwithstanding the opinion of these authorities, however, the majority of scholars and the majority of states now appear to accept the 'restrictionist' theory which posits that such intervention is not permissible.[183]

Three basic premises are underlying this theory. First, the theory maintains that the fundamental objective of the United Nations system is the maintenance of international peace and security. Second, it holds that except in clear cases of state self-defence, the UN has a monopoly on the legitimate recourse to force. Third, it contends that if states were permitted to take recourse to armed coercion for any purpose other than 'individual or collective self-defence', they would merely be provided with a ready pretext for geopolitical intervention.

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[179] N Krylov, *Humanitarian Intervention: Pros and Cons,* 17 LoyoLA.ICLJ (1995), at 366 and D Scheffer, supra note 165, at 254

[180] Five cases were referred to the Permanent Court of International Justice for advisory opinion.H Kelsen, *Principles of International Law,* p.235

[181] Article 2(4) in connection with Chapter VII of the UN Charter

[182] e.g. C Greenwood, *Gibt es ein Recht auf humanitaere Intervention,* Europa-Archiv (1993), at 105; F Teson, supra note 170, p.247

[183] e.g. I Brownlie, *Thoughts on Kind-Hearted Gunmen,* in: R B Lillich (ed), HUMANITARIAN INTERVENTION AND THE UNITED NATIONS, p.146; O Schachter, supra note 75, p.118

Articles 2(4) and 51 play central roles in the restrictionist rendition of the UN Charter *jus ad bellum*. The language of Article 2(4), restrictionist scholars submit, clearly indicates a general prohibition on the use of force. For them, Article 51 represents only a narrow exception to the general prohibition of Article 2(4). By the terms of these two Charter provisions, therefore, humanitarian intervention has been rendered legally impermissible.

Because it does not involve 'individual or collective self-defence' (Art.51) or Security Council enforcement (Chapter VII), humanitarian intervention constitutes a proscribed use of force 'against the territorial integrity and political independence of a state' (Art. 2(4)). While all those authors view humanitarian intervention as illegal *per se*, some concede that in special situations such a use of force might be more or less condonable.[184]

3.2.2.2. 'Counter-Restrictionist' Arguments

Three basic arguments are typically advanced in support of the international legality of humanitarian intervention: 1) permissible use of force below the Article 2(4) threshold; 2) protection of human rights; and 3) the revival of the customary right of humanitarian intervention.[185]

The first argument in support of the legality of humanitarian intervention relies upon a rather narrow or literal reading of the provisions of Article 2(4). As we have seen, Article 2(4) 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.' Several scholars suggest that there may be uses of force that do not infringe upon the long-term territorial integrity and political independence of states, and that are not inconsistent with the UN's purposes.

Of necessity, such uses of force would not involve: a prolonged military presence by the intervening state in the target state; a loss of territory by the target state; a regime change there; or any actions 'inconsistent with the purposes of the United Nations'. Limited uses of force of this kind would fall below the Article 2(4) threshold, and thus would not be prohibited by the UN Charter. Specifically, any short-term military

[184] See for further references W D Verwey, supra note 174, p.417

[185] A representation and comparison of the arguments can be found in S G Simon, *The Contemporary Legality of Unilateral Humanitarian Intervention,* 24 Cal.WILJ (1993), at 124

intervention undertaken exclusively for the purpose of protecting human rights would be legally permissible.

According to Teson a genuine humanitarian intervention does not result in territorial conquest of political subjugation. So contend Professors Reisman and McDougal:

> Since a humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the State involved and is not only not inconsistent with the purposes of the United Nations but is rather in conformity with the most fundamental peremptory norms of the Charter, it is a distortion to argue that it is precluded by Article 2(4).[186]

As noted above, most international legal scholars agree that the United Nations system has one principal purpose: the maintenance of international peace and security. A few jurists – most notably Professors McDougal, Reisman and Teson – reject this restrictionist premise. They contend that the UN has two major purposes, both equally significant: first the maintenance of international peace and security and second the protection of human rights. Submits Teson, for example: "the promotion of human rights is as important a purpose in the Charter as is the control of international conflict."[187]

To bolster this position, proponents of the 'human rights' argument typically cite the developing corpus of international human rights law as well as the UN Charter's preamble.



According to Reisman and McDougal human rights deprivations might well represent a 'threat to the peace', thereby prompting the Security Council's Chapter VII jurisdiction. If the Security Council failed to act under such circumstances, the cumulative effect of the human rights provisions would be to establish the legality of unilateral self-help.[188] Individual states could therefore undertake humanitarian interventions, for there exists a co-ordinate responsibility for the active protection of human rights: members may act jointly with the Organisation ...or singly or collectively.

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[186] M Reisman & M S McDougal, *Humanitarian Intervention to Protect the Ibos*, in: R B Lillich (ed), supra note 183, p.167

[187] F Teson, supra note 170, p.

[188] M Reisman & M S McDougal, supra note 186, p.170

Closely related to the 'human rights' argument is the argument that the customary right of 'humanitarian intervention' has revived in the period after 1945. Under pre-Charter customary international law, counter-restrictionists often contend, states were permitted to engage in humanitarian interventions.[189] This customary law right was legitimately exercised to protect human rights. It was not invoked as a bogus rationale to support *Realpolitik* actions, as restrictionists typically assert.[190] State uses of force before the Second World War may have exported European economic and political perspectives elsewhere; nevertheless, they argue, this fact does not necessarily impeach the viability of the rules that were established, especially since these rules operated in the interests of the smaller countries as well.

The UN founders, counter-restrictionists maintain, assumed that self-help would no longer be necessary since an authoritative international organisation could now provide the police facilities for enforcement of international rights. Unfortunately for the international system the UN enforcement mechanisms have been consistently confounded by discord among the Security Council's permanent membership. Article 2(4)'s prohibition of the threat or use of force, they assert, must consequently be conditioned on the UN's capacity to respond effectively. When the United Nations fails to do so customary law revives and states may invoke the right of humanitarian intervention.



The debate about whether there actually was a pre-UN Charter customary right of forcible humanitarian intervention was extensive, counter-restrictionists relying on judgements such as that of Sir Hersch Lauterpacht that a 'considerable body of opinion and practice' supported such a customary right.[191] The evidence cited by Fonteyne[192] for a pre-customary right was influential, but has been recently challenged. One the whole as often happens in such arguing, those who thought that there should be such a customary right also thought that there was, whereas those who thought that there should not be maintained that there was not.

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[189] D Scheffer, supra note 165, at 258

[190] Presenting a review of the opinions pro and con with respect to this question during the pre-UN era J-P Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention,* 4 Cal.WILR (1974), at 205-236

[191] H Lauterpacht, International Law (1955,1906), p.312

[192] J P Fonteyne, supra note 190

*3.2.3. Legal Assessment*

What is the legal status of humanitarian intervention? Absent UN Security Council authorisation is the use of armed force by a state (or states) to protect citizens of the target state from large scale human rights violations there permissible under the contemporary *jus ad bellum?* To answer this question, it is useful to recall the relevant state practice in order to examine whether this doctrine could win the support of the international community. Evidence of state practice and related *opinio juris* on a sufficient scale is necessary to support a humanitarian exception to the general prohibition against non-defensive use of force.[193] Article 2(4) did not 'freeze' international law for all times subsequent to 1945. Rather the rule of Article 2(4) underwent change and modification almost from the beginning. The plausible assertion is therefore that subsequent customary practice has profoundly altered the meaning and content of Article 2(4).[194]

Since the entry into force of the United Nations Charter, states have taken a number of military actions which they have either justified on general 'humanitarian grounds' or explicitly characterised as 'humanitarian interventions'. States have likewise taken actions which they have not dubbed 'humanitarian intervention' themselves, but which other states or scholary observers have done so. This section will consider a number of forcible interventions which might be considered potential humanitarian interventions.



3.2.3.1. The Pre-1990 Period

Although there are a number of discrepancies in the specification,[195] one can extract three instances in the pre-1990 era where interventions did take place, belatedly, where the most severe cases of mass violation of human rights occurred. The three cases are the 1971 Indian intervention in East Pakistan, Vietnam's invasion of

[193] O Schachter, supra note 75, p.124

[194] G Ezejiofor & E Quashigah, supra note 171, at 53

[195] It is immediately apparent that there are problems in specifying what instances should be cited as examples of forcible humanitarian intervention in the first place. A comparison of some of the most acute analyses from the Cold War period shows how definitional difficulties are encountered at the outset – the number of instances is found to vary from four (F R Teson, supra note 170) to nine (W Verwey, supra note 174, pp.60)

Kampuchea in 1978 and finally the 1979 Tanzanian intervention in Uganda.[196] The common denominator of these cases is that all three invaders had solid ground on which to rest a claim of legitimate humanitarian intervention. Yet they ignored the doctrine, choosing instead to claim self-defence from an armed attack, a claim not one of them could persuasively sustain.[197] Their choice therefore hardly suggests confidence in the exculpatory power of a humanitarian motive which renders a customary law rule all the more questionable.[198]

3.2.3.2. The Post-Cold War Era

Let us now turn to the period 1991-1999 to see how much of the Cold War debate about forcible intervention has survived the end of the Cold War. A great number of publicists now maintain that the revitalisation of Security Council functions has triggered a major change in international law and policy.[199] But it is dangerous to reach hasty conclusions about world politics soon after the collapse of an old order. It normally takes several years for the nature of new geopolitical configurations to emerge clearly, and there is no reason why the situation should be any different in the post-Cold War world.

The fact that there were no UN Security Council vetoes between June 1990 and May 1993 (when Russia vetoed a resolution about financing the peacekeeping operation in Cyprus) does not mean that new hard-line governments in Russia or China may not revert to confrontation and once again emasculate the machinery for collective action. Nor may the United States government be prepared to continue to underwrite UN operations. Conflict patterns may shift again. Nevertheless, the literature on forcible humanitarian intervention is already extensive, and comparison with (a) the Cold War literature on forcible humanitarian intervention and (b) the post Cold War literature on non-forcible intervention shows that a fundamental transformation has already taken place.

In fact since 1990 the United Nations are increasingly intervening in internal conflicts where human rights are in serious jeopardy. Examples are the action by UN forces in

[196] In this regard, see G Klintworth, *Vietnam's Invasion in Cambodia in International Law,* S K Chatterjee, *Some Legal Problems of Support Role in International Law: Tanzania and Uganda,* 30 ICLQ (1981), at 755

[197] O Ramsbotham & T Woodhouse, supra note 46, p.51

[198] T Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention*, in: L F Damrosch (ed), supra note 38, p.193

Somalia to try both to prevent widespread violations of international humanitarian law resulting from a sanguinary civil war and to create conditions conducive to the undertaking of relief operations, as well as to the bringing about of national reconciliation (1992), in Bosnia and Herzegovina to protect civilian population (1992-1995) and in Rwanda to stop the genocide of Tutsis (1994).[200]

But still there are numerous examples as well, in which massive human rights violations took place without any UN intervention. In fact the credibility and effectiveness of the United Nations as a global institution with universal appeal lies in the balance when it decides that Libya is a threat to the peace for failing to surrender suspected terrorists for trial but not Afghanistan,[201] and when it chooses to authorise the use of force against unconstitutional governments in Haiti but not in Nigeria or Sierra Leone.[202] The problem is compounded because the United Nations Charter does not envisage the possibility of judicial scrutiny of Security Council action[203] and of course, by the very nature of the political beast that is the Security Council.[204] Employees of UN organisations designed to eliminate human rights abuses realise their organisations' shortcomings. At the thirty-seventh session of the Commission on Human Rights, Theo van Boven pled for help, "our methods for tackling violations of human rights are still in their infancy and are often inadequate to deal with the problems faced."[205]



Therefore it still seems logical to argue that if the international community fails to act when it should, non-authorised intervention must be available as a last resort to relieve individuals from unnecessary suffering.

There are two examples of intervention by a regional organisation after 1990 who seem to fit into the narrow concept of 'humanitarian intervention', i.e. intervention without prior Security Council authorisation. These admittedly contentious examples

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[199] Asserting that the system of collective security has shown renewed potential in a variety of regional disputes around the globe. W Kapinga, supra note 84, at 17

[200] See L F Damrosch, *Introduction,* in L F Damrosch (ed), supra note 38, pp.5

[201] See U.N. Doc. S/Res/748 (1992) concerning the imposition of sanctions against Libya, <gopher://gopher.undp.org:70/00/undocs/scd/scouncil/s92/748>

[202] See U.N.Doc. S/Res/940 (1994), <gopher://gopher.undp.org:70/00/undocs/scd/scouncil/s94/940>

[203] J E Alvarez, *Judging the Security Council,* 90 AJIL (1996), at 1

[204] S G Simon, supra note 185, at 140

[205] Ibid. at 141, quoting UN Press Release, HR 1992

are the ECOWAS intervention in Liberia in 1992 and the intervention undertaken by the same regional actor in Sierra Leone in 1998.[206]

Although Africa is often viewed as a continent that is the recipient of, rather than a contributor to, the development of international law, its recent contribution to the development of international legal norms governing regional enforcement action is significant. In order to determine if these cases can be seen as precedent for a modern doctrine of humanitarian intervention[207] or at least as expression of a growing tendency, it is useful to recall the history of the conflicts.

3.2.3.3. The ECOWAS Intervention in Liberia (1992)

On Christmas Eve in 1989, a small band of rebels entered Northeastern Liberia from Cote d'Ivoire. The rebels, followers of exiled Liberian official Charles Taylor, hoped to overthrow the government of President Samuel Doe. President Doe sent troops to meet the rebel forces. The ensuing civil war, which was marked by unimaginable brutality, tribalism and senseless killing, led with astonishing swiftness to the collapse of the Doe government. By July 1990, all semblance of civil authority within Liberia had ceased to exist. Rebel forces (which by then had fractured into opposing factions) held all of Liberia except for the capital city Monrovia. Fighting street by street, they struggled with the remnants of Doe's army and with each other for control of the city. The already extraordinary human toll of the conflict escalated rapidly. All sides regularly tortured and murdered non-combatants; thousands of civilians faced starvation; and tens of thousands were forced into exile, joining some 500.000 of their fellow citizens already seeking refuge in neighbouring countries.[208]

In response to the social and political upheaval caused by Taylor's action, the rivalry that developed between him and the Independent National Patriotic Front of Liberia (INPFL), a breakaway faction led by one of his former lieutenants, Prince Johnson,

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[206] In the Iraqi case the allied forces relied upon Security Council Resolution 688 to create safe havens for the Kurds and to authorise military force. No such ambiguous authorisation existed in the case of the ECOWAS intervention in Liberia and Sierra Leone.

[207] This view is expressed by G Ezeijofor and E Quashigah, claiming that the ECOWAS interventionin Liberia established a precedent which will influence the future use of humanitarian intervention in the West African region at least. In Africa the general consensus seems to be moving towards the explicit legalisation of collective humanitarian intervention. Supra note 171, at 60.

[208] D Wippman, *Enforcing the Peace: ECOWAS and the Liberian Civil War,* in: L F Damrosch (ed), supra note 38, pp.163

Doe's persistent refusal to surrender his tenuous hold on power and the general breakdown of law and order in Liberia, the Economic Community of West African States (ECOWAS) decided to intervene in the conflict.

Initially, the Community adopted a diplomatic approach. The ECOWAS Standing Mediation Committee met in Freetown, Sierra Leone with representatives from Taylor's army to try to reach a peaceful settlement. The proposals outlined were unacceptable to Taylor[209] and the result was that a cease-fire monitoring group (ECOMOG) was set up. ECOMOG had a clear mandate. It was to monitor the cease-fire, and create a framework for the election of a civilian administration to replace the discredited and later assassinated President Doe. It is remarkable that the West African leaders were talking in terms of monitoring a cease-fire which had not yet been agreed or arranged. In retrospect, it is evident that the seeds of immediate direct involvement in the civil war were planned at the very beginning of the operation.[210] Soon after the ECOWAS troops intervened they came under attack by the forces of Charles Taylor. Fighting and negotiations alternated over the next two years and called into question the neutrality of ECOWAS and its ability to fashion a peaceful settlement.



In large part, ECOWAS[211] assumed that role by default. At the height of the civil war, the United States refused requests for military intervention, insisting that an "African problem" required an "African solution". Moreover, Washington viewed all three warring factions as undesirable and did not wish to incur blame for assisting any of them into power.[212] The Security Council similarly declined even to discuss the Liberian conflict until well after ECOWAS decided to intervene. Efforts to place the Liberian crisis in the Security Council's agenda proved fruitless, in part because of opposition by Cote d'Ivoire, which was sympathetic to Taylor and in part because the

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[209] The essence of the ECOWAS proposals was as follows: There was to be an immediate cease-fire followed by the deployment of an ECOWAS peacekeeping force and the immediate formation of an interim administration. K O Kufuor, *The Legality of the Intervention in the Liberian Civil War by ECOWAS,* 5 Afr.J.Int'l & Comp.L. (1993), at 527

[210] E Kannyo, *Civil Strife and Humanitarian Intervention in Africa,* 4 African Yearbook Int'l L.(1996), at 60

[211] As its name suggests, the Community is a sub-regional organisation designed primarily to promote West African economic integration. In recent years, however, many West African leaders have concluded that economic integration cannot be divorced from larger political and security concerns. Acting on this theory, the ECOWAS heads of state adopted at their 1981 summit a defence pact providing mutual assistance in case of any external aggression and any 'internal armed conflict'. Ibid. at 535

Council's members shared the U.S. view that the problem should be solved by Africans. In particular, the two African members of the Council, Ethiopia and Zaire, 'were not prepared to have Security Council deal with Liberia'.[213]
For many, this reaction confirmed the pessimistic view that the 'new world order' spells only neglect for African states, or at least for those not fortunate enough to possess any vital natural resources.

Only in late 1992 as relations between ECOMOG and the rebels deteriorated, calls for UN intervention became more frequent and pronounced. Former President Jimmy Carter, who had periodically sought a role as mediator in Liberia, publicly questioned the capacity of ECOWAS to continue to serve as a neutral broker and urged the dispatch of a UN observer group. Even several ECOWAS states, led by the Cote d'Ivoire, began to describe ECOWAS as "stymied" in its peacekeeping efforts, and to call for 'logistical support' for ECOWAS in the form of UN observers, who would be considered neutral.
In October 1992 ECOWAS requested a meeting of the Security Council to consider imposition of a blockade against all of the warring parties that refused to respect the peace accords negotiated earlier, as a means of making the sanctions it adopted binding on the international community as a whole. The Council met on November 19, and for the first time, it concluded a substantive on-the-record discussion of the situation in Liberia. The discussion is notable mostly for its effusive praise of the ECOWAS initiatives in Liberia, and for the vague promises of continued Security Council support. At the conclusion of the discussion, the Council unanimously adopted Resolution 788, which constituted a clear endorsement of ECOWAS initiatives in Liberia.[214] The resolution and debate also reflect the Council's strong sense of relief that ECOWAS was willing to continue pursuing settlement of a protracted conflict that would otherwise fall to an over-stretched UN to resolve.

From the outset, the international community's response to the ECOWAS intervention has been, for the most part, one of guarded approval. Well before passage of Resolution 788, the Security Council, the Organisation of African Unity (OAU),

[212] J Butty, *A Year of Terror,* West Africa, (January 7-13, 1991), at 3151
[213] D Wippman, supra note 208, p.165
[214] See S/Res/788 at <gopher://gopher.undp.org:70/00/undocs/scd/scouncil/s92/63>

the European Community, and a host of individual countries periodically encouraged ECOWAS in its efforts to find a solution to Liberia's course of self-destruction. But apart from Burkina Faso's early denunciation of ECOMOG as in illegal intervention in a sovereign country's internal affairs, most states have said little or nothing about the means ECOWAS chose to establish peace. In short, the international community has responded to the initial ECOWAS intervention in much the same way that it responded to Tanzania's intervention in Uganda in 1979: it has validated the result without formally validating the means.

The primary reason ECOWAS advanced for its initial deployment of troops Liberia, and the most compelling one, was to end the carnage. The Standing Mediation Committee cited the 'massacre of innocent civilians' as a basis for its decisions to create ECOMOG. Similarly, ECOWAS chairman Jawara rejected the charge that the monitoring group was an 'invasion force' on the ground that its mission was primarily humanitarian.[215] Moreover, when Nigeria's foreign minister first wrote to advise the Security Council of ECOMOG's deployment, he, too, described the Community's motivation primarily in humanitarian terms.[216] Therefore, from the ECOWAS perspective, it was a humanitarian intervention.

By all accounts, the loss of life in Liberia had reached near genocidal proportions; mass starvation and widespread disease were imminent. The continued fighting posed a clear danger to the peace and security of the region, both through the creation of an enormous refugee population in countries ill-equipped to handle such an influx and through the potential (soon realised) for a direct spill-over of fighting from Liberia into neighbouring states. ECOWAS made all reasonable efforts to obtain the warring parties' consent to a cease-fire and to a Community interposition force. The decision to intervene was a multilateral one, undertaken by a sub-regional organisation with a direct interest in the preservation of peace in the region. Moreover, although the decision did not initially command the full support of all ECOWAS members, unanimous support for ECOMOG was eventually forthcoming.[217] Further the

[215] K Whiteman, *Towards Peace in Liberia,* West Africa Magazine (November 26-December 2, 1990), at 2895

[216] Cited in K O Kufuor, supra note 209, at 528

[217] In a final communique from the Abuja summit meeting, the Heads of State and Government of ECOWAS reaffirmed the Yamoussoukro IV Accord. This meeting of the Committee of Nine was attended by the Presidents of Burkina Faso and Cote d'Ivoire thus indicating their support for the ECOWAS peace effort. K Whiteman, supra note 215, at 2895

intervention was proportional to the humanitarian crisis that precipitated it; a minimum of force was used to end the fighting and to create a modicum of order and security in which relief supplies could be delivered to the Liberian population. A large majority of Liberians enthusiastically welcomed the intervention. In addition, ECOWAS took great care to minimise the impact of the intervention of the intervention on Liberian sovereignty interests. Finally, long after the initial intervention, ECOWAS has continued to shoulder the financial, political and military burden of efforts to preserve the peace and has continued to seek a negotiated political solution to the conflict.[218]

In light of the above, it is not surprising that the international community has acquiesced in the initial decision to impose peace. As noted earlier, the Security Council, the OAU and the European Community have applauded ECOWAS for bringing a measure of peace and humanitarian relief to a shattered country, but in terms that have glossed over the initial use of force. The Security Council's statements, for example, all follow the imposition of peace, and focus on the need for all parties to co-operate with ECOWAS in its plan for a peaceful resolution of the conflict; the statements largely ignore the use of force. In fact, even the ECOWAS heads of state, when they first endorsed the Standing Mediation Committee's peace plan, referred only obliquely to the initial use of force, and concentrated instead on the parties' subsequent agreement to the Committee's plan.[219] Thus for the most part, the international community and ECOWAS itself, implicitly approved of the Committee's decision to use force, without overtly endorsing the principle of humanitarian intervention.

According to David Wippman, the role of ECOWAS in Liberia and the response of the international community suggest the following 'lessons'.
First, regional organisations at times will have both the capacity and the incentive in local conflicts that do not engage the interest of attention of the great powers sufficiently to result in an effective response by the UN.

[218] For the details of these efforts at peace-making, see A Adeleke, *The Politics and Diplomacy of Peacekeeping in West Africa: The ECOWAS Operation in Liberia*, 33 J.Modern Afr.Stud.(1995), at 190
[219] P da Costa, *The Cost of Peace*, West Africa Magazine, (September 3-9, 1990), at 2390

Second, the international community now appears willing not only to tolerate but to support a considerable degree of intervention in internal conflicts when necessary to restore order and save lives.

Third, many African countries are willing to reconsider, at least to some extent, their traditional hostility to intervention in any form and to recognise internal human rights violations as a threat to international peace and security warranting the attention of outside states.

Forth, the ECOWAS intervention illustrates one obvious point: it is easier to get in than to get out.[220]

3.2.3.4. The ECOWAS Intervention in Sierra Leone (1998)

The conflict in Sierra Leone dates from March 1991 when fighters of the Revolutionary United Front (RUF) launched a war from the east of the country near the border with Liberia to overthrow the government. After five years of civil war, parliamentary and presidential elections were held in February 1996 and the army relinquished power to the winner Dr. Ahmed Tejan Kabbah. The Abidjan Accord, signed on November 30, 1996, declared an immediate end to the armed conflict and provided for the demobilisation of RUF forces. In January 1997, United Nations Secretary General Kofi Annan proposed a peacekeeping operation in Sierra Leone to "aid in the implementation of the Abidjan Accords."[221] The Secretary General's report, however, was never adopted. Reports indicate that Security Council members felt the operation would not gain the support of the United States.[222] Specifically, Security Council members felt the Clinton administration would be loath to engage in a new peacekeeping operation in Africa while in the midst of "delicate negotiations with Congress on the payment of $1 billion in arrears."[223]

Without supervisory presence to ensure enforcement, the Abidjan Accord began to unravel when RUF rebels failed to disarm and demobilise according to schedule.

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[220] Since 1991, numerous efforts involving mediation by ECOWAS, the UN and leaders of West African states resulting in temporary truces and agreements have all failed to end the civil war. Only in 1997, after seven years of a protracted civil war, Liberia made a transition to an elected constitutional civilian government. In furtherance of the terms of a peace agreement (Abuja Accord of August 1995 and its supplement of 1996) general presidential and legislative elections were held on 19 July 1997. For more detailed informations see <http://www.amnesty.org/ailib/aipub/1997/afr/13400597.htm>

[221] Report of the Secretary General on Sierra Leone, UN Doc.S/1997/80 (1997)

[222] M Tran & C McElroy, *UN Failure in Sierra Leone Feeds Recriminations,* Guardian, May 29, 1997, at 15

[223] Ibid.

Tensions exploded on May 25, 1997, when soldiers seized power, overthrowing the fourteen-month old civilian government of President Kabbah.[224]

The Organisation of African Unity (OAU) swiftly condemned the *Coup d'Etat* in Sierra Leone and called for the restoration of democracy.[225] The United Nations Security Council, however, did not act as rapidly. Five months after the coup, the Security Council passed Resolution 1132, requesting the military junta to "relinquish power" and allow the "restoration of the democratically elected government."[226] Although the Security Council found that the situation in Sierra Leone constituted a threat to international peace and security in the region, it stopped short of authorising military intervention. Instead, it authorised the imposition of sanctions against the regime, prohibiting the sale of arms and military equipment to the RUF junta.[227] While the Security Council debated appropriate responses to the coup, West Africans attempted to negotiate an end to the RUF's illegitimate regime. But the rebels resisted again the agreed disarmament and fighting continued in the countryside.[228] On February 13, 1998, Nigerian troops, under the auspices of ECOMOG, captured Freetown and ousted Koromah's government after a nine-day full military offensive. Sierra Leoneans welcomed ECOMOG's intervention and reacted with joy to the overthrow of Koromah's regime.[229]



The international community accepted the ECOWAS action in Sierra Leone, apparently willing to turn a blind eye to the question of legality of the intervention. The OAU welcomed the events almost immediately.[230] The United Nations Security Council issued a statement welcoming "the fact that the military junta has been brought to an end" and commended "the important role" that ECOWAS was played in the "peaceful resolution" of the crisis.[231]

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[224] J Rupert, *Civilian Rule Overturned in Sierra Leone,* Washington Post, May 26, 1997, at A21
[225] H French, *Nigeria, Set back by Sierra Leone Rebels,* New York Times, June 4, 1997, at A 7
[226] See S/Res/1132 (1997) at <http://www.un.org/Depts/dpko/unamsil/doc/rs971008.htm>
[227] Ibid. para.6
[228] Third Report of the Secretary General on the situation in Sierra Leone, <http://www.un.org/Depts/dpko/unamsil/doc/r980205.htm>
[229] J Rupert, supra note 224, at A21
[230] *Sierra Leone, Putting a Country Together,* The Economist, February 21st, 1998
[231] See Statement of the President of the Security Council, February 26, 1998, <http://www.un.org/Depts.../st980226.htm>

ECOWAS itself presented a number of reasons to justify the intervention.[232] Inter alia ECOWAS claimed to respond to outright violations of human rights by the military junta against the Sierra Leonean populace and the large-scale flow of refugees to neighbouring countries.[233] But the manifest objective was to restore the government of exiled President Kabbah. Nigeria immediately made this position clear by announcing that it would not withdraw from Sierra Leone until Kabbah's restoration to power.[234]

Although the classic definition of 'humanitarian intervention' applies only to situations where fundamental human rights are at stake or in situations requiring emergency provisions, an intervention to restore democracy is included in the broader concept of intervention to safeguard human rights. The disruption of a democratic process can be seen as a violation of the people's right to self-determination. Additionally it must be considered that most interventions addressing gross violations of human rights generally aim at establishing an interim government as a first step to restore democracy.[235]

Even if the ECOWAS intervention in Sierra Leone does not qualify as a humanitarian intervention[236], it is nonetheless not without precedential value for advocates of humanitarian intervention. It again reflects a nascent willingness on the part of many African states, long among the most vociferous defenders of absolute state sovereignty, to recognise that massive human rights abuses can transform an internal, domestic problem into a problem for the larger community. Perhaps even more important was the fear among many ECOWAS states that the violent overthrow of a government in a neighbouring state might prove contagious.

After all, the case of Sierra Leone well exemplifies the strength and advantages of regional organisations and their capability to handle regional conflicts when there is reluctance and unwillingness on the part of international and Western powers.

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[232] The most prominent justifications include: the right to self-defence, the appeal by President Kabbah seeking ECOWAS assistance and the atrocities committed by junta troops against Sierra Leone citizens. For references see K Nowrot & E Schabacker, *The Use of Force To Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone,* 14 AUILR (1998), at 349

[233] President Kabbah's accusations that the junta was executing a 'genocide plan' in Sierra Leone, or at least planned to in case of a foreign intervention, were not substantiated by any objective proof. Ibid., at 351

[234] Ibid., at 376

[235] C Borgen, *The Theory and Practice of Regional Organisation Intervention in Civil Wars,* 26 New York Uni.JIL (1993-94), at 817

[236] This view is expressed by K Nowrot & E Schabacker, supra note 232, at 376

*3.2.4. Liberia, Sierra Leone and Kosovo – Setting a Precedent?*

If we compare the circumstances surrounding the initiation of armed attack by NATO countries on the FRY it is undeniable that there are certain similarities.

First it seems indisputable that before the attack, as Secretary General Solana put it "the danger of a humanitarian catastrophe" in Kosovo loomed large or as he wrote after the initiation of the attack, "a brutal campaign of forced deportation, torture and murder" had been going on in the heart of Europe" leading to a humanitarian tragedy.[237]

Second for many years, the FRY has defied resolutions and decisions of the Security Council, thus blatantly demonstrating its unwillingness to comply with the international rule of law.

Third, in three successive resolutions (1160 of 31 March 1998, 1199 of 23 September 1998, and 1203 of 24 October 1998)[238] the Security Council unanimously decided that it was acting under Chapter VII of the UN Charter, and in the second and third of these resolutions explicitly defined the situation in Kosovo as a 'threat to peace and security in the region.'

Fourth, it cannot be denied that peaceful means of settling disputes commensurate to the unfolding crisis had been tried and exhausted by the various countries concerned, through the negotiations promoted by the states comprising the Contact Group for the Former Yugoslavia.

Fifth, armed action has not been unilaterally decided by a hegemonic power, but has been freely agreed upon by a group of countries, namely the 19 member states of NATO.

Sixth, no strong opposition has emerged in the majority of member states of the UN. It is a fact that the draft resolution sponsored in the Security Council by three members aimed at condemning NATO's use of force was rejected by a vote of 12 to three (China, Namibia and the Russian Federation).[239]

If one takes into account the premise of the forcible action and the particular conditions surrounding it, Professor Cassese's argument gains more weight that an

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[237] International Herald Tribune, 17-18 April 1999, at 6

[238] <http://www.un.org/depts/dhl/da/kosovo/koso_sc1.htm>

[239] See supra note 86

evolving customary rule of international law would allow – as a further exception to the prohibition of the use of force – use of force by a group of states in the absence of prior authorisation by the Security Council.[240] As Cassese in his innovative, forward looking spirit rightly puts it, such a rule is only evolving, i.e. "resort to armed force may gradually become justified". Thus as international law stands today, the NATO attacks cannot be justified in the absence of an explicit Chapter VII resolution of the Security Council. NATO bombings are illegal under current international law.
But in the face of recent state practice, in particular the Kosovo case, the possibility of the evolution of a rule legalising 'humanitarian intervention' has to be considered and analysed seriously.

*3.2.5. Policy Considerations*

Practice, accompanied by requisite legal statements or stated convictions, confirms existing laws or edges us towards new normative frontiers, or at least that is the implication.
Within the literature, the case made for or against the acceptance of humanitarian law is not however predicated solely on the patterns of vicissitudes of state practice.[241] For instance, the line of attack arguing against any formal endorsement of humanitarian intervention as a matter of principle also comprises a series of policy objections. The implication here is that even where states sympathise with humanitarian intervention in practice, the principle of non-intervention should be prioritised in deference to the principles and purposes which this law is designed to serve: the preservation of the sovereignty of states and the peace and order which exists between states. The argument is made that established laws of such standing should not be usurped by new considerations, notwithstanding the strength or appeal of these counter-claims and concerns, because the policy reasons for such laws continue to hold strong and should be applied in the long-term interest.[242]
Therefore the next section investigates these policy driven objections to humanitarian intervention: each of these objections have themselves become deserving targets for criticism. Such objections also need to be set against policy considerations which

[240] A Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EJIL (1999), at 30
[241] D Kritsiotis, supra note 76, at 1014

Such safeguards against abuse are essential because "whether a claim invoking any given norm is made in good faith or abusively will always require contextual analysis by appropriate decision-makers - by the Security Council or by the International Court of Justice."[248]

Moreover the multilateral application of armed force for humanitarian protection in Liberia in 1990 and then again in Kosovo in 1999 demonstrates that the danger of abuse may not be as pervasive as once envisaged. The lesson of these interventions suggests that where the actions of a regional association or an *ex tempore* coalition of states can be reduced to the common denominator of humanitarian need, the dynamic of such operations countenances against abusive use of force.[249]

3.2.5.2. Selective Application

The idea of comparable treatment in comparable cases is in essence the reasoning and argument behind the second objection to humanitarian intervention which argues that, if accepted in law, the right of humanitarian intervention would introduce endless opportunities for the selective use of force in cases of humanitarian need and this in turn would endanger the crucial kinship between international law and the rule of law. "Humanitarian intervention would be highly selective and nearly always dictated by political and strategic interest."[250]



In response it could be argued that this argument misconceives the theoretical composition of a 'right, because inherent in the very concept of a right is an element of selectivity in the exercise of that right.[251] And proposing Security Council

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unable to take any coercive action to stop the massacres because of disagreement among the members; (iv) any other means short of force have been exhausted; (v) a group of states (not a single hegemonic power) decides to try to halt the atrocities with the support or at least the non-opposition of the majority of member states of the UN; (vi) armed force is exclusively used for the limited purpose of stopping the atrocities. A Cassese, supra note 240, at 29

[248] R Higgins, *Problems and Process: International Law and How We Use It,* at 18

[249] D Kritsiotis, supra note 76, at 1025

[250] I Brownlie, *Non-Use of Force in Contemporary International Law,* in: W E Butler (ed), THE NON-USE OF FORCE UNDER INTERNATIONAL LAW, p.25

[251] In operations which arguably typify humanitarian intervention in recent times, the legal conviction of participating states has been expressed in terms of an entitlement and not in terms of a duty. No statement was made by the intervening states in Liberia in 1990 to the effect that the humanitarian intervention occurred pursuant to some pressing legal obligations. G Nolte, *Restoring Peace by Regional Action: International Legal Aspects of the Liberian Conflict,* 53 ZaoeR (1993), at 603

authorisation as the preferable route for forcible humanitarian action[252] comes with similar problems and difficulties. Questions of double standards which face the UN in the execution of its legal and institutional responsibilities are more serious than those levelled against states acting on the basis of some legal right or entitlement.

Additionally the Security Council itself adopted an ad hoc approach to the numerous humanitarian crises it faced during the last ten years, which is per se highly selective.[253]

These difficulties extend to important practical limitations on how the Security Council may respond in a given crisis or conflict situation.

3.2.5.3. Failure of the UN System

In fact these problems provide another argument for those in favour of interventions. Realists argue even if society accepts the position that the UN system was designed to prohibit the unilateral use of force for humanitarian intervention, states retain this right because of the frequent failure of the UN system to act collectively when human rights are being violated.[254]

A number of conceptual, geopolitical and structural constraints hamper the active involvement of the United Nations in many cases of humanitarian crisis. First the debate on the interpretation of Article 2(7) of the UN Charter amongst member states remains inconclusive and is likely to remain so.[255] Second there is the problem of multiple moral standards, which complicates the assessment of objective reality. This problem is compounded by the process of decision-making. Collective decision-making is more often correct, but is also more difficult than individual decision-making. Members of the General Assembly or the Security Council perceive their



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[252] The arrangement in Chapter VII, it has been asserted, would formalise the legal justification for humanitarian intervention by subsuming it within the enforcement powers of the Security Council which would minimise the opportunities for the selective, ad hoc application of force. S D Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*, p.381

[253] In the debate about Security Council Resolution 687 of 3 April 1991 consisting of measures of disarmament of the Iraqi forces and its verification the representative of the United States emphasised that: "The circumstances that are before us are unique in the history of the United Nations, and this resolution is tailored exclusively to these circumstances." Cited in M Bedjaoui, *The New World Order and the Security Council, Testing the Legality of its Acts, p.42*

[254] S G Simon, supra note 185, at 140

[255] For instance during the debate preceding the passage of Resolution 688 (concerning Iraq's treatment of the Kurdish population in the wake of the Persian Gulf War 1991), many states embraced sovereignty and domestic jurisdiction by repeatedly citing Article 2(7). See U.N. Doc. S/PV.3145 (1992)

respective self-interest differently on different occasions. Therefore, the development of rational criteria for humanitarian intervention is no easy task. The veto power of the five permanent members of the Security Council hangs as a Sword of Damocles over the head of collective decision-making. Even if there were no veto, many countries would probably be averse to involvement in costly humanitarian missions. Perhaps this perspective is not surprising because it is unlikely that the vast majority of states would agree to endanger their own citizens solely to rescue the nationals of a foreign state.[256] The geopolitically oriented interventions represented the outgrowth of assessment of strategic interest by government leaders who then mobilise public support for an interventionary policy. In contradistinction, humanitarian interventions result from societal pressures, recently enhanced by a more globalised media, that finally compel a reluctant political leadership to act against its sense of national interest, but to limit its commitments to the extent possible politically. This mechanism explains the difficulties to induce action in support of such humanitarian claims at the United Nations forum.

Additionally, the limited resources of the United Nations do not allow it to fulfil its humanitarian responsibility. For instance, the UN Secretary-General once said that the United Nations was not in a position to finance the humanitarian intervention in Haiti. He therefore urged the United States to lead and finance the multilateral forces to restore the democratically elected government in Haiti.

As for the effectiveness of humanitarian intervention, the success of any military operation depends, inter alia, on command control and communication. In the case of a UN operation, the co-operation of member states is also important. Unfortunately, each of these aspects has been weak in cases of humanitarian intervention by the United Nations.

[256] In the U.S after its experience of encountering violent resistance in Somalia, followed by a firestorm of criticism, there has existed a Mogadishu syndrome suggesting that humanitarian intervention that take the form of ground forces risk serious military confrontation. In reaction, the U.S. has scaled back drastically its willingness to act, directly or indirectly, to restore peace and normalcy to societies. R Falk, *The Complexities of Humanitarian Intervention,* 17 Mich.J.Int'l L. (1996), at 505

### *3.3. Prospects for the Near Future*

All these policy objections as they have been advanced over the years are neither conclusive nor sustainable grounds to make the case for or against a revitalisation of the doctrine of humanitarian intervention. When considered in a critical and contextual perspective it becomes apparent that each of these objections raise new problems and difficulties. Given the complexities of the discussion, it is hardly surprising, that the subject matter of interventionary diplomacy has and will consistently give rise to controversy and inconclusive results. Part of the complexity is its confounding and varying admixtures of politics, morality and law.[257] However, the question remains, whether the case can be made for an evolving norm in international law legalising humanitarian interventions as an interim solution for humanitarian emergencies. Supporting the development of such a rule, the following observations can be made:

First, the best opportunity, given available levels of capacity, to avoid acute suffering is normally for states to become seriously engaged in a preventive role. Such a role can include providing a symbolic presence, substantial economic relief and making constructive diplomatic services available to the troubled states. In the Kosovo crisis as well as in many other cases this point has been insufficient emphasised. The worsening conflict in Kosovo was on the international agenda for years.[258] During the Dayton Peace Conference the international community had the unique opportunity to address this issue, but failed to do so. Diplomatic efforts seriously got underway only after the outbreak of violence had already infected the mutual relationship with mistrust and fear.

Second, if the conflict is coming to a point when all peaceful means are exhausted and the situation reaches intolerable magnitudes of human suffering, recourse to the use of force to stop the fighting must be possible. This is a response to the humanitarian imperative, that something must be done while gross violations of human rights are taking place. The horrors which have been taking place in Kosovo were plain for all

[257] Ibid., at 494

[258] See the Report of the UN Human Rights Commission in 1994 addressing the issue of human rights violations by the Serbian administration against ethnic Albanians, supra note 17

to see: ethnic cleansing, atrocities against civilians, widespread rape and violence of a medieval character. They are in itself a justification for military intervention, when there are no other means available to stop the fighting.

Third, regardless, whether the forcible intervention is undertaken by the UN or by regional organisations, the decision to intervene should be based on the objective examination by an international institution and a formal statement that the humanitarian crisis reaches alarming proportions which require a firm response by the international community. What is important is that this valuation is the outcome of a multilateral and democratic process reflecting the opinion of the majority of states. This requirement was met in the case of Kosovo since the Security Council in subsequent resolutions unanimously stated that the situation constituted a 'threat to peace and security in the region' directly relating to the humanitarian crisis.[259]

Forth, given the lack of capacity and will in the United Nations to activate forces for the protection of vulnerable peoples against severe forms of abuse and suffering, the only interim solution is collective intervention by members of multilateral organisations. These actors gain some form of credibility and impartiality through the process of collective decision-making. Their strength also lies in the know how when it comes to regional peculiarities rooted in history, ethnicity, etc. Although NATO's task was to serve as a transatlantic forum geographically confined to the Europe-Atlantic region, the majority of mostly European Allies see the Atlantic Alliance as a quintessential European Security Organisation.[260] Given the strong European background and NATO's capability to conduct more robust combat missions – missions for which only NATO is uniquely prepared – the organisation was the primary choice for military involvement in the Balkans.[261] In the case of Kosovo, it required prolonged efforts to build an Alliance-wide consensus as a formal basis for

[259] See S/RES/1199 (1998), supra note 23; S/RES/1203 (1998), supra note 26

[260] I Daalder, *NATO, the UN and the Use of Force*, at <http://www.unausa.org/issues /sc/daalder.htm>

[261] During the Yugoslavia conflict which started in 1991 other regional (European) organisations like the CSCE, EU, and WEU proved to be of limited use. In part, the problem stemmed from institutional weaknesses in each of the organisations, which all were in the early stages of adapting to the post-Cold War era. J Steinberg, *International Involvement in the Yugoslavia Crisis*, in: L F Damrosch, supra note 38, p.56

action.[262] But this can be seen as a necessary security check against premature military actions, preventing abuse in a way, that certain allies will abstain from any participation and in effect become "free riders".

Fifth, armed force must be exclusively used for the limited purpose of stopping the atrocities and restoring respect for human rights, not for any goal going beyond this limited purpose. Moreover it is axiomatic that use of force should be commensurate with and proportionate to the human rights exigencies. The NATO bombings, however, show the limited utility of airstrikes in complex ethnic conflicts. After five weeks of war, NATO claimed it has wrecked Serbia's oil-refining capacity and taken bites out of several other industries. General Clark, the NATO commander, said his bombers had inflicted "moderate to severe" damage on the Yugoslav forces' communications and, by attacking roads and railways, had made it much harder for them to send fresh troops to Kososvo.[263] But in fact, surgical airstrikes against military targets proved to be politically and military indecisive. The humanitarian crisis merely intensified, with nearly a million people without shelter and continued attacks on Albanian villages.[264] Dazzled by technology and obsessed with avoiding casualties of their own, the allies seemed unable to hurt, let alone destroy, Serbia's army. Meanwhile the list of accidents – innocent bombed, aircraft lost – grew longer. Therefore, the conclusion can be drawn, that when the decisions to intervene is made, NATO members must commit themselves to a strong and concerted action involving the deployment of a large number of ground troops. This will lead to further constraints on making a decision to intervene, but will also underline the effectiveness and success of foreign military interventions for the protection of human rights.

## CONCLUSION

In sum, the discussion regarding the use of force to safeguard human rights focuses at profound questions of international law reaching beyond routine legal assertion.

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[262] W Drozdiak, *U.S., European Allies Divided over NATO's Authority to Act,* Washington Post, November 8, 1998, A 33

[263] *The West versus Serbia,* The Economist, March 27, 1999, at 29

[264] *A Bungled War,* The Economist, May 8, 1999, at 11

What becomes clear is that the Kosovo crisis and the following debate about the evolving norm legalising humanitarian intervention dramatically shows the limits of classical international law. Whether one decides in favour or against, both positions create massive conflict with international legal duties to protect against violations of the right to life of the civilian population.

Instead it must be asked if it would not be wiser to seriously think of a reform of the Security Council, with the aim of avoiding, for the future, situations where one of the permanent members can block a humanitarian intervention for purely political reasons. In other words, in the long run it would be more reasonable to remove the main obstacle which compels states to resort to armed force outside the UN-system instead of approving obvious contradictions in the international legal system. Additionally, it must be said that the traditional international system (embodied in the UN Charter) in general cannot be a good basis of a new humanitarian law. Contemporary practice is inadequate and controversial. Therefore we have to strike new ground. The progress made in the creation of a new international law norms should be tested in the light of its capacity to overcome the traditional inadequacies of international law.

Broadly we find the following weaknesses in codified international law: the lack of efficient and just decision-making of UN bodies; the absence of clarity, consistency and credibility; the lack accountability of major international actors and the increasing expectations of masses in face of the limited resources of international organisations.[265] In addition, the nature of the international legal process is such that it provides plenty of opportunities for continuing controversies.

The progressive development and codification of a new law of humanitarian intervention ought to reflect normative transparency, both in terms of substance and procedure. This is possible when not just the UN Security Council but also all other relevant organs of the UN system are involved in the process. Operational transparency is necessary to ensure the credibility of the intervenor, be that a state or an international organisation. This is possible, inter alia, by giving precedence to humanitarianism over interventionism, by reforming the Security Council, by granting

[265] P Wilenski, *The Structure of the UN in the post-Cold War period,* in: A Roberts & B Kingsbury (eds), UNITED NATIONS, DIVIDED WORLD, p.437

an appropriate legal status to the non-governmental actors' participation in humanitarian intervention and by creating a dispute settlement mechanism available to the parties involved in humanitarian intervention.[266]



[266] Ibid.

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