THE UNIVERSITY OF HULL

THE PRACTICE OF HUMANITARIAN INTERVENTION AFTER THE END OF THE COLD WAR: EMERGING NORM OR JUST PRACTICE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW

Being a Thesis submitted for the degree of Philosophy Doctor (PhD)
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ACKNOWLEDGMENT

Three years ago I started my research on Humanitarian Intervention and my main desire was to deal with the 1999 NATO intervention in Kosovo. The issue of humanitarian intervention was a great challenge for me since 1999. The western publics welcomed the NATO response in Kosovo, but during the campaign NATO met wide criticism for its tactics. When I came to Hull for my post-graduate studies (MA International Law and Politics) I wanted to explore the facts of this intervention. Under the supervision of Mr. Justin Morris, I have written two essays on Kosovo (Kosovo and the media, Kosovo and the use of force under international law). His guidance was of a great importance and he made me more eager to research new fields of humanitarian intervention. He has written some articles on humanitarian intervention and his work influenced my thought. Therefore, I am grateful to Mr. Morris for his guidance and help during and after the completion of my MA. During the first two years of my PhD research I was meeting him and we were chatting about the progress of my studies.

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recommended very essential changes. Thus, I acknowledge that without his contribution my thesis would be much poorer.

Last but not least, I would like to thank my family for supporting me all those years economically and in any other ways. Thus, I have to specially thank my father Vasileios, my mother Maria, and my brothers Christopher and Constantine.

Summary of Thesis submitted for PhD degree

by IAKOVOS MAVRIDIS

on

THE PRACTICE OF HUMANITARIAN INTERVENTION AFTER THE END OF THE COLD WAR: EMERGING NORM OR JUST PRACTICE?

HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW

This thesis examines the practice of humanitarian intervention after the end of the Cold War. In the 90s there was an evident willingness of the world community to promote and protect human rights. The Security Council got involved in matters traditionally regarded internal affairs of states and imposed economic and diplomatic sanctions. What is more, the UN authorised military interventions in cases where massive abuses of human rights have taken place and this is the most significant normative change regarding humanitarian intervention. Thus, from "unilateral" humanitarian intervention we move to "collective" humanitarian intervention. Accordingly, the UN Security Council authorised military action in Somalia, Rwanda and Haiti. Yet, although the Council granted authorisation of the use of force, states had been reluctant to recognise a "unilateral" right of humanitarian intervention.

Kosovo is the most challenging case that caused a wide debate regarding the legality of humanitarian intervention. Yet, Kosovo has set a very bad precedent for humanitarian intervention. NATO's violations of humanitarian laws, the bombing against civilian infrastructures, as well as the significant loss of civilian lives proved that the means used were against the proclaimed humanitarian ends. Furthermore, NATO intervention did not bring peace to Kosovo, but the situation remains tense. Thus, it could be argued that the 1999 intervention did not bring a positive and long-term outcome. This is a good case that can illustrate how political and moral omissions can create bad precedents for the emergence of a new norm.

Finally, this thesis concludes that after the attacks of 9/11, the prospects of humanitarian intervention in the future are questionable. War against terrorism became the new form of interventionism in the new millennium. Thus, omissions and failures of the past, along with the new challenges of the world community have curtailed the future of humanitarian intervention.

CONTENTS

PART I

INTRODUCTION

CHAPTER 1

Humanitarian intervention is a highly controversial issue. There is a great chasm among lawyers and political analysts regarding the legality and morality of such interventions. During the Cold-War, states met severe criticism when decided to intervene for humanitarian purposes. At the end of the Cold-War and the emergence of the New World Order, however, there was a remarkable shift of the world community towards a more effective protection of human right worldwide. A long lasting debate over humanitarian intervention dominated during the 90's. At the peak of this debate stands the 1999 NATO intervention in Kosovo. In this case, an international organisation of 16 democratic states decided to intervene in the Federal Republic of Yugoslavia (Serbia and Montenegro) without obtaining a Security Council authorisation. Scholars of international law, as well as scholars of international relations offered various interpretations regarding the legality and legitimacy of this intervention. This debate with its various and divergent aspects challenged me to explore what the legal status of humanitarian intervention is and the possible development of normative changes in this specific area of intervention.

But, what is humanitarian intervention? According to this thesis, humanitarian intervention is the threat or use of armed force against a state in order to prevent, or halt mass violations of human rights. Yet, this is a broad definition that needs clarification and some restrictions. Accordingly, for this thesis, the protection of nationals abroad cannot be regarded as an instance of humanitarian intervention. Oscar Schachter noted that *"such action has sometimes been called a type of humanitarian intervention, although it is much*

more circumscribed".[1] Donnelly, Holzgrefe, Murphy and Malanczuk also preclude the protection of nationals abroad from the broader sphere of humanitarian intervention.[2] In my thesis, the concept of humanitarian intervention has to do with situations that there is a humanitarian emergency in a state and the people of this state expect some kind of help from another state, that it, in turn, will not only care for its own citizens in the troubled region, but for all the oppressed people. In other words, humanitarian interventions should be altruistic. Intervening in a place with situations of humanitarian necessity in order to protect your own citizens cannot be a pure humanitarian intervention.

Further, this thesis will not consider cases of alleged humanitarian interventions that the official government of the state invited or welcomed the use of force in its territory to restore order, prevent anarchy, protect threatened populations, or halt massive human rights abuses. This is because there is no question of intervention, when a state is invited to intervene by the authorities of the target state. Hence, the alleged humanitarian intervention of Australia in East Timor (1999) will not be considered in the post Cold-War case studies of humanitarian intervention. Farer, for instance, precludes the Australian-led and Security Council authorised intervention in East Timor because Indonesia consented to the occupation.[3] Similarly, most authors do not include this case

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[1] . Oscar Schachter, "The Right of States to Use Armed Force", *Michigan Law Review*, vol.82, 1984, p.1029.

[2] Jack Donnelly, "Human Rights, Humanitarian Intervention and American Foreign Policy: Law, Morality and Politics", *Journal of International Affairs*, 1983/83, vol.3, p.313. Peter Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force*, Amsterdam, Het Spinhuis, 1993, pp.3-5. J. L. Holzgrefe, *The Humanitarian Intervention Debate*, in J. L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, Cambridge, Cambridge University Press, 2003, p.18. Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*, Philadelphia, University of Pennsylvania Press, 1996, p.16.

[3] Tom J. Farer, *Humanitarian intervention before and after 9/11: Legality and Legitimacy*, in J. L. Holzgrefe and Robert Keohane, *Humanitarian Intervention, Ethical, Legal and Political Dilemmas,* Cambridge, Cambridge University Press, 2003, p.58.

in their works because of the consent of the Indonesian government. Likewise, the government of Bosnia-Herzegovina welcomed resolution 770 authorising the use of all necessary measures for the delivery of humanitarian intervention. Hence, Wheeler argued that with this fact *"the Security Council was not setting a radically new precedent for humanitarian intervention"*.[4]

Furthermore, this thesis includes pro-democratic intervention in the wider sphere of humanitarian intervention. As democracy is a polity that derives from the people and serves the rights and well being of its people, it could be argued that protection of democracy in a state might further safeguard fundamental freedoms and human rights. In other wars, disruption of a democracy by an unconstitutional regime (for instance, military coup) might lead to violations of human rights and fundamental freedoms of people. Thomas Franck noted that there is an emerging right to democratic governance.[5] In addition, Lois Fielding argued that *"evidence of an emerging right of humanitarian assistance to restore democracy is supported by recent pronouncements in documents, declarations and resolutions of the UN and of regional organisations, statements of government officials and international law theorists, and statements in (US) national policy documents"*.[6] From the above, the connection of human rights and democracy is obvious. Yet, for a pro-democratic intervention to qualify as a humanitarian one there needs to be mass violations of human rights, or, at least, an imminent threat to fundamental human rights. Thus, for the purposes of this thesis the disruption of democracy

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[4] Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford, Oxford University Press, 2000, p.252.

[5] Thomas Franck, "Emerging Right to Democratic Governance", *American Journal of International Law*, vol.86, No1, 1992, p.52.

[6] Lois E. Fielding, " Taking the Next Step in the Development of New Human Rights: the Emerging Right of Humanitarian Assistance to Promote Democracy", *Duke Journal of International Law*, vol.5, Spring 1995, p.329.

by unconstitutional regimes when followed by violations of human rights will count for humanitarian intervention.

Another very important element for humanitarian intervention is the primacy of humanitarian motives. Some scholars believe that the primacy of humanitarian motives is not necessary, others that it is requisite and others that a humanitarian intervention should be purely motivated by humanitarian concerns. However, state practice certifies that each and every intervention is motivated by interests. The fact that a humanitarian intervention coincides with selfish interests of the intervening state does not preclude its humanitarian character, if these interests are not the primary goal. If humanitarian motives lie there in order to veil the selfish motives of an intervening state, then this is an act of aggression and not a humanitarian intervention. For this thesis, humanitarian intervention applies in cases that a large population of a state is threatened by an "imminent peril", "humanitarian catastrophe", "humanitarian disaster", "humanitarian emergency", egregious-mass-enormous violations of human rights, genocidal practices, ethnic cleansing, mass torture and killings. Hence, humanitarian intervention should be a reasonable response to the above situations, but concern for human rights should be the primary goal of intervening states, not a supplementary one.

Let us now explore what other scholars think of humanitarian intervention. Ian Brownlie calls humanitarian intervention *"the threat or use of armed force by a state, a belligerent community, or an international organisation, with the object of protecting human rights"*.[7] Fernando Teson thinks that humanitarian intervention is *"the proportionate transboundary help,*

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[7] Ian Brownlie, *Humanitarian Intervention*, in John N. Moore (ed.), *Law and Civil War in the Modern World*, Baltimore, Johns Hopkins University Press, 1974, p.217.

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".[8] Jack Donnelly speaks of humanitarian intervention as an *"intervention (in the narrow sense of coercive interference in the internal affairs of another state) in order to remedy mass and flagrant violations of the basic human rights of foreign nationals by their government".*[9] Murphy thinks that *«humanitarian intervention is the threat or use of force by a state, group of states, or international organisation primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognised human rights".*[10] A very good definition of humanitarian intervention had been offered by J. L. Holzgrefe: *"the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied".*[11] This definition, also adopted by Farer[12] and Buchanan[13], covers what is humanitarian intervention for this thesis.

To this extent, it is essential to explore what prevents such a "noble" kind of intervention from becoming a legal norm. It could be argued that there are four basic objections to humanitarian intervention. Firstly, there are divergent views regarding what principles should govern humanitarian

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[8] Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edition, New York, Transnational Publishers, 1997, p.5
[9] Jack Donnelly, op.cit., p.313.
[10] Murphy, op.cit., p.12.
[11] Holzgrefe, op.cit., p.18.
[12] Farer, op.cit., p.55.
[13] Allen Buchanan, *Reforming the International Law of Humanitarian Intervention*, in J. L. Holzgrefe and Robert Keohane, *Humanitarian Intervention, Ethical, Legal and Political Dilemmas,* Cambridge, Cambridge University Press, 2003, p.130.

intervention.[14] Secondly, there are fears that states may attain their selfish interests, which usually motivate this kind of intervention.[15] The third objection is strongly compound with the second one and it is the problem of selectivity.[16] In other words, the historical records reveal that states do not intervene in places where they have no interests. This fact makes states suspicious of the real motives of intervening states and renders humanitarian intervention unreliable. The question of double standards in the world community has to do with this issue. The fourth objection to humanitarian intervention is the problem of abuses and distortion of the principle of non-intervention.[17] Finally, the last objection has to do with the prudence of such a kind of intervention, as the terms "humanitarian" and "intervention" is highly contradictory, especially when intervention is armed intervention. This is why Adam Roberts has called "humanitarian war" an "oxymoron".[18]

After having examined what is humanitarian intervention and having set its parameters for this thesis, we come to the central question of this thesis. The topic of humanitarian intervention comprises various and specific perspectives.

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[14] Ian Brownlie, *The Principle of Non-Use of Force in Contemporary International Law*, in William E. Butler, *The Non-Use of Force in International Law*, Dordrecht, Kluer Academic Publishers, 1989, p.25. Nicholas J. Wheeler and Justin C. Morris, *Humanitarian Intervention and State Practice at the End of the Cold War*, in Rick Fawn and Jeremy Larkins (eds.), *International Society after the Cold War: Anarchy and Order Reconsidered*, Basingstoke-England, Macmillan Press, 1996, p.136.

[15] Dino Kritsiotis, "Reappraising Policy Objections to Humanitarian Intervention", *Michigan Journal of International Law*, vol.19, 1998, pp.1007 and 1034. Vaughan Lowe, *The Principle of Non-Intervention: Use of Force*, in Vaughan Lowe and Colin Warbrick (eds.), *The United Nations and the Principles of International Law: Essays in the Memory of Michael Akehurst*, London, Routledge, 1994, p.66. Thomas M. Franck and Nigel S. Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force", *American Journal of International Law*, vol.67, 1973, p.290. Also Brownlie, op.cit., p.26, and Wheeler and Morris, op.cit., p.138 and Schachter, op.cit., p.1629.

[16] Franck and Rodley, op.cit., p.290, Brownlie, op.cit., p.26, Wheeler and Morris, op.cit., p.137 and Kritsiotis, op.cit., p.1007 and 1026-8.

[17] W. Michael Reisman, "Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention", *European Journal of International Law*, vol.11, No.1, 2000, p.6. Also Wheeler and Morris, op.cit., p.137, Schachter, op.cit., p.1629, Franck and Rodley, op.cit., p.305 and Kritsiotis, op.cit., p.1007 and 1020-5.

[18] Adam Roberts, *Humanitarian War: Military intervention and Human Rights*, International Affairs, vol.69, No3, 1993, p.429.

Yet, the pivotal question for this thesis is whether the boom of humanitarian intervention during the 90's leads to an emerging norm, or if it reflects the contemporary practice of states that is just an exception to the norm of non intervention. Since the fall of the Cold War, there is a remarkable shift in the world community towards a more effective protection of human rights. An enhanced involvement of the UN Security Council in matters previously considered strictly domestic illustrates evolving trends in the UN and international law in general. The goal of this thesis is to detect these trends, to explore the possible iterance of these precedents and, finally, examine whether or not these specific changes signify the emergence of a new legal norm in favour of humanitarian intervention.

Let us now consider what an emerging norm is. In order to have a norm, a relative practice is necessary. A norm has usually two meanings. Accordingly, norm is *"a typical pattern or practice"* or *"a prescription with a justification attached to it"*.[19] However, a legal norm has a somewhat different meaning. This pattern of practice should be accompanied with evidence that it is accepted as a legal one. In other words, evidence of *opinio juris* is a prerequisite. The fact that states intervene in order to protect human rights does not necessarily mean that their intervention is legal. On the other hand, many times intervening states had received stern criticism for their actions and had been accused of blatant violations of international law. According to Article 38,

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[19] Neta C. Crawford, *Decolonisation as an International Norm: The Evolution of Practices, Arguments, and beliefs*, in Laura W. Reed and Carl Kaysen, (eds.), *Emerging Norms of Justified Intervention*, Cambridge-Massachusetts, American Academy of Arts and Sciences, 1993, p.39. Similarly, the Oxford Concise Dictionary of Politics gives two interpretations of norm: "a standard which I statistically determined or derived from a number of cases. The statistically normal means simply that which occurs most frequently" or " a standard embodying a judgement about what should be the case". Ian McLean, *Oxford Concise Dictionary of Politics*, Oxford, Oxford University Press, 1996, p.344.

paragraph 1 of the Statute of the International Court of Justice, the Court is directed to apply the following:

1. international Treaties;
2. international custom, as evidence of a general practice accepted as law;
3. the general principles of law recognised by recognised nations;
4. Judicial decisions and the teachings of the most highly qualified publicists of the various countries as subsidiary means for the determination of rules of law.[20]

Currently, there is no legal norm permitting humanitarian intervention. As regards international treaties, it could be argued that non-intervention remains the rule in international law. Article 2(4) of the UN Charter clearly notes that *"all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"*. Simma argued that the prohibition of the use of force enunciated in Article 2(4) of the Charter is part of *jus cogens*, which means that it is accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same peremptory character.[21]

Nevertheless, there are two exceptions to Article 2(4). Article 51 declares that *"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*

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[20] International Court of Justice, Statute of the International Court of Justice, for more details see: http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm#Article_1

[21] Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects", *European Journal of International Law*, vol.10, 1999, p.3.

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". The other exception to the ban of the use of force lies in Chapter VII of the UN Charter. According to Article 42 *"should the Security Council consider that measures provided in Article 41 would 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"*.

It is clear from the above that the UN Charter does not provide any exception in favour of humanitarian intervention. The only permissible humanitarian intervention under the UN Charter would be after a determination of international peace and security under article 39, the authorisation for the use of force to restore international peace and security under Article 42. Yet, this would be a response to a threat to international peace and security and without such a determination the use of force would not be appropriate. Thus, the UN Charter does not include any provisions for humanitarian intervention. What is more, for many years Article 2(7) remained a constraint for enforcement action: *"nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application*

of enforcement measures under Chapter VII". However, it is unmistakable that this article does not apply to UN enforcement action and it is questionable why states refrained to adopt such measures for internal matters when there was a determination of a threat to peace and security.

In addition, the basic instruments on human rights, (the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Prevention and Punishment of Genocide and other conventions) do not provide for neither unilateral, nor collective military enforcement for the protection of human rights.[22] Thus, it could be argued that humanitarian intervention is impermissible by the UN and, subsequently, by current international law.

In order to complete the legal regime, it would be very essential to mention some interpretations of article 2(4), according to which humanitarian intervention is not impermissible by the provisions of this article. Some scholars argue that a genuinely humanitarian intervention would not be a use of force *against the territorial integrity and political independence* of the target state, or that it would not be *inconsistent with the Purposes of the United Nations*.[23] Teson believes that recent research has revealed that the meaning of

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[22] Franck and Rodley, op.cit., p.299.

[23] Anthony D'Amato, "The Invasion of Panama Was a Lawful Response to Tyranny", *American Journal of International Law*, vol.84, No.2, April 1990, p.520. Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, The Hague, The Netherlands, Kluwer Law International, 1999, pp.91-102. Richard B. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in J. N. Moore (ed.), *Law and Civil War in the Modern World*, Baltimore, John Hopkins University Press, 1974, pp.235-244. W. Michael Reisman and Myres S. McDougal, *Humanitarian Intervention to Protect the Ibos*, in R. B. Lillich (ed.), *Humanitarian Intervention and the United Nations*, Charlottesville, Virginia University Press,1973, pp.167-177. Martha Brenfors and Malene

"force against territorial integrity and political independence", as was known to the 1945 drafters, is quite technical and does not encompass all uses of force.[24] Accordingly, he supported that *"a genuine humanitarian intervention does not result in territorial conquest or political subjugation"*.[25] He comes to this argument to support that humanitarian intervention is not against the territorial integrity or political independence of states. Actually, alleged humanitarian interventions should not result in territorial political subjugation. However, his argument is misleading, because humanitarian interventions affect the political independence and the territorial integrity of states, even temporarily. In the case of Bangladesh, although there was no political subjugation or territorial conquest, India's intervention led to the break up of Pakistan and the creation of a new state, Bangladesh. This was a clear breach of the Pakistani sovereignty and affected permanently the territorial integrity and political independence of the Pakistani state.

Another element of Article 2(4) that has provided the basis for arguments that humanitarian intervention may be lawful under the UN Charter is that humanitarian intervention is not *"inconsistent with the Purposes of the United Nations"*.[26] Teson thinks that this clause provides a rather strong literal argument in favour of accepting a right of humanitarian intervention in appropriate cases.[27] He supports this argument on the basis that the promotion of human rights is a main purpose of the United Nations.[28] He further believes

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Maxe Petersen, "The Legality of Unilateral Humanitarian Intervention - A Defence", *Nordic Journal of International Law*, vol.69, 2004, p.467.

[24] Teson, op.cit., pp.150-151.

[25] Ibid., p.151.

[26] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, New York, Oxford University Press, 2001, 52.

[27] Teson, op.cit., p.151.

[28] *Id.*

that humanitarian intervention is in accordance with one of the fundamental purposes of the UN Charter and that it is a distortion to argue that humanitarian intervention is prohibited by Article 2(4).[29] However, it could be said that Teson's argument is invalid, because the UN Charter prohibits intervention in general, apart from the two exception that have to do with self-defence and UN enforcement action, in order to eliminate any distortion of the principle of non intervention in the international affairs of states.

It is clear from the above that treaty provisions do not support a right of humanitarian intervention. In theory, it is still possible to have a treaty reform that would introduce a right of humanitarian intervention. The Independent International Commission on Kosovo recommended the establishment of a right of humanitarian intervention with criteria that would evaluate its legality.[30] In practice, however, it is very difficult to attain treaty reforms in this specific area of law, because it is doubtful that the majority of the UN members would vote for such a new treaty law.[31] This is because UN members would not vote for such a reform due to fears of abuse by powerful states. Furthermore, identifying possible criteria and codifying them are very difficult matters.[32] Discrepancies and opposition will doom the new treaty to failure.

The other alternative for the emergence of a new legal norm in favour of humanitarian intervention would be the creation of new customary law. Franck argued that *"law is rarely static and that its evolutionary response to changing circumstances may deliberately be to purchase a degree of contextual*

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[29] *Id.*

[30] Independent International Commission on Kosovo, *Kosovo Report*, Oxford, Oxford University Press, 2000, pp.187-198.

[31] Jane Stromseth, *Rethinking Humanitarian Intervention*, in J. L. Holzgrefe and Robert Keohane, *Humanitarian Intervention, Ethical, Legal and Political Dilemmas,* Cambridge, Cambridge University Press, 2003, pp.255-260. Also Buchanan, op.cit., pp.134-139.

[32] Stromseth, op.cit., p.258.

reasonableness at some cost to its absolute, one-size-fits-all, certainty".[33] How can this evolution become a legal norm? There are two criteria for the creation of a rule of customary international law: (1) general practice of States and (2) the acceptance by States of the general practice as law.[34] Article 38(b) of the International Court of Justice defines international custom *"as evidence of a general practice accepted as law".*[35] In contrast to treaty reform, Buchanan believes that *"the process by which international customary law is formed is perhaps somewhat more promising, but still very difficult and uncertain".*[36]

Stromseth wonders *"whether an emerging norm of customary international law can be identified under which humanitarian intervention should be understood not simply as ethically and politically justified but also as legal under the normative framework governing the use of force".*[37] She believes this approach has three advantages: first, it appreciates the nuances of responses and the evolution of thinking reflected in recent practice; second, this approach takes seriously the legal justifications offered by states and the responses of the international community; and thirdly, this approach keeps the Charter's non intervention presumption front and centre, but it is open to a customary law evolution and acceptance of humanitarian intervention as lawful, based on concrete cases and precedents.[38] She believes that *"the normative status of humanitarian intervention is arguably in a state of*

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[33] Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in J. L. Holzgrefe and Robert Keohane, *Humanitarian Intervention, Ethical, Legal and Political Dilemmas,* Cambridge, Cambridge University Press, 2003, pp.204-205.
[34] H. W. A. Thirlway, *International Customary Law and Codification*, A. W. Sijthhoff-Leiden, 1972, p.46.
[35] International Court of Justice, Statute of the International Court of Justice, for further details see: http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm#Article_1.
[36] Buchanan, op.cit., p.134.
[37] Stromseth, op.cit., p.244.
[38] Ibid., pp.246-247.

evolution somewhere between the second and third approaches".[39] Finally, she compares elements in the cases of Iraq and Kosovo and concludes that common elements suggest the contours of a possible emerging norm.[40]

On the other hand, Byers and Chesterman are very cautious for the possibility of the creation of a new customary law in favour of humanitarian intervention. They believe that *"only if most states support, and none or only few oppose, it can the desired new or changed rule become a binding rule of customary international law".*[41] This is the hard reality regarding the emergence of a new customary law. The world community has to accept a specific practice as legal. Some states, or even a majority of states, are not for the establishment of customary law. Byers and Chesterman further illustrate the difficulties in creating a new customary law In favour of humanitarian intervention. They argue that *"since clear treaty provisions prevail over customary international law, an ordinary customary rule allowing intervention would not have been sufficient to override Article 2(4)".*[42] Therefore, the only way to establishing a customary law, is when this rule achieves the status of *jus cogens* and thus override conflicting treaty provisions.[43]

Yet, the emergence of a new customary law is not impossible, as law is not static and evolves rapidly. A new customary law in favour of humanitarian intervention can become an exception to Article 2(4) if the world community accepts a legal right of humanitarian intervention. No scholar can claim with

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[39] Ibid., p.247.
[40] Ibid., pp.248-253.
[41] Michael Byers and Simon Chesterman, *Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law*, , in J. L. Holzgrefe and Robert Keohane, *Humanitarian Intervention, Ethical, Legal and Political Dilemmas,* Cambridge, Cambridge University Press, 2003, p179.
[42] Ibid., p.182.
[43] Ibid., p.183.

certainty the emergence or not of a customary law and, respectively, if we consider that humanitarian intervention will become customary law, no one can predict the exact time that the world community will accept this right. But one thing is sure, rules change. In the past colonialism had been the norm. Nevertheless, decolonisation became the new norm because the interests and capabilities of colonial actors changed, or changing norms led to the extinction of colonialism.[44] The UN was founded on the principle of non-intervention. Articles 2(4) and 2(7) of the UN Charter verify the above argument. Yet, recent trends in the world community indicate that sovereignty is not sacrosanct and that states intervene with the purpose of protecting innocent people from mass human rights violations.

Trachtenberg thinks that *"it is increasingly taken for granted that the world community has a right, and maybe even an obligation, to intervene when certain limits are transgressed-when ethnic minorities are being massacred, for example, or when states allows its territory to be used as a base for terrorist activity, or even perhaps if countries are ruled by dictators. Clearly, something important is going on. New norms seem to be emerging. The international system may be changing in fundamental ways".*[45] Haas includes democracy in this evolution in international norms.[46] Damrosch discerns a shift in the concept of "threats to peace" towards intrastate conflicts.[47] Anne Marie Slaughter and Carl Kaysen argued that *"an intervention in the traditional language of*

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[44] Crawford, op.cit., pp.37-38 and 46.

[45] Marc Trachtenberg, *Intervention in Historical Perspective*, in Laura W. Reed and Carl Kaysen, (eds.), *Emerging Norms of Justified Intervention*, Cambridge-Massachusetts, American Academy of Arts and Sciences, 1993, p.15.

[46] Ernst B. Haas, *Beware the Slippery Slope: Notes towards the Definition of Justifiable Intervention*, in Laura W. Reed and Carl Kaysen, (eds.), *Emerging Norms of Justified Intervention*, Cambridge-Massachusetts, American Academy of Arts and Sciences, 1993, p.64.

[47] Lori Fisler Damrosch, *Changing Conceptions of Intervention in International Law,* , in Laura W. Reed and Carl Kaysen, (eds.), *Emerging Norms of Justified Intervention*, Cambridge-Massachusetts, American Academy of Arts and Sciences, 1993, p.100.

international law is an illegal action. In our exploration of changing legal concepts and evolving norms, this connotation is no longer universally appropriate".[48] All the above assertions are factual and no one can ignore the remarkable changes in the world community since the end of the Cold War. The discrepancies, however, have to do with the extent of this state practice. Some argue that these are exceptions and illegalities that will not be repeated in the future, while others believe that this series of changes are signs of evolving norms.

Yet, how can one detect the emergence of a new norm? How can we be sure that the signs of normative changes will finally lead up to the creation of customary law in favour of humanitarian intervention? Or, in what cases should this law apply and what would the criteria be? According to Wheeler, an intervention has to satisfy certain tests to count as humanitarian. Accordingly, he set four requirements that an intervention must meet to qualify as humanitarian: there must be a supreme humanitarian emergency; the use of force must be a last resort; it must meet the requirement of proportionality; there must be a high probability that the use of force will achieve a positive humanitarian outcome.[49] For Wheeler, the primacy of humanitarian motives is not a threshold condition.[50] He believes that *"even if an intervention is motivated by non-humanitarian reasons, it can still count as humanitarian provided that the motives, and the means employed, do not undermine a positive humanitarian outcome".*[51]

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[48] Anne-Marie Slaughter Burley and Carl Kaysen, *Introductory Note: Emerging Norms of Justified Interventions*, in Laura W. Reed and Carl Kaysen, (eds.), *Emerging Norms of Justified Intervention*, Cambridge-Massachusetts, American Academy of Arts and Sciences, 1993, p.7.
[49] Wheeler, op.cit., pp.33-37.
[50] Ibid., p.38.
[51] *Id.*

The above criteria for an intervention in order to count as a humanitarian one are very satisfactory. For this thesis the supreme humanitarian emergency is a prerequisite for intervention. Proportionality and the use of force as a last resort are also two necessary criteria. The last criterion, although very important, lacks a basic requirement. The probability that the use of force will achieve a positive humanitarian outcome is not a sufficient prerequisite. The positive humanitarian outcome is a requisite itself. Once states decide to militarily intervene in another state to prevent mass murder, they have to ensure that they will attain a positive humanitarian outcome. Because if we cannot have a positive humanitarian outcome, how could the intervention be called a humanitarian one? Last but not least, the primacy of humanitarian motives is indispensable. This condition reduces the probability of abuses by powerful states that wish to attain their interventionist goals under the flag of human rights. It is questionable, however, why Wheeler excludes this condition.

Ramsbotham and Lewer adopted from the International Law Association and from Lillich the following criteria for military humanitarian intervention (under international Law):

1. an immediate and extensive threat to fundamental human rights, particularly a threat of widespread loss of human life;
2. a proportional use of force which does not threaten greater destruction of values than the human rights at stake;
3. a minimal effect on authority structures in the affected states;
4. a prompt disengagement, consistent with the purpose of the action;

5. immediate full reporting to the Security Council and appropriate regional organisations;
6. if possible an invitation from the *de jure* government to intervene;
7. the relative disinterestedness of the intervening state or states;
8. if possible authorised by the collective decision of a supranational body.[52]

Criteria 3 and 4 are very essential and are not included in Wheeler's list. This is probably because Wheeler did not offer criteria for humanitarian intervention under international law, but for a framework of humanitarian intervention in general. It is very important for the legal theory of humanitarian intervention that these two criteria should be fulfilled once intervention has taken place. This is because it fits with the scholars of international law that claim that humanitarian intervention is not against Article 2(4) because it is not against "the territorial integrity and political independence of any state". As regards criterion 6, it is essential for this thesis that an invitation by the official government of the target state disqualifies an intervention from humanitarian. Last but not least, criteria 7 and 8 are very crucial safeguards against abuses of a right of humanitarian intervention.

Professor Cassese has set a number of conditions for a legally justified humanitarian intervention:

1. gross and egregious human rights involving the loss of lives of hundreds or thousands of innocent people;
2. the Security Council is unable to take any coercive action to stop the massacres because of disagreement among the Permanent Members or because one or more of them exercises its veto power;

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[52] Nick Lewer and Oliver Ramsbotham, *"Something Must Be Done", Towards an Ethical Framework for Humanitarian Intervention in International Social Conflict*, Bradford, Department of Peace Studies, University of Bradford, 1993, pp.89-90.

3. all peaceful avenues have been exhausted;

4. a group of states decides to try to halt the atrocities, with the support or at least the non-opposition of the majority of Members States of the UN;

5. armed force is exclusively used for the limited purpose of stopping the atrocities and restoring respect for human right, not for any goal beyond this limited purpose. Consequently, the use of force must be discontinued as soon as this purpose is attained.[53]

From this exploration, conditions 2 and 4 are very interesting because a prior Security Council consultation and acceptance by UN Member States is a requisite.

Very significant are the criteria worded in two recent reports. The ICISS "Responsibility to Protect" advances six criteria for military intervention: right authority, just cause, right intention, last resort, proportional means and reasonable prospects.[54] As regards the right authority, it means who can authorise military intervention (according to this report the UN is the competent organisation to authorise military intervention). Another report, the December 2004 High-Level Panel Report, suggested six criteria of legitimacy that the Security Council should always address in considering whether to authorise or apply military force: seriousness of threat, proper purpose, last resort, proportional means, and balance of consequences.[55]

Stromseth argued that a careful examination and comparison of the Kosovo intervention and earlier intervention to protect the Kurds following the Gulf

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[53] Antonio Cassese, "Ex Iniuria Ius Oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?", European Journal of International Law, vol.10, 1999, p.27.
[54] The International Commission on Intervention and State Sovereignty (ICISS), *Responsibility to protect*, IDRC Publishers, Ottawa, 2002, p.32.
[55] A/59/565, 2 December 2004.

War suggest the contours of a possible emerging norm.[56] This is a very interesting approach that results to undisputable signs of evolution in the world community's normative framework. The contours of a possible norm that she detects from these two cases are: same threshold conditions (mass violation of human rights involving loss of life); the UN Security Council was unable to act because of a veto threat; the Security Council did not criticise or condemn the action undertaken; diplomatic means had been exhausted; proportionality; common humanitarian purpose and effect; both interventions were collective; the intervening states offered legal justifications (previous Security Council resolutions adopted under Chapter VII that characterised the situation as a threat to peace and security); both interventions were welcomed by the population that was bearing the brunt of atrocities; and, finally, both interventions had a reasonable prospect of success in achieving their humanitarian objectives.[57]

The outcomes of this comparison are valuable and are founded on state practice; they are not simply a theory. Yet, she thinks that this approach for an incremental change under international customary law has some drawbacks: there are relatively few cases to provide data points making it hard to say definitively that a new norm is emerging or what its contours are; states may not explain clearly the legal justification for their action; abuses by powerful states.[58] Moreover, she did not examine other cases that lead to entirely different contours. For instance, ECOWAS interventions in Liberia and Sierra Leone have not many things in common with Kosovo and Iraq. The lack of a previous Security Council resolution characterising the situation as a threat to

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[56] Stromseth, op.cit., p.248.
[57] Ibid., pp.246-252.
[58] Ibid., p.253.

peace and security is obvious. Nevertheless, some scholars argue that these are two of the most important cases in support of humanitarian intervention. On the whole, however, it could be said that her method of research is very interesting and brings light in the presumable signs of evolution in the world order.

Various aspects had been examined so far regarding the contours of an emerging norm. For this thesis, those criteria result from state practice and the behaviour of state in a parallel examination of what the world community considers legal or what the world community is ready to accept as legal. World politics are a very significant factor for the creation of a new norm, as the practice of states does not reflect international law, but choices in the international political stage. If, in turn, the world community embraces these political choices and starts to consider them as legal responses of states, then the creation of international customary law is undisputable. Thus, political choices of states should not be underestimated when considering the evolution of a new norm. On the other hand, the matter of legality is likewise valuable in order to establish new customary law. For this purpose, the criteria for humanitarian intervention will derive from an exploration of state practice. This thesis will include some of the criteria listed above, as well as some that had been detected through the exploration of this thesis. These criteria are:

1. humanitarian emergency with thousands of lives threatened by egregious abuses of fundamental human rights and mass murder;
2. peaceful remedies have to be tried and exhausted;
3. proportionality is a basic prerequisite. Those in need of humanitarian aid should not be harmed by the ones that are supposed to save them. The means used should not be against the humanitarian ends.

4. primacy of the humanitarian motives and not of any other goal of intervening states;
5. relative disinterestedness of intervening states;
6. prior Security Council consultation of the matter;
7. Security Council ineffectiveness because of a veto threat;
8. prior Security Council resolution deploring the situation in a state or characterising it a threat to international peace and security;
9. lack of condemnation in the Security Council;
10. the action should be collective;
11. there must be a minimal effect on authority structures in the affected states;
12. immediate withdrawal of troops as soon as the humanitarian objective has been attained;
13. intervention should be welcomed by the threatened population;
14. a reasonable prospect of success that will lead to a positive humanitarian outcome and not to failure.
15. this outcome should have the prospects for a long-term resolution of the conflict.

Drawbacks for the crystallisation of a new customary law are: selectivity, abuses of such a right, failures of alleged humanitarian interventions, and the inability to attain a long-term goal in the region that the intervention takes place.

METHODOLOGY

The first two chapters represent an introduction to humanitarian intervention, definitions, specifications, research questions methodology, analysis of basic concepts for this thesis, parameters of an emerging norm and non-intervention. This thesis further includes a brief consideration of humanitarian intervention during the Cold War. It carefully examines the justifications of intervening states at this specific time and the reactions of the world community. This is essential for this thesis, in order to illustrate the changes in the world community through a confrontation of the past and the recent trends. Therefore, Chapter 3 will have to do with the Cold War instances of humanitarian intervention. There will be a brief analysis of the pivotal interventions, which include the Belgian intervention in the Congo (1960), the Belgian and US intervention in the Congo (1964), the US intervention in the Dominican Republic (1965), the Vietnamese intervention in Kampuchea (1978), the Tanzanian intervention in Uganda (1979), the French intervention in the Central African Empire (1979), the US intervention in Grenada (1983) and the US intervention in Panama (1989). India will be examined in a subchapter, as it is, according to this thesis, the leading case of humanitarian intervention during the Cold War. This is because of the incontestable magnitude of the human tragedy, the slaughter and genocide of several millions of Bengalis, the secession of East Pakistan and the creation of Bangladesh, the justifications offered and the doubtless positive humanitarian impacts in the region.

On the other hand, Chapter 4 will consist of the examination of the following post-Cold War cases: French, US and UK intervention in northern Iraq (1991), NATO intervention in Yugoslavia (1992), ECOWAS intervention in Liberia (1991), US-led intervention in Somalia (1992), French intervention in Rwanda (1994), US intervention in Haiti (1994), and ECOWAS intervention in Sierra Leone (1997). Through the exploration of these cases I will try to trace the reactions of the world community towards humanitarian intervention, the nascent trends in this specific area, and the possible precedents they have set. Finally, in Chapter 5, I will focus on the top-ranking humanitarian intervention, NATO's intervention in Kosovo (1999). This is the leading humanitarian intervention after the end of the Cold War and, in turn, this is the main case study of this thesis. Hence, this chapter is divided in 5 subchapters, including the background of the conflict, the legal questions, political motives and selfish interests, moral and ethical aspects and, finally, the future status of this Serbian province and its compatibility with the theory of humanitarian intervention.

This structure illustrates another important element of this thesis. According to this thesis, the establishment of a legal norm requires both legal/moral and political considerations. For the creation of a customary rule state practice is a requisite. Buchanan notably argued that *"in fact it appears that significant change through the development of new customary law will usually, if not always, require illegality"*.[59] Therefore, the research and analysis of each case will be divided in three stages: legal, moral and political, except for the Cold War cases (only the Indian intervention in East Pakistan will be

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[59] Buchanan, op.cit., p.135.

examined from the three several aspects separately). Moral and political imperatives, as well as legal considerations can lead to the creation of a stark new norm. The same factors can also suppress the emergence of a new norm. From this contradistinction valuable connotations can be made. Very useful lessons can be taken by the emergence of decolonisation in an era that imperial states used to get millions of goods from their colonies. The abolition of slavery that was a factor in favour of decolonisation was a result of moral and political considerations, that later became legal imperative. The same happened with decolonisation. One of the reasons that led up to the emergence of the new norm is the fact that the interests and the capabilities of the relevant actors changed.[60] In addition, moral voices led to the abolition of slavery.[61]

As regards to the used materials, I used books regarding the use of force, humanitarian intervention, international law and the use of force. The articles from various journals of international law and international relations were also quite useful. As regards to the primary sources, most of them come from the United Nations (Security Council and General Assembly documents mostly). I also used material from the International Court of Justice, the OAS, EU, COE, OSCE, AU, NATO and other sources. Further, in the case of Kosovo the analysis of primary documents and bibliography is not the sole source of my research. I have travelled twice to Yugoslavia, where I met some distinguished people and I got some information for the history of Kosovo, the pre-war and the post-war Yugoslavia. My visit there helped me explore various issues that I did not know from the existing bibliography. Thus, this information has helped me to explore and develop some further points in my

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[60] Crawford, op.cit., p.38.
[61] Ibid., p.51.

thesis. In Yugoslavia I got some interviews and I discussed with intellectual people on various subjects. In addition I got some books from Yugoslavia, primarily special editions of the Serb Orthodox Patriarchate. These editions have to do with the historical, cultural and religious life of Kosovo before and after the bombings. Nevertheless, I used these books and the interviews in only few instances. Most of my work depends on the exploration of primary sources, documents and the current bibliography regarding the Kosovo intervention.

CHAPTER 2

This chapter will have to deal with three different issues. First of all, there will be a brief reference to non-intervention. After some definitions and clarifications of matters relating to non-intervention, there will be a brief reference to early theories of non-intervention. Examination of both natural and positive law on this issue will be included. In the last stage, there will be an examination of the status of non-intervention after the creation of the UN Charter and whether or not this principle has survived after 1945. The second topic has to do with pro-democratic intervention, as a specific part of humanitarian intervention. Basic goal of this part is to clarify whether pro-democratic intervention can count as a humanitarian one, which its parameters should be and what are the evolving trends in this specific area of law. The last part will consist of the arguments and interpretations of various scholars regarding normative changes in the area of humanitarian intervention. Is humanitarian intervention becoming a norm, or the boom of humanitarian intervention in the 90s was a significant exception to the norm of non-intervention? All the above issues will be explored right away.

NON-INTERVENTION

An approximate definition of intervention and no-intervention is given by R.J. Vincent: *"that activity undertaken by a state, a group within a state, a group of states or an international organisation which interferes coercively in the domestic affairs of another state. It is a discreet event having a beginning*

and an end, and it is aimed at the authority structure of the target state. It is not necessarily lawful or unlawful, but it does break a conventional pattern of international relations...Intervention having been defined, nonintervention might be said to be the circumstance in which intervention does not occur". [1] There are three types of intervention: military, economic and political intervention.[2] The purposes of intervention are: the balance of power, the interests of humanity, and the maintenance of ideological solidarity.[3] Vincent believes that *"the rule of nonintervention can be said to derive from and require respect for the principle of state sovereignty...If a state has a right to sovereignty, this implies that other states have a duty to respect that right by, among other things, refraining from intervention in its domestic affairs. The principle of non intervention identifies the right of states to sovereignty as a standard in international society and makes explicit the respect required for it in abstention from intervention. The function of the principle of nonintervention in international relations might be said, then, to be one of protecting the principle of state sovereignty".*[4]

The early views on non-intervention are very important for the principle of non-intervention. Among the naturalist's international lawyers, Grotius can be taken as a precursor of the notion, because he conceived of international law as a law which existed between sovereign states.[5] However, the principle of non-intervention finds its first explicit manifestation in the writings of Wolff and Vattel, although neither of them used the word

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[1] R.J. Vincent, *Nonintervention and international world order*, Princeton, Princeton University Press, 1974, p.13.
[2] Ibid., p.9
[3] Ibid., p.11
[4] Ibid., p.14.
[5] Ibid., p.22.

intervention.[6] In particular, Wolff argued that *"by nature no nation has the right to any act which belongs to the exercise of the sovereignty of another nation, for sovereignty, as it exists in a people or originally in a nation, is absolute"*.[7] Yet, he does allow a limited right of intercession on behalf of subjects *"too heavily burdened or too harshly treated"* by their sovereign, but draws line at the use of force.[8] Similarly, Vattel noted *"Of all the rights possessed by a nation, that of sovereignty is doubtless the most important and the one which others should most carefully respect if they are desirous not to give cause for offence"*.[9] He further argued that *"no foreign power has any right to interfere otherwise by its good offices, unless it be requested to do so or be led to do so by special reasons. To intermeddle in the domestic affairs of another Nation or to undertake to constrain its councils is to do it an injury"*.[10] For him, there were only two notable exceptions to the rule of non-intervention: intervention on the just side in a civil war and intervention in the interests of the balance of power.[11]

On the other hand, the positivist school of international law was adherent to the principle of non-intervention. Martens, for instance, argued that *"foreign nations having not the least right to interfere in arrangements which are purely domestic"*.[12] James Kent noted that *"no state is entitled to take cognizance or notice of the domestic administration of another state, or of what passes within it as between the government and its own citizens"*.[13] Likewise,

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[6] Ibid., p.26.
[7] Ibid., pp.27-28.
[8] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, New York, Oxford University Press, 2001, p.17. Also Vincent, op.cit., p.28.
[9] Vincent, op.cit., p.30.
[10] Chesterman, op.cit., p.18.
[11] Vincent, op.cit., p.30.
[12] Ibid., p.32.
[13] Ibid., p.32.

Henry Wheaton noted that *"non-interference is the general rule"*.[14] W. E. Hall took the nest step by regarding the absence of interference from other states as a defining characteristic of the right of independence.[15] T.W. Lawrence argued that states should intervene very sparingly, and on the clearest grounds of justice and necessity.[16] Finally, Mountague Bernard echoed Wolff's absolute principle of non-intervention.[17]

It is clear from the above, that both schools advanced the principle of non-intervention in the domestic affairs of states. It would be necessary, however, to make notion of some doctrinal theories on non-intervention. Richard Cobden wished to see the principle of non-intervention win general acceptance as a rule of international conduct.[18] John Stuart Mill tempted to clarify the grounds upon which it was justifiable to intervene in the affairs of other countries. He made a distinction between rules applicable in the relations of civilised nations and those which were relevant to conduct towards "barbarians".[19] For Immanuel Kant, *"no state shall forcibly interfere in the constitution and government of another state"*.[20] Last but not least, Joseph Mazzini saw the origin of the principle of non-intervention as an offspring of the theory of human rights which was the legacy of the eighteenth century thought in Europe.[21] Mazzini strongly criticised the doctrines on non-intervention. He believed that the non-intervention principle after 1815 meant *"intervention on the wrong side; intervention by all who choose, and are*

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[14] Ibid., p.34.
[15] Ibid., p.36.
[16] Ibid., p.37.
[17] Ibid., p.38.
[18] Ibid., p.45.
[19] Ibid., pp.53-55.
[20] Chesterman, op.cit., p.20 and Vincent, op.cit., p.56.
[21] Vincent, op.cit., p.59.

strong enough, to put down free movements of peoples against corrupt governments. It means cooperation with despots against peoples, but no cooperation of peoples against despots".[22]

Having examined theories on non-intervention, it would be very essential to explore what happened after the creation of the UN Charter. It seems that the UN members were devoted to state sovereignty and the principle of non-intervention. Article 2(4) of the UN Charter clearly states that *"all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations"*. In addition, Article 2(7) declares that *"nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII"*. Vaughan Lowe argued that both articles are framed in a general manner.[23] Vincent also detected that *"nowhere in the Charter is the principle of nonintervention explicitly laid down as a rule governing the relations between the members of the United Nations".*[24] He thinks that Article 2(7) supports the principle of non-intervention, but it was to apply to relations between the UN as an organisation and its several members, and not to relations between the members themselves.[25]

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[22] Ibid., p.60.
[23] Vaughan Lowe, *The Principle of Non-Intervention: Use of Force*, in Vaughan Lowe and Colin Warbrick (eds.), *The United Nations and the Principles of International Law: Essays in the Memory of Michael Akehurst*, London, Routledge, 1994, p.68.
[24] Vincent, op.cit., p.234.
[25] Ibid., p.235.

Yet, it could be argued that there is a clear support from the Charter to the principle of non-intervention. Although the Charter fails to explicitly support this principle, it is clearly evident in Articles 2(4) and 2(7), as well as in 2(1) that declares that *"the organisation is based on the principle of the sovereign equality of all its members"*. Further, Article 2(4) bans any form of military intervention. But if there are any ambiguities on the Charter's purposes and principles, there is a series of General Assembly resolutions regarding the principle of non-intervention. First, in 1949, the Essentials of Peace Resolution called upon every nation to *"refrain from any threats or acts, direct or indirect, aimed at impairing the freedom, independence, or integrity of any State, or at fomenting civil strife and subverting the will of the people in any State"*.[26] In addition, the Peace Through Deeds Resolution condemned the *"intervention of any State in the internal affairs of another State for the purpose of changing its legally established government by the threat or use of force"*.[27] Vincent argued that with these resolutions the implicit noninterventionism of the Charter began to be made explicit in the practice of the United Nations.[28]

In 1957, the Declaration Concerning the Peaceful Coexistence of States demanded *"respect for each other's sovereignty, equality and territorial integrity and non-intervention in one another's internal affairs"*.[29] Moreover, in 1965, the Assembly adopted resolution 2131, which declared that *"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*

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[26] General Assembly Resolution 290, 1 December 1949.
[27] General Assembly Resolution 380, 17 November 1950.
[28] Vincent, op.cit., p.237.
[29] General Assembly Resolution 1236, 14 December 1957.

personality of the State or against its political, economic and cultural elements are condemned".[30] In 1966, the Assembly adopted the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Independence and Sovereignty, where it considered its duty to *"urge the immediate cessation of intervention, whatever its form, to condemn it as a basic source of danger to the cause of world peace".*[31]

In 1970, another important resolution had been adopted by the UN General Assembly. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations declared that *"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 in violation of international law".*[32] Last but not least, the General Assembly adopted the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, which includes everything the previous resolutions declared, but, apart from armed intervention, it also added other kinds of intervention, such as economic sanctions.[33]

It is clear from the above that the principle of non-intervention remains pivotal in the international relations of states after the foundation of the UN. The UN Charter, as well as the General Assembly resolutions can certify its importance. But this is only the theory. In practice, things are quite different.

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[30] General Assembly Resolution 2131, 21 December 1965
[31] General Assembly Resolution 2225, 19 December 1966.
[32] General Assembly Resolution 2625, 24 October 1970.
[33] General Assembly Resolution 36/103, 9December 1981.

Vaughan Lowe wonders why anyone should suppose that it exists, as *"the very terrain of history is mapped out on the grid of intervention"*.[34] Thus, he concludes that, *"on the one hand, we have a continuous tradition of legal formulations of the principle of non-intervention. On the other hand, there is an equal continuous tradition of intervention in the affairs of foreign states. There is plainly a long standing contrast between the word and the deed. Non intervention is preached, but not practiced"*.[35] This is a quite acute argument of Lowe. Although non-intervention is the rule, the practice proves the contrary. From the creation of the UN until recently we have a plethora of interventions in various states. This is an evident contradiction of theory and practice. Yet, it is obvious that the principle of non-intervention is pivotal in the international relations of states.

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[34] Lowe, op.cit., p.67.
[35] Ibid., pp.71-72.

PRO-DEMOCRATIC INTERVENTIONS

After the end of the Cold War self-determination became a very important principle in international relations. Self-determination should not only be regarded as the main purpose for decolonisation, but as an historical root from which grew the democratic entitlement.[36] Thomas Franck supports that there is an emerging right to democratic governance.[37] He thinks that democracy is becoming these days a normative rule of the international system.[38] After the end of the Cold War the right to democratic governance grew sharply and at the beginnings of the 90's it could be seen that almost two thirds of the world were governed by democratic regimes.[39] This was the result of the dissolution of the Soviet Union and the emergence of a significant number of states, which founded their states with the democratic entitlement. Many factors led up to this outcome, but one of the most significant is the contribution of regional organisations that promote democracy. Among these organisations are: the Organisation of American States (OAS), the Organisation for Security and Cooperation in Europe (OSCE), European Union (EU), the Council of Europe (COE) and the African Union (AU).

Further, the recent developments in the UN Security Council and its involvement in cases where democracy is disrupted by illegal regimes illustrate that there is an interest in the world community of protecting democracy. Lois

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[36] Thomas Franck, "Emerging Right to Democratic Governance", *American Journal of International Law*, vol.86, No1, 1992, p.52

[37] Ibid., p.46

[38] *Id.*

[39] Michael Byers and Simon Chesterman, *"You, the People": Pro-Democratic Intervention in International Law*, in Gregory H. Fox and Brad R. Roth (eds.), *Democratic Governance and International Law*, Cambridge, University Press, 2000, p.260. Also Tom J. Farer, "Collectively Defending Democracy in a World of Sovereign States: The Western Hemisphere's Prospect", *Human Rights Quarterly*, vol.15, 1993, p.716

Fielding noted that *"the overthrow of a democratic government can constitute a threat to peace and security under Article 39 of the UN Charter, and that evidence of an emerging right of humanitarian assistance to restore democracy is supported by recent pronouncements in documents, declarations and resolutions of the UN and of regional organisations, statements of government officials and international law theorists, and statements in (US) national policy documents"*.[40] UN Security Council resolution 940 that authorised the use of force to restore democratic rule in Haiti represents a development in favour of the democratic entitlement. Haiti was not the one and only UN Security Council involvement in the internal affairs of a state. The precedence of Iraq, Liberia, Bosnia-Herzegovina, Somalia and Rwanda for humanitarian purposes is a good illustration.

The difference here is that the overthrown of the democratically elected Haitian government had led to the deterioration of the humanitarian situation and the refugee flows, which, in turn, led up to the imposition of sanctions and to the authorisation of the use of force. But Haiti is not the only incident of pro-democratic intervention. In 1997 ECOWAS intervened in Sierra Leone to remove the military coup and restore the unconstitutionally overthrown government. The Security Council had condemned the coup and demanded the restoration of democracy in Sierra Leone.[41] ECOWAS intervened military in Sierra Leone and restored democracy without a prior authorisation by the Security Council. The Council's response was not condemnation of this intervention, but it welcomed the fact that the military junta had been

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[40] Lois E. Fielding, " Taking the Next Step in the Development of New Human Rights: the Emerging Right of Humanitarian Assistance to Promote Democracy", *Duke Journal of International Law*, vol.5, Spring 1995, p.329

[41] S/PRST/1997/29 (27 May 1997) and S/RES/1132 (1997), 8 October 1997.

defeated.[42] This practice of the Council in the 90s reflected the world community's will to protect democracy, as a polity deriving from the people and serving for the rights of the people. Nevertheless, in order to count as humanitarian ones, pro-democratic interventions should be responses to places where human rights are massively being deprived or violated. In absence of egregious violations of human rights, or of an imminent threat to fundamental human rights, pro-democratic intervention cannot qualify as a humanitarian intervention.

THE DEBATE ON HUMANITARIAN INTERVENTION TODAY

During the 90's the debate over humanitarian intervention dominated the political and legal agendas. Issues regarding the legality and legitimacy of such a kind of intervention had been raised quite often and various arguments had been offered. If one examines the positions taken by scholars of international relations and international law, it would be quite easy to determine the chasm among various arguments, interpretations and assumptions. At the peak of this debate stand the questions below: to intervene, or not; legal or illegal; legitimate, or illegitimate; collective, or unauthorised humanitarian interventions; mere state practice, or an emerging norm; precedent, or not. As the question of this thesis has to do with the possible emergence of a new norm in favour of humanitarian intervention, it would be quite useful to examine the views expressed by prominent scholars of international relations on this specific question. Thus, the positions offered by various scholars will reflect

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[42] S/PRST/1997/52, (14 November 1997).

their arguments on whether the world community is moving towards fundamental changes in the area of intervention or not.

First of all, some scholars argue that the recent trends in the world community reflect the emergence of a right of humanitarian intervention. Fernando Teson, one of the most fervent supporters of humanitarian intervention, thinks that *"forcible action to stop serious human rights deprivations is permitted by international law, properly construed"*.[43] Commenting on the adoption of resolution 794 of the Security Council on Somalia, he noted that *"human suffering has taken precedence over state sovereignty, which is precisely the policy that undergirds humanitarian intervention"*.[44] As regards the adoption of resolution 940 on Haiti, he called it *"the most important precedent supporting the legitimacy both of an international principle of democratic rule and of collective humanitarian intervention"*.[45] Teson's views, however, are overenthusiastic and do not reflect the reality. Of course, resolutions 794 and 940 reflect normative changes in the world community, since the Council adopted forcible measures to protect human rights under Chapter VII, but this does not mean that human suffering has taken precedence over sovereignty. The Councils enforcement measures to restore international peace and security are not enough to support that humanitarian intervention outside the Council's realm is also permissible. Thus, it seems that his argument is misleading.

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[43] Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edition, New York, Transnational Publishers, 1997, p.5.
[44] Ibid., p.247.
[45] Ibid., p.249.

Other authors have supported quite similar arguments, but in a modest way. Franck, for instance, argued that law is rarely static[46] and that after the 1999 NATO intervention in Kosovo *"egregious repression of minorities is not a risk free venture, particularly for smallish states"*.[47] Indeed, law is not static and evolves quite rapidly sometimes. Many rules have been replaced by new emerging norms and possibly humanitarian intervention may become an exception to or even abolish the principle of non-intervention. Henkin thinks that *"the NATO action in Kosovo, and the proceedings in the Security Council, may reflect a step toward a change in the law, part of the quest for developing "a form of collective intervention" beyond a veto-bound Security Council"*.[48] Henkin wisely supports that recent developments may reflect a step toward a change in international law, as in this transitional stage it would be quite premature to say that law has changed because of nascent trends. Similarly, Charney estimates that *"perhaps the Kosovo intervention sets a precedent for the development of new international law to protect human rights"*.[49]

Michael Reisman had expressed the view that *"when human rights enforcement by military means is required, it should, indeed, be the responsibility of the Security Council acting under the Charter. But when the Council cannot act, the legal requirement continues to be to save lives, however one can and as quickly as one can, for each passing day, each passing hour means more murders, rapes, mutilations, and dismemberments-violations*

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[46] Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in J. L. Holzgrefe and Robert Keohane, *Humanitarian Intervention, Ethical, Legal and Political Dilemmas,* Cambridge, Cambridge University Press, 2003, pp.204-205.

[47] Thomas M. Franck, "Lessons of Kosovo", *American Journal of International Law*, vol.93, No4, October 1999, p.859.

[48] Luis Henkin, "Kosovo and the Law of Humanitarian Intervention", *American Journal of International Law*, vol.93, No4, October 1999, p.828.

[49] Jonathan I. Charney, "Anticipatory Humanitarian Intervention in Kosovo", *American Journal of International Law*, vol.93, No4, October 1999, p.836.

of human beings that no prosecution will expunge nor remedy repair".[50] Abiew noted that *"developments in the post-Cold War era regarding intervention to protect human rights suggest a gradual change in attitudes and challenges to state sovereignty and its corollary principle of non-intervention".*[51] He thinks that state sovereignty *"will not bar action to protect and sustain the lives of large numbers of civilians trapped in situations of internal conflict".*[52] It could be said that his arguments are quite close to Teson's beliefs, but again it is quite untimely to support that human rights have taken precedence over state sovereignty and the principle of non-intervention.

Murphy also believes that *"recent interventions in Liberia, Iraq, Somalia, Rwanda, and Haiti, and to a certain extent in Bosnia, reveal evolving attitudes about the use of military force to protect human rights".*[53] No doubt, similar interventions in the past would be unlikely to happen. The above interventions in the internal affairs of these states do reflect gradual changes in the area of intervention. But these changes do not reflect the law, but evolving attitudes in the realm of international law. Greenwood said that *"the end of the Cold War has brought about a transformation in the political situation of the Security Council, so that the possibility of humanitarian intervention by that body can no longer be discounted".*[54] He also thinks that *"international attitudes towards humanitarian intervention have undergone a considerable*

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[50] W. Michael Reisman, "Kosovo's Antinomies", *American Journal of International Law*, vol.93, No4, October 1999, p.862.
[51] Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, The Hague, The Netherlands, Kluwer Law International, 1999, p.223.
[52] Ibid., p.229.
[53] Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*, Philadelphia, University of Pennsylvania Press, 1996, p.391.
[54] Christopher Greenwood, *Is there a Right of Humanitarian Intervention?*, The World Today, vol.49, February 1993, p.35.

change in the last few years".[55] It could be said that his arguments are very substantial. Professor Cassese had supported an extreme argument: *"based on the nascent trends of the world community, I submit that under certain strict conditions resort to armed force may gradually become justified, even absent any authorisation by the Security Council".*[56] Nevertheless, in a later article of his he contented that *"it is premature to maintain that a customary rule has emerged".*[57]

Nicholas Wheeler stressed that *"the key normative change in the 1990s was that the Security Council, under pressure from Western governments increasingly interpreted its responsibilities under Chapter VII as including the enforcement of global humanitarian norms. However, this norm of humanitarian intervention is critically limited to cases where the Security Council authorises action".*[58] Wheeler masterly distinguished between Security Council authorised intervention for humanitarian purposes and unilateral humanitarian intervention out of the Charter's realm. The significant changes in the 90s had to do with the Council's intense occupation with internal matters of states, namely the protection of human rights. Jane Stromseth thinks that *"over time, as the cases of the Kurds and Kosovo suggest, the elements of a normative consensus regarding intervention for humanitarian purposes may emerge".*[59] Tom Farer becomes more direful by remarking that *"one could fairly see*

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[55] Ibid., p.39.
[56] Antonio Cassese, "Ex Iniuria Ius Oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?", European Journal of International Law, vol.10, 1999, p.27.
[57] Antonio Cassese, "A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis", *European Journal of International Law*, vol.10, 1999, p.796.
[58] Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford, Oxford University Press, 2000, p.289.
[59] Jane Stromseth, *Rethinking Humanitarian Intervention*, in J. L. Holzgrefe and Robert Keohane, *Humanitarian Intervention, Ethical, Legal and Political Dilemmas*, Cambridge, Cambridge University Press, 2003, p.271.

humanitarian intervention as very much more than a minor exception or adjustment to the received organisation of the human race".[60]

All the above authors have tried to detect signs of normative changes in the world community and each of them interpreted these changes with various arguments. Yet, some scholars are more cautious and critical for these emerging values. Glennon, for instance, believes that *"current international law dogma is out of sync with emerging values"*[61] and Roberts called "humanitarian war" an "oxymoron" which may yet become a reality.[62] Jack Donnelly pointed out that *"a review of the major arguments in the literature clearly shows that humanitarian intervention is not a recognise principle of international law".*[63] One of the starkest opponents of humanitarian intervention, however, is Oscar Schachter. He thinks that *"international law does not, and should not, legitimise use of force across national lines except for self-defence (including collective defence) and enforcement measures ordered by the Security Council. Neither human rights, democracy nor self-determination are acceptable legal grounds for waging war, nor for that matter, are traditional just war causes of righting of wrongs".*[64] Further, he believes that *"the idea that wars waged in a good cause such as democracy*

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[60] Tom J. Farer, *Humanitarian intervention before and after 9/11: Legality and Legitimacy*, in J. L. Holzgrefe and Robert Keohane, *Humanitarian Intervention, Ethical, Legal and Political Dilemmas,* Cambridge, Cambridge University Press, 2003, p.55.

[61] Michael J. Glennon *Limits of Law, Prerogatives of Power: Interventionism After Kosovo,* New York, Palgrave, 2001, p.6.

[62] [62] Adam Roberts, *Humanitarian War: Military intervention and Human Rights*, International Affairs, vol.69, No3, 1993, p.429.

[63] Jack Donnelly, "Human Rights, Humanitarian Intervention and American Foreign Policy: Law, Morality and Politics", *Journal of International Affairs*, v.3, 1983/84, p.314.

[64] Oscar Schachter, *International Law in Theory and Practice*, London, Nijhoff Publishers, 1991, pp.128-129.

and human rights would not involve violation of territorial integrity or political independence demands an Orwellian construction of those terms".[65]

Chesterman is also quite sceptical on the matter. He contested the survival of a customary right of humanitarian intervention after the passage of the UN Charter and Article 2(4).[66] He further asserted that *"as a legal concept it will be argued that humanitarian intervention in incoherent- any 'right' of humanitarian intervention amounts not to an asserted exception to the prohibition of the use of force, but to a lacuna in the enforceable content of international law".*[67] In a joint article with Michael Byers, they argue that *"it is extremely unlikely that workable criteria for a right of humanitarian intervention will ever be developed to the satisfaction of more than a handful of states".*[68] Yet, this is a very absolute premise, as one cannot predict the position of states in the future. The nascent trends of the post-Cold War era indicate that some important changes are evolving in the international system. Time will show if these changes will lead up to the crystallisation of a new customary law, or not.

Professor Simma maintained that *"humanitarian interventions involving the threat or use of force and undertaken without the mandate of the Security Council will, as a matter of principle, remain in breach of international law".*[69] Nevertheless, he noted that *"the lesson which can be drawn from this is that unfortunately there do occur 'hard cases' in which terrible dilemmas must be*

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[65] Oscar Schachter, "The Right of States to Use Armed Force", *Michigan Law Review*, vol.82, 1984, p.645.
[66] Chesterman, op.cit., p.235.
[67] Ibid., p.2.
[68] Michael Byers and Simon Chesterman, *Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law*, , in J. L. Holzgrefe and Robert Keohane, *Humanitarian Intervention, Ethical, Legal and Political Dilemmas,* Cambridge, Cambridge University Press, 2003, p.202.
[69] Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects", *European Journal of International Law*, vol.10, 1999, p.6.

faced and imperative political and moral considerations may appear to leave no choice but to act outside the law".[70] In a parallel way, Peter Malanczuk argued that *"in current international law collective humanitarian measures, based on the decision of a competent international organisation, are the only lawful instruments available to use armed force to protect fundamental human rights".*[71] Last but not least, Richard Falk thinks that the NATO intervention in Kosovo was *"a badly flawed precedent for evaluating future claims to undertake humanitarian intervention without proper UN authorisation".*[72]

To sum up, it could be said that most scholars accept the fact that the end of the Cold War brought fundamental changes in the world community. From a veto-bound Security Council we move to a time of cooperation and the adoption collective measures under Chapter VII. The threats to international peace and security now derive from internal conflicts, not solely from external aggression. The world community becomes quite often involved in the internal affairs of other states. It is difficult to disconfirm the above changes. The main reason for confrontation, however, has to do with the various interpretations of these changes. There are many discrepancies because of the different understanding of these normative trends. Accordingly, some scholars regard these changes as precedents for unauthorised humanitarian intervention; on the other hand, others estimate that these were some exceptions to the rule that must not be repeated.

Let us now consider three recent reports relating to the issue of intervention and peacekeeping and their arguments might be quite useful for

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[70] Ibid, p.22.
[71] Peter Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force*, Amsterdam, Het Spinhuis, 1993, p.30.
[72] Richard A. Falk, "Kosovo, World Order, and the Future of International Law", *American Journal of International Law*, vol.93, No4, October 1999, p.856.

this thesis. First of all, the ICISS Report (report of the International Commission on Intervention and State Sovereignty) was created with a specific mandate: to build a broader understanding of the problem of reconciling intervention for human protection purposes (humanitarian intervention) and sovereignty.[73] This Commission believes that while there is not yet a sufficiently strong basis to claim the emergence of a new principle of customary international law, growing state and regional organisation practice, as well as Security Council precedent suggest an emerging guiding principle which in the Commission's view could properly be termed *"the responsibility to protect"*.[74] Accordingly, the emerging principle in question is that intervention for human protection purposes, including military intervention in extreme cases, is supportable when major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or itself is the perpetrator.[75] In addition, the Commission found that *"the Charter's strong bias against military intervention is not to be regarded as absolute when decisive action is required on human protection grounds"*.[76]

In the Commission's view, *"the Security Council should be the first port of call on any matter relating to military intervention for human protection purposes"*.[77] Yet, a possible alternative, according to the ICISS, *"would be to seek support for military action from the General Assembly meeting in an Emergency Special Session under the established 'Uniting for Peace'*

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[73] The International Commission on Intervention and State Sovereignty (ICISS), *Responsibility to Protect*, IDRC Publishers, Ottawa, 2002, p.2.
[74] Ibid., p.15.
[75] Ibid., p.16.
[76] *Id.*
[77] Ibid., p.53.

procedures".[78] A further possibility would be for collective intervention to be pursued by regional or sub-regional organisation acting within its defining boundaries.[79] It is easy to detect that the Commission does not provide any support for unilateral humanitarian intervention, but prefers to rely upon the UN. Finally, the Commission has found *"less tension between these principles [state sovereignty and intervention] than we expected. We found broad willingness to accept the idea that the responsibility to protect its people from killing and other grave harm was the most basic and fundamental of all the responsibilities that sovereignty imposes – and that if a state cannot or will not protect its people from such harm, then coercive intervention for human protection purposes, including ultimately military intervention, by others in the international community may be warranted in extreme cases"*.[80]

The second document to be examined is the Brahimi Report. This report deals with peacekeeping. In this report the Panel concurred that *"consent of the local parties, impartiality and the use of force only in self-defence should remain the principles of peacekeeping"*.[81] In contrast to the above assertion, the report supported that *"the United Nations military units must be capable of defending themselves, other mission components and the mission's mandate. Rules of engagement should not limit contingents to stroke-for-stroke responses but should allow ripostes sufficient to silence a source of deadly fire that is directed at United Nations troops or at people they are charged to protect and, in particularly dangerous situations, should not force the United Nations*

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[78] *Id.*
[79] *Id.*
[80] Ibid., p.69.
[81] The Brahimi Report, A/55/305 or S/2000/809, 21 August 2000.

contingents to cede the initiative to their attackers".[82] This position contradicts the earlier one that supported the use of force only in self-defence. Probably, this has to do with changes in the traditional notions of self-defence. In the past the use of force in self defence of the peacekeepers meant that they could use their weapons to defend themselves. Now, according to this report, they can do so to defend themselves, other mission components and the mission's mandate.

Last but not least, there is the December 2004 High-Level Panel Report. This report asserted the new threats that the world community faces today: economic and social threats, including poverty, infectious diseases(such as HIV), and environmental degradation; war and violence within States, including civil war, genocide, and other large scale atrocities; the spread and possible use of nuclear, radiological, chemical and biological weapons; terrorism; and Transnational organised crime.[83] These threats are from non-State actors as well as states. Thus, the Panel argued that there are new challenges for collective security as well as changing notions. Accordingly, the Panel supported that *"the central challenge for the 21st century is to fashion a new and broader understanding of what collective security means – and of all the responsibilities, commitments, strategies and institutions that come with it if a collective security system is to be effective, efficient and equitable"*.[84] As regards the use of force, however, the Panel believes that *"Chapter VII fully empowers the Security Council to deal with every kind of threat that states may confront"*.[85] It is remarkable that both the ICISS and the December 2004 High-

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[82] *Id.*
[83] The December 2004 High-Level Panel Report, A/59/565, 2 December 2004.
[84] *Id.*
[85] *Id.*

Level Panel reports support that the Security Council is the competent organ to apply coercive measures, including military intervention.

Commenting on these developments, it could be said that all reports detect the changing attitudes in the world community and the new challenges for the United Nations. It is quite interesting that all of them suggest UN involvement for the resolution of these new challenges in the world community. Yet, although these reports and their findings are quite significant, as they detect signs of normative changes, it could be argued that they are not of a legal significance, as they do not reflect law, but they explore the new trends in the world community and recommend specific proposals. However, it could be said that none of them supports an emerging right of unilateral humanitarian intervention, outside the Council's realm. On the contrary, all of the explicitly point out that all new threats to our system of collective security should be addressed in the UN or competent regional organisations.

PART II

PRE-KOSOVO CASES

CHAPTER 3

HUMANITARIAN INTERVENTION DURING THE COLD WAR

This Chapter will include cases from the Cold War era. These cases are very crucial for this thesis, as the emerging trends in the 90s can become evident through a mere confrontation with attitudes of states during the Cold War towards humanitarian intervention. Some of the most essential cases will be explored and the leading case study will be India's intervention in East Pakistan (1971).

3.1 BELGIAN INTERVENTION IN THE CONGO (1960)

No doubt, this is one of the weakest cases regarding humanitarian intervention. The Congo gained its independence in 1960 and thereafter the Republic of the Congo was the object of the largest military assistance operation directed by the Organisation itself.[1] Belgium ignored this international effort undertaken by the UN and intervened militarily on 5 July in the Congo. Belgium officially claimed that it went to the Congo in order to protect the lives of Belgian and other nationals.[2] On 13 July the US Security Council adopted resolution 143 authorised the Secretary-General to provide the Congo with military assistance and called upon Belgium to withdraw its troops.[3] The fact that the Belgian troops remained in the Congo until September

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[1] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, New York, Oxford University Press, 2001, p.65.
[2] Michael Akehurst, *Humanitarian* Intervention, in Hedley Bull (ed.), *Intervention in World Politics*, Oxford, Clarendon Press, 1984, p.99. Also Chesterman, op.cit., p.66.
[3] S/RES/143 (1960), 17 July 1960

certifies the Belgian interests in this area.[4] The overlapping of the UN military assistance operation also leaves the Belgian intervention vulnerable to suspicions. As Chesterman noted, this is not a very convincing instance of humanitarian intervention.[5]

3.2 BELGIAN AND US INTERVENTION IN THE CONGO (1964)

In September 1964, rebel forces in the Congo took over two thousand hostages in Stanleyville and Paulis. They had threatened to kill them, unless the central government agreed to certain concessions. When the government rejected their demands, the rebels killed forty-five of the hostages. As a result, Belgian forces with the aid of US aeroplanes intervened in Congo on 24 November 1964. Both the US and Belgium claimed that they intervened in the Congo to protect their and foreigner nationals, as well as humanitarian concerns.[6] There were various reactions in the UN Security Council.[7] The Security Council, finally, adopted a resolution deploring the events in the Congo, requesting all states to refrain from intervening in the internal affairs of the Congo, but did not condemn the intervention.[8]

It is difficult to claim that this intervention is strong enough to create a precedent for humanitarian intervention in customary law. First of all, Belgium

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[4] Akehurst, op.cit., p.99 and Chesterman, op.cit., p.66.
[5] Chesterman, op.cit., p.65.
[6] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, New York, Oxford University Press, 2001, p.67. Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, Dordrecht-the Netherlands, 1999, p.105. Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World* Order, Philadelphia, Procedural Aspects of International Law Series, vol21, University of Pennsylvania Press, 1996, p.93.
[7] S/PV.1170 (1964), 9 December 1964.
[8] S/RES/199 (1964), 30 December 1964.

and the US did not intent to primarily protect the human rights of the Congolese nationals.[9] Further, various states criticised and reacted to this action. Resolution 199, although it did not condemn the US and Belgian intervention, it clearly manifested its discontent by requesting states to refrain from intervening in the internal affairs of the Congo. In addition, political and economic interests were at stake.[10] Finally, the 1964 intervention in the Congo cannot qualify as a humanitarian intervention, since the legitimate government of the Congo consented to this intervention.[11] Thus, it could be argued that this case as state practice does not add much to the theory and law surrounding humanitarian intervention.

3.3 US INTERVENTION IN THE DOMINICAN REPUBLIC (1965)

In 1963, a military coup removed from power the democratically elected Juan Bosch. In April 1965, revolt broke up in the Dominican Republic, as the public was disappointed by its unpopular leader. On April 28, a large number of US troops landed in Santo Dominico. The US officially claimed that its intervention aimed at rescuing its nationals.[12] First of all, the protection of

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[9] Murphy, op.cit., p.93.
[10] Chesterman, op.cit., p.69.
[11] Ian Brownlie, *Humanitarian Intervention*, in John N. Moore (ed.), *Law and Civil War in the Modern World*, Baltimore, Johns Hopkins University Press, 1974, p.221. Michael Akehurst, *Humanitarian* Intervention, in Hedley Bull (ed.), *Intervention in World Politics*, Oxford, Clarendon Press, 1984, p.100. Also Abiew, op.cit., p.105, Chesterman, op.cit., p67 and Murphy, op.cit., p.93.
[12] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, New York, Oxford University Press, 2001, p.70. Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, Dordrecht-the Netherlands, 1999, p.109. Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World* Order, Philadelphia, Procedural Aspects of International Law Series, vol21, University of Pennsylvania Press, 1996, p.94. Oliver Ramsbotham and Tom Woodhouse, *Humanitarian*

nationals abroad cannot be regarded as a legitimate instance of humanitarian intervention. This is because the motives of humanitarian interventions have to be altruistic and aim to rescue the people in danger, not only the nationals of one or two states. As Schachter argued *"such action has sometimes been called a type of humanitarian intervention, although it is much more circumscribed".*[13] Donnelly and Malanczuk also distinguish between humanitarian intervention and intervention for the protection of nationals abroad.[14]

Apart from this fact, the real concern of the US was not the protection of its nationals, but its interests of national security. Indeed, the US declared that its aim was to prevent a communist take-over.[15] Brownlie commended that *"the United States had no more title to intervene than did the U.S.S.R. in the similar political circumstances in Czechoslovakia in 1968".*[16] He believes that this action was an action of national self-interest and was "simply illegal".[17] It could be argued that this was not the best example of intervention for the protection of national abroad. The maintenance of the US troops for over a year in the island manifested its desire to control the region.[18] In the debates of the Security Council, some states seem to have embraced the US justification for

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Intervention in Contemporary Conflict: A Reconceptualisation, Cambridge, Polity Press, 1996, p.56. Michael Akehurst, *Humanitarian* Intervention, in Hedley Bull (ed.), *Intervention in World Politics*, Oxford, Clarendon Press, 1984, p.100. Oscar Schachter, "The Right of States to Use Armed Force", *Michigan Law Review*, vol.82, 1984, p.1629. Ian Brownlie, *Humanitarian Intervention*, in John N. Moore (ed.), *Law and Civil War in the Modern World*, Baltimore, Johns Hopkins University Press, 1974, p.221.

[13] Schachter, op.cit., p.1029.

[14] Jack Donnelly, "Human Rights, Humanitarian Intervention and American Foreign Policy: Law, Morality and Politics", *Journal of International Affairs*, 1983/83, vol.3, p.313. Peter Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force*, Amsterdam, Het Spinhuis, 1993, pp.3-5.

[15] Ramsbotham and Woodhouse, op.cit., p.56, Abiew, op.cit., p.110, Chesterman, op.cit., p.70 and Murphy, op.cit., p.97.

[16] Brownlie, op.cit., p.221.

[17] *Id.*

[18] Abiew, op.cit., p.110

the protection of its nationals, but most states condemned the action.[19] Overall, it could be said that the 1964 US intervention in the Dominican Republic has not to offer much on the debate of humanitarian intervention.

3.4 VIETNAM'S INTERVENTION IN KAMPUCHEA (1978)

Vietnam's intervention in Kampuchea represents another alleged instance of humanitarian intervention. On December 1978, Vietnam invaded Kampuchea, following sporadic fighting along the borders of the two countries. This intervention resulted to the overthrow of Pol Pot, an unpopular and undesirable regime. The Khmer Rouge forces of Pol Pot took over power from the Republican government in 1975 and began a campaign of remaking the Kampuchean society. However, this regime had committed a series of atrocities that horrified the world community: torture, mass killings, deportations, starvation and forced evacuation of cities. It is estimated that more than a million Kampucheans perished in a three year period.[20] Undoubtedly, the Vietnamese intervention had halted these horrifying atrocities and there was a positive humanitarian outcome.[21] Yet, does the Vietnamese intervention fit into the framework of humanitarian intervention? And further, did this intervention set any precedent for future humanitarian interventions?

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[19] S/PV.1176 (1965), 1 May 1965; S/PV.1198 (1965), 4 May 1965; S/PV.1200 (1965), 5 May 1965.

[20] Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World* Order, Philadelphia, Procedural Aspects of International Law Series, vol21, University of Pennsylvania Press, 1996, p.103. Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, Dordrecht-the Netherlands, 1999, p.127.

[21] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, New York, Oxford University Press, 2001, p.79.

Abiew thinks that the Vietnamese intervention in Kampuchea is another illustration of the use of force for the protection of human rights.[22] Yet, this argument is not very persuasive, as intervention in Vietnam seems to be one of the most inappropriate cases in support of humanitarian intervention. This is because, although the situation in Vietnam favoured intervention in support of human rights, the world community denied responding to such a crisis and Vietnam justified its use of force on self-defence. This fact explains why Teson did not include in his case studies the intervention of Kampuchea in Vietnam. Abiew himself acknowledges that despite the world community's expression of outrage at the human rights atrocities, no effective measures were taken to stop what was happening in Kampuchea.[23] No resolution was adopted in the Security Council due to a Soviet veto. The cold war rivalries were present at this time and the discussions in the Security Council meetings clearly illustrate this fact. Thus, his argument is insubstantial.

What is more, the Vietnamese representative in the UN argued before the Security Council that it had acted in self-defence and that Pol Pot had been overthrown by the Kampuchean people.[24] The above argument had been also supported by the Soviet block. No doubt, Vietnam got involved in the conflict only after prior Kampuchean aggression.[25] As a result, Vietnam claimed its right to self defence. As regards the overthrow of Pol Pot, Vietnam argued that the Kampuchean people were the actors that led to this outcome. Accordingly, the argument of two wars been fought at the same time is also present to this

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[22] Abiew, op.cit., p.127.
[23] Ibid., p.128.
[24] S/PV.2109 (1979), 12 January 1979; and S/PV.2110 (1979), 13 January 1979.
[25] Frederik Harhoff, "Unauthorised Humanitarian Interventions-Armed Violence in the Name of Humanity?", *Nordic Journal of International Law*, vol.70, 2001, p.86. Also Murphy, op.cit., p.104 and Abiew, op.cit., p.128.

case.[26] This argument of two wars fought in a parallel way was also advanced by Tanzania after its invasion in Uganda. The fact here, however, is that Kampuchea advanced claims to self-defence and denied any humanitarian purposes.[27]

Despite Kampuchea's claims to self-defence, Abiew believes that self-defence cannot justify the instalment of a new regime and the presence of Vietnamese troops in Kampuchea for over a decade.[28] Hence, he argued that a possible basis for justifying intervention on humanitarian grounds was the existence of large scale atrocities.[29] Ronzitti thinks that this case is probably the one that throws most light on the relation between the use of force and the protection of human rights.[30] Yet, Vietnam met stern criticism for its intervention in Kampuchea and its claims on self defence could not convince the world community.[31] In the Council's meetings most states said that Vietnam had acted illegally by intervening in Kampuchea's internal affairs.[32] Had Vietnam claimed a right of humanitarian intervention, the reaction of the world community would have been much more condemnatory. Thus, Ronzitti and Abiew miscalculated these reactions when they try to link the use of force and human rights. It is also questionable why Ronzitti linked this intervention with the protection of human rights, while he rejected such a premise in

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[26] Oliver Ramsbotham and Tom Woodhouse, *Humanitarian Intervention in Contemporary Conflict: A Reconceptualisation*, Cambridge, Polity Press, 1996, p.55. Also Chesterman, op.cit., p.80, Abiew, op.cit., p. 128.

[27] Michael Akehurst, *Humanitarian* Intervention, in Hedley Bull (ed.), *Intervention in World Politics*, Oxford, Clarendon Press, 1984, p.97. Also Chesterman, op.cit., p.80, Murphy, op.cit., pp.104-105and Abiew, op.cit., p.128.

[28] Abiew, op.cit., p.130 and Harhoff, op.cit., p.86.

[29] *Id.*

[30] Natalino Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity*, Dordrecht, Nijhoff, 1985, p.98.

[31] Chesterman, op.cit., p.80, Murphy, op.cit., p.104 and Abiew, op.cit. 129.

[32] S/PV.2109 (1979), 12 January 1979; and S/PV.2110 (1979), 13 January 1979.

Tanzania's intervention in Uganda,[33] where the world community at least did not condemn the Tanzanian aggression.

Furthermore, the UN General Assembly censured the Kampuchean intervention.[34] It is also quite interesting that the Assembly did not recognise the instalment of the new regime in Kampuchea and voted to accept the credentials of Pol Pot's delegate. The newly installed Peoples Republic of Kampuchea was not recognised by the world community until 1991.[35] Thus, there is an evident lack of *opinio juris* in the Vietnamese intervention.[36] What is more, the interests of Vietnam and its selfish motives are the ones that can explain its intervention, while its humanitarian impulse was at least very weak.[37] Most scholars support that the three leading cases of humanitarian intervention during the Cold War (India's intervention in East Pakistan, Tanzania's intervention in Uganda and Vietnam's intervention in Kampuchea) revealed little support for the existence of a right of humanitarian intervention. Although there were mass abuses of human rights, including mass killings and genocidal practices, none of the above states tried to justify its actions on humanitarian grounds, but relied on self-defence.[38] Thus, it is obvious that this practice is not accompanied by *opinio juris*, which is very vital for the creation of customary law.

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[33] Ronzitti, op.cit., p.110.

[34] United Nations General Assembly Resolution 34/22 (1979), 14 November 1979; and UN General Assembly Resolution 34/46 (1979), 23 November 1979.

[35] Danesh Sarooshi, *Humanitarian Intervention and International Humanitarian Assistance: Law and Practice*, London, HMSO Publications Centre, 1994, p.23. Also Chesterman, op.cit., p.81and Murphy, op.cit., p.104.

[36] Chesterman, op.cit., p.81.

[37] Murphy, op.cit., p.104 and Chesterman, op.cit., p.81.

[38] Nicholas J. Wheeler and Justin C. Morris, Humanitarian Intervention and State Practice at the End of the Cold War, in Rick Fawn and Jeremy Larkins (eds.), International Society after the Cold War: Anarchy and Order Reconsidered, Basingstoke-England, Macmillan Press, 1996, pp.142-143. Christopher Greenwood, "Is There a Right of Humanitarian Intervention?", The World Today, vol.49, February 1993, p.35. Adam Roberts, "Humanitarian War: Military Intervention and Human Rights", International Affairs, vol.69, No3, 1993, p.434. Also Akehurst, op.cit., pp.96-98, Chesterman, op.cit., pp.71-81

3.5 TANZANIA'S INTERVENTION IN UGANDA (1979)

Dictator Idi Amin came to power in Uganda in 1971 after his successful coup. The brutality and savagery during his reign had been horrific. Under his rule there were egregious violations of human rights in Uganda, including killings of a large number of people, pogroms, expulsions and gross ethnic discrimination.[39] Donnelly thinks that *"the heinous nature of Amin's rule is beyond dispute. The human rights records of a handful of post-war regimes have been worse, but Amin's barbarism, his penchant for international notoriety, and the absence of major countervailing ideological, strategic or economic concerns, made Uganda an ideal situation for humanitarian intervention, and thus a useful test"*.[40] In April 1979, the Tanzanian Army, along with Ugandan exiles and refugees toppled Amin from power and a new provisional government was formed. As Donnelly argued, this had been an ideal situation for humanitarian intervention. Yet, does the Tanzanian intervention in Uganda qualify for the doctrine of humanitarian intervention?

This is a very special case because Tanzania decided to intervene in Uganda, after Amin's occupation of the Kagera salient, which was attached to the Tanzanian borders.[41] Amin declared annexation of Kagera and the creation of a

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[39] Oliver Ramsbotham and Tom Woodhouse, *Humanitarian Intervention in Contemporary Conflict: A Reconceptualisation*, Cambridge, Polity Press, 1996, p.4. Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, Dordrecht-the Netherlands, 1999, pp.121-125.

[40] Jack Donnelly, "Human Rights, Humanitarian Intervention and American Foreign Policy: Law, Morality and Politics", *Journal of International Affairs*, 1983/83, vol.3, p.316

[41] Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World* Order, Philadelphia, Procedural Aspects of International Law Series, vol21, University of Pennsylvania Press, 1996, p.105. Also Ramsbotham and Woodhouse, op.cit., p.6, Abiew, op.cit., p.121.

new boundary between the two countries.[42] No doubt, this announcement of annexation leaded up to the immediate Tanzanian response. As a result, the Tanzanian intervention could be justified on its legal right to self-defence. Indeed, the Tanzanian President, Julius Nyerere, declared the annexation an act of war and grounded its intervention as a reaction to the Ugandan aggression.[43] Self-defence in response to the Ugandan aggression is a sufficient legal justification. Thus, the Tanzanian President neglected the doctrine of humanitarian intervention and relied upon the traditional grounds of self-defence.

Nevertheless, there are two factors that cannot justify Tanzania's intervention as exercising its right to self defence. First of all, Amin offered to withdraw from the Tanzanian territory, but Nyerere rejected this offer because Tanzania could not forget the "pillage, massacre, destruction and rape and had created a state of war between the two countries.[44] Thus, it is questionable why Nyerere intervened in Uganda when Amin began to withdraw his troops from the Kagera salient.[45] Secondly, Tanzania penetrated into Uganda, alongside with Ugandan exiles and refugees and toppled the Ugandan dictator.[46] The fact that the Tanzanian army stayed for four months in Kampala makes the

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[42] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, New York, Oxford University Press, 2001, p.77. Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edition, New York, Transnational Publishers, 1997, p.179. Also Abiew, op.cit., p.121, Murphy, op.cit., p.105 and Donnelly, op.cit., p.316.

[43] Martha Brenfors and Malene Maxe Petersen, "The Legality of Unilateral Humanitarian Intervention-A Defence", *Nordic Journal of International Law*, vol.69, 2004, p490. Also Teson, op.cit., pp.179-180, Chesterman, op.cit., p.77, Murphy, op.cit., p.105 and Abiew, op.cit., pp.122-124.

[44] Teson, op.cit., p.180 and Chesterman, op.cit., p.77

[45] Chesterman, op.cit., p.77, Murphy, op.cit., p.105, Abiew, op.cit., p.121and Teson, op.cit., p.180

[46] Teson, op.cit., p.182, Abiew, op.cit., p.122, Chesterman, op.cit., p.77 and Ramsbotham and Woodhouse, op.cit., pp.6-7.

argument about self-defence doubtful.[47] Chesterman, however, thinks that *"Tanzania's military action was clearly precipitated by Uganda's armed attack on Tanzania, though was variously characterised as defensive and punitive in character"*.[48]

Teson argued that *"article 51 of the UN Charter cannot possibly justify overthrowing the Ugandan government, because self-defence is not a punitive action"*.[49] On the contrary, Murphy argued that *"Tanzania's claim that it was acting in self-defence is not clearly erroneous, unless it is shown that Tanzania's security would not have been further threatened if Idi Amin remained in power"*.[50] He explained this argument by traditional theories of "pre-emptive" or "preventive" self-defence that became familiar after the attacks of September 11 in New York. Yet, it is not the purpose of this chapter to explore whether or not the Tanzanian intervention can be explained as its right to self-defence. What matters here is that the legal justification offered by Tanzania's leader was self-defence, not humanitarian intervention. It could be argued that this fact weakens the claims for humanitarian intervention.

As regards to Nyerere's humanitarianism, it seems that the Nigerian President was genuinely concerned about Amin's human rights violations.[51] Many authors believe that this is an ideal case for humanitarian intervention.[52] The egregious violations of human rights, including mass killings, approve the above assertion. Teson supported that *"the Tanzanian intervention in Uganda is a precedent supporting the legality of humanitarian intervention in*

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[47] Abiew, op.cit., p.125.
[48] Chesterman, op.cit., p.77.
[49] Teson, op.cit., p.185.
[50] Murphy, op.cit., pp.106-107.
[51] Teson, op.cit., p.182, Abiew, op.cit., p.123, Donnelly, op.cit., p.316 and Murphy, op.cit., p.107
[52] Donnelly, op.cit., p.316, Teson, op.cit., p.184 and Abiew, op.cit., p.125.

appropriate cases... The Ugandan case is perhaps the clearest in a series of cases that have carved out an important exception to the prohibition of Article 2(4)".[53] He concludes to the above argument because he believes that the Tanzanian action was legitimised by the international community,[54] which did not react against the use of force by Tanzania.[55]

No doubt, the intervention was tolerated by the world community.[56] Surprisingly, the matter was never brought up in the UN Security Council or the General Assembly.[57] But as Chesterman argued the above argument of Teson is an exaggeration, because *"most states acknowledged Tanzania's right to defend itself and were subsequently content to see Amin's regime replaced, but this is not the same as saying that they regarded the intervention as a lawful use of force".*[58] Even Teson, for instance, acknowledges that the US government supported Tanzania from the outset, although on self-defence grounds.[59] Thus, Tanzania's claim to self-defence weakens the claims to humanitarian intervention. Further, it is uncertain that Tanzania would have intervened in Uganda, had Amin not occupied the Kagera salient. Self-interest was also a leading motive for intervention, given the long-standing animosity between the two countries.[60] The fact that there were humanitarian concerns is indisputable, but the primary motive for Tanzania's action had been the Ugandan aggression.

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[53] Teson, op.cit., p.188.
[54] Ibid., p.187.
[55] Ibid., p.191 and 195.
[56] Ramsbotham and Woodhouse, op.cit., p.52, Brenfors and Petersen, op.cit., p.491, Chesterman, op.cit., p.78, Murphy, op.cit., p.106, Abiew, op.cit., p.123 and Teson, op.cit., p.191 and195.
[57] Frederik Harhoff, "Unauthorised Humanitarian Interventions-Armed Violence in the Name of Humanity?", *Nordic Journal of International Law*, vol.70, 2001, p.88. Also Chesterman, op.cit., p.78, Murphy, op.cit., p.106, Brenfors and Petersen, op.cit., p.490.
[58] Chesterman, op.cit., p.78.
[59] Teson, op.cit., p.185
[60] Donnelly, op.cit., p.316.

It seems that Reisman considered the Tanzanian intervention legitimate instance of humanitarian intervention: *"there is neither need nor justification for treating in a mechanically equal fashion Tanzania's intervention in Uganda to overthrow Amin's despotism, on the one hand, and Soviet intervention in Hungary in 1956 and Czechoslovakia in 1966 to overthrow popular governments and to impose undesired regime on a coerced population, on the other".*[61] Teson and Abiew seem to share this view.[62] On the other hand, Ronzitti claimed that there were two wars fought in Uganda: one would be a war of self-defence between Tanzania and Uganda and the second war would be a war of liberation fought by the Ugandans against Amin.[63] Thus, he concludes that Tanzania's intervention in Uganda is not an authoritative precedent for the existence of a right of humanitarian intervention.[64] Donnelly believes that the Tanzanian action clearly failed to meet the doctrine's legal standards, as *"the decision to leave several thousands troops in Uganda well after the final elimination of Amin's forces clearly violates the standards proposed by the defenders of humanitarian intervention".*[65]

In conclusion, it could be argued that although Tanzania's intervention in Uganda could have been a good example of humanitarian intervention, Tanzania's selfish motives and its justification on the grounds of self-defence weaken the validity for a precedent of armed humanitarian interventions. As Chesterman argued, *"there is little evidence of opinio juris beyond an*

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[61] Reisman, W. Michael, "Coercion and Self-Determination: Construing Article 2(4)", *American Journal of International Law*, vol.78, No3, July 1984, p.644.
[62] Teson, op.cit., p.184 and Abiew, op.cit., p.125.
[63] Natalino Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity*, Dordrecht, Nijhoff, 1985, pp.102-104.
[64] Ibid., p.110.
[65] Donnelly, op.cit., p.317.

affirmation of the right of self-defence".[66] If Nyerere would have claimed Tanzania's right of humanitarian intervention, he would definitely have created a very strong precedent for humanitarian intervention. But his statements on Tanzania's right to defend itself against the Ugandan aggression eliminate the significance of this intervention in setting a precedent for future armed humanitarian interventions. Moreover, his interventions in another two African States (the Comoros 1975 and the Seychelles in 1997) to oust regimes that he disliked weaken further his humanitarian motives.[67] In addition, his friendship with the ousted Ugandan President Milton Obote[68] further complexes the cause of intervention. Thus, it could be said that Tanzania managed to serve its selfish motives under its challenged right to defend itself against the Ugandan aggression.

3.6 FRENCH INTERVENTION IN CENTRAL AFRICAN EMPIRE (1979)

In January 1966 Jean-Bedel Bokassa removed President David Dacko from power in a military coup. In the first decade, this regime had been supported by France, both economically and politically.[69] However, during the last years of his power, political opposition grew and he became brutal in

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[66] Chesterman, op.cit., p.79.
[67] Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism After Kosovo*, New York, Palgrave, 2001, p.72.
[68] Teson, op.cit., p.185 and Glennon, op.cit., p.72.
[69] Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World* Order, Philadelphia, Procedural Aspects of International Law Series, vol21, University of Pennsylvania Press, 1996, p.107. Also Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edition, New York, Transnational Publishers, 1997, p.198.

responding to this opposition. The torture and murder of about a hundred schoolchildren following unrest in January 1979 triggered international outrage.[70] As a result, in May 1979, the sixth Franco-African Congress convened in Kigali and established an African judicial commission to investigate the massacre.[71] On 16 August, this commission confirmed that the atrocities had taken place and that Bokassa had personally participated in the massacre.[72] A month later, while Bokassa was in Libya, French troops intervened and restored Dacko to power in a bloodless coup.

Murphy noted that *"this incident is probably the best example of humanitarian intervention during the Cold War that was accepted as lawful by the international community"*.[73] Teson believes that *"the null cost in human lives makes the Central African case an instance of humanitarian intervention par excellence"*.[74] Yet, does the French intervention qualify as a legitimate instance of humanitarian intervention? It seems that the arguments above are isolated and have not been expressed elsewhere. First of all, France pretended that its troops intervened in the Central African Empire in response to the request of the new regime.[75] On the other hand, France did have humanitarian concerns.[76] As a result, France had off financial aid after publication of the report of the judicial commission.[77] But France never articulated claims on humanitarian intervention, or the protection of human rights. Teson noted that

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[70] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, New York, Oxford University Press, 2001, p.82. Also Teson, op.cit., p.196 and Murphy, op.cit., p.107.
[71] Chesterman, op.cit., p.82, Murphy, op.cit., pp.107-108 and Teson, op.cit., p.196.
[72] *Id.*
[73] Murphy, op.cit., p.108.
[74] Teson, op.cit., p.199.
[75] Michael Akehurst, *Humanitarian* Intervention, in Hedley Bull (ed.), *Intervention in World Politics*, Oxford, Clarendon Press, 1984, p.98. Also Chesterman, op.cit., p.82, Murphy, op.cit., p.108 and Teson, op.cit., p.197.
[76] Murphy, op.cit., p.108 and Teson, op.cit., p.198.
[77] Chesterman, op.cit., p.82.

statements of French officials confirm that humanitarian concerns were crucial to the French decision to intervene.[78] Yet, he does not cite these statements, as he did in other cases. What is more, France never justified its intervention on humanitarian grounds.

The fact that the world community did not condemn this intervention, or even tolerated it[79] does not imply that this case was a clear instance of humanitarian intervention that states regarded it as lawful. The absence of the UN and OAU[80] also does not explain the world community's support to the French intervention. Chesterman believes that *"as in the case of Tanzania's statements concerning its ouster of Amin, it appears that the action against Bokassa was more in the nature of punishment, than prevention"*.[81] This is a good explanation, but what matters here is that this case does not present a clear instance of humanitarian intervention. First of all, there were not human rights violations in a large scale. Unlike East Pakistan, Uganda and Kampuchea, the Central African Empire lacked the genocidal practices of the three other cases. The torture and murder of 100 schoolchildren is hideous, but cannot alone justify humanitarian intervention. Glennon argues that the magnitude of human rights violations was questionable.[82] He also pointed that the French economic interests remained strong in the Central African Republic, following its independence from France in 1960.[83]

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[78] Teson, op.cit., p.198
[79] Murphy, op.cit., p.108 and Teson, op.cit., p.198.
[80] Teson, op.cit., p.197.
[81] Chesterman, op.cit., p.82
[82] Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism After Kosovo*, New York, Palgrave, 2001, p.73.
[83] *Id.*

3.7 US INTERVENTION IN GRENADA (1983)

In October 1983, Bernard Coard deposed Maurice Bishop in a coup. Bishop came to power after replacing the elected government in 1974. The fact that the first coup followed the later is very important for this subchapter and the following analysis. On 19 October 1983, following public unrest, up to 200 people had been killed, including Maurice Bishop and three of his cabinet ministers. There were reports of the army firing on women and children.[84] On 25 October, following requests by the Organisation of Eastern Caribbean States, 1900 US troops accompanied by 300 Caribbean soldiers landed in Grenada and deposed after three days of fighting the coup of Bernard Coard. This was a low-casualties operation (less than a hundred). An interim government was established, which led to multi-party elections in late 1984.[85] Troops withdrew by 15 December, leaving only a small number of US and Caribbean support personnel on the island.[86]

Nigel Rodley thinks that this intervention is one out of the four interventions during the Cold War that could be best justified by the doctrine of humanitarian intervention (the other three include: India's intervention in Bangladesh, Tanzanian intervention in Uganda and Vietnam's intervention in Kampuchea).[87] Teson also believes that *"the operation in Grenada was aimed at rescuing the Grenadians from an immediate threat to their lives and from*

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[84] Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edition, New York, Transnational Publishers, 1997, p.212

[85] Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*, Philadelphia, Procedural Aspects of International Law Series, vol21, University of Pennsylvania Press, 1996, p.109.

[86] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, New York, Oxford University Press, 2001, p.99. Also Murphy, op.cit., p.109.

[87] Nigel S. Rodley, *Collective Intervention to Protect Human Rights and Civilian Populations: The Legal Framework*, in Nigel S. Rodley (ed.), *To Loose the Bands of Wickedness: International Intervention in Defence of Human Rights*, London, Brassey's (UK), 1992, p.21.

deprivation of their democratic rights stemming from the imminent imposition on them of an unwanted authoritarian regime".[88] Finally, D'Amato argued that the US intervention in Grenada *"was a lawful and temporary humanitarian intervention to free the people of Grenada from the tyranny of the thugs who had machine-gunned their way to power... now the episode can safely be cited as an instance of limited humanitarian intervention on behalf of the citizens of Grenada".*[89] But was this the official justification of the US for its 1983 intervention in Grenada? Or, can an immediate threat of abuses of human rights justify humanitarian intervention? And can Grenada be an authoritative instance of pro-democratic intervention to ensure respect for human rights? All these three questions will be addressed further down.

As regards to the first question, it could be said that the Reagan administration advance three official justifications for its use of force in Grenada. None of them, however, included humanitarian intervention, protection of human rights or whatsoever. Accordingly, the first justification had to do with an invitation from the Governor of Grenada to restore order to the island.[90] The second justification refers to a request from the OECS for collective security action in Grenada.[91] Finally, the US invoked the protection of nationals abroad as a legal justification.[92] Yet, Schachter argued that *"the Americans on the island were not hostages and treats had not been made*

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[88] Teson, op.cit., p.211.
[89] Anthony D'Amato, "The Invasion of Panama Was a Lawful Response to Tyranny", *American Journal of International Law*, vol.84, No.2, April 1990, p.523.
[90] Oliver Ramsbotham and Tom Woodhouse, *Humanitarian Intervention in Contemporary Conflict: A Reconceptualisation*, Cambridge, Polity Press, 1996, p.56. Also Murphy, op.cit., p.109, Chesterman, op.cit., p.100 and Teson, op.cit., p.211 and 213.
[91] Ramsbotham and Woodhouse, op.cit., p.56, Murphy, op.cit., p.109, Chesterman, op.cit., p.100 and Teson, op.cit., p.211 and 213.
[92] Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism After Kosovo*, New York, Palgrave, 2001, p.75. Also Ramsbotham and Woodhouse, op.cit., p.56, Chesterman, op.cit., p.101, Murphy, op.cit., p.109 and Teson, op.cit., p.211 and 214.

against them".[93] It is clear from the above that the US did not advance any claims for a right of humanitarian intervention.[94] The legal advisor to the US Department of State noted that the United States *"did not assert a broad doctrine of humanitarian intervention".*[95] What is more, none of the Caribbean states advanced humanitarian justifications, but referred to the stabilisation of the country and the prevention of the Marxist revolution *"spreading to all the islands".*[96]

As regards to the second question, Teson argued that *"the conditions in Grenada were such that a very serious deprivation of human rights was imminent. Intervention to prevent imminent, certain, and extensive human rights violations must be considered encompassed in the doctrine of humanitarian intervention".*[97] Nevertheless, humanitarian intervention is considered to be the use of force by states to remedy flagrant violations of fundamental human rights and policies of mass murder, ethnic cleansing, genocide and other atrocities. Most authors support this view, rather than an imminent threat.[98] Teson also noted that humanitarian intervention is *"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*

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[93] Oscar Schachter, "The Right of States to Use Armed Force", *Michigan Law Review*, vol.82, 1984, p.1631.
[94] Murphy, op.cit., p.109.
[95] Teson, op.cit., p.216.
[96] Will D. Verwey, *Humanitarian Intervention*, in Antonio Cassese (ed.), *The Current Legal Regulation of the Use of Force*, Dordrecht, Nijhoff, 1986, pp.56-65.
[97] Teson, op.cit., pp.219-220.
[98] Michael Laban Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2nd edition, New York, Basic Books, 1992, p.107. Jack Donnelly, "Human Rights, Humanitarian Intervention and American Foreign Policy: Law, Morality and Politics", *Journal of International Affairs*, v.3, 1983/84, p.313. Ian Brownlie, *Humanitarian Intervention*, in John N. Moore (ed.), *Law and Civil War in the Modern World*, Baltimore, Johns Hopkins University Press, 1974, p.217.

oppressive government".[99] Thus, he omitted to add the imminent threat in his own definition of humanitarian intervention. Further, there were not atrocities of a large scale in Grenada at the time of intervention, nor was there any possibility of widespread atrocities and violence.[100]

It could be argued that this intervention does not fit into the doctrine of humanitarian intervention. Although Teson tried to collect statements from politicians and organisations to prove the implied humanitarian concerns,[101] the official position of the US and the Caribbean states disconfirm his arguments. Actually, there were no mass violations of human rights, or an imminent threat. The real motive of intervening states had been their goal to curtail the Soviet influence over Grenada. As Murphy noted, the dominant feature is less "pro-human rights" and more "anti-communism".[102] Teson cannot find supporters to his views, as most scholars point out this anti-communist campaign of the US intervention.[103] Not surprisingly, Teson ignores the above fact and remains silent to the anti-communist syndrome of intervening states. Yet, he refers that the pro-Western New National Party won 14 of the 15 seats.[104] This fact also verifies the fact that the goal of intervening states had been the fighting of communism.

The third question had to do with the significance of the US intervention in Grenada in setting a precedent for pro-democratic intervention. Murphy, for instance argued that the intervention would be characterised as a

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[99] Teson, op.cit., p.5
[100] Murphy, op.cit., p.110, Glennon, op.cit., p.75
[101] Ibid., pp.214-215.
[102] Murphy, op.cit., p.110. Schachter also believes that this was the real motive for the US intervention in Grenada. Schachter, op.cit., p.1632.
[103] Ramsbotham and Woodhouse, op.cit., p.56, Murphy, op.cit., p.110, Glennon, op.cit., p.75, Chesterman, op.cit., p.101, Verwey, op.cit., p.65.
[104] Teson, op.cit., p.218.

new breed of humanitarian intervention, such as "intervention to restore democracy" or "pro-democratic intervention".[105] Teson also advances this argument.[106] But the United States did not advance such a claim. Although the broader sphere of pro-democratic intervention will be explored in a later chapter, some points will be stressed here for this specific intervention. It could be argued that this is a totally inappropriate case for the pro-democratic interventions. This is because pro-democratic interventions involve the restoration to power of a democratic government, which was illegally disrupted by unconstitutional regimes.[107] However, there was no democratic government to restore in Haiti. Maurice Bishop came to power after a coup and was replaced by Coard's coup.

Furthermore, the new regime did not commit a large scale of atrocities. Thus, pro-democratic intervention would be inappropriate. The world community and the UN strongly criticised the US intervention in Grenada. A Security Council resolution condemning the intervention as a breach of international law was vetoed by the US and a General Assembly resolution *"deeply deplored the US-led intervention as a flagrant violation of international law"*.[108] Teson thinks that *"the reaction of the United Nations majority and of his first group of critic does not do justice to the human cause"*.[109] Thus, he acknowledges that this intervention cannot be a strong precedence for pro-democratic or humanitarian intervention. The lack of *opinio juris* is more than evident.[110]

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[105] Murphy, op.cit., p.110.
[106] Teson , op.cit., pp.215-216.
[107] For further details see the chapter on Haiti and pro-democratic intervention.
[108] [1983] UNYB211 and General Assembly Resolution 38/7 (1983), 2 November 1983.
[109] Teson, op.cit., p.220.
[110] Chesterman, op.cit., p.102.

3.8 US INTERVENTION IN PANAMA (1989)

On 20 December 1989, about 12,000 US military forces along with other US forces already stationed in Panama intervened in Panama to remove Manuel Noriega and to install Guillermo Endara as President of Panama. Earlier in the same year, Endara won the election over Noriega's candidate, but Noriega annulled the election. President Bush justified the use of force on four grounds: the protection of US citizens in Panama, the restoration of democracy, protection of the integrity of the Panama Canal Treaties and fighting drug trafficking off.[111] It is important to mention that Noriega was indicted on US courts for drug trafficking. Noriega was taken into custody and Endara became the President of Panama. Once again, the world community had to deal with new challenges regarding the sphere of the use of force in international law. After Grenada, Panama became the second case where democracy had been advanced by the US as a justification for the use of force. And although in Grenada there was no disruption of democracy, but only installation of democracy through free and fair elections, in Panama there was an actual disruption of democracy. Yet, did the world community accept the US intervention? And did it set any precedence for the use of force to restore democracy?

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[111] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, New York, Oxford University Press, 2001, p.102. Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World* Order, Philadelphia, Procedural Aspects of International Law Series, vol21, University of Pennsylvania Press, 1996, p.114. Ved P. Nanda, "The Validity of United States Intervention in Panama under International Law", *American Journal of International Law*, vol.84, No.2, April 1990, p.494.

It could be argued that the US intervention in Panama cannot set a strong precedent for pro-democratic intervention in international law. It is clear from the discussions in the UN Security Council that states condemned the US intervention as an "act of aggression" and "flagrant violation of international law".[112] The US vetoed a draft resolution condemning the intervention (ten members in favour, four members against the adoption of this resolution and one abstention).[113] The UN General Assembly, however, adopted a resolution that strongly condemned the US unilateral armed invasion in Panama.[114] The condemnation of the world community was evident on other levels as well. The Permanent Council of the OAS initially refused to accept the credentials of the ambassador dispatched by Endara to present Panama, while the Noriega regime's ambassador continued to participate and joined the vote deploring the invasion.[115] What is more, the new regime lacked recognition by Latin American states.[116] The lack of *opinio juris* in the case of Panama is obvious.

Let us now consider the position of several scholars relating the US intervention in Panama. Farer noted that *"if sovereignty means anything, it means that one state cannot compromise another states territorial integrity, or dictate the character or the occupants of its governing institutions"*.[117] Professor Nanda argued that there was *"no legal basis on replacing Noriega with democracy. No international legal instrument permits intervention to maintain or impose a democratic form of government in another state... The US stands alone in making such a claim and the community response at the UN*

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[112] S/PV.2899 (1989), 20 December 1989; and S/PV.2900 (1989), 21 December 1989.
[113] S/PV.2902 (1989), 23 December 1989.
[114] United Nations General Assembly Resolution 44/240 (1989), 29 December 1989.
[115] Tom J. Farer, "Panama: Beyond the Charter Paradigm", *American Journal of International Law*, vol.84, No.2, April 1990, p.510. Also Chesterman, op.cit., p.106.
[116] Farer, op.cit., p.520 and Chesterman, op.cit., p.106
[117] Farer, op.cit., p.507.

and the OAS has appropriately been to reject this claim".[118] On the other hand, Professor D'Amato thinks that *"their views are conditioned by a static conception of international law".*[119] He believes that the US interventions in Grenada and Panama *"are milestones along the path to a new nonstatist conception of international law that changes previous formulas".*[120] What is more, he argued that the US forcible intervention in Panama did not violate Article 2(4), because the US did not act against the "territorial integrity" of Panama, nor was the use of force directed against the "political independence" of Panama.[121]

As regards the above discrepancies, it could be argued that the Teson's mentor, Professor D'Amato, if far optimistic for regulations of the use of force regarding human rights and democracy. The world community had never accepted such values at this time and the strong condemnation of the US intervention in Grenada confirms the above assertion. He strongly supported a new era for human rights and democracy in a case that met severe opposition by the society of states. Hence, it is questionable why he makes his case under such unfavourable circumstances. Further, as Murphy observed, human rights and democracy was not the primary goal of the intervention, but national US interests: to beat drug trafficking and to eliminate a severe irritant in US foreign relations with Latin America (Noriega).[122] Accordingly, he argued that *"even if pro-democratic intervention is considered within the scope of humanitarian*

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[118] Nanda, op.cit., pp.498-500.
[119] Anthony D'Amato, "The Invasion of Panama Was a Lawful Response to Tyranny", *American Journal of International Law*, vol.84, No.2, April 1990, p.516.
[120] Ibid., p.517.
[121] Ibid., p.520.
[122] Murphy, op.cit., pp.114-115.

intervention, the intervention in Panama is not a strong precedent in support of its acceptance by the international community".[123]

[123] Ibid., p.115.

3.9 INDIA'S INTERVENTION IN EAST PAKISTAN (1971)

INTRODUCTION-THE BACKGROUND OF THE CONFLICT

After the end of World War II and the decolonisation period, India and Pakistan became two independent states. The separation of these two states did not settle all of their disputes and continuous conflicts continued to occur between those states. Good illustrations are the two wars between India and Pakistan in 1947-48 and 1965.[1] The 1971 war, however, had nothing to do with the ordinary problems and territorial claims of India and Pakistan, but it had to deal with the crisis resulting from the revolt in East Bengal. The Pakistani State was divided into East and West Pakistan. East Bengal was a province of Pakistan and it constituted its eastern province (East Pakistan). The only link between these two parts of Pakistan was religion. Most of the people in East Bengal were Muslims.[2] The Hindu minority in East Pakistan reached the figure of ten to twelve million people. [3]

Nevertheless, there were important cultural, linguistic and economic disparities between the two parts of Pakistan.[4] In the west wing of Pakistan people spoke Urdu, the official language, while in the east the majority of the population spoke Bengali.[5] Further, East Bengal is a land of monsoon rains and

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[1] Chopra Pran, "East Bengal: A Crisis for India", *The World Today*, vol.27, Sept.1971, p.372.
[2] Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, The Hague, The Netherlands, Kluwer Law International, 1999, p.113. Also Chopra Pran, op.cit., p.372.
[3] Leo Kuper, *The Prevention of Genocide*, New Heaven, Yale University Press, 1985, p.45.
[4] Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford, Oxford University Press, 2000, p. 56. Also Abiew, op.cit., p.113.
[5] Kuper, op.cit., p.45.

rise in contrast with the dry land of West Pakistan.[6] Culturally, Pakistan was strongly linked with the Middle East, while East Bengal had strong cultural and economic affinities with India.[7] However, political motives led to the outbreak of war in 1971. The East Bengalis felt like they were a colony of West Pakistan.[8] West Pakistan became increasingly more industrialised and prosperous, while the conditions in the East deteriorated.[9] The realisation of the political and economic domination of East Pakistan by the West Pakistan Government led the Bengali people to demands of a greater autonomy for their region.[10]

To avoid this discrimination in their area and to achieve their autonomy the Bengalis nurtured a movement for greater regional autonomy in East Pakistan, the Awami League.[11] After many years of dictatorship in Pakistan, in the November-December 1970 general election the Awami League won 167 seats out of the 169 in East Pakistan.[12] The success of the Awami League was an expression of Bengali separatism.[13] East Pakistan wanted a generous measure of autonomy in a loose federation in which the central government's authority would be confined to defence, foreign affairs and some currency matters.[14] After the elections, the Awami League and the Pakistan People's Party commenced negotiations and tried to proceed to a resolution of the

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[6] Chopra Pran, op.cit., p.372.
[7] Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edition, Transnational Publishers, 1997, p.200 and Chopra Pran, op.cit., p.373.
[8] Wheeler, op.cit., p.56.
[9] Kuper, op.cit., p.46.
[10] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, New York, Oxford University Press, 2001, p.72.
[11] Kuper, op.cit., p.46.
[12] Chesterman, op.cit., p.72, also Kuper, op.cit., p.47, Wheeler, op.cit., p.56, and Teson, op.cit., p.201.
[13] Peter Calvocoressi, *World Politics 1945-2000*, 8th edition, London, Longman, 2001, p.516. And Abiew, op.cit., p.113.
[14] *Id.*

conflict.[15] The Pakistani Government desired to maintain the territorial integrity of the state and it had serious fears that the Awami League was planning the secession of East Pakistan.[16] Therefore, President Yahya Khan postponed the National Assembly indefinitely.[17]

The Pakistani Government decided that the only options to eliminate disaccord in East Pakistan were massacres and massive terror.[18] The international Commission of Jurists in its review describes the situation as very brutal. It acknowledged that there was indiscriminate killing of civilians, attempts to exterminate or drive out of the country a large part of the Hindu population, arrests and torture of students and Awami League activists, raping, destruction of villages and towns.[19] The Pakistani Army carried death lists on which appeared names of political, cultural, and intellectual leaders of Bengal.[20] Leo Kuper describes that the brutality of the Pakistani army increased sharply with massive collective reprisals in the annihilation of Bengali villages as the resistance of the Bengalis mounted.[21] The cruelty in East Bengal caused a large influx of refugees to India. Leo Kuper states that seven million refugees had fled to India and that the daily flows of refugees to India were at the rate of 40 to 50 thousand a day.[22] Other scholars have stated that the number of refugees had reached ten million.[23] This fact constituted a refugee aggression to the Indian state that created an unbearable economic strain to India.[24]

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[15] Kuper, op.cit., p.47.
[16] Wheeler, op.cit., p.56, and Teson, op.cit., p.202.
[17] Chesterman, op.cit., p.72, and Teson, op.cit., p.202.
[18] Kuper, op.cit., p.47, and Abiew, op.cit., p.114.
[19] East Pakistan Staff Study by the Secretariat of the International Commission of Jurists 1972, Review of the International Commission of Jurists, pp. 26-27.
[20] Michael Laban Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2nd edition, New York, Basic Books, 1992, p.105.
[21] Kuper, op.cit., p.47.
[22] Kuper, op.cit., p.50.
[23] Chesterman, op.cit., p.72, Wheeler, op.cit., p.58, and Abiew, op.cit., p.114.
[24] *Id.* and Teson, op.cit., p203.

Relations between Pakistan and India had been deteriorated as a result of the crisis.[25] On 3 December, for reasons that are unclear, the Pakistani air force had launched an air strike against India.[26] The crisis began when India decided to intervene militarily in Pakistan to stop the atrocities. On 16 December 1971 the war ended after the intervention of the Indian Army, which sealed the successful secession of the independent state of Bangladesh.[27] India had justified its intervention in the Pakistani territory not only on the aggression committed by Pakistan, but also on the inhumane conditions in which the Bengali people had been kept.[28] Subsequently, India's justifications for its intervention were based on mixed motives.[29]

One of the main concerns of this chapter is to consider whether or not the Indian intervention in Pakistan was motivated by pure humanitarian reasons or by other factors. The examination of this case will be divided into three stages. India's legal justifications and the legitimacy or not of its intervention, especially the claims on humanitarian intervention, will be the first part. In the second stage, political and other motives will be put forward with the purpose of detecting whether or not humanitarian intervention constitutes a political rather than a legal principle. To this extent, it is very important to balance the arguments for and against humanitarian intervention and to observe which of them applies to the Indian case. The last part will have to do with the moral ground of the intervention and it will be explored whether or not the intervention was morally justified.[30] It should be noted that the Indian

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[25] Chesterman, op.cit., p.72.
[26] *Id.*
[27] Kuper, op.cit., p.48.
[28] Natalino Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity*, Dordrecht, Nijhoff, 1985, p.96 and Leo Kuper, op.cit., p.54.
[29] Wheeler, op.cit., p.55 and Chesterman, op.cit., p73.
[30] Chesterman, op.cit., p.75 and Walzer, op.cit., p.107.

intervention is one of the few instances that many writers have called an intervention morally justified. Finally, there will be a comprehensive evaluation of the Indian intervention in East Pakistan.

LEGAL ASPECTS FOR THE USE OF FORCE

In 1971 neither India nor Pakistan was a member of the UN, but under Article 31 of the UN Charter they were entitled to participate in the discussions of the Council.[31] India's ambassador Sen had denied that his government had breached the prohibition on the use of force in Article 2(4) since Pakistan had struck first.[32] The Indian Government had supported that its intervention had been justified by the aggression committed by Pakistan.[33] As already stated above, India had justified its intervention on humanitarian grounds and on UN Article 51 on self-defence[34]. However, India's justifications on self-defence had been insufficient.[35] Article 51 states that nothing in the 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. In addition, customary international law places further restrictions on the right to self-defence.[36] Nicholas Wheeler plausibly states that the fact that Ambassador Sen did not refer Article 51 explicitly before the UN Security Council suggests that the Indian Government had recognised that it was dubious in invoking this

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[31] Wheeler, op.cit., p.60.
[32] S/PV.1606 (1971), 4 December 1971.
[33] *Id.*
[34] Martha Brenfors and Malene Maxe Petersen, "The Legality of Unilateral Humanitarian Intervention", *Nordic Journal of International Law*, vol.69, 2004, p.488. Also Kuper, op.cit., p.54.
[35] Wheeler, op.cit., p.60.

rule.[37] This is because the bombing of Indian villages along the India-Pakistan border could not justify India's claims on self-defence, since minor bombing incidents along the border had been a feature of Indian-Pakistani relations ever since their independence.[38]

Another Indian justification is the refugee aggression on India.[39] Ambassador Sen had argued that the meaning of aggression should also encompass the aggression that resulted from ten million people coming to India as refugees.[40] The Indian delegation had tried to persuade the Security Council that its intervention was a legitimate response to Pakistan's refugee and military aggression.[41] India had claimed that the refugee aggression caused by the refugee influx jeopardised India's social system and its economy and this is a further act of aggression.[42] All India's justifications seem rational and legitimate. However, international law does not provide any articles and resolutions on the matter of refugee aggression. Murphy adds: *"whether the massive flow of refugees can also be considered an act of aggression is likewise doubtful; a better case is made that they were a threat to international peace and security in the region"*.[43] Indeed, this argument of refugee aggression is an invention of the Indian delegation. The UN Charter, treaties, juridical decisions and laws do not refer to such a kind of aggression.

Let us now consider India's claims on humanitarian intervention and examine the validity of such claims. Keeping in mind that India's primary

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[36] Wheeler, op.cit., p.60. Wheeler illustrates this argument with the Caroline Case of 1837.
[37] Ibid., p.61.
[38] Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*, Philadelphia, Procedural Aspects of International Law Series, vol21, University of Pennsylvania Press, 1996, pp.98-99.
[39] S/PV.1606 (1971), 4 December 1971.
[40] *Id.*
[41] *Id.*
[42] *Id.*

justification for its use of force was Pakistan's aggression on India (including the refugee aggression), it could be said that India relied primarily on the traditional ground of self-defence, rather than the doctrine of humanitarian intervention.[44] Yet, the Indian delegation decided that the humanitarian reasons would give it another justification for the use of force and it would mitigate the criticism against India. The Indian Ambassador Sen had argued before the Security Council that the military repression in East Pakistan was enough to shock the conscience of mankind and he had asked what had happened to the conventions on genocide, human rights and self-determination.[45] Ambassador Sen was well aware of the answer of this question. All the conventions on genocide, human rights and self-determination do not recognise a right to humanitarian intervention. What is more, he did not claim a right to humanitarian intervention, but he primarily relied upon traditional and new imaginative grounds of self-defence. Thus, it is doubtful why he invoked these conventions. He probably wanted to mitigate the reactions of the world community to India's intervention by speaking in moral terms. Yet, this question of his does not add any credits to India's legal justifications.

The international Commission of Jurists concluded by stating that India's armed intervention would have been justified if she had acted under the doctrine of humanitarian intervention.[46] Nevertheless, India had never explicitly invoked the doctrine of humanitarian intervention, but it had only advanced humanitarian claims. Hence, the world community had lost this unique opportunity to test whether a right to humanitarian intervention would

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[43] Murphy, op.cit., p.99.
[44] Chesterman, op.cit., p.74, Wheeler, op.cit., p.62, Kuper, op.cit., p.54, Ronzitti, op.cit., p.96.
[45] S/PV.1606 (1971), 4 December 1971.

be welcomed or not. Further, the discussions before the Council and the General Assembly had nothing to do with discussions on the legitimacy of humanitarian intervention. Akehurst argued that India had realised that humanitarian intervention was an insufficient justification for the use of force and this is why it had relied upon the ground of self-defence.[47] Teson disagreed with Akehurst's view and he stressed that the important point is that the whole picture of the situation was one that warranted foreign intervention on the grounds of humanity.[48] Michael Walzer supported that morality is not a bar to unilateral action when there is no immediate alternative available, like in the Bengali case.[49] He thinks that humanitarian intervention is justified when it is a response to acts that shock the moral conscience of mankind.[50] Yet, this justification can only be moral, not legal. This is because there is no provision in international law for humanitarian intervention. Undoubtedly, the atrocities committed by Pakistan had shocked the international community. Therefore, according to his beliefs, India's intervention was a classical instance humanitarian intervention. In the same sense, Nicholas Wheeler believes that it is the failure of the Security Council to stop the massive violations of human rights in East Pakistan, and the appalling situation of the refugees on the Indian border, that gave India a legal right to act unilaterally.[51]

It seems that most of the writers had rushed to justify India's intervention on the atrocities and the genocide committed by Pakistan. Therefore, they try to justify India's intervention as a humanitarian one.

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[46] East Pakistan Staff Study by the Secretariat of the International Commission of Jurists, op.cit., p.62.
[47] Michael Akehurst, *Humanitarian Intervention*, in Hedley Bull (ed.), *Intervention in World Politics*, Oxford, Clarendon Press, 1984, p.96.
[48] Teson, op.cit., p.208.
[49] Walzer, op.cit., p.107.
[50] *Id.*

However, India had never justified its intervention in the terms of the legal doctrine of humanitarian intervention.[52] Nicholas Wheeler had clearly observed that India had attempted to persuade members of the Security Council that its intervention was justifiable in terms of the UN principles relating to the protection of human rights.[53] Nevertheless, India's references to human rights, apart from the fact that they were not India's primary justification, did not constitute claims to a right of humanitarian intervention. It could be argued that this had happened because India had been well aware of the trends in the international community, which had been stressing upon the matters of territorial integrity and state sovereignty, rather than the protection of universal human rights.

The fact that the international community did not seem willing to favour human rights instead of state sovereignty and the rule of non-intervention and non-interference in the internal affairs of a state can be clearly illustrated by a quick examination of the position of states during the crisis. First of all, it should be stressed that during the days of the crisis the UN Security Council had remained inactive due to the Cold War rivalries.[54] The matter was raised only nine months after the first massacre.[55] Nine members of the Security Council were calling for a meeting. The subject was on the deteriorating situation, which had led to armed clashes between India and Pakistan.[56] This had happened on 4 December, when India had already invaded Pakistan.[57] The Indian Government had insisted that the cause of the conflict was the refusal of

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[51] Wheeler, op.cit., p.62.
[52] Ibid., p.64.
[53] *Id.*
[54] Wheeler, op.cit., p.59, and Kuper, op.cit., p.52.
[55] Kuper, op.cit., p.52.
[56] Chesterman, op.cit., p.74.
[57] Kuper, op.cit., p.53.

the Pakistan Government to accept the results of the General election and to grand autonomy to the Bengalis.[58] On the other hand, the Pakistan Government had claimed that the cause of the internal conflict and its military intervention in East Pakistan was the secessionist movement in East Bengal. Further, Pakistan claimed that India's real motive was the breaking up of Pakistan.[59]

It could be said that the international community was not willing to accept India's justifications. There was, however, a variation in the states' opinions. The US and China had been aligned with Pakistan and the Soviet Union had supported India. There had been two states that named India an aggressor. The Chinese Ambassador had rejected India's justifications and had called the Council to name India as an aggressor and to demand that it withdraw its forces from East Pakistan.[60] Albania was the second state to condemn India as being an aggressor.[61] The United States had acknowledged that the cause of the human suffering of the Bengali people lay in the failure of both India and Pakistan to arrive at a political solution. Thus, the immediate cessation of hostilities and the withdrawal of forces were essential conditions for progress. Therefore, the US proposed a resolution calling upon the governments of India and Pakistan to take all steps necessary for an immediate cessation of hostilities and withdrawal of armed forces to their own sides of the Indian-Pakistan borders.[62]

A Soviet veto, however, had prevented adoption of the US proposed resolution.[63] The Soviet Union and its Warsaw Pact ally Poland were the only

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[58] S/PV.1606, 4 December 1971.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] Chesterman, op.cit., p.74.

states to condone India's action in the Security Council.[64] The USSR representative had argued that the inhumane acts of repression and terrorism by the Pakistan government had been the main cause of a most serious problem and of human suffering. The USSR had, therefore, called for a political settlement in East Pakistan and for a cessation of all acts of violence by Pakistani forces in East Pakistan. Furthermore, the USSR had called for a political settlement in East Pakistan that would put an end to the hostilities.[65] Although the Soviet Union supported the fact that India's recourse to force had to be located in the context of the massive human suffering caused by Pakistan, it did not explicitly defend India's use of force as a humanitarian intervention.[66]

The Security Council had been paralysed due to the opposition of the superpowers and the Soviet veto. After a third meeting that the Council had failed to attain a resolution, the non-aligned group of states had managed to persuade the major powers to refer the issue to the General Assembly under the Uniting for Peace Resolution of 1950.[67] The General Assembly had considered the question at two plenary meetings held on 7 December 1971.[68] Most delegates in the General Assembly had said that the situation in East Pakistan was an internal one, to be settled by the Pakistan Government, with no external interference and expressed support for the principles of integrity and non-interference.[69] Resolution 2793 carried by 104 votes to 11 with 10 abstentions had called for an immediate ceasefire with a reference to an early political solution and to intensified efforts to bring about the conditions necessary for

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[64] S/PV.1606, 4 December 1971.
[65] *Id.*
[66] Wheeler, op.cit., p.66.
[67] Kuper, op.cit., p.56, and Wheeler, op.cit., p.68.
[68] Chesterman, op.cit., p.74.
[69] Akehurst, op.cit., p.97.

the voluntary return of the refugees to their homes.[70] The resolution had called upon India and Pakistan to conclude a ceasefire and withdraw their forces.[71] The states that had opposed the resolution and that did emphasise the atrocities committed by Pakistan were the Soviet Union and the other members of the Warsaw Pact.[72] India, however, had stated that it did not feel bound by the General Assembly Resolution because it is recommendatory, not mandatory.[73] This official statement of India is unacceptable. No doubt, the General Assembly resolutions have a recommendatory character and are not binding, like the Security Council resolutions. Yet, India should not ignore this resolution because it is not mandatory, but she could have stressed other justifications. For instance, India could advance claims of internal security, along with humanitarian ones, in support of its decision not to implement the call of the General Assembly resolution.

India's decision to disregard Resolution 2793 had led to the final meeting of the Security Council from 12 to 21 December 1971.[74] Once again the superpowers were irreconcilable and there was a great difficulty in obtaining a resolution. On 16 December the Indian ambassador had announced to the Security Council that the Pakistani forces had surrendered in Bangladesh and that the Indian government had also ordered a cease-fire in the West.[75] The participating states in the Security Council had concluded in a resolution after the Pakistani forces had surrendered to the Indian army. Security Council Resolution 307 had called, between others, for a durable cease-fire and cessation of all hostilities in all areas of conflict, for all Member States to avoid

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[70] General Assembly Resolution 2793 (XXVI), 7 December 1991.
[71] *Id.*
[72] Wheeler, op.cit., p.68, and Kuper, op.cit., p.57.
[73] Wheeler, op.cit., p.68.

any action, which might aggravate the situation in the subcontinent and for a safe return of refugees in their homes.[76] Leo Kuper characterised this resolution as meaningless, even as a face-saving device.[77] Indeed this Security Council Resolution had been meaningless, given that the Indian arms had defeated the Pakistani army and created the new state of Bangladesh.[78]

All this debate in the Security Council and the General Assembly and the reactions of states had proved that states were unwilling to recognise a right to humanitarian intervention.[79] None of the states had justified India's use of force in terms of the doctrine of humanitarian intervention.[80] Yet, the debate in the General Assembly illustrated that India had to respect Pakistan's sovereignty and territorial integrity.[81] As Nicholas Wheeler argued, in the Security Council and the General Assembly, India's cries for justice fell on deaf ears.[82] On the other hand, the international community had stressed upon Article 2(4) of the UN Charter and the maintenance of the principle of non-intervention in the internal affairs of another state. Territorial integrity and sovereignty had proved their predominance over humanitarian issues in the world community. Thus, the states had chosen to solidify the principle of non-intervention and sovereignty, instead of preventing crimes against humanity. For instance, China and Albania had shown their oppositions to India's humanitarian claims by naming India an aggressor. The other states did not use such an accurate word, but they had shown that they considered the Indian

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[74] Kuper, op.cit., p.59.
[75] Ibid., p.60.
[76] S/RES/307, 21 December 1971.
[77] Kuper, op.cit., p.84.
[78] *Id.*
[79] Akehurst, op.cit., p.96, Wheeler, op.cit., p.74, and Murphy, op.cit., p.99.
[80] Wheeler, op.cit., p.68.
[81] Abiew, op.cit., p.116.
[82] Wheeler, op.cit., p.71.

intervention illegal. Therefore, it could be said that the Indian intervention in East Pakistan could not set a precedent for humanitarian intervention in international law for reasons that will be analysed further.

Oscar Schachter thinks that despite considerable sympathy for the oppressed Bengalis, a large number of the UN General Assembly had called on India to withdraw its forces.[83] Simon Chesterman notably proves that the General Assembly resolution had been directed at both India and Pakistan.[84] However, Schachter's point of view seems to be very rational because, although the resolution had been directed against both of the conflicting states, it could be said that it had mostly implied India because India had used force against Pakistan and Pakistan had had every right to keep its military forces in its territory according to international law.[85] This is why Nicholas Wheeler thinks that India had suffered a major defeat in the General Assembly.[86] Similarly, Leo Kuper argued that the General Assembly Resolution had been a rejection of humanitarian intervention and a commitment to two general principles of international relations between states, which is respect for state sovereignty and territorial integrity, and non-interference in the internal affairs of member states.[87] No doubt, General Assembly resolution 2793 had been a rejection to humanitarian intervention. Nevertheless, in the case of Bangladesh humanitarian intervention had been rejected much earlier by India, when it had the opportunity to invoke humanitarian intervention, but it denied it. In other words, the same intervening state did not recognise a right to humanitarian intervention. Hence, it relied on the grounds of self-defence. Thus, the rejection

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[83] Oscar Schachter, *The Right of States to Use Armed Force*, Michigan Law Review, 1984, vol.82, p.1629.
[84] Chesterman, op.cit., p.74.
[85] Murphy, op.cit., p.99.

of humanitarian intervention is not simply a result of the response of states, as illustrated before the Security Council and the General Assembly, but it is the same India's rejection of humanitarian intervention, as it had denied claiming such a right in favouring circumstances.

Teson had argued that the statements and the wording of General Assembly Resolution 2793 show that nations were concerned with the restoration of conditions necessary for the voluntary return of refugees, an ultra-euphemism to urge Pakistan to renounce its genocidal policies.[88] He had implied that the General Assembly had been turned against Pakistan. This argument, though, seems totally insubstantial, because the Soviet Union and its Warsaw Pact allies, the most fervent supporters of India, were the minority of states that did not vote for Resolution 2793. Concern had been expressed about the fate of the people, but as Chesterman argues, the fact remains that the issue only came onto the agenda, when Indian troops crossed the border and the main step taken was to call upon the two states to respect each other's territory.[89]

In addition, Teson argued that the characterisation of the Indian action as humanitarian intervention can be made at two levels: foreign assistance for people engaged in a struggle for their right to self-determination and as foreign intervention aimed at stopping acts of genocide.[90] It could be said that those justifications are of a more moral and political, rather than legal nature. Self-determination and the prevention of genocide are not enough themselves to justify the unilateral use of force. What is more, India did not intervene in East Pakistan in order to assist people engaged in a struggle of self-determination,

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[86] Wheeler, op.cit., p.68.
[87] Kuper, op.cit., p.58 and 84.
[88] Teson, op.cit., p.209.
[89] Chesterman, op.cit., p.74.

nor to halt genocide. On the contrary, India claimed a right to self-defence, as a justification for its actions. Richard Lillich had been more temperate on this topic by stating that the human rights violations in East Pakistan and the UN inactivity calls for a fundamental re-evaluation of the protection of human-rights by general international Law.[91] However, he did not support that there is a legal right of humanitarian intervention in the international relations of states. He had just supported that the doctrine of humanitarian intervention deserves a reassessment due to the failure of the UN to prevent genocide.[92] An answer, however, to this argument could be that humanitarian intervention encloses the high risk for abuses by states of the principle of non-intervention in their international relations.

On the other hand, Thomas Franck and Nigel Rodley noted that the UN instruments on human rights (the Universal Declaration on Human Rights, the ICCPR, the ICESCR, the Convention on the Prevention and Punishment of Genocide and many others) provide neither collective, nor unilateral military enforcement.[93] Moreover, they stressed that the UN had repeatedly tried to prevent unilateral intervention.[94] Therefore, it is clear from their arguments that they consider the Indian intervention illegal according to international law. They had evidently supported immediately after the Indian intervention that the use of unilateral force remains and should remain illegal except in instances of self-defence against an actual attack.[95] Further, they stated that the Bangladesh

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[90] Teson, op.cit., p.206.
[91] Richard Lillich, *The International Protection of Human Rights by General International Law, Second Interim Report of the Sub-Committee*, in the *Report of the International Committee on Human Rights of the International Law Association*, 1972, p.54.
[92] *Id.*
[93] Thomas M. Franck and Nigel S. Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force", *American Journal of International Law*, vol.67, 1973, p.299.
[94] Ibid., p.301.
[95] Ibid., p.276.

case although containing important mitigating factors in India's favour, does not constitute a definable and workable new rule of law, which would make certain kinds of unilateral military interventions permissible in the future.[96] In other words they had noted that India's intervention could not set a precedent for a new rule of customary international law.

Let us now consider how India's action might have established a new rule of customary international law. The International Court of Justice had defined the criteria for the creation of a rule of customary international law: (1) a general practice of States and (2) the acceptance by States of the general practice as law.[97] It could be said that India did not fulfil both of the criteria. Humanitarian intervention is evidenced in state practice, but it had been proved that states claim humanitarian intervention because they cannot justify their intervention in the name of their interests and power politics. The heads of states know that they will be condemned as aggressors in the international community. Even if we accept that humanitarian intervention is evidenced in state practice, in the case of India humanitarian intervention had not been the justification for the use of force because India had primarily relied on the traditional ground of self-defence.[98] India had tried to justify its intervention on humanitarian grounds, but it had never explicitly justified its use of force in terms of the legal doctrine of humanitarian intervention.[99] Even the Soviet Union that had supported that India's recourse to force had to be located in the context of the massive human suffering caused by Pakistan, it did not explicitly

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[96] *Id.*
[97] Statute of the ICJ, Article 38, for more details see: www.icj-cij.org.
[98] Wheeler, op.cit., pp.60-62.
[99] Ibid., pp.63-64.

defend India's use of force as a humanitarian intervention.[100] Therefore, it could be said that in this case India's most significant supporter had not even claimed the right to humanitarian intervention. In that sense, how is it possible to claim that the Indian intervention had been accepted as a precedent for humanitarian intervention?

Nevertheless, even if one accepts that India's action constitutes state practice for the purposes of establishing customary international law, there is little evidence of *opinio juris*.[101] The acceptance by states of general practice as law is very significant for the formulation of a customary rule of international law. In the case of India, however, humanitarian concerns appear to have tempered criticism of India but were not accepted as a justification for its intervention.[102] It had been clearly illustrated by the UN Security Council and the General Assembly that States had been unwilling to accept such an intervention. On the contrary, states had proved their allegiance in the rules of sovereignty and non-interference in the internal affairs of another state. Even the argument of the International Commission of Jurists that India's intervention would have been justified if she had acted under the doctrine of humanitarian intervention cannot be valid at the time that the international community was not ready to accept such an intervention and states were not willing to accept humanitarian intervention as a legal justification for the use of force. What is more, the International Commission of Jurists is not an authoritative body, but they are merely commentators.

POLITICAL MOTIVES

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[100] Ibid., p.66.
[101] Chesterman, op.cit., p.75.

An exhaustive examination of humanitarian interventions in the past can prove that along with humanitarian purposes states intervene for their national interest and for matters of power politics. More specifically, states veil their cruel interests behind the flag of human rights and humanitarian intervention. A critical analysis of India's intervention can easily prove that India's primary motives were political and that the claims for the cessation of massive human suffering in East Pakistan were simply a reason to achieve its purposes. Undoubtedly, in the case of India there had been many human rights violations and acts of genocide and India had contributed to their cessation. What is important, however, is that India did not intervene with the pure objective of protecting the human rights of the Bengali people and stopping the Pakistani brutality and cruelty. Yet, this is one of the few cases that there had really existed humanitarian necessity and the grounds for a pure humanitarian intervention.

Teson based upon this fact had called India's intervention "an almost perfect example of humanitarian intervention".[103] He had further suggested that it is not important whether Indian leaders had selfish purposes along with "humanitarian ones", but that the whole picture of the situation was one that favoured foreign intervention on the grounds of humanity.[104] It could be said that this argument is superficial and does not correspond to a scholar of international law. Abuses of the principle of non-intervention under the fallacious shield of human rights veil pure national interest of states. In a similar argument to Teson's, Michael Walzer, although he had recognised that India had strategic interest in its intervention, he had supported that the Indian

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[102] Ibid., p.73.
[103] Teson, op.cit., p.207.

intervention qualifies as humanitarian because it was a rescue, strictly and narrowly defined.[105] Others had recognised that self-interest was an important motive for the Indian intervention, but they still insisted that India's motives had been "apparently genuine humanitarian motives".[106]

The fact that many authors had viewed the Indian intervention as one of the most illustrative examples of humanitarian intervention does not mean that this intervention was perfect and constitutes a model that justifies humanitarian intervention. Neither could this model be characterised as an ideal model of humanitarian intervention. Even in this "almost perfect example of humanitarian intervention" there had been mixed motives on the part of India.[107] The flow of refugees that threatened the country's life had led the Indian Prime Minister Mrs Ghandi to tell the Congress Party workers in New Delhi that she would do what is best in India's national interest.[108] This is enough to prove that there is no humanitarian intervention based upon pure humanitarian purposes, but on national interest. Humanitarian objectives had been put forward just in order to mitigate the reactions of the other states of the international community. This is why humanitarian intervention constitutes a political rather than a legal or a moral concept. And this is why there is no genuine humanitarian intervention in the past.

Let us now consider the interests that the Indian government had veiled behind the protective shield of human rights. First of all, the breaking up of Pakistan would favour India's position in world politics, because India would

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[104] Ibid., p.208.
[105] Walzer, op.cit., p.105.
[106] Jack Donnelly, "Human Rights, Humanitarian Intervention and American Foreign Policy: Law, Morality and Politics", *Journal of International Affairs*, 1983/84, v.3, p.316.
[107] Chesterman, op.cit., p.73, Walzer, op.cit., p.105, and Wheeler, op.cit., p.55.
[108] Schachter, op.cit., p.1629. Also Wheeler, op.cit., p.61.

weaken the power of its archenemy.[109] As already stated above, India had two wars with Pakistan regarding territorial claims after the separation of the two states.[110] This enmity existed at the time of the Bengali crisis and it exists even today. Therefore, India had achieved a major goal against Pakistan with its "humanitarian intervention". East Pakistan had become an independent state, Bangladesh, and Pakistan had lost the most vital and the richest region of its territory. Further, Mrs Ghandi's party was doing badly in the polls as a consequence of the refugee crisis and the appropriate handling of the situation would lead up to desirable electoral outcome.[111] Yet, as Nicholas Wheeler had argued, it was impossible for an Indian Government to argue that it would go to war and justify it on the basis of weakening an enemy and improving its electoral fortunes.[112] It would be irreconcilable with UN principles and with international law. Therefore, the Indian Government had claimed the right to self-defence and had implied humanitarian motives.

Apart from the above named Indian interests, there is another piece of evidence that leaves no space for any doubts that the Indian intervention was not motivated by humanitarian reasons, but mostly, if not only, by its vital national interests. India had claimed that it had acted for humanitarian reasons, self-defence and refugee aggression. However, India did not intervene militarily in East Pakistan to halt the massacre and to protect human rights to rescue the Bengali people, but it had only intervened nine months after the atrocities began.[113] The Indian intervention had come too late to save hundreds

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[109] Wheeler, op.cit., p.62, Walzer, op.cit., p.105, Murphy, op.cit., p.99, Abiew, op.cit., pp.118-119 and Schachter, op.cit., p.1629.
[110] Chopra Pran, op.cit., p.372.
[111] Wheeler, op.cit., p.62.
[112] *Id.*
[113] Ibid., p.64 and Leo Kuper, op.cit., p.60.

of thousands of Bengalis.[114] The only reason for the use of military force was not India's humanitarian claims, but the exodus of ten million refugees that caused a vital threat to the security of the Indian state and the survival of Mrs Ghandi's "Congress Party".[115] This explains clearly why the Indian Government had decided to intervene in East Pakistan after a long delay. If the motives were purely and primarily humanitarian, then, India would have intervened months earlier in Pakistan. This "almost perfect example of humanitarian intervention" proves that there is no pure humanitarian intervention. It is only another justification for the use of force that mitigates the feelings of the public opinion and that of the world community.

The struggle for national interest and power politics could be understood by the positions taken by states at the time of the crisis. The only states that condoned India's action in the Security Council and the General Assembly were the Soviet Union and its Warsaw Pact allies.[116] This is because the Soviet Union and India had signed a Treaty of Peace, Friendship, and Cooperation in August 1971.[117] The Soviet Union had been a fervent supporter of India and had favoured India's interventionism at that time, although it had traditionally insisted in the past on its doctrinal position on the inviolability of territorial borders and non-use of force because this suited its interest.[118] By supporting India, the Soviet Union had ensured its alliance with India and its future control over the new state of Bangladesh, which had given India an important advantage in its power seeking policies against China and the

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[114] Wheeler, op.cit., p.74.
[115] Ibid., p.64.
[116] Ibid., p.66 and 72.
[117] Ibid., p.66.
[118] Ibid., p.72.

USA.[119] The position taken by the Soviet Union reveals the hypocrisy in the international relations of states. This is why unilateral humanitarian intervention should not be legitimate and accepted by the world community: because it will give states hypocritical willingness to protect human rights and thus abuse the principle of non-intervention.

MORAL JUSTIFICATIONS

After the examination of the legal and political aspects of India's "humanitarian intervention" it is useful for the overall understanding of the intervention to examine the intervention from a moral point of view. The Indian intervention has created many dilemmas on the matter of morality. The first dilemma is that some writers had condemned the intervention as illegal, while they had also observed that it have been morally justified.[120] Some writers had accepted that it could be possible to consider an act as illegal and yet moral, while some others had rejected it as inherently contradictory, thinking that if an act is moral, the law should recognise it as legal.[121] On this divergence of arguments, it could be said that it is difficult to regard an act as illegal and yet moral. It is amply known that law and the rules derive from moral principles. The Ancient Romans had expressed this view in the Latin dictum *"ex injuria (or delicto) jus oritur"*. This means that law derives from injustice and presupposes that it comes out from injustice in order to protect justice. Therefore, it would seem odd to claim that justice does not embrace ethical principles.

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[119] *Id.*
[120] Chesterman, op.cit., p.75.

On the other hand, the dilemma above could be characterised as a pseudo-dilemma. Before scholars proceed to this dilemma they should clarify whether this intervention had been morally justified or not. The majority of writers had viewed the Indian intervention as morally justified. Nicholas Wheeler had supported that the level of human rights abuses had clearly met the criteria of a supreme humanitarian emergency.[122] He had further argued that although India's intervention was not motivated by primarily humanitarian reasons, it counts as a humanitarian one, because the matters of the demographic aggression committed by the refugee influx did not undermine the humanitarian benefits of the intervention.[123] Michael Walzer had argued that morality is not a bar to unilateral action, so long as there is no immediate alternative available and he thinks that there was no alternative in the Bengali case.[124] As it has been already stated above, most of the writers seem to consider the Indian intervention as moral. As a consequence comes the argument of how an intervention can be considered illegal and yet moral. Nevertheless, it could be said, in contrast to the majority of the writers on this topic that in the Indian intervention morality was not the pragmatic motive. The potential moral incentives had been clearly subrogated and sacrificed by the political ones. If India wanted to rescue the Bengalis from the Pakistani atrocities it would intervene nine months earlier, when the first massacres occurred in East Pakistan.[125] But India had only intervened when the refugee crisis became a threat to its national security and it humanitarian motives did not undermine a positive humanitarian outcome and that the intervention had

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[121] *Id.*
[122] Wheeler, op.cit., p.55.
[123] Ibid., p75.
[124] Walzer, op.cit., p.107.

been humanitarian because the security reasons that had led India to intervene did not undermine the humanitarian benefits of the intervention.[126] But the fact that political motives coincided with a positive humanitarian outcome does not mean that India's primary aim had been the part of morality and the protection of human rights. Human rights and morality had simply been a justification to mitigate the clamours of the world community. Some scholars would support that moral incentives can coexist with selfish motives. However, it is very dubious that India would intervene without the calculation of those selfish motives. Thus, if such coexistence is feasible, then selfish motives are overestimated and they are the most determinative criterion for intervention.had imposed economic strains to its society. Therefore, India's intervention had been based upon selfish motives rather than moral ones. Nicholas Wheeler believes that the non-

Morality is one of the most attractive appeals of humanitarian intervention. Michael Walzer had argued that humanitarian intervention is justified to acts "that shock the moral conscience of mankind".[127] In the Indian case, the world community had been horrified by the atrocities committed by Pakistan. The inactivity of the United Nations and the unwillingness of states to cooperate with the purpose of ending up to a political solution had been clearly illustrated. The fact that India did intervene in East Pakistan does not mean that India had been the moral actor in this problem and the other states indifferent or immoral. It could be said that India had acted for its own political motives. No doubt, India had claimed morality and humanitarian necessity, while its primary goals were the political ones. Subsequently, states never intervene for

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[125] Wheeler, op.cit., p.64.
[126] Ibid., pp.55 and 75.

moral objectives, even if they claim humanitarian intervention, but they pursue their interests. The moral concepts of humanitarian intervention are sacrificed by the political ones. What is more, the moral concept probably exists for the theoretical foundation of the doctrine. Therefore, it could be said that India's intervention had not been pure and morally justified on the fact that it had stopped the massacre and it had rescued the Bengali people, at the time that political motives had been the fulcrum. It seems that humanitarian intervention and its moral premises are simply a form of state hypocrisy in international relations. Thus, the Indian intervention had arguably been legally condemned in the sense that even morality could not justify it.

CONCLUSION

The Indian intervention in East Pakistan is one of great importance because it constitutes the one and only paradigm of secession and the creation of a new state in the Cold War era.[128] Further, it was the first time in the UN era that humanitarian claims had been used to justify the use of force.[129] This is one out of many claimed "humanitarian interventions" that had gained the support of many authors and mitigated the clamours against the intervening state. This is because the situation in East Bengal and the atrocities committed by Pakistan had favoured the existence of such an intervention. As Nicholas Wheeler had noted, the level of human rights abuses had clearly met the criteria of a supreme humanitarian intervention. Undoubtedly, if genocide would not meet the criteria of a supreme humanitarian intervention, then no other reason would

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[127] Walzer, op.cit., p.108.
[128] Abiew, op.cit., p.114.

be sufficient to justify this kind of intervention. However, the Indian army had used force against Pakistan not with the purpose of rescuing the Bengali people but in order to protect the Indian society from the refugee influx. If India would intervene in East-Bengal before the refugees start fleeing to its own borders, then the intervention would be purely humanitarian. Nevertheless, selfish motives had been the pivotal factor for intervention.

Some writers think that the mixed interventions (humanitarian and other motives) cannot undermine the positive humanitarian outcome. No doubt, India had succeeded in stopping the Pakistani atrocities and it was the only nation that led to the rescue of the Bengalis from genocide. Nevertheless, it would be more prudent if India's incentives and the outcome coincided. If India's objectives were purely humanitarian then its intervention would be justified and it would reply to the realist argument against humanitarian intervention, which refers to the matter of self-interest. But even this "almost perfect example of humanitarian intervention" is vulnerable because national interest had been at stake. Compared to other humanitarian interventions where it turned out that there had been no grounds for such an action, it could be said that the Indian intervention is the most justifiable because genocide in East Pakistan had actually occurred. Thus, many commentators have considered this intervention to be a leading case of humanitarian intervention.[130] In addition, the positive outcome for the Bengali people had given India mitigation for its breach of international law, but it did not justify the intervention. Although most states had been devoted to sovereignty and non-interference in the internal

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[129] Wheeler, op.cit., p71.
[130] Abiew, op.cit., p.118.

affairs of a state, India's intervention, no matter what the motives had been, had halted the genocide of the Bengalis.

It is very essential, however, to state that the international community did not seem willing to establish a new customary rule favouring intervention on the grounds of humanity. Abiew thinks that *"the fact that the UN did not condemn the intervention could also be interpreted as an implied recognition of the doctrine.*[131] However, such an argument is very insubstantial, since the Soviet Union had prevented adoption of a US proposed resolution regarding a ceasefire.[132] Further, the majority of the states had demonstrated its opposition to India's intervention in the UN Security Council and in the General Assembly. States had supported the principles of non-intervention and non-interference in the international affairs. Apart from this, India had never referred to the doctrine of humanitarian intervention but it had put forward humanitarian reasons. Even the Soviet Union that supported India did not claim a right of humanitarian intervention. Finally, even if India's intervention had been accepted as a state practice, there was not enough evidence of *opinio juris*, because the international community did not regard India's intervention as legal and India's use of force had been condemned within the UN instruments. The acceptance by states of the general practice as law is very significant for the formulation of a customary rule of international law. The 1971 India's intervention in East Pakistan, however, does not set any precedent for future unauthorised humanitarian intervention. The fact that India did not advance any explicit claims on a right to humanitarian intervention, as well as the reluctance of states to accept India's use of force reflects the reluctance of states to

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[131] Ibid., p.120.
[132] Chesterman, op.cit., p.74.

embrace such a right. This reluctance of states had been evident in most pre-Cold War alleged humanitarian interventions.

This chapter on India's intervention in East Pakistan is very significant for this thesis, because it illustrates the practice of humanitarian intervention in the Cold War era. From this chapter it is not difficult to discern the reluctance of the world community to accept a right to humanitarian intervention. What is more, states had been devoted to the principle of non-intervention and non interference in the internal affairs of other states. The following chapters will deal with the same issues and the main aim of this thesis is to examine the practice of humanitarian intervention after the end of the Cold War and to detect whether or not normative changes have been formed in the realm of the use of force.

3.10 ASSESSMENT OF HUMANITARIAN INTERVENTION DURING THE COLD WAR

Several cases from the Cold War period had been examined so far. From these cases one can conclude in some substantial arguments. Firstly, it could be argued that some of these cases had not to do with actual instances of humanitarian intervention, but with the protection of nationals abroad. Secondly, the main characteristic of this period is that all instances were alleged "unilateral" humanitarian interventions. This means that in each case only a state decided to intervene in the domestic affairs of another state with alleged humanitarian purposes and outside the Council's realm. Thirdly, the Security Council was inactive due to Cold War rivalries and veto threats. Moreover, the majority of intervening states primarily relied upon self-defence and various other justifications, while the advancement of humanitarian claims was at least weak. States were unwilling to put forward a right of humanitarian intervention, even in the most critical cases: India's intervention in East Pakistan, Vietnam's intervention in Kampuchea and Tanzania's intervention in Uganda.

What is more, the world community reacted to such a kind of intervention and supported in the debates of the Security Council as well as the General Assembly the principle of non-intervention and respect to state sovereignty. As a result, there is an evident lack of *opinio juris*, as regards to the formulation of customary law in favour of humanitarian intervention. Further, it could be said that the first examples of pro-democratic intervention appeared in this era. Thus, Grenada and Panama are the first alleged instances of this kind of intervention. However, in Grenada this was a premature

expression of this kind of interventions, as the overthrown government was not democratically elected. As regards to Panama, it could be argued that it was the first time that the right to democratic governance was officially advanced by the intervening state, but the world community approved by its vote in the UN General Assembly that it was not ready to accept this kind of intervention.

Last but not least, there is a decision by the ICJ that rejects the existence of a right of humanitarian intervention as a customary law during the Cold-War. In 1985, when the US alleged violations of human rights in support of its actions in Nicaragua, the ICJ rejected this justification and stated that *"while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent state, which is based on the right of collective self-defence".*[133]

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[133] Case of Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, ICJ Rep (1986), 14 , at 134-135, para 268.

CHAPTER 4

HUMANITARIAN INTERVENTION AT THE END OF THE COLD WAR

4.1 US, UK, FRENCH INTERVENTION IN IRAQ (1991)

INTRODUCTION

In the previous chapter there had been made an examination of humanitarian intervention during the Cold War era. The paralysis of the Security Council because of veto-threats during this era plays an important role in understanding the system of states at that time. What is more, the world community had witnessed "unilateral" humanitarian interventions during the Cold War. The world community had been reluctant to accept a right to humanitarian intervention and strongly opposed any relevant effort. However, this chapter has to deal with a shift in world politics and with a new era for international relations. The end of the Cold War led up to a new world order, where states are more eager to cooperate between them and get effective ends. As regards to humanitarian issues, the Security Council has played a central role in legitimising the threat or use of force in defence of humanitarian values.[1] The multiple Security Council authorisations under Chapter VII reveal an era where the UN will have a more drastic role.[2] The Security Council got involved in essentially domestic crises deriving from massive abuses of human rights. Thus, many times the Council had interfered in the internal affairs of states.[3]

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[1] Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford, Oxford University Press, 2001, p.139.
[2] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, New York, Oxford University Press, 2001, p.126.
[3] Ibid., pp.128-129.

What is more, from unilateral humanitarian intervention during the Cold War, we move to collective humanitarian intervention, many times under the authority of the Security Council. The first case to examine will be Iraq in 1991 and the protection of Kurds. In Iraq, the US, UK and France had intervened for humanitarian purposes without obtaining a Security Council authorisation, but with a resolution with a wording very close to Chapter VII and recognition that the transboundary implications of a humanitarian crisis can constitute a threat to international peace and security.[4] Intervening states had offered various justifications for their actions in Iraq. This incident is very essential and illustrative for the understanding of this shift in the World Community after the end of the Cold War. Thus, the first case study of collective humanitarian intervention in the 90's will be Iraq.

INTERVENTION IN IRAQ: THE BACKGROUND OF THE CONFLICT

The Kurdish problem had existed before the end of the two World Wars. The Kurds claim their existence in the area from the 7th century BC.[5] They had wanted to establish their own state since the nineteenth century.[6] At the end of World War I, when the Ottoman Empire had been dissolved and its territories had been divided into separate spheres of influence, the Treaty of Sevres (1920)

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[4] S/RES/688 (1991), 5 April 1991.
[5] Peter Malanczuk, *The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War*, European Journal of International Law, 1991, vol.2, p.115.
[6] Wheeler, op.cit., p.139 and Malanczuk, op.cit., p.116.

provided the Kurds with the prospect of an independent Kurdish state.[7] However, the Treaty of Lausanne (1923) ignored completely the claims of the Kurds.[8] The reason for not creating an independent Kurdistan could be traced in the Anglo-French collusion and rivalry in redrawing the map of the Middle East and in the British interest in controlling the oil in the area.[9] Although the Kurds are about 20 million people and they represent the fourth largest ethnic group in the Middle East, they lack a state of their own.[10] After the Treaty of Lausanne they had been divided in the states of Turkey, Iran, Iraq and Syria.[11] Since then, the Kurdish struggle for independence and the creation of a sovereign Kurdish state had never been accomplished due to geopolitical considerations on the part of the European powers.[12]

In Iraq, the Kurds secured an important autonomy under a 1974 decree.[13] Nevertheless, the Iraqi government continued with its efforts to suppress the Kurdish language and culture and persecute its political leaders.[14] Further, the Iraqi government marginalized and excluded the Kurds and began a colonial

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[7] Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, The Hague, Kluwer Law International, 1999, p.145. Oliver Ramsbotham and Tom Woodhouse, *Humanitarian Intervention in Contemporary Conflict: A Reconceptualisation,* Cambridge, Polity Press, 1996, p.73. Peter Calvocoressi, *World Politics 1945-2000*, 8th edition, London, Longman, 2001, p.488. Also Malanczuk, op.cit., p.116.

[8] Abiew, op.cit., p.145, Calvocoressi, op.cit., 488, Ramsbotham and Woodhouse, op.cit., p.73 and Malanczuk, op.cit., p.116.

[9] Malanczuk, op.cit., p.116.

[10] Lawrence Freedman and David Boren, *"Safe Heavens" for Kurds in Post-War Iraq*, in Nigel S. Rodley(ed.), *To Loose the Bands of Wickedness: International Intervention in Defence of Human Rights*, London, Brassey's (UK), 1992, p.44. Malanczuk argues according to his information that the Kurdish population is between 8 and 30 million people (op.cit., p.115).

[11] Wheeler, op.cit., p.139, Freedman and Boren, op.cit., p.44, Malanczuk, op.cit., p.115, and Abiew, op.cit., p.145 although he does not cite Syria and more specifically Turkey, which has the largest population of Kurds, more than 10 million people (Calvocoressi cites that half of the total 25 millions of the Kurdish population lives in Turkey).

[12] Ramsbotham and Woodhouse, op.cit., p.73 and Abiew, op.cit., p.146.

[13] Calvocoressi, op.cit., p.459, Wheeler, op.cit., p.139 and Malanczuk, op.cit., p.117.

[14] Freedman and Boren, op.cit., p.45.

"Arabisation" program consisting of large scale Kurdish deportations and forced Arab settlement in the region.[15] During the Iran-Iraq War, Kurdish rebels had seized the opportunity to challenge the Baath party's control of northern Iraq.[16] At the end of the war in 1988, however, Saddam Hussein turned his fire on the Kurds.[17] He undertook a brutal campaign against the Iraqi Kurds, destroying villages, using chemical weapons and munitions and killing about 100,000 people.[18] There were protests and the world community condemned these attacks, but no sanctions were imposed, and yet, the Soviet Union and France continued to supply arms to the Iraqi regime.[19] This is an important point, because later France was one of the intervening states that offered its "protection" to the Iraqi Kurds that had been oppressed by its own arms.

In 1991, Iraq's defeat in the Kuwait conflict incited the Kurdish rebels to strengthen their position in the region.[20] The Kurds knew that Saddam's regime was very weak at that time and they also counted on western support, given the fact that the coalition countries made clear their distaste for the Iraqi regime and their desire to see Saddam replaced.[21] Further, Iraqi military presence in the Kurdish populated areas was reduced because of Saddam's desire to stamp out the rebellion in the south.[22] As a consequence, Kurdish guerrillas made rapid military

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[15] Abiew, op.cit., p.146.
[16] Wheeler, op.cit., p.139.
[17] Freedman and Boren, op.cit., p.45, Ramsbotham and Woodhouse, op.cit., p.73, and Wheeler, op.cit., p.139.
[18] Freedman and Boren, op.cit., p. 45, Wheeler, op.cit., pp.139-140, and Ramsbotham and Woodhouse, op.cit., p.73.
[19] Wheeler, op.cit., p.140 and Ramsbotham and Woodhouse, op.cit., p.73.
[20] Christopher Greenwood, *Is there a Right of Humanitarian Intervention?*, The World Today, vol.49, February 1993, p.35. Also Abiew, op.cit., p.147, Wheeler, op.cit., p.141, and Freedman and Boren, op.cit., p.45.
[21] Freedman and Boren, op.cit., p.45.
[22] Abiew, op.cit., p.147.

advances in removing the Iraqi Army.[23] The accomplishment of the Kurdish dream of independence did not last for long. Immediately, the Iraqi Army responded by attacking Kurdish cities, guerrillas and unarmed civilians.[24] The massacres and the plight of the Kurds led to the devastation of the Kurdish populated areas and to a mass exodus of refugees into Turkey and Iran.[25] The number of the refugees reached 1.5 million people and the situation was appalling, due to the bad weather conditions and starvation.[26] Turkey was reluctant to accept a substantial number of refugees because of its fears of PKK and its separatist movements.[27] Unlike Turkey, Iran did not prevent the refugees entering the country, although Iran already had more refugees than any other country in the world at that time.[28]

The situation was horrifying. The deaths totalled as many as 1,000 per day, mainly children and old people.[29] But what was the reaction of the US and the European allies? What did they do to halt the plight of the Kurds and a human tragedy? Initially, the allies stood idly by and they did not show any interest of intervening in Iraq to prevent it from committing the massacres and causing human suffering.[30] Nevertheless, it had been the allies that played a major role in this insurgence of the Iraqi Kurdish and they bore a large part of responsibility for the

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[23] Freedman and Boren, op.cit., p.45 and Abiew, op.cit., p.147, Wheeler, op.cit., p.141 and Malanczuk, op.cit., p.118.
[24] Abiew, op.cit., p.147 and Wheeler, op.cit., p141.
[25] James Mayall, "Non-Intervention, Self-Determination and the "New World Order", *International Affairs*, vol.67, No3, 1991, p.426. Also Greenwood, op.cit., p.35, Wheeler, op.cit., p.141, Abiew, op.cit., p.148, Freedman and Boren, op.cit., p.46.
[26] Martha Brenfors and Malene Maxe Petersen, "The Legality of Unilateral Humanitarian Intervention", *Nordic Journal of International Law*, vol.69, 2004, p. 493. Also Abiew, op.cit., p.148 and Freedman and Boren, op.cit., p.48.
[27] Freedman and Boren, op.cit., p.49.
[28] Ibid., p.51. It is argued that apart from the 1 million Kurds who arrived in 1991, there were 600,000 Kurds following past expulsions and 2.2 million Afghans that fled their country after the 1979 USSR invasion.
[29] Ibid., p.49 and Wheeler, op.cit., p.141 and 151.
[30] Mayall, op.cit., p.426.

situation. This is because the allies encouraged them to revolt during the conflict, but when the conflict was over and the Government of Iraq remained in power, the Kurds and the Shiites were left at the Government's mercy.[31] Thus, the rebels had been expecting support from the ones that encouraged them. On 15 February, President George Bush superficially stated that *"there's another way for the bloodshed to stop, and that is for the Iraqi military and the Iraqi people to take matters into their own hands to force Saddam Hussein the dictator to step aside and to comply with the United Nations resolutions and then rejoin the family of peace-loving nations".*[32]

However, when Saddam commenced the massacre against the Kurds, President Bush preferred to follow a non-interventionist policy, having in mind that he could face another Vietnam.[33] The truth is that the Bush administration was under the pressure of Saudi Arabia and Turkey not to allow Iraq break up, because Turkey had the fear of an independent Kurdistan and Saudi Arabia worried that the disintegration of Iraq could lead to the emergence of an Iranian controlled Shiite state hostile to its interests.[34] President Bush held the idea that the situation in Iraq was an internal struggle, a civil war that the Iraqi people had to resolve for themselves.[35] Likewise, the British Prime Minister, John Major, was initially unfavourable in the idea of protecting the Kurds and his government justified its

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[31] Christine Gray, *After the Ceasefire: Iraq, the Security Council and the Use of Force*, 1994, British Year Book of International Law, No.65, 1994, p.160.
[32] Chesterman, op.cit., p.196. Also Freedman and Boren, op.cit., p.46 and Mayall, op.cit., p.428 (note 14).
[33] Wheeler, op.cit., p.150 and Freedman and Boren, op.cit., p.47.
[34] Wheeler, op.cit., pp.147-148 and Freedman and Boren, op.cit., p47.
[35] Wheeler, p.147 and 150.

policy of non-intervention on the grounds that there was no legal mandate to intervene inside the Iraqi borders.[36]

Although the policy of the US and European states was initially non-intervention, it was not the reassessment of international obligations towards those who have had their fundamental rights systematically abused but the media that led Western states to intervene in order to protect the Kurds.[37] The media had led to a shift in the US policy. Suddenly, President Bush became pro-interventionist and expressed his humanitarian concerns. He did not only decide to send US soldiers into northern Iraq to protect the Kurds, but he also stated that *"all we are doing is motivated by humanitarian concerns"*.[38] Simultaneously, the British Prime minister was obliged to change his policy of non-intervention by the television coverage of the conflict and the severe criticism of his predecessor, Margaret Thatcher.[39] Security Council Resolution 688 came as a response to the plight of the Kurds and it triggered a debate on whether it would set a precedent supporting humanitarian intervention in the future. Security Council Resolution 688 and the intervention based upon it, as well as the ends of that intervention will be discussed below.

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[36] Ibid., pp.148-149.
[37] Wheeler, op.cit., p.140, Mayall, op.cit., p426, and Freedman and Boren, op.cit., p. 50.
[38] Freedman and Boren, op.cit., p.54.
[39] Wheeler, op.cit., p.149.

SECURITY COUNCIL RESOLUTION 688

Following the massacre in northern Iraq in 1991, France and Turkey brought the issue before the Security Council.[40] More specifically, France had advanced claims in a previous resolution for a "duty of intervention" to protect the Kurds, but it could not gain support from other members of the Security Council.[41] Further, Turkey and Iran in their letters to the Security Council had asked for international action to prevent the exodus of Kurdish refugees into their borders on a scale that posed threat to the security of the region.[42] On 5 April 1991 Security Council adopted resolution 688, based on a draft resolution submitted by France and Belgium and co-sponsored by the UK and USA.[43] The Council condemned the repression of the Iraqi civilian population in many parts of Iraq, the consequences of which threaten international peace and security.[44] It further demanded Iraq to immediately end this repression and expressed the hope that an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens are respected.[45] It also insisted that Iraq allow immediate access by international organizations to all those in need of assistance in all parts of Iraq and make available all necessary facilities for their operations.[46]

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[40] S/PV.2982, 5 April 1991.
[41] Wheeler, op.cit., p.141-142.
[42] *Id.*
[43] Nigel S. Rodley, *Collective Intervention to Protect Human Rights and Civilian Populations: The Legal Framework*, in Nigel Rodley (ed.), *To Loose the Bands of Wickedness: International Intervention in Defence of Human Rights*, London, Brassey's (UK), 1992, p.29. Also Wheeler, op.cit., p.143 and Malanczuk, op.cit., p.127.
[44] S/RES/688 (1991), 5 April 1991.
[45] *Id.*
[46] *Id.*

Resolution 688 had been the least widely supported of all the resolutions until then adopted by the Security Council resolution in response to the Kuwait crisis.[47] Out of the 15 members, ten voted in favour, three voted against (Cuba, Yemen, Zimbabwe), and two abstained (China and India).[48] As Wheeler argued, this reflected the fact that it was not only an immediate response to the suffering of the Kurds, but also the result of a process of argumentation within the Security Council as to the meaning to be given Article 2(7) of the UN Charter in the Post-Cold-War period.[49] Not surprisingly, Security Council Resolution 688 was the first resolution expressly to recall Article 2(7) of the UN Charter.[50] The legitimacy of this resolution by the Security Council was vigorously debated, since the participants understood that the resolution would establish a precedent for future Security Council involvement in situations arising out of internal conflict.[51] Iraq and those voting against the revolution argued vigorously that the human rights and humanitarian concerns addressed by the draft resolution were beyond the purview of the Security Council and their very discussion was incompatible with Article 2(7).[52]

It would be very essential to observe the position of the states voting against Security Council Resolution 688 in order to understand the how this resolution had been adopted and under which circumstances. Yemen argued that

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[47] Peter Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force*, Amsterdam, Het Spinhuis, 1993, p.17, Adam Roberts, *Humanitarian War: Military Intervention and Human Rights*, International Affairs, vol.69, No3, 1993, p.438. Also Greenwood, op.cit., p.36, Chesterman, op.cit., p.133 and Gray, op.cit., p.161.

[48] Wheeler, op.cit., p.143, Rodley, op.cit., p.29, Chesterman, op.cit., p.133, Ramsbotham and Woodhouse, op.cit., p.77, Roberts, op.cit., p.438, Malanczuk, op.cit., p.17, Greenwood, op.cit., p.36, and Gray, op.cit., p..161.

[49] Wheeler, op.cit., p.143.

[50] S/RES/688 (1991), 5 April 1991. Also Chesterman, op.cit., p.132.

[51] Abiew, op.cit., p.149 and Rodley, op.cit., p.29.

[52] S/PV.2982, 5 April 1991.

the humanitarian crisis inside Iraq did not pose a threat to international peace and security, and that therefore the whole issue is not within the competence of the Council. In addition, the Yemeni Ambassador expressed his worries about the draft resolution on the dangerous precedent it might set.[53] The Zimbabwe Representative argued that the humanitarian crisis in Iraq did not justify Security Council action and that other organs of the UN are competent to deal with the humanitarian situation and the refugee problem.[54] Respectively, the Cuban Ambassador stated that the Security Council had no right to violate the principle of non-intervention and questions of a humanitarian nature raised by some members constituted a clear breach of the domestic jurisdiction rule in Article 2(7).[55]

As regards to the abstaining states, China stressed that according to Article 2(7) the Security Council should not consider or take action on questions regarding the internal affairs of any state and if there are international aspects involved in the question, they should be settled through the appropriate channels.[56] India argued that the Security Council was competent to deal with the matter, only if it could be shown that Iraq's use of force resulted in a clear threat to international peace and security.[57] It could be said that the crisis in northern Iraq posed a threat to international peace and security, not only because of the refugee flows, but because there are about 20 million Kurds in the Middle East and an expansion of the crisis could generate much more serious consequences. This is why Turkey and the Saudi Arabia had been seriously concerned with the crisis in northern Iraq. From

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[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*

Iraq's point of view, however, it was paradoxical that the Security Council should interest itself in letters from Iran and Turkey concerning the Kurds when those states did not have a good record of treatment of the Kurds in their own jurisdictions.[58] It could be argued that all of the countries opposing resolution 688 pointed out on a possible precedent that might allow future intervention in the internal affairs of any state and violation of the UN Article 2(7). Yet, Article 2(7) does not preclude the Security Council, since it clearly declares that "this principle shall not prejudice the application of enforcement measures under Chapter VII".[59] But it is obvious that many states did not wish any kind of intervention in the internal affairs of states, including the Council. It could be argued, though, that the Security Council does not need any precedent in order to intervene in the internal affairs of states. If it finds a threat to peace and security it is competent to respond to such a threat, irrespectively of its internal nature. Thus, it could be said that states had expressed fears of not setting a precedent for future Security Council practice on matters considered essentially domestic.

On the other hand, states voting for resolution 688 argued that the situation was a threat or potential threat to international peace and security, triggered by the transboundary impact of the refugee problem.[60] Most of the states voting for the resolution, apart from France and the UK, were very anxious not to set a precedent that might legitimise Security Council intervention on humanitarian grounds alone.[61] For instance, Rumania was anxious not to create a precedent susceptible to later political abuse and believed that this was a special case in the aftermath of the

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[58] *Id.*
[59] UN Charter.
[60] S/PV.2982, 5 April 1991 and S/Res/688 (1991), 5 April 1991.
[61] Malanczuk, op.cit., p.128, and Wheeler, op.cit., p.144.

Gulf War.[62] Ecuador had stressed that it would not have supported the resolution had it been dealing solely with a case of violation of human rights by a country within its frontiers.[63] Overall, it could be argued that apart from Britain and France, all the other states voting for the resolution emphasized that their support did not present a weakening of their commitment to the non-intervention rule in the society of states.

Nevertheless, France and Britain had a different understanding of the situation and they advanced humanitarian claims. France made explicit reference to a "crime against humanity".[64] Further, the French Ambassador noted that having passed fourteen resolutions designed to restore peace and security in the region, the Security Council would have been remiss in its task had it stood idly by, without reacting to the massacre of entire populations, the extermination of civilians, including women and children.[65] This argument, although it seems supporting humanitarian values, it still makes reference to international peace and security. It clearly points the humanitarian nature of the situation, but it explicitly connects it with international peace and security of the region. Britain also raised humanitarian claims arguing that Article 2(7) did not apply to human rights because they were not essentially domestic.[66] However, these humanitarian claims were raised only after the vote had been taken and they did not play any part in persuading members of the Security Council to adopt Resolution 688.[67]

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[62] S/PV.2982, 5 April 1991.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] Wheeler, op.cit., p.145.

As illustrated above, states were reluctant to create a precedent for intervention on humanitarian grounds. Simon Chesterman argues that resolution 688 is a dubious precedent for two reasons. The first is that it was the fourteenth Security Council Resolution following the Iraqi invasion of Kuwait, but the first that failed to state explicitly or implicitly that the Council was acting under Chapter VII of the Charter.[68] Secondly, the Council referred to the threat to international peace and security as a result of the transboundary implications of the conflict.[69] Furthermore, as Rodley said, the situation had been considered a threat to international peace and Security, which is the pre-condition for action under Chapter VII of the Charter.[70] Yet, the wording of the resolution did not mention any collective enforcement measures, and it did not expressly authorize or endorse the allied military intervention.[71] What is odd in this case is that Resolution 688 uses the verb "demands" and the verb "insists", which are peremptory and bring the Council closer to an interventionist role.[72] However, the resolution was not adopted under Chapter VII of the Charter. Malanczuk notably argued that *"Resolution 688 by itself did not provide the legal basis [for the allied intervention in Iraq] and as such is not a precedent for Security Council practice of forcible humanitarian measures under Article 42"*.[73]

Another factor that makes this precedent dubious, according to Chesterman, is that the Council did refer to the threat to international peace and

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[68] Chesterman, op.cit., pp.131-132 and Gray, op.cit., p.161.
[69] *Id.*
[70] Rodley, op.cit., p.31.
[71] Malanczuk, op.cit., p.18 and Abiew, op.cit., pp.152-153.
[72] Rodley, op.cit., p.32 and Wheeler, op.cit., p.146.
[73] Malanczuk, op.cit., p.19.

security only in connection with the transboundary effects of the situation.[74] Peter Malanczuk argued that the resolution cannot be cited as a precedent for the proposition that the Security Council views massive, but purely internal human rights violations as such, without transboundary effects, as a direct threat to international peace and security.[75] Further, he said that Resolution 688 amounted to little more than a formal censure of Iraq.[76] Adam Roberts goes further by noting that the Council asserted that the refugees and their transboundary effects posed the threat to international peace and security and that the resolution was perhaps not at all humanitarian.[77] He believes that the action reflected the responsibility of the coalition after the Gulf War as a customary law variant on the rights of victors.[78] What is more, no right of intervention on humanitarian grounds, without Security Council authorization, was recognized.[79]

On the other hand, there are some scholars arguing that Security Council Resolution 688 sets a very significant precedent for the creation of new rules in international law. Christopher Greenwood thinks that the law on humanitarian intervention has changed both for the United Nations and for individual states.[80] Moreover, he believes that international law does not forbid military intervention altogether when a government massacres its own people.[81] According to Rodley, the resolution represents what could be a first step towards a possible doctrine of

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[74] Chesterman, op.cit, p.132.
[75] Malanczuk, op.cit., pp.17-18.
[76] Malanczuk, op.cit., p.129.
[77] Roberts, op.cit., p.437.
[78] *Id.* This opinion is also held by Francis Kofi Abiew. He thinks that the obligation to help the Kurds came out from specific responsibilities incurred by the Western powers from the Gulf War. He further believes that in other circumstances there would be no intervention on behalf of the Kurds-Francis Kofi Abiew, op.cit., pp.151-152.
[79] Roberts, op.cit., p.437.
[80] Greenwood, op.cit., p.40.
[81] *Id.*

collective military intervention to protect human rights.[82] Calvocoressi thinks that the resolution, although it did not invoke Chapter VII, is felt to have sanctioned international intervention within Iraq and led to the injection of armed forces into Iraq without its consent.[83] Some observers believe that Resolution 688 and the following action as a global turning-point in forcible humanitarian intervention, in which statist non intervention norms were giving way before a new international consensus that minimum humanitarian standards within states would be enforced by the international community.[84]

However, all of these views refer to intervention, while Resolution 688 did not even imply it. Apart from its wording that seems to be under Chapter VII, it did not mention it and it did not authorize all necessary means for the restoration of the peace and security in the region. Therefore, it could be argued that Resolution 688 cannot set a precedent for humanitarian intervention in international law, in the sense that humanitarian intervention involves the use of force. It could be argued that Nicholas Wheeler is very close to the exact meaning of this resolution. He clearly stated that the significance of resolution 688 in setting a precedent for UN humanitarian intervention is that the Security Council recognized for the first time that a state's internal repression could have transboundary consequences that threaten international peace and security.[85] In other words, the Security Council will be responsible in the future to address human rights violations with transboundary effects that threaten international peace and security. Malanczuk

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[82] Rodley, op.cit., p.33.
[83] Peter Calvocoressi, *A problem and its Dimensions*, in Nigel S. Rodley (ed.), *Loosing the Bands of Wickedness: International Intervention in Defence of Human Rights*, London, Brassey's (UK), 1992, p.12.
[84] Ramsbotham and Woodhouse, op.cit., p.79.
[85] Wheeler, op.cit., p.168 and Rodley, op.cit., p.32.

argued that this precedent for a more active role of the Security Council in cases of gross violations of human rights threatening international peace should not be overestimated, but it will definitely be an important reference for future cases.[86] He further noted that the right of humanitarian intervention asserted was a limited one, in that it required a supporting Security Council resolution and it was restricted to bringing relief and redress in human rights emergencies.[87]

Moreover, apart from the fact that the resolution did not authorize the use of all necessary means, there is a little evidence of opinion juris to claim that a new custom of humanitarian intervention has been created.[88] As already stated above Resolution 688 is the only resolution to recall Article 2(7). States stressed upon the importance of this article and their reluctance to change the norms of international community. The debate in the Security Council proved that states reaffirmed their commitment to the principles of sovereignty and non-intervention. Even the supporting states relied crucially on the transboundary implications of Iraq's repression that posed a threat to international peace and security.[89] Last but not least, Resolution 688 was the least widely supported resolution regarding Iraq's invasion of Kuwait[90] and it reflects the will of states to reaffirm their commitment to state sovereignty and non-intervention in the internal affairs of other states.

Thus, it could be argued that resolution 688 did not create any precedent for intervention in the internal affairs of states. The only potential precedent is that the transboundary implications of a humanitarian crisis can threaten international

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[86] Malanczuk, op.cit., p.129.
[87] Ibid., p.169.
[88] *Id.*
[89] Chesterman, op.cit, p.132 and Wheeler, op.cit., p.144.
[90] Greenwood, op.cit., p.36, Chesterman, op.cit., p.133, Roberts, op.cit., p.438, Malanczuk, op.cit., p.17 and Wheeler, op.cit., p.143.

peace and security. Then, the Council, as the competent UN organ to maintain international peace and security, can get involved to remove this threat. As regards collective humanitarian intervention under the auspices of the UN Security Council, it could be argued resolution 688 did not set such a precedent. This is because resolution 688 does not even mention the use of force, nor does it authorise all necessary means to restore international peace and security in the region. Nevertheless, it would be essential to explore the practice of intervening states and their justifications for the no-fly zones in Iraq.

THE SAFE HAVENS AND THEIR LEGAL RATIONALES

After the adoption of Resolution 688, the US got greatly involved in the provision of humanitarian relief.[91] On 10 April 1991, Washington had instructed the Iraqi government not to send military forces north of the 36th parallel.[92] President Bush declared that the operation would have a temporary nature, because the administration and security for the sites would be handed over as soon as possible to the United Nations.[93] Immediately, the US prepared the plan of "Operation Provide Comfort", which called for six zones of protection, each capable of handling 60,000 refugees.[94] The rescue plan involved 5,000 American troops with more available in the event of conflict, another 2,000 British men, 1,000 French and Dutch forces.[95] According to Freedman and Boren, the logic of

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[91] Ibid., p.150.
[92] Freedman and Boren, op.cit., p.53 and Malanczuk, op.cit., p.120.
[93] Wheeler, op.cit., p.151.
[94] Wheeler, op.cit., p.151 and Freedman and Boren, op.cit., p.56.
[95] Wheeler, op.cit., p.151 and Freedman and Boren, op.cit., p.56.

the Safe Havens "was to establish Western military authority over a substantial area of Iraq".[96] The Iraqi ground forces had been recommended to pull back of this area by the US commander in charge, and the threat of military clashes convinced them to comply with this demand.[97] Iraq had been also recommended to withdraw its police from the area as well, so that the refugees feel safe to return.[98]

The idea of safe-havens was originally Turkish and it came out in a speech of Turkey's President on 7 April, when he declared that *"We have to get better land under UN control and to put those people in the Iraqi territory and take care of them"*.[99] Western Countries, although indifferent in the beginning, changed their position after the media coverage of the plight of the Kurds.[100] In the European arena, the French initiated calls for a bolder response to the Kurdish crisis.[101] However, the British Prime Minister was the first that proposed a drastic and solid possible solution of the problem in an EC Summit in Luxembourg, where he suggested the creation of UN-protected Kurdish enclaves of northern Iraq.[102] The Community leaders endorsed the plan, as an initiative in an area where the US was weak in taking a drastic position.[103] The US was initially not enthusiastic to the idea of safe enclaves because of the fear that the creation of enclaves for the Kurds could lead up to the break-up of Iraq, which would cause problems to Turkey, a US and a NATO ally.[104] Therefore, Britain's Ambassador in the UN suggested that

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[96] Freedman and Boren, op.cit., p.57.
[97] *Id.*
[98] Ibid., p.58.
[99] Freedman and Boren, op.cit., p.52, Wheeler, op.cit., p.148 and Chesterman, op.cit., p.197.
[100] Freedman and Boren, op.cit., p.50.
[101] Ibid., p.52.
[102] Wheeler, op.cit., p.149, Freedman and Boren, op.cit., p.52 and Chesterman, op.cit., p.197.
[103] Freedman and Boren, op.cit., p.53, Wheeler, op.cit., p.149 and Malanczuk, op.cit., p.119.
[104] Freedman and Boren, op.cit., p.53, Wheeler, op.cit., p.149 and Chesterman, op.cit., p.198.

the term enclave be substituted by that of "safe haven", which did not imply the redrawing of national borders.[105]

RESOLUTION 688 AS A LEGAL BASIS FOR INTERVENTION

No doubt, "Operation Provide Comfort" was a very crucial response to the plight of the Kurds and it was also the main factor that helped the Kurds return to their homes.[106] However, it could be argued that the "Safe Havens" represented a breach of international law. The intervention was not legally justified on any ground. The United States, the United Kingdom, and France proposed contradictory justifications.[107] It could be said that the main justification for the use of force in Iraq was that the measures taken were consistent with resolution 688.[108] The US Senate called President Bush to *"adopt effective measures to assist Iraqi refugees as set forth in Resolution 688 and to enforce, pursuant to Chapter VII of the United Nations Charter, the demand in Resolution 688 that Iraq end its repression of the Iraqi civilian population"*.[109] Further, when Bush declared the US decision to send military forces on behalf of the Kurds, he stated that this was consistent with Resolution 688.[110] The British Prime Minister claimed that the intervention was legally justified according to Resolution 688.[111]

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[105] Wheeler, op.cit., pp.149-150.
[106] Wheeler, op.cit., p.152, Chesterman, op.cit., p.199 and Freedman and Boren, op.cit., p.58.
[107] Chesterman, op.cit., pp.199-200.
[108] Greenwood, op.cit., p.36.
[109] Chesterman, op.cit., p.200.
[110] Wheeler, op.cit., p.152.
[111] *Id.*

Yet, Resolution 688 could not provide such a justification. It simply did not approve the use of force against the sovereign state of Iraq and, therefore, it did not endorse the military protective measures taken by the allied forces in creating the security zone in the north of Iraq.[112] As already discussed above, the wording of Resolution 688 comes very close to Chapter VII of the UN Charter and to an interventionist end, but it never recalls Chapter VII, nor calls for the use of all necessary means to restore peace and security in the region.[113] Therefore, the US and British claims fall out of the reach of Resolution 688. If the allied powers needed such an authorization, they should seek for another resolution, authorizing the use of force in order to implement the humanitarian relief efforts, as declared in Resolution 688. Yet, the intervening states knew that such an attempt would be vetoed by China and the USSR. This is why the western allies did not seek to propose a Chapter VII resolution, enforcing the use of all necessary means, because of the fear of veto.[114] As a result, Resolution 688 has not the language of Resolution 678, which authorized the use of all necessary means to repel the Iraqi aggression in Kuwait.[115]

Apart from the fear of a veto, however, there is another very substantial explanation for the omission of enforcement provisions. When the Security Council adopted Resolution 688 on 5 April, the idea of military intervention to create such safety zones had not yet found the support of the US.[116] Only five days later, on 10 April, the US made it clear that it would use force against Iraq if it will

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[112] Malanczuk, op.cit., p.129.
[113] Rodley, op.cit., p.32, Wheeler, op.cit., p.146, Malanczuk, op.cit., p.18 and Greenwood, op.cit., p.36.
[114] Chesterman, op.cit., p.200, Wheeler, op.cit., p.154.
[115] Greenwood, op.cit., p.36 and Malanczuk, op.cit., p.18.
[116] Malanczuk, op.cit., p.18.

not cease all military activity on its territory north of the 36th parallel and block international relief efforts for the Kurds.[117] Then, Washington found itself strongly committed to the matter and knowing that a future Security Council would not authorize the use of force decided to base upon Resolution 688. Nigel Rodley believed that *"no Security Council member who voted for resolution 688 is known to have challenged the allied view that the operation was consistent with resolution 688"*.[118] Nevertheless, this fact cannot justify the allied intervention in Iraq.

The UN Secretary General, Perez de Cueller, raised the question whether safe havens for the Kurds could be imposed upon Iraq in disrespect of its sovereignty.[119] What is more, he stated that any deployment of foreign troops in Iraq would require permission by Iraq.[120] He further declared that if the safe havens cannot get Iraq's consent the allied powers would have to create the safe havens under the aegis of the UN, after they obtain a Security Council authorisation.[121] Even for the deployment of a UN supported police force the consent of the Security Council would be necessary according to him.[122] However, the views expressed by the Secretary General were dubious. On the one hand, he insisted for Iraqi consent and he seemed to be very sensitive to the legal questions involved, and on the other hand, he acknowledged the importance of acting from a moral and humanitarian point of view.[123] Hence, he stated that *"if the countries*

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[117] *Id.*
[118] Rodley, op.cit., p.33.
[119] Wheeler, op.cit., p.152, Malanczuk, *Humanitarian Intervention*, op.cit., pp.18-19 and *The Kurdish Crisis*, op.cit., p.129.
[120] Wheeler, op.cit., p.152, Malanczuk, *Humanitarian Intervention*, op.cit., p.19 and *The Kurdish Crisis*, op.cit., p.129.
[121] Ramsbotham and Woodhouse, op.cit., p.77, and Wheeler, op.cit., p.153.
[122] Malanczuk, op.cit., p.129.
[123] *Id.*

involved do not require the United Nations flag, then that is quite different", because he knew that the UN was not getting involved in something illegal, but it was the US, Britain and France that breached international law.[124] What is more, in the September final report to the General Assembly, he noted a change in the traditional understanding of state sovereignty in light of the international community's interest in taking action where massive human rights violations are involved.[125]

Rodley argued that the declared intention to hand over the relief effort to the United Nations meant that the Safe Havens action could be understood as a contribution to the humanitarian relief efforts that resolution 688 called for.[126] Calvocoressi stressed that Resolution 688 is felt to have sanctioned international intervention within Iraq and led to the injection of armed forces into Iraq without its consent.[127] Yet, most of the scholars arguably consider the intervention illegal and inconsistent with resolution 688.[128] As already clearly argued, resolution 688 was not adopter under Chapter VII and it did not authorise the no-fly zones. The UN Charter provides only two exceptions to the principle of non-intervention: Article 51 on self-defence and Article 42 on Security Council enforcement action under its authority. Operation Provide Comfort and the no-fly zones did not fulfil any of the above criteria. The fact that a resolution deplored the situation in Iraq, found a threat to peace and demanded Iraq to stop the repression does not provide

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[124] *Id.*
[125] Abiew, op.cit., p.154.
[126] Rodley, op.cit., p.32.
[127] Calvocoressi, op.cit., p.12.
[128] Malanczuk, op.cit., p.19 and Chesterman, op.cit., p.201.

a legal justification, because it is not an exception to Article 2(4) of the UN Charter.

HUMANITARIAN INTERVENTION AS A JUSTIFICATION

Another justification put forward was that the use of force could be better explained by the paradigm of humanitarian intervention. France had been the first state to officially call for intervention with the purpose of protecting the human rights of the Kurds in northern Iraq. The French Foreign Minister argued that the fate of the Kurds should lead the society of states to recognise a "duty of intervention" in cases where human rights are being massively violated.[129] The French Ambassador in the UN argued that "violations of human rights such as those being observed become a matter of international interest when they take on such proportions that they assume the dimension of a crime against humanity".[130] Britain's Ambassador put forward humanitarian claims as well, claiming that Article 2(7) did not apply to human rights because they were not essentially domestic.[131] However, the claims of France for a duty of intervention to protect the Kurds failed to secure support from other members of the Security Council, because they did not wish to erode the rule of non-intervention.[132] Three days before the adoption of Resolution 688 France failed to persuade the Security Council to adopt a resolution to provide protection for the Kurds.[133] In addition, as

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[129] Wheeler, op.cit., p.141.
[130] S/PV.2982, 5 April 1991.
[131] *Id.*
[132] Wheeler, op.cit., p.142.
[133] Malanczuk, op.cit., pp.118-119.

regards the adoption of Resolution 688, Britain and France had advanced these solidarist claims after the vote had been taken and these claims played no part in the formulation of the resolution.[134] And as regards to the possibility for humanitarian intervention under the UN auspices, Resolution 688 did not authorise forcible humanitarian intervention.[135]

Humanitarian voices had been raised during the intervention as well. More specifically, the British Foreign Secretary Douglas stated that "*not every action that a British government or an American government or a French government takes has to be underwritten by a specific provision in a UN resolution provided we comply with international law. International law recognises extreme humanitarian need... we are on strong legal as well as humanitarian ground in setting up this "no-fly" zones*".[136] The same view had been presented by the Common Wealth Legal Counsel Anthony Aust at a hearing of the House of Commons Foreign Affair Committee, where he repeated the argument that intervention should be justified in cases of extreme humanitarian need.[137] Yet, both Douglas Hurd and Anthony Aust continued to rely on the Security Council's authority, linking the no-fly zones with Resolution 688.[138] Moreover, an FCO acknowledged that this intervention was not covered by Resolution 688, "*but the states taking action in northern Iraq did so in exercise of the customary international law principle of humanitarian intervention*".[139]

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[134] Wheeler, op.cit., p.145.
[135] Gray, op.cit., p.162.
[136] Greenwood, op.cit., p.36. Also Chesterman, op.cit., pp.203-204 and Wheeler, op.cit., p.162.
[137] Chesterman, op.cit., p.204.
[138] *Id.*
[139] Gray, op.cit., p.165.

Malanczuk wonders whether the intervention in Iraq could be justified on the principle self-determination of Kurds, although he recognises that this principle is to a large extent unclear in its precise scope and content in contemporary international law.[140] He acknowledges that self-determination can be implemented by a sufficient degree of autonomy and not with state secession.[141] Nevertheless, he notes that the principle of self-determination cannot justify the allied armed intervention because it does not justify third-party intervention on behalf of secessionist movements.[142] Further, the intervention in north Iraq was not purely humanitarian, nor did it aim to support the self-determination of Iraq.[143] It could be said that his remark is accurate, since Resolution 688 stressed upon the transboundary implications of the crisis and not human rights as such. In addition, the "safe havens" did not seek for political commitment for future status of the Kurds.[144] This instance of humanitarian intervention cannot be the ideal one, once the incentives for intervention had been too many, apart from the humanitarian ones.

On the other hand, Abiew believes that the humanitarian crisis in Iraq constituted a threat to international peace and security of the region and hence, the Security Council would be justified in demanding intervention for humanitarian purposes, and in fact, did just that.[145] Further, although he recognises that Resolution 688 did not approve the use of force for humanitarian purposes, he thinks that the Secretary-General did not request such an authorisation and that in

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[140] Malanczuk, op.cit., p.124.
[141] *Id.*
[142] Ibid., p.125.
[143] Ibid., p.126.
[144] Roberts, op.cit., p.438.
[145] Abiew, op.cit., pp.150-151.

the end he acquiesced in the intervention.[146] First of all, the Secretary General does not have any legal authority and he is not competent to determine what is legal or not. Further, it could be said that Abiew follows the traditional misinterpretation of the pro-interventionists, which tend to distort the truth in favour of their arguments. In fact, the Secretary General declared that if the safe havens cannot get Iraq's consent the allied powers would have to create the safe havens under the aegis of the UN, after they obtain a Security Council authorisation.[147] Thus, it is clear from the above that Abiew's allegation is false. This is a very good illustration of how the interventionists formulate their arguments in order to prove that their doctrine has a legal basis. They usually put forward false arguments or misleading and distorted truths. Teson uses this tactic quite many times. For instance, he notes that resolution 940 on Haiti did not determine that the situation in Haiti constituted a threat to international peace and security.[148] Yet, despite the fact that previous resolutions made such a reference, resolution 940 clearly determined that "the situation in Haiti continues to constitute a threat to international peace and security in the region".[149] This is the desperate and undocumented tactic of some fervent interventionists.

It could be said that humanitarian intervention could not justify this intervention in legal terms. In current international law, the prevailing view rejects the legality of humanitarian intervention because of the danger of abuse by the powerful states.[150] The Charter of the United Nations and all the basic UN

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[146] Ibid., p.152.
[147] Ramsbotham and Woodhouse, op.cit., p.77, and Wheeler, op.cit., p.153.
[148] Teson, op.cit., p.253.
[149] S/RES/940 (1994), 31 July 1994.
[150] Malanczuk, op.cit., p.126.

instruments on human rights (Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights etc.) do not provide military enforcement for the protection of human rights.[151] Scholars claiming such a right in international law found their arguments on international customary law. However, in all the alleged instances of humanitarian intervention in the past, apart that most of the intervention the motives are mostly, if not at all, not humanitarian, there is lack of opinion juris. There is not evidence that states have accepted a right to humanitarian intervention. The ICJ confirmed the above assertion in the 1985 Nicaragua case.

This is why Britain and France did not try to justify their intervention exclusively on the doctrine of humanitarian intervention and they sought for other legal rationales in support of their action's legitimacy.[152] This is because they knew that their claims would simply fall in deaf ears.[153] Exactly the same happened with the paradigm of India's intervention in East Pakistan, where India raised many justifications for the use of force (refugee aggression, self-defence, humanitarian intervention).[154] On any case, however, the non-fly zones had been an unorthodox example of humanitarian intervention, as Simon Chesterman notes.[155] It could be argued that although many humanitarian claims had been raised for this intervention, the main concern of the intervening powers was that

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[151] Thomas M. Franck and Nigel S. Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force", *American Journal of International Law*, vol.67, 1973, p.299.
[152] Gray, op.cit., p. 162.
[153] *Id.* She argues that such a right is notoriously controversial; since the Second World War it has always been more popular with writers than with states.
[154] Wheeler, op.cit., pp.60-64.
[155] Chesterman, op.cit., p.204.

the crisis would destabilise the peace in the region. Turkey had pushed its western allies to respond to the refugee problem, afraid that the refugees would raise the Kurdish secessionist movement in Turkey. The fear of an independent Kurdistan troubled not only the Turks, but its US ally as well, because of their interests of oil in the area. This is why they did not pressure Saddam for a solid political solution on the Kurdish matter.

SELF-DEFENCE AS A LEGITIMATE BASIS

Along with other justifications for the no-fly zones and the safe havens, the allies grasped the chance to legitimise their intervention making reference to a right of self-defence. The United Kingdom was the one that referred to self-defence. The Secretary of State for Defence expressed in the House of Commons that the no-fly zones were established to meet situations of severe humanitarian need and that the air strikes were an exercise of self-defence in response to threats to allied aircraft enforcing the zones.[156] Further, the UK considered that attacks against Iraqi missile systems and associated command and control centres were necessary and proportionate response in self defence to such threats.[157] Nevertheless, it could be argued that this argument of self-defence is misleading, because the coalition aircraft did not have the authority to fly over Iraq in the first place.[158] Thus, the allies could not claim such a right in the sovereign state of Iraq

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[156] Greenwood, op.cit., p.36.
[157] Chesterman, op.cit., p.205.
[158] Gray, op.cit., p.168.

without a UN authorisation, but, on the other hand, Iraq would be legitimate in exercising a right to self-defence against the intervening states.

Among these claims for a right to self-defence Chesterman places the American attacks against Iraq in 1993, launched with twenty three cruise missiles in response to alleged assassination on former President George Bush.[159] The US tried to justify this attack on the right to self-defence; yet, the UN Security Council has consistently rejected such responses as illegal reprisals, which have also been declared illegal by the ICJ and the General Assembly.[160] Therefore, it is clear from the above that states misinterpret the traditional ground of self-defence in order to legitimise their actions. As Simma argued, Article 51 of the UN Charter has become the subject of gross misinterpretations.[161] Indeed, both of the arguments above fall in this category. In this respect, the third justification of the intervening states cannot legitimise the action taken for the no-fly zones. The right to self-defence had been just put forward as another legal rationale, although these states had been well aware they had no justification in invoking Article 51 of the UN Charter.

RESOLUTION 678 AS A LEGAL BASIS

The last rationale for an air attack in the no-fly zones came out by the UN Secretary General, which claimed that the action taken by the allies was authorised by the United Nations as a response to Iraq's violation of the Kuwait ceasefire

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[159] Chesterman, op.cit., p.205.
[160] *Id.*
[161] Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects", *European Journal of International Law*, vol.10, 1999, p.3.

resolution 687.[162] More specifically he stated that *"the raid yesterday and the forces that carried out the raid have received a mandate from the Security Council according to Resolution 678, and the cause of the raid was the violation by Iraq of Resolution 687 concerning the ceasefire"*.[163] This view of the Secretary General had been contradictory to a large extent, once the allies had proposed three different justifications, but never resorted to Resolution 687.[164] In addition, his view points out a marked change from the Secretary-General's earlier criticism of unilateral action.[165] It could be argued that the role of the UN Secretary General had been a little bit ambiguous in this matter. It seems difficult to understand why he tried to find legitimate aspects for the allied action and more specifically why he used a justification never put forward before by the intervening parties. His statement could be read as an implicit approval of the no-fly zones, since he implicitly acknowledges that the allied forces were acting on behalf of the UN.[166] Nevertheless, this view cannot justify the no-fly zones because it is oxymoron to argue that the allies acted under Resolution 678, once its validity ends with the ceasefire resolution 687.[167]

MORAL OR IMMORAL?

The premise of genuine humanitarian intervention claims that when a government oppresses its own people the world community has a legal and moral

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[162] Chesterman, op.cit., p.201, Greenwood, op.cit., p.36 and Gray, op.cit., p.167.
[163] Gray, op.cit., p.167.
[164] Chesterman, op.cit., p.201.
[165] Gray, op.cit., p.167.
[166] *Id.*
[167] *Id.*

obligation to intervene on behalf of the people deprived of their fundamental rights. Yet, the 1991 intervention in Iraq had revealed the falsehood of this premise. There is no genuine humanitarian intervention in state practice. Vital interests of powerful states use to motivate such a kind of intervention. The fact that the world community had been eager to defend human rights of some people, while it ignored others proves the unfaithfulness of humanitarian intervention. Powerful states intervene selectively to protect human rights from abuses by totalitarian and oppressive governments. The criterion for intervention is unchallengeable: interests. This immoral game had been easy to understand in Iraq. Western powers decided to intervene in Iraq to protect its Kurdish population (about 2 million people), while it had turned a blind eye on Turkey's brutal repression on the Kurdish population of south-eastern Turkey that counts millions of people more than Iraq. Turkey's stance had also been hypocritical because Turkey brought the issue before the UN Security Council, along with France. However, at the same time, Turkey had been involved in its own campaign of ethnic cleansing of the Kurdish populated south-eastern part of the country.[168] Let no one be mistaken: this hypocrisy of humanitarian intervention as witnessed in international relations should never be embodied into international law. An extent analysis to the issue of selectivity and the Kurds will be undertaken in a later chapter (Kosovo: political motives vs. human rights and morality).

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[168] Doug Bandow, *NATO's Hypocritical Humanitarianism*, in Ted Galen Carpenter (ed.), NATO's Empty Victory, A Postmortem on the Balkan War, Washington D.C., CATO Institute, 2001, pp.32 and 36. Eric Herring, *From Rambouillet to the Kosovo Accords: NATO's War against Serbia and Its Aftermath*, in Ken Booth (eds.), *The Kosovo Tragedy: The Human Rights Dimensions*, London, Frank Cass Publishers, 2001, p.238. Marjorie Cohn, "NATO Bombing of Kosovo: Humanitarian Intervention or Crime against Humanity?", *International Journal for the Semiotics of Law*, vol.15, 2002, p.103, Noam Chomsky, *The New Military Humanism, Lessons from Kosovo*, Monroe ME, Common Courage Press, 1999, p.52.

Further, the fact that France continued to supply arms to the Iraqi regime during the crisis[169] and later raised claims of a "duty to intervene" highlights another evident contradiction. A state that supplies arms to an ambiguous regime that evidently uses these arms to halt revolution and commit ethnic cleansing supports in a way these brutal acts. The later reference to a "duty to intervene" is totally contrary to the supply of arms to this repressive regime. However, this apparent contradiction illustrates one fact: states want to curry out their selfish motives. France had interest in selling arms to Iraq. Hence, it did not bother how these arms were used in this country. However, when the 1991 crisis challenged the anger of the western publics, France raised its humanitarian claims for a duty to intervene. This fact proves the hypocrisy in the international relations of states. In the international relations of states any action moves around the axis of selfish interests. States never act purely for humanitarian concerns, but only with calculation of their selfish motives.

CONCLUSION

The "Safe Havens" and the no-fly zones in northern and southern Iraq in 1991 imposed by the western coalition illustrate the vulnerable points of humanitarian intervention. Once again, the intervening states fell into the hallucination of offering various interpretations and legal rationales for the legitimacy of their action. The records of alleged humanitarian interventions in the past prove that states rely upon other justifications, along with the humanitarian

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[169] Wheeler, op.cit., p.140 and Ramsbotham and Woodhouse, op.cit., p.73.

ones. This is because they realise that humanitarian intervention is not a legal norm and they refer to other grounds of legitimate use of force. This practice of "insecurity" is strongly connected to the alleged doctrine and it is verified by each and every intervention. The 1991 "Safe Havens" in Iraq had not been an exception to the rule, but a confirmation of this practice. Thus, it could be argued that there is something common in the practice of alleged humanitarian intervention prior and after the end of the Cold War: states offer a wide range of justifications, degrading the humanitarian character of the intervention. Thus, the continuation of this tactic shows that immediately after the end of the Cold War the world community was not ready to accept such a right. Nevertheless, there is a major difference in the 1991 intervention in Iraq: from unilateral interventions in the past we move to collective interventions in the 90's. It had not been a single state, but a coalition of three Western states that intervened in Iraq: US, UK and France.

As regards to the meaning of Security Council resolution 688, it could be argued that it does not set any precedent for future intervention sanctioned by the UN Security Council on behalf of human rights. Although the wording of this resolution is close to the wording Chapter VII, it does not make any reference to Chapter VII. What is more, it does not contain any authorisation for the use of force. Yet, humanitarian interventions involve the use of force against a state that systematically violates human rights. Thus, it could be said that the only precedent of resolution 688 had been the fact that the Security Council got committed to an issue that concerned the internal affairs of a state (human rights). This resolution made it clear that refugee flows caused by massive abuses of human rights can threaten international peace and security. The idea that human rights do not

anymore belong to the internal affairs of states is not recent.[170] Yet, the fact that the Council deals with a humanitarian issue due to its transboundary consequences that threaten international peace and security is new. Thus, under this interpretation, the Security Council might get involved and take action in similar cases in the future. This internationalisation of domestic crises that had been reflected much earlier in the world community, however, had led to the next step, the Security Council authorisation for the use of force in situations where humanitarian crises had been considered to threaten international peace and security. Yet, as already said above, the 1991 intervention in Iraq, as well as resolution 688, do not set any precedent for future humanitarian interventions. What is more, the recall of Article 2(7) in resolution 688 shows that the principle of non-intervention in the domestic affairs of states still matters.

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[170] Rosalyn Higgins, *Intervention and International Law*, in Hedley Bull (ed.), *Intervention in World Politics*, Oxford, Clarendon Press, 1984, pp.34-35.

4.2 NATO INTERVENTION IN BOSNIA (1992)

Bosnia represents another alleged instance of humanitarian intervention after the end of the cold war. Most scholars include this case in the sphere of humanitarian intervention and some conclude that it supports the view that human rights prevail over state sovereignty. Nevertheless, it could be argued that intervention in Bosnia and Herzegovina is not a clear instance of humanitarian intervention. This is not to say that massive abuses of human rights were not present in Bosnia, or that the world community did not intervene to halt ethnic cleansing and mass human tragedy. The point here is that two external factors render humanitarian intervention inapplicable in this case. First, the conflict in Bosnia was not just an internal conflict, but a conflict with international interference. Secondly, humanitarian intervention is an intervention in a state without the consent of the legitimate government of that state. However, the legitimate government of Bosnia and Herzegovina was the one that called the international community to intervene and the one that welcomed international intervention to halt the massacres. But again, it would be unjust to say that Bosnia did not add any precedents in the context of humanitarian intervention and the protection of human rights in general. A detail analysis of the arguments above will be explored further down.

Let us now consider what happened in Bosnia and Herzegovina in the beginnings of the 90's and what the reaction of the world community was. First of all, the conflict in Bosnia broke out after the dissolution of Yugoslavia in the

beginnings of the 90's and followed the secessionist trends of two other Yugoslav republics, Slovenia and Croatia. Bosnia was ethnically and religiously mixed (around 44%, Muslims, 30% Serbs and 17% Croats). The rights of Bosnia's ethnic and religious groups had been protected under Tito's rule.[1] Yet, the disintegration of Yugoslavia and the secession of Slovenia and Croatia created new challenges for the province. The Bosnian Government held a referendum on 29 February 1991 and a large majority voted for independence. Most of the Bosnian Serb population boycotted and rejected the results of this referendum. However, the Bosnian Government declared independence on 3 March 1992. In the following days the EU and the US awarded formal recognition to Bosnia. The immediate Serb response had been attacks against Bosnia-Herzegovina from Serbia. The war that broke out immediately was brutal, involving widespread and massive violations of human rights that included torture of civilians, rape, illegal detentions, indiscriminate shelling of civilians, forced evacuation, inhumane treatment of prisoners and tactics of ethnic cleansing.[2] Wheeler argued that this was a war fought against civilians.[3] It should be noted though that all groups committed crimes and atrocities against the civilian population, but most atrocities had been committed by the Serbs.[4]

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[1] Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, Dordrecht-the Netherlands, 1999, p.177.

[2] Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World* Order, Philadelphia, Procedural Aspects of International Law Series, vol21, University of Pennsylvania Press, 1996, p.200. Oliver Ramsbotham and Tom Woodhouse, *Humanitarian Intervention in Contemporary Conflict: A Reconceptualisation,* Cambridge, Polity Press, 1996, p.170. Also Abiew, op.cit., p.177.

[3] Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society,* Oxford, Oxford University Press, 2000, p.250.

[4] Robert C. DiPrizio, *Armed Humanitarians: US Interventions from Northern Iraq to Kosovo,* Baltimore, The John Hopkins University Press, 2002, p.112. Also Murphy, op.cit., p.200.

What was the response of the international community? What measures had been taken to protect civilians from suffering? On 7 April 1992 the Security Council decided to authorise the full deployment of the United Nations Protection Force (UNPROFOR).[5] Further, the Council demanded the immediate cessation of the fighting in Bosnia, the immediate stop of forcible expulsions of persons from the areas that they live and any attempts to change the ethnic composition of the population; the Council also demanded that all forms of interference out of Bosnia cease immediately.[6] After the non-compliance of all parties with the above demands, the Council, acting under Chapter VII of the Charter of the United Nations, imposed economic sanctions against Serbia and Montenegro.[7] In August 1992, the Security Council, recognising that the situation in Bosnia-Herzegovina constitutes a threat to international peace and security and acting under Chapter VII of the UN Charter, celled upon States *"to take nationally or through regional agencies or arrangements all measures necessary to facilitate in coordination with the United Nations the delivery by relevant United Nations humanitarian organisations and others of humanitarian assistance to Sarajevo and whatever needed in other parts of Bosnia and Herzegovina"*.[8]

What was the significance of the above resolution? Did it authorise Member States to use all necessary means to halt the atrocities? No doubt, the resolution does not grant any authorisation for the use of force for such reasoning. The Council is clear in its premise: *"take...all measures necessary to facilitate...the*

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[5] S/RES/749 (1992), 7 April 1992.
[6] S/RES/752 (1992), 15 May 1992.
[7] S/RES/757 (1992), 30 May 1992.
[8] S/RES/770 (1992), 13 August 1992.

delivery...of humanitarian assistance". Nevertheless, some scholars rushed to discern an authorisation for the use of force to halt the atrocities. Abiew, for instance noted that the Council *"was also concerned by the reports of abuses against civilians imprisoned in camps, prisons and detention centres which had so shocked the international community that it referred to the use of all necessary means to have them closed"*.[9] Yet, it is clear from the wording of resolution 770 that such an authorisation had not been granted. Even Teson recognises that the purposes of resolution 770 were limited to securing the delivery of humanitarian assistance.[10] Malanczuk also argued that *"the text limits the purpose of action by Member States to the facilitation of the delivery of humanitarian assistance"*.[11] Indeed, this was the meaning of resolution 770.

Yet, did resolution 770 set any precedent for the legitimacy of humanitarian intervention? No doubt, this is the first time that the Council authorised force for the delivery of humanitarian assistance, however limited[12]. In the past, resolution 688 on northern Iraq demanded Iraq to immediately end repression and insisted that Iraq allow immediate access by international organizations to all those in need of assistance in all parts of Iraq and make available all necessary facilities for their operations.[13] But this resolution was not adopted under Chapter VII of the UN Charter, nor did it include an authorisation for the use of force. On the other hand, resolution 770 was adopted under Chapter VII and authorised *"all measures*

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[9] Abiew, op.cit., p.180.
[10] Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edition, New York, Transnational Publishers, 1997, p.265.
[11] Peter Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force*, Amsterdam, Het Spinhuis, 1993, p.21.
[12] Wheeler, op.cit., p.252.
[13] S/RES/688 (1991), 5 April 1991.

necessary" for the delivery of humanitarian assistance. This was a decisive step towards the adoption of resolution 794 on Somalia that authorised *"the Secretary-General and member states cooperating to implement the offer to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia"*.[14] Thus, it could be argued that resolution 770 plays a significant role in post-Cold War humanitarian intervention.

Yet, there are many setbacks that render this precedent very weak. As Wheeler argued, *"since this resolution was warmly welcomed by the internationally recognised government of Bosnia, the Security Council was not setting a radically new precedent for humanitarian intervention"*.[15] Indeed, throughout the conflict the Bosnian Government insisted for a more drastic intervention by the world community to halt the massacres. Resolution 770 was a step towards these demands and was expectedly welcomed. The fact that the Government of Bosnia endorsed this resolution makes the doctrine of humanitarian intervention inapplicable in this case, because humanitarian interventions apply only in cases that lack the consent of the legitimate government of the country that commits mass violations of human rights. Accordingly, this is not a clear instance of humanitarian intervention.

Let us now consider other actions of the UN Security Council, concerning the situation in Bosnia and Herzegovina. In October 1992, the Council decided to *"establish a ban on military flights in the airspace of Bosnia and Herzegovina, this ban not to apply to United Nations Protection Force flights or to other flights in*

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[14] S/RES/794 (1992), 3 December 1992.
[15] Wheeler, op.cit., p.252.

support of United Nations operations, including humanitarian assistance".[16] Further, the Council, acting under Chapter VII of the UN Charter, authorised Member States *"seven days after the adoption of this resolution, acting nationally or through regional organisations or arrangements, to take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary measures in the airspace of the Republic of Bosnia and Herzegovina, in the event of further violations, to ensure compliance with the ban of flights and proportionate to the specific circumstances and the nature of flights".*[17] This was the second time that the Security Council authorised Member States to use all necessary measures. The significance of this resolution, as a precedent for humanitarian intervention, is the same as resolution 770.

Last but not least, the Council declared "safe havens" in Bosnia. Resolution 819 demanded that *"all parties and others concerned treat Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act".*[18] A following resolution added Sarajevo and the towns of Tuzla, Zepa, Gorazde, Bihac and their surroundings in the safe areas.[19] Like in northern Iraq, the Council did not authorise the use of all necessary measures to ensure that any of the parties would not violate these safe areas.[20] Nevertheless, the fact that the Council adopted the policy of "safe havens" for another time illustrates the link between the two humanitarian crises and certifies the precedence of this practice in Iraq. But the safe havens in Iraq had been imposed without the consent of the Iraqi

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[16] S/RES/781 (1992), 9 October 1992.
[17] S/RES/816 (1993), 31 Mars 1993.
[18] S/RES/819 (1993), 16 April 1993.
[19] S/RES/824 (1993), 6 May 1993.
[20] Wheeler, op.cit., p.254.

government, while in Bosnia the legitimate government welcomed any kind of international intervention.

This was the response of the UN in the 1992 crisis in Bosnia and Herzegovina. The response of western states and NATO were bombings against Bosnian Serbs and political pressure.[21] These bombings in accordance with the efforts of the "Contact Group" resulted to the Dayton Agreement and the settlement of disputes.[22] Teson believes that intervention in Bosnia *"is another instance of collective humanitarian intervention, notwithstanding the fact that the operations were motivated also by the aim of forcing the Bosnian Serbs to negotiate peace".*[23] Yet, the instance of Bosnia and Herzegovina does not fit into the sphere of humanitarian intervention because of the consent of the Bosnian Government to this intervention. No doubt, there were massive violations of human rights and the use of force was to stop massacres and those violations. The consent of the Bosnian Government, however, does not allow any limits for the application of humanitarian intervention.

What is more, the conflict in Bosnia was not simply an internal one. It was both a civil war and an international conflict.[24] In April 1992, both the EU and the US recognised the Bosnian independence.[25] Shortly after, in May 1992, the Security Council recommended to the General Assembly that the Republic of

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[21] Murphy, op.cit., pp.207-208, Wheeler, op.cit., p.255.
[22] Murphy, op.cit., pp.212-213.
[23] Teson, op.cit., p.262.
[24] Stanley Hoffmann, *Humanitarian intervention in the Former Yugoslavia*, in Stanley Hoffmann (ed.), *The Ethics and Politics of Humanitarian Intervention*, Indiana, Notre Dame Press, 1996, pp.42-43.
[25] DiPrizio, op.cit., p.117.

Bosnia and Herzegovina be admitted to membership in the United Nations[26] and the Assembly admitted Bosnia on 22 May 1992.[27] Chesterman noted that *"from this point there is little question that the conflict was international"*.[28] Greenwood argued that *"once the former Yugoslav republic became independent states in their own right, the situation ceased to be one of civil war within a single Yugoslavia and became instead complicated mixture of international and internal conflicts"*.[29] Thus, he believes that the legal basis for outside intervention *"no longer needed to rest on any theory of humanitarian intervention"*.[30] Murphy also thinks that the conflict in Bosnia was not simply an internal conflict.[31] Accordingly, Murphy argued that the actions taken in Bosnia *"do not fit easily within the concept of humanitarian intervention"*.[32]

It could be argued that the instance of Bosnia does not fit into the traditional framework of humanitarian intervention. However, this does not mean that intervention in Bosnia has nothing to offer in the trends of the 90's towards a more effective protection of human rights in the world community. The adoption of resolution 770, the imposition of safe areas and the aerial bombings support the above argument. Further there is a continuum from Iraq to Bosnia and from Bosnia to Somalia. NATO imposed the safe areas in Bosnia, as France, the UK and the US imposed the safe havens in northern Iraq. Further, resolution 770 was a decisive

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[26] S/RES/755 (1992), 20 May 1992.
[27] A/RES/46/237 (1992), 22 May 1992.
[28] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, New York, Oxford University Press, 2001, p.134.
[29] Christopher Greenwood, "Is There a Right of Humanitarian Intervention?", *The World Today*, vol.49, February 1993, p.38.
[30] *Id.*
[31] Murphy, op.cit., p.214.
[32] *Id.*

step towards the adoption of resolution 794 in Somalia that authorised the *"use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia"*.[33] Thus, from an authorisation with a limited mandate of delivering humanitarian assistance in Bosnia we go to a broader authorisation for the use of force in Somalia.

Teson believes that this is another instance of collective humanitarian intervention.[34] Yet, NATO intervention in Bosnia is not a clear instance of humanitarian intervention. The consent of the legitimate Government of Bosnia and Herzegovina, as well as the international character of the conflict precludes this definition. Yet, despite the consent of the Bosnian Government and the international character of this conflict, the humanitarian impulse was present throughout the crisis. The world community reacted and responded to the massacres in Bosnia. However, the humanitarian impulse was very week this time[35] and the response to mass human rights violations was belated. There was an evident reluctance by western states to intervene.[36] Although there was a limited mandate by the Security Council under resolution 770, western states were unwilling to intervene to halt the massacre. Ramsbotham and Woodhouse comment on this resolution *"Here was a remarkable moment in which the international community was responding to a major international-social conflict as a largely humanitarian crisis in its contemplation of the use of force. But the momentum*

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[33] S/Res/794 (1992), 3 December 1992.
[34] Teson, op.cit., p.190.
[35] Adam Roberts, "Humanitarian War: Military Intervention and Human Rights", *International Affairs*, vol.69, No3, 1993, p.443
[36] Abiew, op.cit., p.178 and 184, Ramsbotham and Woodhouse, op.cit., p.171, DiPrizio, op.cit., p.116.

passed".[37] The crimes committed in Bosnia-Herzegovina were of a large scale. The response came late and solution had been achieved four years after the termination of the conflict. As a result, many scholars have sharply criticized this intervention and called intervention in Bosnia a "failure" of western states.[38]

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[37] Ramsbotham and Woodhouse, op.cit., p.178.

[38] Tom J. Farer, "Intervention in Unnatural Humanitarian Emergencies: Lessons from the First Phase", *Human Rights Quarterly*, vol.18, 1996, p.18. Nicholas J. Wheeler and Justin Morris, *Humanitarian Intervention and State Practice at the end of the Cold War*, in Rick Fawn and Jeremy Larkins (eds.), *International Society After the Cold War: Anarchy and Order Reconsidered*, Basingstoke-England, McMillan, 1996, p.137. Also DiPrizio, op.cit., p.103 and Wheeler, op.cit., pp.255-256.

4.3 ECOWAS INTERVENTION IN LIBERIA (1992)

Liberia represents another inter-ethnic conflict of an African state. In 1980 Samuel Doe emerged to power after a violent coup by the armed forces. This resulted to the assassination of President William Tolbert. In 1989, Charles Taylor organised a rebel force (National Patriotic Front of Liberia, or NPFL) in the neighbouring Ivory Coast and invaded Liberia in an attempt to oust the unpopular President Doe. Civil war broke out between the NPFL, Doe's Armed Forces of Liberia (AFL) and another rebel group, the Independent National Patriotic Front of Liberia (INPFL). Doe's campaign to suppress the rebellion through indiscriminate attacks on villages and people[1] resulted to a disturbing number of atrocities and a refugee crisis.[2] Soon the NPFL managed to control the largest part of the country and AFL was confined to a small part of Monrovia, while the INPFL controlled the rest of Monrovia.[3] In July 1990, President Doe requested that the ECOWAS introduce a peacekeeping force into Liberia *"to forestall increasing terror and tension and to assure a peaceful transitional environment"*.[4] To this extent, the UN did not do anything to prevent the crisis in Liberia or to protect human rights. I could be argued that UN's occupation with the crises in Iraq, Bosnia and Somalia

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[1] Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World* Order, Philadelphia, Procedural Aspects of International Law Series, vol21, University of Pennsylvania Press, 1996, p.147.

[2] Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, Dordrecht-the Netherlands, 1999, pp.200-202. Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford, Oxford University Press, 2001, p.135. Also Murphy, op.cit., pp.147-148.

[3] Murphy, op.cit., p.147.

[4] Ibid., pp.147-148.

did not leave any space for intervention in Liberia. Actually, the UN was absent and indifferent from this African inter-ethnic conflict.

In absence of the UN and the OAU (the recently renamed Africa Union, or AU), the Economic Community of West African States (ECOWAS) called on the warring parties in Liberia to observe an immediate ceasefire and established an ECOWAS Cease-fire Monitoring Group (ECOMOG), with the purpose of *"keeping the peace, restoring law and order and ensuring that the ceasefire is respected"*.[5] Another task of ECOMOG was the establishment of an interim government to prepare for elections.[6] ECOMOG was deployed in Liberia by late August. At the time of ECOMOG's intervention, Doe, as well as Taylor, opposed it.[7] Only the INPFL leader did not oppose the intervention.[8] From the first days of its deployment ECOMOG clashed with Taylor's NPFL and ECOMOG forces were successful in keeping the NFPL out of Monrovia and in establishing a zone for humanitarian assistance to be channelled to many of the victims of the civil war.[9] As Chesterman argued, *"although nominally a peacekeeping force, ECOMOG was responsible for the first use of aerial bombing in the war"*.[10] However, ECOMOG with its interventionist role managed to persuade the factions agree to a ceasefire.[11]

The Security Council responded with a presidential statement, where *"the members of the Security Council commend the efforts made by the ECOWAS*

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[5] Christopher Greenwood, "Is There a Right of Humanitarian Intervention?", *The World Today*, vol.49, February 1993, p.37. Also Chesterman, op.cit., p.135 and Murphy, op.cit., p.150.
[6] Greenwood, op.cit., p.37 and Murphy, op.cit., p.150.
[7] Murphy, op.cit., pp.151-152, Abiew, op.cit., p.202 and Greenwood, op.cit., p.37.
[8] Murphy, op.cit., p.152.
[9] *Id.*
[10] Chesterman, op.cit., p.135 and Murphy, op.cit., p.152.
[11] Chesterman, op.cit., p.135 and Murphy, op.cit., pp.152-153.

Heads of State and Government to promote peace and normalcy in Liberia".[12] In addition, this statement called upon the parties to the conflict to respect the ceasefire agreement.[13] It seems that the Council provided the ECOWAS with an ex post facto approval of its intervention. This ceasefire proved to be very fragile and after a series of four meetings in Yamoussoukro (Ivory Coast), agreement was reached in October 1991. This agreement provided for the disarmament of the warring factions and the organisation of elections under the supervision of foreign observers by April 1992.[14] Another statement of the President of the Security Council supported this agreement as the best possible solution of the conflict in Liberia.[15] This agreement also failed due to Taylor's non-compliance and fighting resumed in earnest August 1992.[16]

On 19 November 1992 the Council unanimously adopted resolution 788. In this resolution, the Council reaffirmed *"its belief that the Yamoussoukro IV Accord of 30 October 1991 (S/24815) offers the best possible framework for a peaceful resolution of the Liberian conflict by creating the necessary conditions for free and fair elections in Liberia".*[17] The Council further determined that *"the deterioration of the situation in Liberia constitutes a threat to international peace and security, particularly in West Africa as a whole".*[18] Interestingly enough, the Council welcomed *"the continued commitment of the Economic Community of West African States (ECOWAS) to and the efforts towards a peaceful resolution of*

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[12] S/22133 (1991)
[13] *Id.*
[14] Chesterman, op.cit., p.136, Murphy, op.cit., pp.153-154 and Abiew, op.cit., p.203.
[15] S/23886 (1992).
[16] Chesterman, op.cit., p.136 and Murphy, op.cit., p.154 and Abiew, op.cit., p.203.
[17] S/RES/788 (1992), 19 November 1992.
[18] *Id.*

the Liberian conflict".[19] Finally, this resolution requested the UN Secretary-General to dispatch urgently a Special Representative to Liberia and under Chapter VII of the UN Charter imposed an arms embargo to Liberia, but decided that this embargo shall not apply to weapons and military equipment destined for the sole use of the peacekeeping forces of ECOWAS in Liberia. [20]

No doubt, it seems that the Council fully endorsed ECOWAS activities in Liberia. It supported its Yamoussoukro Accords, it welcomed the commitment of ECOWAS towards a peaceful resolution of the conflict, and under its Chapter VII powers imposed an arms embargo that did not apply to ECOMOG. Thus, it could be said that there is an *ex post facto* support of the Council to ECOMOG's legitimacy.[21] Nevertheless, it could be said that ECOWAS intervened in Liberia without prior consultation of the UN Security Council.[22] Accordingly ECOWAS was not granted with the Council's authorisation. And although some argue that the Councils statements and resolution 788 were *"short of authorising the use of force by ECOMOG"*,[23] it could be said that the Council's lack of condemnation[24] does not legitimise an armed intervention.

The basis for ECOMOG's intervention is unclear[25], because there was no authorisation of the Security Council and regional arrangements can be sought only in accordance with Article 53 of the UN Charter. What is more, ECOMOG

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[19] *Id.*
[20] *Id.*
[21] Murphy, op.cit., p.164, Chesterman, op.cit., p.137 and Abiew, op.cit., p.207.
[22] Martha Brenfors and Malene Maxe Petersen, "The Legality of Unilateral Humanitarian Intervention-A Defence", *Nordic Journal of International Law*, vol.69, 2004, p.492.
[23] Frederik Harhoff, "Unauthorised Humanitarian Interventions – Armed Violence in the Name of Humanity?", *Nordic Journal of International Law*, vol.70, 2001, p.90.
[24] Brenfors and Petersen, op.cit., p.493.
[25] Chesterman, op.cit., p.136.

was a peacekeeping force with the powers of peace-enforcement. Accordingly, ECOMOG did not use force only for self-defence, but for the enforcement of peace. Thus, in order to be legitimate, the Security Council should approve the intervention. Nevertheless, ECOWAS did not require an authorisation for the use of force before intervening in Liberia. There is little doubt that ECOWAS intervention did not fit the UN Charter.

Yet, this *ex post facto* approval of the Security Council to conflicts that human rights violations have taken place will be the question in ECOWAS intervention in Sierra Leone (1997) and NATO intervention in Kosovo (1999). In a similar manner, The Security Council with a presidential statement welcomed the fact that the military junta in Sierra Leone had been defeated, without referring how this had been achieved[26]. In Liberia also the Council did not endorse or condemn ECOMOG's intervention in Liberia, but the lack of condemnation, or the support to ECOMOG's actions implies an ex post approval of this intervention. In addition, a similar situation exists in the case of NATO intervention in Kosovo, where resolution 1244 brought an end to hostilities in Kosovo and decided for the future of the Serbian province. Some lawyers claimed that this resolution could be taken to imply *post facto* approval of the military action.[27] However, such tactics

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[26] S/PRST/1997/52, 14 November 1997.

[27] Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian* Intervention, in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention, Ethical, Legal, and Political Dilemmas*, Cambridge, Cambridge University Press, 2003, p.225. Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects", *European Journal of International Law*, vol.10, 1999, p.22. Luis Henkin, "Kosovo and the Law of Humanitarian Intervention", *American Journal of International Law*, vol.93, No4, October 1999, pp.824-826. Ruth Wedgwood, "NATO's Campaign in Yugoslavia", *American Journal of International Law*, vol.93, No4, October 1999, p.828. Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned*, Oxford, Oxford University Press, 2000, p.163 and 172-173. Thomas

cannot legitimise or justify the use of force by states or organisations of states. There is a more extensive analysis of such cases in the Kosovo chapter.

The fact is that ECOWAS intervention in Liberia was not accordant with international law, but the world community failed to condemn this action. However, it seems that the international community favoured ECOWAS intervention in Liberia.[28] First of all, there was no reaction of the Security Council to the dispatch of ECOMOG's units in Liberia without obtaining the Council's authorisation. Secondly, the Council failed to condemn the use of force by ECOWAS in Liberia. At the same time, it provided ECOWAS with an ex post facto approval of its actions in Liberia. And although there is not a direct debate on the use of force, the lack of condemnation, as well as the Council's support for ECOWAS efforts in Liberia seem to approve its actions. This practice of the Council illustrates the reluctance of the Council in cases that do not attract the attention of powerful western states. Western states were occupied with the dissolution of Yugoslavia, northern Iraq and Somalia during the Liberian conflict. ECOWAS action could justify their indifference and reluctance to deal with Liberia's internal conflict. Thus, the only task left for the Council was the approval of ECOWAS efforts in Liberia.

As regards the humanitarian aspects of the crisis, it could be said that Liberia represents another case of alleged humanitarian intervention.[29] However, the reasons for intervening in Liberia, according to ECOWAS, were that

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M. Franck, "Lessons of Kosovo", *American Journal of International Law*, vol.93, No4, October 1999, p.857.

[28] Murphy, op.cit., p.163 and Abiew, op.cit., p.204.

[29] Abiew, op.cit., p.205.

"thousands of non-Liberian West African nationals were trapped in Liberia. Furthermore, large numbers of refugees had fled to neighbouring countries, causing considerable economic and political turmoil in the region. The turbulence in Liberia had the potential to expand into a much wider regional conflict".[30] Nevertheless, there was a dominant concern for the plight of Liberian citizens.[31]

Once again there is a mix of motives in the course to intervening in Liberia. Abiew believes that *"the precedential value of the intervention as an example in regional or sub-regional collective action for meeting the challenge of humanitarianism is particularly significant. It shows many African states are becoming amenable to the idea that egregious human rights violations, whether arising from governments or the result of civil war, have been removed from the domestic sphere and have become matters of international concern".*[32]

It seems that Abiew's argument is very enthusiastic. No doubt, this intervention in Liberia was a precedent for the ECOWAS intervention in Sierra Leone. Further, the *post facto* approval by the Security Council does not mean that this intervention was regarded legitimate. However, ECOWAS intervention represents another case where a coalition of states intervened, among other justifications, to protect human rights and this is a very strong precedent for the practice of the 90's. And like any other humanitarian interventions there were again oddities that ran against the humanitarian objectives. For instance, ECOMOG officers undertook lucrative business ventures to exploit Liberia's

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[30] Murphy, op.cit., p.159.
[31] *Id.*
[32] Abiew, op.cit., p.210.

timber, diamond, rubber, and gold resources.[33] Another fact that raises suspicions is the willingness of an economic organisation to undertake military operations.[34] Expectedly, the OAU or the UN would have intervened in Liberia. Thus, the involvement o ECOWAS should not intervene because such a right does not derive from its constituent document.[35] Finally, the records of human rights violations were not of a large scale.

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[33] Murphy, op.cit., p.160.
[34] Ibid., p.163.
[35] Murphy, op.cit., pp.148-149 and 163.

4.4 US-LED INTERVENTION IN SOMALIA (1992)

INTRODUCTION

The end of the cold war denoted not only a new era for human rights, but also a new era for peacekeeping operations. From traditional peacekeeping we move onto a modern type of peacekeeping, which dynamically indicates that peace enforcement is the new trend in the international arena. A traditional peacekeeping operation is *"an operation involving military personnel, but without enforcement powers, undertaken by the United Nations to help to maintain or restore international peace and security in areas of conflict. These operations are voluntary and are based on consent and co-operation. While they involve the use of military personnel, they achieve their objectives not by force of arms, thus contrasting them with 'enforcement action' of the United Nations"*[1] In another traditional apprehension, peace-keeping is: *"the prevention, containment, moderation and termination of hostilities between or within states, through the medium of a peaceful third party intervention organised and directed internationally, using multinational forces of soldiers, police and civilians to restore and maintain peace"*.[2] This used to be the definition of peacekeeping in the past. Nowadays, this definition does not seem to have remained intact. Rapid changes in the international community after the fall of the Cold War and the

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[1] *The Blue Helmets: A Review of United Nations Peacekeeping,* 2nd edition, UN Publication, 1991, p.4.

[2] Richard Connaughton, *Military Intervention and UN Peacekeeping*, in Nigel S. Rodley(eds.), *To Loose the Bands of Wickedness, International Intervention in Defence of Human Rights*, London, Brassey's, 1992, p.166.

rivalry of the superpowers had influenced this particular area of the United Nations as well as lots of others.

Let us now consider how the traditional context of peacekeeping has changed and which factors triggered this transition. An early omen of this change in the normative understanding of peacekeeping operations emerged from former UN's Secretary Boutros-Ghali and his "Agenda for Peace".[3] In this work, the Secretary General makes a distinction between peacekeeping and peace making. He supported that the UN plays a pivotal role for the concept of collective security and is competent for the maintenance of international peace and security. He stated that there are cases where *"cease-fires have been agreed to but not complied with, and the United Nations has sometimes been called upon to send forces to restore and maintain the cease-fire. This task can on occasion exceed the mission of peace-keeping forces and the expectations of peace-keeping force contributors. I recommend that the Council consider the utilisation of peace-enforcement units in clearly defined circumstances and with their terms of reference specified in advance"*.[4] Somalia was the ideal case for testing and implementing his ambitious plans.[5] This is because he had the chance to practically observe if peace-enforcement units can succeed. Thus, Somalia became the first witness of peace enforcement in a failed-state, where there were no governmental authorities to consent on this operation.[6]

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[3] Boutros-Ghali, *An Agenda for Peace,* New York, UN, June 1992.
[4] Ibid., p.20.
[5] Walter Clarke, *Failed Visions and Uncertain Mandates in Somalia*, in Walter Clarke and Jeffrey Herbst(eds.), *Learning from Somalia: The Lessons of Armed Humanitarian Intervention*, Oxford, Westview Press, 1997, p.6 .
[6] Ibid., p.10.

This chapter will examine the alleged humanitarian intervention in Somalia, which seems to bring the traditional ground of peacekeeping operations into the sphere of intervention for humanitarian purposes. What is more, there will be a thorough examination of Security Council Resolution 794 that authorised the use of all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.[7] Resolution 794 seems to be the first UN Security Council resolution for explicit humanitarian purposes.[8] Therefore, it is very essential to inquire the impacts of this resolution in the international system and whether or not it could set a precedent for future Security Council interventions for humanitarian reasons. As the legitimacy of the intervention in Somalia is not questionable here, because it was authorised by the Security Council, it would be interesting to examine the intervention from another point of view, the political one. What is more, it would be very essential to check whether or not intervention in Somalia has set a precedent for humanitarian intervention in the future. In Somalia many scholars and specialists pointed out that military intervention is not necessary, especially in a stateless society like Somalia, with its clan-based system. The main object is to search if all peaceful measures had been exhausted before the resort to military force. Evidence shows that the Secretary General held a pro-interventionist role from the beginning of the crisis. As a result, the early resort to force without prior profound consultation led to another UN

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[7] S/Res/794 (1992), 3 December 1992.

[8] Nicholas J. Wheeler, *Saving Strangers:Humanitarian Intervention in International Society*, Oxford, Oxford University Press, 2000, p. 172 .

failure, signalled firstly by the US withdrawal, and others that followed immediately.[9]

THE UN INVOLVEMENT AND INTERVENTION IN SOMALIA

The UN decided to get involved in the crisis in early 1992, when the Somali permanent representative to the UN requested assistance from the organisation.[10] By March 1992 thirty to fifty thousand people died, of whom 14,000 were in the Mogadishu area.[11] After a year of disinterest, the UN appeared willing to deal with the Somali problem. The Security Council's first response to the Somali crisis came on 23 January 1992, with Resolution 733.[12] In this resolution the Council *"strongly urges all parties to the conflict immediately to cease hostilities and agree to a cease-fire...decides, under Chapter VII of the Charter of the United Nations, that all states shall, for the purposes of establishing peace and stability in Somalia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Somalia...Calls upon all parties to cooperate with the Secretary General to this end and to facilitate the delivery by the UN, its special agencies and other humanitarian*

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[9] Jonathan Stevenson, "Hope Restored in Somalia?", *Foreign Policy*, Summer 1993, vol.91, p.138.
[10] Danesh Sarooshi, *Humanitarian Intervention and International Humanitarian Assistance: Law and* Practice, London, HMSO, 1994, p.26. Samuel M. Makinda, *Seeking Peace from Chaos, Humanitarian Intervention in Somalia*, London, Lynne Rienner Publishers, 1993, p.14.
[11] Ioan Lewis and J. Mayall, *Somalia*, in J. Mayall (ed.), *The New Interventionism 1991-1994: United Nations Experience in Cambodia, Former Yugoslavia and Somalia*, Cambridge, Cambridge University Press, 1996, p.101. Also Thomas G. Weiss, *Military-Civilian Interactions, Intervening in Humanitarian Crises*, Lanham Md., Rowman & Littlefield, 1999, p.76.
[12] Christopher Greenwood, "Is There a Right of Humanitarian Intervention?", *The World Today*, vol.49, February 1993, p.37. Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, Dordrecht-the Netherlands, 1999, p.162. Weiss, op.cit., p.81and Wheeler, op.cit., p.175.

organisations of humanitarian assistance to all those in need of it, under the supervision of the coordinator." [13] However, the imposition of such an arms embargo was an uncertain mandate, given the flow of arms from the neighbouring states, mainly from Kenya.[14] In the same month, James Jonah, the then UN Undersecretary-General for special Political Affairs, was sent to negotiate a cease-fire between Mahdi and Aideed.[15] A cease-fire was agreed, but its provisions were never implemented.[16]

The main problem the UN had to counter in Somalia was the successful delivery of humanitarian aid to the people in need. Yet, this object failed to become reality because of the armed gangs and the warlords, who demanded a share of the incoming aid as the price for providing aid agencies with security against attack.[17] In other words, the problem was not the lack of international humanitarian aid, but looting, as well as control and late distribution by the warlords.[18] This fact obstructed the UN's task and demanded further action. On 17 March the Security Council approved Resolution 746, where it *"Urges the Somali factions to honour their commitment under the cease-fire agreements signed at Mogadishu on March 3 1992...Strongly supports the Secretary-General's decision urgently to dispatch a technical team to Somalia, accompanied by the*

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[13] S/RES/733 (1992), 23 January 1992.
[14] Ioan M. Lewis, *Making History in Somalia: Humanitarian Intervention in a Stateless Society*, London, Centre for the Study of Global Governance, London School of Economics, 1994, p.14.
[15] Oliver Ramsbotham and Tom Woodhouse, *Humanitarian Intervention in Contemporary Conflict: A Reconceptualisation*, Cambridge, Polity Press, 1996, p.202, Wheeler, op.cit., p. 175, and Weiss, op.cit., p.81.
[16] Wheeler, op.cit., p.176, and Weiss, op.cit., p.81.
[17] Wheeler, op.cit., p.176.
[18] Lewis, op.cit., pp.7-8, and Wheeler, op.cit., p.176.

Coordinator..." [19] The only innovation by this resolution was the dispatch of a technical team to Somalia, whose effectiveness was totally dubious.

A more effective resolution had been approved on 24 April 1992. Resolution 751 introduces new promising ways for improving the situation in Somalia. Accordingly, the Security Council *"Decides to establish under its authority and in support of the Secretary-General...a United Nations Operation in Somalia. Requests the Secretary-General immediately to deploy a unit of fifty United Nations observers to monitor the cease-fire in Mogadishu...Agrees, in principle, also to establish under the overall direction of the Special Representative of the Secretary-General a United Nations security force to be deployed as soon as possible..."* [20] According to this resolution, fifty military observers, unarmed and dressed as civilians, were deployed to monitor the "Green Line", which divided Mogadishu in Mahdi and Aideed controlled areas.[21] As regards to the establishment of a UN security force under the direction of the Special Representative of the Secretary General, it had been agreed that 500 peacekeepers would move to Somalia to assist the delivery of humanitarian aid.[22]

Yet, the deployment of these 500 peacekeeping forces demanded the consent of the most powerful warlords of Mogadishu.[23] This is because peacekeeping operations are based on the consent of the state concerned. But Somalia was a failed state and there was no central authority. Thus, the UN Secretary General's Special Representative for Somalia tried to get the consent of

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[19] S/RES/746 (1992), 17 March 1992.
[20] S/RES/751(1992), 24 April 1992.
[21] Weiss, op.cit., p.81.
[22] Wheeler, op.cit., p.176.
[23] *Id.*

Somali warlords, given the absence of a government. Indeed, Mohamed Sahnoun contributed profoundly to the deployment of the security forces with the consent of Somali warlords.[24] He was appointed Special Representative for Somalia on 28 April and arrived in the country on 1 May.[25] Ramsbotham and Woodhouse call him *"the major exponent of non-forcible intervention."* [26] Indeed, the Algerian diplomat skilfully contributed to understanding the Somali society.[27] He started immediately negotiations with the warlords and local elders in order to ensure the successful delivery and distribution of food to the people in need of it.[28]

Sahnoun understood that *"clans are politically interesting because they dilute power."*[29] Hence, he aimed to put the clan system to work for Somalia.[30] He believed that respect for and the ability to work closely with the people of an aid-receiving country clearly lies at the moral core of humanitarian intervention.[31] The truth is that with his negotiations and his understanding of the Somali society he managed to persuade the Somali warlords for the deployment of 500 Pakistani soldiers in Mogadishu and to secure the Mogadishu international airport.[32] Nevertheless, his continuing criticism of the UN for its late arrival and for its bureaucratic agencies, as well as the failures of the UN in Somalia appeared to cost

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[24] Stevenson, op.cit., p.146, Weiss, op.cit., pp.81-82 and Lewis, op.cit., p.9.
[25] Ramsbotham and Woodhouse, op.cit., p.203, and Wheeler, op.cit., p.176.
[26] Ramsbotham and Woodhouse, op.cit., p.203.
[27] Mohamed Sahnoun, *Mixed Intervention in Somalia and the Great Lakes, Culture, Neutrality, and the Military*, in Jonathan Moore(ed.), *Hard Choices, Moral Dilemmas in Humanitarian Intervention*, Lanham Md., Rowman & Littlefield, 1998, pp.88-89.
[28] Wheeler, op.cit., p.176, Lewis, op.cit., p.9, Stevenson, op.cit., p.146, and Clarke, op.cit., p.7.
[29] Stevenson, op.cit., p.146, Wheeler, op.cit., p.176, Ramsbotham and Woodhouse, op.cit., p.203, and Sahnoun, op.cit., p.89.
[30] Stevenson, op.cit., p.146.
[31] Sahnoun, op.cit., p.91.
[32] Stevenson, op.cit., p.147.

him Ghali's esteem.[33] On the other hand, he won respect from the Somali society.[34] What matters is that his criticism prompted the UN Secretary-General to castigate the neglect of Somalia by the major powers by calling the conflict in Yugoslavia "a rich man's war".[35]

However, his work seems to be interrupted by Ghali's more forcible approach.[36] On 28 August 1992 the Security Council authorised *"the increase in strength of the United Nations Operation in Somalia (UNOSOM) and the subsequent deployment as recommended..."* [37] Ghali decided to increase the number of forces in Somalia without Sahnoun's consultation and regardless of the warlords' wishes.[38] An immediate response came from Aideed, who threatened to send the soldiers home in body bags.[39] Thus, decisions taken in New York had undone Sahnoun's four months of arduous and fruitful diplomacy.[40] As a result, in late October Sahnoun sent a resignation letter to the Secretary-General and he, in turn, accepted the resignation.[41] As Ramsbotham and Woodhouse put it, Sahnoun's resignation *"brought to an end an experiment in what was...effectively non-military humanitarian intervention"*.[42] Moreover, the demotion of Sahnoun left an empty space for the Secretary General's forcible options.

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[33] Ramsbotham and Woodhouse, op.cit., p.203, Wheeler, op.cit., p.177, and Stevenson, op.cit., p.148.
[34] Ramsbotham and Woodhouse, op.cit., p.203, Wheeler, op.cit., p.177, and Stevenson, op.cit., p.151.
[35] Ramsbotham and Woodhouse, op.cit., p.204.
[36] Ramsbotham and Woodhouse, op.cit., p. 205, Wheeler, op.cit., p.173, and Stevenson, op.cit., p.147.
[37] S/RES/775 (1992) 28 August 1992.
[38] Stevenson, op.cit., p.147 and Wheeler, op.cit., p.177.
[39] Ramsbotham and Woodhouse, op.cit., p.205, and Stevenson, op.cit., p.147.
[40] Ibid., p.148.
[41] Ramsbotham and Woodhouse, op.cit., p.205, Stevenson, op.cit., p.148 and Wheeler, op.cit., p.177.
[42] Ramsbotham and Woodhouse, op.cit., p.205.

In November 1992 Boutros Ghali disclosed his approach on the matter: *"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 to determine that non-military measures as referred to in Chapter VII were not capable of giving effect to the Council's decisions"*.[43] Suddenly, although in the past the US President did not seem willing to get involved in the Somali crisis, he felt strongly committed to respond to the humanitarian disaster in Somalia. Media had been one of the factors that explain Bush's change of policy.[44] On 25 November, Bush proposed to the Secretary-General that Washington would lead a military operation in Somalia.[45]

Accordingly, on 3 December 1992 the Security Council approved Resolution 794, which: *"Acting under Chapter VII of the Charter of the United Nations, authorises the Secretary-General and member states cooperating to implement the offer to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia"*.[46] This resolution's innovation is the assertion 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*

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[43] Greenwood, op.cit., p.37.
[44] Wheeler, op.cit., pp.179-181, Weiss, pp.82-83.
[45] Greenwood, op.cit., p.37 and Weiss, op.cit., p.83.
[46] S/RES/794 (1992), 3 December 1992.

international peace and security".[47] It was literally the first time in the UN history that the Council acknowledges that the human suffering causes a threat to international peace and security and authorises the use of force to establish a secure environment for humanitarian relief operations. There will be a comprehensive analysis of the meaning of resolution 794 and the impacts it might have for the doctrine of humanitarian intervention in the next chapter.

A few days after the adoption of resolution 794, the first forces of "Operation Restore Hope" were landing in Mogadishu.[48] The United States was in command of 30,000 soldiers (24,000 US soldiers and 6,000 from other countries).[49] The primary object of the Unified Task Force (UNITAF) was the distribution of food and other humanitarian supplies securely to the worst affected areas of southern Somalia.[50] More specifically, UNITAF had to secure the airport of Mogadishu and Kismayu, to open supply routes and secure towns and feeding centres.[51] But the UN and the Secretary-General wanted to expand the functions of this-limited in time and scope-operation. Within a week of launching Operation Restore Hope, the US and UN publicly clashed over the matter of disarmament of Somali militias.[52] The Secretary General believed that the creation of "a secure environment" envisaged in Resolution 794 presupposed disarming the gunmen.[53] Further, in his letter to President Bush argued that the UNITAF should ensure

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[47] *Id.*
[48] Lewis, op.cit., pp.9-10 and Weiss, op.cit., p83.
[49] Makinda, op.cit., p.70-73 and Lewis, op.cit., pp.9-10.
[50] Lewis, op.cit., 10.
[51] Makinda, op.cit., p.70.
[52] Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World* Order, Philadelphia, Procedural Aspects of International Law Series, vol21, University of Pennsylvania Press, 1996, pp.226-227. Robert G. Patman, *Securing Somalia: A Comparison of US and Australian Peacekeeping during the UNITAF Operation*, Oslo, Institute for Forvarsstudier, 1997, p.8. Also Lewis, op.cit., p.10 and Makinda, op.cit., p.71.
[53] Patman, op.cit., p.8, and Makinda, op.cit., p.71.

before it withdrew that the heavy weapons of the organised factions be neutralised and brought under international control.[54]

On the other hand, Robert Oakley, US special envoy to Somalia, stated that the mission is clearly defined and its objective is the establishment of security conditions in Somalia in order to provide the relief supplies and not disarmament.[55] President Bush did not want to get involved in the domestic affairs of Somalia due to his respect of Somalia's "sovereignty and independence".[56] It could be said that the disagreement between Washington and the UN had to deal with their interpretation of the phrase "secure environment".[57] The main point is that UNITAF succeeded in securing the distribution of food.[58] Boutros Ghali, in his report to the Security Council, on 26 January 1993, claimed that UNITAF had fulfilled its mission of ensuring that humanitarian aid reached those most in need.[59] However, this operation was limited on time and scope and expectedly the UN was preparing for the replacement of UNITAF by another operation.

Indeed, on 26 March 1993, the Security Council adopted Resolution 814. In its preamble the Council acknowledges *the need for a prompt, smooth and phased transition from the Unified Task Force (UNITAF) to the expanded United Nations Operation in Somalia (UNOSOM II).*[60] This Resolution acting under Chapter VII of the UN Charter decided to *expand the size of the UNOSOM force and its mandate in accordance with the recommendations contained in paragraphs 56-58*

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[54] Patman, op.cit., p.8, and Makinda, op.cit., p.71.
[55] Wheeler, op.cit., p.189, and Patman, op.cit., p.8.
[56] Ibid., p.9.
[57] Makinda, op.cit., p.71.
[58] Ramsbotham and Woodhouse, op.cit., p.208Lewis, op.cit., p.10 .
[59] S/24868, 29 November 1992.
[60] S/Res/814 (1993), 26 March 1993.

of the report of the Secretary-General of 3 March 1993, and the provisions of this resolution; emphasised *the crucial importance of disarmament;* demanded *that all Somali parties, including movements and factions, comply fully with the commitments they have undertaken in the agreements they concluded at the Informal Preparatory Meeting on Somali Political Reconciliation in Addis Ababa; further demanded that all Somali parties...take all measures to ensure the safety of the personnel of the United Nations and its agencies;* requested *the Secretary-General to provide security, as appropriate, to assist in the repatriation of refugees and the assisted resettlement of the displaced persons, utilising UNOSOM II forces...*[61]

Wheeler argues that Resolution 814 was unprecedented in UN history, because it authorised UN forces under Chapter VII to use force and it had expanded mandates, like the promotion of political reconciliation and the establishment of the rule of law.[62] UNOSOM II had to undertake the reconstruction of economic, social, and political life of Somalis.[63] Makinda argues that UNOSOM II represents the first peace-keeping operation in UN history that had been given the mandate to use force not only in self-defence but to pursue its mission.[64] China, Morocco and Spain emphasised on the "exceptional" and "unique" character of this Security Council mandate under Chapter VII, in order to avoid setting a precedent for future mandates in peacekeeping operations.[65] Nevertheless, the facts are irreversible and UNOSOM is the first UN peacekeeping

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[61] *Id.*
[62] Wheeler, op.cit., p.193.
[63] Ramsbotham and Woodhouse, op.cit., p.211.
[64] Makinda, op.cit., p.76.
[65] Wheeler, op.cit., pp.193-194.

operation with a mandate to use force for the enforcement of peace in a failed state and not for the security of its personnel.[66] Thus, UN enforcement action and traditional peacekeeping became one from this dubious resolution. This is because for the first time in the UN history a peacekeeping operation had been authorised to use force. It is possible that many similar will follow. Boutros Ghali argued for this precedent setting operation in his report to the Security Council as early as 19 December 1992.[67] The Secretary General achieved to accomplish his interventionist plans, as published in his "Agenda for Peace". However, the word "Peace" stated in the title of his paper is very questionable. This is because there are better means to achieve peace, rather than forcible options.

UNOSOM II consisted of 20000 peacekeeping troops, 8000 logistical support staff and 2800 civilian personnel.[68] UNOSOM II took over from UNITAF/UNOSOM I on 4 May 1993.[69] As an operation with much more obligations than UNITAF/UNOSOM I and, oddly, with reduced troops, it would be predictable that its effectiveness would be tested soon. A month after UNOSOM II officially took over, Aideed's forces attacked UN Pakistani troops in an ambush close to Aideed's radio station and killed 24 Pakistani peacekeepers, 10 soldiers were missing and 54 were wounded.[70] This attack was reported to the Security Council, which strongly condemned the *"unprovoked armed attacks"*

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[66] Clarke, op.cit., p10.
[67] Makinda, op.cit., p.77.
[68] Ramsbotham and Woodhouse, op.cit., p.211, Lewis, op.cit., p.12, Wheeler, op.cit., p.194, and Weiss, op.cit., p.88.
[69] Robert C. DiPrizio, *Armed Humanitarians: US Interventions from Northern Iraq to Kosovo,* Baltimore, The John Hopkins University Press, 2002, p.48. Also Ramsbotham and Woodhouse, op.cit., p.211, Wheeler, op.cit., p.194 and Lewis, op.cit., p.13.
[70] Ramsbotham and Woodhouse, op.cit., pp.211-212, Wheeler, op.cit., pp.194-195, Lewis, op.cit., p.13, Abiew, op.cit., p.165, Weiss, op.cit., p.89 and Murphy, op.cit., p.230.

against the personnel of UNOSOM II and acting under Chapter VII of the UN Charter noted *"that the Secretary-General is authorised under Resolution 814 (1993) to use all necessary measures against all those responsible"* for these attacks.[71] This resolution named the SNA (SNA/USC is the United Somali Congress, Aideed's group) responsible for the clash and the UNOSOM II commenced the hunt of General Aideed, as the one responsible for the Pakistani casualties.[72]

It had been this phase of the crisis that Admiral Howe, in a Wild West style that included a reward poster, offered $25,000 for the capture of Aideed.[73] Thus, the tasks of rebuilding and reconstructing the Somali economic, social and political life, as well as the enforcement of a secure environment and peace turned into hunt for the most powerful Somali leader. UNOSOM II, an operation with a very ambitious and unprecedented mandate, got another dubious and uncertain mandate: to arrest General Aideed. As a result of this odd mandate, in early June US air forces attacked Aideed's bases, radio station and other key installations.[74] It had been reported that the civilian casualties of the US attacks, including women and children, were more than 100.[75] Was this included in the Secretary-General's Agenda for "Peace"? Was the Security Council content with the results of its policies in Somalia? The Security Council, although regretted the civilian casualties, it had stated *"some Somali factions and movements had used women*

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[71] S/RES/837 (1993), 6 June 1993.
[72] *Id.* Also Ramsbotham and Woodhouse, op.cit., p.212, Lewis, op.cit., p.13, Makinda, op.cit., p.80, and Wheeler, op.cit.,p.195.
[73] Wheeler, op.cit., p.195 and Weiss, op.cit., p.89.
[74] Lewis, op.cit., p.13, Wheeler, op.cit., p.195, and Makinda, op.cit., p.80.
[75] Robert C. DiPrizio, op.cit., p.47, *Ramsbotham* and Woodhouse, op.cit., p.212, Wheeler, op.cit., p.195, Lewis, op.cit., p.13, and Makinda, op.cit., p.81.

and children as human shields to perpetrate their attacks against UNOSOM".[76] Not surprisingly, this explanation was invented by the Secretary-General in his report to the Council, where he expressed his view that the Somali gunmen themselves were firing upon civilians to produce bodies for the international media.[77] Once again he managed to influence the Council with his dangerous calumniations.

The Security Council's hypocritical statement pointed at the SNA as responsible for the civilian casualties. This kind of excuse is very common for cases of aerial bombing and very frequently used, especially by the US, when tragic mistakes occur. In Kosovo for instance, many times that NATO had been accused of humanitarian law violations it had put forward such justifications.[78] Yet, excuses like this are very difficult to become credent. Some scholars try to explain those attacks against Aideed on a rational basis. They argue that the Secretary-General feared that a failure to respond to Aideed's attacks could place in jeopardy the lives of other peacekeepers across the world.[79] However, is it rational to compensate the lives of other UN personnel with civilian casualties? This is a good question that the former Secretary-General should answer. It could be said that the UN response was not proportionate and accordant to the humanitarian objectives of the operation.[80] This is because the means of UNOSOM II were against the humanitarian ends. UNOSOM II was there to protect the

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[76] Ramsbotham and Woodhouse, op.cit., p.212.
[77] S/26022, 6 June 1993.
[78] ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia. For further details see: http://www.un.org/icty/pressreal/nato061300.htm.
[79] Wheeler, op.cit., p.196.
[80] *Id.*

civilian population, not to kill innocent people. The decision to hunt Aideed was not only uncritical, but it was also dangerous for future UN missions.

It did not take long for the international community to observe the results of this paradoxical policy. On 3 October 1993 in an effort to seize key Aideed aides two US helicopters (black hawks) were shot down, 18 US soldiers were killed, and 75 were wounded.[81] TV cameras that motivated Western states to intervene had commenced turning the public opinion against the intervention.[82] President Clinton rushed to state that US troops would be withdrawn by 31 March 1994.[83] After the US withdrawal from Somalia, the UN mission focused back to traditional peacekeeping-food relief and distribution-and left aside its nation building scope.[84] The announcement of US withdrawal ended any hopes of UNOSOM II success.[85] Actually, it ended Ghali's interventionist plans and justified Sahnoun's non-military efforts. Many scholars argued that the main achievements of the UN operation in Somalia would almost have resulted from Sahnoun's softer techniques.[86] In addition, many scholars observed that Somalia would limit future humanitarian interventions.[87] The US stated in a Presidential

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[81] Ramsbotham and Woodhouse, op.cit., p.212, Weiss, op.cit., p.90, Murphy, op.cit., p.233, and Wheeler, op.cit., p.198. Wheeler argues that 84 were wounded and one pilot was captured. Murphy says 12 killed.

[82] Ramsbotham and Woodhouse, op.cit., p.212, and Wheeler, op.cit., p.198.

[83] *Id.*

[84] Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edition, New York, Transnational Publishers, 1997, p.244.

[85] Weiss, op.cit., p. 91.

[86] Stevenson, op.cit., p.154.

[87] Walter Clarke and Jeffrey Herbst, *Somalia and the Future of Humanitarian Intervention*, Centre of International Studies, Monograph Series, No9, Princeton, Princeton University Press, 1995, p.1. Also Stevenson, op.cit., p.138.

Decision that it would not become involved in any peace-operation that was not judged within US strategic interests.[88]

The humiliating withdrawal of UN troops and personnel from Somalia ended Ghali's experiment in peace-enforcement.[89] Maybe Somalia was to become a good lesson for him and his dangerous precedents, as envisaged in his "Agenda for Peace", or better "Agenda for the New Interventionism". Yet, the second edition of his paper on UN peacekeeping is less optimistic about the possibilities for intervention than in the first edition, due in large part to the UN's failed experience in Somalia.[90] There, he believes that *"conflicts the United Nations is asked to resolve usually have deep roots and have defied the peacemaking efforts of others. Their resolution requires patient diplomacy and the establishment of a political process that permits, over a period of time, the building of confidence and negotiated solutions to longstanding differences. Such processes often encounter frustrations and set-backs and almost invariably take longer than hoped. It is necessary to resist the temptation to use military power to speed them up".*[91] Unfortunately, he did not hold the same view during the 1992 intervention in Somalia. Nevertheless, the former Secretary-General did not give up. He tried to develop his interventionist skills on other occasions of alleged humanitarian interventions, such as Rwanda and Haiti. He tried to incite the Western allies to contribute militarily in Rwanda, but after the failure in Somalia there was no

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[88] Weiss, op.cit., p.90.
[89] Patman, op.cit., p.5.
[90] Walter Clarke and Jeffrey Herbst, op.cit., p.2.
[91] Boutros Boutros-Ghali, *An Agenda for Peace*, 2nd edition, New York, UN, 1995, p.36.

enthusiasm between the US and other members.[92] He did not, however, have another opportunity like Somalia, to test his "Agenda for Peace" in another "fiasco" peacekeeping operation.

The ethical lesson from this peacekeeping operation is of a great importance for legal scholars as well. The UN Secretary-General has to be strongly committed to international peace and his efforts should only focus on this objective. Personal ambitions should not obstruct his prominent task. What happened in Somalia is an oxymoron. The voice of the Secretary-General, instead of being a voice for peace turned into a battle cry. His efforts to influence the Council were persistently evident. Boutros Ghali, as a very ambitious person, wanted to write history and to shake the stagnant waters with his subversive "Agenda". And his "Agenda for Peace" is subversive because it tries to move from traditional peacekeeping to peace-enforcement (which is an interventionist position). He used Somalia to experiment if his peace-enforcement units could operate. Nevertheless, a prudent Secretary-General has to seek for peaceful means, as regards to the restoration of order in failed states. The changing world order does not require the change of traditional peacekeeping. The effectiveness of Sahnoun's efforts clearly illustrates that diplomatic means can bring a better end. The UN Secretary-General should honour his chair by holding such a position.

SECURITY COUNCIL RESOLUTION 794

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[92] Nicholas J. Wheeler and Justin Morris, *Humanitarian Intervention and State Practice at the end of the Cold War*, in Rick Fawn and Jeremy Larkins (eds.), *International Society After the Cold War: Anarchy and Order Reconsidered*, Basingstoke-England, McMillan, 1996, pp.156-157. Also Tom J. Farer, "Intervention in Unnatural Humanitarian Emergencies: Lessons from the First Phase", *Human Rights Quarterly*, vol.18, 1996, p.1.

Although in 1991 the Security Council had been indifferent to the collapse of the Somali state and the deterioration of the situation, in 1992 it passed six resolutions, all of which put emphasis on humanitarian grounds.[93] The most significant for the legal debate on humanitarian intervention is resolution 794. In its preamble, resolution 794 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..."*[94] Further, the resolution provided that the Security Council *"acting under Chapter VII of the Charter of the United Nations, authorises the Secretary-General and member states cooperating to implement the offer to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia"*.[95] This UN enforcement action, based on a determination of a threat to international peace and security and caused by the magnitude of the human suffering had set up new challenges for the debate of UN humanitarian intervention.

Undoubtedly, it is the first time that the Council determines that internal aspects of a humanitarian problem threaten international peace and security.[96] It could be argued that the conflict in Somalia did not pose any serious threat to international

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[93] Adam Roberts, "Humanitarian War: Military Intervention and Human Rights", *International Affairs*, vol.69, No3, 1993, p.439.
[94] S/RES/794 (1992), 3 December 1992.
[95] *Id.*
[96] Peter Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force*, Amsterdam, Het Spinhuis, 1993, p.24. Also Wheeler, op.cit., p.183, Teson, op.cit., p.247, and Abiew, op.cit., p.170.

peace and security.[97] The actual reason for invoking Chapter VII of the Charter had been the plight of the Somalis.[98] Unlike resolution 688 where *"the repression of the Iraqi civilian population...led to a massive flow of refugees towards and across international frontiers and to crossborder incursions which threaten international peace and security in the region"*,[99] resolution 794 explicitly stresses out the humanitarian dimension of the Somali crisis. Even Roberts acknowledges that reference to "international peace and security" is "duly" mentioned once in resolution 794, but the word humanitarian occurs 18 times.[100] He argues that the Secretary-General by putting the intervention in the legally safe context of a response to a threat to the peace intended to make *"the awkward facts of a crisis fit the procrustean bed of the UN Charter"*.[101] Robert's argument justifies the assertion above for the Secretary-General's fervent interventionist plans.

In addition, it had been the humanitarian motives that led to the unanimous adoption of resolution 794.[102] Even China voted in favour of resolution 794, but the allegation that China is becoming receptive to the idea of humanitarian intervention is very doubtful.[103] It could be said that China kept on moving on its traditional pathways. China always insisted and continues to insist that the UN should not get involved in the internal matters of states. It is obvious that the wording of resolution 794 strongly opposes the setting of a precedent for future Security Council action. Accordingly, the resolution acknowledges that *"the*

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[97] Teson, op.cit., p.245, and Greenwood, op.cit., p.38.
[98] Greenwood, op.cit., p.38, Wheeler and Morris, op.cit., p.149, Teson, op.cit., p.245.
[99] S/RES/688 (1991), 5 April 1991.
[100] Roberts, op.cit., p.440.
[101] *Id.*
[102] Wheeler, op.cit., pp.184-185.
[103] Wheeler and Morris, op.cit., p.150 and Abiew, op.cit., p.164.

unique character of the present situation in Somalia and mindful of its deteriorating, complex and extraordinary nature, requiring an immediate and exceptional response".[104] Many scholars noticed that the use of words such as "unique", "extraordinary" and "exceptional" undermine the significance of this resolution for setting a precedent for future Security Council involvement in other cases of internal disorder or instability.[105] On the other hand, Teson thinks that the word "unique" cannot limit the significance of resolution 794 in future cases because unique does not mean that this is the only case, but it means that this is an extraordinary case covered by a principal that authorises intervention only in this class of extraordinary cases.[106]

Nevertheless, although China voted for the resolution, it was the first among other states to emphasise the unique character of the crisis.[107] Actually, the terms unique, extraordinary and exceptional seem to have been inserted in order to avert China from blocking the adoption of this resolution.[108] Therefore, it seems that the above assertion that China is becoming receptive to the idea of humanitarian intervention is false. On the contrary, the wording of resolution 794 indicates that it is motivated by a fear of eroding Article 2(7) of the UN Charter.[109] However, many scholars ignore China's concerns that this resolution should not be seen as a precedent for humanitarian intervention and end up in the contrary argument. Abiew thinks *"the Council's action is unprecedented to the extent that it*

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[104] S/Res/794 (1992), 3 December 1992.
[105] Wheeler and Morris, op.cit., p.151, , Wheeler, op.cit., p.186, Malanczuk, op.cit.,p.26, and Abiew, op.cit., p.169.
[106] Teson, op.cit., p.249.
[107] S/PV.3145 (1992), 3 December 1992.
[108] Wheeler and Morris, op.cit., p.151.
[109] Ibid., p.152.

clearly specifies the use of collective intervention for humanitarian purposes".[110] Teson goes even further by noting *"human suffering thus has taken precedence over state sovereignty, which is precisely the policy that under girds humanitarian intervention".*[111]

Teson's predictable argument, given his usual positions, would not surprise or worry any legal scholars or any other people well aware of his specific views. His understanding of the situation and its implications for future interventions was literally expected. What is really scary is the Secretary General's belief on the matter. Boutros Ghali stated that the Security Council had *"established a precedent in the history of the United Nations: it decided for the first time to intervene militarily for strictly humanitarian purposes".*[112] His views are especially dangerous because he is the UN Secretary-General and he should be very cautious for every single word of his. Roberts successfully describes him as *"more hawkish than the Pentagon".*[113] Indeed, Ghali was the one that threatened international peace and security. Somalia clearly illustrates the impacts of an uncritical and bellicose UN Secretary-General's failure. Although it was gratifying that he has no legal authority, it could be said that his views could influence the Council.

Another issue that raised an extent debate on whether the UN intervention in Somalia would set a precedent for future UN involvement in intrastate humanitarian crises with the lack of government. Malanczuk argues *"the fact that*

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[110] Abiew, op.cit., p.170.
[111] Teson, op.cit., p.247.
[112] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford, Oxford University Press, 2001, p.142.
[113] Roberts, op.cit., p.440.

Somalia has no government and nothing akin to a structure of government must not be underestimated when evaluating the relevance of this precedent for the future".[114] Roberts said that Somalia is not a humanitarian intervention in the classic sense because it is *"not a case of intervention against the will of the government, but of intervention when there is a lack of government. Thus Operation Restore Hope could have been justified in terms of the long-standing proposition in international law that when a state completely collapses into chaos, there can be grounds for military intervention by other states if such a course has a serious chance of restoring order. This proposition is contentious among lawyers and historians, and it is associated with European colonial practices in the nineteenth century".*[115] He further states that the UN Secretary-General fitted this proposition in the modern legally safe context of a response to a threat to the peace.[116]

Nevertheless, Wheeler and Morris strenuously attacked his explanation. They probably did so because they misunderstood his proposition. They interpret his argument as if he said that the state had collapsed because the government had collapsed and thus a state and its government are synonymous.[117] They point out that government is one of the criteria for statehood, but governments are not wholly constitutive of statehood.[118] Teson raised the same argument.[119] Indeed,

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[114] Malanczuk, op.cit., p.24.
[115] Roberts, op.cit., p.440.
[116] *Id.* Boutros Ghali letter of 29 Nov 2003 as cited in Robert's *Humanitarian War*: "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".
[117] Wheeler and Morris, op.cit., p.151.
[118] *Id.*
[119] Teson, op.cit., pp.246-247.

government is one of the criteria of statehood, which also include a defined territory, a permanent population and the capacity to enter into relations with other states.[120] Yet, Wheeler and Morris misunderstood Roberts's proposition. He did not say that government equals to state. He was very accurate in stressing that Somalia is not a classic case of intervention against a sovereign state, because at the time of the conflict, no doubt, Somalia was a failed state.[121] There was no government and no legally sanctioned authorities or state structures to provide or withhold consent.[122] As Murphy noted, had there been authorities fully in control of Somalia, it is not clear that the international community would have viewed the decision to intervene in the same way.[123] Further, as Patman masterfully observes *"this was an unchartered territory for the UN. The UN Charter made no provision how to deal with failed states"*.[124] This is what Roberts tried to express in another more sophisticated and more analytical way. Nobody argued that the Somali state did not exist because of the lack of government. Many scholars pointed out the extraordinary nature of a failed state in the current legal system. Even Wheeler acknowledged in a later work of his that the Somali case is different from other humanitarian interventions because the cause of the suffering was not governments murdering their citizens, but it was the break down of civic authority.[125]

As regards the significance of resolution 794 for setting a precedent for humanitarian intervention in international law, the valuations differ and this is

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[120] Article 1 of the Montevideo Convention of 1933 on the Rights and Duties of States includes the above criteria.
[121] Clarke, op.cit., p.4, 11-12 and DiPrizio, op.cit., p.45.
[122] Ramsbotham and Woodhouse, op.cit., p.207, Clarke, op.cit., p.10.
[123] Murphy, op.cit., p.238.
[124] Patman, op.cit., p.8.
[125] Wheeler, op.cit., p.206.

because of the different interpretations. For instance, Teson's understanding of this resolution is that *"human suffering has taken precedence over state sovereignty, which is precisely the policy that undergirds humanitarian intervention"*.[126] Yet, many scholars are more critical and cautious. For example, Morris and Wheeler are quite sceptical over the emergence of a new norm that is fuelled by the "caveats" attached to resolution 794.[127] Of course, these caveats are the words "exceptional", "extraordinary" and "unique". But even if we leave aside these words the precedent would be: the Security Council will be competent in future cases to intervene militarily in the internal affairs of states to protect human rights. Accordingly, Abiew said that resolution 794 *"sent a strong signal that the UN will no longer be prevented from interfering on humanitarian grounds in the internal affairs of member states"*.[128]

However, the wording of the resolution does not, at least explicitly, allow such a precedent. As regards to Teson's above argument, humanitarian intervention outside the UN realm will undoubtedly remain impermissible in international law. This is because the alleged UN humanitarian intervention constitutes Security Council practice, in other words state practice. But as the Council is the political body of the UN it does not have the possibility to grant *opinio juris* for the creation of an international customary law. As Davidson argued *"the Security Council is a political organ of the UN, and while its resolutions might have legal force they are more likely to be informed by extra-legal*

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[126] Teson, op.cit., p.247.
[127] Wheeler and Morris, op.cit., p.150.
[128] Abiew, op.cit., p.171.

considerations than not".[129] Thus, resolution 794 does not legitimise the doctrine of humanitarian intervention. It seems that Murphy is very close to as what precedent resolution 794 might set: *"the intervention in Somalia serves as a precedent for UN Security Council authorisation of states to intervene for humanitarian purposes, at least in situations where there has been a collapse of the local government".*[130]

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[129] Scott J. Davidson, "Kosovo, Human Rights, and the Use of Force", *Human Rights Law and Practice*, vol.5, No.3, December 1995, p.169. Also Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects", *European Journal of International Law*, vol.10, 1999, p.11.
[130] Murphy, op.cit., p.240.

POLITICAL AND MORAL INCENTIVES

Malanczuk argues that the case of Somalia is a normative landmark of genuine Security Council practice of humanitarian intervention.[131] Roberts observes that Operation Restore Hope is widely seen as a classic case of humanitarian intervention.[132] Wheeler and Morris support exactly the same assertion.[133] In a later work of his, Wheeler characterises the US intervention in Somalia as historic, because it is the first time that the Security Council authorised a Chapter VII intervention, without the consent of a sovereign government, for explicitly humanitarian reasons.[134] Yet, he did not underscore that there was no government to ask for its consent. This part of this thesis aims to prove that humanitarian intervention in Somalia does not lack all the oddities and the hypocrisy in current state practice. Although in the eyes of some scholars Somalia seems to be a classic case and illustrative of a pure humanitarian intervention, a profound and analytical examination proves the contrary. This intervention had other incentives far from humanitarian ones. Weiss observes that *"the underlying reasons for US intervention went much deeper than a "humanitarian impulse"*.[135] These motivations will be exposed straightforward.

First of all, the real incentives were the media that socked the public opinion with images from the Somali plight and not the humanitarian concerns of

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[131] Peter Malanczuk, op.cit., p.25.
[132] Roberts, op.cit., p.439.
[133] Wheeler and Morris, op.cit., pp.148-149.
[134] Wheeler, op.cit., p.172.
[135] Weiss, op.cit., p.83.

the intervening states.[136] Most scholars agree that media had been the primary motive for intervention in Somalia. Teson, perhaps the most fervent advocate of humanitarian intervention, masterfully veils the contribution of media to military intervention by providing doubtful and uncertain motives.[137] Morris and Wheeler believe that *"there is no evidence to suggest that in the case of Somalia, Washington was covertly pursuing national self-interest behind the figleaf of humanitarianism. Nevertheless, there is a little doubt that the primary driving force behind US policy was the desire to placate a public opinion saturated by media coverage of suffering Somalis"*.[138] Nevertheless, if the US had no vital national interests in the region, it was in the US government's interest to intervene in order to avoid further public reaction against its inaction and placate the public opinion. Otherwise, had the intervention been so purely motivated by humanitarian concerns, the US would not have intervened that late, a whole year after the Somali state collapsed into anarchy and its society suffered from starvation, diseases and deaths.[139] Actually, it had been the CNN effect on US policymaking because of its influence on public opinion; there was similar suffering to Sudan and elsewhere in Africa, but it was in Bush's interest to intervene in Somalia because of the media coverage.[140] Further, the fact that the US had interest in intervening in Somalia is proved by the reference of Wheeler and Morris that *"the loss of US service*

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[136] Hugo Slim and Emma Visman, *Evacuation, Intervention and Retaliation: United Nations Humanitarian Operations in Somalia, 1991*-1993, in John Harriss (ed.), *The Politics of Humanitarian Intervention,* London, Pinter, 1995, p.157. Also Ramsbotham and Woodhouse, op.cit., p.204, Wheeler and Morris, op.cit., p.150, Weiss, op.cit., p.82, Clarke, op.cit., p.8, Makinda, op.cit., p.69, Wheeler, op.cit., pp.179-180, and 201, Murphy, op.cit., p.237, and DiPrizio, op.cit., p.50 and p.55.

[137] Teson, op.cit., p.243.

[138] Wheeler and Morris, op.cit., p.150.

[139] Ramsbotham and Woodhouse, op.cit., p.200, and Makinda, op.cit., p.60, Slim and Visman, op.cit., pp.149-152.

[140] DiPrizio, op.cit., p.55.

personnel leaves Washington's policy of intervention in Somalia vulnerable to the realist critique that state leaders violated their primary ethical responsibility to place soldiers at risk only when national interest requires it".[141]

Another reason in favour of intervention in Somalia was Bush's desire to leave office with a last foreign policy success.[142] Further, he might wish to leave his successor a difficult and diverting foreign policy legacy.[143] Wheeler thinks that another motivation for intervention related to the fact that Somalia was perceived as a relatively risk-free and short-term operation.[144] It would not be useful to further analyse these two factors because the key motivation for intervention was the media. It would be prejudiced, however, if we sink the humanitarian objectives. The main humanitarian arguments for intervention had been starvation, high levels of looting of relief supplies and the high death rate.[145] The media management of the conflict and the images of starving people in Western television had underpinned these humanitarian objectives. Thus, it could be argued that the US intervention and interest for Somalia followed the interest of the media and the public opinion. Murphy cites another two possible factors for intervention; the first is US national security interests, and the other is US obligation because it provided Somalia extensive weaponry.[146] As regards the claims on Bush's humanitarian concerns[147], it could be said that such allegations are very naif. His actual concern

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[141] Wheeler and Morris, op.cit., p.154.
[142] Murphy, op.cit., p.237, Wheeler and Morris, op.cit., p.181, Slim and Visman, op.cit., p.157, and Clarke, op.cit., p.9.
[143] Slim and Visman, op.cit., p.157.
[144] Wheeler, op.cit., p.180.
[145] Slim and Visman, op.cit., p.158.
[146] Sean D. Murphy, op.cit., pp.237-238.
[147] DiPrizio, op.cit., p.50-53, and Wheeler, op.cit., p.180.

was to respond to Clinton's criticisms for inaction in Somalia and to media pressure.[148]

Apart from the main realist argument, which notes that interests are strongly affiliated with humanitarian intervention, there is the problem of prudence and proportionality. Humanitarian interventions will always bear Robert's substantial argument that *"humanitarian war is an oxymoron"*.[149] Indeed, it is difficult to reconcile the words "humanitarian" and "war". Therefore, those responsible for the conduct of a humanitarian war should be very cautious not to offend the values that they promised to promote and protect. In order to support that the US intervention in Somalia was prudent, there should be evidence that diplomatic efforts had been exhausted. Did it happen in Somalia? The answer is unfortunately no. The UN special representative for Somalia, Mohamed Sahnoun, struggled to secure the distribution of food and humanitarian aid, as well as to find a permanent political solution through his cooperation with clans and local elders.[150] Sahnoun strongly contributed to the improvement of the situation in Somalia and his negotiations with the Somalis strongly facilitated the delivery of humanitarian aid.[151] Nevertheless, his work had been abruptly terminated by the UN Secretary-General's more forcible approaches.[152]

Sahnoun's resignation signalled the interception of the efforts for non-military humanitarian intervention and favoured Ghali's forcible approaches.[153]

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[148] DiPrizio, op.cit., p.50.
[149] Roberts, op.cit., p.429.
[150] Stevenson, op.cit., p.146, Ramsbotham and Woodhouse, op.cit., p.203, Wheeler, op.cit., p.176.
[151] Wheeler, op.cit., p.172, and Stevenson, op.cit., pp.146-147.
[152] Ramsbotham and Woodhouse, op.cit., p.204, Wheeler, op.cit., p.173, and Stevenson, op.cit., pp.147-148.
[153] Ramsbotham and Woodhouse, op.cit., p.205.

Stevenson argues that the goals of Operation Restore Hope would almost certainly have resulted from Sahnoun's softer techniques.[154] We will never know, however, whether or not Sahnoun's efforts would work, since his work had been stopped by Ghali's interventionist trends. The only thing sure is that his diplomatic efforts during his duties were successful. Once again the role of the UN Secretary-General during the crisis is uncertain and dubious. As Clarke puts it, diplomacy and mediation are the best responses to failed-states situations.[155] But the UN Secretary-General had a totally different understanding for such situations. His task was to exhaust all peaceful means, but he preferred to test his dangerous skills, as printed in his "Agenda for Peace". His understanding of peace, however, was very ambiguous. How can we talk about the prudence of this intervention when the UN Secretary-General acted so ill advisedly? No doubt, his ardent desire for intervention should be consider as one of the main motives for intervention.[156] This explains why he interrupted Sahnoun's efforts and replaced him. The most provocative act of his, however, is that most of the main elements in the UN Secretary General's letters of 24 November 1992 to the Security Council, which triggered the decision in favour of forcible intervention, are seen as falsehoods.[157] Thus, an ambiguous UN Secretary-General disregarded one of the main criteria for humanitarian intervention, that war should be the last resort.[158]

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[154] Stevenson, op.cit., p.154.
[155] Clarke, op.cit., p.6.
[156] DiPrizio, op.cit., p.56.
[157] Ramsbotham and Woodhouse, op.cit., p.209.
[158] Nick Lewer and Oliver Ramsbotham, *"Something Must Be Done": Towards an Ethical Framework for Humanitarian Intervention in International Social Conflict*, Bradford, Department of Peace Studies, University of Bradford, 1993, pp.87-88.

When talking about prudence, the intervention in Somalia will always be vulnerable. The above mistakes and omissions are not the only ones. The illusive hunt for Aideed is a scandal. A few months before Sahnoun negotiated with him for the 500 UN troops, the security of relief supplies and the international airport of Mogadishu. Suddenly, the UN judged that his apprehension was vital to the stability of Somalia.[159] Yet, the hunt for Aideed signalled the UN failure. The initial humanitarian objectives turned on a hallucinogenic hunt for Aideed.[160] Thus, it could be said that the UN ran out of its intentions. Tom Farer, former legal consultant to the United Nations, has pointed out that the intervention reached its most extreme form in the demonisation of General Aideed in the second half of 1993.[161] Thus, the UN embodied the classic western technique of the demonisation of leaders when they want to justify their odd interventions.[162]

Last but not least, a thorough analysis of humanitarian intervention requires an estimation of proportionality. Was the military response to the Somali plight proportionate? Were the means used acceptable and effective? First of all, although UNITAF succeeded in its objectives, security and distribution of food and relief, it had no long term outcomes.[163] But the doctrine of humanitarian intervention aims to a long-term outcome, not a temporary solution. Another disproportionate activity of the intervention had been the killing of civilian people, including women and children. Wheeler wondered whether civilian casualties from UN-US attacks against Aideed's weapon sites, radio stations and control facilities were

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[159] Wheeler and Morris, op.cit., p.154.
[160] *Id.*
[161] Slim and Visman, op.cit., p.148.
[162] Michael Maccgwire, "Why Did We Bomb Belgrade?", *International Affairs*, vol.76, No.1, January 2000, p.1.
[163] Wheeler, op.cit., p.204, and Roberts, op.cit., p.441.

compatible with the *jus in bello* requirement of proportionality.[164] In addition, bombing a meeting of elders under the mistaken impression that Aideed was among them does not sound proportionate.[165] Lewer and Ramsbotham argue that one of the criteria for military humanitarian intervention is that non-combatants should be immune from direct attack.[166] Further, there were many violations of basic human rights by the UN forces, like the detention without charge of captured Somalis and reports of excessive force against Somali civilians, including torture.[167] Finally, intervention in Somalia did not meet the criteria of proportionality for another very obvious and unambiguous reason: the UN and US decided to intervene in Somalia only a year after Somalia sank into chaos and anarchy.[168] Had they authentically been interested for Somalia, they would have intervened earlier to prevent the plight of the Somali nation. Nevertheless, they were totally indifferent until media images shocked the public opinion in western countries. Thus, it is clear from the above that the UN response in Somalia was not proportionate. A proportionate response would be a peaceful approach to situations where failed states and the subsequent anarchy lead to a humanitarian crisis. Nevertheless, when intervention is the option, intervening states have to be very careful as to the means they use to attain their aims.

As regards to the matter of abuses in humanitarian intervention, everything is very clear from above. Teson's and Abiew's misinterpretations of resolution 794 have already been mentioned. Many other fervent exponents of the doctrine of

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[164] Wheeler, op.cit., p.196.
[165] Sahnoun, op.cit., p.98.
[166] Lewer and Ramsbotham, op.cit., p.88.
[167] Murphy, op.cit., pp.134-135.
[168] Ramsbotham and Woodhouse, op.cit., p.200, and Wheeler, op.cit., p.201-202.

humanitarian intervention will support that Somalia clearly illustrates the precedence of human rights over sovereignty.[169] Yet, such views are overoptimistic and far from reality and current international law. Article 2(4) and the principle of non-intervention is the basis of international relations. It is premature to claim that human rights are above sovereignty. No doubt, there is an active eagerness of the world community to protect human rights, but at the same time, an evident reluctance to accept a right of humanitarian intervention. The specific wording of Security Council resolutions, as well as the avoidance of states to explicitly claim a right to humanitarian intervention illustrates that sovereignty and the principle of non-intervention is still very significant for international relations. As regards to the matter of selectivity, the UN did not intervene in Somalia before 1992 because it had been preoccupied with Iraq and Bosnia. [170] It is stated above that states do not intervene unless they have to hunt their interests. Somalia did not draw their attention, until media took the matter on its hands. Thus, the assertion that states intervene militarily for the protection of human rights only when they seek to attain their interests is proved to be veracious. In Somalia, because of the lack of interests, the US and the UN would not have intervened if western governments did not get all the pressure from the public opinion.

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[169] Teson, op.cit., p.247, and Abiew, op.cit., p.171 and pp.174-175.
[170] Wheeler, op.cit., p.175, Patman, op.cit., p.7, and Makinda, op.cit., p.14 and 60.

CONCLUSION

To sum up, although many scholars viewed the UN intervention in Somalia as the best example of humanitarian intervention in the post Cold War era and a good illustration of the precedence of human rights over sovereignty, such arguments seem to be very dubious. The humiliating withdrawal of the US and other UN forces out of Somalia signalled the failure of the UN intervention in Somalia.[171] One of the illustrative oddities of the intervention in Somalia is the alternation of intervening forms: from traditional UN peacekeeping operation (UNOSOM I) to UN authorised humanitarian intervention (UNITAF) and then to a radical peacekeeping operation (UNOSOM II) with UN authorisation and expanded mandate for the use of force not only for the safety of the UN personnel, but for peace enforcement and nation-building as well. Such an ambivalent mandate conflates the traditional UN peacekeeping with UN enforcement action (although by the traditional definition peacekeeping operations contrast UN enforcement action).[172]

Boutros Ghali fought obsessively for the implementation of his experiment and as a result he is responsible for the failure in Somalia. It seems that his role as a UN Secretary-General was very ambiguous. During his office the UN authorised another two similar interventions: Haiti and Rwanda. Although the failure in Somalia curtailed the future of humanitarian intervention[173], his thrust for forcible responses led to similar UN authorisations for the use of force in similar situations.

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[171] Slim and Visman, op.cit., p.163, Stevenson, op.cit., p.138, Clarke and Herbst, op.cit., p.1 and p.4, Patman, op.cit., p.5, and Sahnoun, op.cit., p.98.
[172] The Blue Helmets, op.cit., p.4.
[173] Clarke and Herbst, op.cit., p.1.

Not surprisingly, during his successor's office, none similar intervention had been granted with a UN authorisation for the use of force. Unlike Somalia, in Kosovo the UN proved to be very cautious and Kofi Anan, the new UN Secretary-General, tried to seek diplomatic solutions and never sought after forcible response. The cut-down of UN forcible involvement in states' internal affairs since Anan took over strongly illustrates Ghali's bellicose role. It could be said that the international community is now released from his ineligibility and threat to international order.

As regards to the dubious precedents in Somalia, there are possibly two. The one might be that the UN can authorise a military intervention to protect human rights in failed states. The other would be a precedent for future peacekeeping operations in obtaining a mandate to use force for the enforcement of peace, as Ghali envisioned it in his "Agenda for Peace". However, the use of words "unique", "extraordinary" and "exceptional" in both of the resolutions limits the possibilities for a precedent. Further, the notion that the international community is now prepared to intervene in the domestic affairs of states and sovereignty can be overruled when massive human rights abuses exist is not valid. The right notion is that after the end of the Cold War western states became keener to the idea of effective protection of human rights. However, it would be difficult to argue that the international community accepted the doctrine of humanitarian intervention. Most countries, especially the developing ones, stick with the classical norm of non-intervention and do not recognise a right to humanitarian

intervention.[174] On the other hand, western states are more eager to protect human rights.[175] This contradiction is evident in resolution 794, where states determined that *"the magnitude of the human tragedy in Somalia... constitutes a threat to international peace and security"*, but also acknowledged that *"the unique character of the present situation in Somalia and mindful of its deteriorating, complex and extraordinary nature, requiring an immediate and exceptional response"*. The former represented innovative trends, while the later proclaims devotion to traditional understanding of state sovereignty. Thus, it would be premature to argue that human rights have taken precedence over state sovereignty.

As regards to the moral part of this intervention, the belated response of the world community indicates the disinterest of states to intervene in Somalia's domestic affairs. Only when the images of the media shocked the publics of Western states, these states decided to get involved in the crisis. Furthermore, it could be said peaceful avenues had not been exhausted. Sahnoun's diplomatic efforts had been replaced by Ghali's interventionist goals. What is more, although the UN granted authorisation for the use of force, the means of the intervening forces were against the humanitarian ends of this resolution. As a result, the killing of civilians in the heart of Mogadishu darkens the UN-authorised intervention. Thus, it seems that the case of Somalia is a bad precedent for humanitarian intervention. Yet, no one can underestimate the fact that the Council authorised the

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[174] Thomas G. Weiss, *Rekindling Hope in UN Humanitarian Intervention*, in Walter Clarke and Jeffrey Herbst (eds.), *Learning From Somalia: The Lessons of Armed Humanitarian Intervention*, Oxford, Westview Press, 1997, pp.209-210.

[175] Christine M. Chinkin, "Kosovo: A "Good" or "Bad" War?", *American Journal of International Law*, vol.93, No4, October 1999, p.846.

use of force for humanitarian purposes, even if the wording of the resolution has got some setbacks.

4.5 FRENCH INTERVENTION IN RWANDA (1994)

On 6 April 1994, the airplane carrying Rwanda's moderate Hutu President Juvenal Habyarimana was shot down. Although there is no evidence to support who was responsible for this incident, it seems that Hutu government military forces shot down the plane because they were suspicious for his efforts to reconcile with the Tutsis (Tutsis constitute 15% of Rwanda and are a minority in this state, while Hutus constitute the majority).[1] In the next day militant Hutus had killed Prime Minister Agathe Uwilingiymana. These incidents reflected the inter-ethnic tensions in Rwanda since Rwanda's decolonisation. They were used, however, by the Hutus to seize control of the government by claiming that Tutsi's rebels had killed the President.[2] Within hours the Hutu-dominated Rwandan military responded by slaughtering innocent Tutsis and moderate Hutus.[3] The world community witnessed one of the worst tragedies of the century. There was an obvious attempt by the Hutu-dominated army to destroy the Tutsi tribe. Many scholars, commentators, states, UN personnel etc. described the situation as genocide, given the fact that about a million people had been exterminated.[4]

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[1] Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World* Order, Philadelphia, Procedural Aspects of International Law Series, vol21, University of Pennsylvania Press, 1996, p.243. Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford, Oxford University Press, 2001, p.144. Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edition, New York, Transnational Publishers, 1997.

[2] Chesterman, op.cit., p.144, Murphy, op.cit., p.243.

[3] Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, Dordrecht-the Netherlands, 1999, p.192. Also Teson, op.cit., p.258.

[4] Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford, Oxford University Press, 2000, p.208. Robert C. DiPrizio, *Armed Humanitarians: US Interventions from Northern Iraq to Kosovo*, Baltimore, The John Hopkins University Press, 2002, p.64. Romeo A. Dallaire, *The End of Innocence, Rwanda* 1994, in Jonathan Moore (ed.), *Hard Choices, Moral Dilemmas in Humanitarian* Intervention, Lanham Md., Rowman & Littlefield,

UN INVOLVEMENT IN RWANDA

Immediately, the Security Council in a presidential statement expressed its concerns for the situation in Rwanda and strongly condemned all acts of violence.[5] In addition the Council condemned all breaches of international humanitarian laws and recalled that the killings of members of an ethnic group with the intention of destroying such a group in a whole or in part constitute a crime punishable under international law.[6] The UN Secretary-General reported the widespread killings in Rwanda derived from political and ethnic tension.[7] In a later report of his he reported that between 200,000 and 500,000 Rwandans, mostly Tutsis, had been killed and that *"there can be little doubt that it constitutes genocide"*.[8] What was the response of the Council to this situation? First of all, it has to be clarified that during the crisis there was already a peacekeeping operation in Rwanda, established by resolution 872.[9] Yet, inaction is the best word to describe the Council's practice. Actually, the Council was not only indifferent in the case of Rwanda, but it also decided to reduce the number of its peacekeepers from 2,500 to 270.[10] This reduction had been a response to the killing of Belgian troops and

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1998, p.77. Abiew, op.cit., p.189, Teson, op.cit., p.260, Chesterman, op.cit., p.144. Also various states condemned the genocide in Rwanda in the Council meetings: S/PV.3392 (1992), 22 June 1994 and the reports of the UN Secretary General: S/1994/640 and S/1994/728.

[5] S/PRST/1994/16, 7 April 1994.

[6] S/PRST/1994/21, 30 April 1994.

[7] S/1994/470, 20 April 1994, Special Report of the Secretary-General on the United Nations Assistance Mission for Rwanda.

[8] S/1994/640, 31 May 1994, 31 May 1994, Report of the Secretary-General on the situation in Rwanda.

[9] S/RES/872 (1993), 5 October 1993.

[10] S/RES/912 (1994), 21 April 1994.

Belgium's decision to withdraw its 440 troops.[11] But this reduction on peacekeeping forces is highly questionable, since the same resolution recognises the deterioration of the crisis, the heightened number of deaths and the increase in refugees to neighbouring countries.[12]

Indeed, the inactivity of the world community in Rwanda contrasts to the past practice in other preceding humanitarian crises: Iraq, Bosnia, Liberia and Somalia. The premises of the New World Order and the increased willingness of the world community to protect human rights were absent in the case of Rwanda. Although the UN had authorised intervention in Somalia for strictly humanitarian purposes, there was an evident reluctance not only to intervene militarily in Rwanda, but also to reinforce the remaining peacekeeping troops. This contradiction of state practice will be explored further down in this chapter. The main task here is to explore the Council's practice until it takes action and authorises the French "Operation Turquoise". The next response of the Council came after a report of the UN Secretary-General. There, the Secretary-General after reporting the results of the widespread violence and the number of nearly 2 million displaced people, asked for an expanded mandate of UNAMIR, which would support and provide safe conditions for displaced persons and other groups in Rwanda affected by the hostilities.[13] Further, this expanded mandate for UNAMIR II should be consisted of 5,500 troops and it should also provide security to humanitarian organisations.[14]

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[11] Chesterman, op.cit., p.145, Teson, op.cit., p.259, DiPrizio, op.cit., p.66.
[12] S/RES/912 (1994), 21 April 1994.
[13] S/1994/565, 13 May 1994, Report of the Secretary-General on the situation in Rwanda.
[14] *Id.*

In the coming days, the Council *"deeply disturbed by the magnitude of the human suffering caused by the conflict and concerned that the continuation of the situation in Rwanda constitutes a threat to peace and security in the region"* authorised an expansion of UNAMIR force up to 5,500 troops and imposed an arms embargo under Chapter VII of the UN Charter.[15] Moreover, the Council recalled *"the killing of members of an ethnic group with the intention of destroying such a group, in whole or in part, constitutes a crime punishable under international law"*.[16] Of course this wording is very close to the definition of genocide[17]. It is very clear that the Security Council adopted the proposals of the UN Secretary-General, as expressed in his report to the Council. With another report of his he suggested that UNAMIR has to immediately commence its additional tasks, as prescribed in his previous report and resolution 918.[18] The Council responded with the adoption of resolution 925, where *"noting with the gravest concern the reports indicating that acts of genocide have occurred in Rwanda and recalling in this context that genocide constitutes a crime punishable under international law"* it endorsed the immediate initiation of the deployment of UNAMIR II.[19]

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[15] S/RES/918 (1994), 17 May 1994.
[16] *Id.*
[17] Article II of the Convention on the Prevention and Punishment of the Crime of Genocide gives a broad definition of the term: "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.
[18] S/1994/640, 31 May 1994, Report of the Secretary-General on the situation in Rwanda.
[19] S/RES/925, 8 June 1994.

All the above resolutions have to do with the UN involvement prior the adoption of forcible measures by the Council. It could be argued that the response of the world community to the plight of the Rwandan people was lukewarm. Western states were reluctant to seek for a viable solution and it was evident that they were not eager to engage in military activities. Although the crisis in Rwanda had much more tragic impacts of the one in Somalia, it had been the choice of western states not to provide the UN with their forces. As a result, approximately half a million people was slaughtered in Rwanda before France's intervention. Hence, it could be said that the world community did not do anything to prevent this *"humanitarian catastrophe"*. There were no serious efforts either to end to a political solution, or to resort to military intervention. Let us now consider what changed this indifference of the world community and how France became keen to the idea of UN enforcement action.

SECURITY COUNCIL RESOLUTION 929

Suddenly, there was a shift to the French foreign policy. From its initial stance of non-intervention, France felt committed to halt genocide in Rwanda. On June 15, France's Foreign Minister Alain Juppe announced that France was prepared to intervene in Rwanda "along with its main European and African partners" to protect groups threatened with "extinction".[20] He also found that

[20] Murphy, op.cit., p.247 and Chesterman, op.cit., p.146.

France had a *"duty to intervene"* in Rwanda in order to halt the massacres.[21] The French Prime Minister held the same view.[22] Nevertheless, he set out five criteria for military intervention: the operation must have UN authorisation and the support of other countries; all operations should be limited to humanitarian actions; troops should remain near the Zairian border; they should not enter into the heart of Rwanda; the mission should be limited to a maximum of several weeks before handing over to a strengthened UNAMIR force.[23] France initially insisted that it would not intervene alone, but soon it became clear that none of its allies would join the intervention.[24] When it became clear that none of its allies would follow, France dropped this prerequisite.

On June 20, the UN Secretary-General reported the *"need for an urgent and coordinated response by the international community to the genocide which has engulfed this country"*.[25] He further expressed his view that *"UNAMIR may not be in position, for about three months, to fully undertake the tasks entrusted to it by those resolutions. Meanwhile, the situation in Rwanda has continued to deteriorate and the killing of innocent civilians has not been stopped... In these circumstances, the Security Council may wish to consider the offer of the Government of France to undertake, subject to Security Council authorisation, a French-commanded multinational operation in conjunction with other Member*

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[21] Nicholas J. Wheeler, *Saving Strangers:Humanitarian Intervention in International Society*, Oxford, Oxford University Press, 2000, p.231. Also Murphy, op.cit., p.248.
[22] Abiew, op.cit., p.194 and 200.
[23] Nicholas J. Wheeler and Justin Morris, *Humanitarian Intervention and State Practice at the end of the Cold War*, in Rick Fawn and Jeremy Larkins (eds.), *International Society After the Cold War: Anarchy and Order Reconsidered*, Basingstoke-England, McMillan, 1996, p.159.
[24] Murphy, op.cit., pp.248-9.
[25] S/1994/728, 20 June 1994, Letter dated 19 June 1994 from the Secretary-General to the President of the Security Council.

States, under Chapter VII of the Charter of the United Nations, to assure the security and protection of displaced persons and civilians at risk in Rwanda. Such an operation was one of the options envisaged in my letter of 29 April (S/1994/518) and a precedent exists for it in the United States-led operation Unified Task Force in Somalia (UNITAF), which was deployed in Somalia in December 1992".[26] It is obvious that the Secretary-General urged the Council to accept France's offer. It is very questionable though why he referred the precedent of Somalia. This is because the failure of the United Nations in Somalia cannot be the best precedent to support intervention in Rwanda.

Nevertheless, on June 22, the Security Council adopted resolution 929. In this resolution, the Council *"noting the offer by Member States to cooperate with the Secretary-General towards the fulfilment of the objectives of the United Nations in Rwanda, and stressing the strictly humanitarian character of this operation which shall be conducted in an impartial and neutral fashion, and shall not constitute an imposition force between the parties... Recognising that the current situation in Rwanda constitutes a unique case which demands an urgent response by the international community... Determining that the magnitude of the humanitarian crisis in Rwanda constitutes a threat to peace and security in the region... welcomes the Secretary-General's letter dated 19 June 1994 and agrees that a multinational operation may be set up for humanitarian purposes in Rwanda until UNAMIR is brought up to the necessary strength".*[27]

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[26] *Id.*
[27] S/RES/929 (1994), 22 June 1994.

And acting under Chapter VII of the United Nations, the Security Council authorised *"the Member States cooperating with the Secretary-General to conduct the operation referred to in paragraph 2 above, using all necessary means to achieve the humanitarian objectives set out in paragraphs 2(a) and 4(b) of resolution 925"*. It further decided that *"the mission of Member States cooperating with the Secretary-General will be limited to a period of two months following the adoption of the present resolution, unless the Secretary-General determines at an earlier date that the expanded UNAMIR is able to carry its mandate"*.[28] It could be said that this resolution reflects the proposals of the UN Secretary-General, as set in his letter to the Council. However, the main challenge for this chapter is resolution 929 and the precedents it has set for an emerging rule of humanitarian intervention.

First of all, it is the second time in UN history that the UN has authorised intervention for strictly humanitarian purposes. In Somalia, the magnitude of the human tragedy constituted a threat to peace and security and this was the reasoning for the Council to authorise intervention.[29] In Rwanda, the magnitude of the humanitarian crisis constituted threat to international peace and security. Thus, it is the second time that the Council finds that humanitarian crises constitute a threat to peace and security and authorises military action. No doubt, Rwanda seals and verifies the practice of the UN authorised humanitarian intervention. The changes in the world community after the end of the cold war are evident. The UN intervenes in humanitarian crises under its Chapter VII enforcement authorities.

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[28] *Id.*
[29] S/RES/794 (1992), 3 December 1992.

There is no doubt that the UN intervened for strictly humanitarian purposes, as resolution 929 explains that *"a multinational operation may be set up for humanitarian purposes"*.[30] The fact that China did not block the adoption of a second resolution authorising the use of force for humanitarian purposes (intervention in the internal affairs of states) is really questionable.

And although in Somalia there was the recognition of the *"unique"* character of the present situation and an *"extraordinary"* nature that required an *"exceptional"* response, in Rwanda the Council only found a *"unique"* case that demanded an urgent response.[31] It seems that the Security Council did not pay much attention in the case of Rwanda for setting dubious precedents. In Somalia there were three words put in resolution 740 as obstacles for future interventions of a similar character. On the other hand, there was only the word *"unique"* in resolution 929. Did this represent the fact that states become more familiar with the idea of the UN intervening in the internal affairs of states when massive human suffering occurs? It seems that many states are not ready to accept intervention in the internal affairs of states. The word *"unique"* is strong enough to create caveats for precedents for the creation of an emerging norm. Yet, it could be argued that states paid less attention in the case of Rwanda, in contrast to Somalia. But the fact is that there are now two *"unique"* cases in a two years time dictates that these cases are not probably *"unique"*. This iteration of the practice of UN humanitarian intervention does not verify the exception, but normative changes in the world

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[30] S/RES/929 (1994), 22 June 1994.
[31] S/RES/794 (1992), 3 December 1992.

community. And this change does not support unauthorised humanitarian interventions, but UN authorised humanitarian intervention.

To this extent, this thesis tried to detect the possible signs for the creation of the emerging norm of humanitarian intervention. Nevertheless, there are some failures and omissions that create setbacks for the creation of such a norm. The argument that political failures and omissions create setbacks for the creation of an emerging norm of humanitarian intervention is pivotal in this thesis. The case of Rwanda is very significant for the support of the above argument. Disinterest alone could not explain the western indifference in Rwanda. The three traditional "humanitarian" allies, US, UK and France, had been reluctant to intervene in Rwanda to halt genocide. What happened to their claims on a duty to intervene? What caused this evident shift in their foreign policy? First and foremost, although the human tragedy was much worse then in Somalia, the world community remained inactive, because of the UN failure in Somalia.[32] And this inactivity has not to do only with military action, but with the peacekeeping operation in Rwanda as well. The "armed humanitarians" of the 90's were bond by the *"Somali Syndrome"*. They would not risk the lives of their soldiers in an African state, far away from their countries, where they have no vital interests.

The paradigm of the US is very convincing and approves the above argument. Bill Clinton did not want to engage in military operation in Rwanda because of the failure in Somalia that turned the US executive, congressional, military and public opinion against intervention.[33] As a result, the Clinton

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[32] Wheeler, op.cit., p.224.
[33] DiPrizio, op.cit., p.71 and Chesterman, op.cit., p.260.

administration had adopted the Presidential Decision Directive 25, which set the guidelines for determining when the United States would support a UN peacekeeping operation, when it would participate in an operation and when it would contribute combat troops.[34] These conditions required a response to a threat to international peace and security, the existence of US interests and an international consensus.[35] As Ramsbotham and Woodhouse pointed out, Presidential Decision 25 is often interpreted as a brake on forcible humanitarian intervention.[36] Indeed, this decision curtailed the future of US contribution to peacekeeping operations and humanitarian interventions.[37] Given the fact that President Clinton was very keen to the idea of an increased role of the UN in such activities,[38] the failure in Somalia made this enormous shift to his foreign policy.

The impacts of the failure in Somalia had been also reflected in the Security Council meeting regarding the adoption of resolution 929. In this meeting, the five abstaining states explicitly explained their position on the failure of Somalia. Brazil, for instance, stressed, *"we are also keenly aware of the difficulty of maintaining simultaneous but separate peace-keeping and peace-enforcement operations in the same country"*.[39] Of course, this difficulty was evidenced in Somalia with the parallel course of UNOSOM and UNITAF. Thus Brazil implied the failure in Somalia. New Zealand, however, referred expressly to Somalia: *Somalia has shown us that even where we have the best of intentions, if we do not*

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[34] Ibid., p.73.
[35] *Id.*
[36] Oliver Ramsbotham and Tom Woodhouse, *Humanitarian Intervention in Contemporary Conflict: A Reconceptualisation*, Cambridge, Polity Press, 1996, p.141.
[37] DiPrizio, op.cit., p.73.
[38] Ibid., p.72.
[39] S/PV.3392, 22 June 1994.

employ the right means, tragedy can be the result. Trying to run two separate operations in parallel with different command arrangements does not work and, in the long run, those whom we sent out to save can be those who suffer".[40] Thus, there is little doubt that intervention in Somalia was a black spot for humanitarian intervention.

Another point that implies Somalia is the reference of impartiality. Both the UN Secretary-General and the Security Council spoke of a strictly humanitarian operation, *"which shall be conducted in an impartial and neutral fashion, and shall not constitute an interposition force between the parties".*[41] This reflects what happened Somalia, where the initial humanitarian objectives turned on a hallucinogenic hunt for General Aideed.[42] As Farer noted, *"one of the main criticisms of the UN operation in Somalia was that it had breached its commitment to impartiality and thereby precipitated the conflict".*[43] From this reference of the Secretary-General and the Council it is clear that they try to avoid past mistakes that led to failure. Another explanation for this insistence on the impartial character of this operation had been the concern of the world community that France would intervene in support of the Hutus, given its military support in the past. But this existence of interests will be explored further down in this chapter. Last but not least, this resolution was the least supported resolution that authorised the use of force for humanitarian purposes. Five countries abstained from the vote and the

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[40] *Id.*
[41] S/1994/728, 20 June 1994 and S/RES/929 (1994), 22 June 1994.
[42] Wheeler and Morris, op.cit., p.154.
[43] Tom J. Farer, "Intervention in Unnatural Humanitarian Emergencies: Lessons of the First Phase", *Human Rights Quarterly*, vol.18, p.5.

remaining ten voted in favour of resolution 929. This fact shows the lack of support for UN intervention on humanitarian purposes in Rwanda.[44]

All the impacts of the UN failure in Somalia had been exposed so far. Somalia decelerated the dynamics of the potential emerging norm. Overall, it could be said that Rwanda reflects the failures of the past practice of humanitarian intervention. It is a big omission that the world community did not intervene to halt genocide. The crisis in Rwanda was much worse than the ones in Iraq, Liberia, Bosnia and Somalia. However, the world community did not respond promptly to halt genocide. Furthermore, there was an evident reluctance and lack of support for UN humanitarian intervention in Rwanda. This practice weakens the credibility of humanitarian intervention. This is because humanitarian intervention remains vulnerable after the genocide in Rwanda and the inactivity of the world community. In addition, inaction in Rwanda recalled the two major problems connected to humanitarian intervention: interests and selectivity. States intervened in situations with lesser human rights violations and loss of lives because of their interests, but they disregarded Rwanda. Late intervention was not adequate to halt the tragedy.

As regards to the impacts of the French intervention, it could be said that the safe areas created in south-western Rwanda by Operation Turquoise saved many lives.[45] Murphy thinks that part of the success of the French operation was its recognition of the importance of using military force to achieve limited goals while at the same time acting as impartially as possible with respect to the local

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[44] Chesterman, op.cit., p.147.
[45] *Id.*

warring factions.[46] However, there are many signs that avert the above assertion. The French intervention was not by all means impartial, but this will be examined with in the political part. As Wheeler noted, *"Operation Turquoise had only temporarily saved lives... with perhaps as few as 13,000 rescued against over a million killed during the previous three months, Operation Turquoise represented a dismal response on the part of the society of states to the Rwandan genocide.*[47] Indeed, the late French intervention was a hypocritical response to the tragedy of Rwanda. The French troops intervened only after the massacres and at the time that Tutsi rebels were gaining control of the country. Thus, the next task is to examine why France changed its initial stance and decided to intervene after the massacres.

POLITICAL MOTIVES AGAINST HUMANITARIAN OBJECTIVES

This part will examine the existence of two problems related to humanitarian intervention in Rwanda. First of all, there is the problem of selectivity. The world community was eager to respond to crises such as Iraq and Bosnia, but was reluctant to intervene in Rwanda, where genocide was taking place. This fact weakens the practice of humanitarian intervention, as well as the prospects for the creation of a norm, because this practice of states will keep on exciting the suspiciousness of states against selfish interests and the erosion of the principle of non-intervention. Rwanda is a clear instance that states did not feel committed to intervene, but at the same states intervened in less critical

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[46] Murphy, op.cit., p.259.
[47] Wheeler, op.cit., p.237.

humanitarian crises. Thus, Rwanda reaffirms that states intervene to protect human rights only when vital interests are at stake.

And this is the second problem of humanitarian intervention. Many states invoke the protection of human rights when they pursue their selfish motives and the French intervention verifies this assertion. Teson is the only person who supports that the French intervention was not motivated by interests, as evidenced by its prompt withdrawal.[48] Yet, this is another insubstantial argument of Teson's since the Security Council authorisation spoke of a limited in time operation of two months.[49] On the other hand, Wheeler and Morris are very censorious of the 1994 French intervention in Rwanda. They asserted, *"there is evidence to suggest that Paris was also covertly pursuing national self-interest behind the figleaf of humanitarianism".*[50] This is because France did not act to stop the massacres, but voted along with the other Security Council members to cut back UNAMIR.[51] In addition, France was fearful that an RPF (Tutsi rebels) victory in French-speaking Rwanda would result in the country coming under the influence of Anglophones.[52] This is why France intervened at that time in the south-western part of Rwanda. Because Hutu forces loyal to the ousted government were strongest.[53] Maybe this was the fear of the world community that asked for an impartial intervention by the French forces. They were suspicious that France would intervene in support of the Hutu-forces to suppress the rebellion.

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[48] Teson, op.cit., p.262.
[49] S/RES/929 (1994), 22 June 1994.
[50] Wheeler and Morris, op.cit., p.158.
[51] Wheeler, op.cit., p.232, Dallaire, op.cit., p.81 and Wheeler and Morris, op.cit., p.159.
[52] Wheeler and Morris, op.cit., pp.158-159 and Wheeler, op.cit., p.233.
[53] Wheeler and Morris, op.cit., p.159 and Murphy, op.cit., p.248.

Accordingly, Nicholas Wheeler argued that there are two spots for the "safe humanitarian zone" created by France in the south-western part of Rwanda. Firstly, although resolution 929 spoke of impartiality and not "an interposition" force, in declaring the zone the French Government and its commanders on the ground made clear that the RPF would not be allowed to enter the zone.[54] Secondly, the zone provided a sanctuary for the retreating Rwandan armed forces and militias that had been responsible for the genocide.[55] Thus, it is obvious that France was not impartial by setting these safe humanitarian zones and it did not act for humanitarian purposes but for primary selfish motives. This disqualifies its intervention from humanitarian. Indeed, the French intervention saved the ones that committed the genocide from the Tutsi-led retribution.[56] However, the French "humanitarianism" was not in favour of the victims, but of the victimisers. France went in Rwanda to save the people responsible for genocide. This intervention can by no means be a humanitarian one.

EVALUATION OF THE FRENCH INTERVETION IN RWANDA

It could be argued that Rwanda, as a case of mass human suffering and genocide, reflected the failures of the past. Somalia had damaged severely the practice of humanitarian intervention. As a result, almost a million people died and the world community did not do anything about these people. As regards the French intervention, it could be argued that it further curtailed the prospects of

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[54] Wheeler, op.cit., p.234.
[55] *Id.*
[56] Chesterman, op.cit., p.147 and Wheeler, op.cit., p.234.

future humanitarian intervention. Wheeler argued, *"if the legitimacy of humanitarian intervention is defined in terms of the primacy of humanitarian motives, then the French intervention fails the test"*[57] and in his article with Morris they claim that *"this is a clear case of a state abusing the concept of humanitarian intervention"*.[58] They both are very critical of Operation Turquoise. On the other hand, Abiew thinks that *"Rwanda demonstrates the tenuous commitment of states to humanitarian intervention"*.

Indeed, Rwanda proved that there are two major problems of humanitarian intervention. Firstly, Rwanda reaffirmed that states intervene selectively when vital interest are at stake. Secondly, this intervention proved that humanitarian intervention is vulnerable to political omissions and failures. The two above problems are obstacles to the emergence of a norm favouring intervention on humanitarian purposes. It is not accidental that Teson is not at all enthusiastic with France's intervention in Rwanda. Although in Somalia he supported that *"human suffering has taken precedence over state sovereignty"*[59], in the case of Rwanda he did not repeat such an argument. He only described Operation Turquoise as a case of *"legitimate humanitarian intervention"*.[60] He did not try, however, to support this argument of his, because he knew the difficulties of such a task. Therefore, he resorted to a brief and groundless conclusion.

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[57] Wheeler, op.cit., p.234.
[58] Wheeler and Morris, op.cit., p.160.
[59] Teson, op.cit., p.247.
[60] Ibid., p.262.

4.6 US-LED INTERVENTION IN HAITI (1994)

The Duvalier family ruled Haiti dictatorially for decades during the twentieth century.[1] In December 1990 Jean Bertrand Aristide became President of Haiti with 67% of the popular vote.[2] This has been the first free and fair democratic election in Haiti, internationally monitored and supervised.[3] In September 1991, few months after the elections took place, the Haitian army led by General Raoul Cedras seized power and expelled Aristide.[4] The international response was belated. The Permanent Council of the Organisation of American States has condemned the coup in an emergency session and it demanded the restoration of democratic rule.[5] Moreover, the OAS has called for the diplomatic isolation of Haiti and imposed economic sanctions.[6] Although the OAS had called

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[1] Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*, Philadelphia, University of Pennsylvania Press, 1996, p.260. Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, Dordrecht, Kluwer Law International, 1999, p213.

[2] Michael Byers and Simon Chesterman, *"You, the People": Pro-Democratic Intervention in International Law*, in Gregory H. Fox and Brad R. Roth (eds.), *Democratic Governance and International Law*, Cambridge, University Press, 2000, p.284. Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edition, New York, Transnational Publishers, 1997, p.249. David Whippman, *Pro-Democratic Intervention by Invitation*, in Gregory H. Fox and Brad R. Roth (eds.), *Democratic Governance and International Law*, Cambridge, University Press, 2000, p.301. Also Reisman, op.cit., p.247, Abiew, op.cit., p.213 and Murphy, op.cit., p.260.

[3] Robert C. DiPrizio, *Armed Humanitarians, US Interventions from Northern Iraq to Kosovo*, Baltimore, The John Hopkins University Press, 2002, p.87. Lois E. Fielding, "Taking the Next Step in the Development of New Human Rights: the Emerging Right of Humanitarian Assistance to Promote Democracy", *Duke Journal of International Law*, vol.5, Spring 1995, p.358. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, in Gregory H. Fox and Brad R. Roth (eds.), *Democratic Governance and International Law*, Cambridge, University Press, 2000, p.247. Also Abiew, op.cit., p.213, Whippman, op.cit., p.301and Murphy, op.cit., p.260.

[4] Tom J. Farer, "Collectively Defending Democracy in a World of Sovereign States: The Western Hemisphere's Prospect", *Human Rights Quarterly*, vol.15, 1993, p.736. Also Reisman, op.cit., 247, Whippman, op.cit., p.301, Byers and Chesterman, op.cit., p.285, Abiew, op.cit., pp.212-213, Teson, op.cit., p.249, DiPrizio, op.cit., p.87, DiPrizio, op.cit., p.90 and Murphy, op.cit., p.260.

[5] Farer, op.cit., p.736 and DiPrizio, op.cit., p.91.

[6] Fielding, op.cit., p.358, Farer, op.cit., p.736, Murphy, op.cit., p.260, Michael Byers and Chesterman, op.cit., p.284, DiPrizio, op.cit., p.87, Teson, op.cit., p.250, DiPrizio, op.cit., p.91 and Abiew, op.cit., p.214.

the UN to impose sanctions to Haiti, the Council did not take any action, because China and other UN members saw the coup as an internal matter, which did not constitute a threat to international peace and security.[7] This fact reflected the fears of China and other states regarding the increasing Council's involvement in the domestic affairs of states.[8] Nevertheless, the UN General Assembly had condemned *"the illegal replacement of the constitutional President of Haiti and the use of violence, military coercion and the violation of human rights"* in Haiti.[9]

The first Security Council involvement in the crisis had been witnessed in 16 June, almost two years after the overthrown of the democratically elected authorities. Then, the Council determined that *"in these unique and exceptional circumstances, the continuation of this situation threatens international peace and security in the region"* and under Chapter VII of the UN Charter it had imposed sanctions.[10] In other words, the situation that threatened international peace and security was the overthrow of the Haitian government by the military junta and the following public unrest and violations of human rights. There are two further remarkable points in this resolution (841). First, the Council repeated the wording of resolution 794 on Somalia. It made reference to the *unique* and *exceptional* circumstances, as well as the warranting *extraordinary measures* by the Security Council in support of the efforts undertaken within the framework of the Organisation of American States.[11] No doubt, the use of this wording reflects the

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[7] Teson, op.cit., pp.249-250 and Abiew, op.cit., pp.214-215.
[8] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford, Oxford University Press, 2001, p.152.
[9] UN GA/Res. 46/7, 11 October 1991.
[10] S/RES/841 (1993), 16 June 1993.
[11] *Id.*

fears of China and other states not to create precedents for future Security Council involvement in essentially domestic crises. Secondly, resolution 841 on Haiti repeatedly refers to the OAS and its efforts to solve the Haitian problem. In the first paragraph the Council *"affirms that the solution of the crisis in Haiti should take into account the above-mentioned resolutions of the Organisation of American States and of the General Assembly of the United Nations"*.[12] It could be argued that this fact reflects an era of closer cooperation between the UN and regional organisations after the end of the Cold War.

The embargo imposed by the UN seems to have forced the military junta to accept the Governors Island Agreement.[13] Aristide and Cedras signed this agreement on 3 July 1993 in New York.[14] It provided for Aristide's return and the restoration of democracy, as well as amnesty for the coup leaders and the deployment of a UN peacekeeping force.[15] After reaching the agreement, the Council, in a new resolution, had called for the suspension of measures adopted under resolution 841.[16] This lift of sanctions was of a temporary nature. The agreement collapsed when violence against Aristide's supporters resumed in September and October of the same year.[17] After the escalation of politically motivated violence in Haiti, the Council authorised *"the establishment and*

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[12] *Id.*

[13] Byers and Chesterman, op.cit., p.285.

[14] Murphy, op.cit., p.262, DiPrizio, op.cit., p.91 and Abiew, op.cit., p.216.

[15] Morris Morley and Chris McGillion, "Disobedient Generals and the Politics of Redemocratisation: The Clinton Administration and Haiti", *Political Science Quarterly"*, vol.112, No3, Autumn 1997, p.368. Also Byers and Chesterman, op.cit., p.285, DiPrizio, op.cit., p.91, Murphy, op.cit., pp.262-263, Teson, op.cit., p.251, Abiew, op.cit., p.216 and Chesterman, op.cit., p.154.

[16] S/RES/861 (1993), 27 August 1993.

[17] Byers and Chesterman, op.cit., pp.285-286, Teson, op.cit., p.251, Murphy, op.cit., p.263, DiPrizio, op.cit., p.91 and Morley and McGillion, op.cit., p.369.

immediate dispatch of the United Nations Mission in Haiti (UNMIH) for a period of six months".[18] In a later resolution (873), the Council decided to terminate the suspension of measures against Haiti and re-imposed the embargo.[19]

In addition, resolution 875 had called upon Member States to *"halt inward maritime shipping as necessary in order to inspect and verify their cargoes and destinations".*[20] This naval blockade was obviously authorized for guaranteeing the effective imposition of sanctions. Similarly, resolution 917, decided that *"all States shall without delay deny permission to any aircraft to take off from, land in, or overfly their territory if it is destined to land in, or has taken of from the territory of Haiti, with the exception of regularly scheduled commercial passenger flights, unless the particular flight has been approved, for humanitarian purposes or for other purposes consistent with the present resolution".*[21] What is more, all officers of the Haitian military and police, as well as their family and supporters were barred from travelling outside Haiti.[22] Finally, the Council had urged all States to freeze without delay the funds and financial resources of the above named people.[23]

Most resolutions have to do with the imposition of sanctions against Haiti and its military and police forces. Actually, all sanctions failed to remove the military junta and to restore democratic order. Although in the first place it seemed that sanctions urged the coup to sign the Governors Island Agreement, in the

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[18] S/RES/867 (1993), 23 September 1993.
[19] S/RES/873 (1993), 13 October 1993.
[20] S/RES/875 (1993), 16 October 1993.
[21] S/RES/917 (1993), 6 May 1994.
[22] *Id.*
[23] *Id.*

course it became obvious that the junta did not actually wish to implement the terms of this agreement. It could be argued that the Cedras regime preferred to make some manoeuvres in order to save time and to shape a cooperative profile. Yet, its reluctance to restore democratic order became evident immediately after the lift of sanctions by the UN. Several months of economic sanctions and diplomatic pressure had failed to remove the *de facto* government.[24] This reflects the incapacity of economic sanctions alone to squeeze a *de facto* government.[25] In fact, sanctions managed to damage severely the Haitian economy, already the poorest in the hemisphere, while creating economic opportunities for the ruling military elite that focused on its contraband narco-traffic business.[26] The actual victim of these sanctions had been the Haitian citizen that faced malnutrition, deteriorating health care and hunger.[27] According to a study, about 1000 more children were dying monthly with the sanctions, and the sanctions helped create 100,000 new cases of moderate or severe malnutrition.[28]

Given the ineffectiveness of sanctions, on 20 May 1994, President Clinton stated that he was considering military intervention in Haiti.[29] The US President had listed six reasons for why it would be in the US interest to intervene: *(1) Haiti was in our backyard; (2) Haiti had been used as a staging area for drug shipments bound for the United States; (3) Haiti was the only Western Hemisphere country where military leaders had seized power from an elected leader; (4) several*

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[24] Monroe Leigh, "The Political Consequences of Economic Embargoes", *American Journal of International Law*, vol.89, No1, January 1995, p.74. Also Whippman, op.cit., p.301.
[25] Farer, op.cit., p.737.
[26] Reisman, op.cit., p.248 and Morley and McGillion, op.cit., p.371.
[27] Murphy, op.cit., p.265, Leigh, op.cit., p.74 and Reisman, op.cit., p.248.
[28] Murphy, op.cit., p.265.
[29] Ibid., p.266.

thousand US nationals live in Haiti; (5) one million Haitian-Americans live in the United States; and (6) continued military rule could result in massive refugee flows to the United States.[30] It could be argued that the actual threat for the United States had been the influx of political refugees from Haiti.[31] Yet, the United States exercised the tactic of forced repatriation of refugees, a program that, according to Byers and Chesterman, *"was as aggressive as it was illegal"*.[32] Among the reasons that urged the Clinton administration to intervene had been the deteriorating political and humanitarian situation in Haiti and domestic pressure for more effective action.[33] The restoration of democracy, however, had also become an objective of the US foreign policy on Haiti.[34]

After the Haitian military authorities ordered the joint UN-OAS mission monitoring human rights in Haiti to leave within two days, the Clinton administration began seeking explicit UN authorization for military intervention in Haiti.[35] Finally, on July 31 the Security Council adopted resolution 940. The council had reaffirmed *"that the goal of the international community remains the restoration of democracy in Haiti and the prompt return of the legitimately elected President, Jean-Bertrand Aristide"*.[36] It further determined that *"the situation in Haiti continues to be a threat to peace and security in the region"*.[37] However, the most important part of this resolution is the authorization for the use of force to restore democracy: *"Acting under Chapter VII of the Charter of the United*

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[30] Ibid., pp.266-267.
[31] DiPrizio, op.cit., p.93.
[32] Byers and Chesterman, op.cit., p.285, Murphy, op.cit., pp.267-268 and DiPrizio, op.cit., p.92.
[33] DiPrizio, op.cit., p.93 and Murphy, op.cit., p.267.
[34] Murphy, op.cit., p.267 and DiPrizio, op.cit., p.94.
[35] Murphy, op.cit., p.268.
[36] S/RES/940 (1994), 31 July 1994.
[37] *Id.*

Nations, authorises Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment that will permit the implementation of the Governors Island Agreement".[38]

This is the first time that the Security Council authorised the use of force in order to restore the democratic order in a country.[39] Murphy noted that although it seems from this resolution that the UN was driven by a concern of human rights atrocities and by a concern for refugee flows, the actual goal had been the restoration of democracy.[40] Fielding noted that a right to assist democratic restoration is only the core of a much broader right of humanitarian assistance.[41] In resolution 940 the Council had been *"gravely concerned by the significant deterioration of the humanitarian situation in Haiti, in particular the continuing escalation by the de facto regime of systematic violations of civil liberties, the desperate plight of Haitian refugees, and the recent expulsion of the staff of International Civilian Mission (MICIVIH)".*[42] Although the international community had been concerned of the humanitarian crisis in Haiti, it reaffirmed that its goal remains the restoration of democracy.

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[38] *Id.*
[39] Reisman, op.cit., p.248.
[40] Murphy, op.cit., p.276.
[41] Fielding, op.cit., p.330.
[42] S/Res/940 (1994), 31 July 1994.

Teson, as well as other imaginative authors, has noted that the case of Haiti is *"the most important precedent supporting the legitimacy both of an international principle of democratic rule and of collective humanitarian intervention"*.[43] Once again, Teson's argument constitutes a misinterpretation of facts. First of all, it could be argued that the Council did act to restore democratic order in Haiti.[44] The United States had called the military blockade of Haiti "Operation Support Democracy".[45] But the fact that the Council authorised the use of force has nothing to do with any precedent for the legitimacy of unilateral and unauthorised pro-democratic and humanitarian intervention. The only precedent from this resolution has to do with Security Council authorised pro-democratic and humanitarian interventions. This is because all resolutions made reference to the situation in Haiti, implying the humanitarian crisis, the refugee flows and the overthrow of the democratically elected government. Further, the Council had used the specific wording, well known from resolution 794 on Somalia. In resolution 940 on Haiti, the Council recognised "the *unique* character of the present situation in Haiti and its deteriorating, *complex* and *extraordinary* nature, requiring an *exceptional* response".[46] It is obvious that, once again, this wording had been used in order to avoid a prospective Chinese veto. China is the strongest advocate of Article 2(7) in the Security Council and would not allow such a precedent for future Council practice.

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[43] Teson, op.cit., p.249, Abiew, op.cit., p.217.
[44] Chesterman, op.cit., pp.151-152.
[45] Murphy, op.cit., p.276 and DiPrizio, op.cit., p.85 and Glennon, op.cit., p.71.
[46] S/RES/940 (1994), 31 July 1994.

Nevertheless, Teson argues that the existence now of two "unique" situations proves that at least Somalia was not strictly a unique case, but an extraordinary one.[47] It could be argued that his argument is very strong because there are not only two, but three "unique" situations: Somalia, Rwanda and Haiti. In Somalia the world community faced a failed state with major humanitarian problems, in Rwanda genocide against an ethnic group and in Haiti the unconstitutional overthrown of a democratically elected government. There is no connecting link between these three paradigms because they are two totally different situations. In Somalia there was no central authority to negotiate, while in Haiti there was the military coup. In fact, all three cases are "unique" in nature, but, as regards to their ultimate goal, they are quite similar: improvement to the humanitarian situation.

Another claim of his suggests that in resolution 940 the Council did not determine that the situation in Haiti constituted a threat to international peace and security, while at the same time asserting that it was acting under Chapter VII.[48] This estimate of his, however, outwits any limits of imagination and misinterpretation. This is because the Council determined that *"the situation in Haiti continues to constitute a threat to peace and security in the region"*.[49] What is more, the Council had determined that the crisis in Haiti constitutes a threat to peace and security from the previous resolutions.[50] Teson's imprecise points render his views totally unreliable. He invented this false dilemma in order to claim, *"the*

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[47] Teson, op.cit., p.253.
[48] *Id.*
[49] S/RES/940 (1994), 31 July 1994.
[50] S/RES/841 (1993), 16 June 1993, S/RES/873 (1993), 13 October 1993, S/RES/875 (1993), 16 October 1993, S/RES/917 (1994), 6 May 1994, S/RES/933 (1994), 30 June 1994.

practice of states has accepted serious violations of human rights as grounds for action by the Security Council under Chapter VII".[51] However, it is clear that resolution 940 found a threat to peace and security. If Teson would like to introduce a rational and valid argument, he could have said that this is clearly an atypical conception of a threat to peace and security.[52] This is because in Haiti there were no massive flows of refugees and the impacts humanitarian situation were not grave to cause a threat to international peace and security. In addition, the unconstitutional overthrow of the Haitian government could not itself cause a threat to international peace. A more notable point is the fact that the Council did not refer to international peace and security, but to the peace and security in the region.[53] This is a field where Teson and other imaginative authors could offer various interpretations.

Thus, some scholars could point out that there was no actual threat to peace and security.[54] That would be a better case for Teson. After the overthrown of the legitimately elected authorities there had been a humanitarian crisis in Haiti, as well as a slight refugee problem. Hence, it could be argued that the transboundary effects of the refugees did constitute a threat to peace and security in the region. However, compared to other similar conflicts (Liberia, Iraq, Somalia, Sudan and Rwanda) the number of refugees from Haiti had been very small.[55] In addition, the forced repatriation of refugees by the United States would not allow

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[51] Teson, op.cit., p.253.
[52] Chesterman, op.cit., p.153 and Byers and Chesterman, op.cit., p.284.
[53] *Id.*
[54] Glennon, op.cit., p.72 and Byers and Chesterman, op.cit., p.284.
[55] Chesterman, op.cit., p.153.

making such an interpretation.[56] Teson suggested that such a "refugee problem" does not justify intervention because the United States receives a huge flux of illegal migrants from Mexico every year, but the US takes no action, even non-forcible, against Mexico.[57] This is a really persuasive argument that shows how states selectively detect problems, when it is in their interest to intervene. The refugees from Mexico do not pose any threat to the US society, but Haitian refugees constitute a threat to peace and security in the region.

Nevertheless, the Council had been gravely concerned by the systematic violations of civil liberties and by the plight of refugees and this determination is sufficient in determining a threat to the peace. Reisman argues that in previous resolutions the Council found massive and systematic human rights violations that constituted a threat to the peace, and that in making this determination, the Council was hardly departing from precedent.[58] Indeed, previous Security Council resolutions led to the adoption of resolution 940. However, it could be argued that Reisman overestimated the findings of the resolutions regarding the situation in Haiti. All resolutions make reference to the situation that threatens international peace and security, but do not explicitly state that "systematic violations of human rights" constitute a threat to international peace and security. This situation can be caused by the refugee flows, the overthrow of the Haitian government, or the humanitarian crisis. Yet, all resolutions are unclear as to what threatens

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[56] Murphy, op.cit., p.267 and Byers and Chesterman, op.cit., p.285.
[57] Teson, op.cit., p.255.
[58] W. Michael Reisman, "Haiti and the Validity of International Action", *American Journal of International Law*, vol.89, No1, January 1995, p.83.

international peace, but they all stress the unique and exceptional circumstances of this situation.

The overall assessment of this intervention, however, suggests that there was no actual threat to peace, nor were there any massive human rights violations. No one can claim that there was ethnic cleansing, genocide, or massacre. The refugee problem was not of a considerable dimension to challenge and justify intervention. On the other hand, it seems that the Council acted with the purpose of protecting and restoring the democratic order in Haiti. The OAS and its efforts to promote and strengthen democracy had affected the Council. In all resolutions regarding the Haitian crisis, the Council recalls the efforts and actions taken by the OAS. By intervening in Haiti, the UN has manifested its own interest in strengthening and protecting democracy. Furthermore, the fact that the Council authorised the use of force after Aristide signalled support for a surgical intervention to remove the illegal regime[59] supports the claim that resolution 940 authorised a pro-democratic intervention. Although China has added the "exceptional" vocabulary to resolution 940, it seems that the Council had acted in order to restore democracy in Haiti and not for a threat to peace that did not actually exist. From this specific wording, it is obvious that the Council was cautious not to create a precedent for future similar interventions. Yet, it is difficult to assert such an argument, after the precedence of another two "unique" cases.

According to some scholars, resolution 940 is not an important precedent supporting the legitimacy both of an international principle of democratic rule and

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[59] Chesterman, op.cit., pp.154-155 and Murphy, op.cit., p.276.

of collective humanitarian intervention.[60] States negotiate before the Council with the criterion of interests, not with legal standards. Thus, the lack of *opinio juris* is undisputable. Hence, it could be argued that the practice of the Council alone cannot set precedents for the creation of customary international law. Teson uses to over-generalise and overestimate the meaning of several Security Council resolutions. Nevertheless, each and every resolution of the Council should be considered as a reflection of state practice and more specifically as a reflection of state practice of the 15 present members of the Council and not of the whole world community. Evidence of *opinio juris* can be found in the statements of governments and states, but not from a Security Council resolution that reflects the negotiation and the political bargains of its 15 members. But the world community counts much more than 200 states. Nevertheless, it could be argued that after the precedence of Somalia and Rwanda, Haiti proves a continuum in the Council's practice, regarding intervention on humanitarian purposes. It seems that the Council became keen to legitimise armed humanitarian interventions. It becomes evident that the Council intervenes in the domestic affairs of states to protect human rights. However, this practise cannot legitimise unauthorised and unilateral humanitarian intervention.

Let us now consider the action taken after resolution 940 and the authorisation for the use of force. On September 15, President Clinton delivered an ultimatum to Haiti's military junta via a television address to the American public.[61] The next day, on the eve of the invasion Clinton sent a negotiation team

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[60] Ibid., p.249.
[61] Ibid., p.252.

to Haiti, led by former President Jimmy Carter, the former Chairman of the Joint Chiefs of Staff Colin Powel and the Democratic Senator Sam Nunn of Georgia to convince Cedras to surrender power to President Aristide and leave the country.[62] The Carter delegation achieved to reach an agreement shortly after President Clinton ordered the commencement of the intervention.[63] The certain forthcoming defeat of the Haitian army led the junta to surrender and sign the agreement.[64] The next morning 3,000 forces landed in Haiti that later became nearly 20,000, without any opposition and took control of its airfields and ports.[65] This had been a no-casualty intervention.[66] Aristide was soon restored to power and all economic sanctions were lifted.[67]

In conclusion, it could be said that excessive efforts by regional organisations and the UN to support democracy illustrate the eagerness of many states to spread the democratic values. No doubt, democracy is becoming a right in international law. Once it appears in treaties it then acquires international status.[68] Hence, it could be argued that democracy is not an internal matter, but an international concern of states. Recent practice of states illustrates that the world community cannot accept the unconstitutional overthrow of governments. However, there is no legal basis for intervention to protect democracy, save the UN Security Council enforcement action after the determination of a threat to

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[62] DiPrizio, op.cit., p.93, Teson, op.cit., p.252, Murphy, op.cit., p.271 and Morley and McGillion, op.cit., p.380.
[63] Murphy, op.cit., p.271, DiPrizio, op.cit., p.93, Byers and Chesterman, op.cit., p.286 and Morley and McGillion, op.cit., p.381.
[64] DiPrizio, op.cit., p.93.
[65] Murphy, op.cit., p.272, Byers and Chesterman, op.cit., p.286 and Teson, op.cit., p.252.
[66] Teson, op.cit., p.252.
[67] S/RES/944 (1994), 29 September 1994. Also DiPrizio, op.cit., p.93.
[68] Rosalyn Higgins, *Intervention and International Law*, in Hedley Bull (ed.), *Intervention in World Politics*, Oxford, Clarendon Press, 1984, p.29.

international peace and security. First of all, the UN Charter does not provide for a right to pro-democratic intervention. What is more, all regional organisations that make efforts to promote and protect democracy do not have any provisions for such a right. Further, the practice of such interventions is very limited and there is no evidence that states has accepted a right to pro-democratic intervention. In the case of Haiti, the Council authorised the use of force to restore international peace and security, but it did not explicitly act to restore democracy, but it repeatedly stressed the implications of the humanitarian crisis and the refugee flows. In addition, its special wording was used to eliminate the chances for similar interventions in the future. Thus, it could be argued that pro-democratic intervention, out of the realm of the Council's enforcement action remains impermissible under international law.

4.7 ECOWAS INTERVENTION IN SIERA LEONE (1997)

Sierra Leone won its independence from the British colonists in 1961[1]. Since then, alternation of coup and democracy dominated in the political life of the country. During the eighties a rebel movement called the Revolutionary United Front (RUF) appeared in the political scene of the country. In March 1996 Ahmed Tejan Kabbah was elected through democratic elections. Kabbah tried to end the RUF rebellion and signed a peace-agreement with Sankoh, the RUF leader, in which the RUF would become a legal political party. However, in May 1997 Kabbah was overthrown in a military coup, led by Major Johnny Paul Koroma. Since then, the military coup faced the opposition of African states, most importantly of Nigeria, and of most of other countries on the planet.[2] Koroma's government tried to strengthen its power, instead of its diplomatic isolation by the international community. The United Nations and other international organisations had strongly condemned the military junta.

After the military coup had overthrown the legal and democratically elected government of Sierra Leone, the initial consequences of such regimes had immediately appeared. A good illustration is the ban of political parties, as well as demonstrations against this illegal regime, violations of human rights, and of course thousands of refugees taking shelter in neighbouring countries[3]. The military coup faced opposition within the boundaries of the country from the majority of Sierra Leone's society. Unfortunately, the coup attained cooperation with the rebels of

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[1] James Ciment, *Encyclopaedia of Conflicts since World War II,* London, Fitzroy Dearborn Publishers, 1998, p.1142.
[2] S/PV.3822, 8 October 1997. Also Whippman, op.cit., p.304.
[3] Whippman, op.cit., p.303.

RUF, which had fought in the past against former governments[4]. However the illegal regime could not control RUF and many government soldiers, which were committing violations of human rights. RUF in cooperation with the Armed Forces Revolutionary Council made a lot of atrocities against innocent civilian people.[5] All those facts led to a series of reactions from the neighbouring countries and from the world community.

Firstly, the Organisation of African Unity (the recently called African Union) immediately condemned the military coup.[6] From the beginnings the OAU Council of Ministers had stressed on the relevance between popular sovereignty and international political legitimacy[7] and it had called the International Community and particularly the African states to condemn the coup and to avoid the recognition of the illegal regime. Moreover the OAU supported the legal elected government of Sierra Leone, which was overthrown by the coup. The OAU suggested that the neighbouring countries should take action to restore the democratically elected government, implying the use of force to remove the *de facto* regime[8]. Actually, OAU impliedly authorised the Economic Organisation of West African States (ECOWAS) to undertake the military enforcement in order to restore democracy in Sierra Leone[9]. Two months after the OAU meeting, ECOWAS declared that the military coup constituted a threat to international peace and security[10] for the countries surrounding Sierra Leone and took measures against the illegal

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[4] Ibid., p.304.
[5] Ibid., p.303.
[6] Harhoff, op.cit., p.92.
[7] Reisman, op.cit., p.252.
[8] Whippman, op.cit., p.304.
[9] Byers and Chesterman, op.cit., p.288.
[10] Whippman, op.cit., p. 305.

government, such as embargo on arms and petroleum and asked all the neighbouring countries to implement this agreement.

In a parallel course, the UN Security Council condemned with a statement of the president of the Security Council the military coup and demanded the restoration of democracy in Sierra Leone just after the illegal overthrow of Kabbah.[11] Immediately after the first statement, another one had followed and supported the efforts of ECOWAS and the International Community to help the people of Sierra Leone restore the constitutional order[12]. Moreover, the second statement had condemned the atrocities, the humanitarian consequences on the civilian people, including the refugees. A third statement had once again condemned the junta, supported ECOWAS in the efforts to negotiate with representatives of the junta and considered the junta's attempt to set conditions for the restoration of democracy in Sierra Leone as "*unacceptable*"[13]. Further, this statement regarded the disruption of democracy in Sierra Leone as a threat for peace, security, and stability of the region.[14] At the same time, the legally elected president of Sierra Leone appeared in the General Assembly of the UN and asked the Security Council to proceed in harder measures against the coup and to support the efforts of the Economic Community of West African States Cease-fire Monitoring Group (ECOMOG) for the restoration of his democratically elected government[15]. He expressed his fears for the situation in Sierra Leone and his reservations for the negotiations with the junta. After this, the UN Secretary General Kofi Annan sent a letter to the Security

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[11] S/PRST/1997/29 (May 27, 1997).
[12] S/PRST/1997/36 (July 11, 1997).
[13] S/PRST/1997/42 (6 August 1997).
[14] *Id.*
[15] Whippman, op.cit., p.306.

Council supporting the efforts for peaceful resolution and the democratic governance.[16] Immediately, the Security Council responded with a unanimous resolution for the situation in Sierra Leone.

In Resolution 1132, the Security Council recalling the statements of its President, taking note of the OAU summit and the ECOWAS meeting of the foreign ministers on Sierra Leone, taking also note of the Secretary-General's letter, expressing its supports for the mediation of the ECOWAS Committee, concerning the violence loss of life and the deterioration of the human conditions following the military coup, and finally determining the situation in Sierra Leone as a threat to international peace and security and acting under Chapter VII of the UN, decided a series of measures.[17] First of all, the Council demanded that *"the military junta take immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically-elected government and a return to constitutional order"*.[18] Furthermore, it decided that all states should prevent the sale or supply to Sierra Leone of petroleum products and arms. Acting also under Chapter VIII of the United Nations Charter, the Council authorised ECOWAS to cooperate with the democratically elected Government of Sierra Leone to ensure strict implementation of the provisions of this resolution relating to the supply of arms and petroleum products.[19]

It seems that the Nigerian-led ECOMOG forces considered an arms embargo under Chapter VII of the UN Charter a Security Council authorisation for the use of force. ECOWAS continued to operate instead of the Council's mandate and the

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[16] *Id.*
[17] S/RES/1132 (1997), 8 October 1997.
[18] *Id.*
[19] *Id.*

Nigeria-led ECOMOG forces launched a major military assault in February 1998 that led the AFRC's to flee the country[20]. This intervention had been a clear violation of Article 2(4) of the UN Charter, as it had not been self-defence, nor was it a Security Council enforcement action to restore international peace and security. The Nigerian Government, in order to defend its actions had claimed that the forces of AFRC and RUF had persistently attacked ECOMOG and that ECOMOG acted in self-defence against the aggression of the junta's military[21]. Once again intervening states had justified their use of force on self-defence and not on their "legal" right of humanitarian (or even pro-democratic) intervention. Nevertheless, the actual goal of the Nigeria-led ECOMOG forces was the restoration of the democratically elected government. It seems odd that a dictatorial regime (Nigeria) seeks the restoration of democracy in its neighbouring country. This verifies the fact that selfish interests of states are the real motives of such interventions. Actually, the stability in the region and the halt of refugee flows had been the major objectives of the Nigerian authorities.

The permanent representative of Sierra Leone in the UN supported ECOMOG's action with the argument that the Security Council had failed to implement adequate measures to restore the democratically elected government of the country and that Sierra Leone had the right in self-defence to seek regional military assistance.[22] According to Roth, as regards to the principle in which a State accepts the external use of force in its territory, in accordance with its democratic entitlement thesis should allow the pro-democratic intervention only in two ways:

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[20] Byers and Chesterman, op.cit., p.289 and Harhoff, op.cit., p.92.
[21] Whippman, op.cit., p. 307.
[22] Ibid., p.308.

"by designating a government that enjoys an electoral mandate (or other "democratic" credentials), but not effective control, as bearer of the legal capacity to render contemporaneous consent on behalf of the State; by validating the effort of an elected government to render the State's consent in advance, by treaty, to forcible restoration of the constitutional government upon the occurrence of a revolution or a coup d' état". [23] Yet, as Whippman noted, *"effective control is an essential (perhaps the only) component of government's authority to represent a state in international affairs... control therefore ordinarily affords de facto rulers a partial, if not exclusive, claim to speak in the name of the state".*[24]

The Security Council with a presidential statement welcomed the fact that the military junta had been defeated, without referring how this had been achieved[25]. It seems that this statement constitutes a *post facto* legitimacy of intervention by the Council. However, the Council did not mention anything about the ECOMOG intervention in Sierra Leone, nor did it refer to the legitimacy or not of this intervention. After the restoration of democracy in Sierra Leone, the Security Council had passed a new Resolution that terminated the embargo[26], and a later Security Council resolution had established the UNOMSIL to monitor the security situation, disarmament, and observance of international humanitarian law.[27] This implicit *ex post facto* approval of intervention by the Security Council is not a new one. The precedence of Liberia in 1992 quite resembles the case of Sierra Leone, as regards to this matter (ex post facto approval of intervention). Yet, the fact that the

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[23] Brad R. Roth, *The Illegality of "Pro-Democratic" Invasion Pacts*, in Gregory H. Fox and Brad R. Roth (eds.), *Democratic Governance and International Law*, Cambridge, University Press, 2000, p.329.
[24] Whippman, op.cit., p.309.
[25] S/PRST/1997/52, 14 November 1997.
[26] S/RES/1156 (1998), 16 March 1998.
[27] S/RES/1181 (1998), 13 July 1998.

Council did not condemned intervention, or welcomed the restoration of democracy, does not mean that it approved this intervention, or it deemed it legal. This issue will be reconsidered in Chapter 5 and the legal aspects of Kosovo intervention.

Brad Roth thinks *"Sierra Leone is the best evidence of a fundamental change in international legal norms pertaining to "pro-democratic" intervention. The Security Council in this case took authorisation of action against the" illegitimate" regime beyond the context of United Nations peace making cum electoral "arbitration", not even bothering to take refuge in assertions of "extraordinary", "exceptional", or "unique" circumstances in invoking Chapter VII. Moreover, its post hoc ratification of the regional organisation's forcible acts neither comported with a literal interpretation of Chapter VIII nor could be rationalised by a threat of imminent humanitarian disaster. The argument can be made, with at least a modicum of plausibility, that coups against elected governments are now, per se, violations of international law, and that regional organisations are now licensed to use force to reverse such coups in member states".*[28]

Nevertheless, it could be argued that Roth's conclusions on the 1997 ECOMOG intervention in Sierra Leone are overoptimistic. Indeed, the Council intervened in the internal affairs of Sierra Leone without the use of the specific wording "extraordinary", "exceptional" and "unique". This is probably because of the lack of authorisation to use all necessary means. It could be said that human rights and democracy are no longer an internal matter of states, but an international one. However, there is no provision for the use of force to protect human rights and democracy. Roth claims that the Security Council took authorisation of action

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[28] Brad R. Roth, *Governmental Illegitimacy in International Law*, Oxford, Clarendon Press, 1999, p.407.

against the illegitimate regime, but he does not clarify that this action had been oil and arms embargo.[29] As regards to his estimates on UN *post hoc* ratification of ECOMOG's forcible acts, it could be said the UN Security Council welcomed the fact that the military junta had been defeated. However, the Council never explicitly referred to the legitimacy or illegitimacy of the use of force. In other words, the Council welcomed the restoration of democratic order, but not the military action that led to this outcome. Last but not least, it seems that Roth's evaluation for fundamental change in international legal norms pertaining to pro-democratic intervention is premature, because there is little evidence in state practice. The only legitimate aspect for pro-democratic intervention, as the precedent of Haiti illustrates, is pro-democratic intervention under the auspices of the Security Council. Yet, the Council did not authorise the use for force in order to restore the democratically elected government in Sierra Leone. The fact that the world community supported the Kabbah government should not be underestimated. Yet, this support does not bear recognition of a right to pro-democratic intervention outside the Council's realm.

CONCLUSION

It seems that there is plenty of evidence that democracy is becoming a right in international law. However, this does not automatically give a rise to a right to unauthorised pro-democratic intervention. International law is not static, but it is an evolving body of rules. The UN has done much about democracy, as well as

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[29] S/RES/1132 (1997), 8 October 1997.

regional organisations. Recent trends in the international community indicate that state practice, as well as practice of world and regional organisations, tries to strengthen and promote democracy. But this practice of states and world organisations is not supportive of a unilateral right of pro-democratic intervention. On the contrary, imposing sanctions, denying recognition of regimes that unconstitutionally overthrow democratically elected governments and suspending rights of the country in question is the main concern of regional organisations. Nevertheless, it should be noted that none of the regional organisations or the UN have any provisions for pro-democratic intervention.

The new human rights agenda will include democracy as a non-deprivable right. The democratic entitlement has been spread in Europe, America and Oceania and takes rapid steps in Africa. The reformed African Union and its Constitutional Act affirm the organisation's will to promote and strengthen democracy within the continent. In Asia thinks are more complicated, given the traditional dictatorial rules and monarchies. What is more, there is not a regional organisation promoting democracy, like in the other continents. Current state practice has shown that regional organisations contribute to the effective promotion of human rights and democracy. After a breach of the above they immediately report the situation to the Council and in cooperation with it search for an optimistic resolution. Thus, the fact that Asia does not have a regional organisation, equal to others examined before, is a drawback for the democratisation process of Asian states. Yet, as this wave of democracy spreads around the world, it could be argued that this trend of the world community will be expanded in Asian countries.

Moreover, there are some points to stress regarding pro-democratic interventions. First of all, it could be argued that pro-democratic interventions are vulnerable to the same critics of humanitarian intervention. The fear of abuses of the principle of non-intervention is eminent. States seek and invent justifications for the use of force. Such a right might create further abuses. Two more issues have to do with interest and selectivity. Accordingly, powerful states intervene to restore democracy only where there are vital interests at stake. As a result, they intervene selectively. For instance, the overthrown of the democratically elected government in Pakistan did not touch the US and its European allies. However, the US found it very important to restore democracy in Haiti. Furthermore, the great paradox of the pro-democratic intervention in Sierra Leone is the role of Nigeria and its dictatorial leader and chairman of ECOWAS Sani Abacha, which is a nullifier of electoral results[30]. He was the one that fought against the military coup and pursued the restoration of democracy in Sierra Leone. A dictator's desire to restore democracy in a neighbouring country is an oddity. The only reasonable explanation is the existence of Nigerian interests in restoring democracy in Sierra Leone.

Further, the western governments, legitimately elected by free and fair elections, ignore the laws and rules of the world community and intervene in various places across the world, thus violating international law. Western democracies have the worst records of intervention after the end of the Cold War. Secondly, Adolph Hitler had been also a democratically elected by the German people. Thus, a legitimately elected person is not necessary better than a dictator. Thirdly, states that now promote democracy used to impose dictatorial rules in many countries, and

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[30] Roth, op.cit., p.408.

more specifically in the Middle East, in order to attain their political goals. This tactic has been widely used by the US during the Cold War. Nowadays, there is a notable shift in US policy that dictates that democracy is the ideal way of promoting the US interests. Recent practice has proven that western democracies are becoming hegemonial powers that ignore international law in order to accomplish their goals of power politics. Accordingly, democracies are not that democratic in their international affairs. Thucydides describes in the 5th book of his histories how classic Athenian democracy, one of the best democracies in history, became a hegemonial power that ignored basic democratic principles, like dialogue. It seems that these principles are forgotten by the US, the current superpower that imposes its will by its economic and military power. Thus, this practice of pro-democratic intervention simply reflects a form of interventionism and power politics in the 90's, rather than a norm of international law.

4.8 EVALUATION OF POST-COLD WAR CASES (SAVE KOSOVO)

All post-Cold War cases dealing with humanitarian intervention have been examined so far. The normative changes in the world community are evident, as regards enforcement of military intervention for the protection of human rights. The Council had dealt many times with matters of the domestic affairs of states. No doubt, human rights and their protection became a pivotal goal of the Security Council. Many resolutions have been passed condemning violations of human rights, imposing diplomatic and economic sanctions, commanding bans of flights, setting safe areas and various other demands. Democratic governance has also gained respect and the world community proved that it is eager to protect democracy from unconstitutional regimes. It became evident that the post-Cold War threats to international peace and security did not have to deal with international crises, but with domestic crises.

The differences from the Cold-War period are obvious. Article 2(7) and the rule of non-intervention in the domestic affairs of states did not bind the Council, but it actively intervenes in humanitarian crises. What is more, the East-West rivalries have terminated, and states are eager to cooperate and vote together for Security Council resolutions without paralysing the Council with veto, or veto-threats. This does not mean that states have not exercised their veto right after the fall of the Cold War, but they significantly reduced this custom. Moreover, from unilateral interventions during the Cold War, we move to collective interventions, many times authorised by the Security Council. In Somalia, Rwanda and Haiti (in Bosnia the Council authorised a limited use of force, but this is not a clear instance of humanitarian intervention) the Council

authorised the use of force for humanitarian purposes. In Sierra Leone and Liberia, ECOWAS intervened without obtaining an authorisation by the Council, but the Council had welcomed its interventions. Finally, US, UK and France intervened in Iraq without the authorisation of the Council, primarily based on Security Council resolution 688, which censured Iraq without adopting any measures under Chapter VII.

The most significant development, however, is the fact that the UN Security Council authorised the use of force for the protection of human rights and democracy. Although the fear of states was still apparent, the Council recognised that mass violations of human rights and the abruption of democracy can threaten international peace and security. Thus, for the first time in UN history, it managed to authorise military intervention for the protection of human rights and democracy under its Chapter VII powers. Although the special wording (unique, extraordinary, and exceptional) makes some caveats for the creation of a new norm, the practice is clear and unmistakeable. Yet, the iterance of this wording in three different cases proves that this practice is not an exception, but a new trend of the Council. Possible interventions in the future will render this practice a custom of the Council.

Nevertheless, there are only a few cases supporting such a right and the exceptional wording weakens such claims. If one has to determine an emerging norm from this practice of the 90s, the emerging norm would be: *the Council is competent to authorise intervention in the domestic affairs of states in order to halt egregious violations of human rights in the target state*. But this suggestion does not mean that humanitarian intervention became permissible as a whole because of the Council's intense occupation with humanitarian objectives. That

would be a misapprehension. Humanitarian intervention outside the Council's realm still remains impermissible under international law. In other words, humanitarian intervention has not been accepted as a right under customary law. Thus, the only legitimate humanitarian intervention would be intervention under the Council's legacy and this is what the practice of the 90s supports. Kosovo is a good case for the exploration of humanitarian intervention without the Council's authorisation. Thus, Kosovo can provide useful lessons for the future of "unauthorised" humanitarian interventions and their legal status.

PART III

KOSOVO

CHAPTER 5

INTRODUCTION

The New Interventionism of the 90's has come to its zenith and at the same time its nadir with the 1999 NATO intervention in the Federal Republic Yugoslavia (FRY). After a "promising" decade of drastic protection of democracy and human rights, an international organisation (NATO) intervened militarily in Kosovo to protect the Albanian population of Kosovo from ethnic cleansing and widespread human rights violations. The international community and more specifically the western states gave signs of a community eager to defend human rights. The debate on Kosovo is much more complicated than all the other alleged humanitarian interventions of the 90's. Unlike Somalia, Rwanda and Haiti, where intervening states secured a Security Council authorisation for the use of force, NATO did not obtain such an authorisation to support the legality of its action. What is more, NATO is a regional organisation that bypassed the UN Security Council that is the only competent institution to respond to threats to international peace and security.

The advocates of humanitarian intervention rushed to discern an "unambiguous" precedent of humanitarian intervention and a "landmark" for the future of humanitarian intervention in international law. Images of harassed Albanian refugees, the bodies of dead women and children, as well as the demonisation of the Serb President Slobodan Milosevic had convinced the public opinion for a forcible intervention in Kosovo. Yet, this enthusiastic cry of the

public before the war turned into a clamour against intervention during and after the war. A large number of civilian casualties, the intensified campaign of ethnic cleansing and the increased number of refugees, the bombing of public utilities, bridges, hospitals, schools, TV station and the Chinese Embassy made the initial objective of humanitarian intervention highly questionable, given the fact that the means used were contrary to the humanitarian ends. Despite the fact that NATO intervention had been sharply criticized by many international lawyers for the lack of legitimacy, the organisation had to answer questions regarding violations of humanitarian laws. In this chapter there will be a five-stage analysis. After commencing with a brief historical exploration, this thesis will have to deal with the questions of legality vs. illegality and alleged precedents for future humanitarian interventions, violations of the laws of war, the future status of Kosovo, the political and moral motives and, finally, the future of humanitarian intervention after Kosovo (in the concluding chapter).

HISTORICAL FLASHBACK

The question of Kosovo and the history of this region of Serbia are very complicated and demand a profound investigation. Kosovo is an autonomous part of the Republic of Serbia. It is a crossroad between Serbia, Montenegro, Albania and the Former Yugoslav Republic of Macedonia (FYROM). This region is traditionally known as a Serbian land. The Serbs regard Kosovo the birthplace of

their state.[1] Many historians believe that this is an exaggeration deriving out of legends rather than history.[2] The myth comes out of the 1389 battle against the Ottoman rule, where Prince Lazar was defeated and killed by the Ottoman forces of Murat.[3] The collapse of the medieval Serb state became through the years the central event of the Serbian history.[4] Although Serbs consider Kosovo as their birthplace, the Albanian population of the region believes that they are the original inhabitants of Kosovo. They claim that they are descendants of the Illyrians and refer to an ancient Albanian state called Illyria.[5] Another theory supports that the Albanians are descendants of the ancient Thracians.[6] However, Kosovo's area is sacred to the Serbs for historical and religious reasons, and is legally part of Serbia.[7] In the 1974 constitution of the Socialist Federal Republic of Yugoslavia it is clearly stated that the Socialist Autonomous Province of Vojvodina and the Socialist Autonomous Province of Kosovo are constituent parts of the Socialist Republic of Serbia.[8]

Given the fact that the Slavs appeared in the region during the 5th and 6th century BC[9], the Albanians support that they are the original inhabitants of the land

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[1] Peter Calvocoressi, *World Politics 1945-2000*, 8th edition, London, Longman, 2001, p.351.
[2] Noel Malcolm, *Kosovo: A Short History*, London, Macmillan, 1998, p.58. Also Calvocoressi, op.cit., p. 351.
[3] Malcolm, op.cit., p.61.
[4] Marie-Janine Calic, *Kosovo in the Twentieth Century: A Historical Account*, in Albrecht Schnabel and Ramesh Thakur (eds.), *Kosovo and the challenge of humanitarian intervention: Selective indignation, Collective action, and International Citizenship*, New York, United Nations University Press, 2000, p.24.
[5] Ibid., p.22.
[6] Malcolm, op.cit., p.28.
[7] Per Fr. I. Pharo, *Necessary not Perfect: NATO's War in Kosovo*, Institute for Forsvarsstudier, IFS Info 1/2000, p.5.
[8] Heike Krieger (ed.), *The Kosovo Conflict and International Law, an Analytical Documentation*, Cambridge, Cambridge University Press, 2001, pp.3-8.
[9] Radomir Popovic, *Serbian Orthodox Church in History*, Belgrade, Grafiprof, 2002, p.7.

of Kosovo.[10] Yet, there is no evidence to prove the theory of the Illyrian origin of the Albanians, nor of the Thracian.[11] As regards the arguments on the Illyrian origins of the Albanians, it would be quite interesting to cite the argument of Professor Israeli. He noted that *"interestingly enough, like the Palestinians who are competing with Israel over their ancestral land by conveniently claiming that they are the descendants of the ancient Cana'anites who had preceded the Israelites on the land, the Albanians now advanced the claim that they inherited the ancient heritage of the Illyrians who were the original inhabitants of Kosovo"*.[12] His argument is really persuasive and if anyone wishes to explore it further will find out that most of ethnic minorities that raise claims over their independence use similar arguments. For instance, the Basques and the Kurds claim to be the original inhabitants of their regions and find their traces back in antiquity.

To this point, there is no persuasive proof of the Albanian national heritage in Kosovo. There is only a theory that cannot be approved or rejected. Actually, the first time that the Albanians emerged in a historical record is 1043.[13] On the other hand, as already said above, the first Slav tribes invaded the territory of Kosovo in 547 and 548.[14] In the ninth century, the Bulgarians invaded Kosovo and they ruled the area until 1014.[15] The new rulers of this region (for approximately a period of two centuries, 11th-12th century DC.) became the Byzantine Emperors,

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[10] Malcolm, op.cit., p.23 and Calic, p.22.
[11] Calic, op.cit., pp.22-23 and Malcolm, op.cit., pp.26-40.
[12] Raphael Israeli, *From Bosnia to Kosovo: The Re-Islamisation of the Balkans*, Christian Thought Special Edition, Belgrade, 2002, p.56.
[13] Malcolm, op.cit., p.28.
[14] Ibid., pp.23-24.
[15] Ibid., p.27 and 41.

starting with the conqueror, Emperor Basil "the Bulgar-killer".[16] In 1160 Stefan Nemanja conquered Kosovo and the Serbs ruled the territory for more than two centuries.[17] During this time, Slavs have constituted a majority in Kosovo[18] and, no doubt, Kosovo played an important role in the Serbian state.[19] Despite some claims on myths and the epic of Kosovo, the significance of this region for the medieval Serb state is undisputable. After the Ottoman domination of the Balkans, Kosovo remained under the Ottoman rule.

The Albanians, having decided to convert and embrace Islam, enjoyed a privileged status in the Ottoman Empire.[20] During these years it was clear that there was a steady flow of Albanians into Kosovo.[21] In 1878 the Albanian League was established in Prizren, which presented the *Greater Albania* plan.[22] Yet, it had been the Serbs that liberated Kosovo from the Ottoman rule in 1912, when the Serb army defeated the Ottoman army units of approximately 16000 men.[23] At the same year Albania declared independence from the Ottoman Empire and raised claims to Kosovo.[24] Many arguments had been raised on ethnic cleansing against the Albanians, committed by the Serbs during this time.[25] As regards the demographic balance in Kosovo in the beginnings of the twentieth century there are diverging views. Some scholars claim that the Albanians were the majority

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[16] Ibid., pp.27-28 and 42.
[17] Ibid., p.43.
[18] Calic, op.cit., p.23.
[19] Malcolm, op.cit., p.49.
[20] Israeli, op.cit., p.54 and Malcolm, op.cit., p.173.
[21] Malcolm, op.cit., p.73.
[22] Israeli, op.cit., p.54.
[23] Robert C. DiPrizio, *Armed Humanitarians, US Interventions from Northern Iraq to Kosovo*, London, The John Hopkins University Press, 2002, p.131. Also Malcolm, op.cit., p.251.
[24] DiPrizio, op.cit., p.131.
[25] Alex J. Bellamy, *Kosovo and International Society*, London, Palgrave Macmillan, 2002, p.3. Also DiPrizio, op.cit., pp.251-255 and Calic, op.cit., p.23.

with 75% and some others that the population of Albanians did not exceed 44% of the overall population of Kosovo.[26] This discrepancy can be easily explained in the following argument: the Serbs were leaving their land and immigrated from Kosovo to other parts of Serbia, while the Albanians increased their percentage with high birth rates.[27]

During World War II, apart from the German and Italian rule, Bulgarians and Albanians took control of parts of Kosovo.[28] This is because of the Albanian and Bulgarian cooperation with the fascists of the Axis. The only countries opposing fascism in the Balkans had been the Greeks and the Serbs. There is plenty of evidence of Albanians fighting against Greek and Serb forces. However, the Serbs had been the victims of the Albanian cooperation with the Axis, due to expulsions of Serbs out of Kosovo.[29] As regards to the Albanians in Kosovo, they considered the Axis conquest as a kind of liberation.[30]

After the end of the Cold War, Tito passed a new Yugoslav constitution, comprised of six republics (Serbia, Croatia, Slovenia, Montenegro, Bosnia-Herzegovina and Macedonia) and two autonomous regions of the Republic of Serbia (Vojvodina and Kosovo).[31] Tito was more than willing to protect the

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[26] Malcolm and Calic argue that the Albanians were the majority in Kosovo in the beginnings of the 20th century. However, Professor Israeli has more profound details and insists that the Albanians did not exceed 44% of the total population. Malcolm, op.cit., p.257, Calic, op.cit., p.23 and Israeli, op.cit., p.54 .

[27] DiPrizio, op.cit., p.131.

[28] DiPrizio, op.cit., p.131.

[29] Malcolm, op.cit., pp.293-296.

[30] Ibid., p.297.

[31] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford, Oxford University Press, 2001, p.207. Also DiPrizio, op.cit., p.131, Malcolm, op.cit., p.316.

Albanian population in Kosovo. First of all, he banned the return of the Slavs[32] exiled during World War II by the Albanians and always under the Nazi tolerance. Under the 1974 Yugoslav constitution Kosovo was granted a significant decree of autonomy.[33] The years after 1974 gave numerous records of ethnic cleansing of Serbs and Montenegrins from Kosovo. The Albanians threatened, verbally abused, harassed and attacked the Serbs in Kosovo. The Serbs had to face violations of property, destruction of crops, beatings and rape on ethnic grounds.[34] As a result, the Slav populations of Kosovo departed to inner Serbia.[35] This evident reduction of the Slav population along with the sharp increase of the Albanian population in Kosovo affirms the argument that the Serbs had also been victims of ethnic cleansing, as their numbers dramatically decreased in Kosovo during the twentieth century.[36]

KOSOVO TODAY

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[32] Malcolm, op.cit., p. 317. Malcolm refers to a ban on the exiled Serb "colonists", but a research proves that the Albanians did not harass and expel colonists, but all Serbs.

[33] *Agon* Demjaha, *The Kosovo Conflict: A Perspective from Inside*, in Albrecht Schnabel and Ramesh Thakur (eds.), *Kosovo and the challenge of humanitarian intervention: Selective indignation, Collective action, and International Citizenship*, New York, United Nations University Press, 2000, p.33. Also Malcolm, op.cit., p.327 and Krieger op.cit., pp.2-8.

[34] Duska Anastasijevic, *The Closing of the Kosovo Cycle: Victimisation Versus Responsibility*, in Albrecht Schnabel and Ramesh Thakur (eds.), *Kosovo and the challenge of humanitarian intervention: Selective indignation, Collective action, and International Citizenship*, New York, United Nations University Press, 2000, p.48.

[35] Malcolm, op.cit., pp329 and 331 and Anastasijevic, op.cit., p.48.

[36] Interview with Professor Avramovic, Law School, University of Belgrade. Also Israeli, op.cit., p.64.

In 1989 the Serbian parliament abrogated the enhanced autonomy granted to Kosovo in 1974.[37] The Albanians immediately reacted with a unilateral declaration of independence in 1991.[38] Albania recognised the self-declared "Republic of Kosovo" as well as its head, Ibrahim Rugova, who opened an office in Tirana.[39] However, this policy was not granted either by Serbia or by the international Community and was not given the chance for discussion in Dayton, where the G8 and Serbia agreed on the future of Bosnia[40]. The only way left for the Albanians to achieve their political goal was a violent response. The Kosovo Liberation Army (KLA or UCK), formed in 1995, commenced its attacks on Serb police and state officials.[41] By late 1997 Kosovo Albanians had begun to refer to Drenica as a liberated territory because of the local KLA presence, while the government considered Drenica the hotbed of Albanian terrorism.[42] In January and March 1998 the Serbian police mounted attacks on this region to suppress terrorism; in these attacks approximately 100 ethnic Albanians had been killed, between of who children and women.[43] In mid-July, after the assassination of more then 60 Serb policemen, Milosevic ordered an all-out offensive with more than 2000 ethnic Albanian casualties and thousands of refugees displaced from Kosovo.[44]

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[37] Krieger, op.cit., p.9, Calvocoressi, op.cit., p.351, DiPrizio, op.cit., p.133, Chesterman, op.cit., p.207, Demjaha, op.cit., p.33, Davidson, op.cit., p.166 and Malcolm, op.cit., p.344.
[38] Calvocoressi, op.cit., p.351, Chesterman, op.cit., p.207, Davidson, op.cit., p.166, DiPrizio, op.cit., p.133.
[39] Krieger, op.cit.,p.12-12, Israeli, op.cit., p.56 and DiPrizio, op.cit., p.133.
[40] Demjaha, op.cit., pp.33-34 and DiPrizio, op.cit., p.133.
[41] DiPrizio, op.cit., p.133.
[42] Human Rights Watch, *Humanitarian Law Violations*, New York, Human Rights Watch, 1998, p.18.
[43] Ibid., pp.18-37 and DiPrizio, op.cit., p.133.
[44] DiPrizio, op.cit., p.133.

During the coming days the internationalisation of the domestic crisis became apparent. Regional organisations, subsequent Security Council resolutions, as well as the Contact Group got involved to the settlement of the crisis. Richard Holbrooke and the Contact Group (under the support of NATO threats) were the major actors for the diplomatic efforts. The "Contact Group" summoned the warring parties to attend at Rambouillet, to agree an interim political settlement to the Kosovo conflict.[45] Key points in Rambouillet were that interim agreements were to be agreed for a period of three years, during which the final settlement would be negotiated; that the territorial integrity of Yugoslavia was to be respected, implying continued Yugoslav sovereignty over Kosovo; that the rights of all communities were to be respected, implying far-reaching autonomy for Kosovo; and that these interim agreements were to be implemented through international participation.[46] The KLA was unwilling to accept the draft, as there was no commitment to an ultimate option of independence, while Milosevic had no difficulty in accepting these principles as the basis for a settlement, as the Serb parliament had endorsed the restoration of Kosovo autonomy.[47]

However, Serbs could not stomach certain aspects of the implementation provisions, most importantly the insistence that the 28,000 strong implementation force (K-FOR) would be an arm of NATO; hence, their initial position was that they would only agree to an unarmed, non-NATO force.[48] Finally, the negotiations in Rambouillet failed because both the Serbs and the Kosovo Albanians refused to

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[45] Michael Maccgwire, *Why did we bomb Belgrade?*, International Affairs, vol.76, No1, January 2000, p.7.
[46] *Id.*
[47] *Id.*
[48] *Id.*

accept the interim agreement.[49] To persuade the KLA to sign, the United States is reported to have committed itself to early elections to considering the issue of independence if regional and international circumstances permitted.[50] On the other hand, the Yugoslav Army used force in an excessive and indiscriminate manner, thus causing numerous of civilian casualties, the displacement of hundreds of thousands of innocent people from their homes and a massive flow of refugees into neighbouring and more distant countries.[51]

The failure of diplomacy led to a series of air strikes against Yugoslavia. NATO could not ask for Security Council authorisation because it was clear that Russia would veto any Council resolution containing a mandate or an authorisation to employ threats or the use of force against the FRY.[52] On 24 March the bombing against Kosovo began and lasted for ten weeks.[53] These bombings failed to protect the Albanians of Kosovo, although this was the aim, but they forced Milosevic to capitulate.[54] The final solution to the crisis came by the UN Security Council Resolution 1244, which authorised the international civilian and security presence in Kosovo to exercise all necessary means to fulfil its responsibilities.[55] However, NATO could not achieve its goal of multi-ethnic and tolerant society of Kosovo. After it stopped the ethnic cleansing of the Albanians, ethnic cleansing of Serbs and other minorities had commenced. Five years after the 1999 intervention and

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[49] Ibid., p.8.
[50] *Id.*
[51] Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, European Journal of International Law, vol.10, 1999, p.6.
[52] Ibid., p.7.
[53] Andrew Brookes, *Hard European Lessons from the Kosovo Air Campaign*, Institute for Forsvarsstudier, IFS Info 2/2000, p.5.
[54] Peter Calvocoressi, op.cit., p.352.
[55] Ruth Wedgwood, *NATO's Campaign in Yugoslavia*, American Journal of International Law, vol.93, No4, October 1999, p.830.

the status of this province remains unresolved. What is more, the Serb, Montenegrins, Roma, and other minority refugees have not returned in Kosovo. Further, the recent outbreak of violence illustrated that NATO goals have not been accomplished in Kosovo.

CHAPTER 6

LEGALITY VS. ILLEGALITY: NATO'S INTERVENTION IN KOSOVO AND ITS IMPLICATIONS FOR THE FUTURE

The Charter, to be sure, is much more specific on respect for sovereignty than on respect for human rights, but since the day it was drafted the world has witnessed a gradual shift in that balance, making respect for human rights more mandatory and respect for sovereignty less absolute. Today, we regard it as a generally accepted rule of international law that no sovereign state has the right to terrorise its own citizens... One day, when the Kosovo crisis will be a thing of the past, we hope that the Security Council will devote a debate to the balance between respect for national sovereignty and territorial integrity on the one hand and respect for human rights and fundamental freedoms on the other hand, as well as to the shift to which I referred. This will not be a pro-Western or anti-third-world debate. The shift from sovereignty to human rights spells uncertainty, and we all have difficulties with it. But the Security Council cannot afford to ignore the phenomenon. Times have changed, and they will not change back.

Mr. van Walsum (Netherlands)[1]

Respect for sovereignty and non-interference in each other's internal affairs are basic principles of the United Nations Charter. Since the end of the Cold War, the international situation has undergone major changes, but those principles are by no means outdated... In essence, the "human rights over sovereignty" theory serves to infringe upon the sovereignty of other states and to promote hegemonism under the pretext of human rights. This totally runs counter to the purposes and the principles of the United Nations Charter. The International Community should maintain vigilance against it.

Mr. Shen Guofang (China)[2]

NATO's intervention in Kosovo is another illustration of the wider chasm among states and scholars regarding the legal status of humanitarian intervention. NATO commenced its air campaign against the Federal Republic of Yugoslavia on

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[1] S/PV.4011, 10 June 1999, debate of the Security Council concerning resolution 1244.
[2] *Id.*

24 March 1999 as a response to widespread human rights violations and discrimination against the Albanian population in Kosovo. Advocates of humanitarian intervention rushed to discern a precedent for future interventions and for the creation of a new customary rule. Opponents of the doctrine of humanitarian intervention highlighted the exceptional character of the 1999 intervention. In any case, most lawyers deemed the intervention as a clear breach of the UN Charter. Needless to say, in the heart of our system lies the UN Charter, where anyone can find the foundations of the world community after 1945. Article 2 (4) clearly declares that *"all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"*. The only two exceptions on this rule are Articles 51 on self-defence and Article 42 on UN Security Council enforcement action, after a determination of a threat to international peace and security. What is more, Article 2(7) points out that *"nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this shall not prejudice the application of enforcement measures under Chapter VII"*. These are the provisions of the UN Charter regarding intervention. Yet, what happened in the case of Kosovo? Was this intervention in accordance with the rules above?

Before answering the question, it would be very helpful to take a brief look into the situation in Kosovo from 1989, when Milosevic abrogated the enhanced autonomy of Kosovo, to 1999, when NATO intervened in Kosovo to

protect the Albanians. Apart from UN reports and resolutions, there is a lot of evidence for the situation in Kosovo form Non-Governmental Organisations (NGO's). NGO's contribute significantly to international law of human rights. Amnesty International in its 1997 report witnessed many violations of human rights including indiscriminate arrests and illegal detentions of ethnic Albanians, torture and ill-treatment by the police.[3] Yet, this report finds that the Serb indiscriminate attacks began after nine Serbs, including five police officers, were shot dead and six others were wounded by the KLA.[4] In the next year, torture and ill-treatment by the police increased dramatically, since the conflict between the KLA and the police started in February.[5] Many of the instances, however, were response to the violent attacks on Police and Serbian civilians.[6] In 1998 the conflict got dramatic form and the situation in Kosovo became perilous.

The 1999 Amnesty International report cites: *"hundreds of ethnic Albanians and smaller numbers of Serbs or Montenegrins were killed in armed conflict in Kosovo. Many of them were extra-judicially executed by police or deliberately and arbitrarily killed by armed ethnic Albanians. Hundreds of people, all of them ethnic Albanians, "disappeared" at the hands of security forces. More than 250,000 people, the vast majority of them ethnic Albanians, were displaced, many of them forcibly, by police, soldiers or opposition ethnic Albanian forces. Armed opposition forces were responsible for human rights abuses, including the abduction of dozens of people, many of whom remained unaccounted for. There*

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[3] Amnesty International, Report 1997 on Yugoslavia (Federal Republic of), from January to December 1996, for more details see: http://www.amnesty.org/ailib/aireport/ar97/EUR70.htm.
[4] *Id.*
[5] Amnesty International, Report 1998 on Yugoslavia (Federal Republic of), from January to December 1997, for more details see: http://www.amnesty.org/ailib/aireport/ar98/eur70.htm.
[6] *Id.*

were numerous reports of ill-treatment, torture and excessive use of force. At least five people died in police custody. At least 1,000 ethnic Albanians were detained and placed under investigation on charges of "terrorism" and "armed rebellion". Many were reportedly tortured or ill-treated during interrogation".[7] What makes the Amnesty International differ sharply from other institutions and organisations is the fact that it acknowledges the significant contribution of the KLA in the worsening of the situation by violating humanitarian laws.[8]

Another NGO, Human Rights Watch, issued an edition on humanitarian law violations in Kosovo during 1998. In this edition, Human Rights Watch reports the attacks in the Drenica region, conducted in January and March 1998 following KLA offensive in the region.[9] In these attacks, 26 ethnic Albanians had been killed in an indiscriminate manner in Likosane and Cirez, including a pregnant woman.[10] In January, the police attacked the village of Donji Prekaz, focusing on the compound of Shaban Jashari, whose son Adem was known as local KLA leader.[11] In this attack an estimated of fifty-eight ethnic Albanians were killed, including eight women and ten children under the age of sixteen.[12] The organisation also reports violations in the Yugoslav-Albania border region to cut off the supply routes of the KLA.[13] Among other violations, Human Rights Watch mentions

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[7] Amnesty International, Report 1999 on Yugoslavia (Federal Republic of), from January to December 1999, for more details see: http://www.amnesty.org/ailib/aireport/ar99/eur70.htm.
[8] *Id.*
[9] Human Rights Watch, *Humanitarian Law Violations in Kosovo*, London, Human Rights Watch, 1998, p.18.
[10] Ibid., pp.19-26.
[11] Ibid., p.27.
[12] Ibid., p.28.
[13] Ibid., p.38.

forcible disappearances, arbitrary detentions and arrests and restrictions on the media.[14]

On the other hand, Human Rights Watch finds that the KLA has committed violations of humanitarian law, including the taking of hostages, operations to drive Serbs out of Kosovo, attacks, abductions (at least 138 individuals, mostly ethnic Serbs, but also some Albanians and Roma who were consider collaborators with the Yugoslavia government by the KLA), and summary executions. [15] This information on the number of abducted people by the KLA had been also confirmed by the International Committee of the Red Cross (ICRC).[16] Further, the massacre in Racak that precipitated intervention in Kosovo had been a Serbian police response to KLA activities in this region. Human Rights Watch reports that a number of ethnic Serbs were kidnapped in the region and three policemen were killed and one wounded.[17] The police responded in January by burning and looting the village, torture, indiscriminate killings and extrajudicial executions.[18] The international community had been horrified by the brutality of the Serbian police in Racak and public opinion in western states became in favour of intervention in Kosovo.

Let us now explore the findings and resolutions of the UN instruments. First of all, the UN General Assembly noted the deterioration of the situation from the beginnings of the 90's. In its resolution 48/153 it condemned the police

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[14] Ibid., pp.50-74.
[15] Ibid., pp.75-87.
[16] International Committee of the Red Cross, Annual Report 1998, Federal Republic of Yugoslavia (Serbia, Montenegro), for further details go to http://www.icrc.org.
[17] Human Rights Watch, Report on the Massacre in Racak, January 1999. For further details see: http://www.hrw.org/press/1999/jan/yugo0129.htm.
[18] *Id.*

brutality against ethnic Albanians in Kosovo, the discriminatory removal of ethnic Albanian officials, the arbitrary imprisonment of ethnic Albanian journalists and the repression by the Serbian police and military.[19] In the same resolution, the General Assembly urges the authorities in the Federal Republic of Yugoslavia (FRY) to revoke all discriminatory legislations, in particular that which has entered into force in 1989, to re-establish the democratic institutions of Kosovo and to resume dialogue with ethnic Albanians in Kosovo.[20] In the next year, the General Assembly added in the list of human rights violation the harassment and persecution of political parties and associations of ethnic Albanians and their leaders, as well as the elimination in practice of the Albanian language, particularly in public administration and services.[21]

In the coming years General Assembly resolutions repeated the same violations of human rights in Kosovo, as there was no improvement of the situation in Kosovo.[22] In 1998 however, things had dramatically changed. The sharp worsening of the situation is evident in resolution 52/164, where the General Assembly was *"gravely concerned about the systematic terrorisation of ethnic Albanians, as demonstrated in the many reports, inter alia, of torture of ethnic Albanians, through indiscriminate and widespread shelling, mass forced displacement of civilians, summary executions and illegal detention of ethnic Albanian citizens of the Federal Republic Yugoslavia (Serbia and Montenegro) by*

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[19] United Nations General Assembly Resolution 48/153, 20 December 1993.
[20] *Id.*
[21] United Nations General Assembly Resolution 49/204, 23 December 1994.
[22] United Nations General Assembly Resolution 50/190, 22 December 1995, and 51/111, 12 December 1996, 52/139, 12 December 1997.

the police and military".[23] On the other hand, the General Assembly was *"concerned about reports of violence committed by armed ethnic Albanian groups against non-combatants and the illegal detention of individuals, primarily ethnic Serbs, by those groups".*[24]

Pursuant to the UN General Assembly, the UN Commission on Human Rights describes the worsening of the situation in Kosovo in a similar manner. The 1992 report of the UN Commission on Human Rights refers the discrimination and oppression of the Albanian population in Kosovo, as well as torture and killings.[25] In Commission Resolution 1993/7, there is evidence of the violations reported by the UN General Assembly of the same year: police brutality against ethnic Albanians, arbitrary searches, seizures and arrests, torture and ill-treatment during detention and discrimination in the administration of justice; discriminatory removal of ethnic Albanian officials and arbitrary imprisonment of ethnic Albanian journalists, closure of Albanian-language mass media.[26] All reports and resolution of the Commission include the same findings of human rights violations in Kosovo from the beginnings of the 90's until the end of 1997. With the deterioration of the situation in 1998 and 1999, however, the reports include new evidence of worse tactics against ethnic Albanians in Kosovo. The Commission now refers to ethnic cleansing, massive military operations against unarmed civilians, systematic and

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[23] United Nations General Assembly Resolution 53/164, 9 December 1998.
[24] *Id.*
[25] UN Commission on Human Rights, Report on the Situation of Human Rights in the Former Yugoslavia, E/CN.4/1992/S-1/9, 28 August 1992.
[26] UN Commission on Human Rights, Resolution 1993/7, Situation of Human Rights in the territory of the Former Yugoslavia, 23 February 1993.

planned massacres, destruction of property and forced mass exoduses to neighbouring countries, as well as internal displacement.[27]

To this point, the situation in Kosovo during the years of the crisis is well manifested through various NGO and UN reports. What did the international community do for the improvement of the situation? Did NATO commence its aerial bombing in the FRY before exhausting all political and peaceful means of settlement of the crisis? Indeed, before the war started, many states, individually or collectively, had expressed their concern on the worsening of the situation. Many efforts had been made by the Contact Group, which was established in 1994 as the Contact Group on Bosnia and Herzegovina and consisted of the Foreign Ministers of France, Germany, the Russian Federation, the UK, the US, and in 1996 Italy.[28] Furthermore, many organisations, and more specifically European ones (i.e. the European Union, the Council of Europe, the Organisation for Security and Cooperation in Europe etc.) contributed in the efforts to bring a peaceful solution.[29] Among the first efforts for political solution of the crisis, is the Hill proposal, which failed to end to an agreement.[30] Of a great importance had been the Holbrooke Agreement, where the FRY and the UN Special Envoy, Richard Holbrooke, agreed on a basis of a political solution for Kosovo.[31] Another

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[27] UN Commission on Human Rights, Resolution 1999/2, Situation of Human Rights in Kosovo, 13 April 1999.
[28] Heike Krieger(ed.), *The Kosovo Conflict and International Law, an Analytical Documentation 1974-1999*, Cambridge, Cambridge University Press, 2001, p.115.
[29] Ibid., chapter 3.
[30] Ibid., pp.116-117 and 155-185.
[31] Ibid., p.290.

agreement reached for the improvement of the situation had been the establishment of the OSCE verification Mission in Kosovo.[32]

Nevertheless, the major effort for a political solution had been the Rambouillet negotiations in France. Although Rambouillet presented a realistic opportunity for both sides to settle their disputes peacefully, this conference embraces many oddities and it could be said that the negative outcome was predictable. First of all, this conference was held under the NATO threats on air strikes against Yugoslavia.[33] NATO insisted that its threats of force had been decided in order to back up diplomatic efforts to achieve peace in Kosovo and open the way for a political solution to the crisis.[34] At the end of it NATO informed Yugoslavia that if it did not sign the whole draft, Yugoslavia would be subjected to aerial assault.[35] This kind of coercive diplomacy, as well as the inflexibility of the US, and more specifically of the US Secretary of State, Madeleine Albright, led to failure of achieving an agreement.[36] Another oddity is that NATO states exercised pressure on Yugoslavia to negotiate with KLA representatives.[37] This action is highly questionable, given the fact that the KLA is considered a terrorist organisation by various regional organisations, UN resolutions and the Contact Group itself.[38] Furthermore, few months before the

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[32] Ibid., pp.188-189.

[33] Nicholas Tsagourias, "Humanitarian Intervention After Kosovo and Legal Discourse: Self-Deception or Self-Consciousness?", *Leiden Journal of International Law*, vol.13, 2000, p.14. Also Alex J. Bellamy, *Kosovo and International Society*, New York, Palgrave McMillan, 2002, pp.120-130.

[34] NATO, statement by the Secretary General, 27 October 1998 (Krieger, op.cit., p.298).

[35] Mark Littman, *Kosovo: Law and Diplomacy*, London, Centre for Policy Studies, 1999, p.9.

[36] Richard A. Falk, "Kosovo, World Order, and the Future of International Law", *American Journal of International Law*, vol.93, No4, October 1999, p.854.

[37] Bellamy, op.cit., pp.130-131.

[38] Michael Maccgwire, "Why Did We Bomb Belgrade?", *International Affairs*, vol.76, No1, January 2000, p.7. Maccgwire cites that in 1998 the KLA was still classified by the State

war, the KLA had been considered an international terrorist organisation by the US Department of State and by the US Central Intelligence Agency (CIA).[39] How could a state negotiate with a terrorist organisation that threatens its national security? What is more, although Russia was a member of the Contact Group, it was only involved in the outskirts of the proximity talks, which were strictly confined to NATO members.[40]

The key points of the Rambouillet Conference affirm the argument that wise and preventive diplomacy was not present to the Kosovo crisis. The main objectives were: an interim agreement for the period of three years; an immediate end to the violence; peaceful settlement of the conflict through dialogue; respect for the territorial integrity of Yugoslavia; free and fair elections in Kosovo, supervised by the OSCE; respect to the rights of members of all national communities; amnesty and release of political prisoners.[41] Yugoslavia had accepted the substance of the political proposals well before the ultimatum date.[42] Yet, the implementation conditions of the interim agreement provided for the establishment of a NATO-led multinational military implementation force in Yugoslavia, which would be endorsed by a UN Security Council Resolution under

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Department as a terrorist organisation. Further, the Contact Group had condemned terrorist actions by the KLA in many statements (i.e. Contact Group Meeting, Statement on Kosovo, Moscow, 25 February 1998 and Contact Group Meeting, Statement on Kosovo, London, 9 March 1998). The EU also condemns terrorism and violence acts committed by the KLA (EU, Common Position Defined by the Council, 19 March 1998). All the statements above can be found in Krieger (ed.), op.cit., p.121, 122, 125.

[39] Edward McWhinney, *The United Nations and a New World Order for a New Millennium: Self-Determination, State Succession, and Humanitarian Intervention*, The Hague, the Netherlands, Kluwer Law International, 2000, p.70. Also Maccgwire, op.cit., p.7.

[40] Maccgwire, op.cit., p.7 and Falk, op.cit., p.854.

[41] Maccgwire, op.cit., p.7, Bellamy, op.cit., pp.131-132, Krieger, op.cit., pp.261-278.

[42] Littman, op.cit., p.9 and Maccgwire, op.cit., p.6.

Chapter VII of the Charter.[43] But the Serbs could not accept that the 28.000 strong implementation forces would be an arm of NATO.[44] As Yugoslavia could not accept the military clause, NATO could have dropped the requirement that the military clauses were non-negotiable and continued negotiation on the basis of the Yugoslav offer to accept an international force to implement the agreed political settlement.[45] But NATO did not wish any amendment on its proposals. Thus, it is obvious that diplomatic means had not been exhausted.

Diplomatic efforts by states, groups of states and regional organisations failed to resolve the Kosovo crisis. But what was the response of the UN Security Council, as the only body competent for the maintenance of international peace and security? In March 1998 resolution 1160 had condemned the excessive use of force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as acts of terrorism by the KLA.[46] Further, acting under Chapter VII of the Charter of the United Nations, it *calls upon the FRY immediately to take the further necessary steps to achieve a political solution to the issue of Kosovo through dialogue... calls also upon the Kosovar Albanian leadership to condemn all terrorist action... calls upon the authorities in Belgrade and the leadership of the Kosovar Albanian community urgently to enter without preconditions to into a meaningful dialogue... agrees, without prejudging the outcome of that dialogue, with the proposal in the Contact Group statements of 9 and 25 March 1998 that the principles for a solution of the Kosovo problem should be based on the*

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[43] Krieger, op.cit., p.272.
[44] Maccgwire, op.cit., p.7.
[45] Littman, op.cit., p.12.
[46] UN Security Council, S/RES/1160, adopted by the Security Council at its 3868th meeting on 31 March 1998.

territorial integrity of the FRY...[47] What is more, the Council imposed an arms embargo in Yugoslavia for the purposes of fostering peace and stability in Kosovo.[48] Thus, it could be said that the Security Council intervened in the internal affairs of the FRY. However, this had been a non-forcible intervention and it did not imply the use of force.

In September of the same year the Council adopted another resolution on Kosovo, resolution 1199. In this resolution, the Security Council had been *gravely concerned at the recent intense fighting in Kosovo and in particular the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army, which have resulted in numerous civilian casualties and, according to the estimate of the Secretary-General, the displacement of over 230,000 persons from their homes; deeply concerned by the flow of refugees into northern Albania, Bosnia and Herzegovina and other European countries... deeply concerned by the rapid deterioration in the humanitarian situation throughout Kosovo...*[49] In this resolution the Council had determined that the deterioration of the situation in Kosovo constitutes a threat to peace and security in the region.[50] This determination is of a great significance because it endorses the internationalisation of the crisis. The Council further demanded under Chapter VII of the Charter that all parties cease hostilities and maintain a ceasefire in Kosovo, that they take immediate steps to improve the humanitarian situation and that they enter immediately into a meaningful dialogue without preconditions and with

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[47] *Id.*
[48] *Id.*
[49] UN Security Council, S/RES/1199, adopted by the Security Council at its 3930th meeting on 23 September 1998.
[50] *Id.*

international involvement.[51] It also demanded the FRY to facilitate the safe return of refugees.[52]

The last resolution before the 1999 NATO intervention in Kosovo was resolution 1203. In this resolution the Council welcomed the agreement between the FRY and OSCE for the establishment of the OSCE verification mission in Kosovo, as well as the agreement between the FRY and NATO for the establishment of an air verification mission over Kosovo.[53] Acting under Chapter VII of the UN Charter, the Council endorsed the above agreements and demanded that both the FRY and the Kosovo Albanian leadership comply fully and swiftly with resolutions 1160 and 1199 and cooperate fully with the OSCE Verification Mission in Kosovo, and that the FRY fully cooperate with the NATO Air Verification Mission in Kosovo.[54] Resolution 1203 did not authorise the use of force under Chapter VII of the UN Charter, nor did resolutions 1160 and 1199. Thus, NATO was not authorised by the UN Security Council to use all necessary means. NATO states offered a plethora of justifications for the use of force in Kosovo. But was the 1999 intervention in Kosovo legal? Were the massacres and human rights violations enough to justify military intervention?

NATO violated Article 2(4), as its action was not an action of self-defence (Article 51), nor was it UN Security Council enforcement action as a response to a threat to peace and Security (Article 42). The threat or use of force is illegal in international law, save the two above exceptions. NATO had violated the rule

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[51] *Id.*
[52] *Id.*
[53] UN Security Council, S/RES/1203, adopted by the Security Council at its 3937th meeting on 24 October 1998.
[54] *Id.*

twice, as it started threatening a sovereign state almost half a year before the intervention.[55] Most lawyers considered the 1999 NATO intervention in Kosovo illegal. Davidson argued that *"since the use of force is clearly proscribed by the UN Charter and a variety of other instruments, as well as customary international law, it would seem that the use of military might as a means of securing compliance is, at present, not a legally acceptable way of proceeding"*.[56] Charney said that *"indisputably, the NATO intervention through its bombing campaign violated the United Nations Charter and international law"*.[57] Falk thinks that *the "textual level of analysis cannot give a satisfactory basis for NATO intervention"*.[58] Thomas Franck accurately observed that *"neither the US Department of State, nor NATO seriously attempted to justify the war in international legal terms"*.[59]

Michael Reisman added *"all appreciate that NATO's action in Kosovo did not accord with the design of the United Nations Charter"*.[60] Professor Lowe believes that *"the analysis of the text of the UN Charter... yields no clear justification for the NATO action. On the contrary, it suggests that the action was unlawful"*.[61] Littman argues that *"given the weight of opinion and legal authority against the NATO position, the paucity of evidence in its favour and the reluctance*

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[55] Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects", *European Journal of International Law*, vol.10, 1999, p.2.
[56] Scott Davidson, "Kosovo, Human Rights, and the Use of Force, *Human Rights Law and Practice*, vol.5, No3, December 1999, p.173.
[57] Jonathan I. Charney, "Anticipatory Humanitarian Intervention in Kosovo", *American Journal of International Law*, vol.93, No4, October 1999, p.834 .
[58] Falk, op.cit., p.853.
[59] Thomas M. Franck, "Lessons of Kosovo", *American Journal of International Law*, vol.93, No4, October 1999, p.859.
[60] W. Michael Reisman, "Kosovo's Antinomies", *American Journal of International Law*, vol.93, No4, October 1999, p.860.
[61] Krieger, op.cit., p.336.

of the UK to test its view before the ICJ, it is difficult to avoid the conclusion that the NATO action was illegal".[62] Cassese noted that the use of force against Yugoslavia was contrary to the UN Charter.[63] It is clear from the above that most scholars of international law criticised sharply the 1999 NATO intervention in Kosovo. What was the NATO response to such criticisms? The alliance and its member states offered a wide range of legal aspects for the 1999 intervention. In the efforts to prove that NATO intervention was legal, those legal justifications many times contradict each other. With humanitarian intervention, most of the times invoked implicitly, in the core of this argumentation, NATO states attempted mis-interpretations of the UN Charter and international legal norms to persuade the world community that they acted legally and in conformity with international law. Nevertheless, this tactic of various justifications is evident in each and every alleged humanitarian intervention. This thesis insists on this argument. States imply the alleged doctrine of humanitarian intervention, but they try to justify their intervention on various other justifications, not on a right of humanitarian intervention. This fact itself proves that states are well aware that such a right does not exist. Let us now consider these justifications.

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[62] Littman, op.cit., p.7.

[63] Antonio Cassese, "Ex Iniuria Ius Oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?", European Journal of International Law, vol.10, 1999, p.23.

NATO JUSTIFICATIONS FOR THE USE OF FORCE

As it has been already stated above, at the core of NATO intervention in Kosovo lays implicitly the doctrine of humanitarian intervention. Given the ambiguous character, the suspiciousness and the criticism that surround the doctrine, NATO states had chosen the easy way of relying on mixed justifications.[64] It is not the first time in history that states intervening for humanitarian purposes rely on a wide range of legal justifications. A detailed analysis of humanitarian intervention indicates that states evoking humanitarian intervention take refuge in other legal justifications, being well aware that such a doctrine is not a legally accepted norm.[65] The intervening states in Kosovo, not unlike states in the past that alleged a right to humanitarian intervention, used a variety of justifications. Before exploring arguments on humanitarian intervention, it would be very essential to take a brief look on other legal aspects.

First of all, some states and lawyers spoke of humanitarian necessity.[66] For instance, the Foreign Secretary and the Minister of State told the Foreign Affairs Committee of the British House of Commons that states had the right to use force in the case of *"overwhelming humanitarian necessity where, in the light of all the*

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[64] Major General William Moorman, "Humanitarian Intervention and International Law in the Case of Kosovo", *New England Law Review*, vol.36, No4, Summer 2002, p.777.

[65] Chesterman, op.cit., pp.70-80. In all of the three major instances of the Cold War era, India, Tanzania and Vietnam had justified their interventions on self-defence. In Iraq, US, UK and France offered a wide range of legal aspects in support of the "Safe Havens" (Chesterman, op.cit., pp.200-205). Also Davidson, op.cit., pp.164-165.

[66] Allen Buchanan, *Reforming the International Law of Humanitarian Intervention*, in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention, Ethical, Legal, and Political Dilemmas*, Cambridge, Cambridge University Press, 2003, p.132; Ruth Wedgwood, "NATO's Campaign in Yugoslavia", *American Journal of International Law*, vol.93, No4, October 1999, p.832; Daniel H. Joyner, "The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm", *European Journal of International Law*, vol.13, No.3, 2002, p.602; and Adam Roberts, "NATO's 'Humanitarian War' over Kosovo", *Survival*, vol.41, No.3, 1999, p.106.

circumstances, a limited use of force is justifiable as the only way to avert humanitarian catastrophe".[67] Belgium advanced the same justification before the ICJ, when the FRY brought proceedings against ten NATO members.[68] Yet, the doctrine of necessity does not apply in the case of Kosovo, as a state of necessity may only be invoked as justification if *"the act was the only means of safeguarding an essential interest of the state against an imminent peril"* and *"the act did not seriously impair an essential interest of the state towards which [an international] obligation existed".*[69] It would be difficult to argue that NATO's action would have justified these requirements.[70]

Furthermore, many politicians of the intervening states stressed upon the internationalisation of the crisis and stated that they cannot sit idly by and see another massacre like Bosnia.[71] Before the International Court of Justice, the US claimed that it finds justification on *"the humanitarian catastrophe that has engulfed the people of Kosovo as a brutal and unlawful campaign of ethnic cleansing has forced many hundreds of thousands to flee their homes and has severely endangered their lives and well-being"*, as well as *"on the serious violation of international humanitarian law and human rights obligations by forces*

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[67] Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism After Kosovo*, New York, Palgrave, 2001, p.24.

[68] International Court of Justice, "Legality of Use of Force", Serbia and Montenegro v. Belgium, 1999, oral pleadings, for more details see: http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm.

[69] Report of the International Law Commission on the work of its 51st session (1999), A/54/10, p.72. Also Jans Elo Rytter, "Humanitarian Intervention without Security Council: From San Francisco to Kosovo-and Beyond", *Nordic Journal of International Law*, vol.70, 2001, p.134. Ole Spiermann, "Humanitarian Intervention as Necessity and the Threat or Use of Jus Cogens", *Nordic Journal of International Law*, vol.71, 2002, p.527. And Davidson, op.cit., p.172 and Chesterman, op.cit., p.214 citing the Gabcikovo-Nagymaros case.

[70] Davidson, op.cit., p.172 and Chesterman, op.cit., p.214.

[71] International Court of Justice, "Legality of Use of Force", Serbia and Montenegro v. United States of America, oral pleadings, 1999, see: http://www.icj-cij.org/icjwww/idocket/iyus/iyusframe.htm.

under the control of the Federal Republic of Yugoslavia, including widespread murder, disappearances, rape, theft and destruction of property It could be argued, that although the international community has recognised some international standards of human rights and international obligations, it has not adopted coercive measures for the protection of human rights".[72]

The US advocate in the ICJ, however, did not explain before the Court how this preposition provides a legal justification, since he admitted himself that the international community has not adopted coercive measures for human rights. No doubt, the obligation of states to respect and protect the basic rights of all human people is the concern of all states, in other words, they are erga omnes.[73] Gross and widespread violations of human rights constitute an obligation erga omnes.[74] But, every state is obliged to respond to those violations by countermeasures that do not involve the threat or use of armed force.[75] The 1970 Declaration on Friendly Relations confirms that countermeasures must not involve the use of force.[76] Further, although many violations of human rights had been witnessed in Kosovo, it is difficult to support that the Serbian Government perpetrated acts genocide against the ethnic Albanians in Kosovo.[77] Thus, the US and NATO justification is

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[72] International Court of Justice, "Legality of Use of Force", Serbia and Montenegro v. United States of America, oral pleadings, 1999, see: http://www.icj-cij.org/icjwww/idocket/iyus/iyusframe.htm.

[73] Peter Hilpold, "Humanitarian Intervention: Is There a Need for a Legal Reappraisal?", *European Journal of International Law*, vol.12, 2001, p. 453. Also Simma, op.cit., p.2.

[74] Catherine Guicherd, "International Law and the War in Kosovo", *Survival*, vol.41, No2, Summer 1999, p.21. Also Davidson, op.cit., p.170 and Charney, op.cit., p.835.

[75] Charney op.cit., p.835, Simma, op.cit., p.2, and Guicherd, op.cit., p.21.

[76] General Assembly Resolution, GA/Res.2625(XXV), Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (A/8082), 24 October 1970.

[77] Davidson, op.cit., p.172, Simma, op.cit., p.2 and Maccgwire, op.cit., p.1.

totally inadequate to prove that NATO action was in conformity with international law.

The most dominant justification put forward by NATO states was that NATO intervention was in conformity with Security Council resolutions 1160, 1199 and 1203, which had demanded Serbian forces to stop their violations of human rights in Kosovo.[78] The US Department of State had argued that no Security Council authorisation was needed.[79] Before the International Court of Justice (ICJ), the US found justification in *"the resolutions of the Security Council, which have determined that the actions of the Federal Republic of Yugoslavia constitute a threat to peace and security in the region and, pursuant to Chapter VII of the Charter, demanded a halt to such actions"*.[80] After the Campaign had ended, the UN Secretary General offered various legal justifications, including the justification of the use of force on the UN Security Council resolutions.[81] Yet, NATO and its members did not explain how those Security Council Resolutions were sufficient to provide legitimacy to their intervention.[82]

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[78] Nicholas J. Wheeler, *Reflections on the Legality and Legitimacy of NATO's Intervention in Kosovo*, in Ken Booth (ed.), *The Kosovo Tragedy, the Human Rights Dimensions*, London, Franck Cass Publishers, 2001, p.153 and 155; J. L. Holzgrefe, *The Humanitarian Intervention Debate*, in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention, Ethical, Legal, and Political Dilemmas*, Cambridge, Cambridge University Press, 2003, p.49. N. D. White, "The Legality of Bombing in the Name of Humanity", *Journal of Conflict and Security Law*, vol.5, No.1, 2000, pp.29-30. Enrico Milano, "Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Territorial Status", *European Journal of International Law*, vol.14 , No.5, 2003, p.1012. Also Guicherd, op.cit., p.26, Wedgwood, op.cit., p.829, Glennon, op.cit.,pp.25-26, Joyner, op.cit., p.602, Krieger, op.cit., p.393 and Roberts, op.cit., p.105.

[79] Glennon, op.cit., p.25.

[80] International Court of Justice, "Legality of Use of Force" Serbia and Montenegro v. United States of America, oral pleadings, 1999, see: http://www.icj-cij.org/icjwww/idocket/iyus/iyusframe.htm.

[81] Glennon, op.cit., p.24.

[82] Mary Ellen O'Connell, "The UN, NATO and International Law After Kosovo", *Human Rights Quarterly*, vol.22, 2000, p.81.

The UN Charter is clear in its prepositions. Article 2(4) on the ban of the threat or use of force provides only two exceptions, which are Articles 42 and 51. The fact that the UN Security Council resolutions were adopted under Chapter VII of the Charter does not mean that NATO was authorised to intervene. Chesterman argued that *"the resolutions passed cannot provide a legal basis for the action, lacking even the ambiguity of resolution 688 (1991) on Iraq"*.[83] Resolution 1199 refers to the situation in Kosovo as being a threat to international peace and security within the terms of Article 39; however, this does not justify resort to force, since nowhere in resolution 1199 is there explicit authorisation for the use of force to protect human rights.[84] Thus, this justification is at least specious.[85] NATO countries were well aware that obtaining Security Council authorisation was impossible, given the threat of a Russian or a Chinese Veto.[86] Thus, NATO chose to rely upon misinterpretations of the UN Charter, being well aware that its action was illegal.

Another justification oddly alleged by lawyers and NATO countries had been collective self-defence.[87] Even the US Department of State spokesman claimed that Article 51 supported NATO's attack.[88] Nevertheless, it cannot be regarded as a species of self-defence within Article 51 of the Charter, because Kosovo is not a state, which is a basic requirement for self-defence under

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[83] Chesterman, op.cit., p.214.
[84] Davidson, op.cit., p.168.
[85] Holzgrefe, op.cit., p.49.
[86] Luis Henkin, "Kosovo and the Law of Humanitarian Intervention", *American Journal of International Law*, vol.93, No4, October 1999, p.825. Thomas M. Franck, "Break It, Don't Fake It", *Foreign Affairs*, vol.78, No.4, 1999, pp.116-117. Also Chesterman, op.cit., p.210, Wedgwood, op.cit., p.831, Moorman, op.cit., p.781 and Roberts, op.cit., p.104.
[87] Christine Chinkin, "Kosovo: A 'Good' or a 'Bad' War?, *American Journal of International Law*, vol.93, No4, October 1999, p.843. Also Guicherd, op.cit., p.28.
[88] Glennon, op.cit., p.22.

international law.[89] What is more, no armed attack occurred against any of the NATO states.[90] Thus, the existence and purposes of NATO come into question. NATO was established in 1949 on the basis of Article 51 of the UN Charter.[91] Its existence had to do with the Soviet threat and the Cold War.[92] After the fall of Communism and the Cold War, NATO leaders reemphasised that the alliance would remain defensive, stressing that none of its weapons will ever be used except in self defence.[93] NATO, given the fact that its action is not justified under Article 51, violated its own 1949 treaty, which does not provide any convincing legal grounds for recourse to force aside from self defence.[94]

The imaginative lawyers and scholars managed to find many more legal aspects for intervention. One of them is the rejection of the Russian draft resolution that called NATO's intervention a flagrant violation of the principle of sovereignty and demanded an immediate cessation of the use of force against the Federal Republic of Yugoslavia.[95] The draft resolution was not adopted since it was

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[89] Brendan Howe, *On the Justifiability of Military Intervention: The Kosovan Case*, in Alexander Moseley and Richard Norman (eds.), *Human Rights and Military Intervention*, Hants, Ashgate, 2002, p.170; Julie Mertus, *Human Rights Should Know no Boundaries*, American Society of International Law, ASIL Insights, April 1999. For more details see: wysiwyg://29/http://www.asil.org/insights/insigh31.htm. Also Byers and Chesterman, op.cit., p.182, Davidson, op.cit., p.168, Guicherd, op.cit., p.28 and Krieger, op.cit., p.336.

[90] Michael Byers and Simon Chesterman, *Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention, Ethical, Legal, and Political Dilemmas*, Cambridge, Cambridge University Press, 2003, p.182. Also Glennon, op.cit., p.22 and Buchanan, op.cit., p.168

[91] Nicola Butler, *NATO: From Collective Defence to Peace Enforcement*, in Albrecht Schnabel and Ramesh Thakur (eds.), *Kosovo and the challenge of humanitarian intervention: Selective indignation, Collective action, and International Citizenship*, New York, United Nations University Press, 2000, p.273. Also Simma, op.cit., p.10.

[92] Butler, op.cit., p.273.

[93] *Id.*

[94] Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned*, Oxford, Oxford University Press, 2000, p.166; Doug Bandow, *NATO's Hypocritical Humanitarianism*, in Ted Galen Carpenter (ed.), *NATO's Empty Victory: A Postmortem on the Balkan War*, Washington D.C., CATO Institute, 2000, p.31. Also Glennon, op.cit., p.21 Buchanan, op.cit., p.168, Krieger, op.cit., p.338 and White, op.cit., p.36.

[95] Draft Resolution S/1999/328.

rejected by 12 votes to three (China, the Russian Federation and Namibia).[96] Some NATO states and lawyers precipitated to discern another legal rationale for NATO's intervention in Kosovo.[97] Yet, the Council's rejection of the Russian draft resolution does not mean that the NATO intervention was legally acceptable because the Council did not condemn the use of force against Yugoslavia.[98] Of great interest is the fact that some scholars presaged that this vote constitutes a new practice and *opinio juris* in support of humanitarian intervention.[99] It could be said though that this proposition is immature and false, but it will be examined below.

The last legal aspect to be examined before exploring the vague and ambiguous claim of the right of humanitarian intervention in customary international law has to do with resolution 1244 that brought an end to hostilities and decided for the future of the Serbian province. Some lawyers claimed that this resolution could be taken to imply *post facto* approval of the military action.[100] The same justification had been raised in Liberia and Sierra Leone, where a presidential statement welcomed the fact that the military junta had been defeated.[101] Yet, it is difficult to believe that resolution 1244 added a sense of *ex-post* UN legitimacy to

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[96] Martha Brenfors and Malene Maxe Petersen, "The Legality of Unilateral Humanitarian Intervention – A Defence", *Nordic Journal of International Law*, vol.69, 2004, p.497. Also Davidson, op.cit., p.169, Chesterman, op.cit., p.213, Wheeler, op.cit., p.152, Milano, op.cit., p.1011 and White, op.cit., p.33.

[97] International Court of Justice, "Legality of Use of Force", Serbia and Montenegro v. Belgium, 1999, oral pleadings, for more details see: http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm. Also Henkin, op.cit., p.826 and White, op.cit., p.33.

[98] Davidson, op.cit., p.169, Wheeler, op.cit., p.156, White, op.cit., p.33 and Roberts, op.cit., p.105.

[99] Wheeler, op.cit., pp.156-157.

[100] Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian* Intervention, in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention, Ethical, Legal, and Political Dilemmas*, Cambridge, Cambridge University Press, 2003, p.225. Also UK House of Commons, Foreign Affairs Committee, Fourth Report on Kosovo, 7 June 2000, as cited in Krieger (ed.), op.cit., p.337, Simma, op.cit., p.22, Henkin, op.cit., pp.824 and 826, Wedgwood, op.cit., p.828, Moorman, op.cit., p.781, the Independent International Commission on Kosovo, op.cit., p.163 and 172-173, Brenfors and Petersen, op.cit., p.497, Milano, op.cit., p.1013 and Franck, op.cit., p.857.

[101] Brad R. Roth, *Governmental Illegitimacy in International Law,* Oxford, Clarendon Press, 1999, p.407 and S/PRST/1997/52, 14 November 1997.

the operation, since it did not approve or ratify the NATO action.[102] The UN Charter is clear in its prepositions. The only Security Council resolution that legitimises the use of force is a resolution under Chapter VII of the Charter that authorises the use of force (under Article 42). Any other interpretation of the Charter remains void. Russia and Namibia that voted for the Russian draft resolution calling NATO's intervention a violation of the Charter, voted for the resolution 1244 as well. Russia would never vote for this resolution if it would legitimise NATO's use of force against Yugoslavia. Indeed, Russia repeated its accusations of NATO by calling NATO "an aggressor" that violated international law.[103] China also criticised NATO action and made reference to violation of the UN Charter and international law.[104] It is obvious from the above that resolution 1244 does not reflect any *post facto* legitimacy, rather that the desire of states to settle the dispute peacefully.

HUMANITARIAN INTERVENTION

NATO and its members offered various justifications for the threat and use of force by the organisation against the FRY. Although some scholars and lawyers argued that in the heart of the 1999 intervention in Kosovo implicitly lies

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[102] Kohen Marcelo, L' Emploi de la force et la crise du Kosovo: Vers un nouveaue désordre juridique international", *Revue Belge de Droit International*, vol32, 1999, p.141. Also White, op.cit., p.32, Hilpold, op.cit., p.441, Simma, op.cit., p.11 and McWhinney, op.cit., p.74.
[103] S/PV.4011, 10 June 1999.
[104] *Id.*

the doctrine of humanitarian intervention[105], NATO countries and NATO itself barely referred to such a right.[106] Most states justified their action as a response to prevent humanitarian catastrophe.[107] When the FRY brought ten NATO states before the ICJ asking for provisional measures against those states, only Belgium explicitly referred to a right of humanitarian intervention in international law.[108] Belgium supported its view on the well known interventionist argument that NATO's actions had been compatible with Article 2(4) because it was not directed "against the territorial integrity or political independence" of the FRY.[109] Moreover, Belgium referred a number of precedents that support NATO's legality.[110] It could be said that humanitarian catastrophe implies the doctrine of humanitarian intervention. Why did NATO states not refer to humanitarian intervention explicitly? Chesterman noted that *"though this phrase (humanitarian catastrophe) recalls the doctrine of humanitarian intervention, some care appears to have been taken to avoid invoking that doctrine by name"*.[111] NATO states were well aware that the international community is very suspicious of humanitarian intervention and it opposes the establishment of such a right. This is why they did not explicitly invoke it; simply because the community of states would not support NATO.

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[105] Dino Kritsiotis, "The Kosovo Crisis and NATO's Application of Armed Force against the Federal Republic of Yugoslavia", *International and Comparative Law Quarterly*, vol.49, 2000, p.340.

[106] Jane Stromseth, *Rethinking Humanitarian Intervention: the Case for Incremental Change*, in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention, Ethical, Legal, and Political Dilemmas*, Cambridge, Cambridge University Press, 2003, p.235. Also Roberts, op.cit., p.107.

[107] Chesterman, op.cit., p.214, Littman, op.cit., p.1, O'Connell, op.cit.,p.80.

[108] Charney, op.cit., p.837. Also ICJ, "Legality of Use of Force", Serbia and Montenegro v. Belgium, 1999, oral pleadings, see: http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm.

[109] *Id.*

[110] *Id.*

[111] Chesterman, op.cit., p.214.

Before the end of the Cold War, many states raised humanitarian claims for their interventions, but the world community had been reluctant to accept a right of humanitarian intervention. Even in the major instances of alleged humanitarian intervention states relied upon other legal rationales and mostly on Article 51 on self-defence.[112] In 1985, when USA alleged violations of human rights in support of its actions in Nicaragua, the ICJ rejected this justification and stated that *"while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent state, which is based on the right of collective self-defence".*[113]

No doubt, the ICJ rejects any claim to a right of humanitarian intervention in customary international law.[114] Interestingly enough, Teson, one of the most fervent advocates of humanitarian intervention noted that *"the Court's discussion of human rights and humanitarian intervention is unsatisfactory. Its reasoning is overly pro-governmental and insufficiently concerned with human dignity. One*

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[112] Davidson, op.cit., p.165 and Chesterman, op.cit., pp.70-80.

[113] Case of Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, ICJ Rep (1986), 14 , at 134-135, para 268.

[114] Nigel Rodley, "Human Rights and Humanitarian Intervention: The Case Law of the World Court", *International and Comparative Law Quarterly*, vol.38, 1989, p.321, 332. Also Glennon, op.cit., pp.23-24, Chesterman, op.cit., p.62.

cannot avoid the impression that the Court has missed a unique opportunity to develop the law in the sense of reinforcement of human rights. The main effect of the Court's endorsement of the sacredness of national borders will be to reassure tyrants from the right and the left against legitimate demands for freedom and human rights".[115] Teson acknowledges that the ICJ decision does not allow the creation of a right to humanitarian intervention. This is why he turns against the Court that missed this unique opportunity to legitimise humanitarian intervention. Yet, he exaggerates things when he claims that the Court's decision will favour tyrants that violate human rights. On the contrary, the Court found that the use of force cannot be the appropriate method to ensure respect for human rights.

However, Kritsiotis argued that the Court concluded its assessment of the military and paramilitary activities of the US in Nicaragua on the basis of the justifications advanced by the US "on the legal plane", and not of those pleaded at "the political level"[116]. Accordingly, the Court found that the US relied solely on the exercise of its right of collective self-defence, while it did not claim that its intervention, which it justified on the political level, was also justified on the legal level, alleging the exercise of a new right of intervention regarded by the US as existing in such circumstances.[117] Thus, the Court considered the legal justification and not the political ones. No doubt, however, the Court rejected the claim that the use of force is the appropriate method to ensure human rights and this is what

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[115] Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edition, New York, Transnational Publishers, 1997, p.312.
[116] Dino Kritsiotis, "Arguments of Mass Confusion", *European Journal of International Law*, vol.15, No.2, 2004, p.236. For the original source see Nicaragua v. United States of America, ICJ Reports (1986), 14, at 109 (para. 208).
[117] *Id.*

counts here. It does not matter if this was a political argument, but the fact that the Court did not accept this political argument as a legal one.

In the case *Legality of Use of Force* ten NATO states would have the chance to test again the same matter. Although Belgium was the only state the made an explicit reference to humanitarian intervention, the ICJ did not decide on the legality of the use of force, since the case fell on a jurisdictional issue.[118] However, supporters of NATO argue that the right of humanitarian intervention has developed in customary international law.[119] Greenwood believes that the right of humanitarian intervention is based on state practice, but that this is state practice which had evolved since the end of the Cold War.[120] It could be said that Greenwood preferred to include only the instances after the end of the Cold War, because the Nicaragua case affirmed that there is not a right to humanitarian intervention in international law. Yet, even the instances of alleged humanitarian intervention after the end of the Cold War manifestly show that such a right does not exist as a legal one. Many lawyers insist that there is paucity of state practice and *opinio juris* to support a right of humanitarian intervention under customary law.[121] Their argument rejects Greenwoods view that state practice after the end of the Cold War provides a right of humanitarian intervention in customary law. The expansion of alleged instances of humanitarian intervention in the 90's illustrate the international community's willingness to protect human rights, but states were reluctant to claim or acknowledge a general right of humanitarian intervention.[122]

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[118] Littman, op.cit., p.6.
[119] Krieger, op.cit., p.337.
[120] Ibid., p.338.
[121] O'Connell, op.cit., p.70, Charney, op.cit., p.837, Davidson, op.cit., p.164.
[122] Davidson, op.cit., p.165, White, op.cit., p.32 and Simma, op.cit., p.11.

What is more, most interventions of the 90s were collective and authorised by the UN Security Council. This practice, however, does not legitimise unauthorised interventions. In other words, there is lack of *opinio juris*, despite the claims of some lawyers that the Security Council has authorised the use of force for humanitarian purposes and it has set a precedent for humanitarian intervention. The Security Council is a political organ of the UN and its resolutions are mostly governed by extra-legal considerations.[123] Thus, unlike the UN General Assembly[124], the Security Council resolutions reflect state practice, not *opinio juris*.

State practice in the 90's witnessed the willingness of the world community to respond to humanitarian crises through significant involvement of the UN Security Council that authorised such interventions. It could be argued that intervention for humanitarian purposes authorised by the UN Security Council is permissible under international law.[125] This is because Article 42 on UN Security Council enforcement action is one of the two available exceptions to Article 2(4). As regards military interventions without prior Security Council authorisation, they remain in breach of international law.[126] Oscar Schachter noted that *"international law does not, and should not, legitimise use of force across national lines except self-defence (including collective defence) and enforcement measures ordered by the Security Council. Neither human rights, democracy nor self-determination are*

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[123] Ibid., p.169.
[124] Byers and Chesterman, op.cit., p.189.
[125] Anne Orford, *Muscular Humanitarianism: Reading the Narratives of the New* Interventionism, "European Journal of International Law, vol.10, 1999, p.680. Also Simma, op.cit., p.5.
[126] Simma, op.cit., p.6.

acceptable legal grounds for waging war".[127] Thus, humanitarian intervention lacking the Council's authorisation cannot provide a legal aspect for NATO's intervention in Kosovo, because it is obvious that such a right does not exist as a customary rule in international law. Yet, did NATO intervention set a precedent for the creation of such a rule?

KOSOVO INTERVENTION: AN EXCEPTION OR A PRECEDENT FOR THE CREATION OF A NEW CUSTOMARY RULE IN INTERNATIONAL LAW?

Simma noted that *"the lesson which can be drawn from this is that unfortunately there do occur "hard cases" in which terrible dilemmas must be faced and imperative political and moral considerations may appear to leave no choice but to act outside the law".*[128] Nevertheless, he concluded that NATO should not set out to include breaches of the UN Charter as a regular part of its strategic programme for the future because it would have a destructive impact on the universal system of collective security embodied in the Charter.[129] Thus, it is clear from the above that professor Simma believes that NATO's intervention should be of an exceptional character and not a precedent for a new customary law

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[127] Oscar Schachter, *International Law in Theory and Practice*, London, Nijhoff Publishers, 1991, pp. 128-129.
[128] Simma, op.cit., p.22.
[129] *Id.*

in international law. Many other distinguished lawyers rushed to express their view that NATO intervention should be seen as an exception.[130]

What is more, most NATO states supported this view simply by stating that their intervention is an exception which will not be repeated.[131] Before the ICJ, although Belgium justified NATO intervention on the doctrine of humanitarian intervention, it clarified that the intervention is of *a quite exceptional character.*[132] The German Minister of Foreign Affairs spelt out that Kosovo is a special case and should not be considered as constituting a precedent.[133] The French President Jacques Chirac argued that the humanitarian situation constitutes a ground that can justify an exception to a rule, however strong and firm it is.[134] US Secretary of State Madeleine Albright and UK Prime Minister Tony Blair supported the same view.[135]

On the other hand, Cassese although he agrees with Simma that the threat of force followed by the use of armed violence is contrary to the UN Charter, he disagrees that NATO's action in Kosovo must not set a precedent and should remain exceptional.[136] Cassese thinks that from an ethical point of view NATO's resort to armed force was justified, because the international community should not

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[130] Franck, op.cit., p.859, Davidson, op.cit., p.173, and Joyner, op.cit., p.609.
[131] The Independent International Commission on Kosovo, op.cit., p.174, Byers and Chesterman, op.cit., p. 202, O'Connell, op.cit., p.57, Chesterman, op.cit., p.216, Guicherd, op.cit., p.20, Stromseth, op.cit., p.239 and Roberts, op.cit., p.107.
[132] International Court of Justice, "Legality of Use of Force", Serbia and Montenegro v. Belgium, 1999, oral pleadings, for more details see: http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm.
[133] Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford, Oxford University Press, 2001, p.262. Also Byers and Chesterman, op.cit., p.199, Guicherd, op.cit., p.29, Krieger, op.cit., p.398 and Stromseth, op.cit., p.2391.
[134] Guicherd, op.cit., p.28.
[135] Byers and Chesterman, op.cit., p.199 and Chesterman, op.cit., p.216.
[136] Cassese, op.cit., p24.

sit idly by and watch the massacres and expulsions.[137] Further, he believes that there are six premises or roots of NATO intervention in the present international community. First of all, human rights do not belong anymore to the internal affairs of a state and they are increasingly becoming the main concern of the world community as a whole.[138] No doubt, after the end of the Cold War the world community has shown its eagerness to promote and protect human rights.[139] Secondly, the concept now is commonly accepted that obligations to respect human rights are *erga omnes* and any state, individually or collectively has the right to take steps (admittedly, short of force) to attain such respect.[140] Undoubtedly, human rights are *erga omnes* obligations, but Cassese did not explain how the use of force can be justified since states are obliged to respond to those violations by countermeasures that do not involve the threat or use of armed force. Even the US advocate before the ICJ acknowledged that although *"the international community has recognised some international standards of human rights and international obligations, it has not adopted coercive measures for the protection of human rights"*.[141]

The third premise, according to Cassese, is that the idea is merging in the international community that large scale and systematic atrocities may give rise to an aggravated form of state responsibility, to which other states or international organisations may be entitled to respond by resorting to countermeasures other

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[137] Ibid., p.25.
[138] Ibid., p.26.
[139] Davidson, op.cit., p.165.
[140] Cassese, op.cit., p.26.
[141] International Court of Justice, "Legality of Use of Force", Serbia and Montenegro v. United States of America, oral pleadings, 1999, see: http://www.icj-cij.org/icjwww/idocket/iyus/iyusframe.htm.

than those contemplated for delictual responsibility.[142] Fourthly, the international community is increasingly intervening through international bodies in internal conflicts where human rights are in a serious jeopardy.[143] Indeed, regional organisations, as well as the UN Security Council got involved in humanitarian crises during the 90's. In all cases the deterioration of the humanitarian situation as well as the influx of refugees caused a threat to international peace, according to the Security Council, which authorised the use of force or imposed sanctions. However, this represents state practice that has not been formalised into a set of rules of international law.[144] State practice is not enough for the emergence of customary law. Thus, the lack of *opinio juris* makes the crystallisation of such a rule impossible.

Fifth, peaceful settlements of disputes are very important and peaceful measures must always precedence before resorting to the use of force.[145] It is not difficult to guess that Cassese believes that diplomatic efforts and all peaceful means had been exhausted before NATO's recourse to war. He clarifies this premise further down in this article. He transparently points out that *"peaceful means of settling disputes commensurate to the unfolding crisis had been tried and exhausted by the various countries concerned, through the negotiations promoted by the states comprising the Contact Group for the Former Yugoslavia, and at Rambouillet, and later Paris"*.[146] It could be said that he was misinformed, because wise and preventive diplomacy was not present in the case of Kosovo, but

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[142] Cassese, op.cit., p.26.
[143] *Id.*
[144] Guicherd, op.cit., p.29.
[145] Cassese, op.cit., p.26.
[146] Ibid., p.28.

coercive diplomacy under the threats of NATO.[147] As Littman argued, in the Rambouillet Conference the proposals provided a form of dictation, not negotiation.[148] But whether NATO exhausted all diplomatic efforts or not will be thoroughly examined in the following chapter. Finally, he thinks that under certain exceptional circumstances, where atrocities reach such a large scale as to shock the conscience of all human beings may need to outweigh the necessity to avoid friction and armed conflict.[149]

Based upon these trends of the international community, Antonio Cassese believes that under certain strict conditions resort to armed force may gradually become justified, even without a Security Council authorisation.[150] Those conditions according to professor Cassese are: if grave violations of human rights and crimes against humanity occur on a territory of a sovereign state by the governmental authorities; if the crimes against humanity result from anarchy in a sovereign state and it does not call upon or allow other states or international organisations to assist in terminating the crimes; if the Security Council is unable to take any coercive action to stop the violations of human rights because of veto of one of its permanent members; if all peaceful remedies are exhausted; if a group of states decides to try to stop the atrocities with the support of the majority of member states of the UN; and if armed force is exclusively used for the limited

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[147] Bellamy, op.cit., pp. 120-130.
[148] Littman, op.cit., p.10.
[149] Cassese, op.cit., p.26.
[150] Ibid., p.27.

purpose of stopping the atrocities and restoring respect for human rights, not for any goal going beyond this limited purpose.[151]

To this extent, it could be argued that the argument of professor Simma that NATO intervention in Kosovo should not be a precedent for international law, leading to the alteration of the current international legal system, is more prudent than the contrary argument of professor Cassese. Thomas Franck also believes that NATO's action in Kosovo is best seen as an exception from which may be derived a few useful lessons for the future, rather than as the future itself.[152] Of course there had been many alleged humanitarian interventions in the past. Nevertheless, apart from the fact that those interventions reflect state practice, they were condemned in legal terms. Professor Cassese rushed to discern a precedent for future interventions, where states or a group of states will have the right to intervene in a sovereign state when humanitarian crises occur, without a Security Council authorisation. Further, he did not wonder if this new rule would lead to further abuses to the principle of non-intervention. In addition, Professor Cassese did not carefully observe that most of NATO member states argued that the situation in Kosovo was exceptional and should not change the importance of the UN Security Council on the future.[153]

It seems that his ideas threaten the UN foundation and the current system of collective security. He justifies his views upon the Latin dictum *"iniuria ius oritur"*, which means that the law comes up from injustice. In our case this dictum implies that what happened to Kosovo was unfair and from this injustice might

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[151] *Id.*
[152] Franck, op.cit., p.859.
[153] O'Connell, op.cit., p.57.

raise a new customary rule. This customary rule could lead to further abuses to the principle of non-intervention ruling the current international system, as many law scholars argue.[154] Moreover, professor Cassese did not observe another Latin dictum, which is: *"dura lex sed lex"*. This means that "law is tough, but it is law". This is what professor Simma wisely meant when he noted that NATO intervention in Kosovo was illegal and should not become a precedent for international law, although it was morally justified.

The final respond on this debate came with the latter article of professor Cassese, where he recognises that it is premature to maintain that a customary rule has emerged from NATO intervention in Kosovo.[155] Additionally, he suggests that the element of *usus* or *diuturnitas* is clearly lacking.[156] Thus, it is clear from the above that Cassese confutes his previous view that from NATO's intervention might emerge a new customary rule in international law. He concluded to this later argument after a thorough examination of the position taken by the states concerned and the reaction of other states both outside and within the United Nations.[157] Firstly, he noted that the overwhelming majority of states did not condemn NATO intervention.[158] Secondly, he observed that states participating in the use of force have not claimed that they acted in conformity with international

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[154] Nicholas J. Wheeler and Justin C. Morris, *Humanitarian Intervention and State Practice at the End of the Cold War*, in Rick Fawn and Jeremy Larkins (eds.), *International Society after the Cold War: Anarchy and Order Reconsidered*, Basingstoke-England, Macmillan Press, 1996, p.137.

[155] Antonio Cassese, "A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis", *European Journal of International Law*, vol.10, 1999, p.796. Stromseth agrees with the above Cassese's argument (Stromseth, op.cit., p.252).

[156] Cassese, op.cit., p.796.

[157] Ibid., p.791.

[158] Ibid., p.792.

law.[159] Literally, neither the US Department of State nor NATO seriously attempted to justify the war in international legal terms.[160] Obviously, NATO countries were well aware that their intervention was illegal.

In addition, Cassese noted that participating states in Kosovo intervention have justified their actions by stressing that they were going to avert a humanitarian disaster.[161] Yet, this constitutes a moral, not a legal justification and this fact is clear from the terms used. Moreover, he claimed that all states placed emphasis upon the fact that they regarded their action as justified only because it was not taken by one state, but by a group of states acting unanimously within the framework of an intergovernmental organisation.[162] However, NATO constitutes an international organisation on the basis of Article 51 of the UN Charter and the only enforcement action envisaged in this Article is self-defence.[163] What is more, the fact that the intervention was undertaken from a regional organisation does not mean that the intervention is justified.

Another claim of his supports that the same states insisted that they had never stopped attaching crucial importance to the central role of the Security Council and that the armed attack was initiated only as an exceptional measure justified by the failure of that body to act.[164] Even this notion does not justify NATO intervention, because current international law does not provide recourse to the use of force without a Security Council authorisation because of the UN

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[159] *Id.*
[160] Franck, op.cit., p.859.
[161] Cassese, op.cit., p.793.
[162] Ibid., p.794.
[163] Bruno Simma, op.cit., p.11.
[164] Cassese, op.cit., p.794.

deficiencies. Moreover, NATO states could have acted under the UN General Assembly's *Uniting for Peace* resolution. The *Uniting for Peace* resolution had been adopted in 1950 by the General Assembly and resolved that *"if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears a threat to the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach to the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security".*[165] This process had been adopted when in 1950 Council could not respond to China's armed intervention in Korea because of the Soviet Veto.[166] Nevertheless, NATO states did not follow this procedure.

Last but not least, Cassese noted that many states did not participate because they considered the Security Council as the only body entitled to legitimise resort to force in the world community.[167] It could be argued that only these states acted in conformity with current international law. These are the results from Cassese's examination of states' positions. Through them he tried to explain that he was mistaken when he supported the view that a new customary rule has emerged. However, Cassese was not the only one that proclaimed the emergence of a new customary norm.[168] Some others observed that the rejection of

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[165] GA Res 377A(V), Uniting For Peace, 3 November 1950.
[166] Chesterman, op.cit., p.118 and White, op.cit., p.38.
[167] Ibid., p.795.
[168] Byers and Chesterman, op.cit., p.187.

the Russian draft resolution presents a strong precedent for the creation of a customary norm in favour of humanitarian intervention.[169] Wheeler seeks for opinio juris in the statements of participating states in the Council.[170] In any case, however, Russia, China, and India spoke out against NATO intervention, as well as Namibia, Belarus, Ukraine, Iran, Thailand, Indonesia and South Africa.[171] Further, five out of the fifteen members of the Council were NATO states[172] (USA, France, UK, the Netherlands, and Canada) plus one state hostile to the FRY due to prior warfare, Slovenia. On the other hand, Russia was weak and had no allies in the Council. Thus, the political character of the Council is evident. There is no sufficient evidence that this practice of humanitarian intervention is followed by legal considerations. The lack of condemnation cannot be interpreted as an implied *opinio juris* supporting an expansion of the right to use force unilaterally beyond the Charter's principles.[173] What is more, the small number of states participating in the Council's discussions is not adequate to determine whether or not the world community is eager to accept a new customary rule.

Teson noted that *"state practice is at the very least ambivalent on the question of humanitarian intervention, so any interpretation of that practice (for or against) has to rely on extra-legal values. There is no such a thing as a 'state practice' that mechanically yields a legal rule. Diplomatic history has to be interpreted in the light of our moral and empirical assumptions about the purposes*

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[169] International Court of Justice, "Legality of Use of Force", Serbia and Montenegro v. Belgium, 1999, oral pleadings, for more details see: http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm. Also Brenfors and Petersen, op.cit., p.497 and Wheeler, op.cit., p.156.
[170] Wheeler, op.cit., pp.156-158.
[171] Byers and Chesterman, op.cit., p.184.
[172] Ibid., p.182.
[173] Milano, op.cit., p.1011.

of international law. If this is correct, the positivist rejection of humanitarian intervention is far from objective, notwithstanding the claims of international lawyers to the contrary".[174] However, this is not correct. It is simply another Teson's mis-interpretation. He explicitly suggests that interpretation of state practice has to rely on extra-legal values. It could be argued that his argument is totally unreasonable. He is a scholar of international law, but he disregards Article 38 of the ICJ statute that defines international custom *"as evidence of a general practice accepted as law".*[175] It is obvious that his understanding of international law ignores basic documents from treaties and other legal works and decisions. However, international lawyers will have to depend on Article 38 of the ICJ statute and not on Teson's conception of international custom. Further, the fact that Teson makes this notion implies that he acknowledges, although he has made excessive efforts to prove the legality of humanitarian intervention, that there is no customary rule of humanitarian intervention in international law in the traditional at least sense, nor is it going to emerge in the near future.

In the case of Kosovo was not the first time that the "noble" objectives of humanitarian intervention mitigated the reaction of states against the illegality of such interventions.[176] Interestingly enough, the 133 developing states of the G77 *"rejected the so-called right of humanitarian intervention, which had no basis in*

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[174] Fernando R. Teson, *The Liberal Case for Humanitarian Intervention*, in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention, Ethical, Legal, and Political Dilemmas*, Cambridge, Cambridge University Press, 2003, p.109.

[175] Statute of the ICJ, Article 38. For more details: www.icj-cij.org.

[176] A good illustration is India's intervention in East Pakistan, Chesterman, op.cit., p.73. Also Franck, op.cit., p.226.

the UN Charter or in international law".[177] This number of countries undoubtedly proves that weak states oppose the creation of customary law of humanitarian intervention after Kosovo.[178] The part of opinio juris remains unsatisfied, since a large number of states reject the legality of unilateral humanitarian intervention. What is more, there is evidently a *"fatal deficiency of relevant opinio juris by the intervening states involved".*[179] Thus, setting up a precedent for future interventions becomes unlikely. Although the US literature makes reference to "leading" and "major" states, implying that some states matter more than others for the formation of custom[180], it could be argued that the views of the international community are much more important factor in the development of international law than many Anglo-American authors believe.[181] Suffice it to mention that the ICJ statute does not speak of major and minor states for the creation of custom, but for state practice accepted as legal.

The UN General Assembly resolution 54/172 is very determinative on whether or not the use of force for the protection of human rights can become acceptable. In this resolution the Assembly *"Recalling that the World Conference on Human Rights, held at Vienna from 14 to 25 June 1993, called upon States to refrain from any unilateral coercive measure not in accordance with international law and the Charter of the United Nations... Urges all States to refrain from adopting or implementing any unilateral measures not in accordance with*

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[177] 23rd Annual Meeting of the Ministers for Foreign Affairs of the Group of 77, Ministerial Declaration, 24 September 1999. For further details see: http://www.g77.org/Docs/Decl1999.html. Also cited in Byers and Chesterman, op.cit., p.184 and Franck, op.cit., p.215.
[178] Byers and Chesterman, op.cit., p.194.
[179] Joyner, op.cit., p.603.
[180] Byers and Chesterman, op.cit., p.193.
[181] Ibid., p.196.

international law and the Charter of the United Nations, in particular those of a coercive nature with all their extraterritorial effects... Rejects unilateral coercive measures with all their extraterritorial effects as tools for political or economic pressure against any country, in particular against developing countries..."[182] The above General Assembly resolution is catalytic against all those who support that NATO's intervention in Kosovo sets a precedent for the creation of a customary rule of humanitarian intervention in international law. Along with the Ministerial Declaration of the Group of 77, this resolution bans the unilateral use of force for the protection of human rights, if it is out of the realm of the UN Charter and international law. Thus, all imaginative "precedent" theories for new customary law fall into space.

In addition, there is another factor that renders the creation of a customary law of humanitarian intervention impossible. Chesterman and Byers skilfully noted that *since clear treaty provisions prevail over customary international law, an ordinary customary rule allowing intervention would not have been sufficient to override Article 2(4)... the only way the Kosovo intervention could have been legal was if a right of unilateral humanitarian intervention had somehow achieved the status of jus cogens and thus overridden conflicting treaty provisions.*[183] The above argument finds support in Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties. Nevertheless, state practice before Kosovo does not fit on the above definition. In fact, NATO intervention itself does not meet the above criteria. A customary international law can only emerge if most states accept, and

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[182] GA Res 54/172, UN General Assembly Resolution, 15 February 2000.
[183] Byers and Chesterman, op.cit., pp.182-183. Also Simma, op.cit., p.3.

none or only few oppose, a general practice as legal.[184] But since such a norm would conflict with Article 2(4) of the UN Charter is void, unless it acquires the form of a peremptory norm of general international law.

KOSOVO AND PAST INTERVENTIONS IN THE 90s

It could be said that, although Kosovo is the last of a series of alleged humanitarian intervention in the 90s, the world community did not manage to authorise the use of force to halt ethnic cleansing in Kosovo. The past practice of UN authorised intervention had not been witnessed in this case. There are two contrary explanations for this fact: first of all, the Council was bound by veto-threats; secondly, some member states, notably China and Russia, had a good reason for opposing such an intervention. From the above exploration, it seems that Kosovo did not set any precedent for future unauthorised interventions. Humanitarian intervention outside the Council's realm remains impermissible in international law. Nevertheless, this case shows that there is a continuum from northern Iraq to Kosovo. In Iraq the intervening states offered resolution 688 as a justification for their action, while in Kosovo NATO states based their intervention on resolutions 1160, 1199 and 1203. What is more, in both cases, intervening states offered a plethora of justifications. Yet, this iteration in state practice does not reflect the emergence of customary law in favour of unauthorised humanitarian interventions. The fact that NATO intervention in Kosovo was not authorised by

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[184] Ibid., p.179.

the Council was also a setback to the practice of UN authorised humanitarian interventions in the 90s. Thus, it weakens the claims for the emergence of UN authorised humanitarian intervention.

CHAPTER 7

KOSOVO AND THE FALL OF THE HUMANITARIAN "MYTH": NATO'S DISPROPORTIONATE RESPONSE, *VIOLATIONS OF HUMANITARIAN* LAWS AND THE COLLAPSE OF THE "*MILITARY HUMANISM*"

This chapter will deal not only with NATO's violation of international humanitarian laws, but it will also assess the outcomes of NATO's intervention in Kosovo, which seem to be far from humanitarian ones. On March 24 1999 NATO blatantly violated Article 2(4) of the UN Charter by commencing an aerial campaign against the Federal Republic of Yugoslavia (FYR). Thomas Franck argued that *"neither the US Department of State, nor NATO seriously attempted to justify the war in international legal terms"*.[1] NATO advanced various "humanitarian" justifications (humanitarian necessity, disaster, catastrophe and intervention) to persuade the public that its intervention would be at least morally justified. No doubt, the humanitarian motives of an intervention sometimes mitigate the reactions of the public and the international community. This chapter aims to illustrate that this intervention was disproportionate and far from a humanitarian one. Further, it supports that this intervention not only does not set a precedent for future humanitarian interventions, but it eliminates the possibilities of such a right. Last but not least, this chapter will put forward an extensive

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[1] Thomas M. Franck, "Lessons of Kosovo", *American Journal of International Law*, vol.93, No4, October 1999, p.859.

analysis of the traditional argument against humanitarian intervention which dictates that humanitarian war is an "oxymoron".[2]

First and foremost, it would be quite determinative to enquire whether or not the 1999 intervention in Kosovo had been proportionate. The first thing to explore is whether peaceful and diplomatic efforts had been exhausted. Peaceful settlement of conflicts is very significant according to the UN Charter. Article 2(3) of the Charter states that *"all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered"*. Further, Article 33 of the UN Charter declares that *"the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice"*. States should exhaust all peaceful means before they resort to force and recourse to war should be the last available option.[3] Did NATO states and the international community exhaust all peaceful and diplomatic efforts before the outbreak of war?

Lewer and Ramsbotham believe that proportionality and exhaustion of peaceful remedies are two of the criteria for the recourse to armed action, as regards humanitarian intervention.[4] The International Law Association has cited

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[2] Adam Roberts, *Humanitarian War: Military intervention and Human Rights*, International Affairs, vol.69, No3, 1993, p.429.

[3] Martha Brenfors and Malene Maxe Petersen, "The Legality of Unilateral Humanitarian Intervention – A Defence", *Nordic Journal of International Law*, vol.69, 2004, p.482.

[4] Nick Lewer and Oliver Ramsbotham, *"Something Must Be Done": Towards an Ethical Framework for Humanitarian Intervention in International Social Conflict*, Bradford, Department of Peace Studies, University of Bradford, 1993, pp.87 and 90-91.

among other criteria for humanitarian intervention that *"all non-intervention remedies available must be exhausted before a humanitarian intervention can be commenced"*.[5] Yet, NATO's intervention in Kosovo does not seem to accomplish the above criteria. To say that the NATO countries and other states in the international community did not make any efforts for the peaceful settlement of the conflict would be unfair. Apart from NATO, many other organisations, states and group of states (i.e. the OSCE, the WEU, the EU, the Council of Europe and the Contact Group) contributed to efforts for a political solution to the crisis.[6] The United Nations was also involved in the efforts to find a peaceful solution through political dialogue. On the other hand, this does not mean that all diplomatic efforts had been exhausted before the recourse to war. The Rambouillet and Paris conferences that presented the major prospects for political solution were very uncritical diplomatic documents. Wise diplomacy had been subrogated by coercive diplomacy under the NATO threats.[7] NATO stated that its threats were decided in order to back up diplomatic efforts to achieve peace in Kosovo and open the way for a political solution to the crisis.[8] In fact, this was a folly perception of diplomacy by NATO. The UN Charter advances diplomacy but bans the threat or use of force. In the traditional sense, diplomacy should not be backed up by threats of force.

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[5] Peter Hilpold, "Humanitarian Intervention: Is There a Need for a Legal Reappraisal?", *European Journal of International Law*, vol.12, No.3, 2001, p.455.

[6] Major General William Moorman, "Humanitarian Intervention and International Law in the Case of Kosovo", *New England Law Review*, vol.36, No4, Summer 2002, p.782.

[7] Alex J. Bellamy, *Kosovo and International Society*, New York, Palgrave McMillan, 2002, pp.120-130

[8] Heike Krieger(ed.), *The Kosovo Conflict and International Law, an Analytical Documentation 1974-1999*, Cambridge, Cambridge University Press, 2001, p.298.

What is more, the Rambouillet and Paris conferences introduced an odd form of diplomacy: dictation, not negotiation.[9] NATO informed Yugoslavia that if it did not at once sign the whole draft agreement submitted to it, Yugoslavia would be subjected to aerial assault unlimited in scope, character or duration until it submitted.[10] The inflexibility of the US Secretary of State, Madeleine Albright, led to failure of achieving an agreement.[11] Although Yugoslavia had accepted the substance of the political proposals well before the ultimatum date[12], it could not stomach the establishment of a NATO-led multinational military implementation force in Kosovo.[13] Yugoslavia could not agree to NATO forces, but it was ready to accept the participation by certain European members of NATO and of course Russia.[14] As Yugoslavia could not accept the military clause, NATO could have dropped the requirement that the military clauses were non-negotiable and continued negotiation on the basis of the Yugoslav offer to accept an international force to implement the agreed political settlement.[15]

But NATO implacability led the negotiations and diplomatic efforts to an end. Littman argues that *"these 'proposals' were draconian and might be regarded as a model for the military occupation of an enemy country that had been defeated*

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[9] Mark Littman, *Kosovo: Law and Diplomacy*, London, Centre for Policy Studies, 1999, p.10. Also Michael Radu, *Stabilising Borders in the Balkans: The Inevitability and Costs of a Greater Albania*, in Ted Galen Carpenter (ed.), *NATO's Empty Victory: A Postmortem on the Balkan War*, Washington D.C., CATO Institute, 2000, p.123.

[10] Ibid., p.9.

[11] Richard A. Falk, "Kosovo, World Order, and the Future of International Law", *American Journal of International Law*, vol.93, No4, October 1999, p.854.

[12] Michael Maccgwire, "Why Did We Bomb Belgrade?", *International Affairs*, vol.76, No1, January 2000, p.6. Also Littman, op.cit., p.9.

[13] "Kosovo: Air Strikes against Serbia", in Sean D. Murphy (ed.), "Contemporary Practice of the United States Relating to International Law", *American Journal of International Law*, vol.93, issue 3, July 1999, p.629. Also Krieger, op.cit., p.272 and Maccgwire, op.cit., p.7.

[14] Maccgwire, op.cit., p.7.

[15] Littman, op.cit., p.12.

in war. They provide not only for NATO to have the right to a complete occupation of Kosovo, but also to have an unlimited right of access, for an unlimited time, for unlimited purposes, throughout Yugoslavia under conditions of total immunity. They are not terms that Yugoslavia, or any other sovereign state that had not been defeated in war, could possibly have been expected to accept".[16] Many others pointed out the fact that no sovereign state would have accepted the NATO terms.[17] Professor Avramovic added that the conference *"brought such a kind of ultimatum for the Serbs that resembled very much to the Austrian one, which was taken as the grounds for World War I. It was nearly impossible to accept it for any government, and the policy of Madeleine Albright was founded exactly upon expectation that Serbs can not accept it. "Casus belli", excuse for a war was found".*[18] Cohn and Chesterman also agree that Rambouillet *"was less of a negotiating round than an ultimatum to the FRY delegation".*[19] Noam Chomsky expressed that *"it has been speculated that the wording was designed so as to guarantee rejection".*[20] In the same context, Dr Henry Kissinger, former US Secretary of State, said of the Rambouillet proposals: *"The Rambouillet text, which called on Serbia to admit NATO troops throughout Yugoslavia was a provocation, an excuse to start bombing. Rambouillet is not a document that an angelic Serb*

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[16] Ibid., pp.10-11.

[17] Hilaire McCoubrey, *International Humanitarian Law and the Kosovo Crisis*, in Ken Booth (ed.), *The Kosovo Tragedy, the Human Rights Dimensions*, London, Franck Cass Publishers, 2001, p.185, and
Noam Chomsky, *The New Military Humanism, Lessons from Kosovo*, Monroe ME, Common Courage Press, 1999, p.107.

[18] Sima Avramovic, Professor of Law, Belgrade Law School, personal interview, 22 August 2003.

[19] Marjorie Cohn, "NATO Bombing of Kosovo: Humanitarian Intervention or Crime against Humanity?", *International Journal for the Semiotics of Law*, vol.15, 2002, p.81 and 94. Also Chesterman, op.cit., p. 223

[20] Chomsky, op.cit., p.107 and Falk, op.cit., p.854.

could have accepted. It was a terrible diplomatic document that should never have been presented in that form".[21]

Indeed, NATO's hallucinogenic terms for the implementation conditions (military clause) and the fact that they were non-negotiable led to the end of the diplomatic efforts and the recourse to war. The lack of proportionality is more evident in the aftermath of the conflict. NATO agreed to amend the implementation provisions of the Rambouillet draft, which were non-negotiable few months ago. As a result, the signatories to the Peace Agreement would be the UN and Yugoslavia and the party responsible for enforcing the resultant Treaty would be the UN, not NATO; the monitoring force would be an international force with a Russian element; the civil administration would be under the control of the Security Council; the international force would have no access to any part of Yugoslavia outside Kosovo; the sovereignty of Yugoslavia over Kosovo would be acknowledged and confirmed without any limit of time.[22] It could be argued that this agreement could have been reached before the recourse to war if NATO clauses were negotiable.[23] Thus, it is clear from the above that NATO did not exhaust all peaceful means before waging war against the FRY.

Another oddity of those diplomatic efforts was that the NATO states compelled Yugoslavia to negotiate with KLA representatives, despite its initial resistance.[24] The KLA had been a secessionist movement within the FRY and it had considered a terrorist organisation by various regional organisations, UN

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[21] Littman, op.cit., p.12.
[22] Ibid., p.19.
[23] Falk, op.cit., p.855.
[24] Bellamy, op.cit., pp.130-131.

resolutions and the Contact Group itself.[25] In 1998 the KLA was still classified by the State Department as a terrorist organisation.[26] Suddenly, the KLA terrorists became some sort of popular liberation force[27], probably because this term assisted the US and NATO to the attainment of their objectives. In Rambouillet, in order to convince the KLA to sign the agreement, it is said that NATO and more specifically the US Secretary of State promised that a referendum on self-determination would be held after three years. [28] It is not difficult to guess why the NATO and the US favoured so openly a secessionist movement and a terrorist organisation: because NATO would be unable to bomb Serbia if the KLA did not sign.[29]

However, the US and NATO hypocrisy became evident two years after the intervention in Kosovo. Two years later, when a KLA branch had launched attacks against the Former Yugoslav Republic of Macedonia, the American Department of State reconsidered the KLA a terrorist organisation and its member's extremists.[30] This fact reflects unscrupulous power politics that cannot meet any requirement of proportionality. McWhinney argues that *"the sudden switch, in a matter of a few months only, from the US Central Intelligence Agency's original classification of*

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[25] The Contact Group had condemned terrorist actions by the KLA in many statements (i.e. Contact Group Meeting, Statement on Kosovo, Moscow, 25 February 1998 and Contact Group Meeting, Statement on Kosovo, London, 9 March 1998). The EU also condemns terrorism and violence acts committed by the KLA (EU, Common Position Defined by the Council, 19 March 1998). All the statements above can be found in Krieger (ed.), op.cit., p.121, 122, 125.

[26] Edward McWhinney, *The United Nations and a New World Order for a New Millennium: Self-Determination, State Succession, and Humanitarian Intervention*, The Hague, the Netherlands, Kluwer Law International, 2000, p.70. Also Maccgwire, op.cit., p.7.

[27] McWhinney, op.cit., p.70.

[28] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford, Oxford University Press, 2001, p.211. Also Maccgwire, op.cit., p.8 and Bellamy, op.cit., p.132.

[29] Maccgwire, op.cit., p.8.

[30] US Department of State, Report, for more details: http://usinfo.state.gov/topical/pol/terror/01031902.htm

the Kosovo Liberation Army as an international terrorist organisation, to the acceptance of the KLA by the US administration as some sort of popular liberation force, might appear to lend credence" for the US forcible approaches.[31] Further, the KLA branch that took action in FYROM is not a separate case of the KLA in Kosovo, since KLA's stated goal is a "Greater Albania". Both the FRY and the FYROM faced the same terrorist threat, but different confrontation was given in each of the above cases.

What is more, NATO's lack of impartiality was evident from the beginnings of the crisis. Although the Council and various states used to condemn both the FRY authorities and the KLA terrorists, NATO focused only on the FRY. And although NATO was very strict in criticising the Yugoslav policies, it was never that strict with the actions of the KLA. If NATO were impartial and objective, the humanitarian crisis could have been avoided in Kosovo. For instance, following the adoption of resolution 1203 the Yugoslav military and police forces commenced a gradual withdrawal, pursuant to Security Council resolutions. Yet, as the Yugoslav military withdrew from the province of Kosovo, the KLA started advancing its forces and occupying several areas. The UN Secretary General welcomed the reports of the withdrawal of Government forces in Kosovo, but also noted the fact that Kosovo Albanian paramilitary units had occupied some areas and is responsible for several violations, including attacks on civilians.[32] NATO also confirmed the withdrawal of the FRY security forces.[33] The return of the Serbian security forces and the January 1999 strong Yugoslav

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[31] McWhinney, op.cit., p.70.
[32] S/1998/1068, 12 November 1998.
[33] Eric, Suy, "NATO's Intervention in the Federal Republic of Yugoslavia", *Leiden Journal of International Law*, vol.13, 2000, p.202.

response in Racak was a result to this KLA policy. Thus, it is difficult to see why the FRY should be blamed for reacting as it did, when strengthening its military presence and its police units in order to defend itself against "terrorist activities".[34] Nevertheless, the US and its NATO allies turned a blind eye on the KLA's atrocities and terrorism.

To this extent, the lack of proportionality regarding the intervention in Kosovo is obvious. But a humanitarian war must be fought for a proportionate reason.[35] Teson, a fervent supporter of humanitarian intervention writes: *"The seriousness of the reaction against human rights abuses must be proportionate both to the gravity of the abuses and to the probability of remedying the situation. If an oppressive government can be forced to enact democratic reforms through economic or political pressure, then those measures are preferable to forcible action and should be tried first. Military intervention, as a remedy against human rights violations, should only be resorted to when all peaceful means have failed or are likely to fail".*[36] Many other advocates of humanitarian intervention believe that peaceful means should be exhausted.[37] Cassese, the judge that rushed to discern a precedent for future interventions without Security Council authorisation

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[34] *Id.*

[35] Nicholas Hopkinson, *Humanitarian Intervention?*, London, HMSO, 1996, p.10. Also Lewer and Ramsbotham, op.cit., p.87.

[36] Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edition, New York, Transnational Publishers, 1997, p.122.

[37] Robert C. Johansen, *Limits and Opportunities in Humanitarian Intervention*, in Stanley Hoffmann (ed.), *The Ethics and Politics of Humanitarian Intervention*, Indiana, University of Notre Dame Press, 1996, p.69. Also Lewer and Ramsbotham, op.cit., p.87.

under certain strict conditions, places among those conditions that *"all peaceful avenues...have been exhausted"*.[38]

However, he is one of the few authors and analysts of the intervention that believe that all *"peaceful means of settling disputes commensurate to the unfolding crisis had been tried and exhausted by the various countries concerned, through negotiations promoted by states comprising the Contact Group for the Former Yugoslavia, and at Rambouillet, and later Paris"*.[39] This argument had been put forward by Stromseth as well.[40] Yet, this argument of Cassese is equally deceptive and hallucinatory as the other one supporting that intervention in Kosovo should not remain exceptional[41], which had been recalled with a later article of his.[42] Most lawyers and political analysts insist on the fact that NATO states did not exhaust all non-forcible remedies.[43]

It is clear from the above that that the requirement of proportionality before recourse to armed intervention has not been fully met by the intervening states. The next step is to explore whether or not the principle of proportionality had been met during the NATO aerial campaign against the FRY. As regards the conduct of war, Lewer and Ramsbotham insist on two specific requirements: *the harm judged*

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[38] Antonio Cassese, "Ex Iniuria Ius Oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?", European Journal of International Law, vol.10, 1999, p.27.
[39] Ibid., p.28.
[40] Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention, Ethical, Legal, and Political Dilemmas*, Cambridge, Cambridge University Press, 2003, p.249.
[41] Cassese, op.cit., p.24.
[42] Antonio Cassese, "A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis", *European Journal of International Law*, vol.10, 1999, p.796.
[43] Jonathan I. Charney, "Anticipatory Humanitarian Intervention in Kosovo", *American Journal of International Law*, vol.93, No4, October 1999, p.840. Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned*, Oxford, Oxford University Press, 2000, p.166. Also Falk, op.cit., p.855.

likely to result from a particular military action should not be disproportionate to the good aimed at; and non-combatants should be immune from direct attack.[44] Similarly, Teson thinks of a humanitarian intervention: *to be morally acceptable it must be narrowly aimed at the delinquent government and its military supporters, and not at the general population.*[45] Johansen believes that *the nature of the means employed in international intervention should be carefully constrained by internationally established norms against excessive use of force and the protection of innocent people.*[46] No doubt, the above criterion applies to all alleged humanitarian interventions, including the NATO intervention in Kosovo.

This criterion for humanitarian intervention is also accordant with traditional international humanitarian laws, which govern the laws regarding the conduct of war. The two Geneva Conventions and the additional protocols have to do with the effective protection of civilians during an armed conflict. Articles 48 and 51 of the 1977 Additional Protocol I to the 1940 Geneva Conventions reflect the current regime:

Article 48: *"In order to ensure respect for and protection of the civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives".*

Article 51(2): *"The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary*

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[44] Lewer and Ramsbotham, op.cit., p.88.
[45] Teson, op.cit., p.122.
[46] Johansen, op.cit., p.76.

purpose of which is to spread terror among the civilian population are prohibited".

Article 51(4): *"Indiscriminate attacks are prohibited. Indiscriminate attacks are:*

- *Those which are not directed at a specific military objective;*
- *Those which employ a method or means of combat which cannot be directed at a specific military objective; or*
- *Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction".*

Article 51 (5) includes two other types of attack which are considered as indiscriminate:

- an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
- an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

The laws of war had been stressed to this point. No doubt, these laws apply to alleged humanitarian interventions as well. Thus, intervening states should be more sensitive with these laws, because of the noble and humanitarian objectives

they invoke. Let us now consider whether or not NATO intervention in Kosovo had been consistent to the above criteria of humanitarian intervention and laws of war. Before the recourse to war, NATO declared a "war without casualties", but it probably meant a war without casualties on the NATO alliance side.[47] Widespread critics of NATO's bombings and the reactions of the public opinion, lawyers, NGO's, and states reflect the situation. The humanitarian "war without casualties" promised by NATO proved to be an "inhumane" humanitarian intervention turned against innocent civilians, public utilities, infrastructure, historical monuments, schools and hospitals. Although NATO and its members used to stress that this war did not aim against the Serbs and Yugoslavia[48], their bombing campaign manifested their cruel intentions. In fact, the victim of this campaign had been the Serbs within proper Serbia and Kosovo, as well as ethnic Albanians in Kosovo. NATO had been repeatedly accused of widespread breaches of humanitarian laws. Bombings turned against civilian infrastructure[49], public utilities[50], and cultural heritage[51] are of a questionable character. The bombing of the Zastava car industry under the suspicion that it produces hunting riffles and pistols is unacceptable.[52] There is further evidence of NATO's damage to Yugoslav industry.[53]

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[47] McWhinney, op.cit., p.47.
[48] Krieger, op.cit., pp.304, 395, 396, 399.
[49] Christine M. Chinkin, "Kosovo: A Good or a Bad War?", *American Journal of International Law*, vol.93, No4, October 1999, p.844. Also Falk, op.cit., p.852.
[50] Murphy, op.cit., p.632 and Falk, op.cit., p.851.
[51] Chinkin, op.cit., p.844.
[52] Dino Kritsiotis, "The Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia", *International and Comparative Law Quarterly*, vol.49, 2000, p.355.
[53] *Id.*

Environmental damage caused by the NATO bombardment is equally blameworthy.[54]

For all the above targets, as well as for many other indiscriminate ones, the public, many NGO's and states had criticised NATO rigorously. For instance, Amnesty International believes that NATO committed *serious violations of the laws of war, leading in a number of cases to the unlawful killings of civilians.*[55] Human Rights Watch investigation concluded that *NATO violated international humanitarian law.*[56] Human Rights Watch and Amnesty International considered a number of NATO targets indiscriminate. Further down in this chapter there will be an examination of alleged "indiscriminate" bombings. First of all, the attack on Grdelica Railroad Bridge, hitting passenger train and killing at least 12 civilians is arguably considered illegitimate by the Amnesty international.[57] NATO said that the target had been the bridge itself and that the train had been hit accidentally.[58] Furthermore, NATO Attacks on a convoy of ethnic Albanians near Djakovica caused the civilian death toll of more than 70 ethnic Albanians and harm of more than 100. Initially, NATO attributed the incident to Serbian forces, but later admitted that its forces had been responsible for the attack on the convoy and expressed regret for the loss of life.[59] Human Rights Watch reported that the most dramatic losses of civilian life from the NATO offensive in Kosovo came from

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[54] Falk, op.cit., p.851 and Chinkin, op.cit., p.844.

[55] Amnesty International, "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force. See: http://web.amnesty.org/library/index/ENGEUR700182000.

[56] Human Rights Watch, Civilian Deaths in the NATO Air Campaign, for further details go to the link: http://www.hrw.org/reports/2000/nato/Natbm200.htm.

[57] AI Report, supra note 55.

[58] *Id.*

[59] *Id.*

attacks on fleeing or travelling refugees confused with military forces.[60] NATO was supposed to protect refugees from fleeing Kosovo, but not by bombing the refugee convoys. This thesis does not support that NATO purposively targeted these groups. However, the conflict between NATO's ends and means was evident in Kosovo.[61] How could this response be considered proportionate, when you target the ones you have promised to protect? Thus, it could be argued that NATO "humanitarian war" is liable to its inhuman means.

Other acts that caused civilian harm, according to Amnesty International, are: attacks on northwest and southeast of Djakovica; civilian bus and ambulance hit at Luãane; market and hospital at Nis hit by cluster bombs; ethnic Albanian civilians bombed at Korisa; Varvarin Bridge; and attack on Surdulica.[62] Human Rights Watch found that there were ninety separate incidents involving civilian deaths during the NATO campaign and determined that nine incidents were a result of attacks on non-military targets that Human Rights Watch believes were illegitimate.[63] These include the headquarters of Serb Radio and Television in Belgrade, the New Belgrade heating plant, and seven bridges that were not on major transportation routes nor had other military functions.[64] Human Rights Watch believes that the attacks on those bridges were of questionable military effect because they were urban or town bridges that are not major routes of communications.[65]

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[60] HRW Report, supra note 56.
[61] McWhinney, op.cit., pp.46-47.
[62] AI Report, supra note 55.
[63] HRW Report, supra note 56.
[64] *Id.*
[65] *Id.*

One of the most contradictory actions had been the use of highly questionably weapons, especially when the intervening states declare that they intent to minimise civilian casualties. Among those weapons are cluster bombs, as well as depleted uranium bombs. Both the Amnesty International and Human Rights Watch reported that a high number of civilian casualties (from 90 to 150) derived from the use of cluster bombs in populated areas.[66] Amnesty International said of cluster bombs: *"Cluster weapons are not banned under international law, but they do present a high risk of violating the prohibition of indiscriminate attack. In addition, cluster weapons present a humanitarian issue due to their high dud rate (NATO officials acknowledged to AI that the rate is approximately five per cent). This means that unexploded sub-munitions are a continued threat to anyone who comes into contact with them".*[67] As regards the use of depleted uranium munitions, pending conclusive studies on the long-term health and environmental effects of the deployment of this weapon, Amnesty International had been concerned about the possible health risks of an indiscriminate nature which depleted uranium munitions may in fact pose.[68] The ICTY report had noted that no treaty restricts the use of cluster bombs and depleted uranium projectiles.[69] Moreover, the ICTY committee found that the NATO campaign did cause some damage to the environment, but it held the opinion that this environmental damage does not reach additional Protocol I threshold.[70]

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[66] AI Report and HRW Report, supra notes 55 and 56.
[67] AI Report, supra note 55.
[68] *Id.*
[69] International Court Tribunal for the Former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia. For further details: http://www.un.org/icty/pressreal/nato061300.htm.
[70] *Id.*

Another indiscriminate target, according to both NGO's, had been the bombardment of the Serb Radio and Television Headquarters. In this attack 16 civilians had been killed and another 16 wounded.[71] It is important to report that 120 civilians had been working in the building at the time of the attack.[72] This means that the number of casualties could be much more than the above. Human Rights Watch says that according to military sources, there was considerable disagreement between the United States and French governments regarding the legality and legitimacy of the target, and there was a lively public debate regarding the selection of Yugoslav civilian radio and television as a target group.[73] Finally, NATO had placed this attack in the context of NATO's policy to "disrupt the national command network and to degrade the Federal Republic of Yugoslavia's propaganda apparatus".[74] Yet, this attack had been a blatant violation of international humanitarian law, since it is difficult to consider propaganda alone a justified military target.[75]

Article 52 of Additional Protocol II to the Geneva Conventions states that *"military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage"*. According to the above rule, the Serb Radio and Television Headquarters did not constitute a legitimate target. On the

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[71] W. J. Fenrick, "Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia, *European Journal of International Law*, vol.12, No.3, 2001. Also AI Report and HRW Report, supra notes 55 and 56.
[72] AI Report, supra note 55.
[73] HRW Report, supra note 56.
[74] AI Report, supra note 55.
[75] Fenrick, op.cit., p.496.

contrary, it had been an indiscriminate NATO's target that confirmed its abhorrent "humanitarian" tactics. The ICTY committee found that *"if the attack on the RTS was justified by reference to its propaganda purpose alone, its legality might well be questioned by some experts in the field of international humanitarian law. It appears, however, that NATO's targeting of the RTS building for propaganda purposes was an incidental (albeit complementary) aim of its primary goal of disabling the Serbian military command and control system and to destroy the nerve system and apparatus that keeps Milosevic in power"*.[76] Evidently, the ICTY committee tried hard to justify NATO's breaches of humanitarian laws. However, its assessments seem to be far from objective. Below there will be an assessment of the ICTY's findings.

The most striking, questionable and odd NATO target had been the Chinese Embassy in the heart of Belgrade. On the night of 7 May, NATO bombed the Chinese Embassy in New Belgrade, killing 3 journalists and injuring 20 Embassy staff members.[77] This incident had significantly increased opposition to Operation Allied Force in the West.[78] Before the Security Council, on May 8, China condemned this *"barbaric"* action as *"a gross violation of China's sovereignty and a flagrant flouting of the Vienna Convention on Diplomatic Relations and the basic norms of international relations, a rare occurrence in the*

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[76] ICTY report, supra note 69.

[77] Michael Mandelbaum, "A Perfect Failure: NATO's War against Yugoslavia", *Foreign Affairs*, vol.78, No.5, Sept/Oct 1999, p.2; and
US Department of State, Oral Presentation by Under Secretary of State Thomas Pickering on June 17 to the Chinese Government Regarding the Accidental Bombing of the PRC Embassy in Belgrade, Released July 6 1999. For more details see: http://usinfo.state.gov/regional/ea/uschina/bombrpt.htm.

[78] Bellamy, op.cit., p.186.

history of diplomacy".[79] The Yugoslav Representative noted: *"the attack is in gross violation of the Geneva Convention of 1949 and of international law. It is, without any doubt, a war crime*".[80] The Russian Ambassador to the UN condemned *"this barbaric action"* and noted that "*all norms of international law are being flouted*".[81] On the other hand, NATO states tried to overshadow this fact by expressing their condolences and by stressing Yugoslavia's responsibility for the escalation of the crisis.[82]

The US Department of State spoke of a *mistake*, an *accidental bombing* and *a series of errors and omissions led to that mistake*.[83] The Central Intelligence Agency (CIA) described the action as a *tragic mistake* and a *major error*.[84] NATO expressed its *"deep regret for the tragic mistake of the bombing of the Chinese Embassy in Belgrade"* as well as its sympathy and condolences to the victims, their families and the Chinese government.[85] President Clinton said that *"this was an isolated, tragic event, while the ethnic cleansing of Kosovo, which has led to the killing of thousands of people and the relocation of hundreds of thousands, is a deliberate and systematic crime*".[86] The US and NATO investigation proved that CIA had been responsible for three failures that led to the bombing of the Chinese

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[79] S/PV.4000, 8 May 1999.
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] Department of State, supra note 77.
[84] Central Intelligence Agency (CIA), DCI Statement on the Belgrade Chinese Embassy Bombing, House Permanent Select Committee on Intelligence Open Hearing, 22 July 1999. For further Details see: http://www.cia.gov/cia/public_affairs/speeches/1999/dci_speech_072299.html.
[85] NATO Statement Concerning Bombing of the Chinese Embassy, Press Release (1999)076, Brussels, 8 May 1999, cited in Krieger, op.cit., p.309.
[86] US Department of State, Statement of President Clinton (10 May 1999), for more details go to link: http://usinfo.state.gov/regional/ea/uschina/clinbomb.htm.

Embassy.[87] Although NATO intended to bomb the Federal Directorate for Supply and Procurement (FDSP) as a potential target for NATO Allied Force strike operations, miscalculations led to this fatal accident.

CIA used three maps that none of them had any reference to the FDSP building, nor did they accurately identify the current location of the Chinese Embassy.[88] The US Department of State acknowledged that although the 1997 US Government map shows the Chinese Embassy in Old Belgrade, one map predated the Embassy's move.[89] Both the CIA and the US Department of State expressed their belief that satellite imagery of the target provided no indication that the building was an embassy; there were no flags, seals, or other markings to indicate that the building was an embassy.[90] Last but not least, the US Department of State and CIA acknowledged that some of their employees and diplomats knew the location of the Chinese embassy, but they were not consulted, since the intended target was not the Embassy. What is more, they found maps which show the correct current location of the Chinese Embassy although there are others that do not.[91]

All this background of the bombing of the Chinese Embassy in Belgrade created a number of conspiracy theories.[92] The Chinese Government itself did not accept the US explanations: *"It must be pointed out that the Chinese Embassy in Yugoslavia has unmistakable symbols and it is also clearly marked on the US*

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[87] William M. Arkin, *Infamous Anniversary*, Washington Post, for further details go to link: http://www.washingtonpost.com. Also CIA, supra note 75, and US Dept of State, supra note 68.
[88] *Id.*
[89] US Dept of State, supra note 77.
[90] CIA, supra note 84, and US Dept of State, supra note 77.
[91] *Id.*
[92] Bellamy, op.cit., p.187.

maps. The US claimed that it did not know its exact location is not justified. The Federal Directory of Supply and Procurement is not a secret agency and its building is half a kilometre away from the Chinese Embassy. The two buildings look totally different. So it was impossible for the US side to mix up these two buildings. According to the US explanation, several individuals all neglected their duties and its review process failed to detect the mistake at every level. This is hard for people to believe".[93] No doubt, the US explanations are not that persuasive. It is hard to believe that the US intelligence did not have the correct maps with the exact location of each building. The new location of the Chinese Embassy was clearly illustrated on tourist maps.[94] How could the CIA, one of the best intelligence agencies internationally, have consulted outdated maps? Further, numerous military experts have told Western news outlets that the CIA could not have been the sole source of target information.[95]

What is more, CIA and the US Department of State stressed that from the satellite imagery of the building there were no flags, seals, or other markings to indicate that the building was an embassy. But when they came to defend the pilots they claimed that they *"had no way of seeing any identifying markers that would show the building was an embassy. A flag in front of the building or any such features would not be discernible at night and at the speeds and altitudes at which our planes fly".*[96] The argument regarding the embassy flags and seals and

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[93] Ministry of Foreign Affairs of the People's Republic of China , for more details see: http://www.fmprc.gov.cn/eng/topics/3755/3809/3810/t19451.htm.

[94] Mike Head, *How Could the Bombing of the Chinese Embassy Have Been a Mistake?*, World Socialist Website, 10 May 1999. See: http://www.wsws.org/articles/1999/may1999/bomb-m10.shtml.

[95] *Id.*

[96] Dept of State, supra note 68.

indications is from its nature highly contradictory, since all embassies have their national symbols and flags out of the embassy buildings. Hence, this US argument was unsatisfactory and insufficient. Many journalists and scholars advanced their ambiguities on the US excuses. Some of them pointed out that it is difficult to call the bombing of the Chinese Embassy just an accident, but it is also dishonest to label it deliberate.[97]

The most blaming report for NATO came from a team of British and Danish journalists. This team advanced the argument that the Chinese Embassy had been deliberately targeted because it was being used to transmit Yugoslav army communications.[98] This report claims that according to senior military and intelligence sources in Europe and the US, the Chinese Embassy was removed from a prohibited targets list after NATO electronic intelligence (ELINT) detected it sending army signals to Milosevic's forces. The Guardian supported that three NATO officers confirmed in detail the above story. In support of its argument, the report cites that two out of the three killed people had not been journalists, but intelligence officers.[99] Furthermore the FDSP building is located approximately half a kilometre away from the embassy.[100] It could be argued that this theory is quite credible, even among people that held a different view.[101] Others stress the fact that the bombing was deliberate for other reasons. Among those reasons are: China's veto threat for future NATO plans before the UN Security Council,

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[97] Washington Post, supra note 78.
[98] Guardian, *NATO Bombed Chinese Deliberately, NATO Hit Embassy on Purpose*, 16 May 1999, for more details see: http://www.guardian.co.uk/Kosovo/Story/0,2763,203214,00.html.
[99] *Id.*
[100] CIA, supra note 84, US Dept of State, supra note 77, and Guardian, supra note 98.
[101] Bellamy, op.cit., p.187.

heightened Sino-American tensions at the time of the incident, and the fact that China was representing the Yugoslav interests in Washington.[102]

A spokesman for the Chinese embassy in London said: "*we do not believe that the embassy was bombed because of a mistake with an out-of-date map*".[103] It is clear from the above statement that China considered the bombing of the Chinese Embassy in Belgrade deliberate. In addition, the Chinese Government had not yet accepted the US explanations and excuses. The ICTY Report, however, accepted the US explanations and deemed that the OTP should not undertake an investigation concerning the bombing of the Chinese Embassy.[104] It did so probably because it considered that the compensation offered by the US to the Chinese Government, the families of the victims and the injured, as well as the dismissal of one intelligence officer and the reprimands of six senior managers were enough to prove that NATO bombing of the Chinese embassy was a mistake.[105] But the ICTY report was not objective enough to observe that the US explanations and compensations were not enough to convince the Chinese Government and people. If one reads the whole text of this report it is easy to understand that this paper is, if not at all, in substance prejudiced by the commands of NATO states.

No doubt, an independent investigation would not have rejected investigations for all NATO's indiscriminate targets that caused heavy civilian damage. This report is at least provocative in the sense that it is overly contradictory with reports of various states, human rights organizations and NGOs,

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[102] World Socialist Website, supra note 94.
[103] Guardian, supra note 98.
[104] ICTY report, supra note 69.
[105] *Id.*

which had accused NATO of violating international humanitarian laws.[106] In addition, this report relied heavily on NATO statements, documents which may be considered as not being entirely reliable in the context of war, where the belligerents need the strong support of national and international public opinion.[107] On the other hand, the Committee did not pay the same attention to Belgrade press statements.[108] Thus, it could be said the ICTY report lacks any objectivity. The fact that the ICTY committee decided that no investigation be commenced is highly questionable.[109] This is because of the evident ICTY Committee's lack of impartiality.[110] If the ICTY Committee was objective and reliable, it should allow the commencement of an independent investigation. The fact, however, that this committee did not even wish to start an investigation proves that it undoubtedly favours NATO and it protects it from very severe accusations. Further, the members of this expert group have remained anonymous, thus inviting educated guesses as to who is behind the report of the group, which had indeed been rendered public.[111] The anonymity of this group adds suspicions for the objectivity and credibility of its report. As a scholar noted, the report is more interesting in its

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[106] Kamyar Mehdiyoun, "NATO Air Campaign against Serbia and the Laws of War", *American Journal of International Law*, vol.94, issue 4, October 2000, pp.690-691. Also AI Report and HRW Report, supra notes 55 and 56.

[107] Paolo Benvenuti, "The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia", *European Journal of International Law*, vol.12, No.3, 2001, p.506.

[108] *Id.*

[109] Ibid., p.503.

[110] Ibid., p.507.

[111] Michael Bothe, "The Protection of the Civilian Population and NATO bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY", *European Journal of International Law*, vol.12, No.3, 2001, p.532.

general legal discussion than convincing in its conclusions regarding the application of the law to the particular facts.[112]

NATO's conduct of war has been examined so far. To this extent one argument can come up for sure. No matter if NATO breached international humanitarian laws or not, it definitely violated one of the most essential premises of humanitarian intervention: its aerial campaign had not been proportionate and civilians were not immune from NATO's intervention.[113] The number of civilian deaths in the NATO air campaign against the FRY varies in different reports, but the Amnesty International, Human Rights Watch and the ICTY report agree that this number ranges from 400 to 600.[114] NATO advanced various justifications for those deaths: collateral damage, regrettable mistake, and incidents where civilians had been used by the Yugoslav Army as human shields. The above justifications, however, do not satisfy the doctrinal prerequisite of humanitarian intervention that civilians should not be affected from intervention. The hundreds of dead people and thousands of injured people will remain a dark spot to NATO's intervention in Kosovo.

The argument made by Dr William Schulz, executive director of Amnesty International, is very illustrative of the nature of NATO's bombings: *"those who act in the name of human rights bear a responsibility to see that their own actions scrupulously accord with human rights standards"*.[115] Nelson Mandela noted that

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[112] *Id.*

[113] Richard Falk, *"Humanitarian Wars", Realist Geopolitics and Genocidal Practices: "Saving the Kosovars"*, in Ken Booth (ed.), *The Kosovo Tragedy, the Human Rights Dimensions*, London, Franck Cass Publishers, 2001,p.331.

[114] AI Report, HRW Report and ICTY Report, supra notes 55, 56 and 69.

[115] Henthoff Nat, "Oh, What a Lovely War!", *Village Voice*, vol.44, issue 28, 20/07/99, p.32.

"NATO's actions are equally criminal with those of Milosevic".[116] US Former President, Jimmy Carter said: *"our destruction of civilian life there [Yugoslavia] has now become senseless and excessively brutal"*.[117] All the arguments above clearly illustrate the contradiction between NATO's military means and humanitarian ends.[118] The fact that NATO's declared "humanitarian war" turned against innocent civilians is a shadow in NATO's strategic plans. NATO's promises for a "war without casualties" proved to be a big lie. What is more, NATO's and its members' statements that this war was not aimed against Serbia, but against its evil regime proved to be another unsuccessful premise. No doubt, the bombing of public utilities, infrastructure, hospitals, cultural heritage, factories, etc.[119] did affect the civilian population and not superficially.[120] It is questionable whether or not it affected Milosevic more than innocent Serb citizens. Falk argued that *"the magnitude and effects of such bombing are difficult to reconcile with the humanitarian claims made by NATO spokespersons"*.[121]

In addition, had NATO really sought a humanitarian war without casualties, it would have avoided aerial bombings and it would use ground troops.[122] This is because aerial bombing often impedes humanitarian relief and is indiscriminate in its targets.[123] The International Independent Commission on

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[116] Littman, op.cit., p.ii.
[117] *Id.*
[118] Tarak Barkawi, *Air Power and the Liberal Politics of War*, in Ken Booth (ed.), *The Kosovo Tragedy, the Human Rights Dimensions*, London, Franck Cass Publishers, 2001, p.307 and 311.
[119] Chinkin, op.cit., p.844, Falk, op.cit., p.851, Murphy, op.cit., p.632.
[120] Mandelbaum, op.cit., p.6.
[121] Falk, op.cit., pp.855-856.
[122] Davidson, , "Kosovo, Human Rights, and the Use of Force, *Human Rights Law and Practice*, vol.5, No3, December 1999, p.173. Also Barkawi, op.cit., pp.307-308.
[123] Anne Orford, *Muscular Humanitarianism: Reading the Narratives of the New* Interventionism, "European Journal of International Law, vol.10, 1999, p.681. Also Amnesty International, supra note 55. Also Chinkin, op.cit., p.844.

Kosovo concluded that *"the high-altitude tactic does not seem to have legal significance, although it does weaken the claim of humanitarianism to the extent that it appears to value the lives of the NATO combatants more than those of the civilian population in Kosovo and Serbia* [proper], *and especially the lives of the Kosovar Albanians that it was acting to protect.*[124] In other words, air-power conflicts with the humanitarian aims of NATO's operation.[125] Yet, the prerequisite of humanitarian intervention is not to protect the combatants, but the civilian population. As regards to the reason why NATO did not commit ground troops, it is very easy to detect it. NATO did not wish to have a great number of casualties among its combatants because such a thing would threaten the smooth continuation of the campaign.[126] NATO's priority to protect its combatants rather than the civilian population in the FRY is another evidence of the lack of proportionality.[127]

A further attestation of the lack of proportionality is that NATO failed to terminate its campaign within the estimated time. The initial NATO estimates for the duration of the air campaign[128] fitted to the traditional requirement of humanitarian intervention that it should be limited in time and scope.[129] Madeleine Albright declared *"I don't see this as a long-term operation"*.[130] Nevertheless,

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[124] Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned*, Oxford, Oxford University Press, 2000, p.181. Also Mandelbaum, op.cit., p.5.
[125] Adam Roberts, "NATO's Humanitarian War", *Survival*, vol.41, No.3, autumn 1999, p.113.
[126] Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford, Oxford University Press, 2001, p.268.
[127] Ibid., p.272.
[128] Paul Robinson, *Humanitarian Intervention and the Logic of War*, in Alexander Moseley and Richard Norman (eds.), *Human Rights and Military Intervention*, Hants, Ashgate, 2002, p.100. Also Roberts, op.cit., p.111.
[129] Nicholas Hopkinson, op.cit., p.11 and Hilpold, op.cit., p.455.
[130] Christopher Layne, *Miscalculation and Blunders Lead to War*, in Ted Galen Carpenter (ed.), *NATO's Empty Victory: A Postmortem on the Balkan War*, Washington D.C., CATO Institute, 2000, p.11. Also Mandelbaum, op.cit., p.4.

NATO campaign had been largely extended from a one week campaign to eleven weeks.[131] Had the FRY and NATO not concluded before an agreement, and had the ground troops been involved in the conflict, then NATO's intervention would extend for several weeks further.[132] It is difficult to believe that NATO strategic commanders did not know that making Milosevic capitulate would be a very difficult and time-consuming task. They probably kept it secret to avoid public opposition.

Further, NATO expressed its intension to halt Milosevic's campaign of ethnic cleansing against the Albanian population in Kosovo.[133] On the contrary, it could be said that NATO intervention precipitated it.[134] Within one month of the start of the bombing campaign, thousands of ethnic Albanians had been killed in Kosovo and over half a million were driven out from Kosovo, while hundreds of thousands had been refugees internally displaced within Kosovo.[135] Thus, not only NATO did not protect the Kosovar Albanians, but it also worsened the situation for the refugees.[136] The expansion of the Serb brutality and the intensification of the Serb campaign of ethnic cleansing were predictable according to the Supreme Commander of the NATO forces in Kosovo, the CIA Director and the Pentagon

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[131] McWhinney, op.cit., p.71.
[132] *Id.*
[133] Chomsky, op.cit., p.3.
[134] Council of Europe, Parliamentary Assembly Recommendation 1403 (1999), Crisis in Kosovo and Situation in the Federal Republic of Yugoslavia, April 1999. For more details see: http://www.coe.int. Also Littman, op.cit., p.16 and Barkawi, op.cit., p.308.
[135] Roberts, op.cit., p.113, Littman, op.cit., p.18, Wheeler, op.cit., p.269 and Mandelbaum, op.cit., p.3.
[136] Jim Whitman, *The Kosovo Refugee Crisis: NATO's Humanitarianism versus Human Rights*, in Ken Booth (ed.), *The Kosovo Tragedy, the Human Rights Dimensions*, London, Franck Cass Publishers, 2001, p165. Also Murphy, op.cit., p.634, Charney, op.cit., p.840 and the Independent International Commission on Kosovo, op.cit., p.163.

spokesman.[137] They did not explain, yet, why the commenced the aerial bombing if this tragedy was predictable from their own estimates.

What is more, NATO's claim that it would stop ethnic cleansing in Kosovo was a damn lie, not only because the Serb campaign of ethnic cleansing against ethnic Albanians was predicted, but because they did not try to prevent it. NATO commander General Wesley Clark stated that *"air power alone cannot stop paramilitary action"*.[138] In addition, a senior NATO officer stated: *"we said from the outset that we couldn't prevent atrocities and crimes against humanity with just an air campaign. But knowing that we had to keep an alliance of 19 nations together, we knew that if we asked for ground troops, we would be asking the impossible"*.[139] From both the above enlightening statements, one can easily understand that NATO's war against Yugoslavia was disproportional. NATO knew that Milosevic would respond with intensified ethnic cleansing campaign, it also knew that aerial bombing was not adequate to halt ethnic cleansing, and yet, NATO commenced its air campaign against Yugoslavia! Some interventionists would support that Yugoslavia would commit ethnic cleansing against the Albanian population in Kosovo irregardless of NATO's intervention. But it would be unfounded to support an argument only with hypotheses. The only thing sure is what Charney noted: *"we will never know if those violations would have taken place in the absence of the removal of the observer mission [OSCE verification mission] and the initiation of the campaign"*.[140]

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[137] Layne op.cit., p.52 and Littman, op.cit., p.17.
[138] Wheeler, op.cit., p.270.
[139] Whitman, op.cit., p.171.
[140] Charney, op.cit., p.840.

Had NATO states been that keen to protect the human rights of the Kosovars, they would involve ground troops to avert the Serb military brutality, regardless of the possibility to face big losses in their own combatants. That would frankly be a moral case for humanitarian intervention, where states disregard their losses with the purpose of attaining a desirable humanitarian outcome. But this is a moral case for the theory, not for the practice of humanitarian intervention, as most instances of alleged humanitarian interventions have proved so far.[141] In a recent intervention, for instance, the US government withdrew its forces from Somalia because TV cameras commenced turning the public opinion against the intervention by showing images of the US heavy losses in Mogadishu.[142] It is evident that western governments calculate the humanitarian objectives with their losses, which is a thing that does not reconcile with the noble objectives of humanitarian intervention. This proposition is also contradictory to the principle of proportionality that recommends the protection of the innocent civilian, not of the combatant.

To this point, it is evident that NATO intervention had not met the principle of proportionality neither before the recourse to war (gunboat-coercive-implacable diplomacy), nor during the conduct of war (civilian deaths, indiscriminate targets, aerial bombing inadequate to halt ethnic cleansing, worsening of the situation). The last thing to define is whether or not NATO intervention managed to set up the prospects for a free and democratic multiethnic Kosovo that it had proclaimed.[143]

Although the researcher's view might seem to be prejudiced because of its

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[141] Roberts, op.cit., p.110.
[142] Oliver Ramsbotham and Tom Woodhouse, *Humanitarian Intervention in Contemporary Conflict: A Reconceptualisation*, Cambridge, Polity Press, 1996, p.212, and Wheeler, op.cit., p.198.
[143] Krieger, op.cit., p.261 and 299.

consistency on the lack of proportionality, the facts assure that the outcome of NATO's intervention in Kosovo is at least disappointing and blameworthy. NATO did not achieve the multiethnic and democratic Kosovo after the end of the conflict, even with the presence of the KFOR military presence and the UN civilian presence. The most blameworthy fact, however, is that after five years of international monitoring of this Serbian province, the situation still remained tense and ethnic cleansing along with repression of ethnic minorities was largely witnessed, but this time the Serbs and Roma had been the target (see below). Thus, it could be argued that NATO intervention does not meet the principle of proportionality even five years after Milosevic withdrew his forces from Kosovo, because it did not attain another criterion of humanitarian intervention (as described in Chapter 1): reasonable prospect of success that will lead to a positive humanitarian outcome and not to failure.

First of all, the fact that the UN Security Council undertook to settle the problems regarding the future of Kosovo, as the only UN organ responsible for the maintenance of international peace and security, had been a positive NATO step. Security Council resolution 1244 demanded that the FRY put an immediate end to violence and repression in Kosovo, and that it withdraw from Kosovo; further, it decided on the employment of international civil and security presences, the demilitarisation of the KLA, the return of refugees and the protection and promotion of human rights.[144] But facts proved that not only NATO, but the whole world community would be unable to settle things down in this troubled region. After the withdraw of the Yugoslav military and police forces, ethnic Albanians

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[144] S/RES/1244 (1999), 10 June 1999.

commenced their campaign of ethnic cleansing against the Serbs and other minorities in Kosovo[145], unmolested by the KFOR security presence in the province. In order to have a detailed and documentary presentation of the situation, this paper will exhibit quotations from various international organisations and NGO's.

The immediate departure of the Serb forces from Kosovo led to another humanitarian catastrophe. The UN Secretary-General's Report, a month after the withdrawal of the Yugoslav forces, presents the savageness in the region: *"while the first wave of Kosovo Serb departures was prompted by security concerns rather than by actual threats, a second wave of departures resulted from an increasing number of incidents committed by Kosovo Albanians against Kosovo Serbs. In particular, high profile killings and abductions, as well as looting, arsons and forced expropriation of apartments, have prompted departures".*[146] A later report of the Secretary General, illustrates the deterioration of the situation: *"the level and nature of violence in Kosovo, especially against vulnerable minorities, remains a major concern. Measures taken to address this problem are having a positive effect, but continuing vigilance is necessary... In the period since mid-June, non-Albanian groups, primarily Serbs and Roma, have been targets for harassment, intimidation and attacks. As a result, many have left Kosovo. According to the Yugoslav Red Cross, approximately 150,000 displaced persons have registered for assistance in Serbia and Montenegro since mid-June 1999. Freedom of movement for those who remain is extremely limited and, in some*

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[145] Whitman, op.cit., p.176.
[146] S/1999/779, 12 July 1999, Report of the UN Secretary-General.

cases, virtually non-existent. In effect, non-Albanians are restricted from making use of public facilities such as hospitals or visiting shops and markets.[147] The above reports reflect the harsh situation in Kosovo, even under the auspices of the UN and the security presence in the region (KFOR).

Let us now examine the OSCE report on post-war Kosovo. Accordingly, this report found that *"one discernible leitmotif emerges from this report. Revenge. Throughout the regions the desire for revenge has created a climate in which the vast majority of human rights violations have taken place... the first, obvious, group that suffered revenge attacks are the Kosovo Serbs... the report repeatedly catalogues incidents throughout the area where vulnerable, elderly Kosovo Serbs have been the victims of violence. The result of this has been a continuous exodus of Kosovo Serbs to Serbia and Montenegro and an inevitable internal displacement towards mono-ethnic enclaves, adding fuel to Serb calls for cantonisation. Other particular victims of violence documented in the report are the Roma and Muslim Slavs".*[148] The Parliamentary Assembly of the Council of Europe had been deeply concerned by *"the plight of almost 200,000 Serb and Roma internally displaced persons, constituting more than 80 per cent of their pre-war population, who fled Kosovo after the withdrawal of Serb military forces".*[149]

Well-known NGO's have also described the post-war situation in Kosovo. Human Rights Watch and Amnesty International noted that the province's

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[147] S/1999/987, 16 September 1999, Report of the UN Secretary-General.

[148] Organisation for Security and Cooperation in Europe, Kosovo report: As Seen, As Told Part II, June to October 1999. For more details: http://www.osce.org/kosovo/reports/hr/part2/03-execsum.htm.

[149] Council of Europe, Parliamentary Assembly Recommendation 1424 (1999), Evaluation of the Humanitarian Situation in the Federal Republic of Yugoslavia, particularly in Kosovo and Montenegro, September 1999. For further details: http://www.coe.int.

minorities, and especially the Serb and Roma (Gypsy) populations, as well as some ethnic Albanians perceived as collaborators, faced daily attacks, abductions and murders; another tactic of the Albanians had been the burning and looting of Serb and Roma property in order to force occupants to leave and to discourage their return; ill-treatment and torture of detainees were happened on a daily basis.[150] Amnesty International cites that according to UN estimates 50 per cent of the non-Albanian population had fled Kosovo by the end of 1999.[151] Human Rights Watch reports that the most serious incidents of violence have been carried out by members of the KLA and that the response of KFOR and the United Nations Mission in Kosovo (UNMIK) to abuses against minority populations has been belated and uneven.[152]

This is a good illustration of NATO's unwise policy. At first, NATO favoured the KLA terrorists by offering its support; then it forced the Serbs to negotiate with KLA representatives in Rambouillet first, and in Paris latter; finally it called the KLA to disarm and it believed that it would do so. But NATO should not forget that a terrorist will never leave his arms and his brutal tactics. This is what happens when someone becomes loyal to an unwise policy. The transmuted terrorists into freedom fighters removed their masks and revealed their cruel purposes; and their intension had not only been the removal of the Milosevic suppressive regime, but the removal of all non-Albanian entities in Kosovo.

Disarming the KLA would be a difficult task, as terrorist do not submit their

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[150] Human Rights Watch Report, Federal Republic of Yugoslavia, Abuses Against Serbs and Roma in the New Kosovo. For more details see: http://www.hrw.org/reports/1999/kosov2/. Also Amnesty International Report 2000, Federal Republic of Yugoslavia, see http://www.amnesty.org.

[151] *Id.*

[152] Human Rights Watch, supra note 150.

weaponry that easily. No doubt, the KLA is not a liberation movement, but a terrorist organisation that chases the "Greater Albania" goal.[153] In support of this argument come all those acts for "revenge" against the Serbs in Kosovo. Some pro-Albanian authors noted that these acts of revenge should not come as a surprise.[154] But if it is to claim such an immoral and inhuman premise, it would be affordable and justifiable only for the first months after the withdrawal of the Yugoslav army and police units, and in absentia of the KFOR security presence. Yet, the continuation of Albanian terrorism within the fifth year after the Yugoslav withdrawal cannot be justified on revenge, but on the cruelty, savagery and barbarity of the Kosovo Albanian population, if we accept that the KLA is not a terrorist organisation and that they condemned the post-war violence.[155] Yet, it is unreasonable to claim that all Kosovo Albanians are cruel and brutal. It is the Kosovo Albanian extremists that caused this savagery against the remaining Kosovo minorities. NATO is responsible for the situation because it treated those armed gangs gently and the present situation is an outcome of its mistaken policy.

Let us now consider in brief the situation in Kosovo from 1999 until recently. In 2003, the UN Secretary-General and the UN Security Council condemned the violent attacks in Kosovo, including shootings, in which the victims were members of the Kosovo Serb Community, as well as UNMIK law

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[153] McWhinney, op.cit., p.70 and Maccgwire, op.cit., p.7.
[154] Agon Demjaha, *The Kosovo Conflict: A Perspective from Inside*, in Albrecht Schnabel and Ramesh Thakur (eds.), *Kosovo and the challenge of humanitarian intervention: Selective indignation, Collective action, and International Citizenship*, New York, United Nations University Press, 2000, p.33. Also Malcolm, op.cit., p.327.
[155] Human Rights Watch, supra note 150.

enforcement authorities.[156] He also noted that *"freedom of movement still remains of great concern to minority residents, particularly after the attacks involving primarily Serb victims that occurred during the reporting period"*.[157] Two of the victims of these violent attacks had been two Serb teenagers shoot dead, and another four injured.[158] But the UN Secretary-General and the Security Council did not opine on the role of the UNMIK and KFOR in creating a secure environment in Kosovo. Five years after their entry in Kosovo they are unable to create the conditions of a multiethnic Kosovo and they failed to confront the Albanian terrorism. NATO intervention did not bring its promising fruits.

This is because neither NATO, nor the UN achieved to accept that the KLA had been unscrupulous terrorist organisation aiming to destabilise the whole Balkan region. NATO had only targeted the Serbs, leaving the KLA terrorist immune from any kind of threat.[159] As a result, the Kosovo Protection Corps, created by UNMIK, consisted of *"the leadership and ranks of the demilitarised UCK [KLA] and the remainder from the civilian population at large"*.[160] Not surprisingly, the Serb representatives resisted this plan because they considered the Kosovo Protection Corps (KPC) as the KLA in disguise.[161] It could be argued that they had been realistic and wise. Indeed, the UN Secretary-General admitted that *"a number of security incidents and crimes have taken place which reportedly*

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[156] S/2003/996, 15 October 2003, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo.
[157] *Id.* Also SC/7870, Press Release, 12/09/2003, security Council 4823rd Meeting, for more details see: http://www.un.org/News/Press/docs/2003/sc7870.doc.htm.
[158] S/2003/996, 15 October 2003.
[159] Layne, op.cit., p.14.
[160] Krieger, op.cit., p.555.
[161] S/1999/1250, 23 December 1999, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo.

involved former members of the KLA and potential members of KPC".[162] On 3 December, the head of the United Nations Interim Administration Mission in Kosovo (UNMIK) has ordered that 12 Kosovo Protection Corps officers be suspended, with pay, for six months while a police investigation takes place into their role in the demolition of a railway bridge in the northern Kosovo town of Loziste in April.[163] The involvement of the KPC in terrorism and organised crime is evident every day in many incidents involving inter-ethnic crime.[164]

In addition, although the ICTY rushed to hunt Milosevic and other Serbs responsible for violations of international humanitarian laws, they left the KLA terrorist immune until recently. It took the ICTY some years to understand that not only the Serbs violated international standards. What was the Albanian population's response to the indictments of KLA members by the ICTY? Kofi Anan's report to the UN Security Council responds thoroughly: *"Kosovo's political leadership pledged full cooperation with the Tribunal, but some elements of the Kosovo Albanian public did not support those arrests. There were 24 peaceful demonstrations associated with the arrests made by the Tribunal and with sensitive trials, arrests and judicial investigations, primarily of former KLA members charged inter alia with war crimes, terrorism and organised crime".*[165] Nevertheless, it is very questionable how peace and multi-ethnic Kosovo can be achieved, when people demonstrate (even peacefully) in favour of terrorists.

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[162] *Id.*

[163] United Nations Interim Administration Mission in Kosovo, Official Website News Coverage. For more details see http://www.unmikonline.org/news.htm#0312.

[164] Alexandros Yannis, "Kosovo Under International Administration", *Survival*, vol.43, No2, Summer 2001, p.39. Also S/PV.4770, 10 June 2003.

[165] S/2003/421, 14 April 2003, Report of the Secretary General on the United Nations Interim Administration Mission in Kosovo.

An unaware reader would suppose that the Kosovo Albanian public provides support for the KLA terrorists, but its greatest fear is the possible indictment of its leader Hashim Thaci, former KLA leader, accused many times by Belgrade for war crimes. Indeed, the fact that he is not in Hague now is really questionable, because he had been the leader of a secessionist movement that adopted unscrupulous terrorist skills and violated humanitarian laws. But again, this reflects the world community of the double standards. The same had happened with the leaders of Croatia and Bosnia-Herzegovina, Franco Tudjman and Alia Izetbegovic, that had never been indicted by the ICTY, although there is plenty of evidence against them.[166] Let us not take a brief glance of other reports on the situation in Kosovo. In March 2003, OSCE and the UNHCR submitted the tenth assessment of ethnic minorities in Kosovo. According to this report, the key areas of concern for minorities in Kosovo are: *"security and freedom of movement, access to essential services, participation in political and civil structure, incentives to inter-ethnic dialogue, and patterns of the return process"*.[167]The report further notes that *"discrimination continues to represent a significant obstacle to the ability of minorities to live reasonable lives in Kosovo"*.[168]

An examination of the situation by NGOs is essential for the overall view and understanding of the situation. Four years after the intervention the Amnesty International found that *"despite the efforts of the NATO-led Kosovo Force*

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[166] James George Jatras, *NATO's Myths and Bogus Justifications for Intervention*, in Ted Galen Carpenter (ed.), *NATO's Empty Victory: A Postmortem on the Balkan War*, Washington D.C., CATO Institute, 2000, p.27. Also Avramovic, supra note 18.

[167] OSCE AND UNHCR, Tenth Assessment of the Situation of Ethnic Minorities in Kosovo (period covering from May 2002 to December 2002), March 2003. For further details see OSCE http://www.osce.org/documents/mik/2003/03/903_en.pdf.

[168] *Id.*

(KFOR) and the UN Civilian Police (UNMIK Police) to provide security and protection, members of minority communities continue to both suffer and fear assaults by the majority community on their lives and property... This climate of fear, insecurity and mistrust, exacerbated by continued impunity, has resulted in the effective denial of the right of minorities to enjoy freedom of movement in Kosovo. Additionally, those who are able to gain some measure of freedom of movement, find themselves subjected to both direct and indirect discrimination when seeking access to basic civil, political, social, economic and cultural rights... Serbs and Roma – were both individually and indiscriminately targeted, on the basis of their identity - and irrespective of their individual responsibility for human rights violations, including war crimes perpetrated by Serbian forces".[169]

From all the reports so far, the plight of the Serbs and other minorities in Kosovo is evidently illustrated. Four years after the UN civilian and security presence (2003) and the international community seemed to be unable to restrain the Kosovo Albanian hatred and brutality. Thus, the fruits of NATO intervention in Kosovo are highly ambiguous, save NATO intervened with the purpose of only protecting the ethnic Albanians in Kosovo. An ICRC survey found that 88 per cent out of the 227,800 Serb Kosovo refugees in Serbia have to survive in extremely harsh economic conditions with an estimated average of 2.40 euros per day.[170] Yet, this huge number of refugees seems unlikely to return in Kosovo, given the

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[169] Amnesty International Report, Serbia and Montenegro (Kosovo/Kosova), "Prisoners in our own homes": Amnesty International's concerns for the human rights of minorities in Kosovo/Kosova. For more details see: http://web.amnesty.org/library/Index/ENGEUR700102003?open&of=ENG-YUG.

[170] International Committee of the Red Cross, Internally displaced facing bleak fate in Serbia and Montenegro, ICRC study for internally displaced people in Serbia and Montenegro, for more details see http://www.icrc.org/web/eng/siteeng0.nsf/iwpList471/7FB81E9B791139C5C1256D8E0043FE88.

inhuman security conditions for minorities in Kosovo. There is another reasonable question regarding NATO's disproportionate response to the crisis of Kosovo. If NATO were to stop ethnic cleansing in the Balkans, why did it not try to halt the Albanian campaign of ethnic cleansing against the Serbs and other minorities[171], given that NATO forces cover their fifth year in Kosovo? NATO's inability to protect the minorities in Kosovo and improve the situation illustrates the fact that NATO's actual goal has not been the improvement of the humanitarian situation in Kosovo, but the fondling of the Albanians.

Yet, there is another thing that darkens NATO's intervention. More than a dozen Christian nations approved this intervention in order to protect the Muslim Albanians of Kosovo. What was the Albanian response as a thanksgiving to these nations? Literally, it has been the destruction of Christian Orthodox churches and monasteries all over Kosovo. A special publication of the Serb Patriarchate clearly illustrates the dimension of the cultural destruction in Kosovo. The second edition of this publication presents 76 instances of desecrated and destroyed Orthodox Serbian Churches and Monasteries in Kosovo, while the third edition 107.[172] There is enough evidence that the Albanians are well aware of exploding and burning churches, desecrating cemeteries and religious icons (Saints, Mother Mary and

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[171] Ramesh Thakur and Albrecht Schnabel, *Unbridled Humanitarianism: Between Justice, Power, and Authority*, in Albrecht Schnabel and Ramesh Thakur (eds.), *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship*, New York, United Nations University Press, 2000, p.497. Also Falk, op.cit., p.332.

[172] Crucified Kosovo, Destroyed and Desecrated Serbian Orthodox Churches in Kosovo and Metohia (June-October 1999), 2nd edition, publisher: "The Voice of Kosovo and Metohia" Media and Publishing Centre of Raska and Prizren Orthodox Eparchy, November 1999;Crucified Kosovo, Destroyed and Desecrated Serbian Orthodox Churches and Monasteries in Kosovo and Metohia (June1999-May 1999), 3rd edition, publisher: "The Voice of Kosovo and Metohia" Media and Publishing Centre of Raska and Prizren Orthodox Eparchy, 2001.Photographs and more information available in the official website of the Serb Orthodox Church in Kosovo: http://www.kosovo.com .

Jesus), and destroying cultural, historical and religious monuments.[173] All those acts of vandalism, flagitiousness, impiety, cruelty and inhumanity reveal the temperament of the Kosovo Albanians. These can only be terrorist acts and reveal the real incentives of the KLA and its supporters. The Council of Europe strongly condemned the *"continuing criminal destruction of cultural heritage"*.[174]

The fact that the world media do not present the plight of the non-Albanian population in Kosovo five years after the UN involvement in the area is really provocative. The Albanian refugees are back, but Serb, Roma and other minorities are still expatriated and cannot return until they feel that there is a secure environment in Kosovo that would assist their decision to return. But all the above acts of Kosovo Albanian-oriented terrorism and vandalism eliminated the hopes for return in their mother land. NATO failed to create a peaceful Kosovo and a "multi-ethnic" society. The Kosovo Albanian extremists illustrate their will to ethnically cleanse the area and create an independent Albanian Kosovo that, no doubt, their ulterior goal will be the unification with their motherland, Albania (although they rule out this possibility for reasonable purposes).[175] But are these people worthy of gaining this independence? Or, will independence solve these problems? Yet, these questions are to be answered in a following chapter.

Last but not least, the clashes of March 2004, five years after the UN and KFOR presence, constitute a clear proof that NATO's intervention did not bear any fruits for Kosovo. Ethnic Albanians indiscriminately attacked Serb homes,

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[173] *Id.*
[174] Council of Europe, Parliamentary Assembly, Recommendation 1422, 1999. For more details see: http://www.coe.int .
[175] Jatras, op.cit., p.26 and Maccgwire, op.cit., 7.

orthodox churches and public offices.[176] Human Rights Watch reported that most of the violence had been directed at the ethnic Serb minority.[177] One of the most brutal tactics, however, had been the arson attacks on newly built homes of Serbs who had recently returned to Kosovo following their forced displacement in previous years.[178] The UN Secretary General's Special Representative in Kosovo, Harri Holkeri, stated to the media and before the UN Security Council that the violence was the most serious setback to the efforts of UNMIK and KFOR of the past five years.[179] NATO decided to send additional troops in Kosovo.[180] The Serb Prime Minister Vojislav Kostunica described the attacks as "planned in advance and coordinated".[181] "This was an attempted pogrom and ethnic cleansing against Kosovo's Serbs", he said.[182] In addition, he noted that these attacks showed the true nature of Albanian separatism, "its violent and terrorist character".[183] The Kosovo Albanians had been also condemned by the US Commander of NATO forces for southern Europe, Admiral Johnson, has linked the recent violence in Kosovo to ethnic cleansing.[184] This statement is of a great importance because it proves that NATO was unable to halt ethnic cleansing in Kosovo. Indeed, NATO's

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[176] Amnesty International, "Amnesty International Calls for Restraint on all Sides after Attacks in Kosovo and Reprisals in Serbia", for more details see: http://web.amnesty.org/library/index/engeur700082004.

[177] Human Rights Watch, "Kosovo/Serbia: Protect Minorities from Ethnic Violence", for more details see: http://web.amnesty.org/library/index/engeur700082004.

[178] *Id.*

[179] UNMIK/PR/1142, SRSG Harri Holkeri's Statement on the events in Kosovo, 18 March 2004, for more details see: http://www.unmikonline.org. Also S/PV.4967, 11 May 2004.

[180] NATO, Press Release 2004(046), 19 March 2004 and Press Release 2004(045) (revised), 18 March 2004, see: http://www.nato.int/docu/pr/2004/p04-045e.htm and http://www.nato.int/docu/pr/2004/p04-046e.htm.

[181] BBC, Kosovo Clashes 'Ethnic Cleansing', see http://news.bbc.co.uk/1/hi/world/europe/3551571.stm.

[182] *Id.*

[183] BBC, Many Die as Kosovo Clashes Spread, see http://news.bbc.co.uk/1/hi/world/europe/3521068.stm.

[184] Shaban Buza, "NATO Sees Spectre of Ethnic Cleansing", REUTERS, for further details go to: http://www.reuters.com/newsArticle.jhtml?type=topNews&storyID=4609096.

intervention stopped ethnic cleansing against the Kosovo Albanians, but it did not manage to put an end to the Albanian efforts to expel the Serbs out of Kosovo. Five years after NATO intervention in Kosovo, it is now evident that NATO's humanitarian intervention did not bring the prospects of peace in Kosovo.

The report of the UN Secretary-General explains everything in detail: *"the onslaught led by Kosovo Albanian extremists against the Serb, Roma and Ashkali communities of Kosovo was an organized, widespread, and targeted campaign. Attacks on Kosovo Serbs occurred throughout Kosovo and involved primarily established communities that had remained in Kosovo in 1999, as well as a small number of sites of recent returns. Properties were demolished, public facilities such as schools and health clinics were destroyed, communities were surrounded and threatened and residents were forced to leave their homes. The inhabitants of entire villages had to be evacuated and, following their departure, many homes were burned to the ground... 730 houses belonging to minorities, mostly Kosovo Serbs, were damaged or destroyed. In attacks on the cultural and religious heritage of Kosovo, 36 Orthodox churches, monasteries and other religious and cultural sites were damaged or destroyed. Two of them are listed by UNSESCO as major sites of universal significance and a third is listed as a site of regional significance".*[185] What is the impact of these violent attacks? Harri Holkeri stated before the Security Council that *"the impact of the violent attacks on members of the Kosovo Serb, Roma and Ashkali communities was dramatic. Some 4100*

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[185] S/2004/348, 30 April 2004, Report of the Secretary-General on the United Nations Interim Administration in Kosovo.

persons were displaced in just two days".[186] No doubt, the extremist elements of the Kosovo Albanian society wanted to expel the remaining minority populations out of Kosovo. The OSCE Mission in Kosovo (OMiK) noted that *"the events of 17-19 March have severely limited the ability of members of minority communities to live, travel and work in Kosovo and let back their trust in the ability of KFOR, UNMIK Police and the KPC to maintain a secure environment and police effectively".*[187]

After the world community had strongly condemned ethnic violence in Kosovo, the crisis calmed down. Nevertheless, it will take a lot of time to heal the wounds of the Kosovo minorities. Nothing can convince them that they will not meet the same challenges in the future. What is more, there have been several other violent events since the March violence, as Harri Holkeri addressed before the UN Security Council in May.[188] Yet, the situation has slightly changed in 2005 and 2006. Although the security situation in Kosovo has improved, the Special Representative of the Secretary-General in Kosovo reported before the Security Council *"members of the minority communities continue to feel insecure".*[189] Kofi Anan reported that *"although security for minorities has improved since the violence of March 2004, freedom of movement remained precarious...Minorities fears are fed by isolated incidents...The Government has not taken sufficient action to punish ethnically targeted crime".*[190] In his 2006 reports, he observed that the security situation in Kosovo, while generally stable, remains fragile and that

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[186] S/PV.4967, 11 May 2004.
[187] OSCE Mission in Kosovo, Human Rights Challenges Following the March Riots, for more details see: http://www.osce.org.
[188] S/PV.4967, 11 May 2004.
[189] S/PV.5130, 24 February 2005.
[190] S/2005/88, 14 February 2005.

violent incidents have continued to occur.[191] He also stressed that these incidents create a perception of insecurity for the members of minority communities.

The situation in Kosovo from 1999 up to date has been examined so far. Although armed intervention ended in 10 June 1999, the intervention in Kosovo continues. NATO has its forces in Kosovo (KFOR) together with the United Nations Interim Administration in Kosovo (UNMIK). However, NATO's "humanitarianism" did not attain the tolerant society in Kosovo. Terrorism and violence continue to threaten the remaining minorities in Kosovo. To achieve its goals, the world community, and more specifically western powers, has to stop fondling the Albanian separatism and condemn all its extremist parameters. Serbs and the other remaining minorities are the ones to be treated gently and protectively, because they are the victims, since the fall of Milosevic. If NATO had been eager to protect the Albanians from Milosevic's brutal tactics, now it will have to prove its humanitarianism in favour of the Serbs and other vulnerable minorities. In the past Milosevic had been culpable for the brutalities in Kosovo. What about today? Who is responsible for the violence in Kosovo? Unfortunately, there is no name for this violence. This is because separatism has no name. Now the separatists see their dream of a "Greater Albania" very close and they will not give up. Their aim is to drive Serbs and other minorities out of Kosovo. It is difficult for NATO to heal the wounds it has opened.

What matters here is the fact that this intervention violated in many aspects the UN Charter, humanitarian laws, and fundamental standards of the so called "humanitarian intervention". In other words, this intervention approved the realist

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[191] S/2006/45, 25 January 2006 and S/2006/361, 5 June 2006.

argument that humanitarian intervention is an "oxymoron", "paradox", a "contradiction" in terms.[192] Too many scholars argue that there is no war to call humanitarian.[193] On the other hand, scholars who oppose that humanitarian intervention is an oxymoron[194] are not only liable to the critics against NATO's intervention, but they have to calculate the positive outcomes of this 'humanitarian war'. The situation did not improve and ethnic cleansing has not been halted. Deprivations of fundamental human rights are evident in every-day Kosovo. Humanitarian Intervention in Kosovo succeeded only on behalf of the Kosovo Albanians. The UN-NATO declared multi-ethnic Kosovo seems to be a legend, as the false promises of humanitarian intervention.

The interventionists would expectedly argue that doing something is better than doing nothing. Indeed, this premise is right and it is difficult to disagree. But doing something does not mean waging war. Humanitarian intervention should express other forms of intervention, rather than military engagement. Among these forms are peaceful efforts of settling disputes. For instance, diplomatic means are the ideal way of dealing with humanitarian crises. Yet, wise diplomacy was absent in the case of Kosovo, as in other alleged humanitarian interventions. In Somalia, for example, the hawkish former UN Secretary-General disregarded Sahnoun's

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[192] [192] Ian Brownlie, *The Principle of Non-Use of Force in Contemporary International Law*, in William E. Butler, *The Non-Use of Force in International Law*, Dordrecht, Kluwer Academic Publishers, 1989, p.25. Also Roberts, op.cit.,p.429 (supra note 2).

[193] Ken Booth, *The Flaws of Just Wars*, in Ken Booth (ed.), *The Kosovo Tragedy, the Human Rights Dimensions*, London, Franck Cass Publishers, 2001, p.324; Colin S. Gray, *No Good Deed Shall Go Unpunished*, in Ken Booth (ed.), *The Kosovo Tragedy, the Human Rights Dimensions*, London, Franck Cass Publishers, 2001, p.302.

[194] Chris Brown, *A Qualified Defence of the Use of Force for 'Humanitarian' Reasons*, in Ken Booth (ed.), *The Kosovo Tragedy, the Human Rights Dimensions*, London, Franck Cass Publishers, 2001, pp.283-284; Melanie McDonagh, *Can There Be Such a Thing as a Just War?*, in Ken Booth (ed.), *The Kosovo Tragedy, the Human Rights Dimensions*, London, Franck Cass Publishers, 2001, p.289;Nigel Dower, *Violent Humanitarianism-An Oxymoron?*, in Alexander Moseley and Richard Norman (eds.), *Human Rights and Military Intervention*, Hants, Ashgate, 2002, p.92.

diplomatic efforts and sought a forceful intervention. But this is not what humanitarian intervention should aim at. Other means of intervention for humanitarian purposes are sanctions (i.e. economic sanctions) by the world community against a state violating its obligations to human rights standards. But if the UN and powerful states wish to attain a world of justice, equality and respect of human rights in rogue and evil states, they should invest on education of these countries. This is the only way to achieve a long-term respect for human rights. In Kosovo, the outcome illustrated that bombardments are not adequate to improve the human rights situation. Thus, it could be argued that war is counterproductive in the realm of human rights and the only way to improve human rights internationally is to educate the societies that enjoy the minimal standards of these rights.

LEGAL AND MORAL CAVEATS FOR THE CREATION OF AN EMERGING NORM IN FAVOUR OF HUMANITARIAN INTERVENTION

According to this thesis, the 1999 NATO intervention in Kosovo is a very bad precedent for the future of humanitarian intervention. Many fundamental premises of humanitarian intervention have been violated by the intervening states. As a result, NATO intervention in Kosovo has not fulfilled most of the criteria of humanitarian intervention, as expressed in Chapter 1. Accordingly, it could be said that NATO did not exhaust all peaceful avenues before the commencement of its bombings. From the analysis in this chapter it becomes evident that the Rambouillet and Paris conferences on Kosovo did not present realistic diplomatic efforts. They were a kind of dictation under the NATO threats, not negotiation. What is more, NATO did not meet the principle of proportionality. The means it used were against the noble humanitarian ends. As a result, the bombing of refugee conveys, hospitals and against the civilian population in general are severe violations of international humanitarian laws. These tactics are more blameworthy when they are used in an intervention that aims to protect fundamental human rights.

In addition, the bombings of public utilities and civilian infrastructure are against another fundamental premise, which dictates that intervention to protect human rights should have a minimal effect on authority structures of the affected states. Yet, the bombing on roads, churches, electricity and water supply cannot justify the above criterion. As regards to the reasonable prospects of success as well as the long-term goal of humanitarian intervention, it could be argued that

NATO intervention did not accomplish any of them. Ethnic cleansing kept on, but this time the Albanian population tried to push the Serbs out of Kosovo. It seems that a multiethnic and tolerant society in Kosovo has not yet been accomplished. Therefore, it is difficult to support that NATO achieved its humanitarian goals by intervening in Kosovo. It could be said that NATO intervention in Kosovo, was not only illegal under international law, but it was also not justified on the moral ground. Yet, the emergence of a new norm requires support in all stages: legal, moral and political. NATO's bombings of civilian infrastructure and population also shocked the moral conscience of the publics. This is why NATO became liable to critics against its bombings. Hence, NATO has set a very bad precedent for the future of humanitarian intervention.

CHAPTER 8

THE FUTURE STATUS OF KOSOVO

Article 2(4) declares that *"all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"*. Yet, some prominent international lawyers believe that Article 2(4) is not a ban to unilateral humanitarian intervention. This chapter has to deal with this traditional argument of interventionists. A thorough analysis will lead to the collapse of such an argument, which seems to be pivotal for lawyers in favour of humanitarian intervention. This analysis will begin with the examination of arguments of both sides. In a second stage follows an analysis of alleged humanitarian intervention in state practice. The purpose of this research is to observe whether or not this theory fits into the practice of this kind of intervention.

Many well-known lawyers in the past and today claim that Article 2(4) allows humanitarian intervention, because this kind of intervention is not directed against "the territorial integrity or political independence of any state", and because it is not "inconsistent with the purposes of the United Nations"[1] Teson

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[1] Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edition, New York, Transnational Publishers, 1997, pp. 146-157; Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, The Hague, The Netherlands, Kluwer Law International, 1999, pp.91-102; Richard B. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in J.N. Moore (ed.), *Law and Civil War in the Modern World*, Baltimore, John Hopkins University Press, 1974, pp.235-244; Anthony D' Amato, *International Law: Process and Prospect*, , New York, Transnational Publishers, 1987, pp.50-75; W. Michael Reisman and Myres S. McDougal, *Humanitarian Intervention to Protect the Ibos*, in R. B. Lillich (ed.), *Humanitarian Intervention and the United Nations*, Charlottesville, Virginia University Press,1973, pp.167-177; Martha Brenfors and Malene Maxe Petersen, "The Legality of

thinks that *"a genuine humanitarian intervention does not result in territorial conquest or political subjugation"*.[2] Hopkinson also thinks that humanitarian interventions should not interfere, influence, act, against or put in question the political independence and territorial integrity of the state concerned.[3] Nevertheless, it would be naive to believe that an armed intervention in the internal affairs of a state is not a clear breach of the state's sovereignty. What is more, state practice has proved that alleged humanitarian interventions turn against the territorial integrity and political independence of states. Such instances will be explored after a brief analysis of the opponents of this interpretation, who believe that Article 2(4) bans all kinds of military force, save the exceptions made by articles 51 and 42 of the UN Charter.[4]

The theoretical examination will be examined in two stages. First of all, it is very essential to detect whether or not humanitarian intervention is consistent with the "purposes of the United Nations". No doubt, the promotion of human rights is a declared purpose of the UN Charter, as it is clearly stated in Article

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Unilateral Humanitarian Intervention - A Defence", *Nordic Journal of International Law*, vol.69, 2004, p.467; Frederik Harhoff, "Unauthorised Humanitarian Interventions – Armed Violence in the Name of Humanity?", *Nordic Journal of International Law*, vol.70, 2001, pp.81-82. Also International Court of Justice, "Legality of Use of Force", Serbia and Montenegro v. Belgium, 1999, oral pleadings, see: http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm.

[2] Teson, op.cit., p.151.

[3] Nicholas Hopkinson, *Humanitarian Intervention?*, London, HMSO, 1996, p.11.

[4] Rosalyn Higgins, *Intervention and International Law*, in Hedley Bull (ed.), *Intervention in World Politics*, Oxford, Clarendon Press, 1984, p.38; Ian Brownlie, *Humanitarian Intervention*, in J. N. Moore (ed.), *Law and Civil War in the Modern World*, Baltimore, John Hopkins University Press, 1974, pp.222-223; Ian Brownlie, *International Law and the Use of Force by States*, Oxford, Clarendon Press, 1963, pp.267-268; Michael Akehurst, *Humanitarian Intervention*, in Hedley Bull (ed.), *Intervention in World Politics*, Oxford, Clarendon Press, 1984, pp.104-106; Oscar Schachter, "The Legality of Pro-Democratic Invasion", *American Journal of International Law*, vol.75, 1984, pp. 645 and 649; Oscar Schachter, "The Right of States to Use Armed Force", *Michigan Law Review*, vol.82, pp.1624-1626; Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford, Oxford University Press, 2001, pp.48-51; Nicholas Tsagourias, "Humanitarian Intervention After Kosovo and Legal Discourse: Self-Deception or Self-Consciousness?", *Leiden Journal of International Law*, vol.13, 2000, p.16.

1(3).[5] Other UN instruments on human rights, such as the Universal Declaration of Human Rights, the International Covenant on Civil and political Rights, the International Covenant on Economic, Social and Cultural Rights, affirm the fact that one of the UN's primal purposes is the promotion of human rights. However, the UN Charter and the other UN instruments do not refer among the purposes of the United Nations the military enforcement for the protection of human rights. Moreover, as Akehurst noticed[6], the first purpose of the UN listed in the Charter is the maintenance of international peace and security.[7] Accordingly, Akehurst argues that Article 2(4) means that every use of force is "inconsistent with the purposes of the United Nations", unless the state concerned can point to some other provision of the Charter which expressly authorises the use of force.[8] Thus, it could be argued that humanitarian intervention is not in conformity with the purposes of the United Nations, that Article 2(4) declares.

The second point to make here is that humanitarian interventions are directed against "the territorial integrity or political independence of any state", despite the opposite claims of the advocates of humanitarian intervention. Many scholars of international law have accurately supported that any humanitarian intervention, however limited, constitutes a clear violation of state's political

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[5] UN Charter, Article 1(3) declares that among the purposes of the United Nations is "to achieve international cooperation 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".

[6] Akehurst, op.cit., p.105 and Chesterman, op.cit., pp.52-53.

[7] UN Charter, Article 1(1) declares that the purposes of the United Nations are: "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace".

[8] Akehurst, op.cit., p.106.

independence and territorial integrity.[9] In support of the above argument comes the ICJ's decision in the *Corfu Channel* case. The UK had carried out a minesweeping operation in Albanian territorial waters and argued before the ICJ that it did not threaten the territorial integrity or the political independence of Albania. But the Court decided that *"the action of the British Navy constituted a violation of Albanian sovereignty"*.[10] Although the argument did not have to do explicitly with humanitarian intervention, it seems that the judgment of the Court condemns any kind of intervention, including humanitarian intervention.[11] In other words, the Court opined that any kind of intervention is a clear breach of a state's territorial integrity and political independence. Oscar Schachter noted that the idea that a war waged in a good cause would violate neither the territorial integrity nor political independence of the target state demands an "Orwellian construction" of those terms.[12]

The above part concerns the theory of humanitarian intervention regarding Article 2(4) of the UN Charter. Let us now consider whether of not the practice of alleged humanitarian intervention violates Article 2(4). No doubt, a detailed analysis of state practice can prove that all humanitarian interventions have constituted a violation of a state's territorial integrity and political independence, however limited in time and scope. In some cases, this violation becomes evident in a very unambiguous way. For instance, India's intervention in East Pakistan led

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[9] Jack Donnelly, "Human Rights, Humanitarian Intervention and American Foreign Policy: Law, Morality and Politics", *Journal of International Affairs*, vol.3, 1983/84, p.318. Also Akehurst, op.cit., p.105.

[10] ICJ Pleadings, 1948, *Corfu Channel Case* (UK v. Albania), vol.3, p.296. Also available on the internet: http://www.icj-cij.org.

[11] Akehurst, op.cit., p.110.

[12] Schachter, op.cit., pp.645, 649.

to a state's secession with the creation of independent Bangladesh. In addition, the US, UK, and French "Safe Havens" to protect the Kurdish population of northern Iraq constitutes a clear violation of the Iraqi territorial integrity and political independence, since Iraq was not able to exercise its sovereign rights over its territory. The aerial control of northern Iraq without a Security Council authorisation is, no doubt, a violation of the Iraqi territorial integrity and political independence. All other interventions for humanitarian purposes have imposed to a lesser or greater extent limitations to state sovereignty. Thus, all cases of alleged humanitarian intervention lead up to the collapse of the pseudo-dilemma that humanitarian intervention does not affect the territorial integrity and political independent of any state. However, it is not possible for a brief chapter to analyse all instances of humanitarian intervention and the extent that the territorial integrity and political independence of a state had been violated. Hence, this chapter will focus on the case of Kosovo and the limitations imposed upon the sovereignty of the Federal Republic of Yugoslavia. Further, this essay will cover matters relating to legality vs. illegality in the current Kosovo administration and its future status.

Initially, before the commencement of the bombings, the intervening states had declared that they would oppose the creation of an independent Kosovo and they expressed their support and respect for the Yugoslav territorial integrity and political independence. First of all, the UN Security Council stressed the importance of the respect of the sovereignty and territorial integrity of the Federal Republic of Yugoslavia.[13] The Contact Group had also stressed that it would

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[13] S/RES/1160 (1998), 31 March 1998, S/RES/1199 (1998), 23 September 1998, S/RES/1203 (1998), 24 October 1998, and S/RES/1244 (1999), 10 June 1999.

support neither independence nor the maintenance of the status quo in Kosovo.[14] The European Union expressed that the principles for a solution of the Kosovo problem should be based on the territorial integrity of the Federal Republic of Yugoslavia and should be in accordance with OSCE standards, including those set out in the Helsinki Final Act, and the Charter of the UN, and expressed support for an enhanced status for Kosovo which would include a substantial degree of autonomy and meaningful self-administration.[15] Accordingly, the Council of Europe stressed their respect for the territorial integrity of Yugoslavia, and they expressed their support for an enhanced autonomy for Kosovo within the Federal Republic of Yugoslavia.[16]

Let us now examine the major diplomatic documents regarding the quest of a solution to Kosovo's political problem, prior to the recourse to force. First of all, the Hill Proposals supported the territorial integrity of Yugoslavia and did not even imply independence for the province.[17] Moreover, the Rambouillet Draft recalled the commitment of the international community to the territorial integrity

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[14] Contact Group Foreign Ministers, Statement on Kosovo, New York, 24 September; Contact Group, Statement on Kosovo, Bonn, 25 March 1998; Contact Group, Statement, Rome, 29 April 1998; Contact Group Meeting, Statement on Kosovo, Washington, D.C., 8 January 1998. All the above cited documents can be found in: Heike Krieger (ed.), *The Kosovo Conflict and International Law, An Analytical Documentation 1974-1999*, Cambridge, Cambridge University Press, 2001, pp.116, 121, 127, 140 and 187.

[15] EU, 1950th Council Meeting, General Affairs, PRES/96/253, Luxembourg, 1 October 1996; EU, 2078th Council Meeting, General Affairs, PRES/98/86, Brussels, 30/31 March 1998; EU, 2085th Council Meeting, General Affairs, PRES/98/109, Luxembourg, 27 April 1998; EU, Cardiff European Council, Presidency Conclusions, DOC/98/10, 15/16 June 1998; EU 2111th Council Meeting, General Affairs, PRES/98/227, Luxembourg, 29 June 1998. The above documents are cited in Krieger (ed.), op.cit., pp.120, 128, 139, 144 and 147.

[16] Council of Europe, Parliamentary Assembly, Recommendation 1360 (1998), Crisis in Kosovo, 18 March 1998; Council of Europe, Parliamentary Assembly, Recommendation 1384 (1998), Crisis in Kosovo and situation in the FRY, 24 September 1998. The above documents are cited in Krieger (ed.), op.cit., pp.125, 154.

[17] Hill Proposals for a Settlement in Kosovo, October 1998-January 1999, cited in Krieger (ed.), op.cit., p.155.

of the Federal Republic of Yugoslavia.[18] The agreement reached by Milosevic and the UN special envoy, Richard Holbrooke, known as the Holbrooke Agreement, had also affirmed the commitment to the respect to sovereignty and territorial integrity of the FRY.[19] NATO positively expressed its full support for the sovereignty and territorial integrity of the FRY.[20] Many powerful states, including France, Germany, Canada, Russia, Japan, China, the US, and the UK opposed independence for the province of Kosovo and insisted for a greater autonomy and self-administration of Kosovo within the FRY.[21]

Subsequently, it is clear from the above that major organisations, powerful states and the international community in general strongly opposed the creation of an "independent Kosovo". Instead of the Kosovo Albanian separatism and the idea of a "Greater Albania", the world community preferred another way to solve the political problem in this Yugoslav province. Hence, before the Security Council and other international fora, states clarified their intention to contribute to the efforts for an enhanced autonomy of Kosovo within the FRY, respecting the sovereignty and territorial integrity of Yugoslavia. All Security Council resolutions regarding Kosovo, for instance, speak of a greater autonomy and self administration for Kosovo and not of the creation of an independent state. What is

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[18] Interim Agreement for Peace and Self-Government in Kosovo, Rambouillet, 23 February 1999, cited in Krieger, op.cit., p.261.

[19] Accord Reached by Slobodan Milosevic, President of the FRY, and the UN Special Envoy, Richard Holbrooke, UN Doc. S/1998/953, Annex, 14 October 1998, cited in Krieger, op.cit., p.290.

[20] NATO, statement by the Secretary General on behalf of the North Atlantic Council, Press Release (99)020, 19 February 1999; NATO, Statement on Kosovo issued at the Ministerial Meeting of the North Atlantic Council, Press Release M-NAC-1(98)61, 28 May 1998; NATO, Statement on Kosovo Issued at the Meeting of the North Atlantic Council in Defence Ministers Session, Press Release M-NAC-D-1(98)77, 11 June 1998. The above documents are cited in Krieger (ed.), op.cit., pp.260, 288 and 289.

[21] Krieger, op.cit., pp. 129-136, 153, 298, 380, 395 and 398.

more, all those resolutions stress their devotion to the respect to sovereignty and territorial integrity of the FRY.[22]

Thus, the pre-war practice clearly illustrates the will of states to respect the Yugoslav sovereignty over Kosovo. This initial position of states seems to be in conformity with the traditional argument of interventionists that humanitarian intervention is not directed against the territorial integrity or political independence of any state. Yet, a military intervention, however limited in time and scope, constitutes a temporary breach of a state's territorial integrity and political independence. As regards to the plans for the future status of Kosovo, it could be said that urging Yugoslavia to cede autonomy and self administration in Kosovo is an unambiguous long-term violation of a state's territorial integrity and political independence. In other words, even if Kosovo is not to become an independent state, an autonomous status imposes restrictions to the Yugoslav sovereignty, thus violating its territorial integrity.

The positions of states, international organisations and group of states, before the aftermath of the conflict, regarding the solution of the political problem of Kosovo have been set out so far. It is very essential, however, to consider how the war ended up and under which circumstances a political settlement for Kosovo can be achieved according to this settlement. Security Council resolution 1244 had been the document that ended the war and that sketched out the prerequisites for a final solution. The fact that the war ended with a Security Council resolution is of a great importance, because NATO acknowledged the exclusivity of the Council as

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[22] S/RES/1160 (1998), 31 March 1998, S/RES/1199 (1998), 23 September 1998, S/RES/1203 (1998), 24 October 1998, and S/RES/1244 (1999), 10 June 1999.

the only organ responsible for the advancement of international peace and security. Accordingly, the Council reaffirmed the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic Yugoslavia, as set out in the Helsinki Final Act.[23] It also reaffirmed the call of previous resolutions for substantial autonomy and meaningful self-administration for Kosovo.[24] In addition, the Council decided that *"a political solution to the Kosovo crisis shall be based on the general principle in annex 1 and a s further elaborated in the principles and other required elements in annex 2"*.[25] According to annex 1, *"a political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic Yugoslavia"*.[26]

There is no doubt the Council does not provide any chance for independence of the Yugoslav province and it spoke of substantial autonomy and self-administration. Annexes 1 and 2 also provide for the same thing and reject any possibilities for the secession of Kosovo from Yugoslavia. A further detail of annex 1 notes that this substantial self-government of Kosovo should be in conformity with the Rambouillet accords. Yet, the Rambouillet accords affirm the commitment of the international community to the sovereignty and territorial integrity of the Federal Republic Yugoslavia.[27] What is more, this agreement for peace and self-government in Kosovo is evidently a plan for an autonomous

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[23] S/RES/1244, 10 June 1999.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] Interim Agreement for Peace and Self-Government in Kosovo, Rambouillet, 23 February 1999, cited in Krieger (ed.), op.cit., p.261-262.

Kosovo and not an independent state. An objective observer can easily feel that the terms of the Rambouillet agreement acknowledge that the FRY has competence over the following areas: territorial integrity, common market, monetary policy, defence, foreign policy, customs services, federal taxation, and federal elections.[28] Thus, it would be a hallucination to claim that resolution 1244 and the Rambouillet accords provide the basis for an independent Kosovo. On the contrary, they provide a basis for enhanced autonomy for Kosovo. The only shadowy remark rests on the Rambouillet clause: *"three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of people..."*[29] It could be argued, that although this premise seems to allow greater flexibility for various misinterpretations,[30] the whole draft is committed to the sovereignty and territorial integrity of the FRY.

As regards to the Council's reference to the 1975 OSCE Helsinki Final Act, there are some points to be advanced. First of all, the participating States expressed in Article I that *"they consider that their frontiers can be changed, in accordance with international law, by peaceful means and agreement"*.[31] Furthermore, Article II contains exactly the same provisions with Article 2(4) of the UN Charter. Thus, the Helsinki Final Act reaffirms the respect to territorial integrity and political independence of any state. In Article III, *"the participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe*

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[28] Ibid., p.62.
[29] Krieger, op.cit., p.278.
[30] Carsten Stahn, "Constitution Without a State? Kosovo Under the United Nations Constitutional Framework for Self-Government", *Leiden Journal of International Law*, vol.14, 2001, p.539.
[31] Helsinki Final Act, http://www.osce.org/docs/english/1990-1999/summits/helfa75e.pdf.

and therefore they will refrain now and in the future from assaulting these frontiers".[32] There is no doubt that the UN Charter and the Helsinki Final Act devote respect to state sovereignty and political independence. In Security Council resolution 1244 there is no provision for the creation of an independent Kosovo, nor is there any similar provision in the statements of states and international organisations until the adoption of this resolution. Accordingly, it could be argued that the international community rejected the dream of "Greater Albania" and KLA's separatism. Reference to an independent Kosovo was not evident in any UN document, nor was it evident in any diplomatic document.

In addition, many scholars have observed that apart from the fact that the Council spoke of a greater autonomy and self-administration, it did not make any reference to a right to self-determination or independence for the Kosovo Albanians.[33] It could be argued that the Council supported the view that Kosovo should remain an integral part of the FRY.[34] In other words, it did not acknowledge a right to secession for Kosovo. What is more, Kosovo is not a state, but an ethnic minority within a state, and the right of self-determination is not a right of a minority to secede.[35] Moreover, Kosovo does not satisfy the criteria of statehood under international law.[36] Under those circumstances, the only legitimate solution

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[32] *Id.*

[33] Andreas Zimmermann and Carsten Stahn, "Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo", *Nordic Journal of International Law*, vol.70. 2001, pp.428 and 453. Helen Quane, "A Right to Self-Determination for the Kosovo Albanians?", *Leiden Journal of International Law*, vol.13, 2000, p226. Also Carsten Stahn, op.cit., p.538 and 541.

[34] Jacques Rupnik, "Yugoslavia After Milosevic?", *Survival*, vol.43, No2, Summer 2001, p.22. Also Zimmermann and Stahn, op.cit., p.427.

[35] Quane, op.cit., p. 227.

[36] Enrico Milano, "Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Territorial Status", *European Journal of International Law*, vol.14 , No.5, 2003, p.1002. Also Stahn, op.cit., p.544.

of the political problem seems to be the attainment of substantial autonomy and self-administration for the Kosovars. Yet, the Council is the only competent instrument of the world community to have the final say on the future legal status of Kosovo.[37]

AUTONOMY

Let us now consider the available options for the future legal status of Kosovo. The first option has to do with the UN Security Council resolution 1244 and its call for "substantial autonomy and self-administration". In this case we have to do with an autonomous province of Kosovo within the structures of Serbia and Montenegro (former Federal Republic of Yugoslavia).[38] Resolution 1244 decided that UNMIK's basic task is to promote the establishment of substantial autonomy and self-government in Kosovo and to organise and oversee the development of provisional institutions for democratic and autonomous self-government pending a political settlement.[39] Yet, things do not work out properly and UNMIK repeatedly violates the provisions of Security Council resolution 1244. Not only it did not prepare Kosovo for substantial autonomy, but it cut off all the connections of Kosovo with Serbia.[40] On the other hand, it could be said that UNMIK prepares Kosovo for an independent course, since it introduced a

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[37] Ibid., p.541.
[38] Independent International Commission on Kosovo, *The Kosovo Report, Conflict, International Response, Lessons Learned*, Oxford, Oxford University Press, 2000, pp.269-271. Also Rupnik, op.cit., pp.24-25, and Zimmermann and Stahn, op.cit., pp.457-458.
[39] S/RES/1244 (1999), 10 June 1999, para 11.
[40] Alexandros Yannis, "The Concept of Suspended Sovereignty in International Law and its Implications in International Politics", *European Journal of International Law*, vol.13, No.5, 2002, p.1047.

different currency and a different legal system and it deprived Serbia of its sovereign rights over Kosovo.[41] This blatant violation of resolution 1244 can only be described by the word "peremptoriness". The basic document adopted by UNMIK is the Constitutional Framework for Provisional Self-Government. Not surprisingly, the document lacks the reference of "substantial autonomy", since it contains no reference to the authority of Serbia and Montenegro organs in Kosovo.[42] While typically and theoretically remaining a part of Serbia and Montenegro, Kosovo has been transformed into an internationalised territory under UN administration.[43]

All these breaches of norms and rules by UNMIK led some scholars and authors in the view that autonomy is not a feasible political solution for Kosovo. No doubt, UNMIK has the authority to decide and implement the form of self-government for Kosovo. Nevertheless, this authority is restricted by resolution 1244, which envisages the provisions for an autonomous province. It seems that UNMIK, the UN Secretary-General, the Secretary-General Representatives in Kosovo and some members of the Council disregard and veil UNMIK violations of resolution 1244. In many Security Council meetings, China, Russia and Ukraine protested against many decisions and policies of UNMIK because they considered them incompatible with resolution 1244 and an erosion of the Yugoslav

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[41] Stahn, op.cit., p.540.
[42] UNMIK, Constitutional Framework for Provisional Self-Government, UNMIK/REG/2001/9, 15 May 2001. For more details see: http://www.unmikonline.org/constframework.htm. Also Zimmermann and Stahn, op.cit., p.428.
[43] Stahn, op.cit., p.540 and Zimmermann and Stahn, op.cit., p.428.

sovereignty.[44] This cut off among the relations of Serbia and Kosovo, as well as the status quo in the province and the Albanian desire for independence, led some scholars to the view that returning Kosovo to the authority of Belgrade is unrealistic, or a utopia.[45] One of the basic arguments in support of the above claim is that no Kosovo Albanian would accept to live under the Serbian rule after the bloodshed of the past years.[46]

INDEPENDENCE

The second option is the creation of an independent Kosovo.[47] This option satisfies the ultimate goal of Kosovo Albanians for political independence. The 1991 referendum on independence in Kosovo and the election of Rugova as the president of the so called "Republic of Kosovo" is a good illustration of this Albanian will.[48] Although this attempt lacked any form of international recognition[49], the Kosovo Albanians became highly optimistic after the 1999 crisis and the UN administration of the province. Interestingly enough, the two major leaders of the Kosovo Albanians, Ibrahim Rugova and Hashim Thaci, both see

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[44] S/PV.4138, 11 May 2000, S/PV.4153, 9 June 2000, S/PV.4171, 13 July 2000, S/PV.4190, 24 August 2000, S/PV.4200, 27 September 2000, S/PV.4225, 16 November 2000, S/PV.4250, 19 December 2000.

[45] John J. Mearsheimer, *The Case for Partitioning Kosovo*, in Ted Galen Carpenter (ed.), *NATO's Empty Victory: A Postmortem on the Balkan War*, Washington D.C., CATO Institute, 2000, p.133. Also Rupnik, op.cit., p.23 and the Independent International Commission on Kosovo, op.cit., pp.270-271.

[46] Independent International Commission on Kosovo, op.cit., p.270.

[47] Ibid., pp.268-269.

[48] Agon Demjaha, *The Kosovo Conflict: A Perspective from Inside*, in Albrecht Schnabel and Ramesh Thakur (eds.), *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship*, New York, United Nations University Press, 2000, p.33. Noam Chomsky, *The New Military Humanism, Lessons From Kosovo*, Monroe, Common Courage Press, 1999, p.27. Also Krieger, op.cit., p.118, Stahn, op.cit., p.534, Chesterman, op.cit., p.211.

[49] Stahn, op.cit., p.535, Milano, op.cit., p.1002 and Demjaha, op.cit., pp.33-34.

independence as the final solution for Kosovo.[50] NATO's victory in the eyes of the Kosovo Albanians had been interpreted as the accomplishment of their perennial dream of a greater Albania. But the problems of an independent Kosovo will be more than its prospects. A future independent State will have to gain recognition from Yugoslavia. Even if the world community recognises an independent Kosovo, it would be difficult to imagine Serbia accepting and recognising an independent Kosovo. What is more, the international community has not recognised a right to secession for Kosovo in the past. Why should it do it now? The right to self-determination is not a right of an ethnic minority within a state to secede.

In addition to the above arguments, there is a major reason against the creation of an independent state. This is that Kosovo remains a potential source of instability in the Balkans.[51] Suffice to mention that the KLA's stated goal had not only been the creation of an independent Kosovo, but also the accomplishment of a "greater Albania".[52] The creation of an independent Kosovo and its unification with this greater Albania is the long-term desirable outcome.[53] Independence of Kosovo would revive nationalist Albanian claims in other neighbouring countries and other parts of Yugoslavia.[54] These countries are FYROM and Greece.[55] From

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[50] Demjaha, op.cit., p.38.

[51] Alexandros Yannis, "Kosovo Under International Administration", *Survival*, vol.43, No2, Summer 2001, p.31.

[52] Michael Maccgwire, "Why Did We Bomb Belgrade?", *International Affairs*, vol.76, No1, January 2000, p.4. Michael Radu, *Stabilising Borders in the Balkans: The Inevitability and Costs of a Greater Albania*, in Ted Galen Carpenter (ed.), *NATO's Empty Victory: A Postmortem on the Balkan War*, Washington D.C., CATO Institute, 2000, p.126.

[53] Mearsheimer, op.cit., p.133 and Radu, op.cit., p.126.

[54] Independent International Commission on Kosovo, op.cit., p.269.

[55] James George Jatras, *NATO's Myths and Bogus Justifications for Intervention*, in Ted Galen Carpenter (ed.), *NATO's Empty Victory: A Postmortem on the Balkan War*, Washington D.C., CATO Institute, 2000, p.24. Also Radu, op.cit., p.129.

the above states only Greece does not receive an actual threat from the Albanian nationalism. Greece is both a NATO and EU member state and it is much stronger economically and militarily than Albania.[56] What is more, despite the unfounded extremist Albanian claims, the only Albanian population in Greece is the large proportion of economic migrants.

Nevertheless, the actual threat lies in FYROM, Serbia and Montenegro. Albanian extremist raise claims against South Serbia and against Montenegro, including the capital, Podgorica, as well as against FYROM, including the capital Skopje.[57] Those actual threats have been confirmed to date. For instance, the crisis in Presevo Valley, in southern Serbia, after the 1999 crisis, represents the revived Albanian nationalism in the whole Balkan region. The Liberation Army of Presevo, Medvedja and Bujanovac (UCPMB) constitutes an offshoot of the KLA (UCK).[58] In December 2000, the Security Council strongly condemned the violent actions by ethnic Albanian extremist groups in Southern Serbia and called for the dissolution of these groups.[59] Another KLA subsidiary took action in FYROM.[60] The removal of the Yugoslav forces out of Kosovo fostered the hopes for a greater Albania in FYROM.[61] This is because former KLA members became convinced that the West was unconditionally behind them and decided to constitute a guerrilla force in FYROM to assert irredentist claims.[62] Thus, the new KLA offshoot in

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[56] Radu, op.cit., p.129.
[57] *Id.*
[58] Tim Judah, "Greater Albania?", *Survival*, vol.43, No3, 2001, p.10. Also Rupnik, op.cit., p.35.
[59] S/PRST/2000/40, 19 December 2000.
[60] Rupnik, op.cit., p.21.
[61] *Id.*
[62] Judah, op.cit., p.11.

FYROM became the NLA, which soon controlled the Tetovo region.[63] The longer-term Albanian goal in FYROM became the secession and union with a future independent Kosovo, or even with a greater Albania.[64] The outbreak of the crisis in FYROM after Kosovo clearly reveals the wider Albanian extremist desires. The Security Council had strongly condemned the violence committed by ethnic Albanian armed extremists.[65] Oddly, NATO intervened in FYROM by sending its forces, but this time not to protect the extremists, but avert them from destabilising the region. How can one explain this shift in NATO policy?

It is clear from the above that an independent Kosovo would affirm the "domino theory" for future crises in the whole Balkans, affecting initially FYROM.[66] No doubt, the desirable goal of Kosovo Albanians, independence, will create much more problems in the area than it might solve. A future independent Kosovo is a prerequisite to a greater Albania.[67] The world community should topple the extremist Albanian hopes in Kosovo. What we witness today is that Belgrade is making democratic process, while the Kosovo Albanians are extremists.[68] And these extremist elements in the Kosovo Albanian society are evident in recent Security Council debates, UNMIK statements and Kofi Annan's reports. However, there will be an extensive analysis of this issue later in this chapter. In addition, the current Greater Albania nationalism has replaced the

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[63] Ibid., p.7.
[64] Ibid., p.12.
[65] S/PRST/2001/7, 7 March 2001, S/RES/1345 (2001), 21 March 2001, S/PRST/2001/20, 13 August 2001.
[66] Rupnik, op.cit., p.22.
[67] Judah, op.cit., p.15.
[68] Rupnik, op.cit., p.20.

Greater Serbia nationalism of the 90's.[69] The crises Presevo Valley and FYROM after Kosovo, together with the Albanian efforts to ethnically cleanse Kosovo with terrorism and acts of violence have changed the pre-war analogies and the world community considers the Serbs good and the Albanians extremists.[70] Thus, it could be said that the seeds of humanitarian intervention did not bring any fruits for the peoples of the Balkans. The only change was the mutual succession of roles: from victim to victimiser, and from victimiser to victim. Overall, it seems that the dream of independence is far from reality. First and foremost, the Council will have the final say on Kosovo's future legal status. Undoubtedly, China and Russia would block any effort to create am independent Kosovo for two reasons. Firstly, because they are devoted to the Yugoslav sovereignty and territorial integrity; and secondly, they are afraid of setting a precedent that might undermine the stability and integrity of their own multi-national and multi-ethnic states.[71]

CONDITIONAL INDEPENDENCE

The third option regarding the future status of Kosovo is conditional independence.[72] This kind of solution would diminish the fears of neighbouring states and reactions among the international community and it would also accomplish the desire of the large population of Kosovo.[73] The Independent International Commission on Kosovo believes that conditional independence is the

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[69] Judah, op.cit., p.7.
[70] *Id.*
[71] Independent International Commission on Kosovo, op.cit., p.269.
[72] Ibid., pp.271-272 and Rupnik, op.cit., pp.25-26.
[73] Rupnik, op.cit., p.25.

best available solution because it would give the people of Kosovo the chance to determine their political future, and because full and unconditional independence is impossible in nature, since an independent Kosovan state lacks the key property of statehood, the means to defend itself against external attack and the ability to guarantee internal order.[74] Thus, Kosovo will remain dependent on some form of international security presence, both police and military.[75] Others believe that this conditional independence should embrace another three conditions, namely denunciation of greater Albanian and change of borders, constitutional guarantee of human rights and renunciation of violence in settling internal or external disputes.[76]

However, the definition of conditions and the acceptance by the Kosovars is going to be a much more difficult task. This is because it is difficult to imagine an extended international intervention into the FRY. What is more, for how long will this international presence remain in Kosovo? Is this conditional independence a leading step to full independence? Or will this conditional character will be permanent? Or, what will be the competences of this international presence? And will these competences conflict with the competences of the state? There are many questions regarding the vagueness of this option. The implied continued intervention in Kosovo will trigger various reactions among states. Such an option entails years of planning and negotiation in order to get to final conclusions. No doubt, the answers to the above questions will be the most difficult task. In addition, KFOR (the security presence in Kosovo) constitutes of various forces of

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[74] Independent International Commission on Kosovo, op.cit., pp.271-272.
[75] Ibid., p.272.
[76] Rupnik, op.cit., p.25.

different states. It would be dubious to claim that these states will keep timelessly sending their forces in Kosovo. It could be argued that conditional independence will produce more problems than it will solve.

INDEFINITE PROTECTORATE

The fourth possible political solution is that Kosovo remains an indefinite protectorate and the maintenance of the current status quo in the province. This would mean an indefinite extension of UNMIK's mandate under resolution 1244.[77] The advantage of the indefinite protectorate would be that it will freeze the political problem for the future status of the province, since the international community will not have to choose between independence (the Kosovo Albanian will) and autonomy within a democratic Yugoslavia (the Serb objective).[78] But, no doubt, both sides would remain disappointed, since no side will attain its ultimate goal. More specifically, the Kosovo Albanians that envisage an independent Kosovo since 1999 is difficult to accept the indefinite extension of the mandate of resolution 1244. On the other hand, the maintenance of the current status quo would mean that many years after the conflict UNMIK was inadequate to prepare the people of Kosovo to enjoy substantial autonomy and self-government, as resolution 1244 proclaimed.[79] In other words, such an option would certify the failure of UNMIK to accomplish the plans for a multi-ethnic and democratic Kosovo, where all nations reconcile and respect human rights and the rule of law.

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[77] Independent International Commission on Kosovo, op.cit., pp.263-266 and Rupnik, op.cit., p.23.
[78] Rupnik, op.cit., p.23.
[79] International Independent Commission on Kosovo, op.cit., p.264.

This is because the Council will have the final say on the future status of Kosovo after Kosovo meets the standards of human rights and the rule of law. Hence, the continuing international presence in Kosovo would certify its failure of the UN to attain its stated goals. In addition, it is contestable that states will keep sending their forces in Kosovo for an indefinite time. Thus, the continuation of the current legal status of Kosovo is practically impossible.

PARTITION

Last but not least, there is the option of partition. According to some scholars this is the only viable solution.[80] This is because co-existence of heterogeneous people in the Balkans is a very difficult task and reconciliation of different ethnic or religious groups much more unlikely.[81] Partition in Kosovo would mean the creation of two separate and ethnically homogenous territories.[82] Such a solution would, no doubt, wipe off ethnic cleansing, inter-ethnic violence and human rights violations among both sides. According to the plan of partition, Serbia would get the northern part of Kosovo, the Mitrovica region, which already contains the majority of the Serb minority, as well as the most Serbian historical and religious sites, churches and monasteries.[83] On the other hand, Albanians will get most of Kosovo and will be able to decide for their future political status. Among the pros of the partition would be the extinction of inter-ethnic crime,

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[80] Radu, op.cit., p.127 and Mearsheimer, op.cit., p.133.
[81] Rupnik, op.cit., p.23.
[82] International Independent Commission on Kosovo, op.cit., p.267.
[83] Mearsheimer, op.cit., p.135, Rupnik, op.cit., p.23, Independent International Commission on Kosovo, op.cit., p.267.

permanent solution of the refugee problem (more than 250,000 Kosovo Serbs have fled to Serbia proper), and the departure of the international forces from Kosovo.[84] The beneficiary impacts of such a solution are evident, but the cons should also be calculated.

One of the major objections to partition is that it may constitute a new form of ethnic cleansing with massive forced population movement for both communities.[85] The Independent International Commission of Kosovo believes that partition is an undesirable option.[86] However, this estimation is not that valid. According to the Commission, the only solution is conditional or full independence for the province. These pro-Albanian sentiments are clearly manifested in its position for partition. There, the Commission notes that partition would deprive the "majority population" of the Trepce mine complex that would reduce the economic viability of an "independent Kosovo".[87] This injudicious premise reveals two important elements of the Commission's preconception against the Serbs. First and foremost, it calculates the "majority population", but it probably ignores that the majority population is Serb because Kosovo belongs to Serbia. Secondly, it transparently worries that its beloved "independent Kosovo" will not survive if partition becomes reality. To this point it should be noted that the KLA repeatedly opposes partition.[88] Obviously the Commission embraces the same view with the secessionists, but it ignores the other side of the coin. To this extent, it could be argued that although massive forced population movement is not the most

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[84] Mearsheimer, op.cit., p.136.
[85] Independent International Commission on Kosovo, op.cit., p.267 and Mearsheimer, op.cit., p.137 and Rupnik, op.cit., p.23.
[86] International Independent Commission on Kosovo, op.cit., p.268.
[87] Ibid., p.267.
[88] Radu, op.cit., p.128.

desirable goal, it might become imperative, given the temperament and mentality of the Balkan peoples and the ethnic hatreds and tensions.

Maybe in the end, the separation of the two different ethnically and religiously groups lead to the permanent squash of the tensions. In addition, the experience in Bosnia and the cantonisation of this Yugoslav Republic may give some crucial lessons for a possible future partition of Kosovo. The explicit partition of Bosnia and Herzegovina into the *Republika Srpska* becoming attached to Serbia, Herzegovina becoming attached to Croatia and a small Muslim entity squeezed between them, testifies that similar practices elsewhere in the former Yugoslavia can flourish.[89] The paradigm of Bosnia and Herzegovina is the one that headaches the KLA. This is because it cannot attain its final goal of a Greater Albania with a "smaller Kosovo". The US and many states in the West seem to side the Kosovo Albanians. The International Independent Commission on Kosovo does not reject partition by accident. It reflects this line of western policy. Yet, few years ago the US Secretary of State Warren Christopher observed that ethnic cleansing in Krajina was "simplifying matters".[90] In that sense, partition in Kosovo would mean the same thing, but probably the US would like to simplify once again the matters by deporting the whole Serb population out of Kosovo. Instead of doing this thing that expresses the will of the Albanian majority, they could support partition as a more just solution.

To this extent it should be noted that Serb representatives in Kosovo had asked for the cantonisation of the province since 1999, as the only way to beat the

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[89] Rupnik, op.cit., p.23.
[90] Chomsky, op.cit., p.32.

wave of violent revenge attacks against his community.[91] However, the Albanian representatives refused to consider the Serbian proposal, which would lead, according to their arguments, to the partitioning of Kosovo.[92] Not surprisingly, the head of the United Nations administration in Kosovo, Bernard Kouchner, declared that he is opposed to plans put forward by Kosovar Serb leaders to create ethnic Serb cantons in Kosovo.[93] An imaginative excuse for the rejection of cantonisation plans had been the pretext that UNMIK wants to preserve a united, multi-ethnic Kosovo.[94] Yet, this multi-ethnic Kosovo exists only as a dream, since five years after the war inter-ethnic clashes are present, but this time the Kosovo Albanians are the ones that do their best to ethnically cleanse Kosovo from its Serb and other minorities. This paper will criticise further down UNMIK's alignment with the Albanian will, since UNMIK could not create a secure environment for a multi-ethnic Kosovo and it failed to protect all minorities. Thus, UNMIK is liable to all those acts of terror and crime against the Serb population, which could be avoided, had cantonisation taken place in the province.

WHAT IS THE BEST AVAILABLE SOLUTION FOR KOSOVO?

All possible options for the future legal status of Kosovo have been explored: autonomy within a democratic Serbia and Montenegro, full

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[91] Chris Bird, "Ethnic Zones Urged for Kosovo, Serbs demand 'Cantonisation' as protection against revenge attacks", for more details see: http://www.guardian.co.uk/print/0,3858,3895753-103558,00.html. Also Gabriel Partos, "A Divided Kosovo?", BBC, see: http://news.bbc.co.uk/1/hi/world/europe/428185.stm

[92] BBC, "cantonisation of Kosovo on the agenda", see: http://news.bbc.co.uk/1/hi/world/europe/429821.stm

[93] Gabriel Partos and Chris Bird, supra note 91.

[94] *Id.*

independence, conditional independence, indefinite protectorate and partition. The only task left now is to examine which option presents the best available solution under the current situation and the enlivenment of the crisis five years after the 1999 intervention. First of all, it could be argued that the current legal status is international protectorate under the UN administration. According to resolution 1244, UNMIK should prepare the people of Kosovo to enjoy substantial autonomy and self-government, but it prepared them for a kind of conditional, if not full, independence. This clear violation of resolution 1244 is evident in each and every document that has to do with matters of the administration in the Serb province of Kosovo. For example, the Constitutional Framework for Self-Government totally ignores the provisions of resolution 1244 for autonomy within the FRY. This it to clarify why autonomy from the more feasible and possible solution, became the more unrealistic.

However, it could be argued that only few efforts have been made for the permanent solution of the status problem. UNMIK has engaged recently on the status issue by proposing ten standards that should be attained before deciding the future status of Kosovo. This policy bears the title *"Standards before Status"* and it contains 8 principles. These principles are: functioning of the democratic institutions, the rule of law, freedom of movement, the return of refuges and internally displaced persons (IDPs), economy, property rights, dialogue, and the Kosovo Protection Corps (KPC).[95] According to the UN Security Council, the fulfilment of these targets is essential to commencing a political process designed

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[95] S/PRST/2003/1, 6 February 2003 and S/PRST/2003/26, 12 December 2003.

to determine Kosovo's future, in accordance with resolution 1244 (1999).[96] Yet, the recent outbreak of violence on 17, 18 and 19 March 2004, all the above targets proved to be a hallucination. The paralysis of law and order, the destruction of Serb property and religious sites, the forceful pogrom of Serbs and the efforts made by the Kosovo Albanians to ethnically cleanse the province[97] prove that these eight standards are unattainable. Five years after the 1999 have proved that UNMIK and KFOR are either deficient to meet the problems, or that terrorism and crime is a wider phenomenon among the Albanian population of Kosovo. Thus, the international community should change its stance against the Kosovo Albanians, or change its administrative policies.

Until the March 2004 clashes the US and western powerful states namely Germany, kept on tacitly supporting the Albanian separatism and extremism. In all meetings of the Council regarding Kosovo their stance is very rigorous against the Serbs. For instance, they condemned Serbia's "declaration on Kosovo" and Serbia and Montenegro's "resolution on Kosovo", as well as the Kosovo government's stated intention to build an independent state.[98] It seems that although the condemnation is dual it is uncritical, because Serbia has any right to insist on autonomy (this right is clearly stated in resolution 1244), since Kosovo is an integral part of the FRY. On the contrary, the Kosovo Albanians are the ones to be condemned because their calls for independence may lead to the destabilising impact of the Albanian terror for the whole Balkan Peninsula.

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[96] *Id.*
[97] S/PV.4942, 13 April 2004 and S/2004/348, 30 April 2004, S/PV.4967, 11 May 2004.
[98] S/PV.4823, 12 September 2003.

The main concern now is to examine which of the possible options fits after the clashes of March 2004, almost five years after the UN and NATO presence in the province. All major news agencies clearly blamed the Kosovo Albanian side for the violent clashes in Kosovo. Yet, before the Council, most states ignored the Serbian cries for condemnation of the Albanian terrorism. On the contrary, the Council called on "all communities" in Kosovo to stop all acts of violence, to avoid further escalation and restore calm.[99] Before the meeting of the Council in March 2004, only the ambassador of the Russian Federation rigorously condemned the Kosovo Albanian community: *"the scope of the violence, apparently first perpetrated by the representatives of the Kosovar Albanian community against ethnic minorities and international presences, allows us to speak of targeted actions to squeeze the non-Albanian population out of the region"*.[100] In a later meeting of the Council, however, there was an evident condemnation of the Kosovo Albanian leadership. The German Ambassador stated that *"the violence highlighted the stark choice between a civilised society and one where extremist influence the people... Political leaders must also be unequivocal about their determination to isolate and punish extremists"*.[101] The French Ambassador noted that *"the main lesson is doubtless an understanding that, even today, the role played by extremist forces in Kosovar society remains extremely significant and that we must make a renewed effort to isolate those extremists from the majority population that seeks a democratic Kosovo"*.[102]

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[99] S/PRST/2004/5, 18 March 2004.
[100] S/PV.4928, 18 March 2004 and S/PV.4942, 13 April 2004.
[101] S/PV.4942, 13 April 2004.
[102] *Id.*

For the first time the two most fervent European states that sough armed intervention against Yugoslavia, Germany and France, five years after the 1999 intervention acknowledged the extremist elements in the Kosovo Albanian Community. Had they been more objective in the earlier stages of the crisis, things would be much better. The existence of this extremism has been also witnessed by the UN Secretary General. Kofi Anan noted in his report to the Council notes that *"the cumulative effect of those incidents (shooting of a Kosovo Serb youth and the death of two Kosovo Albanian children) made worse by inflammatory and biased media reporting, were demonstrations, which, although spontaneous at the outset, were quickly taken over by organised elements with an interest of driving the remaining Serbs out of Kosovo and threatening international presence there".*[103] The Under-Secretary-General for Peacekeeping Operations, Mr. Guehenno, adds that *"there were reports of cases in which members of veteran groups of the Kosovo Liberation Army participated in the violence".*[104] What happened with the "demilitarised" KLA? Why are these people still in Kosovo and not in the Hague? It was not only Milosevic responsible for horrible crimes, but this team is equally blameable. And if Milosevic's campaign of ethnic cleansing has stopped, their campaign keeps on. The world community has to stop treating them gently. First, the world community negotiated with them in Rambouillet and then in Paris and did not chase them for war crimes. Then they took posts in the Kosovo Protection Corps and they accepted those people in the Kosovo government. Now what? Will

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[103] S/2004/348, 30 April 2004.
[104] S/PV.4942, 13 April 2004.

the world community authorise them to ethnically cleanse Kosovo and accomplish their dream of "Greater Albania"?

There is only one explanation for the March clashes. The Kosovo Albanians understood that they cannot attain their dream of independence with dialogue, but only with force. In 1998-9 they realised that they got closer to their goal by the KLA terrorist acts. The fight between the KLA and the FRY military and police forces drew the attention of the world community. In March, they wanted to attain their goals with their forcible approaches. Kosovo Albanian Politicians were reluctant to condemn the attacks on minorities and minority sites, including religious sites (Serb sites).[105] On the contrary, as both the Secretary General and his Special Representative in Kosovo (Harri Holkeri) noted, some politicians used the violence to renew calls for independence.[106] The fact that arrests of key suspects in the March violence triggered some protest demonstrations[107] proves that the Kosovo Albanian society embraces these extremists. Thus, it could be argued that Kosovo Albanians will not give up with their forcible tactics as the only means for attaining their political goals.

However, it seems that after the late incidents in Kosovo independence (conditional or full) became a less possible option. Undoubtedly, no neighbouring state would accept the creation of such a state, since they know that it would be a gunpowder storehouse in the heart of the Balkans. What is more, if the world community recognises an independent Kosovo it will have to be prepared for the destruction of the last Serb property and church, as well as for the removal of all

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[105] S/PV.4967, 11 May 2004 and S/2004/348, 30 April 2004.
[106] S/PV.4967, 11 May 2004 and S/2004/348, 30 April 2004.
[107] S/PV.4967, 11 May 2004. Harri Holkeri's address to the Council.

Serbs out of Kosovo. The Kosovo Albanians have already proved their intention to ethnically cleanse Kosovo and turn it into an Albanian province. Thus, the world community will have to be cautious for such an option. As regards autonomy and an enhanced self-administration for Kosovo within the structures of Serbia and Montenegro, it seems the past policies of western states and UNMIK actually rejected the prospects for an autonomous province of the FRY, since they did not make any effort to link the Kosovo institutions with the ones in Serbia, as resolution 1244 envisages. What is more, the overwhelming majority in Kosovo rejects this option. But since resolution 1244 provides for such a solution UNMIK should try to implement it and examine whether it works or not. The option of Kosovo remaining an indefinite protectorate becomes an automatically rejected option after the events of March 2004, because they prove that five years of UN administration of the province it did not manage to create the conditions for a democratic and peaceful Kosovo, where the respect of law and human rights would make all communities feel safe. The dream of a multi-ethnic Kosovo fell into chaos. The Under-Secretary-General for Peacekeeping Operations noted that *"the brutality and breadth of these events have indicated to all of us that Kosovo still has a long way to go on the path to multi-ethnicity"*.[108] Moreover, the "standards before status" policy of UNMIK is a utopia. The March clashes proved that most standards are practically unattainable. Half of these standards are: the rule of law, freedom of movement, return of refugees and IDPs and property rights. Can anyone guarantee them after March 2004, at the time that KFOR and UNMIK cannot?

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[108] S/PV.4942, 13 April 2004.

What is the most feasible and realistic option? However hard it may sound, the only feasible and long-standing solution would be a form of partitioning Kosovo. The Serb premise on cantonisation of the province seems to be the right choice. Facts clearly illustrated that Kosovo Albanians are reluctant, if not hesitant, to live in peace with any other minority in Kosovo. The facts of March 2004 constitute clear evidence that Albanian extremists want to ethnically cleanse Kosovo, to make it a state consisted of only Albanian citizens. They did not hesitate to attack the last Serb enclaves in the province. The burning of houses and churches is a tactic of expelling the Serbs out of their land. In their cruel terrorist and criminal attacks the Kosovo Albanian extremists did not refrain from targeting UN offices and personnel. Thus, it could be argued that the desirable multi-ethnic Kosovo is practically a utopia. The UN administration in Kosovo will now have to consider alternatives for the future. This thesis suggests that cantonisation of the province is the best available solution. Maybe the UN administration in Kosovo and the UN Security Council will revise their position and chase a feasible and realistic response to the Kosovo problem. If the UN and UNMIK fail to resort to this decisive and effective solution they will loose their credibility and align themselves with failure.

Let us now consider the possibilities of future partition or canonisation of Kosovo. First and foremost, there are two options for the cantonisation (or partition) of Kosovo. The first option is cantonisation of an independent Kosovo with two separate and autonomous regions, in the model of Bosnia and Herzegovina. This means that separation on ethnic lines is an imperative, since coexistence is impossible in practice. It is difficult to extinguish the ethnic and

religious hatred, mostly expressed by the ethnic Albanian extremists. In this first option it is essential to note that these divided areas may expect unification with Serbia or Albania. Although it seems that the consolidation of northern Kosovo would create no major problem to the neighbouring states, a possible unification of Albania and southern Kosovo would trigger a wave of reactions among the Balkan states, mostly because of its destabilising factors. FYROM has a large Albanian minority and fears future revolution of its Albanian population. The alternative option for cantonisation of Kosovo will be a divided autonomous Kosovo within a democratic Serbia and Montenegro. This option would be the ideal one because it would guarantee the preservation of borders and will not allow the Albanian separatism and the idea of a greater Albania to lead to another massacre in the Balkans. What is more, this option would be consistent with resolution 1244.

All possible options for the future legal status of Kosovo had been examined to this extent. Accordingly, it has been stressed that the best solution to the political problem of Kosovo is partition of an autonomous Kosovo within the structures of Serbia and Montenegro. Nevertheless, the last part of this chapter will focus on whether each possible solution of the political problem will be against the territorial integrity of the FRY. The argument here is that the 1999 intervention in Kosovo had and continues to have significant impact on the FRY sovereignty and territorial integrity.[109] Despite the arguments advanced by some advocates of humanitarian intervention, it could be said that humanitarian interventions blatantly violate a state's territorial integrity. If the province is to become

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[109] Jane Stromseth, *Rethinking Humanitarian Intervention: the Case for Incremental Change*, in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention, Ethical, Legal, and Political Dilemmas*, Cambridge, Cambridge University Press, 2003, p.250.

independent, (conditionally or fully), its impact will be catastrophic for the Yugoslav sovereignty and territorial integrity. Serbia will loose a vital part of its country. Such a version would ruin the argument that humanitarian intervention is not against the territorial integrity or political independence of any state. Further, the option of the indefinite protectorate will reject the Yugoslav sovereignty over Kosovo. Thus, it would also violate the territorial integrity and political independence of Serbia and Montenegro.

Partition is another clear breach of the Yugoslav sovereignty, because if Serbia and Montenegro gets the northern part of Kosovo, it will still loose the southern, which is also the larger part of Kosovo. The minor limitation upon the Yugoslav sovereignty would be the option of autonomy, as it is forecasted in resolution 1244, or partition of an autonomous Kosovo. Yet, autonomy still affects the territorial integrity of Yugoslavia. The disappointing fact is that the intervening states that waged this "humanitarian war" do not make any effort to fit it into the traditional frames of such a practice. The idea of an independent Kosovo is more than welcomed among powerful NATO states and more specifically the US. Yet, after the clashes of March 2004 the considerations on the future status of Kosovo are set on a new basis. But the impacts for the theory of humanitarian intervention will be damaged after the 1999 intervention in Kosovo, no matter what its future status will be. Five years of international presence and administration over Kosovo and the cut-off links and connections of the province with Serbia indicate a serious breach (not limited in time) of the Serbian sovereignty. Thus, it could be argued that Kosovo reveals another obscure side of humanitarian intervention: its

hypocritical and false premises in the theoretical part, which cannot be affirmed by the relative practice.

RECENT DEVELOPMENTS REGARDING KOSOVO'S FUTURE STATUS

In October 2005, the Security Council released a presidential statement, where the Council *"agrees with Ambassador Eide's overall assessment that, notwithstanding the challenges still facing Kosovo and the wider region, the time has come to move to the next phase of the political process. The Council therefore supports the Secretary-General's intention to start a political process to determine Kosovo's future status, as foreseen in Security Council resolution 1244"*.[110] Since then, four meetings have been convened in Vienna between Belgrade and Pristina with the purpose of determining Kosovo's future status. The Secretary-General reported to the Council in a very recent report of his *"The process designed to determine the future status of Kosovo has moved forward during the reporting period...Four rounds of direct talks between the parties (Belgrade and Pristina) on the decentralisation of Kosovo's governmental and administrative functions were held in Vienna on 20 and 21 February, 17 March, 3 April and 4 and 5 May"*.[111]

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[110] S/PRST/2005/51, 24 October 2005.
[111] S/2006/361, 5 June 2006.

CHAPTER 9

POLITICAL MOTIVES VS. HUMAN RIGHTS AND MORALITY

The last part of the analysis of the 1999 NATO intervention in Kosovo has to deal with other vulnerable perspectives of humanitarian intervention. This chapter will check whether the traditional arguments against humanitarian intervention are verified by the 1999 NATO intervention in Kosovo, or not. First of all, there are two objections to humanitarian intervention that have been examined in the two previous chapters. The first has to do with abuses and distortion of the principle of non-intervention in international law.[1] It is clear from the previous legal analysis (Chapter 6) that NATO intervention in Kosovo had been a clear breach of the UN Charter and international law. Thus, Kosovo affirms the argument that humanitarian intervention generates problems of abuses of the principle of non-intervention. The other has to do with prudence and proportionality. NATO's response to Milosevic's atrocities in Kosovo was disproportionate and ineffective. As already stated in a previous chapter (chapter 7), the means used by NATO were against the proclaimed humanitarian ends. What is more, NATO's intervention did not manage to halt ethnic cleansing in the Serbian province, nor did it produce a tolerant and multi-ethnic society, where the rule of law and respect for human rights is the basic attained goal. Five years after NATO's intervention, inter-ethnic tensions and efforts committed by Kosovo

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[1] Dino Kritsiotis, "Reappraising Policy Objections to Humanitarian Intervention", *Michigan Journal of International Law*, vol.19, 1998, p.1007.

Albanians to wipe out the Serbs and ethnically cleanse the province prove that humanitarian war is an oxymoron.

Apart from the two above arguments that have been thoroughly examined in previous chapters, there are another two objections to humanitarian intervention that will be explored extensively in this chapter and have to do with the political ground. The first task here is to search whether or not political motives and interests of states had been involved in NATO's decision to recourse to war. This is very important, because people opposing humanitarian intervention claim that no state would intervene for purely humanitarian motives, save a state has interests involved at stake. Secondly, there will be an extent analysis of the problem of selective protection of human rights. State practice has proved that states intervene selectively to protect human rights. Human rights should know no boundaries and should apply equally to all citizens of the world community. Nevertheless, the practice of humanitarian intervention has shown that some people are more worthy than other people across the planet. For instance, in the pre-UN era the great powers intervened in Turkey to protect the Greeks and the Christian population in Syria, but they did not intervene to halt genocide of the Christian Armenian people. This chapter will inquire whether or not the intervening states, namely NATO, did not intervene elsewhere in the world, where similar or worse atrocities had been committed by brutal regimes against its people. If this is the case, the last myth of humanitarian intervention will have collapsed after the 1999 NATO intervention in Kosovo.

Let us now consider whether or not selfish interests of states had been involved in the case of Kosovo. First of all, it could be argued that selfish motives

of states and power-seeking policies usually motivate this kind of intervention.[2] This is why many lawyers and scholars of international relations oppose the creation of such a rule. This fact replies to the pseudo-dilemma that humanitarian interventions are illegal but moral. On the contrary, humanitarian intervention is illegal and the morality of such interventions is highly questionable. If one seeks to justify humanitarian intervention on moral grounds, then he will have to prove that a state had been primarily motivated by such noble incentives and that there had been no major selfish interests at stake. However, there are not many scholars that would advance such a claim. Most advocates of humanitarian intervention would stress that the coexistence of other motives would not overcome the positive humanitarian outcome. This argument sounds persuasive, but it is very dangerous. Many states in the past advanced humanitarian justifications, but they only served their selfish motives. Adolph Hitler belongs to this category.[3] A genuine humanitarian intervention would be a relatively interest-free intervention, where the main concern would be the positive humanitarian outcome. But such an intervention had never existed in the past and it is quite difficult to occur in the future.

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[2] Oscar Schachter, "The Right of States to Use Armed Force", *Michigan Law Review*, vol.82, 1984, p.1629. Thomas M. Franck and Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, American Journal of International Law, vol.67, 1973, p.290. Vaughan Lowe, *The Principle of Non-Intervention: Use of Force*, in Vaughan Lowe and Colin Warbrick (eds.), *The United Nations and the Principles of International Law: Essays in the Memory of Michael Akehurst*, London, Routledge, 1994, p166. Ian Brownlie, *Humanitarian Intervention*, in John N. Moore (ed.), *Law and Civil War in the Modern World*, Baltimore, Johns Hopkins University Press, 1974, p.26. Nicholas J. Wheeler and Justin C. Morris, *Humanitarian Intervention and State Practice at the End of the Cold War*, in Rick Fawn and Jeremy Larkins (eds.), *International Society after the Cold War: Anarchy and Order Reconsidered*, Basingstoke-England, Macmillan Press, 1996, p.138. Jim Whitman, *The Kosovo Refugee Crisis: NATO's Humanitarianism versus Human Rights*, in Ken Booth (ed.), *The Kosovo Tragedy: The Human Rights Dimensions*, London, Frank Cass Publishers, 2001, p.166.

[3] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, New York, Oxford University Press, 2001, pp.27-28. Also Kritsiotis, op.cit., p.1021.

Kosovo is another paradigm that verifies the above assertion. Selfish motives, power-seeking policies and state interests had been once again strongly involved. From the beginning of the conflict powerful states rushed to protect the rights of the Kosovo Albanians. The political leaders of these powerful western states did not lack any cynicism to explicitly state the existence of such interests. President Clinton, for instance, in his address to the nation, clearly admitted the existence of interests. He said that *"by acting now, we are upholding our values, protecting our interests and advancing the cause of peace... ending this tragedy is a moral imperative. It is also important to America's national interests"*.[4] In December 1992 George Bush had warned Milosevic that if Serbia began a war in Kosovo, the United States would consider it a direct threat to US national interests and would be obliged to act.[5] Both US Presidents had confirmed the presence of US interests in Kosovo since 1992. Their persistence to act in order to protect their selfish motives leaves no doubt that humanitarian concerns had not been the primary goal of intervening states. This is because President Bush threatened Milosevic that he would act to protect US interests *in absentia* of humanitarian purposes. The fact that President Clinton intervened in 1999 under the pretext of human rights does not mean that this had been his actual intention.

Thus, the existence of vital US interests in Kosovo are undisputable. The British Prime Minister, Tony Blair, also stressed the importance of interests in the

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[4] Heike Krieger (ed.), *The Kosovo Conflict and International Law, an Analytical Documentation, 1974-1999*, Cambridge, Cambridge University Press, 2001, p.415. Sean D. Murphy (ed.), "Contemporary Practice of the United States Relating to International Law", *American Journal of International Law*, vol.93, issue3, July 1999, p.630. Robert C. DiPrizio, *Armed Humanitarians: US Interventions from Northern Iraq to Kosovo*, London, The John Hopkins University Press, 2002, p.140. Also Chesterman, op.cit., p.211.

[5] Michael Maccgwire, "Why Did We Bomb Belgrade?", *International Affairs*, vol.76, No1, January 2000, pp. 5 and 14.

House of Commons: *"strategic interests for the whole of Europe are at stake"*.[6] The remaining task is to detect what these interests could be and what is their significance for the US and its western allies. No doubt, it is impossible to obtain all relevant information that the US intelligence agencies have (i.e. the CIA). But there are many interests easy to detect. First and foremost, President Clinton had stressed the importance to act in order to avert the destabilisation of the whole Balkan region, the consequences of which might involve two of NATO's allies, Greece and Turkey.[7] This argument, however, is misleading, because after the 1999 NATO intervention in Kosovo the prospects and the impacts of a future independent Kosovo are much more dangerous for destabilising the Balkans than any other aspect. Thus, it could be argued that peace and stabilisation had not been the primary objective of the US.

The most credible explanation is the fact that Kosovo is rich in mineral resources.[8] The Trepce mine in northern had always been a major resource for the whole of Yugoslavia. Accordingly, 50% of Yugoslavia's Nickel deposits, 48% of the magnesium, and 36% of the lignite come from Kosovo.[9] In addition, one fifth of the Serbian energy supply was produced in Kosovo.[10] The mine's director, Novak Bjelic, said that *"the war in Kosovo is about the mines, nothing else"*[11]. In addition, they are very important for the weakening of Serbia, which had been a

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[6] Nicholas Tsagourias, "Humanitarian Intervention After Kosovo and Legal Discourse: Self-Deception or Self-Consciousness?", *Leiden Journal of International Law*, vol.13, 2000, p.15.
[7] Krieger, op.cit., p.415, Murphy.
[8] Marjorie Cohn, "NATO Bombing of Kosovo: Humanitarian Intervention or Crime against Humanity?", *International Journal for the Semiotics of Law*, vol.15, 2002, p.91.
[9] *Marie-Janine Calic, Kosovo in the Twentieth Century: A Historical Account, in Albrecht Schnabel and Ramesh Thakur (eds.), Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship,* New York, United Nations University Press, 2000, p.26.
[10] *Id.*
[11] Cohn, op.cit., p.91.

major political goal for the US in the 90's. The extreme Serbian nationalism and fears of a Greater Serbia within the whole Balkan region constituted a threat to US dominance and control of the region. The US wanted the weakening of Serbia and it did accomplish it. It deprived Serbia from its claims over Krajina, Bosnia, and now, Kosovo. The continuous shrinkage of Serbia's national borders, as well as ethnic cleansing of the Serb population in Krajina and Kosovo brought the US very close to its ultimate goal. The creation of new and small, economically and terrestrially, states had been a major goal for the US, since it exercises a great control over these states. On the other hand, the US did not put an end to the exceeding Albanian nationalism and the dreams of a Greater Albania. This is because Albania is very weak economically, strategically and culturally.

Moreover, the US control over Europe would ensure its hegemony over the transportation of rich oil deposits from the Caspian Sea, as well as control of European markets.[12] A scholar has masterfully observed that *"Russia and the United States each want to control the flow of Caspian oil to world markets... Russia wants Caspian oil pipelines to run through its territory to the Black Sea. The US, controversially, wants those pipelines routed through its ally, Turkey... The April 1999 bombings of bridges at Novi Sad and other points on the Danube River blocked international cargo traffic to the Black Sea... Until April, tankers carried Caspian oil on the Danube from the Black Sea directly into Europe. NATO bombs halted this flow of oil along the route favourable to Russia"*.[13] No doubt, the US foreign policy is unscrupulous in attaining its desirable outcomes. A good

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[12] Ibid., p.81.
[13] Ibid., p.87.

illustration is Vietnam, or recently Iraq. In 1998, President Clinton's Energy Secretary, Bill Richardson, stated that the extraction and transport of Caspian oil *"is about America's energy security. It is also about preventing strategic inroads by those who don't share our values"*.[14] This statement verifies the above assertion that the 1999 intervention in Kosovo has strong links with the Caspian oil transportation.

It is clear from the above that the US had selfish motives in intervening in Kosovo. For some interventionists the above arguments might be insufficient or unpersuasive, but there is a final fact that leaves no doubt for the US power-seeking and interest policies over Kosovo. In other words, this fact supports the argument that the humanitarian intent had only been a hypocritical reference by NATO states, with the purpose of veiling their cruel interests and gaining the support of the Western public, who is very sensitive on humanitarian issues. This fact bares the title "selective defence of human rights". The practice of powerful states after the end of the Cold War offers a wide range of such paradigms. This practice proves that states only act when they have interests at stake and they never intervene for primarily humanitarian purposes. There is no intervention purely motivated by human rights. In the case of Kosovo, although interventionists had rushed to proclaim that the intervening states did not have any selfish motives, it is now clear that they did.

There are many instances that states did not intervene to protect the people of a state from repression, massacres and genocide committed by a brutal regime. Such a case is the Armenian genocide committed by the Turks, where the western

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[14] Ibid., p.89.

powers had actually ignored the plight of this people. No doubt, powerful states did not have any interest to intervene in Armenia. Therefore, they left the Armenians on their own fate. But human rights are universal and apply to each and every person in the world community. Human rights disregard colour, race, sex, language, religion or any other discrimination. But this selective protection of human rights illustrates that some people are worth of protection, while some others are not and this is the most vulnerable spot of humanitarian intervention. This is because, although the doctrine of humanitarian intervention is about the protection of human rights, it discriminates against some people across the planet, because of the lack of vital interests of powerful states in that region. Any form of discrimination is a violation of human rights. Thus, it could be argued that humanitarian intervention is against international law of human rights, because its practice discriminates in favour or against people in various places of the world.

The existence of the problem of selectivity had always been evident in the past. However, the main concern here is whether or not this form of discrimination been present in the 1999 NATO intervention in Kosovo. Given the practice of alleged humanitarian interventions in the past, there is no doubt that Western states decided once again to selectively defend human rights. There are many examples in support of the above argument. The first and strongest argument comes from the inland of the former Socialist Republic of Yugoslavia. In 1995 the Croatian Government started its own campaign of ethnic cleansing against the Serb population from the Krajina region.[15] In that case, the US and its NATO allies

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[15] Adam Roberts, "NATO's 'Humanitarian War' over Kosovo", Survival, vol.41, No3, Autumn 1999, p.108. James George Jatras, *NATO's Myths and Bogus Justifications for Intervention*, in Ted

turned a blind eye to the cleansing of hundreds of thousands of Serbs from Krajina.[16] What is more, the US and its allies assisted the Croatian army's Operation Storm.[17] For the US Department of State ethnic cleansing in Krajina was "simplifying matters".[18] However, the crimes of the Croatians against the Serb population of Krajina are equal to those of the Serbs against the Kosovo Albanians. Yet, the free and democratic Western states did not feel committed to halt ethnic cleansing against the Serbs. In the case of Kosovo, the US did not use its previous claim that ethnic cleansing was simplifying matters.

On the other hand, the world community had been horrified by the ethnic cleansing of Albanians in Kosovo. In that case, controversially, they tried to stop the Serb military, paramilitary and police forces. How could anyone explain this shift in the US and western policy? Does the West take into account ethnic cleansing or not? Why did they rush to save the Kosovo Albanians, while they ignored the Krajina Serbs? These questions are difficult for western politicians and diplomats to answer. But there is a realistic explanation: the West only intervenes in situations that vital interests are at stake. In absence of such interests the option of intervention remains unrealistic. In other words, humanitarian intervention is not a moral choice, but a hypocritical justification in order to sanctify and purify the evil and bellicose aims. This hypocrisy is also evident in the International Court Tribunal for the Former Yugoslavia (ICTY), where Milosevic had been indicted, but the Croat President Tudjman and the Bosnian President Alia Izetbegovic that

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Galen, Carpenter (ed.), *NATO's Empty Victory, A Postmortem on the Balkan War*, Washington D.C., CATO Institute, 2000, p.26. Noam Chomsky, *The New Military Humanism, Lessons from Kosovo*, Monroe ME, Common Courage Press, 1999, p.26. Also Cohn, op.cit., p.103.

[16] Jatras, op.cit., pp.26-27.

[17] Cohn, op.cit., p.103 and Jatras, op.cit., p.27.

[18] Chomsky, op.cit., p.32.

could be accused for exactly the same crimes had been excluded from this process (and they will never appear before the ICTY because they are both dead now).[19] Last but not least, the continuous presence of refugees from Krajina in Serbia affirms the negligence of the US and its Western allies for the ethnic cleansing in Krajina.[20]

At the same time, there were many places in the world, where worse humanitarian crises have taken place but the world community has not acted to rescue the oppressed people.[21] The US and its NATO allies remained absolutely indifferent, or at least ignorant. One instance had been the Western disregard for East Timor. East Timor has been the place where the one of the worst atrocities since 1945 has taken place.[22] There, more than a quarter of the whole population was decimated.[23] Compared to Kosovo, the massacre in East Timor had been expressively worse. Thousands of people had been killed and thousands had been forced to flee. The situation was much worse that the one in Kosovo. Yet, the world community appeared indifferent to the Timorese problem. Frankly, while the Western option for Kosovo had been action, for East Timor the West chose inaction (as regards military intervention in support of human rights). The hypocrisy of western states was obvious, because the crisis in East Timor had occurred at the same time with the crisis in Kosovo. Chesterman argued that *"at*

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[19] Sima Avramovic, Professor of Law, University of Belgrade, personal interview. Also Chomsky, op.cit., p.26, Maccgwire, op.cit., p.5, Jatras, op.cit., p.27.
[20] Roberts, op.cit., p.108.
[21] Michael J. Glennon, *Limits of Law, Prerogatives of Power, Interventionism after Kosovo*, Basingstoke, Palgrave, 2002, p.139. Doug Bandow, *NATO's Hypocritical Humanitarianism*, in Ted Galen Carpenter (ed.), NATO's Empty Victory, A Postmortem on the Balkan War, Washington D.C., CATO Institute, 2001, pp.32-34.
[22] Chomsky, op.cit., p.41.
[23] Cohn, op.cit., p.104.

the time there was great reluctance to intervene, despite the apparent hypocrisy given the international response to the situation in Kosovo".[24]

Which factor did finally change the world community's reluctance to militarily intervene in East Timor? The answer lies on Australia's (Australian troops had been the major components of INTERFET) desire to intervene after some conditions were to be met: there was a Security Council mandate; the action was consented to by Indonesia; the mission was a short-term one aimed at restoring security prior to the establishment of a UN force; and the force had a strong regional component.[25] Thus, Australia did not intervene before getting consent of the Indonesian government and before domestic political pressure over fears of a refugee crisis.[26] The consent of the Indonesian government, as well as Resolution 1264 had satisfied the Australian prerequisites for intervention.[27] As a result, Australia led a multi-national force to restore peace and security in East Timor. However, this late intervention raises many questions about the stance of major actors in Kosovo. The US, UK, France and Germany had been at least reluctant to intervene, with the purpose of protecting the Timorese people. Actually, the US and UK had supported the Indonesian brutal regime in many ways: diplomatic support and crucial military aid.[28] The major actor here had been Australia, but the response had been belated. Yet, where were the superpower and

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[24] Chesterman, op.cit., p.150.
[25] Nicholas J. Wheeler and Tim Dunne, "East Timor and the New Humanitarian Interventionism", *International Affairs*, vol.77, No4, 2001, p.807.
[26] Chesterman, op.cit., p.150.
[27] Tom J. Farer, *Humanitarian Intervention Before and After 9/11: Legality and Legitimacy*, in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention, Ethical, Legal, and Political Dilemmas*, Cambridge, Cambridge University Press, 2003, p.58. Also S/RES/1264 (1999), 15 September 1999.
[28] Chomsky, op.cit., p.42.

the European "humanitarians"? They felt strongly committed to halt ethnic cleansing in Kosovo, but their absence in Timor illustrates their hypocrisy. They went to Kosovo for their own interests and they disregarded East Timor because of this lack of interests. No doubt, humanitarian intervention is an integral part of power politics.

One of the major proofs of the selective and hypocritical interventionism to protect human rights in the 90's had been the Western reluctance to intervene in Turkey. The Turkish authorities had been oppressing the Kurds for many years, but campaigns of ethnic cleansing escalated in the 80's and 90's.[29] Turkey has perpetrated major atrocities and massacres in the Kurdish populated areas (south-eastern Turkey) and it had deprived its people from their most fundamental rights. Thus, the Kurds had been deprived from their cultural and linguistic rights for many years.[30] Assassination, torture and summary executions had been the main characteristic of the Turkish campaign.[31] Freedom of expression had suffered greatly in the 90's.[32] Articles 168, 169 and 312 of the Turkish constitution were used to prosecute writers, journalists and political activists who challenged the government's policies in the southeast.[33] A great blow to political freedom in Turkey came with the banning of the Kurdish-based Democracy Party and the

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[29] Bandow, op.cit., p.32.

[30] Chomsky, op.cit., pp.8 and 13.

[31] Amnesty International Report 1997, Turkey, see: http://www.amnesty.org/ailib/aireport/ar97/EUR44.htm
Human Rights Watch Reports, Turkey, 1994-5-6, for more details see: http://www.hrw.org/reports/1995/WR95/HELSINKI-16.htm#P655_198257, http://www.hrw.org/reports/1996/WR96/Helsinki-19.htm#P960_193943 and http://www.hrw.org/reports/1997/WR97/HELSINKI-17.htm#P674_209013. Also Bandow, op.cit., p.36.

[32] *Id.*

[33] Amnesty international, supra note 31.

subsequent trial of seven of its parliamentary representatives and one independent.[34]

Disappearances while in police custody or after being detained had occurred very often.[35] In recent years, the Turkish military has destroyed and burned about 3000 villages and has prosecuted its own campaign of ethnic cleansing.[36] Forced migration became a great problem for the Kurdish population of south-eastern Turkey. The internally displaced people varied between 2.5 and 3 million people, along with unknown numbers who had fled the country.[37] Tens of thousands are estimated to have died in conflict.[38] The Council of Europe and the European Court of Human Rights had regularly issued judgements finding Turkey *"responsible for burning villages, inhuman and degrading treatment, and appalling failures to investigate allegations of ill-treatment at the hands of the security forces".*[39]

Turkey is responsible for all the above "crimes against humanity". This phrase has been used many times by the NATO allies in the case of Kosovo, but they turned a blind eye on Turkey's worse and more appalling crimes. Instead of bombing Turkey or imposing an arms embargo, or even just doing nothing, the United States of America and the rest of NATO countries has armed it to the teeth and downplayed the repression.[40] How could one explain this stance of the US, the

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[34] Human Rights Watch, supra note 31.
[35] Amnesty International ad Human Rights Watch, supra note 31.
[36] Eric Herring, From Rambouillet to the Kosovo Accords: NATO's War against Serbia and Its Aftermath, in Ken Booth (eds.), The Kosovo Tragedy: The Human Rights Dimensions, London, Frank Cass Publishers, 2001, p.238. Also Cohn, op.cit., p.103, Chomsky, op.cit., p.52, and Bandow, op.cit., p.36 and Human Rights Watch, supra note 31.
[37] Chomsky, op.cit., p.54.
[38] Chomsky, op.cit., p.52, Bandow, op.cit., p.36, Herring, op.cit., p.238, and Cohn, op.cit., p.103.
[39] Chomsky, op.cit., p.52.
[40] Herring, op.cit., p.238.

"unchallenged" world representative of the "new humanitarianism"? Undoubtedly, the US did not want to punish its sole Middle-East Muslim ally.[41] The fact that the US had been the main provider of arm and economic supplies to Turkey reveals the US "humanitarian" concerns in the 90's. Neither the US, nor its Western allies tried to impose an arms embargo on Turkey, given its bad records of human rights. The fact that those weapons had been used against unarmed civilians did not restrain the free and democratic western states from selling arms to Turkey. The only US action had been a slight reduction to arms and other supplies.[42]

At the same time, Turkey's human rights records are very bad for other violations of human rights. However, the US and the Europe "humanitarians" never considered a possible military intervention in Turkey to protect its citizens from Turkey's repression. In addition, Turkey has also engaged in ethnic cleansing in Cyprus, after its 1974 invasion and occupation of the northern part of the independent island.[43] Turkey still occupies 37% of the island and displaced between 170,000 to 200,000 ethnic Greek Cypriots, while 100,000 settlers from inner Turkey had moved to northern Cyprus.[44] Thousands of Cypriots have been killed and thousands more remain missing.[45] The refugees from the northern part have lost their property.[46] All the above facts had happened in miscalculation of Turkey's international obligations under international law. The continuous breaches of laws and humanitarian norms by Turkey have never touched its western allies. Western states have not prevented Turkey from violating the

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[41] Chomsky, op.cit., p.10.
[42] Human Rights Watch, supra note 31.
[43] Bandow, op.cit., p.36.
[44] Ibid., pp.36-37.
[45] *Id.*
[46] Ibid., p.37.

principles of international law in Cyprus, which is illegally occupied for over thirty years by the Turkish military forces.[47] Yet, the US and the European allies of Turkey felt sensitive and obligated to act in Kosovo in order to promote and protect internationally recognised standards of human rights.

Having all the above evidence on US and Europe's reluctance to protect human rights in Turkey and in other parts of the world, how convincing can the argument of intervention become on behalf of human rights? When Turkey consistently breaches international law and violates the minimum standards of human rights, western states turn a blind eye on these violations. This hypocrisy became more evident in 1991, when the US, UK and France had imposed the "Safe Havens" and the "no fly zones" in northern Iraq, with the purpose of protecting its Kurdish population from the Iraqi mistreatment. At the same time, the same countries did not do anything relevant in Turkey, where the population of Kurds is far greater than the one in Iraq. Moreover, the operation of the Turkish army was not better than Saddam's operation in northern Iraq. Yet, the West cynically and unscrupulously intervened in Iraq, while it had turned a blind eye on Turkey. An arms embargo had been imposed upon Iraq, but the same thing had not occurred for Turkey. Interestingly enough, Western states deemed the Iraqi Kurds capable of getting their protection, while they ignored the Kurds of Turkey. This fact is a strong proof who certifies the hypocrisy of western states and the falsehood of humanitarian intervention.

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[47] Judith Hippler Bello, Juliane Kokott, and Beate Rudolf, "Loizidou v. Turkey", *American Journal of International Law*, vol.90, No1, January 1996, p.98-99.

Humanitarian intervention is vulnerable to such policies. Had such a doctrine existed, it would apply to each and every *place of the world. But the fact* that it only applies to places where vital interests of powerful states are at stake verifies that humanitarian intervention provides solely another potential abuse of the principle of non-intervention in international affairs. Some scholars would argue that even this calculation of interests and real politic can lead to a positive humanitarian outcome. They would further suggest that "doing something" is better than "doing nothing". Nevertheless, it seems that their arguments are vague and misleading. This is because they do not really believe that humanitarian intervention is a rule of international law. If they believed that there is such a norm, then they would not accept this selective form of interventions. Rules and laws apply equally to all states. However, state practice has proved that states apply the alleged doctrine of humanitarian intervention only when they calculate their own benefits. But humanitarian intervention is not a rule and it is quite difficult to become in the future.

Kosovo has ruled out any possible options for the legality and legitimacy of humanitarian intervention. A Latin dictum says that law comes out from injustice (ex injuria ius oritur). However, humanitarian intervention comes out from injustice. If it was just to intervene on behalf of the oppressed people around the world, then it would apply to each and every people. The fact that some people are worth of protecting them, while some others are not, illustrates the injustice of this doctrine of "state hypocrisy". People are told that everybody is equal before the law. But the practice of humanitarian intervention rejects this view. Nevertheless, Kritsiotis thinks that the argument of selectivity *"misconceives the theoretical*

composition and traditional understanding of humanitarian intervention in international law, which has been framed as a right of states and not as an obligation requiring state action".[48] Accordingly, this is *"why it is the right of - rather than the right to - humanitarian intervention".*[49] Although his argument seems persuasive, he does not actually reply to the problem of selectivity. The fact that states are not obliged to intervene does not mean that the selective protection of human rights can be acceptable. The selective defence of human right will always be reprehensible. Thus, it could be said that international law should not embrace and embody such a rule that topples classic values of law and justice. The practice of humanitarian intervention is contrary to legal norms and to morality. The pseudo-argument that humanitarian intervention is a moral choice is not simply a lie, but hypocrisy as well. Hence, the world community should reject any claim for the legitimacy of such an unlawful and immoral doctrine that aims to legitimise interests of powerful states under the pretext of human rights. Or, if the world community adopts in the future a new rule in favour of humanitarian intervention, then this rule should apply to every place on earth, not only in places where vital interest are at stake.

AN ALTERNATIVE TO HUMANITARIAN INTERVENTION?

The fact that this thesis criticises the US and other European states for their hypocritical and selective defence of human rights does not mean that it is in

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[48] Kritsiotis, op.cit., p.1027.
[49] *Id.*

favour of intervention against Croatia (Krajina), Turkey (intervention on behalf of the Kurds) and other parts where gross violations of human rights have taken place. On the other hand, this thesis welcomes the fact that the world community has sought for a political solution to such crises. As already said in a previous chapter, one of the best ways to assure respect fro human rights is education. The use of military force to protect human rights is not a prudent choice. Thus, the last part of this chapter will deal with another alternative to the use of force. This is the non-military intervention by world community in general, or by regional organisations in particular. Accordingly, this last part explores the situation in Turkey, a state that massive human rights violations have taken place but no military action was undertaken by western states.

First of all, it could be argued that European regional organisations and more specifically the European Union had shifted the Turkish policy towards respect and protection of human rights. In the 2004 Amnesty International report, it is noted that *"important legal reform packages (known as the "harmonisation laws") relating to human rights protection and aimed at meeting the criteria for accession to the European Union continued to be introduced by the Justice and Development Party (AKP) government. Implementation of the reforms was uneven and it was too early to gauge significant progress of human rights as a result of the legislation"*.[50] Further, Turkey ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[51] It is obvious that the EU Copenhagen criteria for

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[50] Amnesty International Report 2004, Turkey.
[51] *Id.*

acceding countries have attained a significant shift in Turkey's human rights policy. Although it is very early to reach the desirable goals, it could be argued that Turkey is on its own way to guarantee democracy and human rights in this place.

Turkey is a good example that non-forcible intervention can bring a desirable humanitarian outcome. The situation of the Kurds in the 80's and 90's is totally different from the situation today. Although it is early to assert that Kurds enjoy all their fundamental rights in Turkey today, it could be argued that the European regional organisations contributed enormously to the protection of their rights. What is more, if Turkey joins the European Union of the 25 democratic states, it will be obliged to enforce respect of human rights and the rule of law in a democratic society. Turkey is the proof and confirmation of effective non-military intervention. In Kosovo, six years after the NATO interventions the situation remains tense. Had NATO states intervened with peaceful means, the situation would be much better. Serbia and Montenegro is on its own way towards becoming a member to the European Union. Thus, it could be argued that the same intervention that sharply changed the Turkish policy towards the Kurds could have worked in the case of Kosovo. This thesis insists that the best way in dealing with humanitarian crises is effective non-forcible intervention by the world community.

PART IV

CONCLUSION

CHAPTER 10

AFTER KOSOVO, 9/11, AND IRAQ: THE FUTURE OF HUMANITARIAN INTERVENTION

"Events since the end of the Cold War starkly show that the anti-interventionist regime has fallen out of sync with modern notions of justice. The Crisis in Kosovo illustrates this disjunction and America's new willingness to do what it thinks right - international law notwithstanding... The new system acknowledges something else the UN Charter overlooks: that the major threats to stability and well-being now come from internal violence as or more often than they do from cross-border fighting – and that to be effective, international law needs to stop the former as well as the latter... It is therefore dangerous for NATO to unilaterally rewrite the rules by intervening in domestic conflicts on an irregular, case-by-case basis."

Michael J. Glennon[1]

"It is a mistake to site Article 2(7) of the U.N. Charter as a ban on intervention 'in matters which are essentially within the domestic jurisdiction of any state', for this restraint does not apply when the Security Council decides to impose 'enforcement measures' under Chapter VII of the charter. Thus Glennon is wrong to argue that the rules bar action to halt intrastate violence: they simply require that the intervention first be approved by the Security Council."

Thomas M. Franck[2]

After the end of World War II and the creation of the UN, the principle of non-intervention and respect to state sovereignty became the pivotal norm of the world community. Article 2(4) of the UN Charter had banned the threat or use of force against the territorial integrity and political independence of any state. The Charter had provided for only two exceptions to the above rule: self-defence under

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[1] Michael J. Glennon, "The New Interventionism", Foreign Affairs, vol.78, No.3, 1999, pp.2-7.
[2] Thomas M. Franck, "Break It, Don't Fake It", *Foreign Affairs*, vol.78, No.4, 1999, pp.116.

Article 51, and UN enforcement action when the Council finds a threat to international peace and security under Article 42. During the Cold War there are many instances that intervention had been justified on humanitarian claims. Among the best instances of alleged humanitarian intervention, as regards the magnitude of human suffering and violations of human rights, is India's intervention in East Pakistan (1971), Vietnam's intervention in Kampuchea (1978), and Tanzania's intervention in Uganda (1979). However, in all instances intervening states had failed to explicitly assert a right to humanitarian intervention, but relied primarily on other justifications.[3] There is no alleged humanitarian intervention during the Cold War that an intervening state had justified its intervention primarily on humanitarian concerns. What is more, discussion before the UN Security Council for a matter traditionally considered internal was improbable, given the devotion of states in Article 2(7) and respect to the internal affairs of states, as well as respect to the principle of non-intervention.

Nevertheless, after the collapse of the Soviet Union and the end of the Cold war, the world community has witnessed an enhanced UN Security Council involvement in matters traditionally regarded internal. This practice had signalled an era that human rights issues would be on the top of the political agendas and a coming boom of alleged humanitarian interventions. Although Brownlie had noted that humanitarian intervention is an old-fashioned intervention[4], state practice in

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[3] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, New York, Oxford University Press, 2001, pp.74, 78 and 79-80. Also Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*, Philadelphia, University of Pennsylvania Press, 1996, pp.99, 103, 104, 105.

[4] Ian Brownlie, *The Principle of Non-Use of Force in Contemporary International Law"*, in William E. Butler (ed), *The Non-Use of Force in International Law*, Dordrecht, Kluwer Academic Publishers, 1989, p.26.

the 90's disconfirmed his valuation. On the contrary, there was a boom of alleged humanitarian interventions in the end of the 20th century and intervention to protect human rights dominated the debates and practice of states in their international relations. Some Security Council resolutions had authorised intervention in order to halt massive repression and violation of human rights.[5] Thus, it had been the first time that the Security Council had authorised UN "collective humanitarian interventions". But the fact that the Council had authorised intervention in places where human rights violations have taken place does not mean that humanitarian intervention outside the Council's realm is permissible. These developments in international affairs did not signal the creation of a "unilateral" right to humanitarian intervention. However, these changes had illustrated that a more drastic involvement of states in matters previously seen internal (cases of massive human suffering). Thus, it could be argued that there were signs of normative changes in the concept of state sovereignty and that human rights were no longer an internal matter of states, but a concern of the world community. Gross violations of fundamental rights might lead the Council to enforcement action to restore international peace and security. As a result, the Council's action imposed restraints upon state sovereignty and the rule non-intervention in the internal affairs of states.

In Iraq, although no authorisation had been granted, the Council recognised for the first time that the transboundary implications of a humanitarian crisis can

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[5] S/Res/794 (1992), 3 December 1992, S/Res/814 (1993), 26 March 1993, S/Res/929 (1994), 22 June 1994, S/Res/940 (1994), 31 July 1994, S/Res/1264 (1999), 15 September 1999.

pose a threat to international peace and security.[6] In other words, refugees coming from humanitarian crises can threaten international peace and security and the Council is competent to intervene. After Iraq, Resolution 770 authorised the all measures necessary to facilitate the delivery of humanitarian assistance.[7] The next significant step had been the adoption of resolution 794 on Somalia. In this resolution, the Council acknowledged that the magnitude of the human tragedy in Somalia caused a threat to international peace and security and authorised the use of force to establish a secure environment for humanitarian relief operations in Somalia.[8] This was the first time that the Council had authorised the use of force for clearly humanitarian reasons, although the use of a special wording diminished the prospects for precedent setting and future Security Council action in other similar situations. The failure of the UN in Somalia led to inaction in Rwanda, where bloody genocide was taking place. Yet, the Council has authorised the use of force in order to halt the massacres, but the response was belated.[9] The third case that the Council had authorised the use of force had been Haiti and the restoration of democracy in this country.[10] Last but not least, the Council has authorised the use of force in East Timor (with the consent of the Indonesian government).[11]

However, there are several other cases that the Security Council did not authorise the use of force, but it had acted under Chapter VII of the Charter to impose arm embargoes, as well as economic and diplomatic sanctions. What is

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[6] S/RES/688 (1991), 5 April 1991.
[7] S/RES/770 (1992), 13 August 1992.
[8] S/RES/794 (1992), 3 December 1992.
[9] S/RES/929, (1994), 22 June 1994.
[10] S/Res/940 (1994), 31 July 1994.
[11] S/Res/1264 (1999), 15 September 1999.

more, it decided the establishment and dispatch of peacekeeping operations and security forces. Apart from the above named countries, this category also includes Liberia, Sierra Leone, Kosovo and various other countries. In Bosnia, for instance, the Council had imposed an arms embargo,[12] established the United Nations Protection Force (UNPROFOR),[13] called for economic sanctions against Serbia,[14] called upon states to take all measures necessary to facilitate the delivery of humanitarian assistance,[15] and imposed a no-fly zone over Bosnia.[16] In Kosovo, the Council had been involved three times before and one after the conflict, but no authorisation had been granted to NATO states because of the Russian and Chinese strong opposition. There are various other resolutions regarding other states for similar humanitarian issues.

The revocation of the above practice of the UN Security Council in matters traditionally seen domestic affairs of states had a sole purpose: the illustration of the Council's intensive occupation with humanitarian crises. No doubt, state practice, as well as the Council's practice in the 90's has illustrated the will of the world community to protect human rights from massive abuses and violations. Many times the sovereignty of states had become restricted because of humanitarian concerns. The question here is whether these normative changes in the world community and the Security Council reflect a new norm in international law, or not. It could be argued that these developments signify the trend of the world community towards a more effective protection of human rights. It would be

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[12] S/Res/713 (1991), 25 September 1991.
[13] S/Res/743 (1992), 21 February 1992.
[14] S/Res/757 (1992), 30 May 1992.
[15] S/Res/770 (1992), 13 August 1992.
[16] S/Res/781 (1992), 9 October 1992.

premature, however, to claim that these changes declare a new era of humanitarian intervention. In all these interventions after the end of the Cold War, although they verify the world community's willingness to intervene with the purpose of protecting human rights from massive violations, there is evident reluctance and opposition of many states to accept such a right. This becomes evident from various Security Council resolutions, where member states recall Article 2(7) and devote their respect to it and where they stress the "extraordinary", "exceptional" and "unique" character of such interventions.[17] What is more, only few states and sporadically spoke of a right of humanitarian intervention in international law.

In Kosovo, where interventionism of the 90's had reached its peak, the same intervening states had renounced that the Kosovo intervention be a precedent for future interventions. Kosovo had challenged numerous debates regarding matters of legality, as well as morality. It had been the first time since the creation of the UN that a regional organisation of 16 democratic states intervened militarily, bypassing the authority of the Security Council, to halt ethnic cleansing within a state.[18] This had been a unique opportunity for the crystallisation of a new right, the right of humanitarian intervention. However, the same NATO states not only did not invoke this right, but they consistently repeated that NATO intervention should be seen as an exceptional one, rather than rule.[19] Further, before the ICJ,

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[17] S/Res/688 (1991), 5 April 1991, S/Res/794 (1992), 3 December 1992, S/Res/929 (1994), 22 June 1994, S/Res/940 (1994), 31 July 1994, S/Res/1264 (1999), 15 September 1999.

[18] Nicholas J. Wheeler, "Humanitarian Intervention after Kosovo: Emergent Norm, Moral Duty or the Coming Anarchy?", *International Affairs*, Vol.77, No.1, 2001, p.113.

[19] The Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned*, Oxford, Oxford University Press, 2000, p.174. Adam Roberts, "NATO's 'Humanitarian War' over Kosovo", *Survival*, vol.41, No.3, 1999, p.107. Catherine Guicherd, "International Law and the War in Kosovo", *Survival*, vol.41, No.2, 1999, p.20. Mary Ellen O'Connell, "The UN, NATO and International Law after Kosovo", *Human Rights Quarterly*, vol.22, 2000, p.57.Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for*

only Belgium raised claims of a right of humanitarian intervention in international law. Moreover, there had been many reactions of various states across the world against NATO action.[20] The fact that the world community is not ready to accept such a right, however, does not mean that interventionism in the 90's is ignored or nullified. On the contrary, this practice proves that the Council is competent to authorise intervention for humanitarian purposes, when it finds a threat to the peace. This is a significant step towards UN collective humanitarian intervention. Yet, humanitarian intervention lacking the Council's authorisation remains impermissible in international law. This is because there is no provision in international law for such a right, nor is there is no sign that from alleged humanitarian interventions in the past emerged such a right as a customary law, given the lack of *opinio juris* in these situations. Yet, the fact that the world community did not accept this practice as legal does not rule out the possibility of accepting it on the future.

Thus, it is clear from the above that international law bans unilateral humanitarian intervention. But what about the oppressed people who are facing suffering and expect from the world community to alleviate this suffering? First of all, human rights are no longer an internal matter of states, but an international one. There are provisions for the promotion and protection of human rights in several treaties and conventions and declarations.[21] Thus, it could be said that states are

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Incremental Change, in J.L. Holzgrefe and Robert O. Keohane (eds.), *Humanitarian Intervention, Ethical, Legal, ,and Political Dilemmas*, Cambridge, Cambridge University Press, 2003, p.239. Chesterman, op.cit., p.216.

[20] 23rd Annual Meeting of the Ministers for Foreign Affairs of the Group of 77, Ministerial Declaration, 24 September 1999. For further details see: http://www.g77.org/Docs/Decl1999.html. S/PV.3988, 24 March 1999, S/PV.4011, 10 June 1999.

[21] The Universal Declaration on Human Rights, the ICCPR, the ICESCR etc.

obliged to respect those rights. But the best way in dealing with humanitarian crises is to follow non-forcible approaches. Although human rights obligations are erga omnes of states, there are no provisions for forcible countermeasures. The only legitimate use of force for the protection of human rights is the US Security Council enforcement action. But the use of force could only bring a positive outcome of a temporary nature. Thus the world community should try to alleviate the suffering of people by peaceful means, rather than the use of force. Accordingly, education in troubled societies would be a good starting point. Further, the work of regional organisations could contribute greatly to respect and protection of human rights.

Yet, it is obvious that state sovereignty in the current legal system does not mean that a government can mistreat its people and that human suffering will happen and no one has the right to stop it because it could be considered intervention in the internal affairs of states. Article 2(7) is not a ban to UN Security Council enforcement action. It is clearly stated in this article. Thus, the Security Council can legitimately authorise intervention to halt massive violations of human rights, if these violations and their transboundary consequences threaten international peace and security. This is, at least, what the practice of alleged "collective humanitarian intervention" in the 90's indicates. But again, this is not what could be considered a "pure" humanitarian intervention. This is because the Security Council responds to threats to international peace and security. In other words, if a humanitarian crisis does not cause a threat to international peace, it would not satisfy the criteria for UN Security Council enforcement action.

Let us now consider what the future of humanitarian intervention could be after several challenges and changes in the world community. It could be argued that humanitarian intervention is in its sunset and its prospects are in question. Humanitarian intervention had reached its apogee with the 1999 NATO intervention in Kosovo. However, everything that flourishes will face its decline. The present chapter has to detect the facts that led to this unexpected decline. Before examining the new challenges posed after the 9/11 terrorist attacks in the US and the interventions in Afghanistan and Iraq, it would be appropriate to seek facts within the realm of humanitarian intervention that limited its prospects. First and foremost, although there had been an increased Security Council involvement in humanitarian crises, the world community did not manage to accept a right of humanitarian intervention. Thus, the doctrine of humanitarian intervention lost a unique opportunity to become a right in extremely favouring circumstances. Nowadays, that the world community is devoted to the war against terrorism and the non-proliferation of weapons of mass destruction the emergence of such a right becomes much more unlikely.

Secondly, this kind of interventionism had actually met failure many times. This fact had impelled states to consider in depth whether intervention will meet success or failure and public reaction and opposition. In Somalia for instance, failure is the only word that can describe the outcome of the UN intervention.[22] As

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[22] Nicholas J. Wheeler and Justin Morris, *Humanitarian Intervention and State Practice at the end of the Cold War*, in Rick Fawn and Jeremy Larkins (eds.), *International Society After the Cold War: Anarchy and Order Reconsidered*, Basingstoke-England, McMillan, 1996, pp.156-157. Jonathan Stevenson, "Hope Restored in Somalia?", *Foreign Policy*, Summer 1993, vol.91, p.138. Mohamed Sahnoun, *Mixed Intervention in Somalia and the Great Lakes, Culture, Neutrality, and the Military*, in Jonathan Moore (ed.), *Hard Choices, Moral Dilemmas in Humanitarian Intervention*, Lanham Md., Rowman & Littlefield, 1998, p.98. And Walter Clarke and Jeffrey Herbst, *Somalia and the*

long as US troops became vulnerable to domestic reactions, the US president announced the withdrawal of the US forces.[23] The decision to intervene was sharply criticised, since intervening states could not attain their humanitarian goals. This failure had been reflected in Rwanda, where the world community had been reluctant to intervene to halt genocide, given the preceding failure in Somalia.[24] Later, in Haiti, the US achieved under the threat of an imminent invasion under the auspices of the UN to remove the military junta and restore democratic order.[25] However, almost ten years later, there was public unrest and deterioration of the humanitarian intervention in Haiti. The OAS immediately condemned the violence in Haiti, deplored the loss of life, and expressed its support for constitutional order in Haiti, as well as its firm support for the Government of the President of Haiti, Jean-Bertrand Aristide, in its efforts to restore public order by constitutional means.[26] Nevertheless, Aristide was forced to resign and leave the country, while a transitional government took office. The Security Council decided to support this transitional government with the establishment of the United Nations Stabilisation

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Future of Humanitarian Intervention, Centre of International Studies, Monograph Series, No9, Princeton, Princeton University Press, 1995, p.1.

[23] Oliver Ramsbotham and Tom Woodhouse, *Humanitarian Intervention in Contemporary Conflict: A Reconceptualisation*, Cambridge, Polity Press, 1996, p.212. Also Wheeler, op.cit., p.198.

[24] Morris and Wheeler, op.cit., pp.156-157.

[25] Morris Morley and Chris McGillion, "Disobedient Generals and the Politics of Redemocratisation: The Clinton Administration and Haiti", *Political Science Quarterly"*, vol.112, No3, autumn 1997, p.380. Robert C. DiPrizio, *Armed Humanitarians, US Interventions from Northern Iraq to Kosovo*, Baltimore, The John Hopkins University Press, 2002, p.93. Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edition, New York, Transnational Publishers, 1997, p.252. Michael Byers and Simon Chesterman, *"You, the People": Pro-Democratic Intervention in International Law*, in Gregory H. Fox and Brad R. Roth (eds.), *Democratic Governance and International Law*, Cambridge, University Press, 2000, p.286. Also Murphy, op.cit., p.271.

[26] Organisation of American States, Permanent Council Resolution on Haiti, CP/Res.861 (1400/04). For more details see: http://www.oas.org/consejo/resolutions/res861.asp.

Mission in Haiti (MINUSTAH).[27] These developments represent the long-term outcome of the brilliant pro-democratic intervention.

Further, the 1999 intervention in Kosovo did not bear the promising fruits. Five years after the end of the conflict the world community did not manage to achieve peace in this troubled region. Although ethnic cleansing of Kosovo Albanian has halted, another ethnic cleansing commenced: Kosovo Albanians have forced the Serbs and Roma to flee the country under the auspices of UNMIK and KFOR. The future status of this province is still uncertain and the world community will have to deal with another difficult task. Furthermore, worldwide criticism of NATO's tactics, reports of NGO's denouncing violations of humanitarian laws, and public reaction had shown the vulnerability of humanitarian intervention.[28] After this promising NATO intervention one would expect the continuation of this practice. However, just after the aftermath of the Kosovo conflict, the world community manifested its reluctance in intervening in another massacre with much more victims of human rights violations and casualties, East Timor. The Australian led forces intervened in East Timor only after obtaining the consent of the Indonesian government and a Security Council authorisation.[29] The belated response in East Timor and the reluctance of the world community towards intervention had been the result of post-Kosovo practice. The same happened in Rwanda after the failure of the UN authorised force in Somalia.

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[27] S/Res/1542 (2004), 30 April 2004.

[28] Amnesty International, "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force. See: http://web.amnesty.org/library/index/ENGEUR700182000. Also Human Rights Watch, Civilian Deaths in the NATO Air Campaign, for further details go to the link: http://www.hrw.org/reports/2000/nato/Natbm200.htm.

[29] S/Res/1264 (1999), 15 September 1999.

This reflects the problems and objections associated with humanitarian intervention, its questions of legitimacy, its effectiveness and the difficulty in attaining the humanitarian goals.

The above facts represent another vulnerability of humanitarian intervention. Most of these interventions in the 90's did not manage to attain a long-term goal. Humanitarian interventions should not focus only on the instant relief of oppressed populations, but should seek for long-term objectives. Yet, the practice after the end of the Cold War disproves the above assertion. A good illustration is the recent overthrown of the Haitian president, as well as the impotence of the world community to achieve a multi-ethnic and a tolerant society in Kosovo. In Iraq, France, UK and US had imposed the no-fly zones, but they never urged for a permanent solution to the political problem of the Iraqi Kurds. Maybe the 2003 intervention and occupation of Iraq will solve this issue, but it will not be the result of the 1993 "collective humanitarian intervention". Moreover, intervention in Somalia did not attain its goals of nation building, disarmament of factions and capture of uncooperative faction leaders.[30] Although the above goals aimed to a long-term solution, they met failure.[31] Thus, it could be said that ineffectiveness of humanitarian interventions is one factor that led to its decline.

Another issue that makes humanitarian intervention problematic is the issue of selectivity, as well as the calculation of national interest and power politics. The world community had been eager to intervene in Bosnia in 1992, but its belated intervention in Somalia and later the total reluctance for intervention in Rwanda

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[30] Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, The Hague, Kluwer Law International, 1999, p.172.

[31]. Wheeler and Morris, op.cit., pp.156-157, Abiew, op.cit., p.172, and Stevenson, op.cit., p.138.

sketch out the above problems. Furthermore, ignorance and indifference in East Timor had been the result of the enthusiastic and promising intervention in Kosovo. The NATO crusaders that twice felt ethically committed to intervene in Yugoslavia in order to protect the Bosnian Muslims and to halt ethnic cleansing of the Kosovo Albanians had never felt morally bound to halt ethnic cleansing in Krajina and to remove the Croat president Tudjman that was equally criminal to Milosevic.[32] On the contrary, the US and its allies assisted the Croatian army's Operation Storm.[33] Finally, the US, UK and French forces deemed crucial to intervene in northern Iraq with the purpose of protecting its Kurdish population from massive violations of human rights, deportation of its population, and casualties of a human tragedy. However, the same countries did not intervene in southeast Turkey, where the Turkish forces and police had committed equal crimes against the Kurdish population.[34] Turkey is a country with very bad human rights records. Yet, Turkey is a NATO ally and it is not in the US, UK and French interest to invade their valuable ally. This selective intervention of states means that either human rights of some people are more worth than others, or that states only intervene where there are interests at stake. All people are equal before the law. Thus, the selective defence of human rights verifies that humanitarian

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[32] Noam Chomsky, *The New Military Humanism, Lessons from Kosovo*, Monroe ME, Common Courage Press, 1999, p.26. James George Jatras, *NATO's Myths and Bogus Justifications for Intervention*, in Ted Galen, Carpenter (ed.), *NATO's Empty Victory, A Postmortem on the Balkan War*, Washington D.C., CATO Institute, 2000, p.26. Marjorie Cohn, "NATO Bombing of Kosovo: Humanitarian Intervention or Crime against Humanity?", *International Journal for the Semiotics of Law*, vol.15, 2002, p.103. Also Roberts, op.cit., p.108.

[33] Cohn, op.cit., p.103 and Jatras, op.cit., p.27.

[34] Doug Bandow, *NATO's Hypocritical Humanitarianism*, in Ted Galen Carpenter (ed.), NATO's Empty Victory, A Postmortem on the Balkan War, Washington D.C., CATO Institute, 2001, p.32 and 36. Eric Herring, From Rambouillet to the Kosovo Accords: NATO's War against Serbia and Its Aftermath, in Ken Booth (eds.), The Kosovo Tragedy: The Human Rights Dimensions, London, Frank Cass Publishers, 2001, p.238. Also Cohn, op.cit., p.103, and Chomsky, op.cit., pp.8, 13 and 52.

intervention is not a right, because it does not apply to all state entities and their citizens, but few that are favoured by power politics.

In addition, many times the means of humanitarian intervention were against the humanitarian ends. Accordingly, in the 1999 NATO intervention in Kosovo, NATO states had been liable to critics of states, NGO's, lawyers and public for their war tactics. Among the critics had been the aerial campaign from high altitudes that cannot support the humanitarian objective of halting ethnic cleansing.[35] Further, the use of weaponry with highly questionable effect for humanitarian purposes had been actually paradoxical. Thus, NATO had been criticised for the use of depleted uranium and cluster bombs.[36] Moreover, the high number of civilian casualties also constitutes a black spot in NATO's intervention.[37] Humanitarian interventions promise by definition to protect the non-combatants. NATO did not only bomb Serb civilians, but also the Kosovo Albanians that it had been engaged to protect. The bombing of refugee conveys totally collides with the NATO promises.[38] What is more, the bombing of civilian infrastructure and public utilities[39], hospitals and the bombing of the Yugoslav car

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[35] Amnesty International, "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force. See: http://web.amnesty.org/library/index/ENGEUR700182000 Also Anne Orford, *Muscular Humanitarianism: Reading the Narratives of the New* Interventionism, "European Journal of International Law, vol.10, 1999, p.681. Also Christine M. Chinkin, "Kosovo: A Good or a Bad War?", *American Journal of International Law*, vol.93, No4, October 1999, p.844.

[36] Human Rights Watch, Civilian Deaths in the NATO Air Campaign, for further details go to the link: http://www.hrw.org/reports/2000/nato/Natbm200.htm. Also AI Report, supra note 33.

[37] AI Report and HRW Report, supra notes 33 and 34.

[38] AI Report, supra note 33.

[39] Richard A. Falk, "Kosovo, World Order, and the Future of International Law", *American Journal of International Law*, vol.93, No4, October 1999, p.851. Also Murphy, op.cit., p.632 and Chinkin, op.cit., p.852.

industry (Zastava)[40] are very controversial and cannot reconcile with the humanitarian objectives of the alliance. But Kosovo is not the only intervention that raised such questions. The Recklessness of intervening states in Somalia led to a large number of civilian casualties in only one day.[41] Thus, it is clear from the above that many times the means of humanitarian interventions often collide with the humanitarian ends.

HUMANITARIAN INTERVENTION AFTER 9/11

To this extent, most factors that lead to the decline of this practice of humanitarian intervention have been stressed out. But new challenges in the world community have taken place and they have ruled out any interest for future humanitarian interventions. Five years after the Kosovo and the debates about humanitarian intervention do not have the same vividness and optimistic splendour. Some scholars have argued that after the 9/11 attacks in US humanitarian intervention has declined and the fight against terrorism and states that foster terrorism had subrogated it.[42] Nevertheless, this contention does not

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[40] Dino Kritsiotis, "The Kosovo Crisis and NATO's Application of Armed Force against the Federal Republic of Yugoslavia", *International and Comparative Law Quarterly*, vol.49, 2000, p.355.

[41] Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford, Oxford University Press, 2000, p.195. Ioan M. Lewis, *Making History in Somalia: Humanitarian Intervention in a Stateless Society*, London, Centre for the Study of Global Governance, London School of Economics, 1994, p.13. Samuel M. Makinda, *Seeking Peace from Chaos, Humanitarian Intervention in Somalia*, London, Lynne Rienner Publishers, 1993, p.81. Also DiPrizio, op.cit., p.47 and *Ramsbotham* and Woodhouse, op.cit., p.212.

[42] Anne Orford, *Reading Humanitarian Intervention, Human Rights and the Use of Force in International Law*, Cambridge, Cambridge University Press, 2003, p.2. Also Tom J. Farer, *Humanitarian Intervention Before and After 9/11: Legality and Legitimacy*, in J.L. Holzgrefe and Robert Keohane(eds.), *Humanitarian Intervention, Ethical, Legal and Political Dilemmas*, Cambridge, Cambridge University Press, 2003, p.53.

reflect the whole true, but just a part of it. The collapse of the myth of humanitarian intervention had occurred much earlier as a result of the oddities, failures and ambiguous outcomes of such interventions. The above analysis explains this proposition. Long before the 9/11 terrorist attacks in the US, the Bush administration declared that it was not interested in using the military for humanitarian or peace operations and it would not be in the business of state building.[43] Therefore, it could be said that other factors led the US administration to neglect this doctrine. Thus, it would be misleading to assert that the decay of humanitarian intervention is simply the post-9/11 outcome.

No doubt, the 9/11 terrorist attacks have focused the US administration and other states towards the new challenges of the world community. Thus, this occupation of the world society with anti-terror had contributed to further weakening the practice of humanitarian intervention. War against terrorism had dominated the political agendas of states and world organisations. This thesis supports that war against terrorism will further reduce the possibilities for future humanitarian interventions in the 1999 Kosovo model, because such interventions collide with the anti-terror objectives. In other words, in 1999, NATO countries had supported the KLA, a guerrilla army heavily committed to terrorist action and until 1998 considered "a terrorist organisation" by the US Department of State.[44] Yet, in 1999 there was an obvious shift in US policy towards the KLA. Since then, the US and NATO fell totally bound to assist the KLA "freedom fighters".

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[43] Sung-han Kim, "The End of Humanitarian Intervention", *Orbis - A Journal of World Affairs*, vol.47, No.4, 2003, p.721. Also DiPrizio, op.cit., p.169.

[44] Edward McWhinney, *The United Nations and a New World Order for a New Millennium: Self-Determination, State Succession, and Humanitarian Intervention*, The Hague, the Netherlands, Kluwer Law International, 2000, p.70. Maccgwire, "Why Did We Bomb Belgrade?", *International Affairs*, vol.76, No1, January 2000, p.7.

Five years after the end of the conflict, this NATO-favoured secessionist organisation (the ultimate goal of KLA had been Kosovo secession and unification with Albania[45]) had confirmed their extremist nature and they evoked the March 2004 clashes, which had been condemned by NATO, UNMIK, UN and the world community as a whole.[46] Five years after the end of the conflict and the world community is inadequate to disarm these people. Now that the US policy focuses exclusively on counter-terrorism, US involvement in similar cases is ruled out. This is because one cannot simply fight terrorism while abandoning a terrorist organisation. Exactly the same thing exists for other interventions in the 90's, such as the 1991 intervention in northern Iraq (safe havens) and the 1999 intervention in East-Timor. It is now totally difficult, if not impossible, for the US foreign policy and its western allies to assist secessionist movements. Humanitarian intervention is strongly connected to secessionist struggles[47] and most secessionist groups use terrorism as the only means for attaining their goals. Such a policy would be disastrous for the fight against terrorism, which is the major challenge of the world community after the 9/11 attacks. This is why this thesis supports that the prospects of humanitarian intervention had been eliminated after the 9/11 attacks.

Let us now consider the factors that led to the decline of humanitarian intervention as a result solely from the 9/11. After 9/11 the Security Council has recognised the right of the US to act forcefully in its defence.[48] Although there was no explicit Security Council authorisation, the fact that a resolution affirmed the

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[45] McWhinney, op.cit., p.70 and Maccgwire, op.cit., p.7.
[46] S/PV.4942, 13 April 2004. Also NATO, Press Release 2004 (045) on the Situation in Kosovo, 18 March 2004, for further details see: http://www.nato.int/docu/pr/2004/p04-045e.htm. Also UNMIK, Press Release UNMIK/PR/1142, 18 March 2004, also available on the net: www.unmikonline.org.
[47] Farer, op.cit., p.58.
[48] S/Res/1373 (2001), 28 September 2001.

inherent right of self-defence gave a legal basis to US intervention in Afghanistan. However, in September 2002 National Security Strategy, the Bush administration had adopted the doctrine of preemptiveness.[49] This new doctrine of the US agenda claims that the US has the right to pre-emptively use force in its defence against an imminent threat to its national security.[50] This doctrine of pre-emption turns against other states associated with terrorism[51], especially when there are concerns about weapons of mass destruction getting into terrorist hands that would produce casualties far greater than those of 9/11.[52] Among the various US justifications for the use of force in Iraq, had been the preventive war against an imminent threat, in relation to UN Security Council resolution relating biochemical, chemical and nuclear disarmament.[53]

It is not proper to examine whether intervention in Iraq or the doctrine of pre-emptive or anticipatory self-defence is lawful or not. As Stromseth argued, we are at a difficult and precarious transitional moment in the international legal system governing the use of force.[54] The consequences, however, of the Iraq invasion for international law and order will depend on the future behaviour of the

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[49] The National Security Strategy of the United States of America, White House, Washington DC, 2002.

[50] Miriam Sapiro, "Iraq: The Shifting Sands of Preemptive Self-Defence", *American Journal of International Law*, vol.67, No.3, July 2003, p.599. Adam Roberts, "Law and the Use of Force after Iraq", *Survival*, vol.45, No.2, summer 2003, p.45.

[51] Jonathan I. Charney, "The Use of Force against Terrorism and International Law", *American Journal of International Law*, vol.95, No.4, October 2001, p.835.

[52] Richard A. Falk, "What Future for the UN Charter System of War Prevention?", *American Journal of International Law*, vol.97, No.3, July 2003, p.592. Jane E. Stromseth, "Law and Force after Iraq", *American Journal of International Law*, vol.97, No.3, July 2003, p.634. Also Kim, op.cit., p.721 and 732, Roberts, op.cit., pp.33, 40, 46.

[53] S/Res/1441 (2002), 8 November 2002. Falk, op.cit., p.592, Roberts, op.cit., p.39, and Sapiro, op.cit., p.599.

[54] Stromseth, op.cit., pp.629 and 634.

Bush administration and its successors.[55] Yet, the only thing sure is that this doctrine of preemptiveness, as well as the linkage of terrorism and weapons of mass destruction have dominated the US agenda and curtailed the possibility for future concerns of humanitarian intervention.[56] It is easier for the US administrations to convince its public for intervention when there are concerns of internal security, rather than external humanitarian concerns. The new form of interventionism and hegemonism in the new millennium is the war on terrorism and the fear of weapons of mass destruction falling into terrorist hands. This proposition is adequate to persuade the publics for the necessity to recourse to war, in order to prevent a future tragedy. The new challenges not only focus upon anti-terror, but they also eliminate the possibilities for future humanitarian interventions.

This is because the US will be able to intervene in places such as the Middle East and Africa, not for humanitarian purposes, but as a part of its anti-terrorism campaign and its anticipatory self-defence. Farer thinks that the post-9/11 reading of the Afghan text provides a new non-humanitarian angle for visualising the US in places like Somalia, Sierra Leone, Sudan Congo and Liberia.[57] Of course, this list could be expanded in other African countries, as well as Middle Eastern, such as Syria or Iran. Thus, it could be argued that the one and only superpower has found a reason for intervening in troubled places and failed states across the world and restore order. The US can point out the consequences

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[55] Tom J Farer, "The Prospect for International Law and Order in the Wake of Iraq", *American Journal of International Law*, vol.97, No.3, July 2003, p.627.
[56] Thomas G. Weiss, "The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era", *Security Dialogue*, vol.35, No.2, June 2004, pp.135-136. Also Kim, op.cit., p.721.
[57] Tom J Farer, "Beyond the Charter Frame: Unilateralism or Condominium?", *American Journal of International Law*, vol.96, No.2, April 2002, p.362.

of terrorist threats deriving from such states and advance claims of democratic society and liberation of the target state. This had been the case of Iraq, where claims on terrorism and weapons of mass destruction fell into a lacuna. However, the Bush administration had a good reasoning in convincing the American public for intervention in Iraq. The fear of future terrorist attacks can persuade a "threatened" nation that military intervention is necessary.

SUDAN: AN EPILOGUE AND EPITAPH TO THE "MILITARY HUMANISM"

A good illustration of this obvious decline of humanitarian intervention is Sudan. The war between the Sudanese army and the Sudan people's Liberation Army (SPLA) that began in 1983 had cost at least half a million dead and 1.5 million refugees.[58] The very bad human rights records of Sudan, especially in the new millennium, are much worse than the ones in Kosovo and other places that western states deemed necessary to intervene in the 90's in order to protect fundamental human rights. Accordingly, the war between the government forces and the SPLA (a secessionist movement) led to a series of human rights abuses. The list includes indiscriminate killings of civilians, torture, abductions, rapes, destroyed houses, looting of property, destruction of livestock and crops and restricted humanitarian aid.[59] What is more, consistent bombing of villages in the

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[58] Peter Calvocoressi, *World Politics 1945-2000*, 8th edition, London, Longman, 2001, p.664.

[59] Amnesty International, Sudan, 2003 Report, Covering events from January-December 2002, for more details see: http://web.amnesty.org/report2003/Sdn-summary-eng.
Also Amnesty International, Sudan, 2004 Report, Covering events from January-December 2003, see: http://web.amnesty.org/report2004/sdn-summary-eng.

region of Darfur (south Sudan) forced the people to flee their homes and seek shelter within the region (internally displaced people), or in the neighbouring state of Chad.[60] According to some estimates, approximately 200,000 refugees have fled to Chad.[61]

The climax of the humanitarian catastrophe in Sudan led to UN Security Council action. In May 2004 the Council expressed in a presidential statement its deep concern *"of the continuing reports of large-scale violations of human rights and of international humanitarian law in Darfur, including indiscriminate attacks on civilians, sexual violence, forced displacement and acts of violence, especially those of ethnic dimension"*.[62] In addition, the Council adopted three resolutions, where it condemned all acts of violence and violations of human rights and international humanitarian law by all parties in Sudan.[63] In 2004, two Security Council resolutions determined that the situation in Sudan constitutes a threat to international peace and security and to the stability in the region.[64] Resolution 1556 imposed an arms embargo on Sudan and endorsed the deployment of international monitors, including the protection force envisioned by the AU, to the Darfur area of Sudan under the leadership of the AU.[65] The European Union had

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Amnesty International, Report, Sudan, Arming the perpetrators of grave abuses in Darfur, for further details see: http://web.amnesty.org/library/index/engafr541392004.

[60] *Id.*

[61] S/RES/1556 (2004), 30 July 2004.

[62] S/PRST/2004/18, 26 May 2004.

[63] S/RES/1547 (2004), 11 June 2004, S/RES/1556 (2004), 30 July 2004, S/RES/1564 (2004), 18 September 2004.

[64] S/RES/1556 (2004), 30 July 2004, S/RES/1564 (2004), 18 September 2004.

[65] S/RES/1556 (2004), 30 July 2004.

also reaffirmed and strengthened an ongoing embargo on Sudan, imposed in 1996.[66]

In 2005, the Security Council passed many resolutions on Sudan, in which it determined that the situation in Sudan constitutes a threat to international peace and security. On 24 March 2004, the Council decided to establish the United Nations Mission in Sudan (UNMIS).[67] Some days later, after deploring the situation in Sudan, the Council emphasised that *"there can be no military solution to the conflict in Darfur"*.[68] In this resolution, the Council decided to establish a Committee of the Security Council and asked the Secretary-General to appoint for a period of six months a Panel of Experts.[69] Last but not least, in another session it decided to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court.[70] In 2006 the Council passed a large number of resolutions regarding the situation is Sudan, but it did not adopt any other measures for attaining a possible humanitarian outcome.

It is noteworthy that despite this ongoing humanitarian catastrophe, the Council did not authorise the use of force in order to halt the massive repression in Sudan. Although the situation resembles the ones of 90's that states intervened to protect human rights from massive abuses, today the world community does not seem willing to use force for humanitarian purposes. Some lawyers and political analysts could claim that this inaction has nothing to do with the decline of humanitarian intervention, but it is simply a matter of selectivity, which is strongly

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[66] European Council, Common Position 2004/31/CFSP, concerning the imposition of an embargo on arms, ammunition and military equipment on Sudan, 9 January 2004.
[67] S/RES/1590 (2005), 24 March 2005.
[68] S/RES/1591 (2005), 29 March 2005.
[69] *Id.*
[70] S/RES/1593 (2005), 31 March 2005.

connected to the doctrine of humanitarian intervention. Nevertheless, such an argument would be very uncritical. This is because the Council's intensive involvement in past crises had led to authorised or unauthorised interventions. But in the case of Sudan the only action is negligence. In the interventionism of the 90's such a wording of a Council's resolution would guarantee intervention. There was a refugee flow and a determination of a threat to international peace and security, imposition of an arms embargo under Chapter VII of the UN Charter and dispatch of international monitoring team. What is more, there was the determination of *"humanitarian catastrophe"*, a word used quite often in the case of Kosovo.

In addition, there is another element that favours intervention in the first place: resolutions 1556 and 1564 express their determination to do everything possible to halt a humanitarian catastrophe.[71] Such a determination was not even present in the case of Kosovo. This wording implies the potential authorisation of all necessary means under Chapter VII of the Charter. This is what the Special Representative of the Secretary General for the Sudan implied in the meeting of the Council. He supported that *"political agreements may come too late to stop the rising violence and human suffering in the towns, villages and settlements in the field. I am afraid that the situation in Darfur may become unmanageable unless greater efforts are made both at the negotiating table and on the ground. The meeting of the Council planned for mid-November in Nairobi provides an excellent opportunity to get such robust measures started. Is it necessary? Yes, it is... It is duty of the international community to consider further action if the action taken*

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[71] S/RES/1556 (2004), 30 July 2004, S/RES/1564 (2004), 18 September 2004.

so far proves to be insufficient".[72] No doubt, his speech advances claims of the 90's of a duty to intervene. Yet, his claims fell on deaf ears. The 15 members of the Council ignored his "hawkish" plans and adopted resolution 1574, which provided support for the efforts of the Government of Sudan and the SPLA for a political solution to the crisis.[73] This resolution did not imply military intervention, nor did it evoke Chapter VII of the UN Charter. In other words, it ended any hopes for military intervention in Sudan.

Western states would not neglect such an opportunity in the past decade, but today they are reluctant to use force for humanitarian purposes. The world community is preoccupied with the war against terrorism and Iraq. The humanitarian catastrophe in Sudan is not crucial for the US National Security Strategy, as it emerged after the 9/11 attacks. It is also not in the political agendas of other western states. Thus, the only option for Sudan is a non-forcible response. Only a political solution can bear long-term and positive outcomes. Interventionism of the past decade had confirmed that military intervention could only provide a short-lived humanitarian goal. It seems that western governments got their lessons from failures of such armed interventions in the 90's. Their choice now is to refrain from the use of force for humanitarian purposes. As a result, the world community supported political efforts for the resolution of the conflict, including ceasefire agreements and plans for a political settlement. Hence, it could be argued that Sudan reaffirms and signifies the decline of humanitarian intervention and constitutes its epitaph.

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[72] S/PV.5071, 4 November 2004.
[73] S/RES/1574 (2004), 19 November 2004.

CONCLUDING REMARKS

To sum up, the prospects for humanitarian intervention are very doubtful. Many reasons have eliminated the possibilities for further expansion of the doctrine after its boom in the 90's. This thesis has addressed many problems of this doctrine that render its future prosperity highly ambiguous. Among those problems are the means of humanitarian intervention that collide with the humanitarian ends, instances of failed humanitarian interventions, the inability of such interventions to attain long-term goals, the problems of selectivity and interests and the impotence to crystallise a right of humanitarian intervention in the favouring circumstances after the end of the Cold War. What is more, recent trends and challenges of the world community render humanitarian intervention a tertiary issue in the realm of the use of force. Nowadays, the major challenges in the world are the war against terrorism and the non-proliferation of weapons of mass destruction, the combination of which might cause a great tragedy. Expectedly, the publics, as well as their governments, do not pay as much attention to humanitarian crises as they did in the past, but they are occupied with the issue of terrorism. The US will intervene according to its doctrine of preemptiveness to each part of the world it deems necessary. Thus, instead of intervening in troubled places and failed states across the world, it can find an imminent threat coming out of the anarchy in one state, or from its "demonised" leader.

In the past decade, the Security Council found that humanitarian crises can constitute a threat to international peace and security and enforced military

intervention under Chapter VII of the UN Charter. It could be argued that this is the fundamental normative change in the 90s and the only possible emerging norm in favour of humanitarian intervention. Yet, this practice of the council is confined in only three cases (Somalia, Rwanda and Haiti). The paucity of relevant instances and the elimination of this practice after 1999, however, do not support the emergence of a new norm in favour of humanitarian intervention. Wheeler and Morris think that *"today, it is virtually inconceivable that the Security Council would oppose armed intervention to end genocide, mass killing and large-scale ethnic cleansing on the grounds that this violated a state's sovereign rights".*[74] Yet, the reluctance of the world community to intervene in Sudan disconfirms the above assertion. As they asserted, *"the much vaunted claim that there is a 'developing international norm' to protect civilians appears very hollow when viewed from the perspective of the millions who perished in the last ten years from genocide and war in Rwanda, the Sudan, and the Democratic Republic of the Congo (DRC)".*[75]

As regards "unauthorised" humanitarian intervention, it is clear from the analysis in the previous charters that such an action is illegal under international law. The emergence of such a norm seems unlikely to develop in the future. As illustrated in Chapter VII, Kosovo was a very bad precedent for humanitarian intervention. After a promising decade of enhanced engagement of the world community in humanitarian issues, Kosovo has strongly damaged the practice of

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[74] Nicholas J. Wheeler and Justin Morris, Justifying Iraq as a Humanitarian Intervention: The Cure is Worse than the Disease, forthcoming in W.P.S. Sidhu and Ramesh Thakur (eds.), The Iraq Crisis and World Order: Structural and Normative Challenges, Tokyo: United Nations University Press, forthcoming 2006.

[75] *Id.*

humanitarian intervention. NATO intervention violated many of the pivotal premises of humanitarian intervention. As a result, its means were against the proclaimed humanitarian ends. In addition, peaceful avenues had not been exhausted prior the commencement of its aerial campaign against the FRY. Last but not least, the positive humanitarian outcome has not yet been attained, nor a long-term resolution of the conflict. NATO intervention in Kosovo has manifestly shown that force is not the appropriate method to enforce respect for human rights. As a result, the world community rejected the proclaimed right of "unilateral" humanitarian intervention, as illustrated in Chapter 6.[76] This is why this thesis considers that moral and political caveats interrupt the emergence of a new legal norm.

Do the above facts reflect the end of humanitarian intervention, or a temporary decline? It could be argued that it is premature to claim that the practice of humanitarian intervention is witnessing its end in the records of world affairs. Nevertheless, an evident and sharp decline is incontestable. Mistakes, omissions, incredibility and failure are the main components of this decline. The current occupation of the world community, and more specifically the sole superpower, the US, with war against terrorism further diminishes any possibility for future humanitarian intervention. But again, it is not prudent to say that this commitment of the world community and US to war against terrorism will annihilate humanitarian intervention. It would be uncritical and venturous to assert such a claim. This is not simply because there is no evidence and proof for the definite

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[76] For instance the G77 denunciation of humanitarian intervention, as well as the General Assembly's resolution.

end of humanitarian intervention. There are some factors that might revive this doctrine after a period of time.

If the world community is preoccupied with war against terrorism and the non-proliferation of weapons of mass destruction, it does not mean that this will be the eternal challenge for international relations. State practice, as well as international law is not static. In the 90's humanitarian intervention had been the pivotal challenge of the world community, as regards the use of force. Nowadays, the war on terrorism has replaced and annihilated humanitarian intervention. What about tomorrow? It could be said that the war against terrorism will last until the US and its western allies intervene in "rogue states" in the Middle East and Africa and they accomplish their "civilising" mission and "democratisation". After the US, the sole superpower, and its allies make their rivals conform to their orders and interests, and then they might seek for alternative forms of the use of force to intervene in places where war against terrorism cannot be persuasive. For instance, after an effective control of the Middle East the US may wish to intervene in China that has nothing to do with terrorism, nor does it foster terrorists. Then, the prospects for a future humanitarian intervention in Tibet to halt massive violations of human rights, ethnic cleansing and mass exodus of refugees can become probable. After Kosovo, China is worried that what happened in Yugoslavia could occur in the future in Asia, especially in China, whose minority and human rights policies are always criticised by the US and its allies.[77]

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[77] Zhang Yunling, *Whither the World Order after Kosovo?*, in Albrecht Schnabel and Ramesh Thakur (eds.), *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship*, New York, United Nations University Press, 2000, pp.117 and 199. Also Franck, op.cit., pp.117-118.

The above argument on a prospective intervention in China for humanitarian purposes is not improbable, but it is not certain as well. Nevertheless, this paradigm shows that humanitarian intervention may again become an imperative, after the US finishes its "civilising" and "liberalisation" mission and its war against terrorism in the Middle East and elsewhere across the planet. After the war against terrorism and the non-proliferation of weapons of mass destruction, the US, as well as its allies, will find new forms of interventionism, or rely upon doctrines of the past, such as humanitarian intervention. Nobody can predict what the future form of the US hegemonism and interventionism will be. It will depend on future US administrations, as well as the challenges and trends of the world community. Hence, it could be argued that future revival of humanitarian intervention should not be ruled out. Yet, there is a certain estimate for the fortune of humanitarian intervention in the present and the near future. Humanitarian interventions in the 90's are still vulnerable to critics such as the instability in Kosovo and the problems concerning its future status, and the recent turbulence in Haiti. This form of interventionism had met sharp opposition. What is more, the war against terrorism has degraded any considerations for future humanitarian interventions. Accordingly, humanitarian intervention will decline in the political agendas for many years to come.[78] The possibility of an isolated instance of alleged humanitarian intervention, however, cannot disconfirm the above

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[78] But these conclusions have to do primarily with western practice of humanitarian intervention. Thus, this estimate does not include the practice of humanitarian intervention in Africa, given the past ECOWAS military involvement in humanitarian crises (Liberia and Sierra Leone). Yet, the signs of the world community today indicate that this temporary decline of humanitarian intervention is also evident in the African political agendas (Sudan). Accordingly, the existing decline of humanitarian intervention relates to the general practice of humanitarian intervention (both western and African).

argument, because such an instance would not be sufficient to disprove this incontestable decline.

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