MARMARA ÜNİVERSİTESİ
AVRUPA TOPLULUĞU ENSTİTÜSÜ
AB HUKUKU ANABİLİM DALI

HUMANITARIAN INTERVENTION IN INTERNATIONAL LAW: EUROPEAN CONFLICTS

DOKTORA TEZİ

Kerem BATIR

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ABBREVIATIONS

AFL	Armed Forces of Liberia
ASEAN	Association of South Asian Nations
AJIL	American Journal of International Law
ASIL Proc	Proceedings of the American Society of International Law
COMECON	Council for Mutual Economic Assistance
CSCE	Conference on Security and Cooperation in Europe
EC	European Community
ECOMOG	Economic Community of West African States Cease-fire Monitoring Group
ECOWAS	Economic Community of West African States
EJIL	European Journal of International Law
EU	European Union
FCO	Foreign and Commonwealth Office
FRY	Former Republic of Yugoslavia
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross/Red Crescent
IFOR	Implementation Force
IISS	International Institute for Strategic Studies
ILA	International Law Association
ILO	International Labour Organization
IMF	International Monetary Fund
JNA	Jugoslavenski Narodna Armija (Yugoslav Peoples Army)
KFOR	Kosovo Force
KLA	Kosovo Liberation Army
KVM	Kosovo Verification Mission
LDK	Democratic League of Kosovo

NAC	North Atlantic Council
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
NPFL	National Patriotic Front of Liberia
OAS	Organization of American States
OAU	Organization of African Unity
OECS	Organization of East Caribbean States
OSCE	Organization for Security and Cooperation in Europe
RPF	Rwandan Patriotic Front
SFOR	Stabilization Force
SFRY	Socialist Federal Republic of Yugoslavia
UK	United Kingdom
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNITAF	United Nations Task Force
UNMIH	United Nations Mission in Haiti
UNOSOM	United Nations Operation in Somalia
UNOMIL	United Nations Observer Mission in Liberia
UNPROFOR	United Nations Protection Force
UNSC	United Nations Security Council
US	United States
USSR	Union of Soviet Socialist Republics
WEU	Western European Union

INTRODUCTION

1. Subject of the Thesis

The doctrine of humanitarian intervention has been the subject of a debate in international law for a long time. The roots of the dispute on the right of humanitarian intervention go back to the ancient times. But academics, lawyers and other scholars were not certain whether this right existed or not. In ancient times, it was part of the "just war doctrine". Then, however, the term was explained by religious factors. The doctrine practiced in 18th and 19th centuries was predominantly based on the rights of Christians. But the term Christians in that context referred to the rights of Christians governed by the 'uncivilized' Ottoman Empire. Humanitarian intervention in this period served as a tool against Turks.

By the 20th century there was a strong support for the principle of non-intervention. There was a tendency among the writers of the time toward the acceptance of the principle of non-intervention as a rule of international law and practice. The Covenant of the League of Nations neither provide for a right to intervene nor prohibit such an action. After the Covenant the support for the principle of non-intervention reached its goal and use of force was prohibited by the Kellog-Briand Pact of 1928. This is the first time in the world history that the use of force is prohibited with the exceptional situation of self-defence.

The United Nations Charter was another important step for the principle of non-intervention. States stressed their sovereignty and obliged all the members of the United Nations to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. This obligation has two exceptions: self-defence and the use of force by the UN Security Council authorization. The period after the UN Charter started with self-determination of ex-colonial states. These states were very sensitive on the

issues about sovereignty and they did not accept any principle or doctrine which may threaten their sovereignty and territorial integrity.

After the situation in Bangladesh (1970) the discussions about humanitarian intervention arose. Many scholars believed that the holy ghost of the 'just war' doctrine existed again. It has been discussed since 1970, and there is still no consensus on the topic. The cases of Panama, Somalia, Rwanda, and Liberia warmed the discussion from time to time.

The subject of this thesis was proposed just after the NATO intervention to Kosovo. It is still one of the hottest topics in international law. There was a common belief among international lawyers that in the post cold-war era the international community would have demands in the concept of law more than the cold-war era. In the cold-war era, because of the bi-polarized world the cases in which the use of force involved could not be ruled by the UN system. With the help of the veto mechanism supreme powers, i.e. USA and USSR vetoed the resolutions and UN security system did not work. In the post-cold war era, the first cases (Iraq, Somalia, and Haiti) fuelled up the expectations about a workable UN security system. This workable system was first shocked by no-fly zones and air strikes in Northern Iraq. But the fatal blow was struck by the North Atlantic Treaty Organization action in Kosovo.

In March 1999 NATO targeted air strikes against the Federal Republic of Yugoslavia. The members of the organization tried to justify their action on various grounds. But the main reason for the intervention was humanitarian objectives. The Secretary General of NATO declared that the action was inconsistent with UN Security Council Resolution 1199 and based on the continuation of humanitarian catastrophe. But the UN Secretary General stressed on the need for a UNSC resolution for the intervention to Kosovo.

The events that have taken place after the September 11th may shadow the doctrine of humanitarian intervention. The war in Afghanistan, Iraqi war and overthrow of Saddam Hussein are the hot topics of today's world and the principle of non-intervention is threatened by not only the doctrine of humanitarian intervention but other doctrines such as anticipatory self defence, the war against terrorism. States which feel that the growing numbers of these

types of actions will put their sovereignty at risk may not accept the doctrine of humanitarian intervention.

The 21st century started with the NATO intervention in Kosovo and continued with the "war against terrorism" in Afghanistan and Iraq. Both of these actions were resulted in the change of the governments of the countries in question. The very basics of the UN system are questioned with these actions. There is a growing amount of opposition to the actions of the United States. But again because of the veto system in the UN Security Council, the United Nations is not able to take action in international conflicts. The doctrine of humanitarian intervention might be the safety valve of the system when the UNSC is blocked by the veto power, but because of the fears of abuse of this mechanism could not be realised in the past.

2. Aim, Content and Structure of the Thesis

This thesis tries to focus on three main topics: The first is the concept of State Sovereignty; can the protection of human rights that were violated by the government be the limits of state sovereignty? The second main concept of the thesis is the doctrine of humanitarian intervention; can the use of force with this doctrine be justified by the violation of human rights? And at last implementation; is it to be done unilaterally or collectively? Is it to be done by regional or collective self defence organizations without the authorization of the UN? In other words: Is NATO's intervention in Kosovo compatible with the criteria for humanitarian intervention? The way to deal with these topics was chosen to focus on the cases by examining how the doctrine and practice of humanitarian intervention evolved from past to present and the possible future practice.

The method of the thesis is based on the sources of international law as expressed in the Article 38 of the Statute of the International Court of Justice. First of all, the thesis focused on the international treaties to find out the legal basis for humanitarian intervention. Then focused on the history of the state practice in order to examine whether a rule in international custom is created or not. Then the general principles of law is analysed in the thesis, the

necessity and the proportionality of the actions are discussed in each case. And the judgements of the cases of Caroline, Corfu Channel and Nicaragua were taken with their relevant parts. And the rest of the thesis is the analysis of the views of international lawyers and scholars.

Currently, the legality of the use of force in Serbia and Montenegro (Kosovo case) is on trail. The judgement of the International Court of Justice will shed light on the debate on humanitarian intervention but it seems that the decision will not be given for a couple of years.

The thesis consists of four parts. They are namely: 1. State Sovereignty, Human Rights, Use of Force and International Law, 2. Humanitarian Intervention and International Law, 3. Humanitarian Intervention in the Post Cold–War Era, and 4. Humanitarian Intervention in European Conflicts.

The first part of the thesis is mainly devoted to the analysis of state sovereignty, human rights and the use of force in international law. The chapter starts with the definition of state sovereignty: the concept and limits of sovereignty. Then the chapter focuses on human rights and its relations with sovereignty. And in the last chapter the use of force; the UN Charter, international treaties and other international documents are examined. The main argument is the principle of non-intervention and its possible exceptions. The next section of the chapter tries to find out the examples of legal use of force: self-defence, the authorized use of force by United Nations, the authorized use of force by regional intergovernmental organizations, and the use of force by one state or a group of States.

The second part focused on the doctrine of humanitarian intervention. This part of the thesis starts with evolution of the concept till the UN Charter period. The first chapter analyses the theory and state practice, in order to find out customary rules, if any, legitimizing the doctrine of humanitarian intervention. First section examines the early examples of 19th and 20th centuries. The second section tries to find out criteria for humanitarian intervention. The third section summarises the discussions around the definition of humanitarian intervention. Second chapter focuses on the place of humanitarian intervention in the UN system. The first section of this chapter tries to find out the place of humanitarian intervention

in the UN Charter. The second section analyses the Security Council resolutions. The state practice in the Cold War era is examined in the last chapter of the second part. This period is very important because of the unworkable UN security system.

The third part deals with the interventions of the post-cold war era. This part starts with the interventions under the United Nations mandate. The cases of Somalia, Haiti, and Rwanda are examined under the first chapter. Interventions without the consent of the UN Security Council are given place in the last chapter. The hot topic of this chapter is the activities that have taken place in the Northern Iraq since the Gulf War. The Northern Iraq case contributed to the arguments in favour of humanitarian intervention. Scholars generally refer to this case in debates on the legality of the NATO's action in Kosovo.

Owing to the absence of an outstanding UN army, the role of international organizations in humanitarian crisis gains importance. According to the United Nations Charter regional organizations have the task of taking care of the peaceful settlement of disputes within its own region. However, this provision does not mean the delegation of the Security Council's Chapter VII powers to regional organizations. In each case the authority to use force remains with the Security Council. After pushing the button the capabilities and actions of relevant regional organizations are taken into consideration to find out whether collective action in humanitarian crisis is possible or not. In this context the activities of this kind of organizations in their respective regions such as the Organization of American States, the Organization of African Unity, and the Organization for Security and Co-operation in Europe are studied. In certain cases where the regional organizations failed to act, individual states or collective self-defence organizations such as NATO were willing to act. This time the discussion is takes place around the terms unilateralism and collectivism.

Humanitarian intervention in European Conflicts is the theme of the last part of the thesis. The last chapter focuses on Kosovo which is the key point of the thesis. The chapter starts with the dissolution of the Social Federal Republic of Yugoslavia and the humanitarian catastrophe in Bosnia Herzegovina. Normally, the Bosnia case is an example of humanitarian intervention under the UN mandate. In order to examine the European Conflicts under a single heading it is dealt with here. The next part deals with the Kosovo case in detail.

Chronology of events, negotiations, resolutions, treaties, decisions of NATO, and all related material examine under this topic. This part analyses the various arguments on the unauthorized use of force by NATO. One of these arguments is the implied consent of the UN Security Council. This argument is an important piece of evidence of the doctrine of humanitarian intervention.

PART I

STATE SOVEREIGNTY, HUMAN RIGHTS, USE OF FORCE AND INTERNATIONAL LAW

This part constitutes the theoretical framework of the thesis. If the right to humanitarian intervention is defined as "the threat or use of armed force by a state, or an international organization, with the object of protecting human rights"[1] then such concepts as state sovereignty, human rights, and use of force should be examined before analysing the term humanitarian intervention. Sovereignty and human rights are both comprehensive terms, but in this part of the thesis, they will be examined to the extent of their relevance to humanitarian intervention.

I. State Sovereignty and Human Rights

State sovereignty and human rights are contending concepts in international law. While state sovereignty rests in the heart of the United Nations Charter, violation of human rights is the reason for humanitarian intervention. In this context human rights is one of the major instruments which draws the limits of state sovereignty.

A. State Sovereignty

States are the main actors of the international system, and the measure of their legitimacy has been the attribution of sovereignty. Sovereignty is an important item in the list of the criteria for statehood. The 1933 Montevideo Convention on the Rights and Duties of States lists three other criteria besides sovereignty: a permanent population, a defined territory, and a government. The coming section will define the term from

[1] Ian Brownlie, "Humanitarian Intervention" in John Norton Moore (ed.), Law and Civil War in the Modern World, The John Hopkins University Press, London-1974, p.217.

different points of view, then analyse the evolution of the concept within a historical perspective and will try to find out the new trends which may change the meaning of the term.

1. Historical Background

Sovereignty emerges from the struggle of the Middle Ages. Claims to supreme authority arose first in the struggle for supremacy between the pope and the emperor concerning the conditions for legitimate rule, and then in conjunction with jurisdictional disputes among feudal lords, particularly when no special feudal bond of allegiance existed between them.[2]

In his book written in 16th century, Bodin described sovereignty as follows:

> It is necessary that those who are sovereigns should not be subject to commands emanating from any other and that they should be able to give laws to their subjects, and nullify and quash disadvantageous laws for the purpose of substituting others; but this cannot be done by one who is subject to the laws or to those who have the right of command over him.[3]

Reisman argues that Bodin and Hobbes shaped the term to serve their perception of an urgent need for internal order. Their conception influenced several centuries of internal politics and law and also became a secular slogan for the various absolute monarchies of the time. He examined that sovereignty often came to be an attribute of a powerful individual, whose "legitimacy over territory rested on a purportedly direct or delegated divine or historic authority but certainly not on the consent of the people".[4]

According to Hugo Grotius, sovereignty was "that power whose acts are not subject to the control of another, so that they may be made void by the act of any other

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[2] Friedrich Kratowich, "Sovereignty as Dominium: Is There a Right of Humanitarian Intervention?" in Gene M. Lyons & Michael Mastanduno (eds.) Beyond Westphalia? States Sovereignty and International Intervention, The Johns Hopkins University Press, Maryland-1995, p.23.

[3] Jean Bodin, Six livres de la république, Paris-1577, Book I, Chapter 8, cited in Friedrich Kratowich, op. cit, p.23.

[4] Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law", AJIL, Vol. 84, 1990, pp.866-867.

human will". The supreme power is, however limited by divine law, natural law, the law of nations, and by such agreements as are made between the ruler and the ruled.[5]

The birth of sovereignty in the nation state is customarily dated from the end of the Thirty Years War in 1648. The peace of Westphalia sought to separate the powers of church and state and in so doing it transferred to nation states the special godlike features of church authority. States inherited sovereignty and with an unassailable position above the law that has since remained the central element of international relations.[6] The peace, which consisted of the Treaty of Osnabrück and the Treaty of Münster, sought to restore order by establishing rules that defined the control that rulers could legitimately exercise over religious matters.[7] In 17th century, Sovereignty was only challenged by the religious rights. In 19th century, it was challenged by the protection of minorities and especially against Ottoman Empire.

In later 19th and earlier 20th centuries, systematic efforts were made to create an international regime that would protect the rights of national minorities, especially in Central and Eastern Europe. Provisions for the protection of such rights were included in a number of treaties in the 19th century that were guaranteed by the great powers.[8]

After World War I, extensive minority rights provisions were written into a number of peace treaties[9], and a monitoring and enforcement mechanism was established within the League of Nations.[10] The Permanent Court of International

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[5] Charles E. Meriam, History of the Theory of Sovereignty since Rousseau, Ams Pres, New York-1968, p.21 cited in Francis Kofi Abiew, The evolution of the Doctrine and Practice of Humanitarian Intervention, Kluwer law international, Netherlands-1999,p.27.

[6] Thomas G. Weiss & Jarat Chopra, "Sovereignty under Siege: From Intervention to Humanitarian Space", in Gene M. Lyons & Michael Mastanduno (eds.) Beyond Westphalia? States Sovereignty and International Intervention, The Johns Hopkins University Press, Maryland-1995, p.99.

[7] Stephen D. Krasner, "Sovereignty and Intervention", in Gene M. Lyons & Michael Mastanduno (eds.) Beyond Westphalia? States Sovereignty and International Intervention, The Johns Hopkins University Press, Maryland-1995, p.235.

[8] These treaties were for the protection of the Christian Minorities in Ottoman Empire, for detailed information please see Part II of the thesis.

[9] Austria, Hungary, Bulgaria and Turkey were defeated states, and protections were written into their peace treaties. Poland, Czechoslovakia, Yugoslavia, Romania and Greece were new or enlarged states . They signed minority rights treaties with the Allied and Associated Powers.

[10] The Covenant of the League of Nations, electronic version, http://www.yale.edu/lawweb/avalon/leagcov.htm access date 29.02.2004.

Justice was given the right to make binding decisions. [11] Any member of the Council of the League could submit a case to the court.

Krasner argues that the minorities regime established after World War I was "a clear violation of the principle of non-intervention". As a condition of full participation in the international community, the smaller states of Central and Eastern Europe were compelled to accept limitations on their internal sovereignty which extended to details as small as the days of the week on which the elections could be held.[12] But the victors did not accept any restrictions on their own sovereignty. Britain refused to allow any issues related to Wales or Ireland to become a matter of concern to the League. Italy and the United States followed the same approach. So this system did not work. Governments disregarded their obligation to protect the rights of minorities within their borders.

After World War II, the effort to guarantee the rights of national minorities was virtually abandoned, replaced by a liberal emphasis on purely individual human rights.

To summarise the subsection, the history of state sovereignty starts with the emergence of secularism, the division of powers between the sovereign and the church, expands with the age of nation states and loose grounds in the age of globalisation.

2. The Concept of State Sovereignty

In drawing on both etymology and the usage of the concept in legal and political theory, the original meaning of "sovereignty" is related to the notion of "superiority." The word "sovereign" stems from the Latin *supra*. The dictionary definition of the concept of 'sovereignty' is

> the supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; the supreme will; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political power, from which all specific

[11] Article 59 of the Statute of the Permanent Court of International Justice, electronic version, http://www.mfa.gov.tr/grupe/ed/eda/eda15e.htm access date: 29.02.2004.

[12] Stephen D. Krasner, op. cit. p.239.

> political powers are derived; the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; also a political society, or state, which is sovereign and independent. Sovereignty is the power to do everything in a state without accountability, to make laws, to execute and to apply them, to impose and collect taxes and levy contributions, to make war or peace, to form treaties of alliance or of commerce with foreign nations, and the like. Sovereignty in government is that public authority which directs or orders what is to be done by each member associated in relation to the end of the association. It is the supreme power by which any citizen is governed and is the person or body of persons in the state to whom there is politically no superior." [13]

Apart from the dictionary definition, the term can also be defined with an emphasis on its different aspects. Sovereignty in its largest sense means supreme, absolute or unquestionable power, or the absolute right to govern. The term, on the other hand, can concisely be defined as "will or volition as applied to political affairs".

In terms of international relations the principle of national sovereignty implies that a state is not under the control of any other state and has rights equal to those of other states within the international system. It involves both formal equality between states and the principle of non-intervention in the internal affairs of another state.[14]

Sovereignty is a legal fiction that continuously evolves; it is not an unchangeable feature of the human condition: a family, or a city have functioned quite well without it. The concept and its content attracted attention much later with the evolution of international law and international relations as fields of study. In 1923, the Permanent Court of International Justice pointed out that "the question of whether a certain matter is or is not solely within the jurisdiction of a state is an essential relative question; it depends on the development of international relations."[15]

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[13] Bryan A. Garner (ed.), Black's Law Dictionary, 7th edition, West Group, 1999.

[14] Iain Atack, "Ethical Objections to Humanitarian Intervention", Security Dialogue, Vol. 33(3), 2002, p.281.

[15] National Decrees Issued in Tunis Morocco Case, PCIJ, ser. B, No.4, 1923, p.143, cited in Thomas G. Weiss & Jarat Chopra, op. cit., p.96.

Sovereignty has come to signify, in the Westphalian conception, the legal identity of a state in international law. It is a concept which provides order, stability and predictability in international relations since sovereign states are regarded as equal, regardless of size or wealth. The concept takes place in the UN Charter with an emphasis on the principle of 'sovereign equality' of states.[16] The protection of state sovereignty does not include any claim of the unlimited power of a state over its own people.

Sovereignty implies a dual responsibility on a state: externally, to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within its boundaries. In domestic terms, sovereignty signifies the capacity to make authoritative decisions with regard to the people and resources within the territory of the state. Generally, however, the authority of the state is not regarded as absolute, but constrained and regulated internally by constitutional power sharing arrangements.

In defining the term 'sovereignty' and describing the theoretical background, one should also focus on the views of different schools of thought. Reus-Smit summarizes them as follows: Realists treat sovereignty as an empirical attribute of the state; states support their territorial authority by military power, economic resources and perhaps the consent of the people. Rationalists, in particular the 'English School' of international society theorists, in contrast, treat sovereignty as an institution of international society, "deeply embedded in the organizing principle that licences the organization of political authority into centralized, territorially demarcated political units". According to Reus-Smit, whereas the former emphasizes the role of resorting to war and military competition in the rise of the modern international system, the latter stresses the emergence of norms of mutual recognition, non-intervention and self-determination. He concludes that both of the schools, however, "view sovereignty as an absolute, empirical or institutional fact that cannot be qualified without nullification"[17].

[16] Article 2(1): The Organization is based on the principle of the sovereign equality of all its Members.

[17] Christian Reus-Smit, "Human Rights and the Social Construction of Sovereignty", Review of International Studies, 2001, Vol.27, p.521.

2. Limits to the State Sovereignty

There are important and widely accepted limits to state sovereignty and to domestic jurisdiction in international law. First, the UN Charter highlights the tension between the sovereignty, independence, and equality of individual states, on the one hand, and collective international obligations for the maintenance of international peace and security, on the other. Second, state sovereignty may be limited by customary and treaty obligations in international relations and law. This subsection tries to analyse the importance of the term in relation to two issues: international organizations and terrorism. International organizations and their effects on state sovereignty gained importance in the second half of the 20th century, after the construction of the European Union in particular. Terrorism has been the hottest topic after the events of September 11th. The implications of these two issues on state sovereignty are worth analysing in this subsection.

a. International Organizations and State Sovereignty

After defining the term 'sovereignty' from different perspectives, the constraints to the term will be analysed in the rest of the subsection. These constraints come from two sources: various developments in international relations and the need for collective decision-making bodies in transboundary problems. These two sources may have political, economic or military effects, but on the whole they all reflect the need for cooperation in a globalised world.

There are certain developments in international society which bring about new limits to state sovereignty. States agreed to form international organizations and to transfer them a portion of their authority within clearly defined limits, and applied the decisions of such organizations. In analysing the impact of these institutions on state sovereignty, Weiss and Chopra find out that international institutions have further contributed to the erosion of state sovereignty. The earlier principle of requiring unanimity in votes in the League of Nations was replaced by majority voting in the United Nations, which means that sovereign states can be bound against their will by the votes of other states. The authors give the example of veto mechanism in the

Security Council; the veto power of each of the permanent members of the Security Council vitiates the sovereignty of all other members because, by definition, one state cannot be more sovereign than another.[18]

Continuing to the analysis of international institutions, Hoffmann states that the system of perfect sovereign states was always "something of an ideal-type: in reality, many states were dominated or controlled by others, or had limitations on their internal sovereignty imposed on them". [19] According to him, the most familiar type is economic interdependence; GATT, the European Monetary system, environmental institutions, the IMF and World Trade Organization are examples of this type.

During this 'internationalisation period', a new concept entitled 'interdependence' gained importance. The term which is mostly associated with economic policy and activity, is used to justify certain new norms of sovereignty. Because of the technology, faster travelling, tourism, in the modern international system states are more dependent to each other than before. In many of these cases, "the concept interdependence can probably be used in tandem with sovereignty in rather traditional sense and nation state consent approaches to persuade nations to give such consent".[20]

European Union is another limitation to state sovereignty. Unlike international organizations, the European Union has a supranational character. In a supranational system, power is held by independent appointed officials or by representatives elected by the legislatures or peoples of the member states. Here the institutions of the European Union have certain legislative, executive and juridical powers in areas defined by the founding Treaties. This does not mean that the members transferred all their sovereignty to the EU; member-state governments still have power, but they must share this power with other actors. Freedom of the movement and the right to political participation wherever one resides challenges a traditional basis of loyalty to a single state.

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[18] Thomas G. Weiss & Jarat Chopra, op. cit., p.99.

[19] Stanley Hoffmann, "Sovereignty and the Ethics of Intervention", in Stanley Hoffmann (ed.) The Ethics and Politics of Humanitarian Intervention, University of Notre Dame Press, Indiana-1997, p.14.

[20] John H. Jackson, "Sovereignty-Modern: a New Approach to an Outdated Concept", AJIL, Vol. 97, 2003, p.801.

In addition to this, European citizenship was created by the Treaty of Maastricht of the European Union in 1992. The terms 'nation', 'sovereignty' and 'statehood' are closely linked. So, in order to understand the concept of 'European citizenship' Boucher examines the relation between human rights issues and the European citizenship. According to him, despite the fact that citizenship has taken on post-national dimensions in Europe, and that rights traditionally grounded in the state are articulated in the level of human rights, the sovereign nation state is still the reference point in this context. European citizenship depends upon the prior national citizenship of a member state, and the enjoyment of human rights depends upon their recognition, implementation and enforcement by member states as sovereign entities. Yet, "pooling the sovereignty of individual states does not dissolve sovereignty; it merely expands the community to which it is applicable".[21] While there is a clear possibility of the European Union evolving in ways that displace the sovereignty model of the state and not simply substituting the states as a new sovereign, states have so far managed the institutional architecture to preserve major roles for themselves in taking the crucial decisions on governance forms.[22]

To conclude this subsection, it can be said that in joining international organizations each member consents in advance to the institutional aspects of that organization, and thus, in principle, obligations can only arise from the consent of states. But as Brownlie mentions "the obligatory nature of membership, majority decision-making, the determination of jurisdiction by the organization itself, and the binding quality of decisions of the organization depart from consent of member state".[23]

b. Terrorism

The international organizations and European Union may be taken as 'positive' limitations to state sovereignty because the sovereign states transfer part of their sovereign rights according to their will. But in contrast, terrorism, as another threat to

[21] David Boucher, "Resurrecting Pufendorf and Capturing the Westphalian moment", Review of International Studies, Vol. 27, 2001, p.574

[22] Benedict Kingsbury, "Sovereignty and Inequality", EJIL, Vol.9, 1998, p.614.

[23] Ian Brownlie, Principles of Public International Law, Oxford University Press, Fifth Edition, Oxford-1998. p.292.

state sovereignty, uses the organized violence against the will of sovereign states. States no longer have a monopoly on organized violence. Terrorists can inflict massive damage on a country, even one as powerful as the United States. Organized crime syndicates and narco-traffickers now possess military-style arsenals equivalent to many a small nation's army. And insurgent movements of various bands have been able to challenge government control over parts of territory, sometimes even including the territory of more than one state. It is also becoming more evident that some developments within states (ranging from providing a safe haven or training grounds to terrorist groups to developing or failing to secure weapons of mass destruction) can have negative impact on the security of others.[24]

The events of September 11th open a new page in the records of terrorism. Within hours of the horrifying events in New York and Washington, the Security Council issued resolution 1368 on 12th September.[25] The resolution affirmed the inherent right of individual and collective self-defence contained in Article 51 of the UN Charter. It also affirmed that terrorist acts constituted threats to international peace and security. NATO members also invoked Article 5 of the NATO treaty for the first time ever, which activated the right to collective self-defence in support of the US.

This response meant that both the Security Council and NATO took the view that the events of September 11th constituted an armed attack upon the US – hence the reference to the right to self defence and collective self defence as provided for by Article 51 of the UN Charter and Article 5 of the NATO treaty.

Whilst armed attack is conventionally understood as being a concept applicable in an inter-State scenario, the scale of the attack, the targets and the damage caused mean that in their effect, the events of September 11th constituted an armed attack. This authorized the use of responsive force is directed against the perpetrators of the events

[24] Ivo H. Daalder, "The Use of Force in a Changing World – US and European Perspectives", Leiden Journal of International Law, Vol. 16, 2003, p.172

[25] UN Security Council Resolution 1368 (2001), 12.09.2001, electronic version, http://www.un.org/Docs/scres/2001/scres2001.htm access date: 15.03.2004

and no state was mentioned in the Resolution. This is the first time in the UN history that the right of self defence is recognized against a terrorist organization.

3. Sovereignty as Responsibility

The idea that there is a relationship between a state's internal and external legitimacy has been at the heart of the global human rights regime since 1945. The state's legal and moral right to claim protection of the norm of non-intervention would depend upon its observance of certain minimum standards of common humanity. The Special Representative of the UN Secretary General for Internally Displaced Persons, Francis Deng, has called this approach 'sovereignty as responsibility'. Speaking in 1998 before NATO's intervention in Kosovo, the Secretary General Kofi Annan emphasised that the UN Charter belongs to the peoples of the world and not the states representing them at the UN:

> The Charter protects the sovereignty of peoples. It was never meant as a license for governments to trample on human rights and human dignity. Sovereignty implies responsibility, not just power.[26]

According to Wheeler, this is not a rejection of the core principles of sovereignty and non-intervention; rather, "states that claim these rights must recognise a responsibility to protect citizens inside their jurisdictions". He examined that during the last decade the UN Security Council reflected a growing acceptance of the doctrine of 'sovereignty as responsibility'. To date the Security Council has not expressly authorised a state, or group of states, to use force to end a human rights emergency where this lacked either the consent of the target state, or where the state had not already collapsed (as in Somalia, Liberia and Sierra Leone).[27]

In its report 'the Responsibility to Protect', International Commission on Intervention and State Sovereignty analyses sovereignty in detail. According to the

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[26] Kofi Annan, 'Reflections on Intervention' in The Question of Intervention: Statements of the Secretary-General, 1999, p.6, relevant parts reproduced in Nicholas J. Wheeler, "Legitimating Humanitarian Intervention: Principles and Procedures", Melbourne Journal of International Law, Vol.2, 2001, p.552.

[27] Nicholas J. Wheeler, ibid

report the Charter of the UN is itself an example of an international obligation voluntarily accepted by member states. On the one hand, in granting membership of the UN, the international community welcomes the signatory state as a responsible member of the community of nations. On the other hand, the state itself, in signing the Charter, accepts the responsibilities of membership flowing from that signature. There is no transfer or dilution of state sovereignty. But there is a necessary re-characterization involved: "from 'sovereignty as control' to 'sovereignty as responsibility' in both internal functions and external duties".[28]

The report also stresses that thinking of sovereignty as responsibility, in a way that is being increasingly recognized in state practice, has a threefold significance. First, it implies that the state authorities are responsible for the functions of protecting the safety and lives of the citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And lastly, it means that the agents of state are responsible for their actions; that is to say, they are accountable for their acts of commission and omission. The case for thinking of sovereignty in these terms is strengthened by the ever-increasing impact of international human rights norms, and the increasing impact in international discourse of the concept of human security.[29]

B. Human Rights

In traditional understanding human rights regulate certain relations between individuals and the states of which they are nationals. However sovereignty means, again in traditional understanding, that what a state does to its own nationals on its own territory is its own business. This understanding has changed significantly over the past half century. Nevertheless sovereignty remains the central norm in the politics of international human rights.

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[28] International Commission on Intervention and State Sovereignty, The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty, Published by International Development Research Centre, Ottowa-2001, p.15.

[29] International Commission on Intervention and State Sovereignty, ibid

1. Definition

Human rights are ordinarily understood as the rights one has simply because one is a human being. They are held equally by all human beings, irrespective of any rights or duties individuals may have as citizens, member of families, or parts of any public or private organization or association. Furthermore no distinction shall be made on the "basis of the status of the country, political, jurisdictional or international status, to which a person belong, whether independent or under any limitation of sovereignty".[30]

All states agree that the 1948 Universal Declaration of Human Rights and the 1966 International Human Rights Covenants provide an authoritative list of internationally recognized human rights. Donnelly argues that although people may be prevented from enjoying the substance of human rights by a wide range of individuals and organizations, "human rights are usually taken to have a special reference to the ways in which states treat their own citizens in their own territory". He gives the two types of examples; domestically people distinguish muggings, private assaults, and ransom kidnappings, which typically are not considered to involve human rights violations, from police brutality, torture and arbitrary arrest and detention, which are violation of human rights. Internationally, people distinguish terrorism, famine, war and war crimes from human rights issues, even though they also led denials of life and security.[31]

2. Human Rights as an International Issue

Until the World War II, human rights practices were generally considered as exercise of the sovereign rights of states with the exception of the interventions of the European great powers and the United States to Ottoman and Chinese Empires.

[30] Article 2 of the Universal Declaration of Human Rights (1948) , in Aslan Gündüz, Milletlerarası Hukuk: Temel Belgeler Örnek Kararlar, Beta Press, İstanbul-1998, p.271.

[31] Jack Donnelly, "State Sovereignty and International Intervention: The Case of Human Rights" in Gene M. Lyons & Michael Mastanduno (eds.) Beyond Westphalia? States Sovereignty and International Intervention, The Johns Hopkins University Press, Maryland-1995, p.116.

'Humanitarian Law' of war, which expressed in 1907 Hague Conventions, limited only what a state could do to foreign nationals, not how a state treated its own nationals.[32]

The main exception was slavery, which is subject to international treaties since 1815 Vienna Congress. But a complete treaty to abolish slavery was not signed until 1926. In the period between the two world wars the International Labour Organization (ILO) dealt with some limited workers' rights issues and the League of Nations established its Minorities System to protect the rights of ethnic minorities in areas where boundaries had been altered following the war. During the World War II, human rights were not a matter of concern in international community.

The main factor that let international system to focus on the human rights issue was the Holocaust[33], which shocked the international community and yet was not clearly prohibited by international law. At the Nuremberg War Crimes Trials (1945-1946) leading Nazis were prosecuted under a novel charge: crimes against Humanity[34]. The human rights first emerged as a subject of international relations in the United Nations.

The Covenant of the League of Nations did not mention human rights. But the Charter of the United Nations started to mention the term from the preamble[35]. In Article 1 human rights are listed among the purposes and principles of the United Nations.[36] In 1948 the Convention on the Prevention and Punishment of the Crime of Genocide[37] was opened for signature. The Universal Declaration of Human Rights[38]

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[32] For the full text please see, Adam Roberts & Richard Guelff, Documents on the Laws of War, Oxford University Pres, 3rd Edition, Oxford-2000.

[33] Holocaust is the systematic state-sponsored killing of six million Jewish men, women, and children and millions of others by Nazi Germany and its collaborators during World War II. The Germans called this "the final solution to the Jewish question.", Encyclopaedia Britannica from Encyclopaedia Britannica Premium Service. http://www.britannica.com/eb/article?eu=41717 access date: 04.03.2004

[34] Jack Donnelly, op. cit., p.123.

[35] The relevant part of the preamble is as follows: "we the peoples of the United Nations determined… to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women…"

[36] Article 1: "The Purposes of the United Nations are… promoting and encouraging respect for human rights…"

[37] For the full text please see: Malcolm D. Evans, Blackstone's International Law Documents, 4th Edition, Blackstone Press, Glasgow-1999, pp. 36-39.

was adopted unanimously by the General Assembly just after the Genocide Convention.

Cold war period interrupted the human rights activities till the decolonisation period. Decolonisation had special impetus on human rights issues. The countries which had suffered under colonial rule interested in human rights. In 1960s the largest group among the members of the UN was Afro-Asian ex-colonies. With the support from the Latin American countries United Nations again focused on the human rights and International Human Rights Covenant completed in 1966. Although states had agreed that they ought to follow international human rights standards they did not agree to let the United Nations enforce implementation of these norms. So implementation of these norms left mostly to the national governments.[39]

UN General Assembly and the Security Council have been willing to address certain areas of human rights violations while minimizing the foregoing concerns. For example both have consistently maintained a commitment to self determination, at least within a colonial context. The United Nations has also responded to severe human rights violations based on race, most notably by making the policy of apartheid a crime against humanity. The Security Council's resolutions regarding the racist regime in Southern Rhodesia are the best examples of Council work in this area.[40]

In 1970s the United Nations beginning to move from setting standards to examining how those standards were implemented by states (at least by a few of them). In this period human rights became "a matter of bilateral foreign policies of individual states".[41] Human Rights NGOs were also constituted in this period. 1980s are the years where the human rights actions increased both multilaterally, bilaterally and

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[38] United Nations General Assembly Resolution 217A (III) reprinted in: Malcolm D. Evans, Blackstone's International Law Documents, 4th Edition, Blackstone Press, Glasgow-1999, pp. 39-42.

[39] For detailed analysis of implementation of Human Rights please see Anthony D'Amato, "The Concept of Human Rights in International Law, Columbia Law Review, Vol.82, 1982, pp.1110-1159.

[40] For detailed information about the actions please see David Bills, "International Human Rights and Humanitarian Intervention: The Ramifications of Reform on the United Nations' Security Council", Texas International Law Journal, Vol. 31, 1996, p.112

[41] The United States linked foreign aid to the human rights practices of recipient countries.

nongovernmental. The treaties on women's rights, torture and the rights of the children completed in 1980s.

Two most important human rights monitoring bodies had also established in this period. These are the UN Commission on Human Rights and the UN Human Rights Committee. The UN Commission on Human Rights is a permanent subsidiary body of the Economic and Social Council; the Universal Declaration of Human Rights and the Human Rights Covenants were drafted by this commission. The UN Human Rights Committee was established to supervise the implementation of the International Covenant on Civil and Political Rights.

3. The Relation between Sovereignty and Human Rights

The principle of sovereignty is widely considered the 'grundnorm'[42] of international society, and evolving human rights norms are seen as a compensatory international regime, the purpose of which is limit the inhumane consequences of the sovereign order. The principle of sovereignty grants states supreme authority within their territorial borders and denies the existence of any higher authority beyond those borders. Human rights norms, in contrast, place limits on how states can treat their peoples, "compromising sovereignty in the name of universal standards of legitimate state conduct".[43]

The meaning of sovereignty has been shifting from 'sovereign's sovereignty' to 'people's sovereignty' in international legal practice in 20th century. Under the old concept, even scrutiny of international human rights without the permission of the sovereign could possibly constitute a violation of sovereignty by its invasion of the sovereign's reserve province. The sovereignty confirmed by the international legal

[42] Grundnorm or "basic norm" derives its validity from the fact that it has been accepted by some sufficient minimum number of people in the community. It may be identified as the foundational norm simply because it is not dependent for its validity on some higher order norm: people simply accept it as authoritative. Kelsen descrices as "a legal norm is not valid because it has a certain content, that is, because its content is logically deducible from a presupposed basic norm, but because it is created in a certain way-ultimately in a way determined by a presupposed basic norm." Hans Kelsen. Encyclopaedia Britannica, internet edition, 2004 http://www.britannica.com/eb/article?eu=46083 access date: 23.03.2004

[43] Christian Reus-Smit, op. cit. p.519.

system as it belongs to the people, and can be cognizably asserted on the people's behalf only where the government conforms to the right to political participation; therefore, measures to implement democratic rights, undertaken by foreign states collectively and/or individually, need not respect the sovereign prerogatives of governments that violate those rights.[44]

Since the late 1980s challenges to the state sovereignty evident in shifts to a more multilateral and interventionist global environment have altered the context in which the ethics and the politics of international relations debated. As humanitarian concerns increasingly infect the normative keystones of international community, so the long standing tension between sovereignty and human rights is being recast.[45]

International law is still concerned with the protection of sovereignty; but, in its modern sense, the object of protection is not "the power base of the tyrant who rules directly by naked power or through the apparatus of a totalitarian political order" [46] , but the ongoing capacity of a population freely to express and effect choices about the policies of its governors. Reisman gives the examples of Rhodesia and China to support this view. The unilateral declaration of independence by the Smith Government in Rhodesia, according to him, was not an exercise of national sovereignty but a violation of the sovereignty of the people of Zimbabwe. The Chinese Government's massacre in Tiananmen Square to maintain an oligarchy against the wishes of the people was a violation of Chinese sovereignty.

The need to enforce human rights protection exposes a tension between two fundamental but conflicting UN Charter principles: the principles of state sovereignty and non-intervention, embodied in Articles 2(4) and 2(7) of the Charter; and that of human rights protection and humanitarian intervention, incorporated into the preamble, Articles 1(3), 13, 55, 56, 62, 68, and 76(c) of the Charter. Enforcing human rights through the UN human rights regime is problematic primarily because states have chosen, by and large, to cling to an old-fashioned conception of state sovereignty and

[44] Gregory H. Fox & Brad R. Roth, "Democracy and International Law", Review of International Studies, Vol. 27, 2001, p.336

[45] Ian Holliday, "When is a Cause Just?" Review of International Studies, Vol. 28, 2002, p.558.

[46] Michael Reisman, op. cit., p.872.

because UN enforcement mechanisms were designed to deal with interstate rather than intrastate conflicts.[47] These issues will be discussed later in this part.

C. Human Security

Human security means "the security of people; their physical safety, their economic and social well-being, respect for their dignity and worth as human beings, and the protection of their human rights and fundamental freedoms". [48] Human security is a newly developed concept. The growing recognition worldwide that concepts of security must include as well as states has marked an important shift in international thinking during the past decade.

1994 United Nations Human Development Report, entitled New Dimensions of Human Security, offered a model that incorporated seven broad categories of security problematic: economic, environmental, personal, community, health, political and food. For the purposes of this study the definition of human security is done by Thomas and Tow with three interlocking features; first, it entails recognizing that trans-national threats to international norms arising from inadequacies in internal state systems make individuals and groups within states more in danger. Second, it emphasizes that states and individuals facing such dangers often cannot address them effectively on their own. And lastly these states and people require some form of international intervention to gain freedom from fear.[49]

The internalisation of human security (and human rights) leaves the state vulnerable against international claims of human rights violations and humanitarian intervention. The rhetoric that state security can be maintained at the expense of human security and thus "human security should be given due priority, erodes the Westphalian

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[47] W. Andy Knight, The Changing Human Rights Regime, State Sovereignty, and Article 2(7) in the Post-Cold War Era, in Abiodun Williams, José Alvarez, Ruth Gordon, and W. Andy Knight Article 2(7) Revisited, The Academic Council on the United Nations System, Reports and Papers 1994, No. 5, Canada-1994.

[48] International Commission on Intervention and State Sovereignty, op. cit., p.15.

[49] Nicholas Thomas and William T. Tow, "The Utility of Human Security: Sovereignty and Humanitarian Intervention", Security Dialogue, Vol.33 (2), 2002, p. 178.

system of non-interference in domestic affairs".[50] Bjorn Moller calls this a new world order in which "international politics is replaced by domestic politics at a global scale"[51]. In contemporary international politics, states are considered as legitimate only as long as provide the necessary human rights protection and justice to their citizens. And their sovereignty depends on their legitimacy. For that reason "a direct link between legitimate statehood and rightful state action and the representation of individual's political interests and the protection of human rights"[52] exists. Cebeci notes that this actually refers to a new understanding of state sovereignty, which regards the state as an important unit but not as an exclusive and unchallenged entity.[53]

II. Use of Force in International Law

This chapter focuses on the use of force in international law. The first section deals with the principle of non-intervention. It stars with the definition of the principle in historical evolution, and then analyse the Article 2(7) of the UN Charter. The second section deals with the treaties and documents related to use of force. This part mainly focuses on Article 2(4) of the UN Charter. Article 2(4) prohibits any threat or use of force but does not explain the terms clearly. So in order to find the meanings of the terms other documents issued by UN bodies are examined. The last section deals with the treaties and documents of regional organizations. As the UN does not have an outstanding army, the regional organizations play important role in actions where the use of force involved.

A. The Principle of Non-intervention and Use of Force

The complementary principle of state sovereignty in international law is non-intervention. This principle provides that no state should be subject to interference in its internal affairs. This follows directly from the assumption that each state is a sovereign

[50] Bjorn Moller, "National, Societal and Human Security: General Discussions with a Case Study from the Balkans", in What Agenda for the Human Security in the 21st Century (First International Meeting of Directors of Peace Research and Training Institution- Proceedings), UNESCO, Paris-2001, p.46.

[51] Bjorn Moller, ibid.

[52] Christian Reus-Smith, op. cit., p.530.

[53] Münevver Cebeci, "The Concept of Human Security and the European Union", in Muzaffer Dartan & Münevver Cebeci (Ed.) Human Rights Education and Practice in Turkey in Process of Candidacy to the EU, Marmara University European Community Institute Publication, Istanbul-2002, p. 337.

actor capable of deciding its own policies and independence. The principle of non-intervention is embodied in the Charter of the United Nations where severely restricts the right to intervene in the domestic jurisdiction of states. The prohibition was strengthened in General Assembly Resolution 2625 (1970). In this document non-intervention is depicted as one of the 'Principles of International Law concerning Friendly Relations among States'. This section analyses these documents together with others in order to explore the outer limits of the principle, therefore these limits will be used in the framework of humanitarian intervention.

1. The Principle of Non-intervention

The principle of non-intervention can be said to derive from state sovereignty. If a state has a right to sovereignty, this implies that other states must respect this right by refraining from interfering in the internal and external affairs of that state. The principle is of western origin, arising out of the Westphalia agreement in 1648, which laid the foundation for the European order of sovereign states. Non-intervention, sovereignty and the legal equality of states have traditionally been regarded as the three basic rules specifying 'the accepted and expected forms of behaviour in relations between states'.[54]

The principle traditionally means that "governments can attempt to influence each other's behaviour only through established diplomatic channels". Governments cannot seek to expand influence by a direct appeal to citizens of another country, by occupation, or by using home territory as a base for opposing another regime. Non-intervention is not the same as non-involvement. Cooperation between governments for political, economic and social interests including such diverse areas as increasing military cooperation, trade arrangements, or seeking to limit narco-trafficking is not prohibited by this principle, even though such activities usually impinge on national sovereignty.

The principle of non-intervention protects the principle of sovereignty, but at the same time the principle of non-intervention limits the principle of sovereignty. Oliver

[54] John Funston, "Asean and the Principles of Non-intervention: Practice and Prospects,", in David Dickens & Guy Wilson-Roberts (Eds.), Non-intervention and State Sovereignty in Asia-Pacific, Centre for Strategic Studies Publication, Wellington-2000, p.10

Ramsbotham and Tom Woodhouse first describe the external sovereignty of any one state being limited by the internal sovereignty of every other state:

> The non-intervention norm … is often described as the other side of the coin of sovereignty. This is somewhat misleading, as can be seen by comparing the right to wage war, long regarded as constitutive of sovereignty (its outward manifestation) with the principle of non-intervention, also seen as constitutive of sovereignty, only this time a manifestation of its inner integrity … The non-intervention norm is in this sense a *constraint on* sovereignty.[55]

Non-intervention is laid down as a constitutional principle of the UN Charter. It is one of the principles of Article 2 which can be defining as a fundamental rule. Because of this status Article 2(7)[56] is a rule addressed to the UN organs, directing them to respect the sphere of jurisdiction of the states affected by this provision. Because of the wording of the article Abi-Saab thinks that the Charter does not mention the principle of Non-intervention directly, but only in the particular context of Article 2(7), which prohibits intervention by the Organization "in matters which are essentially within the domestic jurisdiction of any State".[57] In other words, the Charter did not expressly address the hypothesis of intervention by a State into affairs of another state. It must be pointed out, however, that even if this opinion is correct there are other provisions in the Charter which seem to indicate that the member states do have a duty of non-intervention which goes beyond that which follows from the more prohibition of the use of force. So Article 2(1)[58] confirms the principle of the sovereign equality of all member

[55] Oliver Ramsbotham & Tom Woodhouse, Humanitarian Intervention in Contemporary Conflict; A Reconceptualization, Polity Press, Cambridge-1996, p.34-35.

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

[57] Georges Abi-Saab, "Some Thoughts on the Principle of Non-intervention", in Karel Wellens (Ed.) International Law:Essays in Honour of Eric Suy, Martinus Nijhoff Pub., the Hague-1998, p.227.

[58] Article 2(1): The Organization is based on the principle of the sovereign equality of all its Members.

states and Article 1(2)[59] that of equal rights and independence of peoples; it can be argued that principle of non-intervention can flow from these provisions.

Ermacora argues that Article 2(7) of the Charter contains three rules: The first is addressed directly to the organs of the UN, instructing them to respect 'domestic affairs'; the second is directed primarily to the members of the UN, stating that they should not submit to the UN a request for a dispute settlement concerning questions of domestic jurisdiction; and third a clear limitation of the reserved domain in relation to measures involving the use of force covered by Chapter VII of the Charter.[60] According to him the first rule causes the great problems. The rule of Article2(7) is merely a detail of the general rule of non-intervention; it is to be understood as "a delimitation of competence between the state and the organs of the UN".

Measures taken by UN organs which resemble action under Chapter VII without, however, having a valid legal basis in that Chapter are impermissible. Ermacora argues that Humanitarian Interventions undertaken by UN member states are not affected by the clause of Article2(7) of the Charter. Their legality has to be determined under general international law.[61]

The provision in the Charter is too broad. In order to clarify the principle of non-intervention under the UN Charter, one should also examine other documents such as resolutions. The General Assembly resolutions are not legally binding but show us the general understanding among the members of the UN. The first detailed formulation of the principle of non-intervention is Resolution 2131[62], which was adopted by the

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[59] Article 1(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

[60] Felix Ermacora, "Article 2(7)", in Bruno Simma (Ed.), The Charter of the United Nations: A Commentary, Oxford University Press, Oxford-1994,p.149.

[61] Felix Ermacora, op. cit., p.150.

[62] The Resolution starts as follows:

> No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are condemned.

UN General Assembly Resolution 2131(XX), 21.12.1965, electronic version, http://www.un.org/documents/ga/res/20/ares20.htm access date: 07.03.2004

General Assembly in 1965. But the famous example is the Friendly Relations Declaration.[63] The principle is stated in its classic modern form as follows:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are in violation of international law.
>
> …
>
> No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the sub ordination of the exercise of its sovereign rights and to secure from its advantages of any kind.[64]

The second part shows that the declaration goes on to make it clear that it is not only military intervention, but any form of intervention whatever, is prohibited.

A further and more detailed elaboration of the concept was adopted in 1981 by the General Assembly Resolution 36/103[65], which is known as the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States. Vaughan Lowe argues that in addition to usual assertion of the duty of non-intervention and the right of self-determination, it prescribes "a striking series of more specific duties which went far beyond the traditional boundaries of the principle".[66] For example it imposes duties such as "free access to information and develop fully their

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[63] For the legal character of the Declaration please read, Ian Sinclair, "The Significance of the Friendly Relations Declaration", in Vaughan Lowe & Colin Warbrick (Eds.) The United Nations and the Principles of International Law, Routledge, London-1994, pp.1-32.

[64] UN General Assembly Resolution 2625(XXV), 24.10.1970, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, electronic version, http://www.un.org/documents/ga/res/25/ares25.htm access date: 07.03.2004.

[65] UN General Assembly Resolution 36/103, 09.12.1981, Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, electronic version, http://www.un.org/Depts/dhl/res/resa36.htm access date: 07.03.2004.

[66] Vaughan Lowe, "The Principle of Non-intervention: Use of Force" in Vaughan Lowe & Colin Warbrick (Eds.) The United Nations and the Principles of International Law, Routledge, London-1994, p.69.

system of information or mass media", or "duty of a State not to use its external economic assistance program as instruments of political pressure against another State". This declaration was opposed by most developed States.

The principle of non-intervention was also subjected to the international litigation. In the 'Corfu Channel' case, the International Court of Justice denounced any pretended right to intervention in international law: whatever the defects in the organisation of international society, respect for the principle of territorial sovereignty was seen as one of the essential bases in international relations.[67] The Court condemned the British minesweeping operation in Albanian territorial waters as an unlawful act of intervention. The most important contribution of the International Court of Justice on the principle is the 'Nicaragua case'. The judgement was meant to be binding on the United States; it is not an advisory opinion, it is a categorical judgement against the United States. The opinion of the majority is to be found within the paragraphs 205 and 241 of the judgement. One of the essential findings of the judgement was that the United States, by

> Training, arming, equipping, financing and supplying the Contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted against the Republic of Nicaragua in breach of its obligations under customary international law not to intervene in the affairs of another state. It is a clear breach of the principle of non-intervention.[68]

The court also consider whether there could be justifications for the intervention which would be legally compelling. The Court could not countenance providing aid to an opposition group, even if a request had been made. It went on to note:

> Indeed it is difficult to see what would remain of the principle of non-intervention in international law if the intervention already allowable at the request of the government of the state were also to be allowed at the request

[67] International Court of Justice, Corfu Channel case (United Kingdom v. Albania) Merits, Judgment, ICJ Reports, 1949, p.35.

[68] International Court of Justice, Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, Judgment, ICJ Reports, 1986, p.14

> of the opposition. This would permit any state to intervene at any moment in the internal affairs of any other state.

The message from the International Court of Justice to the United States is clear: intervention is unlawful.[69]

The prohibition on intervention is not taken as absolute by the international community today. Collective actions under the authority regional organizations such as ECOWAS, OAS or under authority of the UN can be considered as preferable today. But unilateral actions are subject to the principle of non-intervention. This subject will be discussed in coming sections.

2. The Relation between the Principle of Non-intervention and Use of Force

The principle of non-intervention was established long before the prohibition of the use of force. While the roots of the principle of non-intervention reached to Westphalia, the prohibition of the use of force gained grounds in 20th century. Kellog-Briand pact was the first instrument that prohibits use of force.

The United Nations Charter, although reinforcing non-intervention and state sovereignty, included an "escape clause" of sorts. Under Chapter VII, Article 39 of the Charter, the Security Council is given complete authority to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." The range of enforcement mechanisms that the Council can employ ranges from diplomatic and economic sanctions to the use of military force.

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[69] The judgement was heavily criticized by the American International Lawyers: Francis A. Boyle, Thomas M. Franck, Gordon A. Christenson, Antony D'Amato, Richard Falk, Tom J. Farer, and Michael J. Glennon expressed their view in a special section of the American Journal of International Law entitled "Appraisal of Nicaragua v United States", AJIL, Vol.81, No.1,1987; For a view in favour please see: Antony Carty, "Intervention and the Limits of International Law" in Ian Forbes & Mark Hoffman (Eds.) Political Theory, International Relations and the Ethics of Intervention, St. Martins Press, London-1993, pp.32-42. Mendelson also believes that the Judgment is credible in the eyes of the legal community, Maurice Mendelson, "The Nicaragua Case and Customary International Law", in W. E. Butler (ed.) The Non-Use of Force in International Law, Marinus Nijhoff Publishers, Dodrecht-1989, pp.85-99.

The Security Council's power is apparently not boundless, given that Article 24 explicitly states that the Council is to act in accordance with the principles and purposes of the organization. One of those principles is Article 2(7), which provides that nothing in the Charter shall authorize the United Nations to intervene in matters that are essentially within the domestic jurisdiction of any state, or shall require members to submit such matters to settlement under the present Charter. As Ruth Gordon notes, for several reasons, however, this principle may not be a useful restraint on many recent Security Council actions, principally because it contains one exception, to intelligence that it shall not prejudice the application of enforcement measures under Chapter VII.[70] This exception was deliberately inserted to ensure that declarations of domestic jurisdiction could not be used to impede Security Council efforts to maintain or restore international peace and security.

B. Treaties and Documents relating to Use of Force

Use of force is primarily analysed in this section. Starting with the provisions related to use of force in the Charter of the UN, the section analysis all major documents on this subject matter. The second part examines the treaties and documents of regional organizations.

1. United Nations Treaties and Documents

The UN adopted several documents and resolutions but the Charter of the UN is found at the heart of the subject. The UN Charter changes the tradition in the use of force. It outlawed not only wars but also every type of use of force. This subsection first focused on the Charter of the UN then other landmark documents.

a. United Nations Charter

Article 2(4) is the primary provision of the Charter in the concept of the use of force. Its predominant significance has been emphasized by the authors and labelled as

[70] Ruth Gordon, Article 2(7) Revisited: The Post Cold-War Security Council, in Abiodun Williams, José Alvarez, Ruth Gordon, and W. Andy Knight Article 2(7) Revisited, The Academic Council on the United Nations System, Reports and Papers 1994, No. 5, Canada-1994.

"the corner stone of peace in the Charter".[71] By this provision the use of force is prohibited in general, dissimilar from the previous documents which outlawed only war. The use of force in international relations includes war. But the prohibition here transcends war and covers also forcible measures short of war. This constitutes a considerable improvement compared to previous legal order, Briand-Kellog Pact.[72] On the other hand, the use or threat of force is abolished in Article 2(4) only in international relations of member states. Intra-state clashes therefore are out of the reach of the Charter's provision.

The central idea of Article 2(4) is that states should stay out of each other's way. Sovereign separateness is the essence of the Charter's rule; "each nation must keep its hands off every other nation when it comes to the use or threat of force".[73]

Article 2(4) is the key provision but it is not the only one. It should be analysed together with Articles 39[74], 51[75], and 53[76]. Certain terms like 'use or threat of force',

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[71] Article 2(4): All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations

[72] For the detailed information for the historical evolution of Article 2(4) see: Belatchew Astrat, Prohibition of Force under the UN Charter, Iustus Förlag, Uppsala-1991, pp.21-38; Edward Gordon, "Article 2(4) in Historical Context, Yale Journal of International Law, Vol. 10, 1984-1985, pp.271- 278.

[73] William D. Rogers, "The Principles of Force, The Force of Principles", in Louis Henkin (ed) Right v. Might: International Law and the Use of Force, Council of Foreign Relations Press, New York-1991, p.102.

[74] Article 39: The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 4 and 42, to maintain or restore international peace and security.

[75] Article 51: 1.Nothing in the present Charter the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate fur regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

4. This Article in no way the application of Articles 34 and 35.

[76] Article 53: 1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on

'threat to the peace', 'breach of the peace', 'act of aggression', 'armed attack' and 'aggressive policy' are used in those articles. These terms are not explained in the Charter.

The members of the UN did not agree even on the scope of the term 'force'. The developing countries and formerly Eastern bloc countries claimed that prohibition on the use of force also includes other forms of force like political and economic coercion. But the prevailing view suggests that the term 'force' is limited to armed force.[77] This interpretation is also confirmed by the Friendly Relations Declaration which will be analysed in the next chapter. The use of force can be direct or indirect. Bu it is still unclear which forms of participation in acts of violence committed by military organised groups can be said to constitute 'force' within the meaning of Article 2(4). ICJ's Nicaragua judgment is a land mark decision relating the use of force particularly in indirect force area. It is certain from the case that; first, a breach by the assisting state of the prohibition of the use of force laid down in Article 2(4) can only be considered when the units receiving the support perpetrate the use or threat of force in another state. Secondly, not every form of assistance is capable of leading to an infringement of the prohibition of the use of force.[78]

Article 2(4) even goes beyond the actual recourse to force, whether or not reaching the level of war, and interdicts mere threats of force. In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons the International Court of Justice stated that:

> The notions of 'threat' and 'use' of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a

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the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

[77] At the San Francisco Conference, a proposal by Brasil of 6 May 1945, to extend the prohibition of force to economic coercion was explicitly rejected. Albrect Randelzhofer, "Article 2(4)", in Bruno Simma (Ed.), The Charter of the United Nations: A Commentary, Oxford University Press, Oxford-1994, p.112.

[78] International Court of Justice, Case concerning Military and Paramilitary Activities in and against Nicaragua, op. cit., p.119, para.228.

> given case is illegal – for whatever reason – the threat to use such force will likewise be illegal.[79]

If a state declares its readiness to use force in conformity with the Charter, this is not an illegal 'threat' but a legitimate warning and reminder. In addition to this, a threat of force must not be confused with an ultimatum.

The addressees of the prohibition are the members of the UN. Article 2(4) starts with "all members…" so members of the UN are obliged to act in accordance with this provision of the Charter. The other side of the dispute can be a country which is not a member of the UN, or a state which is not even recognized by the previous state.

The territorial integrity and the political independence are the two specific objectives against which the use or threat of force is prohibited under Article 2(4). The use of force within the meaning of these two phrases not only occurs when a state's territorial existence or the status of its political independence is altered or abolished. The two modes of the use of force cover any possible kind of trans-frontier use of armed force. It has been suggested that "the use of force within the boundaries of a foreign state does not constitute a violation of its territorial integrity, unless a portion of the State's territory is permanently lost".[80]

The correct interpretation of Article 2(4) is that any use of inter-State force by member states for whatever reason is banned, unless explicitly allowed by the Charter. The Court pronounced in its Nicaragua judgment that Article 2(4) articulates the 'principle of the prohibition of the use of force' in international relations.

The UN Charter also provides exceptions to the prohibition of the use of force. These are: a) Measures against former enemy states, b) Security Council enforcement measures and c) Self-Defence. The provision for the former enemy states, together with Article 107, have become outdated, since all former enemy states now UN members.

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[79] International Court of Justice, Advisory Opinion on the Legality of the use by a State of Nuclear Weapons in Armed Conflict, 8 July 1996, electronic version, http://212.153.43.18/icjwww/icases/ianw/ianwframe.htm access date: 11.03.2004

[80] Yoram Dinstein, War, Aggression and Self-Defence, Third edition, Cambridge University Press, Cambridge-2001, p.81.

But the two other provisions are still in force and at the centre of the arguments. These exceptions will be discussed in coming sections.

A couple of special problems about the prohibition of the use of force had arisen since the Charter; 'Wars of National Liberation', 'the So-called Brezhnev Doctrine', 'Protection of Nationals Abroad' and 'Humanitarian Intervention' are the topics of discussion in this period. Wars of national liberation by peoples under colonial or racist regimes or other forms of alien domination were claimed to be as lawful as the support, including the use of force, given to these peoples by third states.[81] This was part of Soviet international law doctrine and gained support from the developing countries. The main argument is that the colonialism may be considered "a permanent armed attack, against which individual and collective self-defence is allowed".[82]

The so-called Brezhnev doctrine is another Soviet attempt to enlarge its control area. According to this doctrine it was not only a right but the duty of socialist countries to intervene, if necessary by force, in other socialist countries whenever, as a result of either external influences or internal developments, the latter's socialist achievements were endangered.[83]

Protection of nationals abroad is another problematic issue. Starting with Belgian-American rescue operation in Congo the governments of several western states have on various occasions expressed the view that Article 2(4) does not prohibit the use of armed force in order to rescue a state's own nationals whose lives or health are endangered in a foreign state, provided that the latter is 'not able or not willing to provide' the required protection.[84] Western authors supported this expression and advocate a right of states to protect by military means the life and health of their own

[81] Michael Reisman, "Criteria for the Lawful Use of Force in International Law", Yale Journal of International Law, Vol.10, 1985,p.280.

[82] Albrect Randelzhofer, op. cit., p.121.

[83] The interventions in Soviet block were done with this justification. The famous intervention is Czechoslovakia (1968). Although it was justified by 'state's consent', the Soviet representative, in the Security Council, stressed on the 'socialist sphere of collaboration'. Stuart Ford, "Legal Processes of Change: Article 2(4) and the Vienna Convention on the Law of the Treaties", Journal of Armed Conflict Law, Vol. 4, 1999, p.89.

[84] This expression is used in several cases like Grenada (1983), Tehran Hostages crisis (1980), Israeli operation at Entebbe (1976) and Belgian-American operation at Stanleyville (1964), by the US representatives in the Security Council.

nationals.[85] Some authors argued that the scale of the force in this kind of operations too small to affect the territorial integrity and political independence of the state in question and therefore, does not infringe Article 2(4).[86] Yoram Dinstein applied Sir Humphrey Waldock's criteria[87] for the use of force by individual states to the cases of protection of nationals abroad and concluded that Entebbe operation of Israel best fitted to the conditions and it is legitimate under self-defence.[88] Others argued that according to the Charter any unilateral use of force is admissible exclusively in response to an armed attack. An attack on nationals abroad can in "no way be equated with an armed attack against the state itself".[89] Brownlie does not believe that the protection of nationals is accepted as a justification for the use of force. According to him, in practice the issue is rarely faced in its pure form.[90]

b. UN Treaties & Documents

i. Vienna Convention on the Law of Treaties (1969)

Article 53 of the Vienna Convention on the Law of Treaties contains provision relating to *jus cogens* which has particular importance in the prohibition of use of force in international law. Article 53 of the Convention is as follows:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as

[85] Richard B. Lillich, "Forcible Self-Help by States to Protect Human Rights", Iowa Law Review, Vol.53, 1967-1968, pp.325-351.

[86] Rosallyn Higgins, "Intervention and International Law", in Hedley Bull (ed.) Intervention in World Politics, Clarendon Press, Oxford-1984, p.39.

[87] 1. An imminent threat of injury to nationals

2. A failure or inability on the part of the territorial sovereign to protect them

3. Measures of protection strictly confined to the object of protecting them against injury.

Sir Humphrey Waldock, "The Regulation of the Use of Force by Individual States in International Law", Collected Courses, Hague Academy of International Law, Vol.81(1952-II), Martinus Nijhoff Publishers, Dordrecht - 1968, p.467.

[88] Yoram Dinstein, op. cit., pp.204-207.

[89] Albrect Randelzhofer, op. cit., p.125.

[90] Ian Brownlie, "Non-Use of Force in Contemporary International Law" in W. E. Butler (ed.) The Non-Use of Force in International Law, Marinus Nijhoff Publishers, Dodrecht-1989, p.23.

> a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[91]

Article 64 of the Convention sanctioned the treaties or documents which are contrary to the provision written above:

> If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

The doctrine of international *jus cogens* was developed under a strong influence of natural law concepts. The participants of the negotiations believed that the rules of jus cogens are based on the legal conscience and moral beliefs of the mankind.[92] The prohibition of articulated in Article 2(4) of the UN Charter is part of *jus cogens*. The International Court of Justice has described the prohibition on unilateral force as a *jus cogens* norm, which is one form which no derogation is permitted even by treaty.[93] This peremptory ban on the use or threat of force does not leave any legal latitude for armed intervention on the territory of another state without the latter's consent except cases mentioned in the Charter. [94]

Stuart Ford believes that many provisions of the Vienna Convention can be said to represent customary international law. The rules on the interpretation of treaties are generally accepted as codifying customary rules. On the other hand Article 53, concerning the status of *jus cogens*, "is the most controversial provision of the Vienna Convention and the one least likely to state a customary norm".[95]

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[91] Vienna Convention on the Law of Treaties, 23.05.1969, 1155 UNTS 331 (entered into force 27.01.1980).

[92] Gennady M. Danilenko, "International Jus Cogens: Issues of Law-Making", EJIL, Vol.2, 1991, pp.42-65.

[93] International Court of Justice, Case concerning Military and Paramilitary Activities in and against Nicaragua, op. cit., para.190.

[94] Ige F. Dekker, " Illegality and Legitimacy of Humanitarian Intervention: Synopsis of and Comments on a Dutch Report", Journal of Conflict and Security Law, Vol.6, 2001, p.117

[95] Stuart Ford, "Legal Processes of Change: Article 2(4) and the Vienna Convention on the Law of Treaties, Journal of Armed Conflict Law, Vol.4, 1999, p.96.

ii. United Nations Convention on the Law of the Sea (1982)

There are certain provisions related to the use of force in UN treaties other than the UN Charter. For instance, Article 301 of the United Nations Convention on the Law of the Sea (UNCLOS) states that,

> in exercising their rights and performing their duties under this Convention, States parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of United Nations'.[96]

iii. Declaration on the Inadmissibility of Intervention (1965)

As partly explained under the section of principle of non-intervention 1965 Declaration is the first document issued by the UN General Assembly in the area of non-intervention and prohibition of the use of force. General Assembly, with this Resolution, considered "armed intervention is synonymous with aggression and, as such, is contrary to the basic principles on which peaceful international co-operation between states should be built". The Assembly declared that "No state shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another state."[97]

iv. Friendly Relations Declaration (1970)

UN General Assembly, with Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, stressed on the Charter provision about the use of force. In the preamble the Resolution states as follows:

> *Considering* it essential that all States shall refrain in their international relations from the threat or use of force against the territorial

[96] United Nations Convention on the Law of the Sea (1982) in Malcolm D. Evans, op. cit. pp. 231-336.
[97] UN General Assembly Resolution 2131(XX), 21.12.1965, ibid.

integrity or political independence of any State, or in any other manner inconsistent with the purposes of United Nations,[98]

In the body text the declaration explains the phrase written above. It states that such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as means of settling international issues. The signatory members of the UN proclaim that a war of aggression constitutes a crime against the peace, for which there is a responsibility under international law. The Declaration continues with the duty to refrain from acts of reprisal involving the use of force, the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state.

It is clear that the UN General Assembly Resolutions are not binding. But the legal status of the General Assembly declarations is questionable. Sir Ian Sinclair believes that there is no juridical distinction between a General Assembly Resolution and a General Assembly Declaration in terms of the legal status of the instrument. Law-declaring or law-developing resolution or declaration "can not be seen as an instance of State practice, but can constitute an expression of *opinio juris* contributing to the physical element".[99] So in order to find out the customary international law, only one should evidence the state practice.

v. Definition of Aggression (1974)

The UN Charter contains no explanation about the term 'aggression'. The Resolution, to which the definition of Aggression is annexed, makes it plain that the primary intention of the General Assembly was to recommend the text as a guide to the Security Council when the Council called upon to determine the existence of an act of aggression. The General Assembly, by Resolution 3314, tried to determine the term as

[98]UN General Assembly Resolution 2625(XXV), 24.10.1970, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, ibid.

[99] Ian Sinclair, op. cit., p.27.

a guideline and with this resolution again called all States to refrain from all acts of aggression and other uses of force contrary to the Charter of the United Nations.[100]

The Definition of Aggression is the most recent and most widely accepted. Some parts of the definition have been held by the International Court of Justice in Nicaragua case to mirror customary international law.

2. Treaties and Documents of Regional Organizations

The provisions related to use of force of the UN Charter are the primary part of the international law, but the treaties and documents of regional organizations have a special meaning. The state practice shows us that when force was used the intervening state tried to justify its action with the help of regional organizations in cases where the UN Security Council was not able to act because of the veto power. The best example is the United States actions which were backed by the Organization of American States. In this subsection the founding treaties and other documents of regional organisations will be examined.

a. Organization of American States

Organization of American States (OAS), was created in 1948, at Bogotá, Colombia, by agreement of Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the United States, Uruguay, and Venezuela. Another 17 states have subsequently joined. The OAS is a regional agency designed to work with the United Nations to promote peace, justice, and hemispheric solidarity; to foster economic development; and to defend the sovereignty and territorial integrity of the signatory nations.

The documents relating to the use of force were done even before the Organization of American States (OAS). The American states, joined by several European countries, condemned wars of aggression and undertook to settle all disputes

[100] UN General Assembly Resolution 3314 (XXIX), 14.12.1974, electronic version, http://www.un.org/documents/ga/res/29/ares29.htm access date: 13.03.2004.

through pacific means in 1933 Rio de Janeiro Anti-War Treaty (Non-Aggression and Conciliation).[101] 1947 Rio de Janeiro Inter-American Treaty of Reciprocal Assistance also includes a formal condemnation of war.[102]

Article 22 of the Charter of the OAS declares that, the American States bind themselves, in their international relations not to have recourse to the use of force, except in the case of self-defence in accordance with existing treaties.[103]

b. Organization of African Unity[104]

Organization of African Unity (OAU), was established 1963 at Addis Ababa, Ethiopia, by 37 independent African nations to promote unity and development; defend the sovereignty and territorial integrity of members; eradicate all forms of colonialism; promote international cooperation; and coordinate members' economic, diplomatic, educational, health, welfare, scientific, and defence policies. The OAU was, at the time, the most significant result of Pan-Africanism. The organization mediated several border and internal disputes and was instrumental in bringing about majority rule and the end of apartheid in South Africa, which in 1994 became the 53rd nation to be admitted to the organization. The OAU had a Defence Commission but this commission was amongst the least effective of Pan-African institutions. As Mazrui states, "Africa may indeed aspire to be her policeman, but she does not seem ready as yet to pay the price for it."[105]

Africa's traditional perspective on intervention is understandably stands on a large extent on the continent's ill-fated history and geopolitical situation, including: colonisation; the legacy of activities in neo-colonial and cold war era in Africa; the

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[101] Rio de Janeiro Anti-War Treaty (Non-Aggression and Conciliation), 1933

[102] Article 1: The High Contracting Parties formally condemn war and undertake in their international relations not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations or of this Treaty.

Inter-American Treaty of Reciprocal Assistance, electronic version, http://www.yale.edu/lawweb/avalon/decade/decad061.htm access date: 14.03.2004

[103] Charter of the Organization of American States, electronic version, http://www.oas.org/juridico/english/charter.html access date: 14.03.2004.

[104] Organization of African Unity was disbanded on 9 July 2002 and replaced by the African Union

[105] A. Mazrui, Towards a Pax Africana: A Study of Ideology and Ambition, Weidenfeld & Nicolson, London-1967, p.213, quoted in Clive Archer, International Organizations, Routledge, London- 2001, p.162.

complex political dynamics between African states; and Africa's political and economic weakness in the broader global context. While Africa's historical experience and geopolitical situation have largely formed the continent's primary tendency towards intervention, these new and ongoing challenges have in recent years prompted African states and institutions to move significantly away from traditional non-interventionist approaches. The most important point among these challenges has been the "phenomenon of failing states, the risks of conflict spill-over, threats to democratic processes, and abject failure to act in the face of humanitarian catastrophe".[106]

Article 4(h) of the African Union Constitutive Act[107] articulates the "right of the Union to intervene in a Member State pursuant to a decision of the Assembly of the Union in respect of grave circumstances, namely war crimes, genocide and crimes against humanity". It is worth observing that the Act makes no reference to the UN Security Council, which is the primary instrument for dealing with the type of emergencies referred to in Article 4(h) of the Act. Article 4(g) effectively torpedoes 4(h) by affirming "non-interference by any Member State in the internal affairs of another". Therefore, under the non-interference clause, a regime guilty of the type of gross human rights violations outlined in 4(h) can legally obstruct Union intervention.[108]

c. Organisation for Security and Co-operation in Europe (OSCE)

CSCE process was launched by 35 States in 1975 in Helsinki. Until 1990, it was designed as a continuous, open ended conference without any institutions. The process started as an attempt to establish a bridge between the Western and the Eastern blocs, still divided by the Cold War. It was institutionalised at the Paris Summit in 1990 parallel to the collapse of the Communist system. The Conference began to transform into a full-fledged organization at the 1992 Helsinki Summit. In 1992 the CSCE

[106] Stanlake JTM Samkange, "African Perspectives on Intervention and State Sovereignty", African Security Review Vol 11 No 1, 2002

[107] Constitutive Act of the African Union, Lome, Togo 11 July 2000, electronic version, http://www.africa-union.org/About_AU/AbConstitutive_Act.htm access date: 14.03.2004

[108] Njunga-Michael Mulikita, "The United Nations Security Council and the Organisation of African Unity: Conflict or Collaboration? ", African Security Review Vol 11 No 1, 2002

declared itself to be a regional arrangement in the sense of Chapter VIII of the UN Charter. In 1994 CSCE was renamed as Organization for Security and Co-operation in Europe. [109]

There are two landmark documents in the CSCE/OSCE process: The Helsinki Final Act and Charter of Paris. The language of Article 2(4) of the Charter is reproduced in the 1975 Helsinki Final Act, adopted by the CSCE. Refraining from the threat and use of force takes place among the principles guiding relations between the participating states.[110] Reprisals are also outlawed with this act.

Although the Helsinki Final Act does not form a treaty, the International Court of Justice cited in the Nicaragua case as evidence for the emergence of customary international law banning the use of force between states. Court stated that acceptance of a text in these terms confirms the existence of opinio juris of the participating states prohibiting the use of force in international relations.[111]

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[109] For more information please read: Michael Bothe, Natalino Ronzitti and Allan Rosas (ed.), The OSCE in the Maintenance of Peace and Security, Kluwer Law, The Hague-1997; Aslan Gündüz, Security and Human Rights in Europe, Marmara University European Community Institute Publication, Istanbul-1994; OSCE Handbook, Third Edition, OSCE Publication, Vienna-2002.

[110] The participating States will refrain in their mutual relations, as well as in their international relations in general, from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations and with the present Declaration. No consideration may be invoked to serve to warrant resort to the threat or use of force in contravention of this principle.

Accordingly, the participating States will refrain from any acts constituting a threat of force or direct or indirect use of force against another participating State.

Likewise they will refrain from any manifestation of force for the purpose of inducing another participating State to renounce the full exercise of its sovereign rights. Likewise they will also refrain in their mutual relations from any act of reprisal by force.

No such threat or use of force will be employed as a means of settling disputes, or questions likely to give rise to disputes, between them.

Conference on the Security and Co-operation in Europe, Helsinki Final Act, 1975, electronic version, http://www.osce.org/docs/english/1990-1999/summits/helfa75e.htm access date: 14.03.2004

[111] International Court of Justice, Case concerning Military and Paramilitary Activities in and against Nicaragua, op. cit., p.100, para. 189.

In 1990 Charter of Paris for a New Europe was signed and the states parties to Helsinki process renewed their pledge to refrain from the threat or use of force. This time the pledge is put under the title 'friendly relations among participating states'.[112]

3. Treaties and Documents of Collective Self – Defence Organizations

a. North Atlantic Treaty Organization (NATO)

North Atlantic Treaty Organization (NATO), established under the North Atlantic Treaty (1949) by Belgium, Canada, Denmark, France, Great Britain, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, and the United States. Greece and Turkey entered the alliance in 1952, West Germany (now Germany) entered in 1955, and Spain joined in 1982. In 1999, the Czech Republic, Hungary, and Poland joined, bringing the membership to 19. In 2004 this number reached to 26 with the accession of Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia and Slovenia. NATO maintains headquarters in Brussels, Belgium.

The treaty, one of the major Western countermeasures in the cold war against the threat of aggression by the Soviet Union, was aimed at safeguarding the freedom of the Atlantic community. Article 5 of the Washington treaty states the provision about the use of force.[113] Considering an armed attack on any member an attack against all, the treaty provided for collective self-defence in accordance with Article 51 of the United Nations Charter.

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[112] In accordance with our obligations under the Charter of the United Nations and commitments under the Helsinki Final Act, we renew our pledge to refrain from the threat or use of force against the territorial integrity or political independence of any State, or from acting in any other manner inconsistent with the principles or purposes of those documents. We recall that non-compliance with obligations under the Charter of the United Nations constitutes a violation of international law.

Conference for Security and Co-operation in Europe, 1990 Summit, Charter of Paris for a New Europe, 1990, electronic version, http://www.osce.org/docs/english/1990-1999/summits/paris90e.htm access date: 14.03.2004

[113] Article 5. The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Its purpose was to deter a Soviet military attack in Western Europe and to defend Europe from the attack. De Wet argues that from NATO's activity in former Yugoslavia one can conclude that "the organization's functions have expanded to include conflict and crisis management within neighbouring countries".[114] This view is based on also NATO's Declaration on Peace and Co-operation. The members of NATO have unanimously accepted that the risks to its security should be more broadly defined. The core purpose of the alliance remained collective defence, but the security threat was not related to massive military attack anymore.[115]

When acting in self-defence, NATO would still enjoy the authority of the right of individual or collective self-defence under Article 51. However, in the case of 'non self-defensive actions', like those undertaken by the Implementation Force for Bosnia, would clearly require Security Council authorization under Article 53.[116]

b. Warsaw Pact

Warsaw Pact was an alliance set up under a mutual defence treaty signed in Warsaw, Poland, in 1955 by Albania, Bulgaria, Czechoslovakia, East Germany, Hungary, Poland, Romania, and the Soviet Union. The organization was the Soviet bloc's equivalent of the North Atlantic Treaty Organization. Initiated as an alliance made necessary by the remilitarization of West Germany under the Paris Pacts of 1954, the treaty was binding for 20 years but would lapse in the event of a general European collective security treaty.

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[114] Erika De Wet, "The Relationship between the Security Council and Regional Organizations during Enforcement Action under Chapter VII of the United Nations Charter", Nordic Journal of International Law, Vol.71, 2002, p.8.

[115] Declaration on Peace and Cooperation issued by the Heads of State and Government participating in the meeting of the North Atlantic Council (including decisions leading to the creation of the North Atlantic Cooperation Council (NACC)) "The Rome Declaration", 8.11.1991, electronic version, http://www.nato.int/docu/basictxt/b911108b.htm access date: 20.03.2004.

[116] Mary Ellen O'Connell, "Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy", Columbia Journal of Transnational Law, Vol. 36, 1998, p.484. However, De Wet argues that the UN Security Council cannot authorise NATO to use of force in the former Yugoslavia because, none of the successor states of former Yugoslavia are members of NATO, then the NATO presence in those countries is contrary to the UN Charter because it is out of area.
Erika De Wet, op. cit., p.9.

Article 1[117]of the Pact states the principle of non-intervention. This rule is a general acceptance of the rule according to the UN Charter. The forth article refers to the Article 51 of the UN Charter. According to the Article 4 when an armed attack occurs, all member states shall render the states attacked immediate assistance including the use of armed force.[118]

In practice the application of this provisions were questionable. In 1968 the organization sent forces to occupy Czechoslovakia after that country began to take steps toward democratization. Together with so called Brezhnev doctrine Warsaw Pact contributed to the survival of the Communist regimes. The 1989 collapse of the Communist governments in Eastern Europe made the treaty superfluous, as the new governments repudiated their former ally, the Soviet Union. The Warsaw Treaty Organization dissolved in June, 1991.[119]

c. Western European Union and the European Union

Western European Union (WEU) was set up in Brussels in 1955 as a defensive, economic, social, and cultural organization, consisting of Belgium, France, Germany, Great Britain, Italy, Luxembourg, and the Netherlands; Portugal and Spain became members in 1988, and Greece joined in 1995. After France had refused to ratify a treaty providing for a European Defence Community, the WEU was created as a substitute solution embodied in the Paris Pacts. Since Western military cooperation had been dominated by the North Atlantic Treaty Organization (NATO) and Western economic

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[117] Article 1. The contracting parties undertake, in accordance with the Charter of the United Nations Organisation, to refrain in their international relations from the threat or use of force, and to settle their international disputes by peaceful means so as not to endanger international peace and security.

Treaty of Friendship, Co-Operation and Mutual Assistance (Warsaw Pact), 1955, *Soviet News*, No. 3165 (May 16, 1955), pp. 1-2 reproduced in Internet Modern History Source Book, Fordham University, http://www.fordham.edu/halsall/mod/1955warsawpact.html access date: 27.03.2004

[118] Article 4. In the event of an armed attack in Europe on one or several states that are signatories of the treaty by any state or group of states, each state that is a party to this treaty shall, in the exercise of the right to individual or collective self-defence in accordance with Article 51 of the Charter of the United Nations Organisation, render the state or states so attacked immediate assistance, individually and in agreement with other states that are parties to this treaty, by all the means it may consider necessary, including the use of armed force. The states that are parties to this treaty shall immediately take council among themselves concerning the necessary joint measures to be adopted for the purpose of restoring and upholding international peace and security.

[119] The Columbia Electronic Encyclopaedia, 6th ed., 2003, Columbia University Press.

coordination by the European Economic Community and later the European Free Trade Association, the primary function of the WEU was to supervise the rearmament of Germany, as provided for under the Paris Pacts.

Article V of the modified Brussels Treaty states the provision related to the use of force in case of self-defence. According to the article when one of the parties attacked in Europe other parties afford all military and other aid and assistance in their power.[120] The use of force is limited to the cases of self-defence and UN Security Council's authority is affirmed along with the reporting mechanism in Article VI. This provision, like the provisions in the treaties of other collective self-defence organizations, based its legality on the Article 51 of the UN Charter. The mechanism foreseen in the modified Brussels Treaty is quite different from the mechanism built in NATO's Washington treaty. The wording of the Article 5 of the Washington treaty includes the phrase "such action as it deems necessary" but Article V of the Brussels treaty does not contain any clause as such. This means that the use of force in NATO is not an automatic mechanism. Together with Article 9 NATO system is based on a centralised implementation structure and recommendations from Defence Committee is needed to enforce counter measures.[121]

Under Treaty on European Union (the Maastricht Treaty 1992), the WEU was envisioned as the future military arm of the European Union (EU); it remained institutionally autonomous. In the Declaration of the Western European Union and its Relations with the European Union and Atlantic Alliance the member states declared that "WEU would form an integral part of the process of the EU".[122] WEU member

[120] Article V: If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power.

The Brussels Treaty signed on 17 March 1948 was amended by the Paris Agreements signed on 23 October 1954.

[121] Article 9. The Parties hereby establish a Council, on which each of them shall be represented, to consider matters concerning the implementation of this Treaty. The Council shall be so organised as to be able to meet promptly at any time. The Council shall set up such subsidiary bodies as may be necessary; in particular it shall establish immediately a defence committee which shall recommend measures for the implementation of Articles 3 and 5.

[122] Declaration of Belgium, Germany, Spain, France, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom of Great Britain and Northern Ireland, which are members of the Western European

states set as their objective "to build up WEU in stages as the defence component of the European Union". In this declaration member states agreed to strengthen the role of the WEU which might lead to a common defence. In the protocol annexed to the Amsterdam Treaty 1997, the EU avails itself of the WEU to elaborate and implement decisions of the EU on the humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking.[123]

In 1999 Cologne European Council of the Heads of States and Governments the WEU was described as an organisation which had completed its purpose. But the alliance remained the foundation of the collective defence of its member states.[124] It means that the institutional structure of the WEU is no longer exists. But the Brussels treaty and the provisions relating to the use of force are still in force.

As to summarise the EU's position in actions in which use of force is involved, Article 11 of the Treaty on European Union sets out the objectives of Common Foreign and Security Policy and Article 17 describes the so-called Petersberg missions as the main framework of the common European defence policy. Article 11 speaks about 'common values', 'independence', 'peace' and 'strengthening international security in accordance with the principles of the UN Charter' but says nothing about the use of force.[125]

Union and also members of the European Union on the Role of the Western European Union and its Relations with the European Union and with The Atlantic Alliance, WEU related texts adopted at EC Summit Maastricht - 10 December 1991

[123] Declaration adopted by the WEU Council of Ministers on 22 July 1997 and attached to the Final Act of the Intergovernmental Conference concluded with the signature of the Amsterdam Treaty on 2 October 1997

[124] The Presidency Conclusions Cologne European Council 3 and 4 June 1999 Annex III Declaration of the European Council and Presidency Report on Strengthening the European Common Policy on Security and Defence

[125] Article 11: 1. The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be:

- to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter,
- to strengthen the security of the Union in all ways,
- to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders
- to promote international co-operation,

Recently, the Constitution of the EU is in the process of ratification. According to the Constitution, the tasks in which the Union may use force shall include 'joint disarmament operations', 'humanitarian and rescue tasks', 'conflict prevention', 'peace-keeping', and 'crisis management'. There is obligatory provision relating to the collective self-defence; Constitution defines the term 'closer cooperation' and the closer cooperation on mutual defence is open to all member states of the Union.[126]

As to conclude this debate, at the beginning the European Union did not have a collective Self-defence concept. The related body was the Western European Union and now the institutional structure of the WEU is defunct. However, the treaty and the obligations of collective self-defence are preserved. With the new Constitution the EU will have certain powers to use force in areas written in the text.

III. The Authority to Use Force in International Law

The second chapter focused on the prohibition of the use of force. This chapter analyses the exceptions to the prohibition of the use of force. This chapter divided into two sections; the first section deals with the exceptions within the context of the Charter of the UN. The second section examines the use of force by regional organizations.

- to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.

2. The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity.

[126] Article III-214: 1. The closer cooperation on mutual defence provided for in Article I-40(7) shall be open to all Member States of the Union. A list of Member States participating in closer cooperation shall be set out in the declaration. If a Member State wishes to take part in such cooperation at a later stage, and thus accept the obligations it imposes, it shall inform the European Council of its intention and shall subscribe to that declaration.

2. A Member State participating in such cooperation which is the victim of armed aggression on its territory shall inform the other participating States of the situation and may request aid and assistance from them. Participating Member States shall meet at ministerial level, assisted by their representatives on the Political and Security Committee and the Military Committee.

3. The United Nations Security Council shall be informed immediately of any armed aggression and the measures taken as a result.

4. This Article shall not affect the rights and obligations resulting, for the Member States concerned, from the North Atlantic Treaty.

A. Framework of the Charter of the UN

As mentioned in the previous Chapter there are two exceptions of the prohibition of use of force: self-defence and authorized use of force by United Nations. Here these two exceptions are explained.

1. Self-defence

Self-defence is referred as a 'right' in Article 51 of the UN Charter. A State subjected to an armed attack is legally entitled to resort to force.[127] Self-defence is an inherent right and closely linked to the sovereignty. In Nicaragua judgment the Court expressed the meaning of inherent right as a reference to customary international law. According to the Court, "the Charter acknowledged that self-defence was a pre-existing right of a customary nature, which is desired to be preserve".[128]

Article 51 clearly sets out self-defence as a right but there has been a debate among the writers on the scope of this right. Those who supported a wide right of self-defence argue that at the time of the conclusion of the Charter there was a wide customary international law of self-defence, allowing the protection of nationals and anticipatory self-defence. The opposite side believes that the meaning of Article 51 is clear and the right of self-defence arises only if an armed attack occurs. This right is an exception to the prohibition of the use of force in Article 2(4), so as an exception it should be interpreted narrowly.[129]

Article 51 permits self-defence exclusively when an armed attack occurs. The Charter does not contain any definition of the term armed attack. Armed attack is a type

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[127] Article 51: Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

[128] International Court of Justice, Case concerning Military and Paramilitary Activities in and against Nicaragua, op. cit., p.94

[129] The views of the two sides analysed in, Christine Gray, International Law and the Use of Force, Oxford University Press, Oxford-2000, pp.86-87.

of aggression and Aggression was defined by the UN General Assembly in 1974.[130] According to the document only a special form of aggression amounting to an armed attack justifies self-defence under Article 51. So under the UN Charter, a State is permitted to use force in self-defence only in response to aggression which is armed. The scale of the force is not important here. An armed attack need not to shape of a massive military operation, according to the Court in Nicaragua case, the sending of armed bands, groups, irregulars or mercenaries into the territory of another state may count as an armed attack.[131] Then Court held that assistance to rebels in the form of the provision of weapons or logistic or other support did not amount to an armed attack, although it could be illegal intervention.[132]

In practice, when inter-State force is engaged, both sides of the conflict generally invoke the right of self-defence. But there can be no self-defence against self-defence. So one of the parties is using force under the false deceptions of legality. In that case an illegal intervention should occur on one side or the other, a counter-intervention is permissible.[133]

Article 51 does contain neither any specific rule, criteria for the self-defence nor a balance between the force used in the attack and the force used in the self-defence. International Court of Justice, in its Advisory Opinion on the Legality of the Threat and the Use of Nuclear Weapons, stated that 'the submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law'.[134] The Court in Nicaragua judgment states that Article 51 does not contain any specific rule whereby "self-defence would warrant only measures which are proportional to the armed attack and necessary to respond it".[135] The requirement of

[130] Definition of Aggression, UN General Assembly Resolution 3314 (XXIX), 14.12.1974, ibid.

[131] International Court of Justice, Case concerning Military and Paramilitary Activities in and against Nicaragua, op. cit., p.103.

[132] International Court of Justice, Case concerning Military and Paramilitary Activities in and against Nicaragua, op. cit., p.104.

[133] Oscar Schachter, "The Lawful Resort to Unilateral Use of Force", Yale Journal of International Law, Vol.10, 1985,p.292.

[134] International Court of Justice, Advisory Opinion on the Legality of the use by a State of Nuclear Weapons in Armed Conflict, 8 July 1996, ibid.

[135] International Court of Justice, Case concerning Military and Paramilitary Activities in and against Nicaragua, ibid.

proportionality is linked to the necessity: acts done in self-defence must not exceed in manner or aim the necessity provoking them.

Yoram Dinstein adds a third condition 'immediacy' to accompany the two conditions of necessity and proportionality. He says that these three conditions are distilled from the yardsticks set out by the American Secretary of State, D. Webster, more than 150 years ago.[136]

Article 51 allocates a central role to the Security Council. States are under a duty to report measures taken in the exercise of the right of self-defence to the Security Council and the right to self-defence is temporary until the Security Council takes measure necessary to maintain international peace and security. The article does not necessarily require the Council to pronounce on the legality of any claim to self-defence. But sometimes the Security Council issues resolutions which made express reference to the Article 51. For example Kuwait's right to self-defence was affirmed by the Security Council after the Iraqi invasion.[137]

Article 51 also imposes a duty on the States in Self-defence to report to the Security Council. Nicaragua case is an important landmark decision for this obligation. Before the Nicaragua case the reporting requirement was not always strictly observed in cases of individual self-defence. The Court held that "the absence of a report may be one of the factors indicating whether the state in question was itself convinced that it was acting in self-defence".[138] Since the Nicaragua case states on the whole do comply with the Article 51 obligation to report actions in self-defence. It is certain that states have taken the message of the Court very seriously that failure to do this will weaken any claim to be acting in self-defence.[139]

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[136] Yoram Dinstein, op. cit., p.183.

[137] Resolution 661 (1990) affirms the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter
UN Security Council Resolution 661 (1990), 06.08.1990, electronic version, http://www.un.org/Docs/scres/1990/scres90.htm access date: 17.03.2004

[138] International Court of Justice, Case concerning Military and Paramilitary Activities in and against Nicaragua, op. cit.,p.105.

[139] Christine Gray, op. cit., p.90.

Self-defence is a temporary right. As Article 51 points out, the right of self-defence continues until the Security Council has taken measures necessary to maintain international peace and security. So once the Security Council involved, there will be no longer a right to resort force in self-defence.

Self-defence can be either individual or collective. If the legitimate government of the victim state requested for assistance then other states legitimately use force to help that state. This statement is examined in Nicaragua case. The court held that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another state to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack[140].

A good example for collective self-defence is the Gulf conflict. As noted above the Security Council, with Resolution 661, referred to the inherit right of individual or collective self defence of Kuwait. But after that Security Council adopted new resolutions and impose sanctions an Iraq. So the legal status of the case was shifted from collective self-defence to collective security. And after that it became the use of force by UN authorization with Resolution 678(1990) authorizing to use all necessary means to uphold and implement Security Council Resolutions.[141]

2. The Authorized Use of Force by United Nations

The second exception to the prohibition of the use of force is the UN authorization. The aim of the drafters of the UN Charter was not only to prohibit the unilateral use of force by states in Article 2(4) but also to centralize the control of the

[140] The Court found that there had been no timely declaration by El Salvador that it was the victim of an armed attack and no declaration at all by Honduras and Costa Rica. Also none of the three had made any request for help to the USA before its forcible intervention. These factors together all showed that the USA was not acting in self-defence of three other states. International Court of Justice, Case concerning Military and Paramilitary Activities in and against Nicaragua, op. cit.,p.104.

[141] UN Security Council Resolution 678 (1990), 29.11.1990, electronic version, http://www.un.org/Docs/scres/1990/scres90.htm access date: 17.03.2004

use of force in the Security Council under Chapter VII. The Charter confers upon the Security Council only primary responsibility for the maintenance of peace and security. The drafters planned an outstanding army owned by the United Nations to use in response to threats to the peace, breaches of the peace and acts of aggression. But this idea was never realised. Article 43[142] of the Charter mainly devoted to the agreements and contributions for the UN army. But states did not conclude the agreements to provide troops for the UN army.

The Security Council, according to Article 39, determines the existence of any threat to the peace, breach of peace, or act of aggression and shall make recommendations or decide what measures shall be taken in accordance with Articles 41[143] and 42[144]. Article 41 determines the enforcement action not involving the use of armed force; the measures concerned have the character of reprisals. Article 42 determines the enforcement action involving the use of armed force and the measures have the character of war. Both enforcement actions are to be performed by the member states, in conformity with the decisions taken by the Security Council under Articles 39,41, and 42.[145]

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[142] Article 43: 1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

[143] Article 41: The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

[144] 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. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

[145] Hans Kelsen, "Collective Security and Collective Self-Defense under the Charter of the United Nations", AJIL, Vol. 42, 1948, p.786.

The collective security is quite different from the collective self-defence under Article 51. The measures of collective security taken under Chapter VII of the Charter are centralized actions of the UN, whereas the process of collective self-defence is a completely decentralized reaction against armed attack. But there is a possibility of the UN authorization in cases where an external armed attack occurs. According to Article 51, the attacked state, unilaterally or collectively, have right to resort self-defence. The Security Council by 'authorizing' them is doing nothing more than recognizing their already existing right to act. Article 51 ensures this right of defence for the situation in which "the Security Council might not able to act because of a veto by a permanent member".[146]

The UN collective security system did not function properly during the cold war period. The veto power of the five permanent members of the Security Council under Article 27(3)[147] was used 279 times between 1945 and 1985. At the beginning, the vetoing member was the USSR, then, however, this situation was changed and during the 1970s the United States replaced the USSR and became the main user of the veto mechanism. Apart from the use of veto the threat to use veto also prevented the adoption of resolutions. The action against Korea in 1950 was the only use of force authorized by the Security Council during the cold war in response to a breach of peace by a state. But the legality of the actions was questioned because of the absence of the USSR in the meetings of the Security Council.[148] The Council recommended actions by states because of the absence of any standing army under Article 43. It did not order to establish a UN force. In Resolution 84[149] Council recommended all member states providing military force and other assistance to make such forces available to a unified

[146] John Quigley, "The Privatization of Security Council Enforcement Action: A Threat to Multilateralism", Michigan Journal of International Law, Vol.17, 1996, p.270.

[147] Article 27(3): 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

[148] The absence of the USSR was a protest at the representation of China in the United Nations by Taiwan government. For detailed information about the arguments on the legality of the action please see Leo Groos, "Voting in the Security Council: Abstention from Voting and Absence from Meetings", Yale Law Journal, Vol.60, 1951, pp.210-238.

[149] UN Security Council Resolution 84 (1950), 07.07.1950, electronic version, http://www.un.org/documents/sc/res/1950/scres50.htm access date: 19.03.2004.

command under the United States, it requested the US to designate a commander, but authorized the force to use the UN flag.[150]

As noted above the Security Council was inactive during the cold war. The international community wanted to take action on certain cases. So the existing gap was tried to be filled by the General Assembly under certain conditions. Nevertheless the General Assembly is authorized to adopt only non-binding recommendations. In its 1962 Advisory Opinion on Certain Expenses, the International Court of Justice decided that the responsibility of the Security Council respecting to the maintenance of international peace and security is 'primary' rather than 'exclusive' but only the Council possesses the power to impose explicit obligations of compliance under Chapter VII.[151]

By the end of the cold war, the ideological distinctions between Eastern bloc and Western bloc were eroded. The Iraqi invasion of Kuwait let the Security Council involvement actively and jointly. The Council used its powers in several ways; ordered economic sanctions, authorized the use of force to restore peace and security in the area. This approach continued in the imposition of economic sanctions against Libya[152], Serbia[153] and Haiti[154]. It has authorized force to secure the effective implementations of measures in many cases like Iraq (1991), Yugoslavia (from 1992), Somalia (1992), Rwanda (1994), and Haiti (1994). During the cold war period the Security Council passed some 650 resolutions with an average of less than 11 per year. By contrast during 1990-93 alone, Security Council passed some 250 resolutions with an average of

[150] For further information about Korea please see, J. Craig Barker, International Law and International Relations, Continuum Press, London-2000, pp.101-106.

[151] International Court of Justice, Advisory Opinion on Certain Expenses of the United Nations, Summary, 20.07.1962 electronic version, http://212.153.43.18/icjwww/idecisions/isummaries/iceunsummary620720.htm access date: 19.03.2004.

[152] UN Security Council Resolution 748(1992), 31.03.1992, electronic version, http://www.un.org/documents/sc/res/1992/scres92.htm access date: 19.03.2004.

[153] UN Security Council Resolution 757(1992), 30.05.1992, electronic version, http://www.un.org/documents/sc/res/1992/scres92.htm access date: 19.03.2004.

[154] UN Security Council Resolution 841(1993), electronic version, http://www.un.org/Docs/scres/1993/scres93.htm access date: 19.03.2004.

more than 60 per year. And the use of veto power is dramatically decreased during this period.[155]

However the whole picture is not limited to the practices mentioned in the previous paragraph. The conflicts which broke out between Ethiopia and Eritrea, Armenia and Azerbaijan, Tajikistan and Afghanistan, Cameroon and Nigeria, as well as the continuation of long standing inter-state conflicts such as those between India and Pakistan, did not provoke the UN to identify an aggressor and to authorise action against it. The Security Council has not concerned itself with identifying a legal basis for such authorizations beyond a general reference to Chapter VII of the Charter. It is striking that these were all internal conflicts, with the controversial exception of the conflict in Former Yugoslavia, or at least were not traditional inter-state conflicts.[156]

The Security Council was heavily criticised by a group of countries also in the post cold war period. These are third world countries in particular, and they voiced mainly two arguments; the first one is the domination of the Council by a few states and the second one is the unfair veto held by the permanent members.[157] Reform callings for broader membership, elimination of the veto power, greater involvement by the General assembly and non-Security Council members can be seen as the request for an ideal security mechanism.

B. Use of Force by Regional Organizations

The United Nations does not have a standing army as mentioned above. In order to implement military enforcement measures the UN was forced to search for alternative means. The possible solution is the authorization of 'willing and able' states or regional organizations to execute military measures on its behalf. Article 43 does not give an answer to the question whether the Security Council may authorize regional

[155]Figures taken from Sean D. Murphy, "The Security Council, Legitimacy and the Concept of Collective Security", Columbia Journal of Transnational Law, Vol.32, 1994-1995, p.207.

[156] Christine Gray, "From Unity to Polarization: International Law and the Use of Force against Iraq", EJIL, Vol.13, 2002, pp.3-4.

[157] For the detailed analysis of the challenges to the legitimacy of the Security Council please see; David D. Caron, "The Legitimacy of the Collective Authority of the Security Council", AJIL, Vol.87, 1993, pp.552-588 (especially pages 562-566).

organizations to execute military measures on its behalf. This article only regulates the extend to which member states or regional organizations are obliged to participate in military operations of the UN. Article 53(1) determines that the Security Council shall, where appropriate, utilize regional arrangements or agencies for enforcement action under its authority.[158] If one reads this article together with Article 43 then it becomes clear that the Article 43 agreements could also be concluded between the Security Council and regional organizations.

Article 53(1) does not describe what a regional organization is. So in order to examine the meaning of regional organization one should look to Article 52(1), the only article which tries to describe the framework of the term.[159] It can be understood from the text that, a regional organization should have the task of taking care of the peaceful settlement of disputes within its own region. The activities of regional organizations are limited to their own regions and amongst their own members. The Organization of American States, the Organization of African Unity and the League of Arab States are examples of regional organizations.

Regional organizations should be distinguished from regional defence organizations. The Organization for Security and Cooperation in Europe (OSCE) considers itself to be such a regional organization. However, the NATO apparently does not. Regional defence organizations such as NATO has its sole purpose of protection against external aggression. Whereas regional organizations are governed by Chapter VIII of the Charter, defence organizations are governed by Article 51 of the

[158] Article 53. 1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state

[159] Article 52. 1. Nothing in the present Charter the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate fur regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

Charter. NATO was established as a collective self defence organization in the sense of Article 51 of the Charter and not as a regional organization under Chapter VIII.[160]

Sarooshi examines the delegation by the UN Security Council of its Chapter VII powers and summarises four main effects of the application of the non-delegation doctrine. First, the Council is prohibited from delegating certain of its Chapter VII powers. Second, a discretionary power can only be delegated when the Council retains such a degree of authority and control over its delegate so that it can change the decision of its delegate at any time. Third, when powers are being delegated the limitations on the exercise of the power must be imposed on the delegate. Forth, the terms of a delegation of Chapter VII powers are to be construed narrowly.[161]

In cases where the use of force is done by regional organizations, the overall command and control must remain in the Security Council. In order to provide this certain requirements should be fulfilled. De Wet analyses the situation and stated these requirements as follows: first of all there must be a Security Council resolution explicitly authorizing the use of force. Where no such authorization exists the regional intervention would be illegal, unless it concerns with a situation of self-defence. Secondly, the resolution should specify clearly the extend, nature and objective of the military action, since broad and indeterminate language provides states with an opportunity to employ force for potentially limitless activities. And finally, Article 54 of the Charter requires a regional organization that has used force in the maintenance of peace and security to report to the Security Council. Reporting became an established procedural practise for monitoring a military operation in terms of Chapter VII of the Charter.[162]

However the state practice has evolved in varying directions. Regional 'recommendations' have been claimed to be distinct from 'enforcement action' in the

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[160] Article 5 of the Washington Treaty.

The North Atlantic Treaty, Washington D.C., 4 April 1949, electronic version, http://www.nato.int/docu/basictxt/treaty.htm access date: 20.03.2004.

[161] Danesh Sarooshi, The United Nations and the Development of Collective Security; The Delegation by the UN Security Council of its Chapter VII Powers, Clarendon Press, Oxford-1999, p.46.

[162] Erika De Wet, op. cit., pp.14-20.

Cuban missile crisis[163] and Dominican intervention. Regional intervention to put down the fighting in the West African states of Liberia and Sierra Leone has been ratified by the Council after the operations were well underway.[164] Furthermore, article 53 does not require regional peacekeeping activities to be authorised by the Security Council. The legal position is reflected in practice. The sending of an inter-African peacekeeping force to Chad in 1982 was simply brought to the attention of the Security Council.[165] A similar procedure was fallowed by the ECOWAS as regards the deployment of their peacekeeping force in Liberia.

This part tries to evaluate the terms and concepts which are essential to understand the doctrine of humanitarian intervention. The realization of the equilibrium between state sovereignty and human rights is significant in judging the necessity of humanitarian intervention. The debate on whether a hierarchy between the UN Charter principles such as principle non-intervention, the prohibition to use force in international relations, and the protection of human rights exists or not is taking place among international lawyers. The authority to use force is also an important topic especially in case where the force is used by regional organizations. State practice in the post cold war period, which is examined in the third and fourth parts of this thesis, shows the examples of the use of force by regional organizations in the absence of the UN Security Council authorization.

Next part is relating to the evolution and concept of the doctrine of humanitarian intervention and its place in international law.

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[163] Müllerson argues that the blockade of the ports or the coastline of a State by armed forces of another state is a violation of the principle of non-threat and non-use of force. Rein Müllerson, "The Principle of Non-Threat and Non-use of Force in the Modern World", in W. E. Butler (ed.) The Non-Use of Force in International Law, Marinus Nijhoff Publishers, Dodrecht-1989, p.30.

[164] Ruth Wegwood, "Unilateral Action in the UN System", EJIL, Vol.11, 2000, p.357.

[165] Danesh Sarooshi, Humanitarian Intervention and International Humanitarian Assistance: Law and Practice, Conference Report Based on Wilton Park Special Conference, 2-4 July 1993, Wilton Park Paper 86, HMSO, London-1994, p.4.

PART II

HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW

The concept of humanitarian intervention will be covered in this part of the thesis together with its definition, historical evolution and its place in the United Nations system. The scholars in favour of the doctrine of humanitarian intervention based their arguments in two sources; the first group argue that humanitarian intervention is consistent with the terms of the Charter of the UN. The second group argues that humanitarian intervention is a principle of customary international law. In this part of the thesis, the views of the first group are primarily examined. Furthermore, this part contains the investigation of the potency of humanitarian intervention under the UN Charter during the cold war era. The state practice in the cold war period may help to explain the views of the second group, but post cold war practice, which lightens the way through the legality of humanitarian intervention, will be examined in the third part.

I. Evolution of the Concept of Humanitarian Intervention

This chapter focuses on four main topics. The first section deals with the historical evolution of humanitarian intervention. Basically, the state practice in 19th and early 20th centuries is examined in this section. The second section tries to categorise the criteria for humanitarian intervention. There are several classifications for humanitarian intervention and under this section, after quoting such examples, a workable criteria is analysed in detail. The third section is about the discussions on the definition of humanitarian intervention. The opposite views of academics are taken here to conceptualise the doctrine. And the final section consists of practices of humanitarian intervention in cold war.

A. Historical Evolution

The historical evolution of humanitarian intervention is important to analyse the doctrine with its meaning today. In the period prior to the UN Charter the international law did not outlaw the use of force in international relations. For the purposes of this study, the traditional features of law in that period had two main points: a) in this period *jus ad bellum* was a generally recognized and consistently implemented right, so as a result, forcible interventions were not prohibited at all; b) fundamental human rights and freedoms, especially the freedom of religion, slowly gained international acceptance and "started to spread irresistibly all over the civilized world".[1]

In this period humanitarian intervention was seen as protection of minorities. Until the World War II, human rights practices were generally considered as exercise of the sovereign rights of states. So the protection of a state's own nationals is not a subject matter in the historical evolution of the doctrine. The state practice of the period demonstrates that it is hard to argue that the actions were done with purely humanitarian objectives. States used humanitarian intervention as a tool to interfere other state's internal affairs.

1. 19th Century

The doctrine practiced in 18th and 19th centuries was dominantly based on the rights of Christians, i.e. rights of Christians governed by 'uncivilized' Ottoman Empire. Humanitarian intervention in this period served as a tool against Turks. It was mainly done through diplomatic intercession but military intervention was also seen. In this period unilateral actions were rare; usually a number of Major Powers acted collectively under the concert of Europe with a religious impetus. The main examples are: Greek insurgency in 1821-1827, Syria 1860-1861.[2]

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[1] Gabor Sulyok, "Humanitarian Intervention: A Historical and Theoretical Overview", Acta Juridica Hungarica, Vol.41, 2000, p.83.

[2] Secession of Bulgaria 1877-78, Macedonia 1903 and Bosnia and Herzegovina were also given as examples of Humanitarian Intervention but they are not taken here. These cases show the general characteristics of Greek case. European powers supported secession of Christian population of Ottoman Empire and they used humanitarian intervention and religious motives as grounds of their action. But for the rest of the world they continued their imperialism politics.

Apart from the cases that the Ottoman Empire involved, the United States' unilateral intervention to Cuba is also an important development in 19th century.

These cases recruited as examples by '*ex post factoism'*. Brownlie argues that the governments of the time did not use a legal justification[3].

a. Greece (1821-1827)

Russia had long seen herself as the defender of Orthodox Christians under the Ottoman rule. At the beginning of the insurgencies, Russia tried to intervene in favour of Greeks but other European States strongly opposed this move. Because weakening the Ottoman Empire would strengthen Russia's position in the balance of power. However, the public opinion in those countries was different from their governments. Intellectuals believed that the classical Hellenic tradition was the basis of European identification and other classes stressed on the religious factors: there were Christians in need.[4] So Philhellenic aid societies were formed and they collect and sent money to Greek insurgents. Even volunteers all over Europe went to Greece to fight against Turkish troops.[5]

The intervention was done following the rumours of extermination. The main motive of the intervention was the prevention of racial extermination in the Morea. It was believed that Ibrahim Pasha (Governor of Egypt) systematically extirpated the women and children of Morea and, to transport them to Egypt, and to re-people the Morea from Africa and Asia.[6]

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[3] Ian Brownlie, "Humanitarian Intervention" in John Norton Moore ed., *Law and Civil War in the Modern World*, The John Hopkins University Press, London-1974, p.220; but Lillich does not share this view. According to him there are a couple of evidences like treaties and resolutions stating clear humanitarian purposes. For detailed information; Richard B. Lillich, "Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives", in John Norton Moore (ed.), Law and Civil War in the Modern World, The John Hopkins University Press, London-1974, p.233.

[4] Stephen A. Garrett, Doing Good and Doing Well An Examination of Humanitarian Intervention, Praeger Publishers, Westport-1999, p.10.

[5] Martha Finnemore, Constructing Norms of Humanitarian Intervention, in Peter Joachim Katzenstein (ed.), The Culture of National Security: Norms and Identity in World Politics, Columbia University Press, USA-1996, p.163.

[6] This scenario was rejected by both Ibrahim Pasha and Ottoman Government.

In the midst of this public pressure and unilateral action threats from Russia, British and French governments together with Russia signed London Treaty (1827) [7]. The Treaty set the grounds on which they justified their intervention. The major concern was 'all the disorders of anarchy' caused by the struggle, that impeded the commerce of the states of Europe and gave opportunity to pirates, 'which not only expose the subjects of the High Contracting Parties to grievous losses, but also render necessary measures which are burthensome for their observation and suppression'[8]. The second reason mentioned in the Treaty is the invitation of France and Great Britain by Greeks as mediator with the Ottoman Empire. Although the Treaty proposed Greek autonomy over that part of territory, Turks strongly rejected this proposal[9]. In October 1827 the allied forces sent an armada. Battle of Navarino was taken place and at the end of the naval war Egyptian army was withdrawn from Morea. This finale satisfied the British government but not the Russian. Russia declared war upon Turkey on 26 April 1828 and as a result the Ottoman Empire accepted the 1827 London Treaty and Greece gained independence in 1830.

This intervention was argued as the first humanitarian intervention but it is hard to reach this judgement. First of all, the geostrategic factors were very important in this case. Russia's position and her aim to reach warm waters threaten not only Ottomans but also other European countries. Secondly, nineteenth-century conception of the term "human" is far different from the concept of the term today; whereas the massacre of Christians was a humanitarian disaster; the massacre of Muslims was not. The initial uprising at Morea "might well have been allowed to burn itself out 'beyond the pale of civilization'".[10] It was only wide scale and very visible violence against Christians that put the events on the agenda of European powers. Thirdly, intervening states, such as France and Russia, placed humanitarian reasons together with religious ones at the

[7] Treaty Between Great Britain, France, and Russia, for the Pacification of Greece, signed at London 6 July 1827, in Edward Herslest, The Map Europe by Treaty, Butterworths, London-1875, electronic version http://www.fordham.edu/halsall/mod/1827gktreaty.html access date: 03.02.2004.

Simon Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, Oxford University Press, Oxford-2001, p.29.

[8] Preamble para 1.

[9] London Treaty had a secret article about the consequences that would follow the rejection by Turkish government. But this article was published by The Times just six day after the signing of the Treaty.

[10] Martha Finnemore, ibid

centre of their concern. Fourthly, the intervention was multilateral. Multilateralism can be seen as criteria for legitimate intervention. And finally, mass publics were involved in this case. It is not certain in which level public opinion influenced the policy making in those countries but European citizen played important roles in Greek insurgency.[11]

b. Syria (1860-1861)

Syria was integral part of the Ottoman Empire starting from the 16th century till the First World War. Syria was used as a geographical term and it covered today's Lebanon, Jordan, Israel, Syria, the West Bank and Gaza. In mid 19th century Mount Lebanon (today's Lebanon) with its capital Beirut was part of Syria. The majority of the inhabitants of the mountain were Druze[12] and Maronite[13] peoples. The Druze, a distant offshoot of the Muslim Shia sect, originally constituted the largest and the most powerful community in the south of Mount Lebanon. But the Druzes had been outstripped numerically by the Maronite Christians, who had expanded south from their strongholds in the north of Mount Lebanon.

Tensions between the Druze and Maronite communities resulted in clashes of mounting severity, culminating in the conflict of 1860. Before the outbreak of fighting both sides made heavy preparations. There had been calls for extermination of Druzes among Maronite community.[14] During the conflict 11.000 Christians were killed and 100.000 were made homeless. Order was stored but this time second wave of killings started from Damascus where the population was dominantly Muslim.

The disorders in Syria led the Ottoman Sultan to despatch his Minister of Foreign Affairs to Syria with an army. Fuad Pasha reassured the Christian population in the region and distributed funds among homeless. Fuad Pasha also designated as 'Commissioner Extraordinary' and supervised the punishment of Muslims who

[11] The Greek flotilla was commanded by a British Captain in an operation against Turkish navy.

[12] For more information about Durzes please read, The Columbia Encyclopedia, sixth edition, 2003.

[13] For more information about Maronites please read, The Catholic Encyclopedia, internet edition, http://www.newadvent.org/cathen/09683c.htm access date: 01.02.2004.

[14] Salibi, Modern History of Lebanon, 1965, pp.88-89, cited in Istvan Pogany, "Humanitarian Intervention in International Law: The French Intervention in Syria Re-examined", ICLQ, Vol. 35, January 1986, p.182.

involved in actions against Maronites. At the end 100 soldiers and 50 civilian were executed including the Governor of Damascus.

On the European side news about Maronite Christians had evoked extensive annoyance in Europe. Great Britain, France and other European powers sent their ships to Syrian waters.

A Conference convoked in Paris on 31 July, attended by the Ambassadors of Great Britain, Austria, France, Prussia, Russia and Turkey, adopted a protocol incorporated in a convention signed on 5 September.[15] The first article of the Convention stated "A body of European Troops, which may be increased to 12.000 men, shall be sent to Syria to contribute towards the establishment of tranquillity". The protocol also stated that "His Majesty the Emperor of French agrees to furnish, immediately, the half of this body of Troops".

A French force was sent to the region. They arrived in the Lebanon after the Ottoman authorities had succeeded in restoring peace and security. The French soldiers dealt with humanitarian work such as building houses for homeless Christian people.[16] French troops occupied parts of Syria and French warships policed the coast from August 1860 to June 1861. They left when the agreement was reached for Christian representation in the Government.

Brownlie argues that the intervention of 1860 in Syria to prevent the recurrence of massacres of Maronite Christians provides one possible genuine example of humanitarian intervention.[17] But there are clear evidences that the facts in this case were slight different. According to a Minute of the British Commissioner to Syria (Lord Dufferin) regarding responsibility for the massacre:

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[15] Convention between Great Britain, Austria, France, Prussia, Russia and Turkey, respecting measures to be taken for the Pacification of Syria, signed at Paris, 5 Sept 1860. The relevant articles of the Convention are reproduced in Louis B. Sohn and Thomas Buergenthal, International Protection of Human Rights, Bobbs-Merrill, Indianapolis - 1973.

[16] Istvan Pagony, op. cit. p.186.

[17] Ian Brownlie, op. cit., p.221.

> "… it is an admitted fact that the original provocation proceeded from the Christians, who had been for months beforehand preparing an onslaught on the Druses, which their leaders confidently expected would terminate, if not in the extermination, at all events in the expulsion, of that race. Arms were imported in extraordinary quantities; martial assemblies were convoked in various parts of the Mountain, inflammatory missives, purporting to proceed from the spiritual chiefs of the Maronite party, were extensively circulated; a Central Committee of very questionable character was established at Beirut; and there is no reason to believe that Christians of other denominations were required, under pain of vengeance in case of their refusal, to take part in the Holy War.
>
> It would further appear that, not content with the confidence inspired by the enormous superiority that a nation of 150,000 souls possesses over a tribe scarcely numbering 30,000 persons, the Christian clergy endeavoured still further to animate the courage of their flocks, by telling them that their endeavour to attain undisputed possession of the Lebanon would be warmly countenanced by the powers of Christendom." [18]

Discussions of humanitarian intervention repeatedly place great emphasis on this case. As the historical record shows, the events were conducted mainly by Maronites and the motives of France were probably ambiguous, while the disturbances in Syria had been pacified before European intervention was authorised. The introduction of French troops in Syria can not be categorised, unconditionally, as 'intervention'. The Ottoman authorities concurred in the decision to despatch a European force, while the troops themselves were given hardly any freedom of action.

Apart from the facts written above perhaps the most important element of this case is: the occupying force did arrive under the mandate of five European Powers and departed when the mandate concluded. In the second protocol signed at the Conference 1860, the Powers declared 'in the most formal manner' that they would not seek any

[18] Minute of the British Commissioner on the Judgements proposed to be passed on the Turkish Officials and the Druse Chiefs by the Extraordinary Tribunal of Beirut. Correspondence relating to the Affairs of Syria: 1860-61 (part I).Cd, No. 2800, in Great Britain , 68 Parliamentary Papers 17, Item No. 351, Inclosure 2 (1861). Relevant parts are reproduced in Thomas Franck & Nigel Rodley, "After Bangladesh: the Law of Humanitarian Intervention by Military Force", AJIL, Vol. 67, Issue 2, April-1973, p.282.

territorial advantage, exclusive influence, or concession under the pretext of the occupation. But multilateral character of the intervention is somewhat less clear. There was multilateral consultation and agreement on the intervention plan, but the execution of the plan was essentially unilateral. Public opinion seems to have had some impact; this time on the vigour which Napoleon pursued an interventionist policy.[19] French interest in Syria can not be considered in isolation from contemporaneous French encroachments on Ottoman territory elsewhere, particularly in North Africa. In 1848, Algeria was declared an integral part of France, after 18 years of French military occupation. In 1881 France seized Tunisia, establishing a protectorate.[20]

Some other cases like Crete (1866), Bulgaria (1877-1878) and Macedonia (1903) are cited as examples of humanitarian intervention.[21] The common and the suspicious *casus belli* of all nineteenth century humanitarian interventions was the protection of Christian minorities living under Ottoman domination. After 1920's because the Ottoman Empire had almost entirely been driven out of the Balkans, then the modern Turkish Republic was formed, no further wars could have been started with such motivation. Furthermore, as Sulyok points out, the international community, in fact having seen the never before experienced scale of damage caused by World War I, abandoned the use of force and also made an attempt to outlaw *jus ad bellum*.[22]

c. Cuba (1898)

The United States' intervention in Cuba is the most suitable example for unilateral humanitarian intervention in the pre-Charter state practice.[23] Cuba, at that time, was under the rule of Spain. Following the rebellion movements against Spanish rule the US Congress authorized an armed intervention by the United States in Cuba leading to the

[19] Martha Finnemore, op.cit., p.165.

[20] Istvan Pagony, op.cit. p.188.

[21] Francis Kofi Abiew, The evolution of the Doctrine and Practice of Humanitarian Intervention, Kluwer law international, Netherlands-1999, pp.50-54; Martha Finnemore, op. cit. pp.165-170; Richard B. Lillich, op. cit. , p.232.

[22] Gabor Sulyok, op. cit., p.88.

[23] Oscar S. Straus, "Humanitarian Diplomacy of the United States", ASIL proc, Vol. 6, 1912, p.45.

defeat of Spanish forces.[24] The intervention was just after the reports on the Spanish authorities that attempting to suppress the insurrection that taken place in 1895. Spanish policy of forcing the disaffected population into concentration camps in order to identify revolutionists result nearly 200.000 deaths.

Another reason to intervene is the right of self defence. US Battleship Maine was destructed possibly by a Spanish submarine mine.[25]

This intervention caused a war between United States and Spain, in a couple of months Spanish navy was defeated and treaty of Paris signed between this two countries.[26] Cuban representatives were excluded from the proceedings and Cuban territory became an American protectorate.[27] US Governed the island till 1902 and after that sovereignty was transferred to Cubans.[28]

In the Spanish-American war nations of continental Europe supported Spain in principle. But both Germany and Russia feared the potential loss in trade and investment with the US which war might her cause. France feared a political and economic combination of America and England against her interests in the Far East. England alone among other European States supported the US.[29]

US intervention to Cuba may be based on other factors than 'humanity'. But evidences here showed us that humanitarian concerns took one of the major roles in this

[24] US President McKinley sent a special message to the Congress outlining justifications for US intervention: The cause of humanity, protection of US citizens and their properties in Cuba, protection of US interest and self-defence.

[25] American Navy conducted an investigation bur the real reason never learned.

[26] The Treaty of Peace between the United States and Spain, December 10, 1898, U.S. Congress, 55th Cong., 3d sess., Senate Doc. No. 62, Part 1,Government Printing Office, Washington -1899, 5-11. electronic version, http://www.yale.edu/lawweb/avalon/diplomacy/spain/sp1898.htm access date: 04.02.2004.

[27] Michaell Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations, Basic Books, New York-1992, pp.103-104.

[28] For more information about this period see Don Mabry, "US Military Dictatorship in Cuba, 1898-1902", electronic version, http://www.historicaltextarchive.com/sections.php?op=viewarticle&artid=400 access date: 04.02.2004.

[29] David S. Bogen, "The Law of humanitarian Intervention: United States policy in Cuba (1898) and in the Dominican Republic (1965)", Harvard International Law Club Journal, 1966, Vol. 7, p.310.

action. And transferring the sovereignty of the island to Cubans in a short period of time is supporting this view.[30]

2. Early 20th Century

19th century interventions were most occurred in situations where the humanitarian motive was outweighed by a desire to protect property or to enforce socio-political and economic instruments of the status quo. Contrary to cases in 19th century states were reluctant to act for the sake of humanity.

By the 20th century there was a strong support for the principle of non-intervention.[31] There was a tendency among the writers of the time toward the acceptance of the principle of non-intervention as the correct and normal or every day rule of international law and practice; but to admit intervention as a legitimate exercise of sovereign power in extreme or exceptional cases on high moral or political rather than purely legal grounds, as for instance in cases of great crimes against humanity or where essential and permanent national or international interests of far reaching importance are at stake.[32]

The notion of unilateral intervention by a state or a group of states sat uncomfortably with the increasing emphasis on the inviolability of the domestic jurisdiction. Collective humanitarian intervention was politically difficult at that time. The League of Nations neither provide for a right to intervene nor prohibit such action. The preamble of the Covenant clearly stated that the primary aim is peace and peace supposed to be secured by 'the acceptance of obligations not resort to war' and 'maintain justice and respect for all treaty obligations in the dealings with organized peoples with one another'. Resort to force is not prohibited per se but members required

[30] However some authors do not share this view. Chomsky argues that the intervention to Cuba was done just in time to prevent its liberation from Spain and turning it into a 'virtual colony' of the United States. Noam Chomsky, The New Military Humanism, Lessons from Kosovo, Pluto Press, London-1999, p.76.

[31] Frederick Charles Hicks, "The Equality of States and the Hague Conferences", AJIL, Vol.2, 1908, pp.530-561.

[32] Amos S. Hershy, "The Calvo and Drago Doctrines", AJIL, Vol.1, 1907, p.42. Hersch argues that intervention is just like war, it is an exercise of sovereign or high political power, a right inherent to sovereignty itself. The government which intervenes performs a political act.

submitting any dispute to the arbitration, judicial settlement or to enquiry by the Council in the first instance.[33]

The watershed date in the legal history of the use of force is 1928. The General Treaty for Renunciation of War as an Instrument of National Policy, famously known as Kellogg – Briand Pact was signed in Paris. Kellogg – Briand pact only consists of three articles. In Article 1 the High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.[34] In Article 2 they agree to settle all disputes with each other 'shall never be sought except by pacific means.'

Although this general prohibition law remained lawful under certain circumstances: A war of Self defence can be seen legitimate under the Pact. 1933 Montevideo Convention on the Rights and Duties of States maintained that no state had right to intervene in the internal and external affairs of another state.[35]

On March 11th, 1932 the Assembly of the League of Nations adopted the following Resolution:

> "The Assembly… declares that it is incumbent upon the Members of the League of Nations not to recognise any situation, treaty or agreement

[33] The Covenant of the League of Nations, electronic version, http://www.yale.edu/lawweb/avalon/leagcov.htm access date: 06.02.2004

[34] Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy. Signed at Paris, August 27, 1928; ratification advised by the Senate, January 16, 1929; ratified by the President, January 17, 1929; instruments of ratification deposited at Washington by the United States of America, Australia, Dominion of Canada, Czechoslovkia, Germany, Great Britain, India, Irish Free State, Italy, New Zealand, and Union of South Africa, March 2, 1929: By Poland, March 26, 1929; by Belgium, March 27 1929; by France, April 22, 1929; by Japan, July 24, 1929; proclaimed, July 24, 1929, electronic version, http://www.yale.edu/lawweb/avalon/imt/kbpact.htm#art1 access date: 06.02.2004.

[35] Comfort Ero & Suzanne Long, "Humanitarian Intervention: a New Role for the United Nations?" in Williamson (ed.), Some Corner of Foreign Field Intervention and World Order, Macmillan Press, London-1998, p.124.

> which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris."[36]

The League of Nations built a Minority System during the 1920s. It worked quite well until 1931 when the threat of totalitarian aggression first seen in the international area. Hitler used humanitarian intervention in order to justify German Occupation of Bohemia and Moravia. He referred to "assaults on the life and liberty of minorities, and the purpose of disarming Czech troops and terrorist bands threatening the lives of minorities" in a speech done by him on March 15, 1939 about proclamation of German occupation.[37]

The unwillingness of major European powers resulted in the incorporation of Austria into Germany, the disintegration of Czechoslovakia and the partition of Poland. There was also no sign of will to intervene in the mass extermination of Jews in Europe in 1930s. One can argue that World War II was the intervention by Allies. But Allies' intervention was a response to Nazi's external aggression, not for the maltreatment against Jews in Germany.[38]

Simon Chesterman believes that the conception, a right of humanitarian intervention was recognized in customary international law in the pre-Charter period, is not true. For him, apart from the circumstances in which this alleged 19th century right was usually invoked, generally in support of Christians against their Muslim overlords and neighbours, "it is misleading to suggest that a majority of legal scholars supported the view that humanitarian intervention existed as an exception to the general prohibition on intervention".[39]

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[36] The relevant parts reproduced in Ian Brownlie, "The Principle of Non-use of Force in Contemporary International Law", in W. E. Butler (ed.), The Non-use of Force in International Law, Kluwer Academic Publishers, Netherlands-1989, p.21.

[37] Ian Brownlie, supra note 2, p.221.

[38] David J. Scheffer, "Toward a Modern Doctrine of Humanitarian Intervention", University of Toledo Law Review, Volume 23, 1992, p.255.

[39] Simon Chesterman, "Legality versus Legitimacy: Humanitarian Intervention, the Security Council, and the Rule of Law", Security Dialogue, Vol. 33(3), 2002, p. 297.

As a summary of the pre-Charter period of humanitarian intervention, the following descriptions are the common characteristics of actions which occurred in this period:

1. Although there were several other reasons to act, the intervening powers were overwhelmingly motivated by humanitarian considerations, those were justified in all cases by treaty provisions, such as Article IX of the 1856 Treaty of Paris or Article XXIII of the 1878 Treaty of Berlin.

2. All actions were initiated with the aim of providing protection to (so-called) persecuted religious minorities living under foreign occupation (predominantly residing within the borders of Ottoman Empire) and carried out by the European powers acting in Concert.

3. Resorts to use of force were always preceded by peremptory demands addressed to the 'target state' in a hope of reaching a peaceful way of settlement (but in such cases these demands were too heavy and had serious effects on the internal affairs of the target state).

4. These peremptory demands were in all cases rejected, mostly with referral to the notion of sovereignty as well as to the exclusive jurisdiction of states over their own nationals.

B. Criteria for Humanitarian Intervention

In assessing the criteria for humanitarian intervention one should focus on the historical data. The legitimacy of resort to force was examined with the Just War principles in the era prior to the UN Charter. In this section the first subsection tries to deal with the just war principles and their applicability to humanitarian intervention. Second subsection deals with the criteria for humanitarian intervention.

1. Just War Principles and Humanitarian Intervention

Since the UN Charter provisions prohibiting the use of all types of force Just war principles are part of history. Its relevance with the subject is seen when scholars

prepare the listings of criteria for humanitarian intervention. The several criteria of humanitarian intervention correspond to Just War criteria in these listings. Here under this subsection the Just War principles are examined with their impacts on humanitarian intervention.

The Western Just War tradition is the tradition for addressing moral questions about when and how to use force. It was developed out of a rejection of the pacifist views that had dominated the early Christian church.[40] The literature on Just War usually starts with Saint Augustine in fifth century. According to Augustine war is and must always be a reaction against wrongdoing, for the sake of defending the innocent, punishing the guilty, and maintaining civil peace. Within this conception, there is no stipulation that the user of force against the wrongdoers must be identical with the aggrieved party.[41]It was made systematic by Saint Thomas Aquinas in the thirteenth century.

The criteria of the Justice of Resort to War is categorised and explained by Richard Miller.[42] The listing below is mainly prepared from his work:

- *Right Authority*: Only a legitimate authority has the right to declare war.
- *Just Cause*: We are not only permitted but may be required to use lethal force if we have a just cause.
- *Right Intention*: In war, not only the cause and the goals must be just, but also our motive for responding to the cause and taking up the goals.
- *Last Resort*: We may resort to war only if it is the last viable alternative.
- *Proportionality*: We must be confident that resorting to war will do more good than harm.

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[40] Mona Fixdal and Dan Smith, "Humanitarian Intervention and Just War", Mershon International Studies Review, Vol.42, 1998, p.285.

[41] Gregory Reichberg and Henrik Syse, "Humanitarian Intervention: A Case of Offensive Force?", Security Dialogue, Vol.33(2), 2002, p.310.

[42] Richard Miller, Interpretations of Conflict, Ethics, Pacifism, and the Just War Tradition, University of Chicago Press, Chicago-1991, pp.13-15.

- *Reasonable hope*: We must have reasonable grounds for believing the cause can be achieved.
- *Relative Justice*: No state can act as if it possesses absolute justice.
- *Open Declaration*: An explicit formal statement is required before resorting to force.

Several authors applied these criteria for judging the cases of humanitarian intervention.[43] Each criterion is evolved to figure out today's needs in assessing the lawfulness of humanitarian intervention.

Right Authority: This criterion is very important in humanitarian intervention because a decision to intervene may be in breach of a state's claim to sovereignty.[44] But there are two types of humanitarian intervention where the question of right authority is not important: a) cases when the governments have agreed to accept UN peacekeeping forces in the context of cease-fire agreement, and b) cases where there is no effective government exists (as in Somalia).

Just Cause: The classical Just War tradition stresses defence of the innocent as a just cause. From a theological perspective, defence of the innocent is a higher good than self-defence. Fixdal and Smith believe that the Just War concept of just cause appears to them to lean in favour of "a contingent duty to intervene but against the idea of a right to intervene".[45] Intervention should happen because it has to, because there is a particular human duty to do so.

Right Intention: This principle relates to how important the humanitarian impulse should be in deciding whether an intervention is just. Fixdal and Smith argue that most writers consider that "the motive for a decision to act on a just cause should be the creation of a just peace. Such a position excludes, among other things, self-interested

[43] Nicholas J. Wheeler, "Legitimating Humanitarian Intervention: Principles and Procedures", Melbourne Journal of International Law, Vol.2, 2001, pp.550-567; Mona Fixdal and Dan Smith, op. cit., pp.283-312.

[44] The limits of State Sovereignty and the relation between Sovereignty and Human Rights was discussed previously in the thesis. For further information please see Part I.

[45] Mona Fixdal and Dan Smith, op. cit., p.299.

motives like profit, power and glory".[46] It is very difficult to consider whether an action is done purely with humanitarian objectives or not. French intervention in Rwanda in 1994 was faced with a wide spread unhappiness because it was seen as motivated not by humanitarian concerns but by a continued desire to play the great power game in Central Africa.

Last Resort: This criterion states that the use of force should be employed only when alternative means are not available. The Just War tradition is concerned with setting moral limits on war and warfare because the use of force will have harmful consequences even if it can also have good consequences. Wheeler argues that it is too demanding to require politicians to exhaust all peaceful remedies; rather, "they must be confident that all avenues have been explored which are likely to prove successful in stopping the violence."[47]

Proportionality and Reasonable Hope: These two criteria are closely linked to each other. The resort to force must be proportional means that interventions must do more good than harm. The stipulation that the means employed must not exceed the harm that is designed to prevent or stop recalls the fundamental question whether violent means can even serve humanitarian purposes. Reasonable hope raises the issues surrounding feasibility, the reasonableness of mandates, and political and strategic obstacles as well as assessments and explanations of failure. Fixdal and Smith argue that these two criteria provide a way to understand the various 'diagnoses and prognoses' related to intervention operations act as a reminder that "authority, cause and intention are not in themselves a sufficient basis on which to decide on humanitarian intervention."[48]

Just War principles may only asses the ethical dimension of humanitarian intervention. But the doctrine also has political and legal dimensions. Next subsection deals with political and legal criteria together with ethical ones.

[46] Mona Fixdal and Dan Smith, ibid.
[47] Nicholas J. Wheeler, op. cit., p.556.
[48] Mona Fixdal and Dan Smith, op. cit., p.305.

2. Categorisation of the Criteria for Humanitarian Intervention

Witnessing the violence committed against the minority Ibos by Nigerian army, Reisman and McDougal produced their famous 1969 memorandum 'Humanitarian Intervention to Protect the Ibos'.[49] This memorandum claimed that there was a legal right of unilateral humanitarian intervention, and suggested that the International Law Association (ILA) be asked to draft a protocol. ILA, building upon an earlier list compiled by the US academic lawyers, offered the following 12 criteria in its Third Interim Report[50]:

1. There must be an imminent or ongoing gross human rights violation.

2. All non-intervention remedies available must be exhausted before a humanitarian intervention can be commenced.

3. A potential intervenor before the commencement of any such intervention must submit to the Security Council, if time permits, its views as to the specific limited purpose the proposed intervention would archive.

4. The intervenor's primary goal must be to remedy a gross human rights violation and not to achieve some other goal pertaining to the intervenor's self-interest.

5. The intent of the intervenor must be to have as limited an effect of the authority structure of the concerned State as possible, while at the same time achieving its specific limited purpose.

6. The intent of the intervenor must be to intervene for as short a time as possible, with the intervenor disengaging as soon as the specific limited purpose is accomplished.

7. The intent of the intervenor must be to use the least amount of coercive measures necessary to achieve its specific limited purpose.

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[49] Michael Reisman & Myres McDougal, "Humanitarian Intervention to Protect Ibos", in Richard B. Lillich (ed.) Humanitarian Intervention and the United Nations, University of Virginia Press, Charlottesville, 1973

[50] Third Interim Report of the Sub-committee on the International Protection of Human Rights by General International Law, I.L.A., Report of the Fifty-Sixth Conference, New Delhi-1974, p.217 quoted in Richard B. Lillich, "Humanitarian Intervention through the United Nations: Towards the Development of Criteria", Zeitschrift für Auslandisches Öffentlisches Recht und Völkerrecht, Vol. 53, 1993, pp.562-563.

8. Where at all possible the intervenor must try to obtain an invitation to intervene from the recognized government and thereafter co-operate with the recognized government.

9. The intervenor, before its intended intervention, must request a meeting of the Security Council in order to inform it that the humanitarian intervention will take place only if the Security Council does not act first.

10. An intervention by the United Nations is preferred to one by a regional organization, and an intervention by a regional organization is preferred to one by a group of States or an individual State.

11. Before intervening, the intervenor must deliver a clear ultimatum or 'peremptory demand' to be concerned State insisting that positive actions be taken to terminate or ameliorate the gross human rights violations.

12. Any intervenor that does not follow the above criteria shall be deemed to have breached the peace, thus invoking Chapter VII of the Charter of the United Nations.

Lillich believes that the above criteria are a useful starting point in any effort to establish legal norms to govern UN Humanitarian interventions in the future.[51] These criteria are for the UN authorized humanitarian intervention. But the main discussion today is the situation where the intervention is done without the consent of the UN bodies.

ILA's listing is criticised by Wheeler from two aspects. First, humanitarian outcomes do not even feature in the ILA list of requirements. Secondly, States contemplating humanitarian intervention are required to report to the Security Council that the action will take place only if the Council does not act first. There is no guarantee that "Council authorization will be forthcoming at that point, and it is possible that a resolution might be passed condemning the proposed action".[52]

[51] Richard B. Lillich, ibid

[52] Nicholas J. Wheeler, Saving Strangers: Humanitarian Intervention in International Society, Oxford University Press, Oxford-2000, p.43.

The 1992 Edition of the Oppenheim's International Law lists the circumstances. If humanitarian intervention is ever to be justified, it will only be in extreme and very particular circumstances. The list is as follows:

> i. Compelling and urgent situation of extreme and large-scale humanitarian distress,
>
> ii. The territorial state is unable or unwilling (since it caused it) to cope with the situation;
>
> iii. The component organs of the international community cannot provide a fast and effective response to the needs brought along by the situation,
>
> iv. The intervention has no practicable alternatives,
>
> v. The question whether active resistance on behalf of the territorial state is likely to be expected,
>
> vi. The action must be proportional, both with respect to its duration and to the aims pursued, to the needs raised by the humanitarian emergency.[53]

Several authors try to find out criteria for humanitarian intervention.[54] A consensus can not be achieved yet. In the absence of an authoritative text, the commonly assured criteria are as follows:

a. A Gross Violation of Human Rights Occurring in the Target State

Humanitarian Intervention must be based on the actual existence or "impending likelihood of gross and persistent human rights violations that shock the world's conscience."[55] The violation of human rights must be of the most fundamental rights

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[53] Sir Robert Jennings & Sir Arthur Watts (eds.), Oppenheim's International Law, Vol. 1, Peace, Introduction and Part 1, Ninth Edition, Longman, 1992, p.443.

[54] Jonathan I. Charney, "Anticipatory Humanitarian Intervention in Kosovo", AJIL, Vol.93, 1999, pp.834-841; Will D. Verwey, "Humanitarian Intervention", in Antonino Cassese (ed.), The Current Legal Regulation of the Use of Force, Martinus Nijhoff, Netherlands-1986, pp.57- 78; Richard B. Lillich, op. cit., pp. 557-575; Christine Chinkin, "The Legality of NATO's Action in the Former Republic of Yugoslavia (FRY) under International Law", International and Comparative Law Quarterly, Vol.49,2000, pp.920-921; The United Kingdom's Foreign and Commonwealth Office also circulated, to NATO allies, a note of criteria for humanitarian intervention, see Adam Roberts, "NATO's 'Humanitarian War' over Kosovo", Survival, Vol.41, 1999, p.106.

[55] Richard B. Lillich, op. cit., p.572.

such as: right to life; right to be free from torture; right not be subject to genocide. These rights frequently designated as *jus cogens*. A problematic issue is whether economic or social rights can be included. In Somalia systematic denial of food considered as a serious violation of human rights.

Such violations may occur from systematic and indiscriminate attacks on civilians by central government, or a system breakdown in law and order producing the dislocation and starvation of the civilian population.

b. The UN is Unable or Unwilling to Act

As mentioned in the first part according to the Charter of the UN the primary responsibility for the maintenance of international peace and security is on the Security Council.[56] The mandate of the Security Council does not include the human rights issues. But recent practice shows us that the Security Council extended its Chapter VII powers to cover such situations in Bosnia and Somalia which are mainly of humanitarian character. With this extension now the Security Council is able to act in cases of gross human rights violations. On the other hand, if the UN is unwilling or unable (because of the veto power) to authorise action, another body, unilaterally or collectively, has moral obligations to act in its place.

c. Exhaustion of Peaceful Means to Resolve the Situation

The intervention should be done after a strong belief that the objective can not be achieved by other means. This belief must be based on certain and clear evidences such as: there is no longer an expectation that the domestic authorities will act to prevent, all reasonable diplomatic efforts on the international and regional level have been exhausted, the UN is unwilling or unable to act, and there is some impartial and neutral evidence that the humanitarian situation can no longer be contained. But in cases where the threat is massive and the situation rapidly failing, exhaustion of other remedies may not be required since delay is likely to worsen the situation.

[56] Article 24: 1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

Another issue to be discussed here is the timing of the intervention. In assessing the necessity the intervening body consider all the evidences and then decides to act. Should the intervening body wait to see the realisation of the evidences before the action? Should the additional loss of lives is sufficient to resort to force in humanitarian intervention? In Rwanda the early warnings of the impeding genocide were not taken into account by the international community. Jonathan Charney named the situation as 'anticipatory humanitarian intervention'. According to him such intervention, like 'anticipatory self-defence' is a "particularly dangerous permutation of an already problematic concept".[57] If this action stands for the right of foreign states to intervene in the absence of proof that widespread grave violations of international human rights are being committed, it leaves the door open for hegemonic states to use force for purposes clearly incompatible with international law. Chinkin believes that yet since the doctrine is intended to operate as an exception to the prohibition on the use of force and against state sovereignty, it must be strictly construed.[58]

d. The Intervention must be Proportionate

The previous criteria relate to the *jus ad bellum* part of the intervention which deals with the decision to intervene. This requirement relates to the *jus in bello* part of the intervention which deals with the means of intervention. The major documents relating to the *jus in bello* are the 1949 Geneva Conventions and 1977 First Additional Protocol. Great care must be taken to keep the use of force to a minimum where possible to prevent the acceleration of violence. The use of force must be kept proportional to the nature and extend of the human rights violations. In other words, the intervention must be strictly limited in scope to actions necessary and proportionate to bring about the cessation of such human rights violations.

Furthermore, criteria for the *jus in bello* part of the humanitarian intervention can be summed as: a) The target state must be notified in advance, b) Compliance with International Humanitarian Law and Human Rights Law, c) The intervention should be limited and once the goal is obtained, the intervening forces should withdraw, and d)

[57] Jonathan I. Charney, op. cit., p.841.
[58] Christine Chinkin, op. cit., p.921.

The intervening states have the responsibility to provide assistance with social and economic reconstruction after the conflict.[59] For the purposes of this study these criteria are not examined in detail.[60]

It was noted that "humanitarian intervention is something of a chameleon" with its colours changing and reflecting the tones of both self-interest and self-sacrifice.[61] The state practice has mixed strategic and economic objectives with humanitarian ones. These criteria are important for reducing the risk of abusive actions in the name of humanitarian intervention. Proposing standards for judging humanitarian interventions does not guarantee that states would enforce it but nevertheless it is a good starting point.

C. Discussions on the Definition of Humanitarian Intervention

The definition of humanitarian intervention is problematic. Some writers believe that a usable general definition of humanitarian intervention would be "extremely difficult to formulate and virtually impossible to apply rigorously".[62] A frequently used definition is "the theory of intervention on the ground of humanity… recognizes the right of one state to exercise international control over the acts of another in regard to its internal sovereignty when contrary to the laws of humanity".[63] Antony Clarck Arend and Robert Beck state that humanitarian intervention may be considered as "the use of armed force by a state (or states) to protect citizens of the target state from large scale human rights violations there".[64] Ian Brownlie defines humanitarian intervention as

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[59] For the detailed analysis of the *jus in bello* criteria Penelope C. Simons, "Humanitarian Intervention: A Review of Literature", Ploughshares Working Paper 01-2, http://www.ploughshares.ca/content/WORKING%20PAPERS/wp012.html access date: 12.04.2004

[60] For more information please read, Judith Gail Gardam, "Proportionality and Force in International Law", AJIL, Vol.87, 1993, pp.391-413.

[61] Hugh Smith, "Humanitarian Intervention: Morally Right, Legally Wrong", Current Affairs, Vol.68, 1991, p.7 quoted in Thomas G. Weiss & Jarat Chopra, "Sovereignty under Siege: From Intervention to Humanitarian Space", in Gene M. Lyons & Michael Mastanduno (eds.) Beyond Westphalia? States Sovereignty and International Intervention, The Johns Hopkins University Press, Maryland-1995, p.106.

[62] Thomas Franck & Nigel Rodley, op. cit., p.305.

[63] Francis Kofi Abiew, op. cit., p.31.

[64] Antony Clark Arend & Robert Beck, International Law and the Use of Force, Routledge, New York,1993, p.113.

"the threat or use of armed force by a state, a belligerent community, or an international organization, with the object of protecting human rights".[65]

According to Nick Lever and Oliver Ramsbotham, to count as humanitarian,

> the intervention must be a) a response to actual or threatened denial or violation of basic or fundamental human rights b) undertaken with a view to remedying the situation and c) carried out in the name of the international community.[66]

Fernando Teson defines the term as the

> proportionate transboundary 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.[67]

Danish Institute Report defines the term as

> coercive action by states involving the use of armed force in another state without the consent of its government, with or without authorization from the UN Security Council, for the purpose of preventing or putting to a stop the progress of gross and massive violation of human rights or international humanitarian law.[68]

Rein Müllerson defines Humanitarian Intervention as

> the intervention when the professed reason for intervening is the violation of human rights, when the professed purpose of the intervention

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[65] Ian Brownlie, "Humanitarian Intervention" in John Norton Moore (ed.), Law and Civil War in the Modern World, The John Hopkins University Press, London-1974, p.217.

[66] Nick Lewer & Oliver Ramsbotham, 'Something Must be Done': Towards an Ethical Framework for Humanitarian Intervention, University of Bradford Department of Peace Studies, 1993, p.25 cited in Comfort Ero & Suzanne Long, op. cit. , p.123.

[67] Fernando Teson, Humanitarian Intervention: An Inquiry into Law and Morality, Transnational Publishers, USA-1988, p.5.

[68] Danish Institute of International Affairs, Humanitarian Intervention: Legal and Political Aspects, Copenhagen – 2000, p.11.

> is redress of such violations and when the intervention is carried out in the name of international community or more generally, of humanity.[69]

To summarise the views above; Humanitarian Intervention consists of armed force applied by one or more other States into the territory of the conflict state for a particular humanitarian purpose. Harhoff analyses the concept of humanitarian intervention and theoretically it is composed of objective and subjective elements, but factual pre-conditions are attached to the concept as well. The objective element is constituted by the application of armed force into the territory of a State, in which an internal conflict is unfolding. On the subjective level, the intervening states must have acted with the intend to compel the conflict State to divert its course of action and bring an immediate end to the violations. Humanitarian Interventions must be motivated primarily by the distinct humanitarian aim of averting further violations of international humanitarian standards against civilians. [70]

Protection of nationals abroad is sometimes considered as part of humanitarian intervention. But writers like Asrat argues that the legal ground for the purpose of protecting a state's nationals is traceable to the independence of States, and thus "it is not proper to lump it together with other types of humanitarian intervention".[71]

II. United Nations and Humanitarian Intervention

A. UN Charter and Humanitarian Intervention

Article 2(4), Article 51 and Chapter VII were analysed in the first part. The use of force is prohibited under the UN Charter and this prohibition has two exceptions: self-defence and authorization by the UN Security Council. If the Security Council determines that massive violations of human rights occurring within a country constitute a threat to the peace, and then calls for or authorizes an enforcement action to put an end to these violations, a humanitarian intervention by military means is permissible. Simma argues that in the absence of such authorization, military coercion

[69] Rein Müllerson, Human Rights Diplomacy, Routledge, London- 1997, p.148.

[70] Frederik Harhoff, "Unauthorised Humanitarian Interventions – Armed Violence in the Name of Humanity?", Nordic Journal of International Law, Vol.70, 2001, p. 71.

[71] Belatchew Asrat, op. cit., pp.184-185.

employed to have the target state return to a respect for human rights constitutes a breach of Article 2(4) of the Charter. Further, as long as "humanitarian crisis do not transcend borders, and lead to armed attacks against other states, recourse to Article 51 is not available".[72]

International law scholars divided on the compatibility of humanitarian intervention to the Charter. Ian Brownlie has a strong point in concluding that it is extremely doubtful whether a right of humanitarian intervention has survived the express condemnations of intervention which have occurred in recent times or the general prohibition of resort to force to be found in United Nations Charter.[73] Oscar Schachter expresses that governments by and large would not assert a right to forcible intervention to protect the nationals of another country from the atrocities carried out in that country. According to Schachter most governments are "acutely sensitive to this danger and show no disposition to open article 2(4) up to a broad exception for humanitarian intervention by means of armed force".[74] Yoram Dinstein concludes that nothing in the Charter substantiates the right of one State to use force against another under the guise of ensuring the implementation of human rights.[75]Randelzhofer, in the Commentary of the UN Charter, believes that there is no room for the concept of humanitarian intervention to continue to exist.[76] Malanczuk expresses his view as humanitarian intervention is abused in the past by strong states to pursue other political, economic or military objectives. According to him "a unilateral right to use force to intervene for humanitarian reasons in another state is illegal in view of the prohibition on the use of force in the UN Charter".[77]

Hersch Lauterpacht expresses his views as follows

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[72] Bruno Sima, "NATO, the UN and the Use of Force: Legal Aspects", EJIL, Vol. 10, 1999, p.5.

[73] Ian Brownlie, International Law and the Use of Force by States, Oxford University Press, Oxford-1963, p.338-342.

[74] Oscar Schachter, "The Right of States to Use Armed Force", Michigan Law Review, Vol.82, 1984, p.1629.

[75] Yoram Dinstein, op. cit., p.65.

[76] Albrect Randelzhofer, op. cit., p.124.

[77] Peter Malanczuk, Akehurst's Modern Introduction to International Law, Seventh revised edition, Routledge, London, 1997, p.221.

> The doctrine of humanitarian intervention has never become a fully acknowledged part of positive international law. But it has provided a signpost and warning. It has been occasionally acted upon, and it was one of the factors which paved the way for the provisions of the Charter of the United Nations relating to fundamental human rights and freedoms.[78]

There are other writers believing the existence of the right of humanitarian intervention. This group grounded their arguments on the phrases embodied in Article 2(4). According to them the clause "against the territorial integrity or political independence of any State, or in any other matter inconsistent with the purposes of the United Nations" limits the prohibition against the use of force. The only force that is prohibited is that that is contrary to the territorial integrity or political independence of any State, or the purposes of the United Nations. Accordingly if the force is not used with the objective listed above then it is legal.

Following the argument that Article 2(4) is not an absolute proscription of use of force; for, if force is used in a manner which does not threaten the 'territorial integrity or political independence of a state'[79] it escapes the restriction of the first clause.[80] Oscar Schachter states that "if these words are not redundant, they must qualify the all inclusive prohibition against force".[81]

Müllerson argues that the UN Charter prohibits any 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" and explicitly provides for its use

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[78] Hersch Lauterpacht, "The Grotian Tradition in International Law", The British Yearbook of International Law, 1946, p.46.

[79] Christine Chinkin mentioned the Corfu Channel Case. The UK argued that the only force that is prohibited is that that is contrary to the territorial integrity or political independence of any State. It asserted that its actions in sweeping the Corfu Channel for mines were not against the territorial integrity or political independence of Albania. It was solely to protect navigation and to collect the evidence of mines there. The International Court of Justice found the UK to have acted contrary to international law. Christine Chinkin, op.cit., p.917.

[80] Philip Jessup, A Modern Law of Nations, Mac Millan Press, New York- 1948, p.162 cited in Francis Kofi Abiew, op. cit., p.94.

[81] Oscar Schachter, op. cit., p. 1625.

only on two occasions: on the authorization of the Security Council 'to maintain or restore international peace and security' and in self-defence. He believes that humanitarian intervention is not per se inconsistent with the purposes of the Charter, since one of the purposes of the United Nations is the promotion and protect of human rights. It is also arguable that humanitarian intervention does not violate either territorial integrity or the independence of a state.[82]

McDougal and Reisman argue that since 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 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)".[83] It is very difficult to argue that there is no conflict between an intervention for humanitarian purposes and the authoritative norms of the Charter such as the prohibition to use of force as written in Article 2(4). There are two authoritative norms and there is no reason why in all cases of such an approval the prohibition of the use of force should without doubt prevail.

Thomas Franck expressed his opinion, in a statement which is carefully designed, as follows:

> The strict application of Article 51 is reasonable, in almost cases. An exception may be, however, where effective government has ceased to exist in the place where the danger to lives has arisen. In that event, however, other normative practice also becomes relevant. A modern customary law of humanitarian intervention is beginning to take form which may condone action to protect lives, providing it is short and results in fewer casualties than would have resulted from non-intervention. This practice does not distinguish between rescuing persons who are citizens of the intervening State, other aliens or citizens of the State in which the intervention occurs. A State which purports to intervene to prevent danger to its own citizens but ignores the needs of others would be in violation of the new customary norm which it seeks to invoke. Moreover, as with

[82] Rein Müllerson, op. cit., p.156.

[83] Michael Reisman & Myres McDougal, op. cit., p. 177.

> "anticipatory self-defence", the State which acts in violation of the general prohibition on intervention has the onus of demonstrating the existence of a genuine, immediate and dire emergency which could not be redressed by means less violative of the law. The emerging normative practice also requires an exhaustion of the multilateral remedies established by the Charter system.[84]

Rosalyn Higgins believes that under customary international law rescuing nationals is widely acceptable. She analyses whether it is permissible under the Charter law. According to her if one can satisfy himself that humanitarian intervention does not violate the prohibition against the use of force against a State's territorial integrity, and then one can feel fairly confident that no other prohibition in Article 2(4) is being violated. Higgins adds that many writers do argue against the lawfulness of humanitarian intervention; they make much of the fact that in the past the right has been abused. Here she gives the example of self-defence; then so have there been countless abusive claims of the right to self-defence; "that does not lead us to say that there should be no right of self-defence". She concludes that invocations of the right of humanitarian intervention (at the time of the publishing the article) – ranging from the Belgian and French interventions in Stanleyville in 1963, to the United States intervention in Grenada in 1987- that humanitarian intervention should be regarded as impermissible, because, in the international legal system, "there is no compulsory reference to impartial decision makers". There are a variety of decision makers, other than courts, who can pronounce on the validity of claims advanced; and claims which may in very restricted exceptional circumstances be regarded as lawful should not a priori be disallowed because on occasion they may be unjustly invoked.[85]

Christine Chinkin finds another way to justify humanitarian intervention. The maintenance of international peace and security is not the only purpose of the United

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[84] Thomas Franck, "Fairness in the International Legal and Institutional System", Collected Courses, Hague Academy of International Law, Vol.240 (1993-III), Martinus Nijhoff Publishers, Dordrecht – 1994, pp.256-257. Relevant parts reproduced in Ian Brownlie & C. J. Apperly, "Kosovo Crisis Inquiry: Memorandum on the International Law Aspects", International and Comparative Law Quarterly, Vol.49,2000, p.891.

[85] Rosalyn Higgins, "International Law and the Avoidance, Containment and Resolution of Disputes, General Course on Public International Law", Collected Courses, Hague Academy of International Law, Vol.230 (1991-V), Martinus Nijhoff Publishers, Dordrecht – 1993, pp.313-316.

Nations. Article 1(3) states as another purpose which is to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. And further Article 56[86] states cooperation to achieve the purposes in Article 55 and Article 55(c)[87] detailed the purpose set forth in Article 1(3). Chinkin argues that where the force is aimed solely at the protection of human rights it does not threaten the political independence and territorial integrity of any State and is entirely consistent with the purposes of the UN Charter. States parties to the International Covenant on Civil and Political Rights 1966 have undertaken to 'respect and ensure' the rights within their own territories. Under the preamble they also recognise that the rights "can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights". She continues that it is not a large step to make this a more general obligation to ensure human rights within other territories as well, an obligation that can also be read into the pledge to take 'joint action' in Article 56 of the Charter. She concludes that the case can be made that the use of force, in defence of human rights in extreme cases is not contrary to the UN Charter, falls within its purposes and is certainly morally justified. On the other hand, it must also be acknowledged that the structure of the UN Charter gives priority to the State Sovereignty.[88]

Christopher Greenwood also stresses on the purposes of the UN and argues that the principles must be read in context, for the Charter one of the purposes of the United Nations is the promotion of human rights. The development of international human rights law since 1945, through global agreements such as the Genocide Convention and the International Covenant on Civil and Political Rights and regional instruments such as the European Convention on Human Rights, has reached the point where the treatment by a State of its own population can no longer be regarded as an internal

[86] Article 56: All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

[87] Article 55: c. Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

[88] Christine Chinkin, op. cit., pp.917-918.

matter. According to him, in particular, widespread and systematic violations of human rights involving the loss of life on a large scale are well established as a matter of international concern.[89] Greenwood also believes that international law is not confined to treaty texts. It includes customary international law. The law is not static but develops through a process of State practice. Since 1945, that process has seen a growing attached to the preservation of human rights.

Third part of the thesis analyse the state practice in the post cold war era. And the final part mainly focuses on Kosovo. The question whether the humanitarian intervention is customary international law or not will be discussed later. Here one should mention that UN Charter was prepared in 1945 just after the World War II. And it is clear that the text of the Charter does not mention any right of humanitarian intervention. The supporters of humanitarian intervention try to base their argument on other purposes of the UN Charter but as many of them mentioned State Sovereignty and the principle of non-intervention are at the hearth of the Charter. However, international law is not static, it evolves and States may make a treaty setting out new rules to cope with the changing demand of international law. But in order to make a treaty or amendments to the UN Charter, international consensus needed. It is worth to mention that in today's world UN has nearly 200 members. Vaughan Lowe believes that it is unlikely that there is either an international consensus on what the law regarding humanitarian intervention should be, or "even any substantial support for the convening of a conference to seek such a consensus". He assumes that no treaty on the matter is likely within the near future.[90]

B. UN Security Council Resolutions and Humanitarian Intervention

As mentioned in the previous chapter, UN Security Council resolutions are adopted under Chapter VII of the Charter. In the post cold war practice UN Security Council expanded the definition of 'international peace and security' and use the term

[89] Christopher Greenwood, "International Law and the NATO Intervention in Kosovo", International and Comparative Law Quarterly, Vol.49,2000, p.926-927.

[90] Vaughan Lowe, "International Legal Issues Arising in the Kosovo Crisis", International and Comparative Law Quarterly, Vol.49,2000, p.938.

apart from its traditional meaning. The Security Council started to authorize the issues like peace building, peace enforcement, early warning systems, and protection of human rights.[91] States like China, India argue that it is not within the jurisdiction of the Security Council to handle human rights issues.

These 'new type' resolutions can be characterised in different aspects: the resolutions authorize the use of force expressly or implicitly, directed to the achievement of specific objectives. One categorisation is done by Vera Gowlland-Debbas according to the purposes of the resolutions.[92] The purpose may be limited like enforcement at sea of an economic embargo;[93] defence of peacekeeping forces;[94] achievement of humanitarian objectives, such as the protection of UN safe areas and the provision of a secure environment for humanitarian relief operations;[95] or achievement of political objectives, such as reinstatement of a democratically elected regime,[96] or implementation of political and peace agreements.[97] In addition to these all out military force has also been authorized by the Security Council in the cases of Korea and Iraq.

As seen in the categorisation the 'new type' resolutions mainly authorizes the actions for humanitarian purposes. In Bosnia the use of force was authorized to ensure the delivery of aid, in Somalia the UNITAF was authorized to establish a secure environment for humanitarian aid operations.[98] In Rwanda the French-led operation was to contribute to the security and protection of disabled persons at risk and to use all

[91] These issues, together with several others, listed and explained in Boutros-Ghali, An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping, Report of the Secretary General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, United Nations Document No: A/47/277- S/24111, 1992.

[92] Vera Gowlland-Debbas, "The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance", EJIL, Vol. 11, 2000, p.366.

[93] Rhodesia (1966), Iraq (1990), Haiti (1994), Federal Republic of Yugoslavia (1991)

[94] Bosnia (1995), Kosovo (1999)

[95] Somalia (1992), Bosnia (1995)

[96] Haiti (1994)

[97] Bosna (1995), Haiti (1994), Kosovo (1999)

[98] UN Security Council Resolution 794 (1992), electronic version, http://www.un.org/documents/sc/res/1992/scres92.htm access date: 20.03.2004

necessary means to achieve its humanitarian objectives.[99] These operations were based on authorization by the Security Council. But other operations such as 'no-fly zones' in Northern Iraq and 'Kosovo' in Yugoslavia did not authorized by the Security Council. The US, the UK and other NATO members claimed a Security Council basis for their use of force in Kosovo, even in the absence of any express authority in a resolution. This approach was named as 'implied consent'.[100]

The authorization may be addressed to one state acting alone or called on to form a multinational force under its command and control[101]; a coalition of states.[102] But resolutions more generally addressed to all member states acting nationally or through regional arrangements.[103]

The requirement of explicit authorization can be met by language showing a clear intent on the part of the Security Council. Diplomatic considerations may require that the text of a resolution not use the term 'force' explicitly. In 1990 the United States, in fact, wanted an explicit reference to the use of force against Iraq, but due to Soviet objections the Council substituted the language 'all necessary means'.

The problems arise in the absence of express authorization by the Security Council. A series of arguments developed for the interventions where no explicit authorization is present.

1. Implied Authorizations

This argument stresses the importance of the Security Council authorization for the use of force, but considers that implicit authorization can be unilaterally deduced from the open-ended nature of certain resolutions or from their wording. This understanding influenced states like France, Italy and the US and forced them to seek

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[99] UN Security Council Resolution 940 (1994), electronic version, http://www.un.org/Docs/scres/1994/scres94.htm access date: 20.03.2004

[100] Christine Gray, op. cit., p. 9.

[101] United States in cases of Somalia (1992) and Haiti (1994); the United Kingdom in Rhodesia (1966); France in Rwanda (1994); Australia in East Timor (1999).

[102] Iraq (1990)

[103] Bosnia (1995), Haiti (1994)

Security Council authorization for the operations, such as in Rwanda, Albania and Haiti, realised by them. This need for legitimacy forced NATO members headed by the US and the UK to claim a Security Council basis for their operations in Kosovo in the absence of express authorization by the Security Council. On this stage, the members of NATO tried to base their use of force on an authorization not a right to use force unilaterally.

In the post cold war era three incidents involving use of force happened without the UN Security Council authorization. These are namely; Northern Iraq, Liberia and Kosovo. The details of these operations will be given in Part III and Part IV. The short summaries of the arguments of the parties as follows:

In Northern Iraq UN Security Council Resolution 688 was not adopted under Chapter VII and therefore did not authorize the use of force; it allowed access to international humanitarian organizations. The United States and the United Kingdom argued that their actions involving air strikes over the no-fly zones were "'consistent with', 'supportive of', 'implementation of', and 'pursuant to' Resolution 688".[104]

In Kosovo states supporting the action, during the discussions in the Security Council, said it was taken as a last resort to prevent a humanitarian catastrophe after the failure of all diplomatic efforts to find a peaceful solution. They all mentioned to the seriousness of the situation and the need to stop the atrocities.[105] Security Council Resolutions declared the situation in Kosovo as a threat to regional peace and security and invoked Chapter VII of the Charter. Then NATO states suggested that there had been an implied authorization for their actions on the basis of the Security Council Resolutions.

Another argument supporting implied consent is the draft resolution proposed by Belarus, India and Russian Federation on March, 26th 1999.[106] The draft resolution

[104] Christine Gray, ibid.

[105] UN Securtiy Council Meeting Reports S/PV.3988, 24.03.1999, electronic version http://www.un.org/Depts/dhl/resguide/scact1999.htm access date: 24.03.2004

[106] UN Security Council Draft Resolution S/1999/328 not adopted, 26.03.1999, electronic version, http://www.un.org/Depts/dhl/resguide/scact1999.htm access date: 26.03.2004

affirmed the use of force by NATO constituted a violation of the Charter of the UN and demanded an immediate cessation of the use of force against Federal Republic of Yugoslavia. This result of the voting in UN Security Council was 12 against and only 3 in favour. So by rejecting this resolution one may argue that the Security Council showed an implied consent of the intervention in Kosovo.

The implied authorization argument is criticised by several countries. Russia and China are the main opponents. It is understandable because the argument was developed against their use of veto in the Security Council. Speaking on Resolution 1203 Russia said that the enforcement elements had been excluded from the resolution and there were no provisions authorizing, directly or indirectly, use of force.[107]

2. *Ex post Facto* Legitimization

The second argument in this context is *a posteriori* legitimization of an action by means of a Security Council resolution "serves to remove any taint of illegality even in the absence of prior authorization".[108] In two cases this argument is raised by the scholars. The first case is the ECOWAS intervention to Liberia. In Liberia ECOWAS intervention started without the consent of the Security Council in 1990. But when fighting took place between the ECOWAS troops and Charles Taylor forces the Security Council adopted Resolution 788, stated that the 'deterioration of the situation in Liberia constitutes a threat to international peace and security, particularly in West Africa as a whole' and condemned the attacks on ECOWAS by Taylor forces in 1992.[109] It is clear that there is no authorization at the beginning but the resolution shows that there is an ex post Facto legitimization for the explicitly unauthorized action.

The second case is Kosovo. UN Security Council issued Resolution 1244(1999) and decided on the deployment of international civil and security presences having a

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[107] UN Securtiy Council Meeting Reports S/PV.3937, 24.10.1998, electronic version http://www.un.org/Depts/dhl/resguide/scact1998.htm access date: 24.03.2004

[108] Vera Gowlland-Debbas, op. cit., p.374.

[109] UN Security Council Resolution 788 (1992), electronic version, http://www.un.org/documents/sc/res/1992/scres92.htm access date: 24.03.2004

clearly defined mandate. This security presence is capable of using 'all necessary means to fulfil its responsibility'. But the resolution did not give any indication that it was to be seen as an approval of the NATO military action. A group of States welcomed the resumption by the Council of its legitimate role in the Kosovo crisis, the enhancement of 'the Council's credibility'. China was abstained from voting and reminded "the purposes and principles of the UN Charter, the primary responsibility of the Council and the commitment of all member states to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia".[110]

III. State Practice in the Cold -War Era (1945-1990)

As noted in the first chapter the interventions before UN Charter mainly done for the sake of the rights of Europeans/ Christians. After 1945 the nature of interventions changed and this time they were done in order to protect non-Europeans / non-Christians. But the interesting thing in these cases is that the states that might legitimately have claimed humanitarian justifications for their intervention did not do so. India's intervention in East Pakistan in the wake of massacres, Tanzania's intervention in Uganda toppling the Idi Amin regime, Vietnam's intervention in Cambodia ousting the Khmers Rouges- in every case intervening states could have justified their actions with strong humanitarian justifications.[111] India first tried to base its argument on humanitarian intervention but government changed her view very quickly. Apart from this quasi action none of these states argued their position on humanitarian intervention grounds.

Verwey categorises the use of armed force for the protection of human rights inside the territory of a state accused of violating them, in theory, in five forms:

> 1. Action taken by the UN Security Council in the form of deployment of a UN army, composed of military units made available to the UN on a stand-by basis by member states and operating under UN command;

[110] UN Securtiy Council Meeting Reports S/PV.4011, 10.06.1999, electronic version, http://www.un.org/Depts/dhl/resguide/scact1999.htm access date: 09.04.2004.
[111] Martha Finnemore, op. cit., p.175.

2. Establishment by the Security Council of a UN force, to which member states are invited to contribute military personnel and services, on a voluntary basis.

3. Establishment of a UN force by the UN General Assembly, acting under its Resolution entitled 'Uniting for Peace' to which member states are similarly invited to contribute military forces and services, again on a voluntary basis.

4. Intervention initiated by states, individually or collectively, authorized by the Security Council or the General Assembly under the Uniting for Peace Resolution. And finally,

5. Intervention by states, individually or collectively, not at their initiative and authorized by the Security Council or the General Assembly.[112]

The legality of situations 1-4 based on the Charter of the UN; but the legality of the fifth one is controversial. Here in this part the legality of the situations cited above are examined.

A. The Congo Interventions (1960&1964)

Belgian Congo became independent on July 1st, 1960 and took the name 'Republic of the Congo'. Short after the independence there was a general movement against Belgian and other European residents. During these movements Europeans began fleeing into neighbouring French Congo. After this event Belgium announced that troop reinforcements were being sent to the Congo. Following the fight between Congolese and Belgian forces Congolese Government appealed for assistance from the United Nations. The Security Council passed a resolution authorizing the Secretary-General to provide Congo with military assistance and calling Belgium to withdraw its troops.[113]

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[112] Wil D. Verwey, "Humanitarian Intervention in the 1990s and Beyond: An International Law Perspective" in Jan Nederveen Pieterse (ed.) World Orders in the Making Humanitarian Intervention and Beyond, MacMillan Press, London-1998, p.181

[113] Security Council Resolution 143,17 July 1960, electronic version, http://www.un.org/documents/sc/res/1960/scres60.htm access date: 09.04.2004.

Belgium argued that it had 'decided to intervene, with the sole purpose of ensuring the safety of European and other members of the population and of protecting human lives in general'.[114] This argument received some support. The United Kingdom asserted that the intervention was only humanitarian and that the international community should be thankful for it. France declared that Belgium could not be held to be an aggressor since the purpose of the action was that of saving human lives.[115]

For the second time Congo was targeted by foreign forces in 1964. This time intervening states were Belgium, the United States and the United Kingdom. In September 1964 insurgents took over two thousand foreign residents as hostages and wanted certain concessions from central government. The Congolese government rejected the demands of them. Insurgents began to kill hostages and they killed forty five of them in a couple of weeks. The central government was reluctant to act and Belgium intervened with the aid of US airplanes and British army facilities. This was a rescue mission and lasted in four days. The intervened state's forces withdrew from Congo after completion of their mission.

To justify United States participation in the rescue operation, the Department of State first expressed the view that the action was taken "in exercise of our clear responsibility to protect US citizens under the circumstances existing in the area. Later one of the Department of State official explained that the operation was undertaken "by permission of the Congo's legitimate government" and hence, technically did not involve a use of forcible help at all.[116]

American authorities named the operation humanitarian - not military. It was designed to avoid bloodshed - not to engage the rebel forces in combat. According to them its purpose was to accomplish its task quickly and withdraw- not to seize or hold territory. Personnel engaged where under orders to use force only in their own defence or in the defence of the foreign and Congolese civilians. They departed from the scene as soon as their evacuation mission was accomplished. In addition to this situation the

[114] Simon Chesterman, op. cit., p.66.

[115] Francis Kofi Abiew, op. cit., p.106.

[116] Richard B. Lillich, "Forcible Self-Help by States to Protect Human Rights", Iowa Law Review, Vol.53, 1967-1968, p.349.

fact that the United Nations and the Organization of African Unity were unable to coup with a situation which required immediate action and one reaches the inescapable conclusion that if ever there was a case for the use of forcible self-help to protect lives, the Congo rescue operation was it.[117]

The intervention was condemned in the Security Council by many African States. Kenyan Ambassador expressed his point of view as follows:

> But if you could put yourself in the shoes of an average educated African, you got a quite different picture. When he looked at the Congo, he saw a black government in Stanleyville being attacked by a gang of hired South African thugs, and black people being killed by rockets fired from American planes…
>
> …
>
> Even more galling to the educated African was the shattering of so many of his illusions- that Africans were now masters of their own continent, that the OAU was a force to be reckoned with, that a black man with a gun was equal of a white man with a gun…[118]

This anti-Western radicalism is the result of the threats to African sovereignty. In building support for their regimes, African governments have used sensitive nationalism to create ideological enemies such as capitalism, colonialism.

Czechoslovakia, Ecuador, Poland and the Soviet Union considered the mission as a pretextual humanitarian intervention aimed at consolidating the central governments power. The Soviet Union considered the action as a crime committed against the Congolese people and a real threat to the peace and the security of the peoples of other African States.[119] Great Britain asserted that the intervention was only humanitarian;

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[117] Richard B. Lillich, ibid

[118] Howard L. Weisberg, "The Congo Crisis 1964: A Case Study in Humanitarian Intervention", Virginia Journal of International Law, Vol.12, 1972, p.267,note 29.

[119] Letter from the USSR Representative to the President of the UNSC, UN Doc. S/6066 Nov.25,1964, cit. in Thomas M. Franck & Nigel Rodley, op. cit. , p.288, note 57.

France declared that the Belgium could not be held to be aggressor since the purpose of the action was saving lives.

To sum up the legal arguments, first it appears that the intervention was authorized by the government which was widely recognized as the legitimate government of the entire Congo, including areas temporarily held by rebels. Secondly the intervention was designed primarily to rescue some 1000 hostages of eighteen nations residing as aliens in Congo. No one argues that such an operation would have been mounted to rescue Congolese Africans.

B. The Dominican Republic Intervention (1965)

The Dominican Republic intervention is the first intervention of the United State's interventions in the Western Hemisphere. It was a part of the US doctrine which has roots since Monroe Doctrine (1823). The United States adopted a policy of intervention in Latin American and Caribbean states to protect its vital and national security interests. The US viewed any threat to the territory of a member state of the region as a threat to its own security and decided that it had a right to intervene to prevent an external intervention or to reverse the conditions that would lead to external intervention.

Following the end of World War II, the United States entered a new era in relations with its neighbours. The Organization of American States (OAS) comprising the United States and its Latin American allies was created to harmonise relations between the United States and Latin America. The Charter of the OAS prohibits all forms of intervention in internal affairs of member states. The Rio Treaty which forms the basis for a regional collective security arrangement provides for collective self-defence only if an armed attack occurs. The basic principles of the OAS Charter and the Rio Treaty were reaffirmed in the Charter of United Nations, which also prohibits

intervention and provides for individual and collective self-defence only if an armed attack occurs.[120]

The situation in Dominican Republic in 1965 was far more complex than the situation in Congo. Following the coup which ousted President Bosch in 1963, the country had been governed by a civilian junta. After some initial success the military balance between the rebels and the government military forces law and order broke down completely. On April 28, 1965, US Marines landed in the Dominican Republic to preserve the lives of foreign nationals and nationals of the United States and many other countries.

US President Johnson justified this operation as below

> We didn't intervene. We didn't kill anyone. We didn't violate any embassies. We were not the perpetrators. But… as we had to go into the Congo to preserve the lives of American citizens and haul them out when they were being shot at, we went into the Dominican Republic to preserve the lives of American citizens and citizens of a good many other nations- 46 to be exact, 46 nations. While some of the nations were denouncing us for going in there, their people were begging us to protect them.[121]

But the operation was not limited to protection of nationals alone. The normal rules governing protection of nationals required the withdrawal of troops after the completion of the mission. Here Marines remained in the Dominican Republic; nearly 20000 military personnel were policing the capital. The reasons offered for this presence was the breakdown of law and order necessitated the preservation of a situation for a period of time which would enable the OAS to act collectively.

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[120] Max Hilarie, International Law and the United States Military Intervention in the Western Hemisphere, Kluwer Law International, the Hague-1997, p.5.

[121] United States Department of State Bulletin (1965) p.20, cit. in Richard B. Lillich, supra, note 41, p.342.

President Johnson later explained the intervention for the national security. He declared that: "The American nations cannot, must not, and will not permit the establishment of another Communist government in the Western Hemisphere".[122]

The Security Council did not condemn the Dominican Republic intervention. Although one can argue that this example confirms the legality of humanitarian intervention, the subsequent presence of the United States, however cannot be justified for the same reason. The initial aim of saving lives having been accomplished, the United States should have withdrawn its forces. Maintaining the presence afterwards suspected other motives than purely humanitarian considerations were involved.

The United States, on its own authority, landed its armed forces ostensibly to preserve the lives of foreign nationals, but more probably to forestall what it feared would be the establishment of another communist government in the Western hemisphere. The invocation of the notion of "multilateral intervention" or "collective intervention" and the continuing controversy over the latitude offered to regional arrangements under the UN Charter must not obscure the simple fact that the territory of an American republic was occupied by the armed forces of another.[123]

C. East Pakistan (Bangladesh) Intervention (1971)

After the withdrawal of Great Britain from the Indian peninsula, two separate nations, India and Pakistan, came into existence. Pakistan was a nation geographically and ethnically divided into two entities, West Pakistan and East Pakistan. These two communities have less in common; Urdu speaking West Pakistanis had closer ties with middle-eastern communities but the East Pakistanis spoke Bengalese and considered themselves closer to Hindu civilization. The only thing tie them together was religion: both of them were Muslim. The conflict between two communities arose from the West Pakistan's economic and military domination over a more populated East Pakistan.

[122] New York Times, May 3,1965 cit. in David S.Bogen, op. cit., p.296, note 3.

[123] Jose A. Cabranes, "Human Rights and Non-Intervention in the Inter American System", Michigan Law Review, Vol. 65, 1966-1967, p.1175.

The Pakistani government was a military dictatorship completely dominated by West Pakistani officials and this situation caused accelerated social and political problems during the 1960s. Free elections were held in 1970. The Awami League, the East Pakistani party, won the elections and had majority in Pakistani National Assembly. Following the elections the central government considered the results as a threat to the territorial integrity of Pakistan and postponed the formation of National Assembly for an indefinite time. The leader of Awami League issued a "Declaration of Emancipation". This was the final attempt to solve the conflict in peaceful way. But it did not work; the West Pakistani Army attacked to the East Pakistani capital, Dacca, and killed civilians and burned houses. It is estimated that at least one million people died and millions escaped from the country.[124]

After the tensions in the border, Indian army invaded East Pakistan and India formally recognized Bangladesh as an independent state.[125] After the invasion the political prisoners were released and refugees returned to their homes.

As the legal framework two possible justifications raised from this intervention. The first one is "self determination of East Pakistan" and the second one is "humanitarian intervention". The Indian Foreign Minister argued that in the face of large-scale violations of human rights by the Pakistani authorities the Indian use of force was justified to prevent loss of life and facilitate self-determination.[126] Indian Ambassador declared that they had on this particular occasion absolutely nothing but the purest of motives and the purest of intentions: to rescue the people of East Bengal from what they were suffering.[127]

Because of the actions done by the West Pakistani army the intervention was considered as humanitarian but there were some doubts. Comments have been made to the effect that more importantly, the operation was strategic. India was politically

[124] For detailed information about the events please see; International Commission of Jurists, The Events in Pakistan, 1971, (1972) cit. in Fernando Teson, Humanitarian Intervention: An Inquiry into Law and Morality, Transnational Publishers, USA-1988, p.179-188.

[125] More than 50 countries recognized Bangladesh within four months of its establishment, Teson, op. cit., p.183, note 168.

[126] UN Doc. S/PV. 1608, Dec. 6, 1971, p.141, cit. in Franck & Rodley, op. cit., p. 276, note 7.

[127] Thomas M. Franck & Nigel Rodley, ibid

interested in secession of Pakistan. India was bordered by Pakistan eastwards and westwards. It was also an important opportunity to weaken Pakistan's power and to lessen the territory of its political and military rival. After that intervention India remained as the single prevailing power in the region and had a strong ally as she helped Bangladesh independence.

Even though India's intervention in East Pakistan is generally referred to as one of the better instances of humanitarian intervention, India defended it action on several grounds. In India's opinion military action had been taken against Pakistan in response to the bombing of villages on Indian Territory before the invasion, and to the inflow of refugees from Pakistan which it regarded as a "civil invasion" constituting "economic aggression". Thus India argued that this was in principle a case of the lawful exercise of the right of self-defence. As another line of defence India also invoked the right of the people of East Pakistan to self-determination, and to be assisted in its struggle for the realisation of this right.

For the justification of "humanitarian intervention" Akehurst points out that although the provisional verbatim records of the Security Council contained statements to that effect, when the final version of the official records was published these statements had been deleted. Since every state is allowed to edit the record of their representatives' speeches this was presumably done by India, and in Akehurst's opinion the most probable explanation is that India underwent a change of mind and realised that humanitarian intervention was an insufficient justification for the use of force.[128]

In United Nations Pakistan, China and the United States accused India of aggression and argued that India had no right to intervene in Pakistan's treatment of East Pakistani population. In the Security Council, Saudi Arabia, Argentina and Tunisia opposed the intervention with various reasons. In the General Assembly, most delegates

[128] Michael Akehurst, "Humanitarian Intervetion", in Hedley Bull (ed.) Intervention in World Politics, Clarendon Press, Oxford-1984, p.96.

referred to the situation in East Pakistan as an internal one, asserting that India had to respect Pakistan's sovereignty and territorial integrity.[129]

D. Cambodia Intervention (1978)

1970s were the years of civil war for Cambodians. In 1975 Khmer Rogue forces seized power in Cambodia. The new regime immediately started a program of extensive economic and administrative reorganisation of the Cambodian society. During the course of the program there were extensive violations of human rights, with well documented practices of torture, killings and deportations on a massive scale. In three years time between one-sixth and one-third of the six million Cambodia's people were died under Pol Pot regime. The chairman of the United Nations Human Rights Subcommission described the events as "the most serious human rights violations to have occurred anywhere since Nazism".[130]

There was no effective measure taken by international community including the United Nations. Only some expressions and a condemnation were taken by the international community. In December 1978, Vietnamese troops and the Cambodian United Front for National Salvation (which is formed by Cambodian refugees in Vietnam) invaded Cambodia and overthrew the Pol Pot regime. A new government was formed that consisted of members of the United Front for National Salvation. Vietnamese occupation continued until 1989.

Vietnam never claimed that it had exercised the right of humanitarian intervention or had intervened to re-establish human rights in Cambodia. Vietnam's legal justification was based on two different arguments. The first argument was the conflict between Vietnam and Cambodia and the second one was civil war between Cambodian people and its government. With this perspective Vietnam denied the invasion and

[129] Francis Kofi Abiew, op. cit., p.116.

[130] Mattias Falk, The Legality of Humanitarian Intervention: A Review in the Light of Recent UN Practice, Juridiska fakulteen vid Stockholms universitet, Stockholm-1996, p.31.

argued that it helped to the United Front and even this help was in a position of exercising the right of self-defence.[131]

Some writers argued that Vietnam's intervention cannot be justified on humanitarian grounds. The Vietnamese were known to harbour territorial ambitions over Cambodia, and were themselves frequent abusers of human rights.[132]

In Security Council, the Soviet Union, Cuba, Czechoslovakia, the German Democratic Republic, Hungary, Mongolia, Poland and Bulgaria supported the Vietnamese position. These states pointed to the inhumane conditions in which the Cambodian people were being held and stated that the Pol Pot regime had been overthrown solely by the United Front. Almost all other states which spoke in the debate said that Vietnam had acted illegally by intervening in Cambodia's internal affairs and by violating its territorial integrity.[133]

During the UN debate, no state spoke in favour of the existence of a right to unilateral humanitarian intervention, and several states, namely Greece, the Netherlands, Yugoslavia, and India that had previously supported humanitarian intervention arguments in the UN voted for the resolution condemning Vietnam.[134]

E. The Uganda Intervention (1979)

During the years of Idi Amin regime (1971-1979), the Ugandan government committed widespread atrocities and massive human rights violations against its own people. It is estimated that nearly three hundred thousand people died in eight years. Uganda also had problems with its neighbouring country, Tanzania. In 1978 Ugandan troops attacked Tanzania and occupied a part of its territory. Amin asserted that the occupation was an act of self-defence in response to Tanzanian support for Ugandan dissidents. Later he declared that, that part of the territory annexed to Uganda. The

[131] Mattias Falk, op. cit., p.32.

[132] Douglas Eisner, "Humanitarian Intervention in the Post-Cold War Era", Boston University International Law Journal, Vol.11,1993, p.206.

[133] Michael Akehurst, op. cit., p.97.

[134] The reason for that might be the style of the intervention. After the liberation Vietnam installed a puppet regime in Cambodia.

Tanzanian president Nyerere considered the annexation tantamount to war and expressly stated his intention to act against Amin's forces.[135] At this level there were several attempts to secure a peaceful solution; Kenya and UN Secretary General and President of Mali offered mediation. The annexation lasted in a couple of weeks. All Ugandan troops withdrew from the Tanzanian territory. But it was too late. Tanzania began military operations against Uganda with the support of Ugandan exiles in Tanzania. Amin's regime was effectively overthrown after the falling of the capital; Amin fled Uganda. A new government was formed and headed by Professor Yusuf Lule.

Teson argues that the Tanzanian intervention is a dilemma for non-interventionists; if they support the action that overthrow Idi Amin they should justify this action on self-defence grounds. But punitive self-defence is not allowed under article 51. If they declare the illegality of the Tanzanian intervention then they would accept that international law does protect genocidal rulers.[136]

In assessing the Tanzanian intervention one should notice that the international community was in favour of the intervention in general. The United States, Zambia, Ethiopia, Angola, Botswana and Mozambique all supported the intervention. The United Kingdom and Kenya gave support for the new government of Uganda. The Soviet Union, although it had condemned Amin's policies, announced the withdrawal of a military contingent from Uganda and the suspension of arms supplies after Amin's initial invasion.

Tanzania justified its action on the absence of collective action by OAU. Owing to this absence Tanzania acted unilaterally. Teson argued that the Tanzanian overthrow of the Ugandan government cannot be justified on self-defence grounds. For him, if the only justification for the Tanzanian action had been self-defence, the overthrow of Amin would have been presumably condemned by the international community as disproportionate to the initial Ugandan aggression. Teson concluded that the Tanzanian intervention is a precedent supporting the legality of "humanitarian intervention" in

[135] Fernando Teson, op. cit., p.159.
[136] Fernando Teson, op. cit., p.164.

appropriate cases. The absolute non-interventionism resulting from a broad construction of article 2(4) of the UN Charter simply does not, and should not represent international law.[137] He also noted that this is surely tantamount to saying that the international community as a whole recognized in this case the primacy of a modicum of human dignity over sovereignty.[138]

As a counter argument Professor Ronzitti rejected this case as an authoritative precedent for the humanitarian intervention. Ronzitti based his argument on three grounds. First he argued that Tanzania never relied on humanitarian reasons. The second argument is that the Tanzanian government relied upon a theory of two wars, as in the case of Vietnamese intervention to Cambodia, the one between Tanzania and Uganda (war of self-defence) and the one between the Dictator and Ugandans (war of liberation). The third argument is that the Tanzanian intervention, when measured by official statements of governments, was not well received in the international community.[139]

F. The Grenada Intervention (1983)

In October 1983, The Grenadian People's Army, led a coup against Grenada's government, and captured and murdered its Prime Minister Maurice Bishop, and three other officials. Soon after the coup, the small Caribbean island descended into chaos. The new government initiated a shoot on sight curfew. Efforts by the US government to evacuate its nationals were rebuffed. The Organization of East Caribbean States (OECS) found the civil strife and breakdown in government to constitute a security threat to their nations and resolved to use force to ensure peace. Sir Paul Scoon, the Governor-General of Grenada, supported this decision by asking the OECS for assistance to help restore order in Grenada.[140]

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[137] Fernando Teson, op. cit., p.167.

[138] Fernando Teson, op. cit., p.170.

[139] The arguments of Prof. Ronzitti analysed in Fernando Teson, op. cit., p.168-169.

[140] Douglas Eisner, op. cit. p.206.

In response to this situation, the United States and the OECS launched a military operation on October 25, 1983. The United States led the invasion, and supported by Barbados and Jamaica.

The United States propounded three legal justifications for the invasion: (a) a request from the Governor-General, Sir Paul Scoon, that the United States intervene, (b) the request from the OECS and (c) concern for the one thousand United States nationals on Grenada.[141]

The request from the Governor-General furnishes the strongest legal basis for the United States' action. The powers of Governor were symbolic and the doctrine of 'intervention by invitation' was highly suspect.[142] At that time Afghanistan was intervened by Soviet Union with the same grounds 'intervention by the invitation' and United States called the invasion unlawful. Intervention to protect nationals is also problematic here. The US argued that the lives of her citizens were in danger and they could not be evacuated because of the hostilities of the coup. But this justification is hard to argue. Canadians were rescued by a charter plane and the US citizens, nearly a thousand in number, were rescued by a military intervention.[143]

The UN reacted to the invasion with hostility. The General Assembly called the invasion "a flagrant violation of international law and of the independence, sovereignty, and territorial integrity of the State". The UN condemned the invasion by 108 to 9 votes with 27 abstentions. The Security Council failed to protest the intervention only by reason of a US veto. The United Kingdom, the former colonial power of Grenada, broke with its close ally, and condemned the United States intervention in Grenada.[144]

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[141] Marian Nash Leich, "Contemporary Practice of United States Relating to International Law" AJIL, Vol. 78, 1984, p.203.

[142] Antonio Tanca, Foreign Armed Intervention in Internal Conflict, Martinus Nijhoff Publishers, Netherlands-1993, pp.39-40.

[143] For the details of the operation Michael J. Levitin, "The Law of Force and Force of Law: Grenada, Falklands, and Humanitarian Intervention", Harvard International Law Journal, Vol.27, 1986, pp. 621-657.

[144] Max Hilarie, op. cit., p.7.

East Caribbean States (not US) justified their action among other things by reference to a mutual support treaty of 1981, to which also Grenada is a party.[145] These countries also claimed *inter alia* that they had been authorized to do so by a regional body (the Organization of Eastern Caribbean States) to bring peace and order to a country in a condition of anarchy.[146] But this justification was not accepted by the General Assembly.

The United States invoked the doctrine of humanitarian intervention as a reason for the invasion; the incident provides little ground to the legitimacy of the doctrine. Most importantly, there was no evidence of widespread human rights violations in Grenada. Therefore, the intervention cannot be reasonably characterized as humanitarian.

G. The Panama Intervention (1989)

On December 1989 the United States invaded Panama inflicting both military and civilian casualties and causing substantial destruction of property. After US forces overwhelmed resistance by Panamanian forces, General Noriega, head of Panamanian state, took refuge at the diplomatic mission of Vatican, but soon left those premises. He arrested by US forces and brought to the United States, where had been put on trial for criminal conspiracy to violate US law.

The United States government has set forth the facts of the invasion, described and characterised events and circumstances leading up to it, a serious of vicious and brutal acts directed at US personnel and dependants. The President also declared that military operations were initiated to protect American lives, to defend democracy in Panama, to apprehend Noriega and bring him to trial on the drug-related charges for

[145] Wil D. Verwey, op. cit.,p.66

[146] Oscar Schachter, "Authorized Use of Force by the United Nations and Regional Organizations", in Lori Damrosh & David J. Scheffer (eds.) Law and Force in the New International Order, Westview Press, Boulder-1991, p.88.

which he was indicted in 1988 and to ensure the integrity of the Panama Canal Treaties.[147]

In order to understand the position of the US government one should examine the Reagan doctrine. Monitoring basic American constitutional principles, the Reagan doctrine rests on the claim that legitimate government depends on the consent of the governed and on its respect for the rights of citizens. A government is not legitimate merely because it exists, not merely because it has independent rulers. Nazi Germany had a de facto government headed by Germans; that did not make it legitimate.[148]

Reagan doctrine, strictly defined did not purport to grant a licence for military intervention to promote democracy where the ruling government is not receiving arms from the Soviet Union, the Soviet bloc, or other foreign sources. Both the Panama Canal Treaty and the Neutrality Treaty were ratified with amendments, conditions, reservations, and congressional testimony that clarify the limited circumstances under which the United States may military intervene in Panama.[149]

Henkin argues that there is little to support the claim that concern for US lives was a significant factor in the decision to launch the invasion. He continues that the use of force in "humanitarian intervention" has become accepted as an exception to Article 2(4)'s prohibition on the use of force only with force to the extend strictly necessary to defend, or to extricate, individuals whose lives are endangered, if the territorial government is unwilling or unable to safeguard their lives. So there is no exception to Article 2(4) permitting armed invasion to safeguard lives which could be safeguarded by removing the persons from the territory in which they are endangered.[150]

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[147] Louis Henkin, "The Invasion of Panama Under International Law: A Gross Violation", Columbia Journal of Transnational Law, Vol.29,1991, p.293.

[148] Jeane J. Kirkpatrick & Allan Gerson, " The Reagan Doctrine, Human Rights and International Law" in Louis Henkin (ed) Right v. Might: International Law and the Use of Force, Council of Foreign Relations Press, New York-1991,pp.19-23.

[149] David J.Scheffer, "Use of Force After the Cold War: Panama, Iraq and the New World Order", in Louis Henkin (ed) Right v. Might: International Law and the Use of Force, Council of Foreign Relations Press, New York-1989, p.113.

[150] Louis Henkin, op. cit., p.297.

Following the landing of US forces in Panama, the United States immediately recognized a new government that it installed in the country. The new government then called on the United States to remain in Panama to maintain law and order in the country. US forces remained in Panama long after their mission was accomplished to provide the necessary security guarantees for the new government. [151]

The intervention was condemned by the United Nations General Assembly and the Council of Ministers of the OAS, and both bodies called for the cessation of hostilities and for the immediate withdrawal of US forces from Panama.[152]

Richard Falk argues that the interventions of the Cold War era provided a dominant pattern of justification for the use of force by the North in the South, which especially needed in the aftermath of the colonial order. The West particularly dependent on such justifications as the main countries of Western Europe had created the colonial system; giving the East the ideological opportunity to claim an pure commitment to decolonisation and national independence. The West, as articulated especially by the United States, countered with a world order claim that it was defending countries against the sort of aggression, sponsored by Moscow, that if unchecked would lead to a third world war, this time fought with nuclear weapons.[153] With few exceptions the United States emerged as the main sponsor of intervention diplomacy in the South during the Cold War years.

From the mid-1960s onwards the new post-colonial members of the UN were not about to tolerate a reversion to interventionist doctrines, which they associated with the era of colonialism. The response of UN bodies to military interventions, while by no means entirely consistent, was in general to condemn them, including those with allegedly humanitarian justifications.

In this period the UN Security Council authorize the use of force in only two cases: Korean War and the blockage of southern Rhodesia. The details of the

[151] Max Hillarie, op. cit., p.8.
[152] GA/RES/44/240 (Dec. 29, 1989) electronic version, http://www.un.org/documents/ga/res/44/a44r240.htm access date: 11.04.2004.
[153] Richard Falk, "Recycling Interventionalism", Journal of Peace Research, Vol.29, 1992, p.130.

authorization in Korean War were examined in the first part of the thesis. Apart from these two, the interventions in this period were done without the consent of the Security Council. Many issues were never discussed at all in the Security Council; and even when they were, many draft resolutions condemning particular interventions were vetoed, usually by the USSR or the USA.

Next part will examine 'the new interventionism'; humanitarian interventions in post cold war era.

PART III

HUMANITARIAN INTERVENTION IN POST COLD – WAR ERA

During the Cold War era, there was no such an instance where the Security Council authorized to intervene on humanitarian grounds. Moreover, a limited number of cases, where individual states pursued what was arguably humanitarian intervention without UN authorization, naturally met with condemnation by the global community as actions threatening world order. The majority of states and many scholars argued that "the paramount interest of preventing the use of force under Article 2(4) of the Charter could not be sacrificed or derogated even in support of efforts to prevent widespread human rights atrocities".[1] Some even doubted whether the Security Council could engage in humanitarian intervention, since under Chapter VII, the Security Council could only act when there was a threat to international peace, a situation not usually implicated in internal human rights abuses.

The hostility between the Soviet Union and the United States and the ideological struggle between capitalism and communism dominated international relations. The cessation of this hostility means that decisions concerning the use of force can now be made on factors other than suppression and spheres of influence. As the only remaining super power, the United States faces few overwhelming strategic threats from abroad and if it chooses, can increasingly allow its ideals to govern its foreign policy. Besides overshadowing the importance of humanitarian issues in foreign policy, the Cold War effectively prevented the Security Council from playing an active role in world affairs. The voting mechanism for the Security Council, which grants the five permanent

[1] Sean D. Murphy, "The Security Council, Legitimacy, and the Concept of Collective Security After the Cold War", Columbia Journal of Transnational Law, Vol.32, 1994-1995, p.230.

members the power to veto any Council action, guaranteed that the Council could not engage in enforcement measures during the Cold War.[2]

Post Cold War Era, however, started with the hope of a peaceful world; the hostilities between the two poles were over, so peace came closer than ever. But in a short period of time it was understood that this presumption was not accurate. New hostilities, this time regional or internal, emerged and human loss in these conflicts reached enormous figures. In this period, hopes for a functioning Security Council mechanism was short lived in cases where international peace and security was threatened. This part analyses the verity of this assumption.

During the period 1991-2000 the question of whether external institutions should, on partly or wholly humanitarian grounds, organize or authorize military action within a state arose frequently. Within the UN Security Council, it did so most sharply in nine cases. In each case there was, sooner or later, a humanitarian intervention of some kind, whether or not it was with explicit UN authorization and host-state: Northern Iraq (1991), Liberia (1990-5)Bosnia and Herzegovina (1992-5), Somalia (1992-3), Rwanda (1994), Haiti (1994), Albania (1997), Sierra Leone (1997-2000), Kosovo (1998-9), and East Timor (1999).

Of the nine cases, only four (northern Iraq, Somalia, Haiti, and Kosovo) involved a clear decision to engage in anything like a 'humanitarian intervention' in the classical sense, that is, without consent of the host state.[3] In addition to this four, the situation in Rwanda also needs to analyse. This part of the thesis will focus on the interventions of Somalia, Haiti, Rwanda, Northern Iraq and Liberia. Bosnia and Kosovo cases will be examined under the title “European Conflicts” in Part IV.

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[2] Douglas Eisner, “Humanitarian Intervention in the Post-Cold War Era”, Boston University International Law Journal, Vol.11, 1993, p.221.

[3] Intervention by invitation and the assesment of the legitimacy of the inviting authority is out of the concept of this thesis. For for information please read: Antonio Tanca, Foreign Armed Intervention in Internal Conflict, Martinus Nijhoff Publishers, Dordrecht-1993, pp.13-47.

I. Interventions under the United Nations Mandate

Article 39 of the UN Charter authorizes the Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to take necessary measures, i.e. recommendations, or decide what measures shall be taken in accordance with Articles 4 and 42 in response to such a finding "to maintain or restore international peace and security". Article 2(7) generally prohibits the Security Council or the UN as a whole from intervening 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. However this prohibition does not apply to enforcement action undertaken pursuant to Chapter VII.

This section will examine whether the Security Council may lawfully determine that the human rights violations are within the concept of threat to peace or breach of the peace under Articles 39 and 2(7). And if the answer is yes, the second issue is whether the Security Council has a right to authorize military actions under these circumstances. During the drafting process of the Genocide Convention many members of the UN asserted that genocide could constitute a threat to the peace, the Soviet representative maintained that an 'act of genocide was always a threat to international peace and security' and therefore should dealt with by the Security Council under Chapter VI and VII of the Charter.[4]

Further, the Security Council itself broadly interpreted its powers under Chapter VII. It has concluded, in such cases that a primarily domestic conflict or issue, including certain human rights violations, constituted a threat to the peace warranting the imposition of mandatory enforcement measures under Chapter VII and typically in the form of economic sanctions. This approach can be seen in the Security Council's Resolutions for the situations in Rhodesia and South Africa. In 1966 the Council adopted Resolution 232[5], in which the situation in Rhodesia determined as threat to international peace and security. The Security Council imposed economic sanctions on

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[4] Briand D. Lepard, Rethinking Humanitarian Intervention, Pennsylvania State University Press, Pennysylvania-2002, p.154.

[5] UN Security Council Resolution 232, electronic version, http://www.un.org/documents/sc/res/1966/scres66.htm access date: 21.02.2004

Rhodesia. In 1977 the Council issued a resolution which established a mandatory embargo on arms transfers to South Africa and strongly condemned the South African government for its act of repressions, its defiant continuance of the system of apartheid and its attacks against neighbouring independent states. In the Resolution it is determined that the acquisition of arms by South Africa constituted a threat to the maintenance of international peace and security.[6]

Nevertheless the main question still remained unsolved: Why is the term 'international peace' used in the Charter? If the Charter's references to peace are references to the absence of war between states, then 'international' plainly refers to such peace between states. First the text of the Charter clearly reveals that peace and human rights within all countries are considered matters of international concern. In this connection human rights violations in Rhodesia could adversely affect 'international peace' even without physically trans-boundary effects because "in contemporary intensely independent world, peoples interact not merely through the modalities of collaborative or combative operations but also through shared subjectivities… The peoples in one territorial community may realistically regard themselves as being affected by activities in another territorial community, through no goods or people cross any boundaries"[7].

Anti - interventionist reading of Article 39 and Chapter VII is too narrow and not supported by United Nations and state practice. A well known example is of course the voting practice in the Security Council. Teson argued that the legitimacy of humanitarian intervention in appropriate cases flows from an interpretation of the UN Charter that looks, beyond the letter, to the purposes and principles that animate shape and define legitimacy in the international community today. He suggested that the substantive law of the Charter has now evolved to include human rights as a centrepiece of the international order, and cases of serious human rights violations as situations that *may* warrant collective enforcement action. This imperative prevails over unrestrained state sovereignty, and may be enforced by the Security Council, acting on behalf of the

[6] UN Security Council Resolution 418. electronic version, http://www.un.org/documents/sc/res/1977/scres77.htm access date: 21.02.2004

[7] Briand D. Lepard, op. cit., p.162.

international community, in rare cases of serious human rights violations where other means have failed or are certain to fail.[8]

During the years of the Cold War, despite many instances in which serious various violations of human rights were closely linked to breaches of international peace and security, the Council rarely acted in its enforcement capacity to adopt measures of any kind. Among the cases typically cited as instances of 'humanitarian intervention' in the sense that the intervening state acted to terminate violations of human rights entailing massive loss of life, several would quite likely have qualified as posing threats to the peace or actual breaches of the peace sufficient to warrant the involvement of the Security Council. Thus it is not coincidence that most such cases of intervention have entailed a claim by the intervening state that it acted in self-defence against attacks emanating from the territory of the state where gross human rights violations were occurring.[9]

Violations of human rights do not necessarily entail threats to peace and security, and where those elements are absent the analysis of the powers of the UN organs must proceed in a different fashion. According to Damrosch, the United Nations has a variety of techniques available to it for enforcement of human rights when peace and security are not threatened. He mentioned that the international community has long recognized the legitimacy of international concern over human rights violations even of a purely 'internal' character, and has rejected the position that a state's treatment of its own nationals in a matter of 'domestic jurisdiction' beyond the reach of the UN.[10]

A. Somalia (1992)

The Somalia case represented a real test of the ability of international community to intervene on humanitarian grounds. International community was confronted by the

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[8] Fernando R. Teson, "Collective Humanitarian Intervention", Michigan Journal of International Law, Vol.17, 1996, p.341.

[9] India's intervention to East Pakistan, Vietnamese intervention to Cambodia, Tanzanian intervention to Uganda may be cited as examples of this position. Please see Part II for details of these cases.

[10] Lori Fisler Damrosh, "Commentary on Collective Military Intervention to Enforce Human Rights", in Lori Damrosh & David J. Scheffer (eds.) Law and Force in the New International Order, Westview Press, Boulder-1991, p.219.

media with the images of starving men, women and children. The UNSC resolutions sent a strong signal that the UN will no longer be prevented from interfering on humanitarian grounds in the internal affairs of member states.

1. Chronology of the Events

The chaotic situation in Somalia created after the overthrow of the government, long time dictator, of President Mohammed Siad Barre. A vacuum occurred after Barre fled the capital city of Mogadishu in 1991. His departure divided the opposition and widespread and increasingly violent fighting between several different fractions began. The country was effectively divided into twelve zones of control.[11] A so-called "reconciliation conference" between those fighting groups organized in July 1991 that resulted in selection of new government and Omer Arteh Qhalib as Prime Minister. But in reality Qhalib had no authority over those fraction leaders. By November 1991 the tension among those fractions raised and a full-scale war started. By early 1992, much of the population was starving and the distribution of aid supplies was becoming increasingly more difficult and dependent upon the warlords who controlled the different parts of the country. Neighbouring countries found themselves faced with a large number of refugees.

Prime Minister Qhalib sent a letter to the UN Secretary General and asked for an immediate meeting to address the rapidly failing security situation in Somalia.[12] In response to Qhalib's letter, the Security Council passed a series of resolutions citing Chapter VII of the Charter as the basis for United Nations action and implying that an Article 39 justification for collective military action could be invoked in the future. By Resolution 733 the Security Council imposed a complete weapons embargo that

[11] Please see the Annex for the map of the country.

[12] Letter Dated 20 January 1992 from the Charge D'Affaires A. I. of the Permanent Mission of Somalia to the United Nations Addressed to the President of the Security Council, UN SCOR, 47th Session, UN Doc. S/23445 (1992), electronic version, http://ods-dds-ny.un.org/doc/UNDOC/GEN/N92/023/25/PDF/N9202325.pdf?OpenElement access date: 28.01.2004

prohibits deliveries of weapons and military equipment to all warring fractions in Somalia.[13]

2. Somalia Operations

Somalia operations can be divided into four phases. a. Conventional ceasefire observation (July- November 1992), b. Forcible delivery of humanitarian assistance (December 1992- March 1993), c. Combat operations (June- October 1993), d. Nation-building (after October 1993).

Negotiations during the following months led to a cease-fire being agreed between the two main warring fractions. In April 1992, by the Resolution 751, United Nations Operation in Somalia (UNOSOM) was established with the provision of urgent humanitarian assistance as one of its main tasks. Fifty UN observers were sent to monitor a widely-ignored cease-fire among the fractions.[14]

a. United Nations Operation in Somalia (UNOSOM)

This operation was intended as a classic peace keeping mission, based on the consent of parties and the use of force in self defence only, but in the summer 1992 the warring fractions in Somalia continued to disrupt urgently needed aid supplies. The Security Council passed increasingly aggressive resolutions; in Resolution 767 asserted that "the situation in Somalia constitutes a threat to international peace and security". In this Resolution Council stated that in the absence of the co-operation from all the fractions it did not exclude "other measures" to deliver humanitarian assistance.[15] In late August, the Security Council passed Resolution 775, which approved airlifts

[13] UN Security Council Resolution 733, electronic version http://www.un.org/documents/sc/res/1992/scres92.htm access date: 28.01.2004.
[14] UN Security Council Resolution 751, electronic version http://www.un.org/documents/sc/res/1992/scres92.htm access date: 28.01.2004.
[15] UN Security Council Resolution 767, electronic version http://www.un.org/documents/sc/res/1992/scres92.htm access date: 28.01.2004.

humanitarian aid and supplemented UNOSOM personnel levels with a battalion of Pakistani troops to assist in aid supply distribution efforts.[16]

The problems of gaining co-operation of the various warlords was in fact a main factor behind a serious delay in getting UNOSOM operational, and by the September 1992 only 60 UN troops had arrived in Somalia. Delivery of humanitarian assistance under these conditions was growing progressively more difficult. The aid supplies were ready but widespread extortion, robbery and looting threatened the lives of aid workers, and prevented more than a trickle from reaching those in need.[17] It was estimated that 1.5 million people were in imminent danger of starvation, and 3000 Somalis were dying each day.[18]

In November 1992, Secretary General Boutros-Ghali reported numerous violations of humanitarian law against UN aid workers, including attacks against Pakistani troops and advised the Security Council that "the situation in Somalia has deteriorated beyond the point at which it is susceptible to the peace-keeping treatment" and the Council had "no alternative but to adopt more forceful measures to secure the humanitarian operations in Somalia". The Secretary General summarised the situation as follows:

> "At present no government exists in Somalia that could request and allow such use of force. It would therefore be necessary for the Security Council to make a determination under Article 39 of the Charter that a threat to the peace exists, as a result of the repercussions of the Somali conflict on the entire region, and to decide what measures should be taken to maintain international peace and security. The Council would also have

[16] UN Security Council Resolution 775, electronic version, http://www.un.org/documents/sc/res/1992/scres92.htm access date: 31.01.2004.

[17] It is estimated that upward of three-quarters of the United Nations food supplies were confiscated or stolen by the various fractions for their own use or to sell for profit. Fernando R. Teson, op. cit., p.349.

[18] Mattias Falk, The Legality of Humanitarian Intervention: A Review in the Light of Recent UN Practice, Juridiska fakulteen vid Stockholms universitet, Stockholm-1996, p.72.

to determine that non-military measures as referred to in Chapter VII were not capable of giving effect to the Council's decisions."[19]

In this context the United States offered to provide troops for a substantial military operation under its command in order to ensure the safety of the aid operation. Although the Secretary General and some other states would have preferred an operation under the direct command of UN, they were willing to accept the United States offer.

b. The Unified Task Force (UNITAF)

On December 1992, the Security Council unanimously adopted Resolution 794, stating that the unique character of the situation in Somalia required an immediate and exceptional response. The Council determined that the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security.[20]

Resolution 794 goes further than any comparable resolution. It went beyond a mere instance on providing access to humanitarian relief agencies. Unlike the arms embargo resolutions there was not even the pretence that the resolution was based on the consent of a government of Somalia. During the debate on the resolution several states expressed the view that the Somali case was unique, because Somalia was a state without a government. Greenwood argued that, although the situation in Somalia had an international element as a result of the threats to UNOSOM and other UN personnel in the country and the flow of refugees to neighbouring states, there was nothing compare to the threats to the security of neighbouring states which was existed in the case of Iraq and Liberia.[21]

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[19] Letter dated 29/11/92 from the Secretary-General addressed to the President of the Security Council, UN Doc No. S/24868, electronic version, http://ods-dds-ny.un.org/doc/UNDOC/GEN/N92/759/55/IMG/N9275955.pdf?OpenElement access date: 01.02.2004.

[20] UN Security Council Resolution 794, electronic version, http://www.un.org/documents/sc/res/1992/scres92.htm access date: 01.02.2004

[21] Christopher Greenwood, op. cit., p.38.

Resolution 794 makes express provision for enforcement. Operative paragraph 10 uses the same language that was employed in Resolution 678, when the Council authorised military action against Iraq over Kuwait. But the mission stated in resolution 794 is limited and this resolution gives the Security Council a far greater degree of political control than it possessed during the Gulf War.

American troops and the forces of France, Belgium and a number of other states began deploying to Somalia shortly afterwards. The Unified Task Force (UNITAF) operated under a unified command established by the United States in accordance with Resolution 794 and was separate from the UNOSOM forces which already present on land. The Secretary General said, in his first report to the Council on the progress of the operation that the unified command was concentrating on establishing security in Somalia, while United Nations personnel were addressing the underlying political problems.[22]

It is known that there was a disagreement between the Secretary General and the UNITAF commander concerning the extent to which the creation of a secure environment demanded the disarming of Somali gunmen and while the original intention had been for UNITAF to lay the groundwork for a return to a normal peace-keeping mission. The United States was in the control of the operation, but for political reasons this situation was very indirectly referred to in the resolution because of the controversy on the extend to which the UN should be in control.

c. UNOSOM II

As mentioned above the United States controlled UNITAF and voiced views which were different from those of the Secretary General on the issue of how far its intervention should go beyond terminating the fighting and securing the supply of aid.[23] The Security Council adopted Resolution 814 where it approved the Secretary General's proposal for a United Nations force (UNOSOM II) with enforcement powers under

[22] Christopher Greenwood, ibid

[23] Peter Malanczuk, Humanitarian Intervention and the Legitimacy of the Use of Force, Het Spinhuis , Amsterdam-1993, p.25.

Chapter VII; the Council emphasized the crucial importance of disarmament and UNOSOM II to assume responsibility for the consolidation, expansion and maintenance of a secure environment throughout Somalia.[24] UNOSOM II had the responsibility to complete the task begun by UNITAF for the restoration of peace, stability, law and order in Somalia.

In the months following the formation, the UNOSOM II, in cooperation with US forces, involved in open military conflict with one of the major Somali fractions, General Aidid, resulting in heavy casualties on both sides.[25] The UN became party to the conflict that it was supposed to resolve, allowing its military activity overshadowed the humanitarian objective of the intervention. Moreover, the American interventionist policy began to change during the Clinton administration. Clinton announced intentions of reinforcing US military presence in Somalia and proceeding with the political dialogue that had already began among the Somali fractions. US officials declared that US made mistakes regarding the Somali operation and the search for General Aidid was no longer the main focus of the operation. The US began disengaging from Somalia, and France, Italy together with other Western countries followed this action.[26]

UN efforts at encouraging negotiations were without success. Resolution 897 limited the mission of the UN forces only to tasks like keeping the roads open to allow humanitarian aid reaching interior part of the country. The mandate of UNOSOM II was expired by the end of March 1995 and neither the Somali fractions nor NGOs requested an extension.

3. UNSC Resolutions on Somalia and Humanitarian Intervention

The case of Somalia and the authorization of "Operation Restore Hope" has been hailed as a normative landmark in the practice of the Security Council. Malanczuk argued that the practice of the Security Council to authorize the use of force under

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[24] UN Security Council Resolution 814, 26 March 1993, electronic version, http://www.un.org/Docs/scres/1993/scres93.htm access date: 01.02.2004

[25] The fighting resulted to the death of several hundred Somalis and over 70 UN and US troops.

[26] Francis Kofi Abiew, The evolution of the Doctrine and Practice of Humanitarian Intervention, Kluwer law international, Netherlands-1999,, op. cit., p.165.

Chapter VII is not limited to cases of military aggression or military threats to international peace and security. He mentioned that to intervene by force in a human emergency within a Member State, whether or not there are external effects, can be brought within the scope of Chapter VII; if the circumstances are such as in Somalia and the government structure in the Member State has collapsed. If there are transboundary effects of a human emergency, such as a large migration of refugees, or the other external aspects which threaten the international peace and security and are determined as such under Article 39 by the Security Council, the case for applying forceful collective measures would seem even stronger.[27]

The first Resolutions on Somalia made formal reference to the request by Somalia for the Security Council to consider the situation. Resolution 794 contained no statement to that effect, and was in fact the first UN resolution ever to explicitly authorize a massive military intervention within a state without any invitation from the government. UNOSOM II was the first operation under UN command ever to be given the mandate to use force not only in self defence but to pursue its mission.[28] Theoretically, the Security Council was under no obligation to reference breaches of humanitarian law as an independent basis for intervention. Explicit references to such breaches, however, suggest that they provide additional legitimacy to Security Council action. Hutchinson argued that it is unclear whether invoking these particular violations served as a mere corollary to the wider "threat to international peace" justification forwarded by the Security Council in its resolution, or whether they provided justification in themselves.[29]

The Somalia case embodies the debate involving making a moral case for non-intervention versus intervention. The international community wondered to know whether there was a legal obligation for the international community to respond to the humanitarian crises such as the one occurred in Somalia. In making a case for non-intervention, some would argue that even if in practice the state is experiencing a crisis

[27] Malanczuk, op. cit., p.25.

[28] Mattias Falk, op. cit., p.75.

[29] Mark A. Hutchinson, "Restoring Hope: UN Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention", Harvard International Law Journal, Vol.34, 1993, p.639.

of authority, because of fighting involving different fractions the ultimate consequences of which will be to split the society apart, foreign intervention is still seen as a greater evil. It is best to leave the resolution of the crisis to the local people. There is a consideration that should not to overstate the normative change represented by the resolutions on this manner. During the debate on Resolution 794 several states underlined that the situation in Somalia was unique because Somalia was a state without government, and this was, as we have seen, also recognized in the text of the resolution itself. It should be observed that the resolutions on the establishment and mandate of UNOSOM II did not make any such references to the uniqueness of the case, but the fact remains that at the time of these resolutions Somalia was in a state of anarchy.

As for the interventionists, it is true that the situation was unique and extraordinary, in the sense that only this kind of extreme situation warrants the collective use of force. This is perfectly consistent with the doctrine of humanitarian intervention. Teson argued that the doctrine does not recommend the use of force to remedy every human rights problem, any more than the doctrine of self-defence recommends using force to repel every unlawful act. Only serious human rights violations that cannot be remedied by any other means warrant proportionate collective forcible intervention for the purpose of restoring human rights, provided that the victims themselves welcome the intervention as they did in Somalia.[30]

The Organization of African Unity (OAU) would have been the appropriate body to cope with this conflict in the very beginning of the events before it took a turn for the worse, since the regional organization would have understood better what was going on, and would have been able to interact with the dynamics of the local politics. But for various reasons and especially because of the principle of non-intervention in internal conflicts on the continent, OAU did not act in Somalia case.

Somalia provides support for the legitimacy of humanitarian intervention. The intervention received lots of support and a new perspective was recognized toward intervene on grounds of humanitarian objectives.

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[30] Fernando R. Teson, op. cit., p.354.

B. Haiti (1994)

The Haitian case was more complicated than the Somalia case.[31] Haiti is the most important precedent supporting the legitimacy both of an international principle of democratic rule and of collective humanitarian intervention.

1. Chronology of the Events

In 1987, the Organization of American States (OAS) urged Haiti to resume the democratic process through free elections. In 1990 Reverend Jean-Bertrand Aristide was elected President of Haiti with a majority voting. On September 1991, a military coup removed Aristide from office. A wave of violent repression was unleashed by the new military regime, and during the following years the population of Haiti was subjected to, with increasing intensity, gross and systematic state-inflicted or state-sanctioned violations of human rights, including extrajudicial executions, torture and rape.[32]

International community tried the possible ways to turn Aristide into power but not succeeded. Then the UN bodies took into place. Both the General Assembly and the Security Council voiced concerns over human rights abuses by the de facto government of Haiti, however, addressing these abuses was not at the heart of the Security Council's resolution to use force in this situation.[33] At the 46th session of the UN General Assembly, Honduras requested that the question of human rights and democracy in Haiti be included on the Agenda. On October 1991 the General Assembly "welcomed the resolutions adopted by Organization of American States (OAS) and strongly condemned the attempted illegal replacement of the constitutional president of Haiti, the use of violence and military coercion and violation of human rights in that country".[34]

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[31] Please see the Annex for the map of the country.

[32] Mattias Falk, op. cit., p.82.

[33] Ruth A. Gordon, "Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti" Texas International Law Journal, Vol. 31, 1996, p.52.

[34] UN General Assembly Resolution 46/7, 11 October 1991, electronic version, http://www.un.org/documents/ga/res/46/a46r007.htm access date: 08.02.2004.

2. United Nations Mission in Haiti (UNMIH)

After the failed attempts of the OAS, the focus shifted towards the UN. On the request of the Haitian delegate, the Security Council unanimously adopted Resolution 841 in June 1993 invoking Chapter VII of the Charter. This resolution imposed variety of sanctions on Haiti; froze the funds, including any funds deprived from the property of the Government of Haiti or of the de facto authorities in Haiti or controlled directly or indirectly by such government and authorities or by entities owned or controlled by such Government and authorities; prohibit all traffic from entering the territory or territorial sea of Haiti carrying petroleum, arms and related material of all types, including weapons and ammunition.[35]

These embargo and economic sanctions accelerated the movement toward democracy in Haiti. Haitian military junta accepted a UN- brokered agreement in July 1993, known as the Governors Island Agreement, which would have turned Haiti to democratic rule under President Aristide.

The 10-point peace plan allowed for (i) the granting by Aristide of an amnesty (without specifying precisely whom this would cover); (ii) Aristide's return to Haiti by Oct. 30, 1993; (iii) the resignation of Cedras (but not of other army officers) and the appointment by Aristide of a new armed forces C.-in C., who, in turn, was to name his own staff; (iv) the adoption of a law creating a new police force and the appointment of a new police chief by Aristide; the appointment by Aristide of a Prime Minister; (vi) the ratification of the Prime Minister's appointment by a "normal" Haitian National Assembly; (vii) the suspension of UN and OAS trade sanctions once the new Prime Minister took office; (viii) the start of exchanges among political parties under UN-OAS auspices to put the country on the path to normality; (ix) international co-operation, consisting of technical aid and assistance, to make administrative and judicial

[35] UN Security Council Resolution 841, electronic version, http://www.un.org/Docs/scres/1993/scres93.htm access date: 08.02.2004.

reforms and to modernize the armed forces; and UN and OAS verification of full compliance with the agreement.[36]

The junta had begun implementing the arrangements for the restoration of democratic rule and for this reason under the terms of Resolution 841 and the Governors Island Agreement; the UN suspended the economic sanctions on Haiti on August 1993 with Resolution 861.[37] The Governors Island Agreement collapsed when violence against Aristide supporters resurfaced in September and October 1993, reaching a crisis point when pro-junta mobs blocked the arrival of the peace keeping force the United Nations Mission in Haiti (UNMIH) assigned to assist in the monitoring and modernization of Haiti's police and military under UNSC Resolution 867.[38] The sanctions reinforced under Resolution 873 when it became obvious that the de facto military authorities in Haiti were not implementing the settlement in good faith.[39] With Resolution 875 the Security Council authorized member states to use military force to enforce the sanctions stated in this resolution.[40]

The situation continued to deteriorate and in May 1994 the Security Council expanded the sanctions by adopting a near –total ban on all trade with Haiti, allowing only for humanitarian exceptions. Strongly condemning the numerous instances of serious human rights violations like extra-judicial killings, illegal detentions, abductions, rape and enforced disappearances, the Council reaffirmed the restoration of democracy in Haiti and the prompt return of the legitimately elected President Aristide as a goal of the international community. The Security Council declared that "the situation created by the failure of the military authorities in Haiti to fulfil their

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[36] Keesing's Record of World Events, July 1993 Haiti Peace Agreement, electronic version, http://keesings.gvpi.net/keesings/lpext.dll/KRWE/krwe-43295/krwe-45456/krwe-45534/krwe-45556/krwe-45557?fn=document-frame.htm&f=templates&2.0 access date: 08.02.2004.

[37] UN Security Council Resolution 861, electronic version, http://www.un.org/Docs/scres/1993/scres93.htm access date: 08.02.2004.

[38] UN Security Council Resolution 867, 23 September 1993, electronic version, http://www.un.org/Docs/scres/1993/scres93.htm access date: 08.02.2004.

[39] UN Security Council Resolution 873, 13 October 1993, electronic version, http://www.un.org/Docs/scres/1993/scres93.htm access date: 08.02.2004.

[40] UN Security Council Resolution 875, 16 October 1993, electronic version, http://www.un.org/Docs/scres/1993/scres93.htm access date: 08.02.2004.

obligations under the Governors Island Agreement and to comply with the relevant Security Council resolutions" constituted a threat to peace and security in the region.[41]

The economic sanctions were disproportionate and had discriminatory impact on the poor. Two reasons account for the world community's delay in recognizing the disproportionately harmful impact the sanctions were having on the Haitian people and the inadequate tailoring of sanctions to affect primarily the Haitian armed forces and their supporters. First, Aristide, Haiti's elected president strongly supported wide-ranging economic sanctions against his country from the time of the coup up to the day the multinational force was deployed in Haiti. A more important factor in the poorly-designed sanctions regime was Haiti's strategic insignificance to the great powers on the Security Council. On the one hand, the human rights violations committed by the Haitian military and the desperate economic plight of the Haitian people aroused international and popular outrage.[42]

Beside the background of continuing violence, the order for expulsion was issued in early July: the joint UN-OAS International Civilian Mission, which consisted of more than 100 human rights observers, was given 48 hours to leave the country. Tensions between the United Nations and the Haitian de facto regime in the following months increased. The UN Security Council on July 12 condemned the expulsion order and expressed its determination to bring about a "rapid and definitive solution to the crisis", and comments by US President Bill Clinton came closer than ever to endorsing US military intervention. Military exercises in preparation for the possible invasion were already being carried out by the United States.[43]

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[41] UN Security Council Resolution 917, electronic version, http://www.un.org/Docs/scres/1994/scres94.htm access date: 08.02.2004.

[42] W. Michael Reisman and Douglas L. Stevick, "The Applicability of International Law Standards to United Nations Economic Sanctions Programmes", EJIL, Vol. 9, No 1,1998,pp. 86-142.

[43] Four US amphibious assault ships, with helicopters, had left for Haiti on July 5 to deploy 2,600 marines offshore, ostensibly to evacuate some 4,000 US citizens and "designated" foreign officials, but who later conducted exercises off the Bahamas and Puerto Rico. The assault ships joined eight US patrolling warships. Meanwhile, airborne and sea exercises in the south-western USA and the Gulf of Mexico in late June were described by military sources as a "final rehearsal" for an invasion, expected to involve 20,000 troops. Keesing's Record of World Events, July 1994 Haiti, Expulsion of human rights monitors UN

On July 31 the Security Council passed Resolution 940 by a vote of 12-0. The Council authorized Member States to form a multinational force and in that framework to use "all necessary means" to facilitate the departure from Haiti of the military leadership and the restoration of the legitimate authorities of Haiti.[44] The Resolution extended the mandate of the United Nations Mission in Haiti (UNMIH) for a period of six months to assist the democratic Government of Haiti in fulfilling its responsibilities. The troop level was increased to 6000 and established the objective of completing UNMIH's mission not later than February 1996.

A settlement was finally achieved with the help of the US representatives, former US President Jimmy Carter and Senator Sam Nunn, in September 1994 after the junta's leadership discovered a US invasion force was on its way to Haiti. United States troops entered Haiti on September 19, 1994. As a result of the agreement the operation was not met by any military opposition. International reaction was almost positive to the agreement and the United States occupation. The new Secretary General of OAS voiced "deep satisfaction over the agreement, which assumes that political measures and diplomacy will prevail". Venezuela was the only Latin American nation to condemn the United States action in Haiti.[45]

US forces in Haiti suffered no casualties till the end of their mission. The United States officially turned the mission over to the United Nations on March 31, 1995.[46]

3. Resolution 940 and Humanitarian Intervention

Resolution 940 differs from the previous resolutions. The Security Council did not determine that the situation in Haiti constituted a threat to international peace and security while asserting that it was acting under Chapter VII. States accepted serious

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authorization for invasion, electronic version, http://keesings.gvpi.net/keesings/lpext.dll/KRWE/krwe-37599/krwe-39955/krwe-40017/krwe-40035/krwe-40036?fn=document-frame.htm&f=templates&2.0 access date: 08.02.2004.

[44] UN Security Council Resolution 940, electronic version, http://www.un.org/Docs/scres/1994/scres94.htm access date: 08.02.2004.

[45] Fernando R. Teson, op. cit., p.357.

[46] Keesing's Record of World Events, March 1995 Haiti, Deployment of UNMIH, electronic version, http://keesings.gvpi.net/keesings/lpext.dll/KRWE/krwe-31619/krwe-36030/krwe-36147/krwe-36148?fn=document-frame.htm&f=templates&2.0 access date 09.02.2004.

violations of human rights as grounds for action by the Security Council under Chapter VII. Resolution 940 refers to the "unique character of the present situation in Haiti and its deteriorating, complex and extra ordinary nature requiring an exceptional response".[47] The important point is that in Somalia case the Security Council stated the situation in Somalia was "unique" and "extraordinary", but here in Haiti the Security Council stated the situation as having "unique" character. Now there are two "unique" cases.

The Haiti case also differs from the others from the mandate point of view. As Glennon notes, 'sovereignty' was lost is Haiti.[48] The mandate given to the multinational force might be "intervention for democracy" rather than an action guided predominantly by humanitarian objectives.[49] But here the restoration of democracy means securing the rights of all people suffering inhumane treatment in Haiti. Haiti represents the first time that the Security Council prepared to invoke its extraordinary powers under the Charter in order to remove a military junta in effective control of the state in question. The Council found the military junta regime as threat to international peace and security in a circumstance that there were no transboundary actions happened, having no border disputes with neighbouring countries. This is a clear example of the use of force under Chapter VII in situations having purely internal character.

C. Rwanda (1994)

The two small neighbouring countries of Burundi and Rwanda in Central Africa are inhabited primarily by two ethnic groups, Hutu and Tutsi, in the same proportions: 85 percent Hutu and 15 percent Tutsi. In 1972, the Tutsi-led government and army of Burundi slaughtered up to 250,000 Hutu. In October 1993, fighting broke out again in Burundi, following an attempted Tutsi coup against the first democratically elected president of the country, a Hutu. Amnesty International estimates that around 100,000

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[47] UNSC Resolution 917 stated that the situation constituted a threat to peace and security in the region. But the same phrase was not inserted into Resolution 940.

[48] Michael J. Glennon, "Sovereignty and Community after Haiti: Rethinking the Collective Use of Force", AJIL, Vol.89, 1995, p.74.

[49] For the discussion about intervention for democracy please read; Gregory H. Fox & Brad R. Roth, "Democracy and International Law", Review of International Studies, Vol.27, 2001, pp.327-352.

people were killed in the three months between October and December 1993; other estimates of the number of dead vary between 50,000 to 200,000.[50]

1. Chronology of the Events

In October 1990, a group of Rwandan exiles, primarily Tutsi who had served for years in the Ugandan armed forces, invaded Rwanda. For the next three years, a war between the Hutu government and the invading force, known as the Rwandan Patriotic Front (RPF), partitioned the country.[51] The government held off the rebel advance on the capital with the assistance of France, Belgium and Zaire. However, the conflict was not settled and the RPF continued low level incursions in the north. Under strong pressure from the international community of aid donors, a peace agreement had been brokered by representatives from the United Nations and the Organization of Africa Unity (OAU) in August 1993, and a cease-fire was in effect from that time until mid-April 1994. However, the Hutu president continually delayed implementation of the peace agreement, in response to the rebel threat, the Habyarimana regime fostered ethnic hatred among the Rwandan population in a bid to unite all Hutus and undermine the moderate political opposition. Extremist political parties openly preached hatred and violence and the governing Hutu party had been recruiting young people into a militia and training them all through the early months of 1994. By April 1994, 10,000 Hutu had been recruited into this militia.[52]

On April 6, 1994, the Presidents of Burundi and Rwanda were both returning to the Rwandan capital of Kigali from an UN-mediated meeting of the contending parties of both countries with other regional leaders. The Rwandan president was under strong international pressure once again, this time to implement the 1993 peace agreement.

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[50] Mary Gray and Sarah Milburn Moore, "Next Arena for Genocide?", The Washington Post, August 24, 1994 cited in Milton Leitenberg, "Rwanda, 1994: International Incompetence Produces Genocide", Peacekeeping & International Relations, Nov/Dec94, Vol. 23, Issue 6

[51] Alan J. Kuperman, "Rwanda in Retrospect", Foreign Affairs, Vol.79, No.1, January/February 2000.

[52] Taylor B. Seybolt, What Makes Humanitarian Military Interventions Effective?, Project Paper, Stockholm International Peace Research Institute http://projects.sipri.se/conflictstudy/Humanitarian_Intervention.html access date: 15.05.2004.

The airplane in which the leaders were travelling was shot down as it approached the Kigali airport. Rwanda's President, Juvenal Habyarimana, died in this incident.

The civil war and the consequent series of massacres started just after this. Among the first victims were not only Tutsi, but members of the Hutu political opposition. By the end of the next day militant Hutus had killed Prime Minister Agathe Uwilingiyimana and seized the control of the government. The killings were at first limited to the capital, but the response of the United States and other Western countries was only to evacuate their own nationals in great quickness.

Silence from the international community let the massacres passed on to the militias, which fanned out into the government-controlled portion of the country with the aid of the military.[53] They claimed that Habyarimana had been assassinated by Tutsi rebels. By the middle of the first week, attackers followed an explicit strategy of concentrating their victims in groups so they could more quickly and easily massacre them. After five days, nearly 20.000 people were killed. Then the killings rapidly accelerated. Approximately three quarters of the Rwandan Tutsis were killed by early May.[54] The total number reached to 800.000 after 100 days. The massacre of Rwanda is only rivalled by the mass killings of the civilian population of Cambodia between 1975 and 1978.[55]A further 1.5 million of Rwanda's 7 million people were estimated to be displaced.

Within two days after the beginning of the genocide, RPF restarted their military campaign to defeat the Rwandan government. Rebel units stationed along the border with Uganda to the north advanced to the periphery of Kigali in three days. There they linked up with their branch, which camped outside the capital as part of the peace process. In two weeks they swept through north-eastern Rwanda. RPF troops controlled all of the Rwandan territory except the south-western corner that French troops

[53] Please see the Annex for the map of the country.

[54] Taylor B. Seybolt, ibid.

[55] Uwe Friesecke, "Can We Learn the Lessons from the Genocide in Rwanda?", Executive Intelligence Review, Vol. 31, Number 18, May 7, 2004.

occupied within three months, stopped the massacres and unilaterally declared a cease-fire. On July 4, they declared a new government in Kigali.

2. United Nations and Rwanda

At the time of the death of the President, there were 2500 UN peacekeepers stationed in Rwanda. Under the terms of the peace accord, the United Nations Assistance Mission to Rwanda (UNAMIR) was present in Rwanda at the time, without Chapter VII provisions to use force.[56] On April 5, one day before the violence broke out in Kigali, the UN Security Council had extended UNAMIR's mandate for six weeks, but threatened to end it unless ". . . full and prompt implementation by the parties . . . of the transitional institutions provided for under the Arusha Peace Agreements . . . took place."[57] In the absence of Chapter VII provisions they were powerless in stopping the massacres. General Romeo Dallaire, the Canadian commander of UNAMIR, requested the Office of the UN Secretary-General to provide him with new Rules of Engagement for his forces so that he could protect innocent civilians. The request was rejected. Rwandan Prime Minister and members of her cabinet, along with Belgian UN guards assigned to protect her, were viciously killed by militants. Belgium withdrew its military presence in UNAMIR after this incident.

Subsequent to these events, the remaining UN troops stayed in their barracks. UN Secretary-General Boutros Boutros-Ghali, with the support of the US administration, essentially recommended to the Security Council that the entire remaining UNAMIR force be withdrawn. He noted that, with the withdrawal of the Belgian contingent, UNAMIR would be unable to carry out its mandate, and stated that “In these

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[56] UNAMIR was created by UN Security Council Resolution 872, on October 5, 1993, and it deployed its first personnel on November 1, 1993. It evolved from UNOMUR, the United Nations Observer Mission to Uganda-Rwanda. There had also been an OAU Neutral Military Observer Group, NMOG I, made up of 50 men from OAU member states, between July 1992 and July 1993, and NMOG II, 132 OAU member-state personnel after August 1993 which was absorbed by UNAMIR. The funds to support the two OAU NMOGs were supplied by the United States.

[57] UN Security Council Resolution 909, 5 April 1994, electronic version, http://www.un.org/Docs/scres/1994/scres94.htm access date: 15.05.2004.

circumstances, I have asked my Special Representative and the Force Commander to prepare plans for the withdrawal of UNAMIR, should this prove necessary."[58] In his Report dated April 20, 1994 Secretary General stressed on three alternatives. The first alternative was immediate and massive reinforcement of UNAMIR and changes its mandate so that it would be equipped and authorized to coerce the opposing forces into a cease-fire. This scenario required additional troops and UNAMIR might have to be given enforcement powers under Chapter VII of the UN Charter. The second alternative was a small group headed by the Force Commander, with necessary staff, would remain in Kigali to act as intermediary between the two parties in an attempt to bring them to an agreement on a cease-fire. The third alternative was the complete withdrawal of UNAMIR.[59]

At the end, such a retreat was considered to be too great an embarrassment, and Security Council allowed 270 troops to remain.

In May, the Security Council realized that the killing continued ever more. The Council then began to discuss sending a United Nations force of 5500 African troops to Rwanda. The Security Council voted on May 17 to increase the authorized force level of UNAMIR to 5500 troops but had obtained no commitments from member nations to provide such forces.[60] The delay by member states meant little or no international action taken that might have prevented or reduced the scale of the refugee situation.

3. France and "Operation Turquoise"

On June 19, Secretary General wrote to the Security Council and stated that it would take a couple of weeks before the expanded UNAMIR troops and equipment would be available for deployment within Rwanda.[61] At the time of the letter UNAMIR

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[58] UN Secretary-General Boutros Boutros-Ghali, letter to the President of the UN Security Council, April 13, 1994.

[59] Report of the Secretary-General on the United Nations Assistance Mission for Rwanda, UN Security Council S/1994/470, 20 April 1994

[60] UN Security Council Resolution 918 (1994), 17 May 1994, electronic version, http://www.un.org/Docs/scres/1994/scres94.htm access date: 21.05.2004.

[61] UN Secretary-General Boutros Boutros-Ghali, letter to the President of the UN Security Council, June 20, 1994, UN. Doc. S/1994/728

consisted of a total force of 503 and this number was far from 5500. There were some offers from nearly 50 countries but those offers were conditional in one way or another. With evidence of the scale of the atrocities in Rwanda, the French government sent the Security Council a proposal for unilateral intervention to stop the bloodshed and establish safe havens for refugees. The French government asked for a resolution under Chapter VII of the Charter giving them a mandate to act until the expanded UNAMIR is deployed.[62] In his letter, the Secretary General put the issue in the agenda of the Security Council. The Security Council considered the letter of the Secretary General, took into account the time needed to gather the necessary resources for the effective deployment of UNAMIR and authorized Member States to conduct the operation using all necessary means to achieve the humanitarian objectives.[63] The Council acted under Chapter VII of the UN Charter. The authorization was limited to two months.

France had an established relationship with the Habyarimana government that had engaged in massive human rights violations against Rwandans. It also supported government military with troops and arms in its counter-offensives against Rwanda Patriotic Front (RPF) in 1992 and 1993. Some members of the Security Council referred to the suspicion that the French initiative for Operation Turquoise was not inspired by humanitarian concerns only, but also by special relationship with the Hutus, one of the two main parties in Rwanda.[64] The international community interpreted this operation as a move to restore French influence after the setbacks of the Arusha Peace Agreement and to block the advance of the Ugandan-backed, English speaking RPF.[65]

Three days after the resolution 2500 French troops were in Rwanda and Zaire establishing safe havens for refugees near the border. Operation Turquoise consisted approximately 2900 troops; 2500 of which were French and the rest were from African countries, mainly from Senegal. French troops helped distribute aid supplies and

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[62] Letter from the Permanent Representative of France to the United Nations addressed to the Secretary General, June 20, 1994, UN. Doc. S/1994/734.

[63] UN Security Council Resolution 929 (1994), 22 June 1994, electronic version, http://www.un.org/Docs/scres/1994/scres94.htm access date: 22.05.2004.

[64] UN. Doc. S/PV. 3392

[65] Oliver Ramsbotham, "Humanitarian intervention 1990–5:a need to Reconceptualize?", Review of International Studies, Vol.23, 1997, p. 462.

patrolled the countryside in tanks and armoured vehicles. As noted in the previous paragraph, French forces were expected to assist government troops which were consisted of Hutus and fight against the English speaking RPF; but French troops stood aside as the RPF seized the control of Kigali on July 4. French forces also did nothing to prevent the fall of Rwanda's second largest city, Butare.[66]

Operation Turquoise had four advantages: they avoided the civil war front, avoided much chaos by arriving after most of the killing was over, attempted to control only a quarter of the country, and met no resistance from the Hutu extremists who believed their former allies were there to support them.[67]

The locus of the protected safe zone was determined by French forces on their own authority. The safe havens placed in south-western Rwanda, but the selection of places later criticised that the intervention served to shield retreating Hutu genocidaires.[68] Nevertheless, Operation Turquoise provided humanitarian assistance to displaced civilians in western Rwanda and Zaire, and established a safe haven for civilian and refugees, mostly of Hutu origin, who at the time fleeing and seeking protection from the advancing RPF troops.

UNAMIR II took over as scheduled on 21 August 1994 as a peace-keeping force and fully deployed by November of 1994. As Resolution 929 did invoke Chapter VII of the UN Charter and thus assumed the existence of a "threat to international peace and security" arising out of an internal conflict, but the Council did not refer to any international or cross-border impacts of the conflict, although it could easily have done so with respect to the refugee flow towards Zaire and Tanzania.[69]

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[66] Fernando R. Teson, op. cit., p.365

[67] Taylor B. Seybolt, Eyes Wide Open: Rwanda and the Difficulty of Worthy Military Intervention, Project Paper, Stockholm International Peace Research Institute, Stockholm-1999, p.11.

[68] Ruth Wegwood, "Unilateral Action in the UN System", European Journal of International Law, Vol.11, No.2, 2000, p.357.

[69] Frederik Harhoff, "Unauthorised Humanitarian Interventions – Armed Violence in the Name of the Humanity?", Nordic Journal of International Law, Vol.70, 2001, p.97.

The Somalia, Haiti, and Rwanda cases showed us that the new political conditions in the post-Cold War era have changed the role of the United Nations. The actions became more multilateral than before and the Security Council has emerged as a key mechanism for reaching and giving legitimacy to decisions to intervene. And the practice of the Council has shown that international community may be prepared to take coercive action to meet humanitarian emergencies as last resort. The cases examined above offer evidence for the limited claim that at least in certain circumstances humanitarian considerations can be accorded priority over sovereign rights, and while there would seem to be little possibility of reaching agreement among states on any general doctrine on the legitimacy of humanitarian intervention.

In Brahimi report, experts of the United Nations recognize that "the UN does not wage war. Where enforcement action is required it had consistently been entrusted to coalitions of willing states with the authorization of the Security Council, acting under Chapter VII of the Charter".[70] This report enlightens the future of enforcement actions. Proposed enforcement mechanism based on the state practice of 1990s. The cases examined here are likely to be examples of the enforcement actions mentioned in the report.

As noted above the two cases, Somalia and Haiti, cited as "unique", and the Security Council and other States avoided stating the legitimacy of intervention on humanitarian grounds. Greenwood argues that the Security Council still feels more comfortable working in the peace-keeping mode, acting only with the consent of the government of the state concerned, even if there is sometimes a degree of artificiality about the consent.[71] The General Assembly also supported the views of Greenwood. In Resolution 46/182 the General Assembly declared the sovereignty, territorial integrity and national unity of states must be fully respected in accordance with the Charter of United Nations. Assembly added that in this context humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an

[70] Report of the Panel on United Nations Peace Operations, UN Doc. A/55/305 – S/2000/809, para. 54.
[71] Christopher Greenwood, op. cit. p.39.

appeal by the affected country.[72] There can be little doubt that there has been an unimportant change in international attitudes towards the use of force for humanitarian purposes.

II. Humanitarian Intervention without the Authorization of the United Nations

The legality and legitimacy of humanitarian intervention without authorization from the Security Council is a longstanding controversy among countries and international lawyers. There is still no consensus among countries or in legal doctrine on humanitarian intervention. Particularly, after the NATO intervention to Kosovo the issue gained actuality and became a hot topic of international law. International law is increasingly concerned with the protection of individuals, in this manner "limiting the sovereignty of states to treat their own citizens at discretion."[73]

The previous chapter shows us that the UN Security Council has interpreted its powers under Chapter VII of the UN Charter broadly, authorising on several occasions intervention to cope with humanitarian suffering within a state, resulting from large scale violations of human rights. The power of Security Council to mandate humanitarian intervention is therefore powerfully established. The dilemma of the international community arises when the Security Council fails to authorise the action necessary to prevent an imminent humanitarian catastrophe because of a veto by one Permanent Member. Here the question is whether states have a right under international law to intervene on their initiative on humanitarian basis or the prohibition on the use of force takes precedence.

B. Northern Iraq (1991-1998)

The interventions in Northern Iraq consist of two separate but complementary practises; the first practice is the creation of safe havens and no-fly zones and the

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[72] UN General Assembly Resolution 46/182, 19 December 1991, electronic version, http://www.un.org/documents/ga/res/46/a46r182.htm access date 09.02.2004

[73] Jens Elo Rytter, "Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond", Nordic Journal of International Law, Vol.70, 2001, p.123.

second practice is air strikes against Iraqi targets. This section deals with these issues separately and then tries to find out the basis for humanitarian intervention.

1. The Creation of Safe Havens and No-Fly Zones

On August 3, 1990 Iraqi Army's Republican Guard divisions invaded and occupied the neighbouring country, Kuwait. In early 1991 the Security Council authorized the use of force to terminate Iraq's occupation of Kuwait.[74] The military action was done by UN member states collectively under the title "Operation Desert Strom". This was an act of collective self-defence and within the perspective of traditional interpretation of principles set forth in the UN Charter.[75] During the defeat of the Iraqi army in and around Kuwait, with the encouragements of foreign leaders to throw Saddam Hussein regime, the desires of independence among Kurds living in Northern Iraq awakened. This uprising was suppressed by forces loyal to the government of Saddam Hussein. Iraqi army troops and helicopters attacked Kurdish villages, forcing two million civilians to flee into countryside. Nearly a million of this population moved towards mountains, near Iraq's borders with Iran and Turkey.

To a significant but lesser extent, Shiite rebels in the south fled towards the territory bordering Kuwait which had been occupied by coalition forces in the closing days of the war. The flight soon turned into a human tragedy in massive scale. The crisis generated a lot of pressure on Western governments to intervene, particularly due to concern that the allied victory over Iraq had indirectly brought about the crisis. After

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[74] This authorization was given by Resolution 678, November 1990, Operative para. 2 stated a deadline of 15 January 1991 for full implementation of the previous resolutions. Iraq did not act in accordance with the timeline and after 15 January the operation started. UNSC Resolution 678, 29 November 1990, electronic version, http://www.un.org/Docs/scres/1990/scres90.htm access date: 14.02.2004.

[75] For the debates on the Resolution 678 and the use of force in Kuwait see; Helmut Freudenschuss, "Between Unilateralism and Collective Security: Authorization of the Use of Force by the UN Security Council", EJIL, Vol. 5, 1994, p.497-498; R. Lavelle, "The Law of the United Nations and the Use of Force, under the Relevant Security Council Resolutions of 1990 and 1991, to Resolve the Persian Gulf Crisis", Netherlands Yearbook of International Law, Vol 23, 1992, pp.3-65.

a period of negotiations they decided to establish protected areas within Iraq to enable the Kurds to return safely to their homes.[76]

Resolution 687[77] did not contain any provision related to human rights and particularly any protection for the Kurds in Northern Iraq and the Shiites and Marsh Arabs in Southern Iraq. The coalition had encouraged them to rebel during the conflict, but when conflict was over and Saddam government remained in power, these people were left at that government's mercy.

Under these circumstances Turkey[78] and France[79] asked Security Council to hold a meeting on this specific subject matter. Resolution 688 was proposed by France and passed by a vote of 10-3 with 2 abstentions.[80] The Security Council first condemned the repression of the Iraqi civilian population in many parts of the Iraq. It stated that the consequences of such events threatened international peace and security in the region. The Security Council further urged Iraq to allow immediate access by international humanitarian organizations. The Council also appealed to all member States to contribute such humanitarian aid efforts.[81]

Resolution 688 has often been referred to as the legal basis for the action and the allies themselves have repeatedly described the intervention as being consistent with that resolution. In the literature it has been interpreted as evidence that the Council may adopt measures under Chapter VII with regard to an internal situation if a massive

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[76] Lawrence Freedman & David Boren, " 'Safe Havens' for Kurds in post-war Iraq" in Nigel S. Rodley (ed.) To Loose the Bands of Wickedness; International Intervention in Defence of Human Rights, Brassy's (UK) ltd., London-1992, p.43.

[77] UNSC Resolution 687, 3 April 1991,electronic version, http://www.un.org/Docs/scres/1991/scres91.htm access date: 16.02.2004.

[78] Letter dated 2 April 1991 from the Permanent Representative of Turkey to the United Nations Addressed to the President of the Security Council, UN Doc. S/22435

[79] Letter dated 4 April 1991 from the Charge D'Affaires A.I. of the Permanent Mission of France to the United Nations Addressed to the President of the Security Council, UN Doc. S/22442

[80] Yemen was against the Resolution. The Yemeni representative stated that the text of the draft resolution is a first departure from the rule of maintaining a strict focus on the Council's responsibilities under the Charter. Nigel S. Rodley, "Collective Intervention to Protect Human Rights and Civillian Populations: the Legal Framework, in Nigel S. Rodley (ed.) To Loose the Bands of Wickedness; International Intervention in Defence of Human Rights, Brassy's (UK) ltd., London-1992, p.29.

[81] UNSC Resolution 688, 5 April 1991,electronic version, http://www.un.org/Docs/scres/1991/scres91.htm access date: 16.02.2004.

violation of human rights amounts to a threat to or breach of the peace, in spite of the non-intervention principle in Art 2(7) of the Charter.[82]

a. Chronology of Events

Iraqi troops, after Resolution 688, continued their attacks on the refugees. The coalition forces advanced the idea "creating safe havens" for the Kurds in the Northern Iraq. The safe havens were organized with full awareness of the fact that this constituted an interference with internal affairs of Iraq, but were justified by the failure of Iraq to conduct its internal affairs in an acceptable manner.

However, Resolution 688 contains no reference to Chapter VII, its wording does not mention any collective enforcement measures, and did not expressly authorize or endorse the allied military intervention. There is no language in Resolution 688 such as in the earlier Resolution 678 which authorized member States "use all necessary means" to repel the Iraqi aggression against Kuwait.[83] In fact, at the time of the adoption of the Resolution 688, on 5 April 1991, the idea of military intervention to create such safety zones had not yet found the support of the United States.

Turkey was one of the first states to propose the idea of safe heavens for the Kurds. On 7 April President Turgut Özal declared that "we have to get the Kurds better land under UN control and to put those people in the Iraqi territory and take care of them".[84] This idea gained support from British Prime Minister John Major and he proposed the creation of UN-protected Kurdish safe havens in northern Iraq during the Luxembourg summit of the European Community on 8 April 1991.

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[82] Peter Malanczuk, Humanitarian Intervention and the Legitimacy of the Use of Force, Het Spinhuis , Amsterdam-1993, p.17.

[83] UN Security Council Resolution 678, ibid.

[84] At that time hundreds of thousand of refugees fled to Turkey and Turkey had no ability to deal with this amount of people. Turkey was criticized for its action to close the borders after reaching a high number of refugees. There were cross border terrorism acts against Turkey and terrorists found a suitable atmosphere among refugees in order to cross Turkish border. President Özal tried to find a solution to all these problems within Iraqi borders.

It was only later that the United States clarified its position and, on 10 April 1991, demanded that Iraq cease all military activity on its territory north of the 36th parallel with the warning to Iraq that it would use force if there was any military activity causing interference with the aid operations. The allied intervention started a week later.[85] The choice of this line excluded the oil producing areas around Kirkuk apparently in an attempt to avoid encouraging Kurdish secession from Iraq.

On 17 April armed forces from United Kingdom, France, the United States and a number of other countries began to move into Iraq, stressing that they were motivated by humanitarian concerns and with the declared aim of setting up camps and coordinating aid supplies to secure the safety of Kurdish refugees.[86] The operation was called "Operation Provide Comfort" and it includes actions like; (i) Airdrops of food, blankets and cloths; (ii) an air exclusion zone was imposed north of the 36th parallel and (iii) Safe havens were set up for the Kurds in northern Iraq. Six protection zones were established by US, British, French and Dutch troops.[87]

Within this scope a security zone under the protection of more than 13000 allied troops was established in the northern part of the country, and Iraqi forces were required to cease all operations north of the 36th parallel.

From the outset coalition forces stated that their intention was to hand over the administration and protection of these safety zones to the United Nations.[88] The suggestion was met by a reserved reaction from the UN Secretary General, who believed that an additional Security Council resolution or the consent of Iraq was required for a military presence under the UN flag.[89]

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[85] Peter Malanczuk, op. cit., p.18.

[86] The Secretary General expressed the view that any deployment of foreign troops in northern Iraq would require permission by Iraq. Iraq denounced the allied action but it did not respond militarily. It continued to negotiate with UN Mission and UN Inter-agency mission. Peter Malanczuk, op. cit., p.19.

[87] Oliver Ramsbotham & Tom Woodhouse, Humanitarian Intervention in Contemporary Conflict; A Reconceptualization, Polity Press, Cambridge-1996, p.73.

[88] Freedman & Boren, op. cit. ,p.55.

[89] Nigel Rodley, op. cit., p.32.

During the days of intervention the negotiations between Iraq and the UN had taken place. A memorandum of understanding was concluded between Iraq and the UN on 18 April, providing for a civilian United Nations presence. This document also provided basis for United Nations humanitarian centres inside Iraq. However Iraq refused to deploy a military UN presence in country. Later consent reached and 500 light armed UN Guards were sent to the region. By mid-July, most of the Kurdish refugees who had fled to Turkey in March returned. The situation was stabilised and allied forces withdrew from Iraqi territories on 15 July.[90] But this was not end for the operation. The allied forces remained in Turkey for a long period of time. This operation was called "operation Poised Hammer". The main aim for this presence was to protect Kurds in the event of reprisals from central government.

On August 1992 a second no-fly zone was imposed south of the 32nd parallel to protect Shiite population. This operation was called "Southern Watch". The action was said to be justified under Resolution 688, though it did not specifically mention Southern Iraq. This zone was later extended to 33rd parallel in September 1996 with the French refusal to patrol the extended area. And after that France withdraw its forces from the operation.[91]

b. Safe Havens, No-fly Zones, and Resolution 688

Ramsbotham argued that the operations in Iraq, either Operation Provide Comfort and Operation Southern Watch were authorized under Resolution 688, in which case this was not intervention, or they were not (because Resolution 688 made no mention of Chapter VII enforcement measures), in which case they are eliminated on more traditional grounds, including those of consent (albeit constrained) and absence of genuine humanitarian motive. According to some commentators, Allied action is

[90] Mattias Falk, op. cit., p. 69.

[91] Charles Truehart, "French Military to Quit Patrols over N Iraq" Washington Post, 28 December 1996 cited in Simon Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, Oxford University Press, Oxford-2001, p.199, note 258.

therefore probably best classed, not as accepted humanitarian intervention at all, but in terms of the rights and responsibilities of victors after a war.[92]

The Iraq's continuing protests made it clear that the action was not based on the consent of the relevant state. Along with the states engaging the operation repeatedly stated that their action was in consistent with Resolution 688. So we have to examine Resolution 688 in detail. The resolution made no formal determination that there was a threat to international peace and security but merely described the situation in Iraq as having created such a threat.[93] Resolution 688 contained no provision regarding the enforcement of the resolution either by the United Nations or by individual member states. This resolution was an important part of the legal basis for the intervention. The wording of the resolution clearly stressed on the internal repression, rather than its external consequences but it also states the internal human rights problem in Iraq threatened the international peace and security[94], and this made clear that the Western states were not intervening in a purely domestic matter, since the situation had already been internationalized. But Resolution 688 could not present a legal basis for the intervention alone. It contained no authorization equivalent to the authorization given by Resolution 678; 'to use all necessary means to end the Iraqi occupation in Kuwait'. The only paragraph referring to action by member states rather than international organizations was the paragraph 6 which 'appeals to all member states to contribute to humanitarian relief efforts'.

In the operative part of the Resolution it is the Secretary General of the UN who is requested to "pursue his humanitarian efforts" and "to use all resources at his disposal" to address urgently the critical needs of the Iraqi civil population. There is no reference to collective enforcement measures under article 42. What is true is that in the operative part of the resolution the "repression of the Iraqi civilian population" is condemned and the Council insists that Iraq must "allow immediate access by international

[92] Oliver Ramsbotham, op. cit, p.461.
[93] Christopher Greenwood, op. cit., p.36.
[94] Nigel Rodley, op. cit., p.31.

humanitarian organizations".[95] However, massive flow of refugees towards and across international frontiers and cross border incursions that threaten international peace and security in the region are consequences to this situation.

c. Safe Havens, No-fly Zones, and Humanitarian Intervention

There may be two justifications for the actions carried out by the United States, the United Kingdom and France. The first argument may be the consistency with Resolution 688. As noted above some authors believed that the operations were authorized under Resolution 688. In issuing a no-fly zone in the southern Iraq, the United States, the United Kingdom and France launched an air attack against the missiles situated in the southern zone. The UN Secretary General made a statement that this attack, although not expressly authorized by the Security Council, was legal and in conformity with the resolutions of the Security Council and in conformity with the UN Charter.[96]

The second justification may be humanitarian intervention. The United States, the United Kingdom and France did not expressly rely on a separate customary law right of humanitarian intervention in any Security Council debates or in their communications to the Security Council at the time of the establishment of the safe heavens. The absence of condemnation by other States in the Security Council or in the General Assembly may be taken as implying acceptance of the legality of the safe havens.[97] But one should consider that a condemnation of a particular use of force by the UN will normally be a strong evidence of illegality but the situation vice versa is not clear.

From August 1992 the UK Government moved gradually to a firmer assertion of a legal right to humanitarian intervention. Douglas Hurt, the foreign minister of the time, stated that they were operated under international law. He argued that international law recognized extreme humanitarian need. According to him, in support of the UN

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[95] Gerard J. Tanja, "Humanitarian Intervention and Humanitarian Assistance: An Echo from the Past and a Prospect for the Future", Law in Humanitarian Crises, Vol. 2, Office for Official Publications of the European Communities, Luxembourg-1995, p.83.

[96] Christine Gray, "After the Ceasefire: Iraq, the Security Council and the Use of Force", the British Yearbook of International Law, Vol.64, 1995, p.166

[97] Christine Gray, op. cit., p.163-164.

resolution they were on a strong legal as well as humanitarian ground setting up this 'No Fly' zone.[98] Hurt said that "international law in this field develops to meet new situations and that is what we are seeing now in the case of Iraq".[99]

In a statement to the House of Commons, the Secretary of State for Defence made clear that neither the creation of the 'no-fly' Zones nor the action to enforce them were based on UN Authorisation. He maintained that the zones were established to meet situations of 'severe humanitarian need' and those air strikes were an exercise of the right of self-defence in response to threats to allied aircraft enforcing the zones. These two statements by the members of the cabinet show the acceptance of the doctrine of humanitarian intervention by British government.

The United States has been less concerned to provide a reasoned legal explanation for the establishment and enforcement of the no-fly zones. An American scholar, David Scheffer argues that the allied deployment should not be regarded as a new type of lawful military intervention. The intervention was right action but for the wrong reason. According to him "the Bush administration would have been more honest if it had invoked the broad view of humanitarian intervention".[100]

The intervention in Northern Iraq was debated in the UN General Assembly. Some states considered the intervention a violation of Iraq's sovereignty, but several states spoke out in its favour. In the end, no resolution of condemnation was adopted.[101] The silence of the Security Council and the General Assembly interpreted by some scholars as acquiescence or even approval of the actions of coalition forces. As noted above the pronouncement of the Secretary General supported the views of this group. But even members of the coalition such as the United Kingdom did not ground its argument on this basis. 'Implied consent', as examined in the second part of the thesis, is a controversial issue and criticised by several members of the Security Council

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[98] UK Materials in International Law, the British Yearbook of International Law, Vol.63, 1992, p. 824.

[99] UK Materials in International Law, op. cit., p.827.

[100] David J.Scheffer, "Use of Force After the Cold War: Panama, Iraq and the New World Order", in Louis Henkin (ed) Right v. Might: International Law and the Use of Force, Council of Foreign Relations Press, New York-1989, p.146-147.

[101] Sean D. Murphy, Humanitarian Intervention: The United Nations in an Evolving World Order, University of Pennsylvania Press, Phildelphia-1996, p.193.

including Russia and China. So it is clear that the interventions in Iraq after the gulf war were not authorised by the Security Council.

From a legal point of view, the use of force in Iraq since 1991 is an example of Humanitarian intervention without the UN Security Council.[102]

As time past the credibility of the argument that the aerial exclusion zones were strictly necessary to meet and urgent and on going humanitarian emergency eroded. Furthermore, it appeared that the zones were also used "to keep Iraq in its box"[103] and limit its freedom to act in the region. This feeling turned into certainty on 3 September 1996 when the southern aerial exclusion zone was moved northwards from the 32nd to the 33rd parallel. Together with the cruise missile attack, this action was triggered by internal fighting among Kurdish fractions in the north, and the intervention of Iraqi troops on the side of one of them, at its own request. It was uncertain that how the extension of the zone in the south helps to protect the Kurds in the north. This situation was used by international lawyers against the right of humanitarian intervention as an example of the abuse of doctrine by powerful states.

2. Air Strikes

Since the end of Operation Desert Strom in early 1991, several air operations were taken place against Iraqi government inside the Iraqi territories. The major ones are the attacks of 1993, 1996 and 1998. Apart from these operations there had been attacks to various Iraqi targets by American and British aircrafts.

The reasons for these operations based on two arguments. The first reason is to enforce no-fly zones in northern and southern Iraq which are imposed by France, the US and the UK in April 1991 and August 1992. As noted above, these zones serve the purpose of protecting the civilian population in those areas. The second reason is to oblige compliance by Iraq with the terms of the cease-fire of 3 April 1991, in particular

[102] Peter Malanczuk, op. cit, 1993, pp.17-19; Sean D. Murphy, op. cit., pp.182-198; Will D. Verwey, op. cit. P.188, Jens Elo Rytter, op. cit., p.142

[103] Marc Weller, "The US, Iraq and the Use of Force in a Unipolar World", Survival, Vol.41, no.4, p.95.

to secure cooperation with the weapons inspection system established by Resolution 687.[104]

The justifications for the air strikes usually follow three types of arguments. The military operations are said to be a legitimate exercise of the right to self-defence to neutralise Iraqi anti-craft batteries. It is argued that the actions were authorized, at least implicitly, by Security Council resolutions. In the absence of a specific authorization by the Council to resort to force, it is necessary to implement Security Council resolutions and to enforce humanitarian and other principles written in the Charter of the UN.

Professor Schreuer believes that legitimate self-defence by aircraft operating over foreign territory would require a legal justification for these operations. In this case there must be a legal basis for the establishment and enforcement of these no-fly zones. This justification must be sought in Security Council Resolutions in the absence of the consent of the territorial State.[105]As analysed above, the Security Council has never imposed or authorized these no-fly zones explicitly. A combination of two Resolutions, namely Resolution 688 and 678 were used to justify these actions by coalition forces. As noted above Resolution 688 contains no authorization to resort to force, further more its preamble reaffirms the sovereignty, territorial integrity and political independence of Iraq.

Resolution 678 was adopted to provide the legal basis for the liberation of Kuwait and ending the Iraqi occupation. Members of the UN were authorized to use all necessary means, which is commonly understood to include the use of military force, to implement Resolution 660(1990) and other relevant resolutions to restore international peace and security in the gulf region. Resolution 688 is following the Resolution 660 and might be held by the reference to subsequent relevant resolutions. The broad purpose of Resolution 678 is to restore international peace and security in the area and

[104] For more information about the Law of Arms Control read, Dieter Fleck, "Developments of the Law of Arms Control as a Result of the Iraq-Kuwait Conflict", European Journal of International Law, Vol. 13, No. 1, 2002, pp.105-119.

[105] Christoph Schreuer, "Is there a Legal Basis for the Air Strikes Against Iraq?", International Law FORUM, 2001, p.72.

according to Schreuer this might include the protection of essential human rights in Iraq.[106]

Resolution 678 has been overtaken by Resolution 687 establishing a cease-fire. So it is not acceptable to argue that Resolution 678 gave a licence to use military force for an indefinite time. Moreover, Resolution 688 contains no reference to Resolution 678 and this situation is not part of the practice of the Security Council.[107] The Security Council's practice is to list earlier relevant resolutions.

Weapons Inspection System was imposed by Resolution 687. The resolution authorized the formation of a special commission which should carry out immediate on-site inspection of Iraq's biological, chemical and missile capabilities. Military action to secure compliance by Iraq is based on the argument that Iraq's obstruction constitutes a material breach of the cease-fire imposed by the resolution in question. The Security Council found Iraq in violation of the terms of cease-fire in several occasions. It is argued that under these circumstances Resolution 678, which granted the original authorization to take military action against Iraq, may be regarded as revived and as furnishing continuing authority to take military action.

These arguments are lack of plausibility. A material breach of the cease-fire cannot overcome the basic prohibition of the use of force as enshrined in article 2(4) of the Charter of the UN. In paragraph 33 of Resolution 687, condition of the entrance into force of the cease-fire is not upon compliance with its terms but upon their acceptance by Iraq. Therefore, as Schreuer notes, upon the entry into force of the cease-fire and the cessation of hostilities a new justification for military action must be found either on the basis of self-defence or an authorization by the Security Council.[108]

The states acting under Security Council authorization might want to continue to employ force after the basic goal of the mission has been achieved. A key question is whether a permanent cease-fire or other definitive end to hostilities terminates Security

[106] Christoph Schreuer, op. cit., p.73.

[107] For example, Resolution 781(1992) for no-fly zones in Bosnia included the expression of such authorization.

[108] Christoph Schreuer, op. cit., p.74.

Council authorizations to use force. To resolve these issues Lobel and Ratner consider using two principles underlying the Charter; the first one is that force be used in the interest of the international community, not individual states. According to them the community interest is furthered by the centrality accorded to the Security Council's control over the offensive use of force. This centrality is compromised by sundering the authorization process from the enforcement mechanism, by which enforcement is delegated to individual states or a coalition of states. Such separation results in a strong potential for powerful states to use UN authorizations to serve their own national interests rather than the interests of the international community.[109]

3. Criteria for Humanitarian Intervention and Northern Iraq

The situation in Northern Iraq needs to be examined with the criteria for humanitarian intervention in order to find out whether it complies or not.

a. A Gross Violation of Human Rights Occurring in the Target State

As seen in the introductory part of the relevant section, after the cease-fire, the Iraqi army turned to rebelling groups namely Kurds and Shiites and attacked their villages with heavy arms. These people started fleeing from the country towards neighbouring countries, Iran and Turkey. Violation of human rights had been objectively proven; the plight of Kurds having been covered on television and that of the Shiites documented by the UN reports. These evidences let authors to assume that a gross violation of human rights occurred in Iraq before the intervention.

b. The UN is Unable or Unwilling to Act

The fulfilment of this criterion is somehow problematic. From the interventionist point of view Resolution 688 did not secure the rights of suppressed people. Resolution 688 condemned the repression of Iraqi civilian population including Kurds but only insisted from Iraq to allow access by international humanitarian organizations. The

[109] Jules Lobel & Michael Ratner, "Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime", AJIL, Vol.93, 1999, p.127

resolution did not refer to Chapter VII of the UN Charter. So interventionists believe that UN did not want to involve in further steps and this criterion was fulfilled.

From the non-interventionist point of view at the time of the intervention the negotiations between Iraq and the UN had taken place and a memorandum of understanding was signed, providing for a civilian United Nations presence. This document also provided basis for United Nations humanitarian centres inside Iraq and 500 light armed UN Guards were sent to the region. These developments showed that UN was willing to act. In addition to this memorandum, Resolution 688 requested the Secretary General to pursue his humanitarian efforts and use all the resources at his disposal, including those of United Nations Agencies, to address urgently critical needs of the refugees.

c. Exhaustion of Peaceful Means to Resolve the Situation

As shown in the chronology of events the time was very limited in this case. All happened within days and it is hard to analyse whether all peaceful means were exhausted or not. Resolution 688 called on Iraq to end repression of its civilian population but Iraq did not stop. The operation started with dropping humanitarian aid from airplanes so in this stage it was still a humanitarian relief operation. But military intervention implemented even though Iraq had signed a memorandum of understanding with the UN on humanitarian operations.

The intervention was planned and acted within days and during this time there was a refugee flee and Iraqi army operation in the region. in cases where the threat is massive and the situation rapidly failing, exhaustion of other remedies may not be required since delay is likely to worsen the situation. In this case it is possible to say that exhaustion may not be required.

d. The Intervention must be Proportionate

Proportionality is a matter of both *jus ad bellum* and *jus in bello*.[110] Here one should focus on the *jus in bello* part of the term. The interventions were limited in

[110] Judith Gail Gardam, "Proportionality and Force in International Law", AJIL, Vol.87, 1993, pp.391-413.

scope and purpose. They were taken place in relevant regions and only for creating safe havens. There was no attempt to replace the Saddam government or to create a new state.[111] After creating safe havens, the intervening forces evacuated the country by July 15; only 2500 soldiers were stationed in Turkey. Coalition air forces patrolled no-fly zones from air bases outside the country. For creating safe havens it can be assumed that the intervention is proportionate.

As to conclude this chapter Northern Iraq case is an important step to accept the proposition that the interests of people come before the interests of state. This case shows the international community's commitment to the view that sovereignty and non-intervention could no longer shield genocidal and other repressive acts which are themselves forbidden by international law and treaties. International community was affected by the television coverage and there was no such opposition to the coalition actions. The discussions around the doctrine of humanitarian intervention had been arisen from the operations and renewed in Liberia and Kosovo cases.

B. Liberia (1990)

The humanitarian disaster in Liberia has its roots in the civil war which started in the late 1980s between the government forces of the then President Samuel Doe, and the rebel forces of Charles Taylor, known as the National Patriotic Front of Liberia (NPFL). The civil war in Liberia witnessed a disturbing number of atrocities, and created a refugee crisis in the West African sub region prompting regional military intervention.

Liberia was created in the early 19th century as a settlement of emancipated slaves from the United States. In 1847 the country declared itself as an independent republic. It wasn't until 1862 that the USA formerly recognised this. The new settlers saw themselves as part of a mission to bring civilisation and Christianity to Africa and so imposed a type of forced labour on the existing population. These freed slaves are the elite that ruled the country for the next 150 years. Even though the Americo-Liberians

[111] In India's intervention to East Pakistan a new state, Bangladesh, was created after the intervention. See Part II of the thesis.

constitute about 5% of the total population, they dominated the country's political, economic and social life. In the late 19th century the country lost large amounts of its territory to the British and French. In 1930 after a hundred years of the virtual enslavement of the indigenous people of Liberia, the US and Britain broke off diplomatic relations, prompted by the scandal over the sale of such labour to the Spanish territories. A coup was staged in April 1980 when Tolbert was overthrown by Master Sergeant Samuel Doe. The coup gave the indigenous inhabitants real political power for the first time, but this was condemned by other African countries, allies and trading partners. This new government executed country's top politicians and ended the domination of the Americo-Liberian elite.[112]

Samuel Doe's military regime was sustained mainly by US foreign aid during 1980s. Doe's government faced an increasing demand for political rights in mid 80s and agreed to a program of democratisation. In elections Samuel Doe was elected as the President of the Liberia but these elections were heavily criticised as being unfair. While the country moved from military coup to civilian administration, the human rights abuses remained unchanged. These widespread human rights abuses together with heavy economic conditions resulted in the outbreak of civil war.[113]

1. Chronology of the Events

The civil war was begun in December 1989 with the invasion of country by Charles Taylor from the Ivory Coast. The aim of Charles Taylor was to overthrow the Doe government. In August 1990 NPFL forces gained control over the whole territory except the capital city of Monrovia. In the meantime, a new group was formed with separations from NPFL and named as INPFL which is led by Prince Johnson. This group reached an agreement with President Doe and afterwards directed its attacks on NPFL.[114] During the war all parties to the conflict blamed each other of torturing and murdering innocent civilians. The human suffering among Liberia's population (2.6

[112] http://www.africanet.com/africanet/country/liberia/home.htm access date: 04.05.2004

[113] Francis Kofi Abiew, op. cit., p.201.

[114] Anthony Chukwuka Ofodile, "The Legality of ECOWAS Intervention in Liberia", Columbia Journal of Transnational Law, Vol.32, 1994-95, p.383.

million) is common; nearly 700000 people fled the country and became refugees and another 500000 moved from their settlements inside the country.[115]

In the absence of UN or Organization of African Unity (OAU) action, the breakdown of law and order in the country, together with loss of life, forced Economic Community of West African States (ECOWAS) to intervene to the dispute. The first attempt was a call for a cease-fire. This was done in June 1990 by ECOWAS but none of the parties to the conflict responded. The organization produced a peace plan in June 1990, which established an ECOWAS Cease-fire Monitoring Group (ECOMOG). The original role of ECOMOG was to monitor and verify a cease-fire, and to restore law and order within the country so that elections could be held.[116] ECOMOG forces, comprised 3000 Nigerians and smaller contingents from Ghana, the Gambia, Guinea, and Sierra Leone, were deployed on August 23, 1990 in a bid to try to end the fighting. Johnson and Doe welcomed the intervention because they found this situation as an obstacle for Taylor's victory. On the other hand Taylor and NPFL forces were strongly against any form of foreign intervention including ECOMOG. Following its arrival in Monrovia, ECOMOG was criticised by all sides of the conflict. It was accused of taking sides with the breakaway INPFL and Doe's Armed Forces of Liberia (AFL) factions and of failing to protect and feed Liberians. ECOMOG tried to impose peace in the country but attacked by NPFL forces.

In September 1990 President Doe was killed by INPFL forces. AFL blamed ECOMOG for the capture of Doe. ECOMOG also was accused of widespread looting and systematically stockpiling goods for return to Nigeria. By November 1990, ECOMOG was in control of Monrovia and an unstable armistice was established. A transitional government was formed under the protection of ECOMOG in Monrovia. This government was supported by ECOWAS. At the same time Taylor, who controlled the whole territory except the capital city Monrovia, declared the establishment of his own government. Taylor's government was recognized by the OAU. Taylor's

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[115] Colin Scott, "Humanitarian Action and Security in Liberia 1989-1994", Watson Institute for International Studies, Occasional Paper No:20, 1992, p.2.

[116] Danesh Sarooshi, Humanitarian Intervention and International Humanitarian Assistance: Law and Practice, Conference Report Based on Wilton Park Special Conference, 2-4 July 1993, Wilton Park Paper 86, HMSO, London-1994, p.12.

government maintained de facto control over most of the country and was exporting its natural resources for income. Each of these two governments claimed its legitimacy in international arena.

ECOMOG never had explicit humanitarian objectives, but in the meantime it reduced hostilities and violent incidents and, by establishing order in capital city and adjacent areas, set up a safe haven for thousands of Liberians. Humanitarian aid operations were secured by this force by controlling ports and airports in the previously defined area. It can be said that ECOMOG was acting as a police force within this zone and as a defence force against the forces of NPFL in order to protect the zone.

Summer 1993 came with peace efforts; a peace agreement providing for a cease-fire was reached in Geneva under the auspices of ECOWAS, the OAU and the UN. The accord was signed on July 15, in Cotonou, Benin and has become known as the 'Cotonou Agreement'. This agreement provided for a 'transitional council' with five members to run the affairs of the country until the elections. It further provided for the expansion the ECOWAS force by the addition troops from Tanzania, Uganda, and Zimbabwe. The UN Security Council established the United Nations Mission in Liberia (UNOMIL) in accordance with the peace agreement to help monitor the cease-fire and disarmament.[117] With the creation of UNOMIL the structure was changed and a hybrid organization with the separation of armed peace-keeping and unarmed observer roles were formed.

These developments fuelled the optimism of Liberian people that peace was nearby. However the parties did not agreed on the meanings of the terms stated in the peace accord; they distrusted each other and moreover, the delay of the deployment of additional troops for monitoring cease-fire resulted in delays of implementation. The parties to the conflict could not agree on sharing the key positions in the transition government. The main parties acted in conformity with cease-fire for some time but new factions emerged in this power-sharing game. There was in-fighting within the various factions, and the former leaders were no longer in control of their forces. This

[117] Anthony Chukwuka Ofodile, op. cit., p.386-387.

situation postponed the implementation of the agreement as the factions were unwilling to disarm under the threat of force from the new factions.

The parties signed several supplementary agreements during the atrocities. These were namely: the Akosombo Agreement (1994), the Accra Agreement (1994), and the Abuja Agreement (1995).[118] The Akosombo Agreement provided a more detailed plan for disarmament and disbandment of forces. This agreement also gave important role to the transitional government. The Accra Accord was mainly for the restructuring of Liberian armed forces. The Abuja Accord was for the elections and formation of the Liberian Council of State. Monitoring the elections was stated as a duty on ECOMOG and UNOMIL with this accord.

In analysing the events in Liberia, Scott identified the following phases for humanitarian activities:[119]

> Phase I: December 1989 – August 1990
>
> This phase covers a period of rapidly deteriorating security as rebel forces closed in on Monrovia, ending with the ECOMOG intervention that prevent Taylor's NPFL from taking the capital city.
>
> Phase II: August 1990 – October 1992
>
> This period covers the time from ECOMOG's establishment of a limited security zone – which prevented NPFL forces from occupying the entire country but did not reduce their influence – to the renewed NPFL assault on Monrovia that ECOMOG repelled.
>
> Phase III: November 1992 – July 1993
>
> This phase covers a period from the appointment of the Special Representative of Secretary General (SRSG), signalling a higher UN political profile to the Cotonou peace agreement. In this phase of increasing anarchy and

[118] For details of the agreements please read, Comfort Ero, ECOWAS and Subregional Peacekeeping in Liberia, The Journal of Humanitarian Assistance, electronic version, http://www.jha.ac/articles/a005.htm access date: 26.05.2004.

[119] Colin Scott, op. cit. , p. 3-4.

factionalization, ECOMOG showed a readiness to shift from peacekeeping to peace enforcement.

Phase IV: August 1993 – December 1994

This phase covers a period from the Cotonou agreement to renewed talks in Ghana. The Cotonou agreement provided a continued security role for ECOMOG alongside a newly created UN monitoring force, UNOMIL. It also supported disarmament, a multifunctional transitional government, and a peaceful context for elections. Lack of progress resulted in the reduction by the end of 1994 of both ECOMOG and UNOMIL. Following renewed talks in Ghana, a cease-fire was signed in Accra in December, but negotiations on factional representation in the LNTG broke down in January 1995 followed by riots in Monrovia.

2. ECOWAS Intervention and United Nations

At the beginning of the events the international community adopted 'wait and see' policy. For some authors, ECOWAS sought the UN's understanding.[120] The UN Security Council did not take action except a statement made in January 1991.[121] This presidential statement commended the efforts made by the ECOWAS to promote peace and normalcy in Liberia. Furthermore the members of the Security Council called upon the parties to the conflict in Liberia to respect the cease-fire agreement and fully cooperate with the ECOWAS. The statement was made five months after the ECOMOG intervention. In November 1992 the Security Council adopted Resolution 788.[122] With this resolution the Security Council determined that the deterioration of the situation in Liberia constituted a threat to international peace and security, particularly in West Africa as a whole. The Security Council also welcomed the pledge of the ECOWAS to and the efforts towards a peaceful resolution of the Liberian conflict. The Resolution called on all parties to the conflict to respect the Yamoussoukro IV agreement with its

[120] Simon Chesterman, op. cit., p.136.

[121] Note by the President of the Security Council, 22 January 1991. UN Doc. No.S/22133, electronic version, http://ods-dds-ny.un.org/doc/UNDOC/GEN/N91/022/41/IMG/N9102241.pdf?OpenElement access date: 08.05.2004.

[122] UNSC Resolution 788, 19 November 1992, electronic version, http://www.un.org/documents/sc/res/1992/scres92.htm access date: 08.05.2004.

belief that the agreement offered the best possible framework for a peaceful solution of the conflict by creating the necessary conditions for free and fair elections. It also imposed an embargo on all deliveries of weapons and military equipment to Liberia until the Security Council decides otherwise.

In reasoning the intervention, leaders of ECOWAS quoted the humanitarian concerns for the action. According to them their task is strictly humanitarian: protecting civilians from the massacre by all parties, helping civilians, protecting relief supplies, etc. In effect the basis for the ECOWAS intervention was based on the need to end the violence and mass killing of civilians in Liberia; the need to protect foreign nationals; the need to protect international peace and security particularly in the region, and the need to restore law and order and erase the chaotic environment.

On the one hand ECOWAS tried to restore law and order in the country; on the other hand it also focused on the humanitarian assistance. The creation of refugee camps, distribution of humanitarian aid among the refugees was the first and practical steps taken by ECOWAS.

The ECOWAS intervention in Liberia may be justified on the grounds of collective humanitarian intervention. Some authors believed that ECOWAS' justifications for the intervention were contrary to principles of international law since the intervention did not satisfy many of the requirements for a valid humanitarian intervention.[123] But some authors argued that if unilateral humanitarian intervention survived the Charter as a rule of customary international law, then a state or a group of states, in this case ECOMOG, was legally justified in intervening to remedy the extreme human rights violations.[124]

3. Criteria for Humanitarian Intervention and Liberia

As noted above some authors believed that the criteria for humanitarian intervention were not fulfilled in Liberia case. This subsection applies the criteria for humanitarian intervention to the Liberian case.

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[123] Anthony Chukwuka Ofodile, op. cit., p.418.

[124] Francis Kofi Abiew, op. cit., p.207.

a. A Gross Violation of Human Rights Occurring in the Target State

Thousands of people were killed and others rendered homeless by the civil war in Liberia. From the humanitarian perspective the number of casualties and the poverty of those displaced by the civil war could be thought to justify the intervention.

b. The UN is Unable or Unwilling to Act

As noted above the UN was dealing with the situation in Persian Gulf at the time of the beginning of the atrocities in Liberia. An attempt to bring the matter before the Security Council in May 1990 had been frustrated by Zaire, reportedly due to fears that intervention in Liberia might serve as an example for other interventions in Africa.[125] The first UN involvement was a statement by the Security Council made five months after the ECOWAS intervention. The African members of the Security Council, namely Ethiopia and Zaire, shared the view that the situation was an internal matter to be left for Africans to resolve. So the UN did not want to act in Liberian conflict and this criterion was satisfied.

c. Exhaustion of Peaceful Means to Resolve the Situation

The right of humanitarian intervention arises only when effective peaceful measures are unavailable. Prior to intervening in Liberia, ECOWAS formed the Standing Mediation Committee to resolve the dispute and achieve a cease-fire. This attempt was unsuccessful. The intervention comes after the failure of the attempts for peaceful solution of the dispute. It is not certain whether other peaceful way existed or not, but the efforts of ECOWAS seems to be enough to fulfil this criterion.

d. The Intervention must be Proportionate

The intervention must be strictly limited in scope to actions necessary and proportionate to bring about the cessation of such human rights violations. So lawful intervention must be of limited duration, lasting only as long as is necessary to remedy the situation. ECOWAS did not achieved its set goals, that is restoring normalcy and

[125] Simon Chesterman, ibid.

stopping deaths, in a short period of time, so the duration of the intervention did not in breach of this requirement.

As seen above the criteria for humanitarian intervention are fulfilled in this case.

4. Humanitarian Intervention by Regional Organizations and Liberia

Another debate on the justification of ECOWAS intervention to Liberia regards to use of force by regional organizations. As discussed in the first part of the thesis, according to Article 52, regional organizations acting under Chapter VIII of the UN Charter are allowed to deal with "matters relating to the maintenance of international peace and security" under the condition that "their activities are consistent with the Purposes and Principles of the United Nations. So is it possible for ECOWAS to intervene under Article 52?

On the one hand, some authors have asserted that ECOWAS did not have the legal authority to determine the existence of a threat to peace and security, and to subsequently embark on an enforcement action without Security Council authorization. This is true because there must be a Security Council resolution explicitly authorizing the use of force. Where no such authorization exists the regional intervention would be illegal, unless it concerns with a situation of self-defence. On the other hand it is argued that the ECOWAS intervention was consistent with the broad purposes and principles of the UN. Restoring peace and Security, protecting civilians from gross human rights violations are among the main purposes of the UN. ECOWAS had reported its efforts to the Security Council consistent with the provisions of the Charter. In fact, the Secretary General of the UN supported the view that ECOWAS did not need the consent of the Security Council before the intervention. According to him, ECOWAS would probably have been under no obligation to obtain the consent of the Security Council if the mission had been a purely peace-keeping operation.[126] Ofodile believes that ECOWAS' action went further than any peace-keeping operation undertaken by the UN. The Secretary General defined the concept of peace-keeping in Agenda for Peace and

[126] Peter da Costa, "Peacekeepers Turn to UN as Mediation Runs out of Steam", Inter Press Service, Sept. 23, 1992, available in LEXIS, News Library, Inpres File. cited in Anthony Chukwuka Ofodile, op. cit., p.414.

according to Ofodile ECOWAS' intervention was not a peace-keeping operation under this definition.[127] But Secretary General stated:

> Liberia constitutes to represent an example of systematic and effective cooperation between the United Nations and regional organizations, as envisaged in Chapter VIII of the Charter. The role of the United Nations has been a supportive one. Closest contact and consultation have been maintained with ECOWAS, which will continue to play the central role in the implementation of the peace agreement.[128]

ECOWAS intervention respected the sovereignty of Liberia. It did not impose a government on Liberia but "encouraged the formation of a transitional government through the involvement of all parties to the conflict".[129]

As a summary of this section, ECOWAS is a sub regional organization in West Africa. The intervention by this organization had the aim of finalizing the Liberian civil war. There was no UN authorization at the time of the intervention but ECOWAS enjoyed full support of the UN. Liberia case is an important step for regional organizations to restore peace and security in their regions in the absence of an authorization by the Security Council. ECOWAS intervention is a good example of humanitarian intervention without the consent of the United Nations. So far as unilateral humanitarian intervention is concerned, Greenwood believes that the widespread acceptance of the ECOWAS intervention in Liberia even before it received support of the Security Council suggests that the law has been shifting in this area.[130]

The two authorizations without host-state consent (Somalia and Haiti) represent a more remarkable development of the Security Council's powers. The fact that the Security Council authorized these two 'classical' humanitarian interventions, and that its

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[127] Anthony Chukwuka Ofodile, op. cit., p.414.

[128] UN Department of Public Information Reference Paper, The United Nations and the Situation in Liberia (April 1995), cited in Sean D. Murphy, op. cit, p.164.

[129] Francis Kofi Abiew, op. cit., p.210.

[130] Christopher Greenwood, op. cit., p.40.

right to do so was not contested by the UN membership generally, suggests that the Council is seen as being within its powers in authorizing humanitarian interventions without host-state consent. Nick Wheeler suggests that, any such right is not absolute. In both cases the Security Council used language emphasizing the uniqueness of the particular situation addressed.[131] The key resolution on Somalia, passed in 1992, said in the preamble: 'Recognizing the unique character of the present situation in Somalia and mindful of its deteriorating, complex and extraordinary nature, requiring an immediate and exceptional response.' Two years later, almost identical wording was used in the equivalent resolution on Haiti

The case that best illustrates both the development of a new norm and its moral limits is Rwanda but, either no action followed or any action taken was too little and too late. As Roberts notes, all these situations involved the United Nations in numerous and complex ways: "the UN has been at the centre of an unprecedented number of field operations and policy debates relating to humanitarian intervention."[132]

The remaining two of the 'classical' humanitarian interventions, northern Iraq and Liberia; the intervention to northern Iraq did not have explicit Security Council authorization. It was evident that such authorization was not likely to be obtained, and so it was not formally requested. In Liberia there was no UN authorization at the time of the intervention but ECOWAS enjoyed full support of the UN.

The turning point for the legality of humanitarian intervention may be the NATO's intervention to Kosovo. Next part will focus Humanitarian intervention in European Conflicts, particularly NATO's intervention to Kosovo.

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[131] Nicholas J. Wheeler, The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purposes in Jennifer M. Welsh(eds.) International Society in Humanitarian Intervention and International Relations, Oxford University Press, Oxford-2003, p.36.

[132] Adam Roberts, United Nations and Humanitarian Intervention, in Jennifer M. Welsh(eds.) International Society in Humanitarian Intervention and International Relations, Oxford University Press, Oxford-2003, p.71.

PART IV

HUMANITARIAN INTERVENTION IN EUROPEAN CONFLICTS

Dissolution of the Socialist Federal Republic of Yugoslavia was one of the most important events occurred in the Continental Europe in 1990s. This part of the continent was not stabilised during the decade. The dissolution created several conflicts among the constituent states, then the provinces. Bosnia and Kosovo cases made major contributions to the doctrine of humanitarian intervention. Bosnia showed the importance of intervention in humanitarian disasters, and Kosovo let scholars think on the criteria and limits of humanitarian intervention. In Bosnia the Security Council agrees that the non-intervention principle should be overridden in cases of extreme humanitarian emergency, on the other hand the Kosovo case demonstrates the difficulties of reaching a consensus on the application of this principle in specific cases in the face of divisions within the Council, significantly among the five permanent members.

First chapter will analyse the events happened during the dissolution of the SFRY and the internal conflict of Bosnia- Herzegovina (1991–1995). A detailed analyse of the actions of international organizations during the conflict is given in order to show the ability of these organizations in such crisis. Due to the continuity of events, the Bosnia case is not examined separately. The second Chapter will analyse the NATO intervention to Kosovo. Owing to its contribution to the discussions around the doctrine of humanitarian intervention, Kosovo case is detailed together with history, chronology of events and the case before the World Court. The last section of the second Chapter is

reserved for the debate on NATO's intervention and its compatibility to international law.

I. Former Yugoslavia (1991-1995)

The dissolution of the Socialist Federal Republic of Yugoslavia produced a cluster of conflicts in the region; started with Slovenia, then Croatia, and ended with Bosnia-Herzegovina.[1] Here these conflicts are examined together in chronological order. Due to its importance and difference from the previous cases, the Kosovo conflict will be examined in the next chapter.

A. Historical Background of the Conflict

Yugoslavia was created around a Serbian nucleus during a series of wars in the 19th and 20th centuries as the Ottoman Empire lost its control on the Balkan territories. Modern Serbia achieved its independence from Ottoman rule in 1878. Modern Yugoslavia arose after World War I from "the ashes of millennia of conflict"[2] and two great empires: the Austro-Hungarian Empire (Slovenia, Croatia, Bosnia and Vojvodina) and the Ottoman Empire (which conquered Kosovo in 1389 and controlled the entire region). These two empires never exerted full control over the various ethnic and national groups in the Balkans; their control was only limited to collect taxes and appoint the rulers.

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. Although Serbs were the dominant group, Slovenes and Croats welcomed the new arrangement because they were afraid of domination by Germany, Italy, Austria and Hungary as it happened in the past. However in a short period of time a national independence movement started in Croatia and conducted violent incidents. Extremist Croatian forces joined to the Nazi invaders in 1941 to create an independent Croatia and massacred hundreds of thousands of Serbs. The Chetniks, a Serbian nationalist group, stroke back and caused

[1] Please see the Annex for the map of the country.

[2] James B. Steinberg, International Involvement in the Yugoslavia Conflict, in Lori Fisler Damrosch (ed.) Enforcing Restraint Collective Intervention in Internal Conflicts, Council on Foreign Relations Press, New York–1993, p.30.

significant Croat casualties. A third movement led by Josip Broz (Marshal Tito) succeeded and built the communist state.

Yugoslavia was built as a federation with six republics: Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia. The internal borders did not attempt to consolidate populations along ethnic lines. Some authors believe that Tito (as a Croat) intentionally sought to limit the Serb's influence by the way he drew the administrative divisions.[3] In accordance with this policy both Bosnia and Croatia contain large portions of Serbian population. The 1974 Constitution paved the way though decentralized Yugoslavia; it created two new autonomous regions, the Albanian Muslim Kosovo in the southern part of Serbia and Vojvodina, with a large Hungarian population in the northern part. The 1974 constitution granted the province of Kosovo and Vojvodina far-reaching autonomy that virtually gave it the status of a republic. It was granted a right of veto in federal bodies and its own political and cultural institutions, including a university in the Albanian language.[4] The Constitution also recognized the Muslims of Bosnia as a nation.

Marshal Tito was died in 1980. His death led to creation of a new governmental structure: rotation of Yugoslav presidency among the six republics. Steinberg believes that this arrangement in effect contained the seeds of its own destruction.[5] Cracks within the Yugoslav Republic began to emerge. Either in response to increasing Serb nationalism and growing anticommunism, or abhorrence in sharing their economic good fortune with their poorer Orthodox and Muslim compatriots, independence movements in Croatia and Slovenia gained momentum in the late 1980s. The Yugoslav Communist party collapsed in January 1990. After the fall of the communist government, the republics of Yugoslavia followed the way through secession. The leaders of Slovenia and Croatia began to push for constitutional changes for loose confederation of

[3] James B. Steinberg, op. cit., p.31.

[4] Catherine Samary, "Dismantling Yugoslavia", Le Monde Diplomatique, November 1998, electronic version, http://mondediplo.com/1998/11/14yugo1 access date: 22.06.2004.

[5] James B. Steinberg, ibid.

sovereign republics. The Slovenian parliament declared it would no longer follow Federal legislation.[6] Croatia also took similar steps toward greater political autonomy.

Serbia obstinately opposed this development given the presence of Serbian minorities in the area as well as the relative economic prosperity of Croatia and Slovenia. Serbia had benefited most from democratic centralism and thus stood to lose the most from a change in authority. In July 1990 Serbian President Milosevic warned 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.[7]

On June 25,1991, Croatia and Slovenia each declared their independence. Serbia and the international community at large regretted these proclamations. The result of these proclamations was the outbreak of warfare. On June 27,1991, the predominantly Serbian Yugoslav National Army (JNA) attempted to seize control of Slovenia's international borders. By July, the incidents occurred between Croatian armed forces and JNA. By January 15, 1992, Croatia and Slovenia had been formerly recognized by the European Community under pressure from Germany.

EC's Badinter panel recommended Bosnia-Herzegovina to hold a referendum to confirm popular support for independence.[8] In February 1992, Bosnia-Herzegovina voted for referendum and the results were in favour of independence. The Serbian population boycotted and rejected the result of this referendum. Nevertheless, the government of Bosnia declared independence on March 3, 1992. The signs of violence were seen after this declaration and speeded up by the EC's recognition of Bosnia-Herzegovina. UN recognition in May 1992 was followed by increased ethnic violence

[6] Marc Weller, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia", AJIL, Vol.86, 1992, p.569.

[7] John Zematica, the Yugoslav Conflict, Adelphi Paper no.270, Brassey's for the International Institute for Strategic Studies, London-1992, p.22.

[8] Roland Rich, "Recognition of States: The Collapse of Yugoslavia and the Soviet Union", EJIL, Vol. 4, No. 1, 1993, p. 50.

by Bosnian Serbs toward Muslims, including the use of ethnic cleansing, violence and incentives to ensure that no non-Serbs remained in areas under the control of Serbs.[9]

Steinberg categorises the international community's involvement in Yugoslavian crises. According to him, the first phase is the primarily political effort to preserve Yugoslavia as a single entity following the collapse of the Yugoslav Communist Party in January 1990. The second phase stars just after the declarations of independence by Slovenia and Croatia on June 25, 1991, and focused on halting the fighting between the Slovenian militia and the Yugoslav army. The third phase is the outbreak of fighting between Serbs and Croats in Croatia. The fourth is the Bosnian referendum in favour of independence at the end of February 1992 and the final phase is the efforts to prevent the conflict from spreading to Kosovo and Macedonia.[10]

As the situation continued to worsen in Bosnia, the international community followed a multidimensional, multi-institutional strategy to address the conflict there: economic sanctions to end Serbia's support for the conflict; UN supported humanitarian relief operations; refugee assistance; investigations of human rights abuses and war crimes; and negotiations for a political settlement. At different stages there were discussions of more direct military involvement, but the idea was rejected.

B. International Community and the Yugoslav Conflict

The international community was careful in its reaction and showed an unwillingness to intervene. The first reaction came from OSCE, then the European Community was involved and tried to mediate the conflict. Yugoslavian crisis was seen as a "European conflict" and European organizations attempted to arrange a series of ceasefires in order to reach a peaceful solution.

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[9] Thomas G. Weiss and Cindy Collins, Humanitarian Challenges and Intervention: World Politics and the Dilemmas of Help, Westview Press, 1996, p.83.

[10] James B. Steinberg, op. cit., p.33.

1. Organization for Security and Co-operation in Europe (OSCE)

The 1975 Helsinki Final Act of the CSCE included the principle of inviolability of frontiers, "a major preoccupation of Europeans only to aware of the disasters that experimenting with frontiers could produce."[11] This reflects the balance between two blocs during the Cold War period. However, the CSCE has had a major hand in establishing norms regarding acceptable conduct among its members. These norms have not been limited to external relations, since individual human rights have had a prominent place on the CSCE agenda from the beginning.

a. The Copenhagen Document

The first important document relating human rights in the Post Cold War era was the Copenhagen Document. It has been argued that some support for the intervention to protect democracy may be found in this document adopted by the Conference on Security and Cooperation in Europe (CSCE) in its meeting in Copenhagen (29.06.1990). This document contained broad and detailed provisions on human rights; on minority rights; its condemnation of anti-Semitism; its condemnation of torture. Of particular interest here are its provisions on the link between human rights, representative government and the responsibility of states to defend and protect these institutions.

What is unique in the Copenhagen Document, a part from other human rights declarations and agreements, is that it asserts that the protection of human rights is one of the basic purposes of government, that a freely elected representative government is essential for the protection of human rights and that states have a responsibility to protect democratically elected governments- their own and other states'- if they are threatened by acts of violence or terrorism.[12] Paragraph 6, which is related to our topic, is as follows:

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[11] James E. Goodby, "Collective Security in Europe after the Cold War", Journal of International Affairs, Vol. 46, No. 2, 1993, p.306.

[12] Malvina Halberstam, "The Copenhagen Document: Intervention in Support of Democracy", Harvard International Law Journal, Vol. 34, 1993, s.164.

> (6) The participating states declare that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government… They recognize their responsibility to defend and protect … the democratic order freely established through the will of the people against the activities of persons, groups and organizations that engage in or refuse to renounce terrorism or violence aimed at the overthrow of that order or of that of another participating state [13]

From the wording of paragraph 6 it could be understood that this paragraph provides the participating states "recognize their responsibility to defend and protect… the democratic order freely established through the will of the people" against "terrorism or violence aimed at the overthrow of that order or of that of another participating state". The question arises whether this provision of the Copenhagen Document authorizes one state to intervene and if necessary to use force to protect a freely elected government.

According to Halberstam a strong argument can be made that the Copenhagen Document does provide such authorization. If there is a freely elected government is barred from taking office or deposed by violent means, other states have not only a right but a responsibility to restore it to power and to use power to that end whenever it is necessary. The wording of the paragraph paves the way of understanding in this direction.[14]

Clearly, intervention at the request of a freely elected government in danger of being overthrown would not constitute a violation of article 2(4). If freely elected government does not request assistance, i.e. it may not be able to communicate with the foreign world or it may fear that this kind of request may endangered the lives of them, what should be done? Again Halberstam argued that restoration of a freely elected government furthers one of the fundamental purposes of the Charter, the promotion of

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[13] The Copenhagen Document, electronic version, http://www.osce.org/docs/english/1990-1999/hd/cope90e.htm access date: 24.06.2004.

[14] Malvina Halberstam, op. cit., p.167.

human rights, and is a vindication of one of the principles affirmed in the Charter, self determination.[15]

After mentioning the Reagan Doctrine and the arguments of Reisman and Schachter , Halberstam concluded that other states' intervention to restore the legitimate government and withdraw is not- and should not be- a violation of international law. She added that the validity of that provision does not depend on the Copenhagen Document alone.

b. The Helsinki Document

At the Helsinki summit meeting of the Council of Ministers in July 1992, the participants strengthened the collective security function of the CSCE. The Helsinki Document set out various mechanisms to provide early warning and conflict prevention. Impetus for the new institutions arose at least as much from the desire to do something to prevent future Yugoslavia-type crises as from theoretical arguments about how to approach such crises. Of particular concern were national minority issues, where security, human rights, and the absence of viable domestic institutions for conflict resolution collided. The most important resulting initiative was the creation of a High Commissioner on National Minorities. Consensus is no longer required for calling emergency meetings. Investigation and rapporteur missions have been created and used in the former Yugoslavia and several other countries. The Helsinki Document states that the CSCE could request that the peacekeeping mechanisms of the Commonwealth of Independent States support peacekeeping in the CSCE region.

Gündüz analysed the later documents adopted by CSCE and he argued that the intervention allowed by the Helsinki Document refers to non-coercive reactions and it does not include measures entailing the use of force to adjust human rights situations. According to him, that was why the term 'non-intervention' was used instead of 'non-interference' as the later suggests "dictatorial interference" which is forbidden by

[15] Malvina Halberstam, ibid.

international law. Gündüz added that the same interpretation is reconfirmed by the Prague Document.[16]

Under the Charter of Paris the CSCE was given three organs: The Council of Ministers, the Committee of Senior Officials, and the Conflict Prevention Centre. At the first meeting a mechanism for consultation and cooperation in emergencies was established. The unwillingness for restructuring Yugoslavia challenged established assumptions on both the importance of maintaining existing boundaries in Europe and the principle of non-interference. In CSCE's Berlin summit, Yugoslav Foreign Minister described the country's situation as a 'time bomb in the heart of Europe'. This was taken place just a week before the outbreak of atrocities. The CSCE ministers expressed their friendly concern about Yugoslavia, and issued a statement which includes a standard requirement of respect for democracy and the rights of minorities but grant support for the 'unity and territorial integrity' of Yugoslavia.[17]

The CSCE mechanism for emergencies was invoked only two weeks after it had been agreed upon in Berlin. The matter was transferred to the Committee of Senior Officials. At the time being the chair of the committee was held by Germany and this factor let the synchronisation of the activities of CSCE with EC's common foreign and security policy and EC involvement in former Yugoslavia.

The possibility of veto by any member country, including the party at the centre of debate, held back CSCE action. After long talks at the Committee of Senior Officials, Belgrade agreed to send a 'good offices' mission to Yugoslavia with objections. The main objection was one of the proposed mission's roles 'the establishment of a new constitutional order'. Although it would be a CSCE mission of good offices, the EC and

[16] Aslan Gündüz, Security and Human Rights in Europe, Marmara University European Community Institute Publication, Istanbul-1994, p. 162.

[17] CSCE First Meeting of the Council, June 1991, Summary of Conclusions, Statement on the Situation in Yugoslavia, electronic version, http://www.osce.org/docs/english/1990-1999/mcs/1berl91e.htm#Anchor-Statemen-8541 access date: 26.06.2004.

its member states were to prepare and to contribute it. The European Community effectively took responsibility for dealing with Yugoslavia on behalf of the CSCE.[18]

2. European Community

European Community's policy was based on economic carrots and sticks. At the very beginning of the conflict, Jack Delors, President of the EC Commission of the time, visited Belgrade and promised the Yugoslavs that, in the event of a constitutional settlement, progress could be made on an association agreement with the Community and direct or indirect financial support of between $4 and $5 billion would be made available.[19] The basic principles were Yugoslav unity and democracy.

At the end of June 1991 the federal army (JNA) moved into Slovenia to assert federal authority, this move was the starting point of the crisis. The European Community moved rapidly into crisis mode; the sense of responsibility was outweighed. Gow and Freedman states that the diplomatic interest of the European Community in Yugoslavia, in addition to a hope that self-determination might be exercised in a way which would not excite nationalist and territorial disputes elsewhere, included a concern to avoid total economic collapse in the region and to avoid refugee problems. Finally, the Community wanted to offer itself and its embrace for the various parties in the future, as part of the new, integrated Europe.[20]

Apart from the issues of refugees and total economic collapse there were couple of other reasons for EC involvement. One of the main reasons was the Germans. After the collapsing of the communist system German unification was realised. This was completed with the principle of self-determination. After the unification Germans became emotional supporters of others claiming this fundamental right. There were also practical reasons for EC involvement. Yugoslavia is situated on the main trade route between the rest of the Community and Greece. Moreover, the Community had

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[18] James Gow and Lawrence Freedman, Intervention in a Fragmenting State: the Case of Yugoslavia, in Nigel S. Rodley (eds.) To Loose the Bands of Wickedness International Intervention in Defence of Human Rights, Brassey's (UK), London-1992, p.106.

[19] James Gow and Lawrence Freedman, op. cit., p.99.

[20] James Gow and Lawrence Freedman, op. cit., p.101.

economic influence; it was much more heavily involved financially in Yugoslavia. The total amount of aid programme which was organized by the Community reached to $4 billion at the time of the outbreak of crisis.

European Community took the lead in the international handling of the Yugoslav conflict, even after the burden of arranging cease-fires and discussing peace-keeping troops had been passed from the Community to the United Nations. In June 1991 the Troika[21], made up of the past, present and future foreign ministers of the presidency of the Council of Ministers of the EC, took a three-point plan to Yugoslavia. This called for a resolution of the presidential crisis, the suspension of the implementation of the declarations of independence for a period of three months and the army's return to its barracks. The session of the federal presidency on 29 June to appoint Stipe Mesic did not materialise and the federal army continued to act on its own in Slovenia. The appointment was failed because Slovenia rejected to attend the meetings declaring that it was no longer part of Yugoslavia.

The European Community and its members backed the troika's effort with the intention of reaching an agreement on cease-fire. An embargo on armaments and military equipment to the whole of Yugoslavia was imposed and there was a call to other countries to follow suit. Moreover, the Community also decided to suspend the second and third financial protocols with Yugoslavia which means blockage of aid worth £700-800 million. Finally, on 7 July the troika succeeded in establishing peace in Slovenia.

The European Community followed a two-track strategy for Croatia: first establishment of a cease-fire supported by EC monitors and secondly, pursuing political negotiations under a peace conference chaired by Lord Carrington, former British

[21] The "Troika" consists of the Member State which currently holds the Presidency of the Council, the Member State which held it for the preceding six months and the Member State which will hold it for the next six months. The Troika is assisted by the Commission and represents the Union in external relations coming under the common foreign and security policy. The Troika in its present form has been altered by the Treaty of Amsterdam and replaced by a system whereby the Presidency is assisted by the Secretary-General of the Council, in his capacity as High Representative for the common foreign and security policy, and by the Commission.

foreign secretary and Secretary General of the NATO. The conference formed three working groups: on constitutional arrangements, minority rights, and economic relations. At the beginning Carrington pressed for some way to keep Yugoslavia together. But in October 1991, Carrington and Dutch Foreign Minister Hans van den Broek released a proposed constitutional plan for a loose association among the Yugoslav republics, retaining the existing borders. All of the republics except Serbia accepted the proposal. The EC voted on November 8 to impose economic sanctions against Yugoslavia, but to exempt any republic that that agreed to the constitutional plan. On December 2 the EC restored aid and trade privileges to Bosnia, Croatia, Macedonia, and Slovenia.[22]

On 16 December 1991, the EC Foreign Ministers meeting in Brussels issued a 'Declaration on the Guidelines on the Recognition of the New States in Eastern Europe and in the Soviet Union'. Accompanying this declaration was a 'Declaration on Yugoslavia'. The Declaration on Yugoslavia introduced a process for applying the Guidelines; a written application for recognition was requested. These applications were sent to the Badinter Commission[23] to review all standing requests for secession and independence signalled a proportionate shift in international policy in the region. The panel established the following criteria for "legitimate" claims for independence: (a) preservation of respect for individual and minority rights; (b) commitment to the sovereignty (inviolability) of existing territorial borders; (c) the promotion of democratization; and (d) the acceptance of any brokered EC peace process.[24] All six Yugoslav republics responded the invitation but only four sought recognition. The recognition of Slovenia and Croatia was requested on 19 December, and granted on 15 January 1992. Bosnia Herzegovina and Macedonia requested the same on 20 December, but the privilege was not extended to Bosnia-Herzegovina until 7 April 1992, after the

[22] James B. Steinberg, op. cit., p.37.
[23] For detailed information about the Badinter Commission: Peter Radan, The Break-up of Yugoslavia and International Law, Routledge, London-2002, pp. 204-243.
[24] Roland Rich, op. cit., pp. 42-43.

Bosnian referendum, while formal recognition of Macedonia was frustrated by Greece until 8 April 1993, due to Greek fears of Macedonian irredentism.[25]

The criteria marked a shift in norms, guiding international intervention into what was heretofore considered off-limits: the internal affairs of sovereign states. The international community began to use principles of individual and group human rights protection as new justification for broader intervention policies.

After the recognition, Bosnian Serbs, with the support of JNA, accelerated the violence, focusing on forcible removal, intimidation, and even killing of Bosnian Muslims and Croats to create ethnically pure Serb regions. The Community's attempts for finding a political solution could not reach an agreement. Furthermore, these attempts were criticised by the UN Secretary General for committing the UN without prior consultation. As a result, the EC and the UN decided to merge their efforts and involve the UN directly in the peace negotiations.

3. Western European Union

Western European Union (WEU) has entered the peace-keeping and peace-enforcement field by sending a fleet to the Adriatic to take part in the UN mandated blockage against the former Yugoslavia. The decision was made unanimously by the defence ministers, who met in Rome on 20 November 1992.

Goodby argues that the one of the main questions confronting the EC is whether the process of unifying its members will continue with the intensity and rapidity envisaged in the Maastricht Treaty. According to him, the Danish rejection of Maastricht, the British withdrawal from the exchange rate mechanism and the narrow approval of Maastricht in the French referendum suggest that the momentum toward deepening economic, political and military cooperation has dissipated considerably.[26] The WEU did not send troops to Yugoslavia and shifted the question to the UN.

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[25] Karin Von Hippel, Democracy by Force : U. S. Military Intervention in the Post-Cold War World: Cambridge University Press, Cambridge-2000. p 131.

[26] James E. Goodby, op. cit., pp. 317-318.

C. United Nations and the Yugoslav Conflict

In September 1991, the UN Security Council passed Resolution 713, and imposed an arms embargo against all parties of the conflict in the former Yugoslavia. Security Council acted under Chapter VII and concerned that the continuation of the situation constitutes a threat to international peace and security.[27] Security Council also expressed support for EC and CSCE'S collective efforts thus providing regional arrangements with the opportunity to settle the local crisis. The UN Security Council supported the arrangements for cease-fire and with Resolution 724 called for the presence of a peace-keeping force in Croatia once a cease-fire had been negotiated.[28] Following that the Council also adopted Resolution 743 which established the United Nations Protection Force (UNPROFOR).[29] The Council established this force in accordance with the Report of the Secretary General and the United Nations peace-keeping plan. This force was essential for consolidating the cease-fire and facilitating negotiation of a comprehensive settlement. UNPROFOR was established in four protected areas of the Krajina region within Croatia. They were to be completely demilitarized and Croatian refugees permitted to return their homes.

As mentioned in the previous section ethnic cleansing by Bosnian Serbs toward Muslims increased after the recognition of Bosnia Herzegovina by the EC and the UN. A large portion of the Bosnian territory came under the control of the JNA. Together with the lack of progress with the EC sponsored cease-fire agreements, the Security Council hold Serbia responsible for the aggression. Security Council adopted Resolution 752 under these circumstances. The Council demands that all parties and others concerned in Bosnia Herzegovina stop the fighting immediately; all forms of interference from the outside Bosnia Herzegovina, including by units of JNA and

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[27] UN Security Council Resolution 713(1991), 25 September 1991, electronic version, http://www.un.org/Docs/scres/1991/scres91.htm access date: 27.06.2004.

[28] UN Security Council Resolution 724(1991), 15 December 1991, electronic version, http://www.un.org/Docs/scres/1991/scres91.htm access date: 27.06.2004.

[29] UN Security Council Resolution 743(1992), 21 February 1992, electronic version, http://www.un.org/Docs/scres/1992/scres92.htm access date: 27.06.2004.

Croatian Army, cease immediately and respect the territorial integrity of Bosnia Herzegovina.[30]

Resolution 755 admitted Bosnia Herzegovina to membership of the UN.[31] International community did everything except to resort to military force to end the conflict. The Security Council held Serbia responsible for the continuation of the conflict with Resolution 757.[32] Resolution 757 imposed comprehensive mandatory sanctions, including economic ones, against Serbia. But these sanctions were not enough to stop the Serb aggression in the country. Weiss and Collins note that the war was about territory, and the best way to gain territory was to eliminate the presence of non-Serbs in whatever manner was most effective. The means to that end included blocking relief supplies to Muslim populations, systematizing the rape of Muslim women and young girls, shelling civilian populations, and practising widespread and indiscriminate torture and murder.[33]

Under these circumstances the Council passed Resolution 770 on 13 August 1992.[34] This resolution fell significantly short of providing authorization for explicit military intervention. The resolution underlined the need for a non-military solution even though it did recognize that the situation in Bosnia constituted a threat to international peace and security. Resolution 770 only called upon states to provide troops under a mandate to use all necessary means to ensure the delivery of humanitarian relief supplies to Bosnia. With reference to Chapter VII, it reaffirmed its demand that all parties stop fighting and called upon states 'to take nationally or through regional agencies or arrangements all measures to facilitate in coordination with the United Nations' the delivery of humanitarian assistance. This resolution expanded the mandate of UNPROFOR to deliver humanitarian assistance and in performing this

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[30] UN Security Council Resolution 752(1992), 15 May 1992, electronic version, http://www.un.org/Docs/scres/1992/scres92.htm access date: 27.06.2004.

[31] UN Security Council Resolution 755(1992), 20 May 1992, electronic version, http://www.un.org/Docs/scres/1992/scres92.htm access date: 27.06.2004.

[32] UN Security Council Resolution 757(1992), 30 May 1992, electronic version, http://www.un.org/Docs/scres/1992/scres92.htm access date: 27.06.2004.

[33] Thomas G. Weiss and Cindy Collins, op. cit., p.83.

[34] UN Security Council Resolution 770(1992), 13 August 1992, electronic version, http://www.un.org/Docs/scres/1992/scres92.htm access date: 27.06.2004.

task to use "all necessary means". For this purposes the number of UN peace-keepers increased to several thousand and they were sent to the region to protect humanitarian convoys with totally insufficient support. As Abiew notes these forces relied almost entirely on negotiations to get humanitarian assistance to where it was needed the most, which frequently resulted in delays and disruptions.[35]

At the same meeting the Security Council adopted Resolution 771 which for the first time expressly condemned the practice of 'ethnic cleansing'.[36] The resolution repeated previous demands by the Council and requested information from states and relevant organizations relating to the violations of humanitarian law. The Council decided that all parties and other concerned in the former Yugoslavia and all military forces in Bosnia Herzegovina shall comply with the resolution, "failing which the Council will need to take further measures under the Charter".

Malanczuk argues that the Resolution 770 must be seen in connection with the discussion at the end of July and beginning of August on launching a massive military relief operation for Bosnia Herzegovina, not with UN 'blue helmets', but with national contingents of Western armies, in other words, within the NATO framework. He also notes that Resolution 770 may have been understood as an authorization of Western states to proceed with such plans, although the text limits the purpose of action by Member States to the facilitation of the delivery of humanitarian assistance.[37]

UNPROFOR troops, in accordance with Resolution 770, were deployed specifically to assist in the delivery of humanitarian aid within Bosnia. France, Britain, Canada, Spain, Pakistan and former COMECON countries provided the troops at the outset according to a type of special arrangement with NATO, but under a UN umbrella. Weiss and Collins argue that although they were authorized to use force to protect humanitarian personnel, especially their own members, the military commanders

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[35] Francis Kofi Abiew, The evolution of the Doctrine and Practice of Humanitarian Intervention, Kluwer law international, Netherlands-1999, p.181.

[36] UN Security Council Resolution 771(1992), 13 August 1992, electronic version, http://www.un.org/Docs/scres/1992/scres92.htm access date: 28.06.2004.

[37] Peter Malanczuk, Humanitarian Intervention and the Legitimacy of the Use of Force, Het Spinhuis , Amsterdam-1993, p.21.

on ground were reluctant to provoke further Serbian aggression and soldiers were unable to act as soldiers for fear that Serbian soldiers would attack.[38] Ero and Long believe that the main reason of this reluctance was the lack of national interest in doing so. The second reason was the view that the use of force by the UN might not necessarily achieve the objectives of the operation; they were not going to be able to use force to impose a peaceful settlement. They argue that there was no clear or common Western policy existed on what the future of the Balkans should be.[39]

During this period, efforts to achieve a political settlement were reinforced by the EC and the UN. The main objectives of the London Peace Conference (26-28 August 1992) were: to negotiate a political settlement to the dispute; to ensure the rapid flow of humanitarian relief, and to make the cease-fires long-lived in the former Yugoslavia. However these statements had no effect on the ground fighting. Further more, it is clear that these objectives could not be achieved in the absence of threat to use force.

After the failure of the attempts for protecting the Bosnian Muslims and continuing ethnic cleansing by the Serbs, the Security Council passed Resolution 781 which stated the imposition of a "no-fly zone" over Bosnia to prevent Serbian attacks.[40] Malik and Norman believe that this was an indication of the 'superfluous nature' of the negotiations and therefore "the provisions of Chapter VII were only the remaining option."[41] Bosnian Muslims were defenceless to Serb attacks in the UN declared safe zones, in the mean time UN peacekeepers and humanitarian aid workers became hostages of local combatants. According to a reporter Bosnian Serbs viewed the UN Resolutions as attempts by the US and EC to give the appearance of protecting the Muslims while doing nothing.[42] Unfortunately, this observation was true; the US and its

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[38] Thomas G. Weiss and Cindy Collins, op.cit., p.84.

[39] Comfort Ero and Suzanne Long, "Humanitarian Intervention: a New Role for the United Nations?", in Roger Williamson (eds.) Some Corner of a Foreign Field Intervention and World Order, Macmillan Press, 1998, p.160.

[40] UN Security Council Resolution 781(1992), 9 October 1992, electronic version, http://www.un.org/Docs/scres/1992/scres92.htm access date:30.06.2004.

[41] Shahin P. Malik and Andrew M. Dorman, United Nations and Military Intervention: a Study in the Politics of Contradiction, in Andrew M. Dorman and Thomas G. Otte (eds.) Military Intervention: From Gunboat Diplomacy to Humanitarian Intervention, Dartmouth Press, Vermont-1995, p.174.

[42] John Darnton, "Serbs Feel Invincible: Having Out-Bluffed the West, They May Now Press Their Bosnia Drive", The New York Times, June 5, 1993, p. 6.

European allies disagreed over the use of force to bring about Serbian compliance with no-fly zones and hindrance of relief delivery. Violations by all warring parties, especially by Serbs, of the 1949 Geneva Conventions, and additional protocols and other customary norms were apparent. There were reports of the massive, organized and systematic detention and rape of women. On 18 December 1992, the Council adopted Resolution 798, which had been introduced by Belgium, France and Britain, and demanded that all the detention camps and camps for women be immediately closed, condemned "these acts of unspeakable brutality" and supported the dispatch of the delegation from the EC to investigate the facts.[43] In the absence of consensus over the use of force against aggressors, the international community focused on distribution of humanitarian aid, and diplomatic negotiations.

Russia was the important factor in the Security Council as an historical supporter of the pan-Slavic movement. The UN action in Bosnia had therefore rested upon the Russian withholding of its veto in the Security Council. A move towards more effective military action or the lifting of the arms embargo would have heightened tensions within the Security Council. This clearly shows how the Security Council can become paralyzed as the direct result of a failure on the part of the Permanent Members to reach a consensus. In addition to this, it indicates that national interests remain an important factor for the Permanent Members.

D. NATO intervention to Bosnia Herzegovina

As the prospects for peace dimmed and the constraints on UNPROFOR became more evident, attention was given to the possible use of NATO air power. The US government was the driving force behind this initiative; NATO governments with troops in UNPROFOR were understandably more cautious in their approach. NATO's involvement in former Yugoslavia developed piecemeal, starting in 1992 with maritime and then air operations and culminating in 1996 with the deployment of a NATO-led Peace Implementation Force (IFOR). All of the NATO operations were undertaken under the authority of the UN Security Council.

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[43] UN Security Council Resolution 798(1992), 18 December 1992, electronic version, http://www.un.org/Docs/scres/1992/scres92.htm access date:03.07.2004.

At the end of March 1993, the Security Council, under Resolution 816 authorized Member States, acting nationally or through regional organizations or arrangements, "to take all necessary measures in the airspace of the Republic of Bosnia Herzegovina to ensure compliance with the bans on flights."[44] With this resolution, the Security Council specifically approved the enforcement by NATO fighter planes. As noted in the previous part of the thesis, there is a disagreement in the interpretation of the resolutions related to Iraq. There was no such clear approval in the case of Northern Iraq.

NATO Secretary General Manfred Worner repeatedly emphasised during 1992 and 1993 that NATO had done everything the UN asked to do. Sharp believes that this is technically true: NATO deployed naval forces to the Adriatic in Operation Sharp Guard to prevent unauthorised shipping entering the waters of new Yugoslavia (Serbia and Montenegro), as well as aircraft to Italy to be available for the Deny Flight, and Close Air Support operations. The problem was that military commanders on the ground were unwilling to call for air strikes against the Serbs and Croats for fear of endangering their own personnel serving with UNPROFOR.[45]

In the meantime Resolution 824 was adopted as the direct result of continued Serbian assault on Bosnian Government strongholds. By this Resolution, the Security Council declared that the capital city of the Republic of Bosnia Herzegovina, Sarajevo, and other such threatened areas, in particular the towns of Tuzla, Zepa, Goradze, Bihac, Srebrenica and their surroundings should be threatened as safe heavens.[46] The official purpose of the safe areas policy was to save lives while working towards a political settlement.

Resolution 836 passed on 4 June 1993 with two abstentions, extended UNPROFOR's mandate in operative paragraph 5 "to deter attacks against the safe areas" and in paragraph 9 it empowered UNPROFOR "acting in self-defence, to take

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[44] UN Security Council Resolution 816(1993), 31 March 1993, electronic version, http://www.un.org/Docs/scres/1993/scres93.htm access date:03.07.2004.

[45] Jane M. O. Sharp, Appeasement, Intervention and the Future of Europe, in Lawrence Freedman (eds.) Military Intervention in European Conflicts, Blackwell Publishers, Oxford-1994, p.38

[46] UN Security Council Resolution 824(1993), 6 May 1993, electronic version, http://www.un.org/Docs/scres/1993/scres93.htm access date:03.07.2004.

necessary measures, including the use of force, in reply to bombardments against the safe areas by any parties or to armed incursion into them".[47] To fulfil this new mandate, member states, acting nationally or through regional organizations, were empowered to take, under the authority of the Security Council and subject close coordination with the Secretary General and UNPROFOR, all necessary means, through the use of air power, in and around the safe areas in Bosnia Herzegovina, to support UNPROFOR in the performance of its mandate mentioned above. After analyzing the statements in Security Council, Wheeler believes that members of the Council interpreted this mandate as being restricted to close air support in defence of UNPROFOR personnel.[48]

Resolution 836 afforded specific permission to Bosnian government military and paramilitary units to remain within the safe areas. According to Bierman this was a blatant violation of the impartiality principle and of the safe havens principles under international humanitarian law. By failing to endorse the agreement reached by the UN Force Commander in the field, the UN Security Council action led to the failure of the safe areas concept.[49]

After the adoption of the Resolution 836 it was reported that additional 32000 troops were needed in order to defend and demilitarize the safe areas. In the end only 3500 additional troops were sent to Bosnia Herzegovina and this additional force was very far from the number that was required to stop Serbian attacks and disarm safe areas.

However, regardless of the implicit threat contained in the Resolution 824, Serbs prepared action against Grodze. Besides, the disarming of Bosnian Government forces within the safe areas was regarded as deeply unfair, as the Serbian side kept their arms.[50] The only military alternative available to the UN was NATO strikes. Acting under the authority of the UN, NATO fighter planes organized a series of bombing

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[47] UN Security Council Resolution 836(1993), 4 June 1993, electronic version, http://www.un.org/Docs/scres/1993/scres93.htm access date:07.07.2004.

[48] Nicholas J. Wheeler, Saving Strangers: Humanitarian Intervention in International Society, Oxford University Press, Oxford-2000, p.254.

[49] Wolfgang Biermann and Martin Vadset, Lessons Learned from Former Yugoslavia, Copenhagen Peace Research Institute Report of Conference held in Copenhagen, Denmark, 12-14 April 1996

[50] Shahin P. Malik and Andrew M. Dorman, op. cit., pp.175-176.

operations against Serbian targets that violated the safe heavens designated by the UN to deter further attacks. These operations worked well for a while. Bosnian Serbs withdrew from mountains around Sarajevo in August 1993 but fighting renewed shortly after.

By late 1993, an estimated 250.000 persons had been killed or were missing in the former Yugoslavia. Bosnia Herzegovina yielded the largest number of internally displaced, with approximately 2.7 million persons homeless and dependent for their daily survival on international assistance.[51]

In the meantime, peace negotiations in Geneva failed to achieve a political and peaceful solution. Bosnian Serbs had regularly prevented the UN from carrying out its peacekeeping mandates. In the Muslim enclave of Srebrenica Serbs had refused to allow Dutch UN troops to replace the Canadians. Moreover, Bosnian Serb siege of Sarajevo made the most pressing place for the UN to act where the media attention was concentrated. There was also a continued breach of no-fly zone by both Serbians and Croats. These factors led NATO to renew its threat of air strikes in January 1994. But the final decision for a bombing campaign belonged to UN Secretary General and Boutros-Ghali, Secretary General of the time, believed that they would lead to break down in the political negotiation process.[52] No fly zone was violated hundreds of times by Serb and Croat aircraft without NATO forces making any attempt to shoot them down. In April 1994, NATO's air attacks against Bosnian Serb forces attacking Goradze halted the offensive and brought an important quantity of relief to civilian population. In August 1994, NATO attacked Serb forces around Sarajevo as part of enforcing an exclusion zone imposed by the UN against heavy weaponry. Furthermore, the air operations were significantly intensified in August 1995, after an attack against Sarajevo by Serbs that killed thirty seven people as a result.

NATO air strikes placed the UN, without a doubt, in the role of a combatant, and the response of the Bosnian Serbs after the attacks against Pale in May 1995 was to take UN soldiers hostage and to overrun the towns of Srebrenica and Zepa.

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[51] Thomas G. Weiss and Cindy Collins, op. cit., p.87.

[52] Shahin P. Malik and Andrew M. Dorman, op. cit., p. 180.

As Wheeler mentions, NATO air strikes had been employed only against Serb forces directly threatening the safe areas, and this intensification in NATO strategy inflicted serious damage on Bosnian Serb military forces and equipment.[53] However, NATO's actions by air force did not save Bosnian Muslims in safe areas; the enclaves of Zepa, Bihac and Srebrenica all fell in 1995.[54]

In the case of Srebrenica, Bosnian Muslims who fled Srebrenica in a huge column during the night of 11 July 1995 were attacked by Bosnian Serb forces and thousands surrendered or were captured in the days following their flight. It is true that the Dutch UNPROFOR troops in Srebrenica never fired at the attacking Serbs. They fired warning shots over the Serbs' heads and their mortars fired flares, but they never directly fired on any Serb units. Had they engaged the attacking Serbs directly it is possible that events would have unfolded differently. The killings of Muslims by Bosnian Serb soldiers, under the command and control of Karadzic and Mladic in Potocari, at surrender or capture locations, and at mass execution sites near Karakaj were happened within this period. At the end of these massacres it was reported that of at least 7414 Muslim men were killed.[55]

Lepard notes that many Council members welcomed NATO bombing attacks against Bosnian Serb positions in August and September 1995 as an assertion of determination by the international community to uphold UN resolutions that could only further the achievement of a fair diplomatic outcome.[56] Furthermore Secretary General Kofi Annan declared in 1999 "When decisive action was finally taken by UNPROFOR in August and September 1995, it helped to bring the war to a conclusion".[57]

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[53] Nicholas J. Wheeler, op. cit., p.255.

[54] The Fall of Srebrenica, Report of the Secretary General pursuant to General Assembly Resolution 53/35, 15.11.1999, UN Doc. No. A/54/549, electronic version, http://www.un.org/Docs/journal/asp/ws.asp?m=A/54/549 access date: 11.07.2004.

[55] Third Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, UN General Assembly, 16.08.1996, UN Doc. No. A/51/292 - S/1996/665, electronic version, http://www.un.org/icty/rappannu-e/1996/index.htm access date: 11.07.2004.

[56] Brian D. Lepard, Rethinking Humanitarian Intervention, the Pennsylvania State University Press, Pennsylvania-2002, p.230.

[57] Report of the Secretary General, The Fall of Srebrenica: An Assessment, 30.1.2000, electronic version, http://www.unacitta.it/ricordarsi/rapponu.html access date: 11.07.2004.

Abiew argues that the intervention by NATO forces is partly explainable in the sense of it having a humanitarian dimension. It was an action undertaken pursuant to authorization from the UN with the aim of ending the horrible human rights situation as a result of the conflict. Although initial UN authorization was limited to the use of air force to securing delivery of humanitarian relief and enforcement of the "no-fly" zones, those limited purposes were exceeded in some instances.[58] Above mentioned actions in 1995 were good examples for strong actions of NATO.

E. Settlement of the Conflict

In December 1995, the parties to the Bosnian conflict started negotiations designed to bring the war in Bosnia to an end. The Dayton proximity talks[59] culminated in the initiating on November 21, 1995, of a General Framework Agreement for Peace in Bosnia and Herzegovina.

1. Dayton Peace Agreement

The agreement was signed in Paris on December 14, 1995. The agreement was initialled by the Republic of Bosnia and Herzegovina, the Republic of Croatia, and the Federal Republic of Yugoslavia. It was witnessed by representatives of the Contact Group nations - the United States, Britain, France, Germany, and Russia - and the European Union Special Negotiator. According to the terms of the agreement, a sovereign state known as the Republic of Bosnia and Herzegovina will consist of two entities: the Bosnian Serb Republic and the Federation of Bosnia. According to the agreement, Bosnia and Herzegovina, Croatia, and the Federal Republic of Yugoslavia (FRY) agree to fully respect the sovereign equality of one another and to settle disputes

[58] Francis Kofi Abiew, op. cit., p.187.

[59] At Dayton there were almost 100 negotiators spent 21 days ia a limited area. The Bosnian Serb members of Milosevic delegation were completely ignored. Dayton have occurred not between Muslims and Serbs but between Croats and Muslims.

by peaceful means and the FRY and Bosnia and Herzegovina recognize each other and agree to discuss further aspects of their mutual recognition.[60]

The Dayton Agreement was typical of a negotiated settlement where there was no victor and parties had essentially been forced to settle. Together with 12 Annexes Dayton Agreement ratifies and seeks to strengthen existing territorial divisions. It requires the withdrawal of all Bosnian Serb forces from the Sarajevo suburbs as well as from a corridor stretching from Sarajevo to Goradze, and assigns these areas to the Bosnian government. It also establishes Implementation Force for Bosnia (IFOR) to supervise the implementation of the military part of the Peace Plan.

According to Morris, many of the more serious problems after Dayton were inbuilt in the non-military provisions of that agreement, which stopped the conflict but did not resolve and has still not resolved its causes. With no significant change in the circumstances that drove people from their homes, and no removal of the political constraints, some governments and NATO military leaders, nevertheless, looked to the international administrators and UNHCR to deliver what the military intervention and political process had failed to achieve: the reversal of ethnic cleansing.[61]

2. Operation Joint Endeavour (IFOR)

Resolution 1031 of the Security Council authorised Member States of the United Nations to "take all necessary measures to effect the implementation of and to ensure compliance with Annex 1-A of the Peace Agreement" under unified command and control[62]. It is necessary to stress that Resolution1031 assigns the unified command and control of contributing States to IFOR, a coalition force established `through or in co-operation with' NATO, but not identical to it. Under Resolution 1031 NATO is responsible for establishing IFOR, while Annex 1-A goes much further by envisaging

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[60] Summary of the Dayton Peace Agreement, Fact sheet released by the Bureau of Public Affairs, December 11, 1995, online version, http://www.state.gov/www/regions/eur/bosnia/dayton.html access date: 11.07.2004.

[61] Nicholas Morris, Humanitarian Intervention in the Balkans, in Jennifer M. Welsh (eds.), Humanitarian Intervention and International Relations, Oxford University Press, Oxford-2003, p.101.

[62] UN Security Council Resolution 1031(1995), 15 December 1995, electronic version, http://www.un.org/Docs/scres/1995/scres95.htm access date:11.07.2004.

that "IFOR will operate under the authority and subject to the direction and political control of the North Atlantic Council ... through the NATO chain of command".

Each contributing State is under the same obligations and has the same rights as if it were acting individually in accordance with the Security Council resolution. In short, IFOR troops are in Bosnia and Herzegovina under the United Nations Security Council authority, and they are accountable only to the United Nations for their actions or omissions. However, as Talamanca notes, the Security Council did make an important concession to the view of the diplomats in Dayton by requesting contributing States to act 'through or in co-operation with' NATO.[63] IFOR treated all factions equally, but as Schulte notes, it had the capability and authority to take enforcement action against any party violating the terms of the peace agreement.[64]

IFOR's authority was limited to a period of one year, after which the Security Council had to decide whether its mandate should be continued. The Council extended the mandate by Resolution 1088 dated 12 December 1996 which replaced IFOR with SFOR.[65]

3. Stabilisation Force (SFOR)

After the September 1996 elections peacefully concluded, it was clear that IFOR would successfully complete its mission. In a meeting just after the elections, NATO Foreign and Defence Ministers concluded that a reduced military presence was needed to provide the stability necessary for the consolidation of the peace. They agreed that NATO should organize SFOR, which subsequently activated on 20 December 1996.

SFOR's mandate was fundamentally the same as that of its predecessor and was limited to a period of 18 months. The mandate has been extended on an ongoing basis,

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[63] Niccolo Figa-Talamanca, "The Role of NATO in the Peace Agreement for Bosnia and Herzegovina", European Journal of International Law, Volume 7, No.2, 1996, p.164.

[64] Gregory L. Schulte, "Former Yugoslavia and the new NATO", Survival, Vol. 39, No. 1, 1997, p.25.

[65] UN Security Council Resolution 1088, 12.12.1996, electronic version, http://www.un.org/Docs/scres/1996/scres96.htm access date: 11.07.2004.

but each extension is subject to a time limit of one year. The states participating in SFOR are required to submit reports to the Security Council on a monthly basis.

G. United Nations, NATO and the evolution of Humanitarian Intervention

Schulte argues that NATO's involvement in former Yugoslavia has had dramatic impact on the Alliance. NATO's new November 1991 Strategic Concept acknowledged the need to adopt the Alliance to the new security environment including risks emerging from outside NATO territory and other challenges to security short of outright military threats. He also believes that, it was operations in former Yugoslavia that gave the immediate impetus for NATO's increased emphasis on peace-keeping and 'out-of-area' operations.[66]

NATO's relations with the UN constituted another important factor in this context. During the Cold War, NATO operated as a collective self-defence organization acting under Article 51 of the UN Charter. For that reason, there was little need for contact between the UN and NATO. In former Yugoslavia, NATO began to operate under the authority of the Security Council and in conjunction with UN forces on the ground. In that case, the two organizations needed to interact. Resolution 836 set the arena for more intensified contact between the two organizations. Planning for close air support was conducted in close coordination with UNPROFOR, and NATO helped to train and equipped the UN tactical air controllers responsible for calling in and controlling close air support. The 'dual key' procedures, agreed in August 1993 to allow for joint decisions on NATO air strikes, were initially seen as a symbol of NATO-UN cooperation. However, in the later phases of the operations, different views on the purposes of air power in a peace-keeping operation of the two organizations became a source of disagreement.

Hoffmann believes that the long war in Bosnia showed the limits of humanitarian intervention in two different ways. First, when atrocities reach a certain level, the humanitarian organizations which tried to protect the victims and provide food and medical care were all too easily weighed down by the magnitude of the task. The

[66] Gregory L. Schulte, op. cit., p. 27.

international society is badly equipped to cope with genocide and ethnic cleansing. Secondly, putting an end to such horrors so that the number of victims ceases to rise and the survivors begin to feel safe requires more than the minimal uses of force authorized by the Security Council in Bosnia before August 1995. This authorization provided only protection for UNPROFOR from direct attack but, as in Srebrenica, left the UN impotent and the victims at the mercy of the killers.[67]

To conclude the Yugoslavian case, UN involvement in the former Yugoslavia conflict could be justified on three grounds. First, there was a refugee situation. More than 500000 Yugoslav refugees fled into other European countries during the conflict. Interior refugee flow was in enormous amounts. Secondly, the humanitarian situation resulting from the war was severer than the refugee situation. The Bosnian Serb strategy was based on attacking Muslim communities as a result left large parts of civilian population lack of essential supplies of food, medicine, power and water. These troubles carried with them starvation, exposure to the natural elements of the weather and disease. Humanitarian concerns were thus significant and fell within the mandate of the UN Security Council. And last, and most importantly, human rights violations perpetrated especially by the Bosnian Serbs for instance, mistreatment of Muslims held in concentration camps and widespread rape of Muslim women shocked the international community. The human rights situations by itself provided the necessary justification for involvement by the CSCE.

The situation in the former Yugoslavia showed the Security Council's awareness, at least in principle, to authorize the use of force for humanitarian reasons. Humanitarian concerns certainly played a prominent role in the international response to the case. As Morris points out, the humanitarian intervention in Bosnia in 1995 was almost too late. It stopped the fighting, but the passage of time without effective action

[67] Stanley Hoffmann, Humanitarian Intervention in the Former Yugoslavia, in Stanley Hoffmann (eds.) The Ethics and Politics of Humanitarian Intervention, University of Notre Dame Press, Indiana-1997, p.57.

to address years of massive violations of human rights meant that only a seriously flawed settlement was achieved, and that only at the last hour of negotiations.[68]

II. Kosovo (1999)

A. Historical Background of the Conflict

The province of Kosovo[69] is an administrative unit of 10.887 square kilometres with the estimated population between 1.800.000 and 2.100.000 of which approximately 85-90% are Kosovo Albanians and 5-10% are Serbs. Discussions of the Kosovo conflict often start with the battle of Kosovo in 1389 when the Serbs were defeated by the Ottoman Empire. This victory led to Ottoman Empire rule in the region. In early nineteenth century national uprising in Serbia slowly led to the withdrawal of the Ottoman Empire. In 1878, at the Berlin Congress Montenegro and Serbia obtained formal recognition of independence by the major European powers. The revival of Albanian nationalism, arguably in full flower since the foundation of the League of Prizren in 1878, aimed at uniting the areas of mainly Muslim Albanian-speaking populations. There has been a conflict between the Albanians' long established wish to unite Kosovo with Albania on the one side and the Serb's emotional attachment to Kosovo and its holy places, such as the seat of the Serb Patriarchate and many historic churches.

In 1912, as a result of the Balkan War Serbia gained control over Kosovo, while Albania gained independence. In 1945, Serbia established the autonomous region of Kosovo-Metohija as a constituent part of Serbia and a year later, the new federal constitution endorsed Kosovo's status as an autonomous region with limited self-government. The 1974 Constitution[70] conferred a status that was a near equivalent of the six republics to the autonomous provinces of Kosovo and Vojvodina. The

[68] Nicholas Morris, op. cit., p.119.
[69] Please see the Annex for the map of Kosovo.
[70] The Constitution of the Socialist Federal Republic of Yugoslavia, Extracts, 1974, relevant parts reproduced in Heike Krieger (eds.) , The Kosovo Conflict and International Law, Cambridge University Press, Cambridge-2001, pp.2-5.

considerable changes already made by amendments in 1971 were incorporated in the constitution. These changes had created a status for the autonomous provinces equal with the republics in most forms of economic decision-making and even in some areas of foreign policy. The autonomous provinces each had their own central bank and separate police, educational systems, a judiciary, a provincial assembly and representation in the Serbian government. Like all republics, the Kosovo Assembly had the power to veto any amendment to the federal constitution. Moreover, the federal constitution granted the provinces a right to issue their own constitution. Although it was possible for republics to secede, 1974 Constitution did not grant provinces the right to secede. The important reason for that was the fear that Kosovo Republic would secede from Yugoslavia in order to unite with Albania. As Malcolm notes, the whole basis of the Yugoslav Federal System rested on the distinction that republics were entities for nations, not for nationalities; the Kosovo Albanians were a nationality, because the nation of Albanians had its own state in Albania.[71]

Serbia's Constitution of 1974 granted an equal status to all nations and nationalities in Serbia, establishing that they individually and collectively would enjoy sovereign rights.[72] Kosovo's own constitution stressed that its people had freely organized themselves in the form of a Socialist Autonomous Province on equal basis with the nations and nationalities of Yugoslavia.[73]

After the death of Marshall Tito Kosovo exploded in March and April 1981 and subsequently produced a 'reversal of fortunes' for Kosovo Albanians. Unrest was sparked off on 11 March by students at Prishtina, Prizren and Projujevo, protesting over their living conditions. In March tensions escalated with Albanians demanding Kosovo to be accorded the status of a Federative Republic; some even calling for union with

[71] Noel Malcolm, Kosovo – A Short History, MacMillan Press, London-1998, p. 328.

[72] Constitution of the Socialist Republic of Serbia, Extracts, 1974, relevant parts reproduced in Heike Krieger (eds.) , The Kosovo Conflict and International Law, Cambridge University Press, Cambridge-2001, pp.5-7.

[73] Constitution of the Socialist Autonomous Province of Kosovo, Extracts, 1974, relevant parts reproduced in Heike Krieger (eds.) , The Kosovo Conflict and International Law, Cambridge University Press, Cambridge-2001, pp.7-8.

Albania. The Federal Army established order with brutal force. The number of death varies between 500-1000.

As Veremis notes, by 1987 Kosovo became the cornerstone of Serb nationalism with 60000 Kosovo Serbs signing a petition alleging 'genocide' against their kind. Slobodan Milosevic's rise to power in the Serb Communist Party sanctioned the nationalist tide and put an end to Tito's multiethnic politics.[74] Milosevic raised the national issue on the top of his agenda and gained support from nationalist intellectuals. His nationalist campaign to bring Kosovo under Serb control and alter its autonomous status of the 1974 constitution was an indication of future developments. In March 1989 the Serb parliament unanimously approved proposals for amending the Serb constitution. Kosovo lost the authority to pass its own laws and on July 5, 1990 the Serbian parliament assumed full and direct control of the province.

B. Chronology of Events prior to the Armed Conflict

The Independent International Commission on Kosovo points out that the revocation of Kosovo's autonomy generated an increase in human rights abuses and "discriminatory government policies designed to Serbianize the province".[75] These included discriminatory language policies: the closure of Albanian language newspapers, radio and television; the closure of the Albanian Institute; and the change of street names from Albanian to Serbian. Thousands of Albanians were dismissed from public employment; according to the local trade unions 115000 people out of a total 170000 lost their jobs. Attempts were also made to colonize the province. Legislation was also passed which made it illegal for Kosovar Albanians to buy or lease property from Serbs.

Ethnic Albanians reacted to the seizure and monopolization of public institutions by boycotting the Serbian take-over building their own parallel set of political and social institutions. Kosovo's parliament and government refused to be dissolved and

[74] Thonas Veremis, The Kosovo Puzzle, in Thonas Veremis and Evangelos Kofos (ed.) Kosovo: Avoiding Another Balkan War, University of Athens Publication, Athens-1998, pp.25-26.

[75] The Independent International Commission on Kosovo, The Kosovo Report: Conflict, International Response, Lessons Learned, Oxford University Press, Oxford-2000, p.41.

went underground. On 7 September 1990, the Assembly of Kosovo adopted a new constitution for Kosovo and Kosovo Albanians issued a formal declaration of independence on 22 September 1991.[76] They organized a referendum which reaffirmed this decision. A year later the Kosovo Albanians privately organized elections, leading to a victory of the Democratic League of Kosovo (LDK) under Ibrahim Rugova.

The Rugova government established a system of parallel administration, whereby, many of the former public sector workers could provide educational, medical and other social services. Albanians organized their own parallel system of schools and clinics, mainly on private premises. The LDK paid employees out of an income tax of three percent levied, on a voluntary basis, from Albanians abroad. In a short period of time more than 400000 children were going to Albanian parallel schools. In order to deny the legitimacy of the Serbian rule Albanians boycotted elections and censuses. But during this period 400000 Albanians are estimated to have immigrated from Kosovo to Western Europe, many to avoid recruitment into the Yugoslav army.

Up to 1995 Milosevic was preoccupied with the wars in Croatia and Bosnia. The 1995 General Framework Agreement for Bosnia and Herzegovina included no provisions for the Kosovo Albanians. The LDK has been criticised for its combination of excessively passive tactics and maximalist political demands. In 1996 and 1997 the first signs of terrorist activities were occurred in Kosovo. In summer 1997, a spokesman for the "Kosovo Liberation Army (KLA)" stated openly that his organization was responsible for recent attacks on the Serb authorities. Since the fall of 1997, there had been indications that a large Yugoslav action in Kosovo was being prepared. First there were stories about a mobilization of the army. Until then, Serbian media had always reported that everything in Kosovo was under control. However, the collapse of the Albanian state system and institutions in 1997 changed the situation dramatically. Albanian army and Interior Ministry warehouses and depots were looted and arms and munitions were made available to the KLA. In December, 1997, Serbian media suddenly claimed that (Serbian and Yugoslav) state control was limited to larger towns

[76] Unilateral Declaration of Independence, relevant parts reproduced in Heike Krieger (eds.) , The Kosovo Conflict and International Law, Cambridge University Press, Cambridge-2001, pp.12-13.

and to some fortified police posts at road junctions. The rest of the country, these reports said, was controlled by a well-armed and well organized Albanian underground army, the KLA.

Because of the collapse of the security system and the ensuing lawlessness in Albania, it was possible, for the first time, to organize training facilities in northern Albania near the borders with Kosovo. By 1998 the KLA had formed itself into a significant force, challenging the legitimacy of the democratic mandate of the government and engaging in direct military operations. On January 21, 1998, the Macedonian president, Gligorov, not known as a friend of the Albanians, declared that Macedonia expected a war in Kosovo and was preparing a "corridor" which Kosovars might use to flee to Albania. The Macedonian Albanians interpreted this as the preparation of Macedonian help for the expulsion of the Kosovars from their country.

On February 11, 1998, two Vojvodinian politicians, the social democrat Canak and the reform democrat Isakov, declared that they had clear proof that the Yugoslav army was being mobilized for a war in Kosovo in a way reminiscent of the preparations for the war in Croatia in 1991.[77] Two weeks afterwards, the war was started by massacres committed by the Serbian police, which used the KLA as a pretext. Albanians charged with membership in the KLA. As Professor Muenzel notes, in such actions, usually whole villages are surrounded, then first shelled by heavy artillery from a distance, sometimes also bombed from the air. Then snipers would shoot at anything still moving, finally the place would be "cleansed" from those people who could not flee in time. Often the livestock, too, is killed. The houses are pillaged. This is important especially for the Serbian volunteers participating in these actions, in particular for the gangs of Raznjatovic alias Arkan which already became well-known for this kind of activity in the Slavonian and Bosnian wars. They use trucks to take away everything of some value, such as household machines and electronic equipment, sometimes also pieces of furniture. They also take vehicles and machines which can still be used. Then

[77] Frank Muenzel, "What Does Public International Law Have to Say About Kosovar Independence?", JURIST, online version, http://jurist.law.pitt.edu/simop.htm access date: 26.07.2004.

they set the houses on fire, including all stocks, sometimes even the crops on the fields.[78]

After 1997 Serbian Parliamentary elections a new governing coalition was formed which included the Radical Party. There were extremist elements in the government and society that were resistant to moves towards compromise and had a vested interest in an escalation of violence to sustain their positions. As the Kosovo Report points out, the finale came on February 28, 1998, when the Serbs decided to arrest Adem Jashari, a local strongman in Prekazi, who had joined the KLA. Within a week, his extended family of 58 people was killed. At this point, village militias all over Kosovo sprang up to defend their villages. Many of them were linked to the parallel structures, but they called themselves the KLA.[79] This was the beginning of the war.

C. Kosovo and the International Community

Kosovo was not a priority for the international community before 1998. The main reason for that was the quantitatively low level of deadly violence. As noted above, during 1990s Milosevic government focused on the cases of Croatia and Bosnia Herzegovina. Milosevic had allowed Ibrahim Rugova and his party the LDK to establish its parallel network, cracking down only sporadically to prevent direct challenges to Belgrade's authority, such as an attempt to set up a parallel police force. The pacifist policies of the LDK let Milosevic to deal with Bosnia Herzegovina. The only event that the attention was directed toward Kosovo was the 1992-3 period when governments feared that war in Bosnia Herzegovina would spill over into Kosovo.

In autumn 1991 governments EU member states, when negotiating the recognition of Slovenia and Croatia, accepted the distinction between republics and provinces enshrined in the Yugoslav constitution. Ibrahim Rugova had appealed to the EU for recognition of independence in December 1991. The Badinter Commission proposed that republics of Yugoslavia should have the right to become independent provided

[78] Frank Muenzel, ibid.

[79] The Independent International Commission on Kosovo, op. cit., p.55.

certain preconditions (e.g. the referendum in Bosnia Herzegovina) were met. Autonomous provinces were not offered the same option.

After Dayton agreement, the EU formally recognized the Federal Republic of Yugoslavia (FRY) as including Kosovo, and Germany even sent back 130,000 Kosovar Albanians. However, the United States, while recognizing the FRY, insisted on maintaining the outer wall of sanctions against FRY because of the situation in Kosovo. The Independent Commission's report notices that Dayton would have been able to devise a solution for the Kosovo crisis; the report moves on and says it would have been helpful if the process had at least included a discussion of the situation in Kosovo.[80]

D. Internal Armed Conflict

In 1998, the clashes between the KLA and the Serb security forces led to a disproportionate use of force on the part of the Yugoslav authorities which resulted in a humanitarian emergency situation and a refugee crisis in the region.

Starting with the Adem Jashari incident, Serb forces attacked several villages and killed dozens of women and children. There were also attacks against humanitarian aid workers and journalists. On the other side KLA abuses were concentrated on Serbs and "collaborators". The Yugoslav government continued to characterize the situation as an internal conflict that was under their control. The KLA was shown as a terrorist organization and the operations in Kosovo were considered as actions against terrorists.

On March 31, 1998, the Security Council passed Resolution 1160 by a vote of 14-0, with China abstaining. No member voted against this resolution, but several notably Russia and China expressed their reservations about Security Council intervention in what they viewed as matters "within the domestic jurisdiction of the FRY". This resolution imposed an arms embargo on FRY and calling for autonomy and "meaningful self-administration" for Kosovo.[81] It also includes calls upon the FRY and the Kosovar Albanian leadership to take steps toward a political solution. The Council

[80] The Independent International Commission on Kosovo, op. cit., p.60.

[81] UN Security Council Resolution 1160, 31.03.1998, electronic version, http://www.un.org/Docs/scres/1998/scres98.htm access date: 30.07.2004.

also warned that the failure to make constructive progress towards the peaceful resolution of the situation in Kosovo would lead to the consideration of additional measures.

Resolution 1160 also states that Security Council review the situation on the basis of the reports of the Secretary General, which will take into account the assessments of , inter alia, the OSCE and the EU. The Secretary General prepared his report on 30 April 1998.[82] In assessing the situation in Kosovo, the Secretary General mentions the absence of progress in negotiations between the parties concerned. Because of no political presence of the Secretariat in the region the Secretary General demanded on the information supported by the OSCE and the EU. He also annexed the reports of these two organizations.

The EU report points out that the atmosphere throughout Kosovo remained extremely tense, in particular in Drenica and surrounding areas. There were reports of harassment of civilians at checkpoints, including physical and verbal attacks and long delays without good reason.[83] The OSCE report stresses on the heavy Serbian police presence, which includes special police forces. Adding to the deadlock between the parties, the Serbian government, acting on the proposal of President Milosevic, decided to hold a referendum on 23 April on the question of accepting or not accepting "the participation of foreign representatives in the settlement of the problem of Kosovo and Metohija". This decision was criticised by OSCE as being a diversionary tactic and having "a disruptive effect on an already inflamed situation".[84]

Facing a rapidly expanding KLA presence, the Yugoslav army entered Kosovo with massive reinforcements and started a large scale operation coordinated with police and paramilitary units. As Independent International Commission declares, this

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[82] Report of the Secretary General Prepared pursuant to Security Council Resolution 1160, UN Doc. S/1998/361, 30.04.1998.

[83] European Union Report on the Situation in Kosovo, 21.04.1998, Annex I of the Report of the Secretary General Prepared pursuant to Security Council Resolution 1160, UN Doc. S/1998/361, 30.04.1998.

[84] Information on the Situation in Kosovo and on Measures Taken by the Organization for Security and Cooperation in Europe, Submitted Pursuant to Paragraphs 13 and 16 of Security Council Resolution 1160, 20.04.1998, Annex II of the Report of the Secretary General Prepared pursuant to Security Council Resolution 1160, UN Doc. S/1998/361, 30.04.1998.

campaign was aimed not only at stopping the spread of KLA activities, but "intended to achieve this by directly targeting the Albanian majority civilian population in rural areas."[85] Extra-judicial executions, excessive use of force, and disappearances were becoming the routine of everyday life. By the end of May 1998, 300 people were estimated to have been killed since the start of the Serbian operation in February.

Summer 1998 was the period of refugee flow towards Montenegro, Albania and Macedonia. The UNHCR figures show that there were 230,000 internally displaced people and 60,000 refugees outside of Kosovo.[86] On September 23, 1998, the Security Council passed Resolution 1199 by fourteen votes, with China abstaining. This resolution affirmed that the deterioration of the situation in Kosovo constituted a threat to peace and security in the region.[87] The Council declared that they were acting under Chapter VII of the UN Charter and demanded a ceasefire and the withdrawal of Yugoslav security units used for civilian repression. As Wheeler notes, although the Security Council was acting under Chapter VII, and hence the resolution is legally binding, members reaffirmed their previous commitment to the sovereignty and territorial integrity of Yugoslavia, making clear that the solution to the Kosovo problem had to be found within the context of greater autonomy within the Yugoslav state.[88]

The United Kingdom and the United States wanted a stronger resolution than 1199, but it was clear from informal consultations that Russia and China would veto anything that legitimated the use of force against the FRY. Just three days after the adoption of Resolution 1199, Yugoslav forces moved to the village of Obri e Eperme, and killed at least 18 women, children, and elderly people.

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[85] The Independent International Commission on Kosovo, op. cit., p.72.

[86] Report of the Secretary General Prepared pursuant to Security Council Resolution 1160, UN Doc. S/1998/834, 04.09.1998.

[87] UN Security Council Resolution 1199, 23.09.1998, electronic version, http://www.un.org/Docs/scres/1998/scres98.htm access date: 30.07.2004.

[88] Nicholas J. Wheeler, op. cit., p.260.

E. NATO and Military Action against Yugoslavia

1. NATO's Threat to Use Force

On 24 September 1998, NATO first decided to have recourse to a threat to use force in order to find a solution to the Kosovo conflict. This threat was consisted of a limited air operation and a phased air campaign in Kosovo.[89] On 3 October, Kofi Annan presented a report that concluded that he was "outraged by reports of mass killings of civilians in Kosovo".[90] The next day the Security Council met informally to discuss the Secretary General's report. The British representative, which was the president of the Security Council at that time, took the lead in proposing a draft resolution specifically authorizing 'all necessary means' to end the massacres in Kosovo. However, Russian representative warned that they would veto any such resolution.

Given Russian and Chinese opposition to a new resolution specifically authorizing NATO to use force against the FRY, the Alliance was forced to justify its threat in terms of existing Security Council resolutions. All members of the NATO agreed that there was a moral and political imperative to act but they could not unanimously find a legal ground for military action against Serbia. US officials based their arguments on existing UN Resolutions. They argued that the Serbian forces were in obvious violation of the resolutions requirements and the resolution being based on Chapter VII of the Charter and thus this situation provided ground for NATO's action.[91] The US government asserted that the UN's affirmation of a threat to peace and security in the region and concern for the humanitarian situation provided sufficient justification for intervention.[92] Apart from this justification, UK Foreign and Commonwealth office issued a note to NATO allies and argued that Security Council authorisation to use force

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[89] NATO, Statement by the Secretary General following the ACTWARN Decision, Vilamoura, 24 September 1998, electronic version, http://www.nato.int/docu/pr/1998/p980924e.htm access date:31.07.2004.

[90] Report of the Secretary General Prepared pursuant to Security Council Resolutions 1160 and 1199, UN Doc. S/1998/912, 03.10.1998.

[91] For the detailed explanations of the US justifications please read Robert F. Turner, "Kosovo: Legal and Policy Considerations", U.S.A.F. Acad. Journal of Legal Studies, Vol. 10, 1999-2000, pp.67-94.

[92] Patrick T. Egan, "The Kosovo Intervention and Collective Self Defence", International Peacekeeping, Vol. 8, No.3, 2001, p.43.

for humanitarian purposes was widely accepted after the Bosnia and Somalia cases. The note argues that a UN Security Council Resolution would give a clear legal base for NATO action but force can also be justified on the grounds of overwhelming humanitarian necessity without the Security Council Resolution. The criteria for unauthorised intervention were listed as below:

> (a) that there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
>
> (b) that it is objectively clear that there is no practicable alternative to the use of force if lives are to be saved;
>
> (c) that the proposed use of force is necessary and proportionate to the aim (the relief of humanitarian need) and is strictly limited in time and scope to this aim – i.e. it is the minimum necessary to achieve that end. It would also be necessary at the appropriate stage to assess the targets against this criterion.
>
> There is convincing evidence of an impending humanitarian catastrophe (SCR 1199 and the UNSG's and UNHCR's reports). We judge on the evidence of FRY handling of Kosovo throughout this year that a humanitarian catastrophe cannot be averted unless Milosevic is dissuaded from further repressive acts, and that only the proposed threat of force will achieve this objective. The UK's view is therefore that, as matters now stand and if action through the Security Council is not possible, military intervention by NATO is lawful on grounds of overwhelming humanitarian necessity.[93]

However, as Guicherd notes, Belgium, France, Germany, Greece, Italy and Spain had political and legal misgivings reflecting the unfinished state of international law concerning humanitarian intervention.[94] Moreover, the German Foreign Minister of the time declared himself unsatisfied with the US and the British arguments. On 13 October 1998, following a deterioration of the situation, the North Atlantic Council

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[93] "FRY/Kosovo: The Way Ahead; UK View on Legal Base for Use of Force", FCO note of 7 October 1998, quoted in Adam Roberts, "NATO's 'Humanitarian War' over Kosovo", Survival, Vol. 41, No. 3, p. 106.

[94] Catherine Guicherd, "International Law and the War in Kosovo", Survival, Vol. 41, No. 2, 1999, p.26

authorized Activation Orders for air strikes.[95] Although Russia explicitly declared its opposition to the use of force to back up UN Resolution 1199, the use of air bombardments against the FRY for this purpose was officially approved by NATO, and a deadline issued for Serbia to comply. The deadline was repeatedly postponed in the succeeding days.

On 14 October, unexpectedly, the so-called Milosevic-Holbrooke agreement was announced.[96] After a period of intense negotiations the US Special Envoy Richard Holbrooke, representing the Contact Group, and the Serbian President Milosevic reached an agreement, based on the demands declared in Resolution 1199 and under the threat to use force by NATO. The major points of the agreement addressed to the reduction in forces and deployment of monitors. All those who had fled their homes in Kosovo and become refugees were to be allowed to return. Serbian forces in Kosovo, including both army units and special forces, were to be scaled back to their pre-1999 levels. Milosevic agreed with negotiators to pull back security forces, allow access to aid workers and accept the OSCE Kosovo Verification Mission (KVM). This monitoring effort would be complemented by NATO over-flights. On 15 October 1998, NATO and the FRY signed an agreement providing for the establishment of an air verification mission over Kosovo.[97] The establishment of two missions was approved by the Security Council Resolution 1203.[98] Russia and China abstained on the ground that the resolution left some room for the use of force. Guicherd believes that they probably were most concerned about paragraph 9 which stipulates that "action may be needed to ensure the OSCE monitors' safety and freedom of movement."[99] In support of the OSCE, NATO established a special military task force to assist in the case of an emergency evacuation of members of the KVM, in order to secure them from renewed

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[95] According to NATO procedure, the military command may deploy forces only upon an activation order from the NATO Secretary-General, who does so as chair and at the behest of the North Atlantic Council.

[96] Accord reached by Slobodan Milosevic, President of the FRY, and the UN Special Envoy, Richard Holbrooke, UN Doc. No. S/1998/953, Annex, 14 October 1998.

[97] NATO – FRY, Agreement Providing for the Establishment of an Air Verification Mission over Kosovo, Belgrade, 15 October 1998, UN Doc. No. S/1998/991, Annex, 23 October 1999.

[98] UN Security Council Resolution 1203, 24.10.1998, electronic version, http://www.un.org/Docs/scres/1998/scres98.htm access date: 31.07.2004.

[99] Catherine Guicherd, op. cit., p.29

conflict. This task force was deployed in the former Yugoslav Republic of Macedonia under the overall direction of NATO's Supreme Allied Commander Europe.

For the following two months the Milosevic-Holbrooke agreement was appeared to be successful on all these provisions, despite a number of violations of the cease-fire. Meanwhile the American and the European diplomats showed their efforts to promote a Kosovo settlement, although still without including the KLA in the process. Despite these steps, the situation in Kosovo flared up again in the last week of December and in the first half of January 1999, following a number of acts of provocation on both sides and the use of excessive and disproportionate force by the Serbian Army and Special Police. Some of these incidents were defused through the mediation efforts of the OSCE verifiers but in mid-January, nonetheless, the situation deteriorated further after rise of the Serbian offensive against Kosovar Albanians. From aerial monitoring over the region, NATO was aware of violations of the cease-fire agreement during this period.

As mentioned in an OSCE Report, three things became clear. The first one was that the reduction in fighting between Serb forces and the KLA had been no more than a temporary calm, which ended in December with a new Serbian offensive in the north-east. The KLA had used the break to rearm and retrain, while a large force of Yugoslav troops was being assembled just outside the province in apparent preparation for a spring offensive. The second was that in these circumstances the OSCE Kosovo Verification Mission (KVM) was neither equipped nor mandated to play a peacekeeping role, so a 2,300-strong NATO "extraction force" was put in place just across the border in the Former Yugoslav Republic of Macedonia to evacuate the monitors if necessary. The third was that atrocities against unarmed civilians had not ceased. In mid-January, 45 people - some of them children - were found murdered in Racak, mostly shot in the head at close range.[100] OSCE-KVM investigated the site of the massacre just a day after

[100] Organization for Security and Co-operation in Europe, KOSOVO/KOSOVA As Seen, As Told, An Analysis of the Human Rights Findings of the OSCE Kosovo Verification Mission October 1998 to June 1999, Chapter 1, online version, http://www.osce.org/kosovo/documents/reports/hr/part1/ch1.htm access date: 31.07.2004.

and found "evidence of arbitrary detentions, extra-judicial killings and mutilation of unarmed civilians."[101]

In February 1999, Contact Group members organized peace negotiations between the parties to the conflict. Both sides were met in Rambouillet, France on February, 6th 1999. Kosovar Albanians were represented by both KLA and LDK. The core of the plan was disarming of the KLA and the withdrawal of Serb forces with supervision from an "enabling force" of NATO troops.[102] The plan provided for a restoration of Kosovo's autonomy and its independent institutions, but left the issue of future status for reconsideration after three years. This proposal was signed neither by the Serbian government nor the representatives of Kosovar Albanians.

After this failure, a second round of talks was conducted in Paris during March 1999. On March 18 while the Kosovar Albanian delegation signed the proposal then on the table, the Serbian delegate refused to sign the document. Moreover, 30000 more Yugoslav troops were sent to Kosovo along with tanks and other units, the OSCE-KVM was pulled out on 20 March. NATO issued another ultimatum demanding Serbia's signature, but the Serbian parliament confirmed the rejection of the Rambouillet proposals. On 24 March 1999 the NATO forces began their aerial campaign.

2. Operation Allied Force

On March 24, at 8 pm local time, NATO aircraft started bombing against Serbian targets. Javier Solana, the Secretary General of the NATO, declared that the objective of the operation was "to halt the violence and to stop further humanitarian catastrophe."[103] The operation was overwhelmingly in the air. Allied pilots flew 37,225 sorties, of which over 14,006 were strike missions. As the campaign progressed, it grew in intensity. By the time the air campaign was suspended on 10 June, Operation Allied Force had 912 aircraft and 35 ships. The United States alone deployed a total of 31,600 military

[101] OSCE-KVM, Human Rights Division (HQ), Special Report, "Massacre of Civilians in Racak", 17 January 1999

[102] Interim Agreement for Peace and Self-Government in Kosovo, Rambouillet, 23 February 1999.

[103] Transcript of March 25, 1999 Press Conference by Secretary General, Dr. Javier Solana and SACEUR, Gen. Wesley Clark, http://www.nato.int/kosovo/press/p990325a.htm access date: 27.08.2004.

personnel dedicated to the mission.[104] This number was one third at the beginning. According to Roberts the reason why NATO used only air force could be explained in two ways. First, the NATO members were not willing to risk lives of their soldiers in this operation. The second reason was the Bosnian case. In 1995 the NATO bombing campaign contributed to Serb acceptance of cease-fire.[105] The Independent International Commission shared the same view and noted that the underlying NATO assumption was that a relatively short bombing campaign would persuade Milosevic to come back to sign the Rambouillet agreement.[106]

NATO's military capacity was extraordinary; the organization had the most sophisticated military capabilities in the world. On the other hand, Yugoslav army studied the Iraqi experience and set its air defence in the light of this case. At the beginning of the air campaign, the Serbian armed forces enjoyed an advantage over the KLA forces. The figures were not balanced; the Serbian army had 40000 combat troops and Serbian police together with paramilitary groups acted under a unified command, while the KLA forces consisted of 8000-10000 lightly armed poorly trained men in Kosovo, with an additional 5000-8000 men training in northern Albania.

UN Secretary General Kofi Annan issued a written statement on the second day of the NATO campaign, expressing "deep regret that … the Yugoslav authorities have persisted in their rejection of a political statement, which would have halted the bloodshed in Kosovo and secured an equitable peace for the population there".[107] The Secretary General's conclusion was carefully weighed. He said that it was indeed tragic that democracy had failed, but there were times when the use of force might be legitimate in the pursuit of peace.

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[104] Anthony H. Cordesman, "The Lessons and Non-Lessons of the NATO Air and Missile Campaign in Kosovo", Centre for Strategic and International Studies, Washington-1999, pp.13–18

[105] Adam Roberts, op. cit., p.110.

[106] The Independent International Commission on Kosovo, op. cit., p.86.

[107] Secretary General's statement on NATO military action against Yugoslavia, M2 Presswire, 25.03.1999, quoted in Ruth Wedgwood, "NATO's Campaign in Yugoslavia", AJIL, Vol. 93, 1999, p. 831.

On 26 March 1999, just two days after the beginning of the operation, Russia drafted a resolution which called for "an immediate cessation of the use of force against the Federal Republic of Yugoslavia."[108] This draft resolution was supported by two non-members of the Security Council: India and Belarus. Only three states voted in favour (Russia, China and Namibia) of this draft resolution, and 12 states voted against. During the Security Council meeting the Slovenian Representative stressed on the point that the Security Council does not have a monopoly on decision-making regarding the use of force. It has "the primary, but not exclusive, responsibility for maintaining international peace and security."[109]

Within weeks of the start of the operation, thousands of Kosovar Albanians were killed; over half a million were driven from their homes to become refugees in neighbouring countries, and half a million were internally displaced.[110] Serb police, military and paramilitary forces took part in committing such murders. This happened in the absence of ground operation in synchronize with the air bombing. Aerial attacks did not stop slaughters by Serbian forces. But as Roberts notes, NATO members believed that without the air operation, the ethnic cleansing would have proceeded with such speed and brutality.[111]

On 3 June 1999 Milosevic formally accepted joint EU-Russian peace terms presented to him on June 2nd. On 10 June 1999, after seventy-seven days of air bombing, NATO Secretary General announced that he had instructed General Wesley Clarck, Supreme Allied Commander Europe, temporarily to suspend NATO's air operations against Yugoslavia. This decision was taken after consultations with the North Atlantic Council and confirmation from General Clarck that the full withdrawal of Serbian forces from Kosovo had begun.[112] This withdrawal was done according to

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[108] Draft Resolution, 26 March 1999, Un Doc. No. S/1999/328, electronic version, http://ods-dds-ny.un.org/doc/UNDOC/GEN/N99/086/80/PDF/N9908680.pdf?OpenElement access date: 27.08.2004.

[109] UN Security Council 3989th Meeting, 26 March 1999, UN Doc. No. S/PV 3989, online version, http://ods-dds-ny.un.org/doc/UNDOC/PRO/N99/852/15/PDF/N9985215.pdf?OpenElement access date: 27.08.2004.

[110] Adam Roberts, op. cit., p.113.

[111] Adam Roberts, op. cit., p.114.

[112] Press Conference by NATO Secretary General, Mr. Javier Solana, 10 June 1999, online version, http://www.nato.int/kosovo/press/p990610b.htm access date: 27.08.2004.

Military-Technical agreement signed between NATO and the FRY.[113] Human Rights Watch reported that about five hundred civilians died in ninety separate incidents as a result of NATO bombing in Yugoslavia.[114]

On 10 June 1999, on the same day as the NATO's announcement, UN Security Council adopted Resolution 1244. The Resolution decided "the deployment in Kosovo, under United Nations auspices, of international and military presences".[115] The language of the Resolution contains no criticism, not even implicitly, of the NATO use of force but as Cassese notes, it contains a reservation in the first paragraph that the Security Council has "the primary responsibility for the maintenance of international peace and security."[116]

Resolution 1244 authorized the creation of KFOR, which is led by and primarily composed of NATO forces, and UNMIK, the United Nations Interim Administration Mission in Kosovo. KFOR is charged with deterring renewed hostilities, maintaining and where necessary enforcing a ceasefire and ensuring the withdrawal of Federal and Republic forces. KFOR is also responsible for demilitarizing the KLA and other armed Kosovo Albanian groups and establishing a secure environment. UNMIK is mandated "to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the FRY."

3. International Response to the NATO's Intervention to Kosovo

The international community was divided into three main camps. Countries like the FRY, Russia, China, Cuba, Belarus, Ukraine and Namibia were the main opponents. Mexico declared its opposition in diplomatic terms. Mexican delegate stressed on the

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[113] Military Technical Agreement between International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, 9 June 1999, electronic version, http://www.nato.int/kosovo/docu/a990609a.htm access date: 27.08.2004.

[114] Human Rights Watch, "Civilian Deaths in the NATO Air Campaign", Human Rights Watch, Vol. 12, No. 1, February 2000, online version, http://www.hrw.org/reports/2000/nato/ access date: 27.08.2004.

[115] UN Security Council Resolution 1244, 10.06.1999, electronic version, http://www.un.org/Docs/scres/1999/scres99.htm access date: 28.08.2004.

[116] Antonio Cassese, "A Follow Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis", European Journal of International Law, Vol. 10, No.4, 1999, p.792.

need of explicit consent of the Security Council.[117] Other states like Brazil and Costa Rica preferred to examine the legality of the action in legal terms. It should also be noted that no state or group of states has committed such action like requesting an immediate meeting of the General Assembly, to show strong opposition to NATO's intervention. The second and the largest group of states did not condemn the intervention as illegal. The third group was the NATO members and supporters of the intervention. During the debate in the Security Council representative of the Netherlands stated that "due to one or two permanent members' rigid interpretation of the concept of domestic jurisdiction, such a resolution is not attainable, we cannot sit back and simply let the humanitarian catastrophe occur… there are times when the use of force may be legitimate in the pursuit of peace."[118]

F. The Kosovo Intervention before the International Court of Justice

On 29 April 1999, the FRY instituted proceedings in the International Court of Justice against ten NATO member countries. These were Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom, and the United States. These countries were accused of violating the prohibition on the use of force by taking part in the bombing of Yugoslav territory together with other member states of the NATO.[119] In its applications, the FRY pointed out that the above mentioned states had committed

> "acts . . . by which [they] have violated [their] international obligation[s] banning the use of force against another State, not to intervene in the internal affairs of [that State]" and "not to violate [its] sovereignty"; "[their] obligation[s] to protect the civilian population and civilian objects in wartime [and] to protect the environment"; "[their] obligation[s] relating to free navigation on international

[117] UN Security Council Press Release, 10 June 1999, UN Doc. No. SC/6686, online version, http://www.un.org/News/Press/docs/1999/19990610.SC6686.html access date: 28.08.2004.

[118] UN Security Council 3989th Meeting, 24 March 1999, UN Doc. No. S/PV 3988, online version, http://ods-dds-ny.un.org/doc/UNDOC/PRO/N99/852/15/PDF/N9985215.pdf?OpenElement access date: 28.08.2004.

[119] Legality of Use of Force, ICJ, General List No. 105-114, 1999. The information relating to these cases can be found at http://www.icj-cij.org/icjwww/idecisions.htm The pronouncements of the Court are to a large extent identical in all ten cases. So for parallel pronouncements the references will made to Yugoslavia v. Belgium.

rivers"; "[their] obligation[s] regarding fundamental human rights and freedoms"; and "[their] obligation[s] not to use prohibited weapons [and] not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group".[120]

The FRY requested the Court to adjudge and declare that the NATO members were responsible for the violation of the international obligations quoted in the previous paragraph and that they were obliged to provide compensation for the damage made.

On the same day, the FRY submitted a request for the indication of provisional measures and asked the Court to order the respondents to cease their acts immediately and refrain from any further threat or use of force against Yugoslavia.[121] Most of the respondent states stated that in that stage they did not want to go into the merits of the case. However Belgium did go into the law on the use of force and argued that the armed intervention was based on Security Council Resolutions. As Gray points out, this is another instance of the argument of implied authorization.[122] In order to support its argument, Belgium showed the rejection of the Russian draft resolution as evidence. The Security Council had decided that there was a humanitarian catastrophe and the situation was threat to peace. And the same Security Council rejected a draft resolution condemning the NATO action. Belgium came to a conclusion that by doing so the Security Council confirmed that the action was legal.

Belgium went further and stated that there was an obligation to intervene to prevent the humanitarian catastrophe which was occurring and which was established by the Security Council resolutions in order to protect essential human rights. Belgium acknowledged that NATO had never questioned the political independence and the

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[120] The applications of ten cases are summarized and formulated in Press Release 2001/5, ICJ, 23 February 2001, online version, http://www.icj-cij.org/icjwww/ipresscom/ipress2001/ipresscom2001-05_yugo_20010223.htm access date: 29.08.2004.

[121] Yugoslavia attempted to found the Court's jurisdiction on (1) declarations of the parties accepting the Court's compulsory jurisdiction made in accordance with the optional clause of Article 36(2) of the ICJ Statute, (2) Article IX of the 1948 Genocide Convention, and (3) specifically with respect to Belgium and the Netherlands, two bilateral agreements of Yugoslavia with Belgium and the Netherlands. For more information about the Jurisdiction issues please read, Jianming Shen, "The ICJ's Jurisdiction in the Legality of Use of Force Cases", in Sienho Yee and Wang Tieya (ed.) International Law in the Post-Cold War World, Essays in Memory of Li Haopei, Routledge, London-2001, pp.480-495.

[122] Christine Gray, International Law and the Use of Force, Oxford University Press, Oxford – 2000, p.37.

territorial integrity of Yugoslavia. So NATO operations could not be counted as actions directed against territorial integrity or political independence of a state and operation is in conformity with Article 2(4) of the UN Charter. Certain historical episodes are invoked as precedents: the intervention of India in East Pakistan (Bangladesh)[123], the intervention of Tanzania in Uganda[124], and the intervention of West African States (ECOWAS) in Liberia.[125]

Hearings on provisional measures were held on 10 to 12 May 1999. The Court, with different majorities, handed down its decision on the requested interim measures in each of these ten cases on 2 June 1999. In the cases of Spain and the United States the Court concluded that it manifestly lacked jurisdiction, rejected the request for the indication of provisional measures and removed the cases from the list. [126]

In other eight cases, the Court found that it lacked prima facie jurisdiction, which was a prerequisite for the issue of provisional measures. A fuller consideration of jurisdiction would take place later. However, as Bruha notes, it stated that this finding in no way prejudged the question of the jurisdiction of the Court to deal with the merits of

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[123] Please see Part II, p.102.

[124] Please see Part II, p.106.

[125] Please see Part III, p.154.

[126] Spain had accepted the jurisdiction of the Court only if the party bringing a dispute before the Court had declared its acceptance at least twelve months prior to the filing of the application. Since Yugoslavia had submitted its declaration under Article 36, paragraph 2, of the Statute only on 26 April 1999, the Court saw no doubt that the declarations manifestly could not constitute a basis of jurisdiction. Moreover, Spain's instrument of accession to the Genocide Convention contained a reservation in respect of the whole of Article IX, which therefore could not serve as a basis for jurisdiction. Similarly, the United States had, upon ratification of the Genocide Convention made a reservation requiring the specific consent of the United States in each case brought before the Court under Article IX. Since the United States had not accepted the Court's jurisdiction under the optional clause, the Court, as in the case of Spain, found that it manifestly lacked jurisdiction in this case.

Case Concerning Legality of Use of Force (Yugoslavia v. United States of America),Case No.114, Order of 2 June 1999, online version, http://www.icj-cij.org/icjwww/idocket/iyus/iyusframe.htm; Case Concerning Legality of Use of Force (Yugoslavia v. Spain),Case No.112, Order of 2 June 1999, online version http://www.icj-cij.org/icjwww/idocket/iysp/iyspframe.htm access date: 29.08.2004

the remaining eight cases and left the rights of the claimant and the respondent States to submit arguments unaffected.[127]

Five years after these decisions, the proceedings are still in the stage of preliminary objections. The respective counter memorials of the eight NATO member states, which remained in the proceedings, were filed with the Court on 5 July 2000. The respondent States challenge the Court's jurisdiction and the admissibility of the FRY's applications. Due to these preliminary objections, the proceedings on the merits are suspended according to Article 79/5 of the Rules of Court.[128] Upon the request of the newly elected Yugoslav Government, the time limit for the filing of written statements on these preliminary objections had extended first by one year to 5 April 2002, then to 7 April 2003.[129] In each of the cases, a written statement by Serbia and Montenegro was filed on 20 December 2002, within the time limit as extended by the Court. Public hearings on the preliminary objections were held from 19 to 23 April 2004. Press release dated 3 May 2004 declares that now the Court is ready to begin its deliberation.[130]

As for the subject matter of this thesis the Court's judgement has a vital importance. But it seems that the Court is far from the judgement. The cases are still in preliminary objections phase and it takes five years to hold oral pleadings on preliminary objections. For the purposes of this thesis preliminary objections will not be analysed here in detail. But as Bruha notes, the decisions of 2 June 1999 showed that the majority judges did not want to be competent to impose interim measures in the cases; the Court did not want to intervene in the political resolution of the conflict.[131]

G. Criteria for Humanitarian Intervention and Kosovo

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[127] Thomas Bruha, "The Kosovo War before the International Court of Justice – A Preliminary Appraisal" in Christian Tomuschat (eds.) Kosovo and the International Community, Kluwer Law International, The Hague-2002, p. 289.

[128] Article 79/5. Upon receipt by the Registry of a preliminary objection, the proceedings on the merits shall be suspended…

[129] Press Release 2002/10, ICJ, 22 March 2002, electronic version http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-10_yugo_20020322.htm access date: 29.08.2004.

[130] Press Release 2004/18, ICJ, 03 May 2004, electronic version http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm access date: 2908.2004.

[131] Thomas Bruha, op. cit., p.314.

The discussions around the Kosovo intervention based on two grounds: the first one is the doctrine of humanitarian intervention, whether it exists or not. The second discussion is whether Kosovo intervention complies with the criteria for humanitarian intervention. Here under this section the situation in Kosovo is examined with the criteria for humanitarian intervention in order to find out whether it complies or not.

a. A Gross Violation of Human Rights Occurring in the Target State

As may possibly be seen in the chronology of events, there is no doubt that there were significant violations of human rights in the region. This situation is also mentioned in Security Council Resolution 1199. The Resolution refers to the Security Council's alarm at the "impending humanitarian catastrophe and affirmed that the deterioration of the situation in Kosovo constituted a threat to peace and security in the region. Reports of the massacres such as the one in Racak in January 1999 supported the view that there were widespread human rights abuses.

Yugoslavia, in its application to the ICJ, claimed that there was no genuine humanitarian purpose. The modalities selected (i.e. bombing populated areas from a height of 15000 feet) disqualified the action as a humanitarian one. Some authors also supported this view and blamed the US for ensuring hegemony and its status as sole superpower.[132]

b. The UN is Unable or Unwilling to Act

NATO never applied to the UN Security Council for a resolution authorizing its use of force in Kosovo. NATO Secretary General Javier Solana, when listing reasons to justify the threat of military action in October 1998, declared that it was impossible to obtain, in short order, a Security Council resolution mandating the use of force. The reason why NATO did not seek explicit authorization from the Security Council is the veto power of permanent members, namely Russia and China. After the NATO action was begun, the Russian delegate proposed a draft resolution to declare the NATO action unlawful. This resolution was supported by three members of the Council including two permanent members: Russia and China. It is clear from the facts that a

[132] Marjorie Cohn, "NATO Bombing of Kosovo: Humanitarian Intervention or Crime Against Humanity?", International Journal for Semiotics of Law, Vol. 15, 2002, p.81.

resolution authorizing military intervention by NATO would be highly likely vetoed by these countries. So as Henkin notes, "the Security Council was not in fact available to authorize intervention."[133] He also argues that the Security Council, in Resolution 1244 approving the Kosovo settlement, effectively ratified the NATO action and gave it the Council's support.

c. Exhaustion of Peaceful Means to Resolve the Situation

NATO intervention came just after the refusal of the Rambouillet proposals. NATO, together with contact group, tried to resolve the conflict peacefully. The last phase of peaceful efforts was Rambouillet talks and after hard negotiations draft agreement was signed by Kosovar Albanians. Serbian government refused to sign and started sending troops through Kosovo. On this stage it can be assumed that peaceful means were exhausted.

However anti-interventionists do not accept the argument that diplomatic means were properly used and exhausted. The exclusion of Russian diplomatic participation prior to the NATO intervention, the absence of any diplomatic effort to induce China and Russia to accommodate the Security Council majority by shifting their veto to an abstention were given as proof of the non-exhaustion of peaceful means.[134]

d. The Intervention must be Proportionate

Where there is no authorization by the Security Council, the burden of responsibility to balance the methods chosen to pursue the objectives must be high. Air strikes are not effective for protecting people on the ground and likely to be seen as reprisals for prior illegal acts. Reprisals, and forcible counter measures are not permissible under international law. Yugoslavia claimed that the selection of a bombing campaign was disproportionate to the declared aims of the action.

The second issue is the question of selecting military targets. The targeting of certain facilities, such as broadcasting stations, bridges and electricity supply facilities has been criticised and suspected to violate the limitations imposed by the international

[133] Louis Henkin, "Kosovo and the Law of 'Humanitarian Intervention'", AJIL, 1999, p.826.
[134] Richard A. Falk, "Kosovo, World Order, and the Future of International Law", AJIL, 1999, p.850

law upon the conduct of hostilities. Lowe argues that all factories can be turned to the manufacture of some item of equipment useful for the armed forces. With the exception of hospitals, places of worship and education, practically all other facilities in a modern state are dual-use facilities, they may be used both for civilian and military purposes.[135] Yugoslavia claimed that the pattern of targets and the geographical extent of the bombing indicated broad political purposes unrelated to humanitarian issues.

The third issue is the use of prohibited weapons. The use of cluster bombs in non-combat situations is problematic. Brownlie argues that using high performance ordnance and anti-personnel weapons in the populated areas has nothing in common with humanitarian intervention.[136] However, Greenwood believes that the means employed by NATO were consistent with the international humanitarian law.[137]

H. Analysing the Kosovo Intervention: Legality v. Legitimacy

International lawyers divided into three main camps on the legality of NATO's action. The first group believes that the intervention is illegal. The second group note that although they believe the intervention is legitimate there is only a thin red line separates NATO's action from international legality."[138] The third group express that the intervention is legal.

1. NATO's Intervention is Illegal

Ian Brownlie is the head of this group. As mentioned in the second part of this thesis, he believes that humanitarian intervention has no place in both the UN Charter and the customary international law. As for the Kosovo case, he notes that the removal of Yugoslav government was among the intentions of the US and the UK, so it is

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[135] Vaughan Lowe, "International Legal Issues arising in the Kosovo Crisis" International and Comparative Law Quarterly, Vol. 49, October 2000, p.940.

[136] Ian Brownlie and C. J. Apperly, "Kosovo Crisis Inquiry: Memorandum on the International Law Aspects", International and Comparative Law Quarterly, Vol. 49, 2000, p.898.

[137] Christopher Greenwood, "International Law and the NATO Intervention in Kosovo", International and Comparative Law Quarterly, Vol. 49, 2000, p.926.

[138] Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects", European Journal of International Law, Vol. 10, 1999, p.1.

impossible to reconcile such purposes with humanitarian intervention. The humanitarian purpose of the action was shadowed with the disproportionate amount of violence involved in the use of heavy ordnance and weapons.[139]

Wheeler argues that NATO acted preventatively and it was right to do so, but it employed wrong means. According to him, the alliance should have demonstrated its commitment to defending human rights by building up an invasion force so that, if diplomacy failed, it could have conducted a successful rescue mission. The humanitarian motives behind NATO's action have to be located in the context of the overriding constraint that the operation be 'casualty free'.[140]

Gowlland-Debbas notes that the Security Council resolutions authorizing the use of military force have a dual function; they serve to delegate the Council's powers and competences, and they preclude wrongfulness. The acts of the FRY constituted gross violations of a whole range of human rights but resort to unilateral action in the absence of express Council authorization, remains an act of seizure of Council powers and a resort to force which is prohibited under international law. She mentions that "even the recent evolution of international law has shown that it is not paradoxical to continue to insist on the inadmissibility of intervention".[141]

Franck argues that NATO did not seriously attempt to justify the war in international legal terms; they clearly did not want their actions to legitimate a reversion to the pre-Charter era when states or regional organizations could claim a right to use force. He mentions that "every nation has an interest in NATO's actions' being classified as the exception, not the rule."[142]

Chinkin notes, the military action was not that of a single state, but of a collective self defence organization that has worked closely alongside the United Nations in

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[139] Ian Brownlie and C. J. Apperly, op. cit., p.904.

[140] Nicholas J. Wheeler, op. cit., p.284.

[141] Vera Gowlland-Debbas, "The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance", EJIL, Vol. 11, 2000, p.378.

[142] Thomas M. Franck, "Lessons of Kosovo", AJIL, Vol.93, 1999, p.859.

Bosnia.[143] The Security Council, in afore mentioned resolutions, has affirmed the actions of different European organizations with respect to Kosovo, the OSCE, the contact group, the European Union and NATO. But she also mentions that the doctrine of humanitarian intervention remains controversial; even if it is accepted as a right under international law, it is not clear that the NATO action satisfied the criteria for humanitarian intervention. She notes that she does not consider that the accumulative effect is to grant legality and conclude that there must be considerable doubt as to whether the basis for military intervention in the FRY was sufficient.[144]

2. NATO's Intervention is Illegal but Legitimate

Simma believes that NATO's action against the FRY in the Kosovo is illegal due to lack of a Security Council resolution, the Alliance made every effort to get as close to legality as possible by, following the driving force of the existing Council resolutions and "characterising its action as an urgent measure to avert greater humanitarian catastrophes in Kosovo, taken in a state of humanitarian necessity".[145] As noted above Simma thinks that only a thin red line separates NATO's action on Kosovo from international legality.

Charney notes that he shares the view that the intervention was morally just in the light of subsequent developments, however, if this action stands for the right of foreign states to intervene in the absence of proof that widespread grave violations of international human rights are being committed, it leaves the door open for hegemonic states to use force for purposes clearly incompatible with international law.[146]

The Independent International Commission's debate on the legality of the NATO campaign ended inconclusively with the approval of the difficulty of reconciling what was done to protect the people of Kosovo with the prohibition on recourse to non-defensive force that has not been authorized by the Security Council. The Commission

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[143] Christine Chinkin, "Kosovo: A 'Good' or 'Bad' War?" AJIL, Vol. 93, 1999, p.843.

[144] Christine Chinkin, "The Legality of NATO's Action in the Former Republic of Yugoslavia (FRY) under International Law", International and Comparative Law Quarterly, Vol.49,2000, pp. 924-925.

[145] Bruno Simma, op. cit., p. 22.

[146] Jonathan I. Charney, "Anticipatory Humanitarian Intervention in Kosovo", AJIL, Vol.93, 1999, p. 841

takes the view that the pattern of Serb oppression in Kosovo, the experience of ethnic cleansing a few years earlier in Bosnia, and the absence of any action in Rwanda combine to create a strong, moral and political duty on the part of the international community to act more effectively. The Commission concluded that the intervention in Kosovo was "illegal, but legitimate".[147]

Other authors such as, Pellet, and Wedgwood, agree with Simma that NATO's action falls outside the scope of the UN Charter and illegal under international law. However they believe that Resolution 1244 dramatically changed the picture. The resolution did not formally declare that NATO's intervention was lawful but clearly endorses the consequences of this intervention. As for them, there were doubts as to the legality of NATO's action before 10 June 1999; nevertheless the arguments in favour of its lawfulness become credible in light of Resolution 1244. [148] According to Wedgwood the Kosovo intervention presents "a curious picture of Council authorization before and after, while dodging the NATO bullet".[149] However, De Wet does not share this view. She argues that the authorization granted in Resolution 1244 only has prospective effect and cannot be interpreted as a retroactive, ex post facto legitimization of the NATO air campaign.[150]

Henkin believes that unilateral intervention by military force by a state or group of states is unlawful unless authorized by the Security Council. However, a decision to authorize intervention in advance can be liberated from the veto, the likely lesson of Kosovo is that states confident that the Security Council will acquiesce in their decision to intervene, will shift the burden of the veto: instead of seeking authorization in

[147] The Independent International Commission on Kosovo, op. cit., pp. 185-186.

[148] Alain Pellet, "Brief Remarks on the Unilateral Use of Force", European Journal of International Law, Vol. 11, 2000, p.389.

[149] Ruth Wedgwood, "Unilateral Action in the UN System", European Journal of International Law, Vol. 11, 2000, p.358.

[150] Erika De Wet, "The Relationship between the Security Council and Regional Organizations during Enforcement Action under Chapter VII of the United Nations Charter", Nordic Journal of International Law, Vol.71, 2002, p.34.

advance by resolution subject to veto, states will act, and challenge the Council to terminate the action.[151]

3. NATO's Intervention to Kosovo is Legal

This view is championed by Christopher Greenwood. He argues that since 1945 state practice has attached a growing importance to the preservation of human rights. Where the threat to human rights has been of an extreme character, States have been prepared to assert a right of humanitarian intervention as a matter of last resort. He gives the examples of Liberia and Northern Iraq and argues that very few States challenged the assertion of a right of humanitarian intervention in those cases. He believes that modern customary international law does not exclude all possibility of military intervention on humanitarian grounds by States or by organizations like NATO. In Kosovo case, the resort to force by NATO "was consistent with international law and was based upon a right of humanitarian intervention which is applicable in a case where there is an extreme and immediate threat of humanitarian disaster."[152]

After analysing the cases occurred in 1990s Antonio Cassese submits that under certain strict conditions resort to armed force may become justified, even absent any authorization by the Security Council. According to him resort to force by NATO countries remains unlawful as it is contrary to the UN Charter, however, this particular instance of breach of international law may gradually lead to the crystallization of a general rule of international law authorizing armed countermeasures to crimes against humanity and constituting a threat to peace. This would constitute an exception to the UN Charter system based on the Security Council authorization. He believes that in the light of the NATO intervention in Kosovo, a new customary rule might be in the process of formation.[153]

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[151] Louis Henkin, op. cit., pp. 826-827.

[152] Christopher Greenwood, op. cit., pp. 926-929.

[153] Antonio Cassese, "Ex Iniuria Ius Oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures", European Journal of International Law, Vol. 10, 1999, pp.26-29.

Michael Reisman analyses the subject from a different point of view. He says "it is the installation in international law of the code of human rights that has created antinomies of the Kosovo action, for international law now sets as an imperative objective a peremptory standard by which the behaviour of governments to be tested and, where necessary, restrained and sanctioned."[154]

To summarise the arguments written above, when assessing the legality of humanitarian intervention both certain and uncertain points may be found. The first and the clearest point is that the doctrine of humanitarian intervention is not present in the UN Charter system. If the legality is defined as lawfulness by virtue of conformity to a legal statute, then NATO's intervention to Kosovo is illegal because it is not in conformity with the UN Charter. The second clear point is that since the adoption of the UN Charter, state practice has attached a growing importance to the preservation of human rights. What is not clear, however, is whether this practice of protecting human rights by the military intervention of a foreign state has reached to a level which creates customary international law. In the light of the Liberia, Northern Iraq, and Kosovo cases some international lawyers say "yes".

On the other hand, customary international law is composed of two elements: state practice and opinio juris. The examples of state practice are limited to a few cases. More controversially, there is no clear evidence that the opinio juris is shifted towards accepting the doctrine. The Russian draft resolution of March 1999 and supporting views of two members of the Security Council, and two other countries are shown as examples of non acceptance of the doctrine. So the answers to the questions of how many practices are required, or how many countries needed to prove that opinio juris is shifted could not be found in legal texts. In addition to this the World Court is far from the decision on the Kosovo case. The judgment will answer these questions by assessing whether the doctrine of humanitarian intervention became customary international law or not. But it seems that the decision will not be given in a short period of time.

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[154] W. Michel Reisman, "Kosovo's Antinomies", AJIL, Vol. 93, 1999, p.862

Legitimacy, however, is different from legality. Legitimacy has moral, political and legal aspects. An authorized action can be seen as both legal and legitimate. Sometimes, the actions can be legitimate without being legal. Humanitarianism can be one strong legitimating reason for the use of force. Whilst humanitarian intervention breaks the law, this is morally justified in exceptional cases. In Kosovo, the Security Council is inactive due to threat of veto from Russia and China. There was an imminent risk of a humanitarian catastrophe and this situation was documented by the report of the UN Secretary General. Supporters of the intervention believe that the humanitarian situation constitutes a ground that can justify an exception to a rule. In addition to this two the Security Council previously declared the situation in Kosovo constituted a threat to peace and security in the region. These are the justifying motives of the NATO action.

NATO did not try getting an authorization from the Security Council. Trying to get a resolution would have shown proper respect for the United Nations. So as Chesterman notes, NATO's action demonstrated the effect of reducing Security Council authorization to a purely formal level: rather than operating as a source of legal authority, it was seen as one policy justification among others.[155] On the other hand, voting in the Security Council was not requested due to the rejection of a resolution authorizing the use of force would have made its illegality too apparent, and would have jeopardized its legitimacy.

The views in favour of the legitimacy of the NATO's intervention prevail among the international lawyers. However Mertus thinks that we are asking the wrong question. According to him the right question is whether in fact states are using humanitarian arguments to provide moral, political, and legal legitimization of state action.[156] The answer is yes.

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[155] Simon Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, Oxford University Press, Oxford-2001, p.218.
[156] Julie A. Mertus, "Legitimizing the Use of Force in Kosovo", Ethics & International Affairs, 2001, Vol. 15, p.150.

CONCLUSION

This thesis tries to evaluate the place of humanitarian intervention in international law. The international law today, the use of force part in particular, is established on the provisions of United Nations Charter. The Charter was adopted after World War II and under the influence of anti war thoughts. In order to secure peace, the Charter includes strict rules on the law of the use of force. These provisions are considered as *jus cogens* and any existing treaty which is in conflict with that norm becomes void. The drafters of the Charter allowed only two exceptional clauses. Although Humanitarian intervention existed prior to 1945, the Charter does not contain any provision relating to this doctrine.

The first examples of humanitarian intervention, as it is understood today, were seen in the cold war period. However, intervening states of the time tried to justify their actions with reasons other than the doctrine of humanitarian intervention. The most common rationale was self defence. These countries were intervening to their neighbours; therefore it was easier for them to rely on self defence which was in conformity with the Charter provisions. Owing to the seriousness of the cases these justifications were not questioned in the Security Council.

The post cold war period is productive for the doctrine of humanitarian intervention. For the first time in history the UN Security Council authorized the use of force in humanitarian crisis. Somalia was the first example of the resolutions authorizing the use of military force in the absence of consent of the government. The Security Council did not determine that the situation in Haiti constituted a threat to international peace and security while asserting that it was acting under Chapter VII. Evidently these cases were unique as noted in the resolutions but they still reflect a transformation in the use of force mechanisms. Through these cases a category,

humanitarian interventions under the UN mandate, was created. However after a few examples the Security Council mechanism was locked again. But humanitarian disasters were continuing. This time unilateral actions started to take place. Some of these interventions were legitimized by the Security Council by a resolution after the cessation of hostilities. In some cases, hot discussions occurred in the Security Council without any resolution. Sometimes the Security Council was inactive due to veto of one or two permanent states. In such cases many states questioned the veto power.

There is an ongoing discussion for the place of humanitarian intervention in customary international law. Customary international law is composed of two elements: state practice and opinio juris. The post cold war period has the examples of State practice in favour of the doctrine of humanitarian intervention. In addition to this, several international lawyers use the cases where the Security Council was inactive as evidence of shifting in the opinio juris towards a rule legitimizing the use of force in the absence of Security Council authorization to respond to violations of international humanitarian law. They argue that the doctrine of humanitarian intervention is becoming a rule of customary international law.

In this respect the Kosovo case plays an important role in assessing the legitimacy of the doctrine. It is obvious that, the intervention to Kosovo is illegal in terms of existing textual international law. But another issue is also apparent; it also contributes to the arguments in favour of the humanitarian intervention as a customary international rule.

Here in this conclusion part the findings are listed in the beginning. In order to prevent facts from interfering with each other the findings are given in a list. In the second part of the conclusion, proposals for solution are offered.

The findings from four parts of the thesis are listed below:

- International law does not rest exclusively on the principles of non intervention and respect for sovereignty. The values on which the international legal system rests also include the UN Charter Preamble's call to respect "the dignity and

worth of the human person." While almost no one suggests that intervention is justified whenever a state violates human rights, it does not follow that international law always requires that respect for the sovereignty and integrity of a state should in all cases be given priority over the protection of human rights. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to stop or prevent it, the principle of non-intervention gives way to the international responsibility to protect that population. In other words, the principle of non-intervention should not be taken in absolute form in the case of humanitarian crisis.

- The state practice of humanitarian intervention shows that the cases prior to the UN Charter are far from the doctrine which is tried to be settled in today's world. The state practice demonstrated that it was used, by the great powers of the time, as an instrument for interference to other states internal affairs. Historic data do not help the attempts to prove the existence of the right. Moreover, the awful reputation of the doctrine generates suspicious views on current discussions.

- The central role for maintaining international peace and security is given to the UN Security Council. This role requires the authorization and overall command and control of military actions. Being a temporary right, self defence needs Security Council authorization for continuing to use force, so that all forms of use of force require authorization from the Security Council. In this respect, humanitarian intervention without the authorization of the Security Council is contrary to the aims of the Charter.

- The decision to use force in case of humanitarian disasters is taken with political considerations rather than legal ones. In the face of serious abuses of human rights, and humanitarian disasters, armed intervention will not occur in an effective form unless such action conforms to the interests of intervening states. The best example is the Rwanda case. The unwillingness of states made the UN force remain inactive during the conflict. The reason why there was no intervention to end the Rwandan genocide was because the UN Member States were reluctant to pay the human and other costs of intervention.

- Countries like the current hegemonic power in the international system, the United States, are strongly opposed to establishing criteria that might tie its hands in the future. This thesis shares the views of Jennifer Welsh that, US reluctance to support any written guidelines for humanitarian intervention derives from two different sets of concerns: its desire to avoid embarrassing situations that do not directly affect its national interests, and its insistence that in cases where US military action is necessary it must be free to interpret notions such as 'last resort' on its own terms. The inability to solve the 2003 Iraq crisis through diplomacy, or to obtain an additional Security Council resolution explicitly authorizing force, would only strengthen US opposition to those proposing codification.

- Most of the cases which occurred in the UN era are not examples of pure humanitarian intervention. The main group of intervening states are the neighbours and they have major interests other than pure humanitarian ones. These countries secured their other interests by intervening in the name of humanity. The interventions of Bangladesh (East Pakistan – 1971), Uganda (1978-9) and Cambodia (1978-9) were seen as good examples of humanitarian intervention; however, intervening states in each case justified their actions with reasons other than humanitarian intervention, mostly self-defence.

- The pure humanitarian actions were seen in the post cold war era. However, there was a problem again; the Security Council authorized to use force only in such cases. States used force without the authorization of the Security Council in a couple of cases but there were cases where the need for intervention was high but no action occurred.

- In cases like Rwanda the Security Council remained silent till the end of the conflict. After the settlement the Council adopted resolutions relating to the conflict without any consideration for the intervention. Many scholars argued this situation as ex post legitimatization of the intervention.

- In the UN mandated operations, like the one in the former Yugoslavia, the complexity of the decision making process of the UN let thousands of civilians to be

killed in protected areas. The UN does not have an outstanding army for this kind of operations and deploying military personnel from various countries resulted in failure of the operation.

- In Kosovo the moral and political reasons for intervention seemed strong; there is a vulnerable and long abused majority population facing an imminent prospect of ethnic cleansing by Serbian rulers. The author totally agrees with Richard Falk that the foundation for a principled departure under exceptional circumstances from a strict rendering of Charter rules on the use of force seemed present. The legality gap was recognized to be unhealthy and eroding the authority of international law over time, and as the International Independent Commission on Kosovo recommends strongly that it be closed at the earliest possible time by the UN.

- Legitimacy is another topic for discussions around humanitarian intervention. If there are significant grey areas relating to the authorization of humanitarian intervention, then questions of legitimacy become as important as questions of law. Legitimacy is an important dimension even when legality is clear. The Independent International Commission on Kosovo, for instance, concluded that the NATO military intervention was illegal but legitimate. But even a solid claim to moral and political legitimacy does not itself render the use of force lawful.

- NATO cannot be seen as a substitute to the UN Security Council. During the debates on Kosovo a group of scholars argued that with 19 members NATO's action could not be counted as 'unilateral', the decision to intervene was taken by voting within the North Atlantic Council and therefore it should be considered as a collective action. This argument is not well founded. It is true that NATO is the largest defence organization and three of the permanent members of the UN Security Council are also members of NATO, but these facts do not lead us to think that in the absence of the Security Council authorization, NATO shall intervene in humanitarian catastrophes. NATO may intervene only after the Security Council authorization. It may be argued that in the light of the International Court's advisory opinion (1962), that the responsibility of the Security Council with regard to to the maintenance of international peace and security is 'primary' rather than 'exclusive'; so in extreme cases in the

absence of such authorization, the UN General Assembly shall consider the facts and authorize such action.

In the light of the findings it can be said that the textual international law in force is distant from securing the needs of the international community. The world today is different from the world of the 40s and international law is still run by the UN Charter which was adopted in those days. State sovereignty should be interpreted in a context that prevents the tyrannical administrations from inhumane treatments to their own people. However, this does not lead individual states to assess the case and intervene unilaterally. The state practice made obvious that the purposes of intervening states sometimes were not purely humanitarian.

Currently, a collective model for intervention in humanitarian catastrophes is required. The assessment of the situation and the decision to intervene must be carried out collectively. Kosovo case demonstrates that the decision to intervene by a group of states (NATO) is not a collective action. In that case a competent body representing the overwhelming majority of states is necessary. This competent body should be the United Nations Security Council. As analysed in the third and fourth parts, the Security Council played this role in a couple of crises. However, in the other cases it is unable to act. Moreover, the authorization to use force for protection of human rights is not listed among the rights and duties of the Security Council. Therefore a workable collective mechanism is essential. The part below is examining the possible solutions to this deadlock.

A couple of proposals may be offered for the clarification of the legality of humanitarian intervention. The first and the preferable solution is the revision of the UN Charter. This revision shall be made in several different ways. It can be another exception clause attached to the Article 2(4), removing the veto power of permanent members of the Security Council, or broadening the Security Council's powers. The second solution is a declaration by the UN General Assembly. As noted below, the UN General Assembly has a secondary role in matters of peace and security and in the absence of a Security Council action the General Assembly may act. The third solution

is the customary international law. The cases analysed in this thesis let scholars assess whether the doctrine of humanitarian intervention is part of the customary international law or not.

The following part of the conclusion offers detailed descriptions of the solutions written in the preceding paragraph.

Revision of the UN Charter

The Charter of the UN was signed and came into force in 1945. It was prepared just after the World War II and the main purpose is to secure international peace and security. To that end it was built on principles such as non-intervention, and prohibition to use force. The world of the time was very far from international protection of human rights. Traditionally, human rights were seen as an internal issue of sovereign states. Apart from the exceptions written in article 2(4), the Genocide Convention was the only international instrument authorizing to intervene in the case of the extreme humanitarian catastrophe: genocide.

Humanitarian Intervention as an exception to Article 2(4)

The first way is to add humanitarian intervention to the exceptions to Article 2(4). In order to prevent humanitarian intervention from abuses, criteria for humanitarian intervention should also be inserted into the text of the Charter. This approach brings the Security Council outside and it is not inconsistent with the existing system. Moreover, to give in to one exception is to open the gates to many others, including rescue of nationals abroad or anticipatory self-defence.

Removing the veto power of the Permanent Members of the Security Council

The state practice analysed in this work showed that the doctrine of humanitarian intervention was developed against vetoes or veto threats of permanent members of the Security Council. The UN collective security system was built on the veto system; in other words, “without the veto, the UN might not have been born at all”. For many years the veto power of the permanent members has been questioned among the other

members of the UN. The possible change in the veto power of the permanent members may lead to certain cases being assessed in the Council. Removing the veto power completely does not seem possible in today's world; however, some sort of 'qualified majority voting' mechanism may replace the veto system.

Broadening the Security Council's Powers

Revision of the UN Charter also is needed in cases where humanitarian intervention is authorized by the UN Security Council. In the current collective security system, the UN Charter does not explicitly give the UN Security Council the power to take measures in cases of violation of human rights. The role of the Security Council is to ensure international peace and international order. The protection of human rights is not the primary responsibility of the Security Council in this context.

The fundamental change in normative practice that occurred during the 1990s concerned the Security Council's willingness to define humanitarian emergencies inside a state's borders as a threat to 'international peace and security'. The importance of this shift is that it legitimates military enforcement action under chapter VII of the Charter. This process of change began in 1991 (Resolution 688) when the Council decided to name the refugee crisis caused by the Iraqi Government's oppression of the Kurds and Shiites as a threat to peace.

The Charter must be amended to restructure the role of the Security Council to include invoking the violations of human rights and authorizing actions against them.

Strengthening Regional Organizations

State practice in the post cold war period shows that regional arrangements like the EU, OSCE, ECOWAS, OAS, and NATO played important roles in humanitarian actions in the Former Yugoslavia, Liberia, Haiti and Kosovo respectively. In the absence of an outstanding UN army, the regional and sub-regional organizations are likely to play important roles in humanitarian operations. Article 52 of the UN Charter recommends that the Security Council to make use of such regional arrangements to facilitate the pacific settlement of disputes or to carry out enforcement measures.

However, there may be also negative effects of strengthening the regional organizations. Non-western regional organizations lack financial sources, efficient organizational structure, and military capacities. Usually, the neighboring members of the organizations are parties to the conflict and under these conditions, it is impossible for the organization to solve the conflict. So strengthening regional organizations may be useful, but in enforcement actions, because of their institutional capacities, they have to act in close relation with the United Nations.

Declaration on Humanitarian Intervention

As noted in the first part of the thesis the International Court of Justice decided, in the 1962 Advisory Opinion on Certain Expenses, that the responsibility of the Security Council respecting to the maintenance of international peace and security is 'primary' rather than 'exclusive' but only the Council possesses the power to impose explicit obligations of compliance under Chapter VII. In other words, the United Nations General Assembly's role in matters of peace and security is subordinate to the Security Council's. In cases where the Council is unable or unwilling to authorize an action, the matter can be considered by the Assembly. Article 11 provides that the General Assembly may consider and make recommendations (not decisions) about matters relating to the maintenance of international peace and security.

The United Nations General Assembly adopted several declarations about the use of force. These declarations are not legally binding but can constitute an expression of opinio juris. In addition, the Uniting for Peace Resolution of 1950 specifically authorizes the General Assembly to make recommendations on enforcement action when the Security Council is unable to take a decision. As a result, the General Assembly is a potential source of authorization when the Security Council is incapable of acting.

In the light of the past practices and in the absence of such action by the Security Council, the General Assembly may adopt, in some modified form, a "Declaration on Humanitarian Intervention". This declaration would lead to two possible developments: the Charter would be adapted to this Humanitarian Intervention Declaration by

upgrading human rights and conditioning sovereign rights on respect for human rights and the maintenance of capacity to govern. The second possibility may be to encourage UNSC interpretations of the Charter that moved explicitly in this direction on a case by case basis.

The proposal for the declaration of humanitarian intervention has not been realised yet. The overwhelming majority of states continue to view humanitarian intervention without the UN Security Council authorization with great suspicion. They distrust the assertion of humanitarian objectives and oppose interference on territorial sovereignty.

Humanitarian Intervention as part of the customary international law

Law is not static; it evolves on the basis of changing state practice. Changing experiences shape principles and norms, just as principles and norms influence policies, decisions, and operations. As a result, and in addition to codified international law, custom also determines what is legal and illegal.

Since the end of the Cold War, state practice has shifted on issues of intervention and state sovereignty. The internationalisation of human rights points to holding governments accountable for gross violations. The Western states' reaction to both Iraq and Kosovo suggests a concern with the humanitarian justification for intervention by collective self defence organizations in the form of *ad hoc* coalitions and regional organizations. African states, which as former colonies have historically been among the most enthusiastic defenders of absolute state sovereignty, have more recently been at the forefront of challenging traditional prohibitions on the use of force in internal conflicts. The ECOWAS intervention in Liberia is a good example so as to show this transformation.

The cumulative effect of the Security Council resolutions relating to Iraq, Yugoslavia, Somalia, Haiti Rwanda and Liberia has been to establish a linkage between human rights violations and threats to international peace and security. Therefore, one may assume that humanitarian intervention under the UN mandate has been emerging in the light of the international practice

However, recent State practice in support of a right of humanitarian intervention without the consent of the UN is insufficient, especially when compared with decades of non-intervention on humanitarian grounds. Opponents of the doctrine argue that, most recent humanitarian interventions have been conducted within the uncertainty of Chapter VII of the Charter of the United Nations, which has meant that situations such as those in northern Iraq, Somalia, Haiti and Rwanda were classified, as threats to 'international peace and security', and that the 'right' to intervene on humanitarian grounds did not therefore need to exist as a right under customary international law. Opponents ignored any sort of linkage between the term and human rights violations.

Non-interventionists criticised the state practice on the grounds that humanitarian intervention did not take place in all cases where humanitarian catastrophes occurred. Because the doctrine of humanitarian intervention is a permissive rather than a mandatory norm, the selectivity of its exercise is no barrier to its being a customary international law. However, the assertion that opinio juris is shifted and a right of humanitarian intervention gains widespread acceptance that is lawful is more difficult to argue. The UN General Assembly's resolutions, examined in the first part of the thesis, rejecting such a right argue strongly against this claim. Although a number of states and scholars argued that a basis already exists in customary international law, there is no clear evidence that such a new right is emerging from the state practice of the 1990s. Moreover, NATO member states displayed no common legal objective as to the precedent setting value of the intervention. A few states advocated a new doctrine of humanitarian intervention, whereas the dominant position was to consider Kosovo an exceptional case.

Finally, the instances in which a state or group of states have intervened for humanitarian purposes without incurring significant opposition from the international system may indicate a certain willingness on the part of that community to brook some violation of the law in instances of clearly demonstrated necessity. But this situation does not indicate a fundamental change in the law to give extensive permission to states to do that which is textually prohibited.

The interventions without the consent of the UN may be taken as *ad hoc* violations of international law in extreme cases. These violations of international law are intended to prevent large portions of population from humanitarian disasters, while at the same time preserving the existing norms of international law. This sort of violations is subject to demands for legitimacy and should be justified in accordance with the criteria put forward in this thesis.

In the absence of a decision from the International Court the debate on whether a right of humanitarian intervention has emerged or not will continue. The international community today is not ready to revise the UN Charter. The permanent members of the Security Council are willing to secure their veto power in the near future. Even though the Security Council is far from an ideal solution; it is the only one that the international community has been able to agree upon.

ANNEX

MAPS OF THE CONFLICT AREAS

Source: United Nations Department of Public Information, Cartographic Section, http://www.un.org/Depts/Cartographic/map/profile/frmryugo.pdf access date: 16.09.2004.

Source: United Nations Department of Public Information, Cartographic Section, http://www.un.org/Depts/Cartographic/map/profile/iraq.pdf access date: 16.09.2004.

Source: United Nations Department of Public Information, Cartographic Section, http://www.un.org/Depts/Cartographic/map/profile/somalia.pdf access date: 16.09.2004.

Source: United Nations Department of Public Information, Cartographic Section, http://www.un.org/Depts/Cartographic/map/profile/haiti.pdf access date: 16.09.2004.

Source: United Nations Department of Public Information, Cartographic Section, http://www.un.org/Depts/Cartographic/map/profile/rwanda.pdf access date: 16.09.2004.

Source: United Nations Department of Public Information, Cartographic Section, http://www.un.org/Depts/Cartographic/map/profile/liberia.pdf access date: 16.09.2004.

Source: United Nations Department of Public Information, Cartographic Section, http://www.un.org/Depts/Cartographic/map/profile/kosovo.pdf access date: 16.09.2004.

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