European Master's Degree in Human Rights and Democratisation

War on the Grounds of Humanity? – The Need for Establishing a Coherent Doctrine of Humanitarian Intervention

Author:
Marinella Bebos

Supervisor:
Dr. Kathleen Cavanaugh

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National University Ireland, Irish Centre for Human Rights, Galway

Abstract

Humanitarian Intervention has been one of the most debated issues during the last decade, since the doctrine implies a tension between the most fundamental values in international law and international relations – State sovereignty versus the need to protect human rights. Given this tension, the primary aim of this thesis is to analyse whether the need to protect human rights can override a state's sovereignty. Against this background it will be further examined, if such doctrine would be compatible with the provisions under the UN Charter. It will be argued that the Charter has to be reinterpreted and adjusted to the developments since 1945. In doing so, I was able to verify that humanitarian intervention is in accordance with the Charter's purposes. However, having acknowledged that the mechanisms under the Charter, to restore peace and security are not efficient and subject to the political willingness of the member states, the second aim was examine how to deal with gross human rights violations in the future, if the Security Council is deadlocked. I shall argue that the current system, to view legitimate unauthorized interventions in 'exceptional circumstances', as in Kosovo, by not establishing a coherent doctrine is not a feasible option. Therefore, I argue that a doctrine with coherent criteria has to be established, to strengthen the existing mechanisms under the Charter and to compel the Security Council to take its responsibility.

Key words: State sovereignty, Human rights, Security Council responsibility, UN Charter

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Abbreviations

AIV/CAVV	Advisory Council on International Affairs/ Advisory Committee on Issues of Public International Law
BiH	Bosnia and Herzegovina
DMZ	De-militarised Zone
ECOWAS	Economic Community of Western African States
FRY	Federal Republic of Yugoslavia
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
IICK	Independent International Commission on Kosovo
IIIR	Independent International Inquiry on Rwanda
KLA	Kosovo Liberation Army
LDK	League for a Democratic Kosovo
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental organisation
NIF	Neutral International Force
OAU	Organisation of African Unity
OSCE	Organisation for Security and Cooperation in Europe
RPF	Rwandese Patriotic Front
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAMIR	United Nations Assistance Mission in Rwanda
UNHCR	United Nations High Commissioner for Refugees

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CHAPTER IV

War on the grounds of humanity? – The Need for Establishing a Coherent Doctrine of Humanitarian Intervention

Introduction

Facing a new world order in the post-Cold War era, the international community was confronted with new threats to peace and security. Especially during the last decade, a proliferation of internal wars were calling for intervention – Iraq, Somalia, Rwanda, or Bosnia are only few to be mentioned. The intervention or non-intervention in these conflicts reflected perfectly the disagreement on the topic. When intervention occurred, those opposed to humanitarian intervention considered it as a breach of the most fundamental principles in international order, namely state sovereignty and territorial inviolability. Advocates on the other hand praised it as the final raising of human rights over a state's sovereignty. Conversely, when intervention did not happen, the international community was blamed for its inaction and considered guilty for not having put an end to the atrocities.

The debate on the question, if force can be used for humanitarian purposes, reached its apex with the unauthorized NATO intervention in Kosovo in 1999. The international community and especially the Security Council were divided about the legality and the legitimacy of this intervention. On the one side, the NATO action had breached the law of a longstanding rule. On the other side, a humanitarian catastrophe was about to occur and a non-interventionist position was thus morally not tenable. Eventually, the debate not only surrounded the legitimate use of force, but also the effectiveness and the authority of the Security Council came under an increasing challenge.

A further challenge arose with the events of 11 September 2001. The following 'war against terrorism' triggered a new debate on the general legitimacy of the use of force in international relations. Although more related to the use of force in self-defence, the general discussion was inseparable from the debate on humanitarian intervention.

The question of the use of force as a legitimate means of humanitarian intervention raises significant debate within international relations and international law. The doctrine

implies a tension between the fundamental values of State sovereignty versus the need to protect human rights in international relations. In 1945, the United Nations Charter was drafted with the determination to avoid the repetition of what has led the world into two devastating wars. The heart of a stable international community was seen in the respect for State sovereignty and the commitment to peaceful co-existence and therewith the non-use of force. This cornerstone came under challenge with the adoption of the Universal Declaration of Human Rights in 1948, which kicked off a process of increasing concern for the respect and protection of human rights. The fulfilment of these obligations required under international law pose a dilemma with regard to humanitarian intervention. Therefore, humanitarian intervention is often regarded as an "obscene oxymoron"[1].
This thesis will attempt to examine the tensions between sovereignty and human rights against the question of humanitarian intervention by addressing the following:

- Can the use of force for humanitarian purposes be compatible with the provisions under the United Nations Charter?
- What will be the repercussions by keeping a strict non-interventionist position?
- If we need to establish a framework for such doctrine, what will be the safeguards against abuses?

Methodology

For dealing with the issue a variety of sources has been used. For the theoretical sections, I mainly used writings of legal scholars. Chapter V, instead, is based on diverse material. First, sufficient information on the background to the conflicts was gained by reports written by NGO's and especially the International Commissions that had been set up for both conflicts. The examination of the role of the international community and the Security Council in the conflicts rest also partly on their reports. Besides, a study has been undertaken of several UN Security Council Resolutions and UN Security Council meeting reports, to establish how the Security Council determined the respective conflicts, and to get a picture on the member states' stance on the topic of intervention.

[1] J.L. Holzgrefe, *The humanitarian intervention debate*, in J.L. Holzgrefe, R.O. Keohane, *Humanitarian Intervention – Ethical, Legal, and Political Dilemmas*, Cambridge, Cambridge University Press, 2003, p. 1.

Delimitations of the Study

When addressing the question of humanitarian intervention, a clear distinction has to be made since the term is used for other purposes as well. In the past, humanitarian intervention was often invoked in situations where a state intervened into another state's territory to rescue its own citizens. This, however, will not be addressed here.
Humanitarian Intervention, for the purpose of this thesis, will be defined as:

> *"the threat of 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."*[2]

It is aimed to protect nationals of another state from an imminent threat of their lives or inhuman treatment within their own state, usually conducted by their government.[3]

The proposed definition may apply, regardless of whether the Security Council has given authorization for the intervention or not. It excludes however, the interference in armed conflicts *between* states and is limited to solely humanitarian purposes.

Thesis Outline

In undertaking examination of these questions, Chapter I will point out the changing notions of state sovereignty and the principle of non-intervention, in the light of the parallel development of human rights. It will stress that the principle of State sovereignty is not absolute anymore, but has, to a certain extent, been limited by the constant establishment of human rights mechanisms. It will attempt to determine whether human rights have evolved so far that, in case of gross violations, an intervention would be permissible and not in violation of a State's sovereignty and of the principle of non-intervention.

Chapter II will discuss whether the use of force for humanitarian purposes is compatible with the fundamental principles of the UN Charter. First, the legality on the use of force

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[2] *Ibid.*, p. 19.
[3] A.C. Arend, R.J. Beck, *International law and the use of force: beyond the UN Charter paradigm*, London, Routledge, 1993, p.114.

under the UN Charter will be outlined, especially in respect to Chapter VII of the Charter. It will show that in determining a situation as a threat to peace and security, the Security Council has broadened its perception to include humanitarian emergencies as a threat to the peace and security. The problems related to the Chapter VII mechanism raises yet another question; whether the use of force, for humanitarian purposes would be compatible with the UN Charter. By examining this question the Charter will be reinterpreted in the light of the human rights developments.

Chapter IV will argue that in cases of gross human rights violations, the international community shares a common responsibility to put an end to these atrocities. It will be examined on what scale human rights violations have to occur to justify an armed intervention. This will be discussed especially in the light of international criminal law. The Chapter ends with a discussion on the non-interventionist position and establishes why the adoption of a doctrine of humanitarian intervention would be a preferable option.

The final Chapter examines the question of humanitarian intervention using two case studies, Rwanda in 1994 and Kosovo in 1999. Given the backgrounds of the conflicts, the international response, in particular of the Security Council, will be examined. Both case studies end with a short conclusion on what lessons can be drawn. The second part of the Chapter deals with the establishment of guiding principles for a humanitarian intervention doctrine. It will be determined that these guiding principles represent a coherent framework, but, however, lack an effective and responsible enforcement mechanism. Therefore, focus has to be given on the existing UN mechanisms, which need to be strengthened rather than sidelined, and not on seeking alternatives outside the existing institutions.

CHAPTER I

1. State Sovereignty and the Principle of Non-Intervention

1.1. A Changing Notion of State Sovereignty

Inevitably when dealing with the question of intervention, one comes back to the question of State sovereignty. After World War II a system was established based on State sovereignty, which was surrounded by principles of non-intervention, respect for territorial sovereignty and equality, notwithstanding economic, social, cultural and other differences.[4] Although there were obvious differences in power, wealth and resources, the universal recognition of sovereign equality acknowledged the authority of non-Western states. The latter derived, as with all other states, their legitimacy exclusively from its people. Consequently, and for the first time in history, less developed, non-Western states were granted the same legitimacy as the more developed Western states.[5] Especially in the days during the Cold War, states like China, India and the USSR emphasized the importance of these principles.

The sovereignty principle is a fundamental part of international law; it is the core of how states interact on the international level. The principle of State sovereignty, in its traditional sense, contains, "the supreme authority of the organs of a state over all persons and objects within its territory."[6] In other words, a sovereign state is an independent one, it is the only one who has the clear legal right to impose what should be done in its territory, and is thus not at the dependency of any other state.[7] Thus, being an intrinsic part of international law, which is mainly based on consensus,

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[4] M. Shaw, *International Law*, 4th edition, Cambridge, Cambridge University Press, 1997, pp. 151-154.
[5] D. Chandler, *From Kosovo to Kabul – Human Rights and International Intervention*, London, Pluto Press, 2002, p. 127.
[6] M. Griffiths, I. Levine, M. Weller, *Sovereignty and Suffering*, in J. Harriss, *The Politics of Humanitarian Intervention*, London, Pinter, 1995, p. 35, [hereinafter Griffiths, et. al.].
[7] P. Malanczuk, *Akehurst's modern introduction to international law, 7th rev.ed.*, London, New York, Routledge, 1997, p. 17.
It has been suggested to replace the word 'sovereignty' by 'independence' as "the emphasise on sovereignty exaggerates their (the state) power and encourages them to abuse it." *Ibid*. p. 18.

reciprocity and voluntary obedience, poses yet another hurdle to overcome in the context of humanitarian intervention.[8]

The traditional international system puts the state as the main actor in the international arena, and regards the relationship between a state and its citizens to be one of internal affairs, being subject to State sovereignty. Increasingly, however, it has been recognized, that individuals are participants and subjects of international law, in so far as individual rights are embodied in the UN Charter and the human rights documents.[9] Individuals hold certain rights against their states, and the states are held to international scrutiny with regard to their human rights conduct.[10]

Michael Reisman developed this change even further and does not speak of state sovereignty anymore but of popular sovereignty.[11] In the traditional view, a government of any given state – no matter how it gained its legitimacy or how effective its human rights performance is – represents its people in international relations. This perception is not tenable any longer. The doctrine of absolute sovereignty, which would shield a state from the interference of the international community on behalf of the treatment of its citizens, has been limited by the imposition of a decent respect for human dignity.[12] In other words,

> *"States are not only abstract entities which possess sovereignty as a result of historical development; they are also the organizations of human beings who have formed a political community to determine their common life, and who have only submitted to a larger community in limited areas."*[13]

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[8] S.I. Skogly, M. Gibney, *Transnational Human Rights Obligations*, in «Human Rights Quarterly», vol. 24, no. 3, August 2002, p. 797.; Shaw, *Supra* note 4, p. 777.

[9] This will be further discussed in Chapter II, Section 3.1.

[10] F.K. Abiew, *The evolution of the doctrine and practice of humanitarian intervention*, The Hague, Boston, Kluwer Law International, 1999, p. 72.
Although a real step has been made, individuals may be called subjects to international law, but have however not reached the same status as states. (See R.J. Vincent, *Grotius, Human Rights, and Intervention,* in H. Bull, B. Kingsbury, A. Roberts (eds.), *Hugo Grotius and International Relations*, Oxford, Clarendon Press, 1990, p. 249).

[11] The concept of popular sovereignty had already been introduced through the American Revolution and ensured by the French Revolution. Popular sovereignty is defined as "governmental authority (..) based on the consent of the people in the territory in which a government purported to exercise power". (M.W. Reisman, *Sovereignty and Human Rights in Contemporary International Law*, in «American Journal of International Law», vol. 84, 1990, p. 867).

[12] R.B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, in «Iowa Law Review», vol. 53, 1967-1968, p. 333.

[13] G. Nolte, *Article 2(7),* in B. Simma, *The Charter of the United Nations – a commentary, 2nd ed.*, Oxford, Oxford University Press, 2002, p. 151, para. 5.

Following Reisman's stance, with the Universal Declaration of Human Rights (UDHR) the concept of "the will of the people"[14] had been expressed in a "fundamental *international* constitutive legal document and therewith the sovereign, in international law, had finally been dethroned."[15] Thus, the content of 'sovereignty' has changed to an extent that "can no longer be used to shield the actual suppression of popular sovereignty from external rebuke and remedy."[16] In this context, denying and violating people's rights is a violation of *their* sovereignty by the one who claims to be the sovereign – the state.

Yet, the concept of sovereign equality became for its supporters a legal invention behind which abusers of power can hide.[17] Gross human rights violations and the proliferation of armed conflicts *within* states, especially in the post-Cold War era, has led the international community into a debate concerning more action in humanitarian crises, at which very heart lies the principle of state sovereignty.

1.2. The Principle of Non-Intervention

International law deeply enshrines the principle of non-intervention. Its legal basis is to be found in the principle of state sovereignty. The respect for territorial sovereignty – which is basically the prohibition of a state to carry out any conduct in another state's territory without its consent[18] - is an essential foundation of international relations and is the basis for the principle of non-intervention. This principle is said to constitute part of customary international law and prohibits any kind of interference of a state into another state's matters that the latter clearly has the right to decide freely upon – such as the determination of their domestic and foreign policies - by the principle of State sovereignty.[19]

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[14] Universal Declaration of Human Rights, U.N. G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810, at 71(1948), Article 21(3), [hereinafter UDHR].
[15] Reisman, *Supra* note 11, p. 867-868.
[16] *Ibid*., p. 872.
[17] *See* e.g., *Ibid*.; P. Allot, J. Camilleri, J. Falk cited in Chandler, *Supra* note 5, p. 128.
[18] *See* Malanczuk, *Supra* note 7, p. 109.
[19] *See* Shaw, *Supra* note 4, p. 797.

As reasonable as this sound, it has been called into question since the establishment of human rights instruments, and even more, since the end of the Cold War. Several questions have arisen such as what constitutes prohibited interventions? What falls within the domestic jurisdiction? Where is the demarcation line to international concern? And especially in the context of this work, how much can human rights challenge the principle of non-intervention?

The precise scope of the prohibition of intervention is highly contested, especially when involving measures such as 'economic intervention'. Nevertheless, matters are clearer with respect to interventions involving military means; Interventions involving the threat or use of force have been prohibited and ruled out by Article 2(4) of the United Nations Charter.[20] After 1945 and throughout the Cold War the principle of non-intervention had a very strong moral basis as it, on the one hand it included the respect for different societies, with different cultural and economic backgrounds and on the other, it reduced the risk of states waging war against each others. Therefore, humanitarian intervention, by using military force, is often presented as the "antithesis" to the principle of non-intervention.[21]

The controversial aspects of this issue are represented by two schools of thought.
On the one side, a broad construction of the concept of non-intervention based on the analogous concept of state sovereignty is supported.

> *"If sovereignty not only is to denote the legal independence and self-determination of states, but also is supposed to have a substantive meaning in the real world of international relations (...), it must be protected from violations as a matter of law."*[22]

According to this view, there are certain matters that are required, as an essence of sovereignty, to be left outside the reach of international law. These matters of 'domestic policy' are viewed as not being subject to international interference. Further, it is argued that developments in international law cannot impinge upon a state's right to formulate domestic policy. No matter how international law evolves, it will always at

[20] For details see Chapter II, para. 1.1.2.
[21] A. Roberts, *The So-Called 'Right' of Humanitarian Intervention,* in H. Fischer, A. McDonald (eds.) «Yearbook of International Humanitarian Law», vol. 3, The Hague, Asser Press, 2000, p. 7.
[22] J. Delbrück, *A Fresh Look at Humanitarian Intervention under the Authority of the United Nations*, in «Indiana Law Journal», vol. 67, 1991-1992, p. 890.

base depend on a world order strictly based on sovereign states, and thus there will always be reserved a core area of state responsibility.[23]

Conversely, it can be argued that this restrictive view does not meet the demands of the international community any longer. What constitutes 'internal affairs' is a fluid concept that has altered as international law has evolved over time. This was recognized as early as 1923 by the Permanent Court of International Justice:

> *"the question of whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations ... it may well happen that, in a matter which ... is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations, which may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to a State is limited by the rules of international law."*[24]

In other words, whilst matters, which are not limited by obligations under international law, may fall under the domestic jurisdiction of a State. Where a rule is regulated by international law it is automatically removed from being solely within this domestic jurisdiction. In more specific terms, if a violation of that rule amounts to a breach of international law, an infringement of the interests of other states, a threat to international peace, or a gross violation of human rights, it can hardly be regarded as falling exclusively within the domestic jurisdiction of a state.[25]

2. An Alternative System - Human Rights as a Limit to State Sovereignty and 'Internal Affairs'

It has long been acknowledged that the observance of basic human rights cannot be the exclusive concern of a State's domestic policies, notwithstanding that they may involve crucial aspects of the relationship between the government and their citizens. The adoption of the Universal Declaration of Human Rights, "the cornerstone of UN

[23] *See* F.R. Téson, *A Symposium on Reenvisioning the Security Council: Article: Collective Humanitarian Intervention*, «Michigan Journal of International Law», vol. 17, winter 1996, p.328, [hereinafter Téson (1996)].
[24] PCIJ advisory opinion in the Nationality Decrees case in Tunis and Morocco (1923) Series B no.4, 24, 27; quoted in Abiew, *Supra* note 10, p. 72.
[25] Malanczuk, *Supra* note 7, p. 369.

activity"[26], for the first time established "the concept of human rights as basic rights of the individual human being"[27] on the international level. Since 1945, numerous other documents have been adopted to protect the basic human rights of individuals. This development also occurred in relation to the protection of civilians during armed conflict, enshrined in the Geneva Conventions and Protocols.[28] Initially, being a non-binding document, today the UDHR is perceived as customary law and some of its provisions are regarded as having reached *jus cogens*[29] status. The basic principles of international humanitarian law are also considered to be an obligation towards the whole international community.

Yet, many obligations of human rights law depend on the state for their implementation could thus be viewed as being exclusively a matter of internal affairs. This is particularly true of those rights that depend on states having reached a certain level of socio-economic development before they can be realised.[30] Once a commitment has been accepted on the international sphere, a state has an obligation to work towards it in the best way it sees fit, but actual implementation measures are to be decided freely by the state. Thus a State is constrained in the construction of its domestic policy only by the caveat that it must act in accordance with its obligations under international law.[31]

Having said that, during the Cold War era states were in practice reluctant to embrace these human rights documents. This was not least for the reason that most states were not willing to resign parts of their state sovereignty by accepting a legal obligation on the international level and still considered the treatment of their citizens to be a mere internal matter.[32]

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[26] Shaw, *Supra* note 4, p. 206.
[27] Malanczuk, *Supra* note 7, p.210.
[28] The Geneva Conventions, without the Protocols, are one of the most successful achievements in the field of human rights, as they have been ratified by 186 (at 1996) states and thus their ratification has virtually reached universality. (*See Ibid.,* p. 345).
[29] For a definition on j*us cogens, see Infra* note 54.
[30] The International Covenant on Economic, Social, and Cultural Rights (ICESCR) for instance merely imposes the duty to take steps "to the maximum of its available sources" to achieve "progressively the full realization" of the stipulated rights. ICESCR, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No.16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, Article 2(1).
[31] ICJ statement in the Nicaragua case: "A state's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law." (Quoted in D. McGoldrick, *The principle of non-intervention: human rights*, in M.B. Akehurst, C. Warbrick, V. Lowe, *The UN and the Principles of International Law*, London, Routledge, 1994, p. 93).
[32] Their unwillingness was already evident with the creation of the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR. The two Covenants only were adopted in 1966 and entered into force ten years later, in 1976. One of the reasons was that the ICCPR imposes a legal obligation on each party, to "respect and to

Nevertheless, with the constant development of human rights documents and mechanisms to monitor their implementation, a new approach concerning international human rights obligations emerged.[33] Although the cooperation of states together with the respective Committees is on a purely voluntarily basis, the human rights records of states were not to be hidden behind the notions of State sovereignty any longer.

The multilateral human rights networks and growing body of customary international law that requires respect for human rights slowly limited State sovereignty and the scope of domestic affairs. This respect for human rights has reached the status of being a universal value, one that the whole international community shares.[34] Or, in other words, the increasing commitment of states towards international treaties and conventions concerning human rights has let their domestic jurisdiction diminish.

All this development made clear that the general subject of human rights became an intrinsic part of international law and international relations and emerged as one of the major values throughout the world.[35] Thus, the line of reasoning that the treatment of a state's own citizens falls exclusively within its domestic jurisdiction lost its grounds.

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ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant ..."(ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, Art. 2(1)).

[33] Since 1970 a wide range of mechanisms has been established not only to control the implementation of these documents, but also to provide individuals and groups the possibility to complain against their government's conduct. Of particular importance to be mentioned of the international human rights implementation bodies are the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination or the United Nations Committee against Torture. All these were established under multilateral treaties and states, that became parties to the respective documents, gave their consent intervention under the conditions stipulated. By the time of 1993 a quarter of the international community had accepted these monitoring systems.

[34] The "universal value" at present is a very general one. There has been a consensus that the individual should receive protection and that the international community should contribute to this protection. Still, many states regard the treatment of their nationals as a matter being of exclusive domestic nature and thus reject – at a certain level of intensity – foreign reaction to their national human rights situation. (*See* Malanczuk, *Supra* note 7, p. 211).

In the region of the Council of Europe and the Organisation of American States human rights courts were created that could not only give recommendations but were also given "functional sovereignty". Moreover in 1991 an optional protocol to the European Convention was approved that allows individuals to bring a petition to the European Court of Human Rights. In this respect it also has to be mentioned that, although human rights have been incarnated into international rules, an effective enforcement mechanism is missing. Nonetheless, this is happening on the regional level where, as just mentioned, some advanced judicial mechanisms have been set up.

[35] *See* Abiew, *Supra* note 10, p. 72; B. Simma, *NATO, the UN and the Use of Force: Legal Aspects*, in «European Journal of International Law», vol. 10, no. 1, 1999, p. 1.

Although about half of the international community has not accepted certain legal obligation under some human rights documents, there is still a general agreement that human rights *per se* are a matter of international concern. However the disagreements mainly remain about definitions and the implementation. *See* K.K. Pease, D.P. Forsythe, *Human Rights, Humanitarian Intervention, and World Politics,* in «Human Rights Quarterly», vol. 15, no. 2, 1993, p. 295.

In particular since the beginning of the 1990's, special emphasise has been given to the idea of universality. This idea reflects the shift from the restrictions that were posed by the territorially bound nation-state towards global concern. The importance here is that it has been acknowledged that the subject of human rights is not the political citizen defined by the nation-state anymore, but the universal citizen, and that human rights cannot be territorially bound.[36] This shift from the emphasise of the state towards the individual being the centre of attention has transformed the international sphere.[37]
Having said that, in the post-war period gross human rights violations have become a "routine feature"[38] within states of the international community. This consequently raises the question whether the longstanding principle of non-intervention and the non-use of force may be sacrificed for more action to protect human rights.

However, one could consider that what once was within the domestic jurisdiction of a state and consequently subjugated to the principle of non-intervention, but has crossed the demarcation line to be of international concern. This suggests that intervention may be considered a viable legal option.[39]

3. Conclusion

The evolution of the human rights movement has brought the strict international state-order system under an increasing challenge. Regarding the latter, a world order based on independent and sovereign states can no longer unquestioningly be considered to be an appropriate organisation of the international community. Especially with the evolution of human rights, a system is forming that aims to protect the individual from its government. The context of intervention has changed and thus it is reasonable to argue that this principle of non-intervention needs some reconsideration in the light of

[36] *See* Chandler, *Supra* note 5, p. 4.
The universality of human rights is based on moral grounds. Human rights are for the maintenance of human dignity and exist by the mere existence of the individual. It is argued that they are not granted by the state or anyone else and can therefore also not be taken away. States or state agents consequently "only" have the duty to respect and ensure human rights. (*See* Abiew, *Supra* note 10, p. 85; A. Cassese, *International Law*, Oxford, Oxford University Press, 2001, p. 373)
[37] *See* Shaw, *Supra* note 4, p. 199; *See* "The idea of empowerment" in Chandler, *Supra* note 5, p. 3.
[38] Abiew, *Supra* note 10, p. 73.
[39] *See* e.g. Pease, Forsythe, *Supra* note, 35, p. 294.

the development in international relations.[40] A new international framework is needed, with existing norms being reinterpreted and the new constitutive human rights norms taken into account. In short, international law has to be updated or contemporised.[41]

While on the one hand, there is an increasing concern about human rights violations, there is on the other the principle of non-intervention, which fails to take this concern into account. In fact, international law protects two norms that uneasily co-exist, when one uses prohibited means (the use of force) to combat a prohibited action (human rights violations).[42] To a certain extent it sounds absurd keeping a system, while developing a new one that is incompatible with the old one.[43] It rather justifies and emphasizes the importance that the principle has to be reformulated and adjusted to the recent developments.[44] Insisting on the principle of non-intervention as absolute and the inviolability of state sovereignty is not tenable anymore.

Insisting that all the fundamental rights belong to all individuals, it is difficult to seriously deny a "substantial, ever expanding, international law of human rights received by and demanding the adherence of the international community"[45]. This leads to the question whether this body of international law, whose principles of humanity project the concomitant product of morality, can justify or even authorize breaking the longstanding rule of non-intervention and the prohibition on the use of force in the name of humanity.[46]

However, having acknowledged that the respect of human rights is owed *erga omnes*, no state must engage in grave and large-scale human rights violations. If they are perpetrated, there is an agreement among almost all states today that the international community is allowed to intervene by peaceful means.[47]

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[40] Abiew, *Supra* note 10, p. 72.
[41] Reisman (1990), *Supra* note 11, p. 873.
[42] *See* F. Harhoff, *Unauthorised Humanitarian Intervention – Armed Violence in the Name of Humanity?*, in «Nordic Journal of International Law», vol. 70, 2001, p. 79.
[43] *Ibid.*, pp. 78-79.
[44] *See* Abiew, *Supra* note 10, p. 73.
[45] H.S. Fairley, *State Actors, Humanitarian Intervention & International Law: Reopening Pandora's Box*, in «Georgia Journal of International & Comparative Law», vol. 10, no. 1, 1980, p. 45.
[46] *Ibid.*
[47] See A. Cassese, *Ex iniuria ius oritur- Are we moving towards International Legitimisation of Forcible Humanitarian Countermeasures in the World Community?*, in «European Journal of International Law», vol. 10, no. 1, 1999, available from http://www.ejil.org/journal/Vol10/No1/com.html.

CHAPTER II

1. Humanitarian Intervention and The United Nations Charter

1.1. Prevailing Principles of the UN Charter

After the experience of the two world wars, it was agreed that the use of force was to be held as a non-acceptable means to preserve the underlying value of international peace, but that State sovereignty and non-intervention had to be the prevailing principles for the common goal of peace. There was a consent among the representatives that even in cases of 'injustice', international peace had to prevail, for it was believed that the use of force to promote justice would have done a greater harm to the international community than accepting a particular injustice. Justice could thus not prevail over peace, but the maintenance of international peace and security was to be given priority.[48]

The two main principles in international relations, that are to maintain peace and security, are enshrined under Article 2(4), the principle of State sovereignty and the non-use of force, and under Article 2(7) which emphasizes the domestic jurisdiction of a state and the related principle of non-interference by others.

1.1.2. Article 2(4) of the UN Charter

Article 2(4), stipulates

> *"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 Purpose of the United Nations".*

[48] Of course the delegates at the Conference agreed that "justice – the promotion of human rights, the encouragement of self-determination, the rectification of economic problems, the correction of past wrongs, and the equitable resolution of host other problems" had to be sought, but in a peaceful way. Thus, interstate justice, human rights and other human values were subordinated to peace. (*See e.g.* L. Henkin, quoted in Chandler, *Supra* note 5, p. 160).

This Article is often referred to as the 'corner stone of peace'[49]. Article 2(4) is not only a policy that governs the international legal order, but also, more basically, a principle "that the use of force is no longer a general right of states professing membership in the community of nations."[50] The drafters of the UN Charter viewed this principle as fundamental to the survival of national entities and it was therefore seen as a higher law rather than only an achieved consensus among states. It has therefore been accorded the status of *jus cogens*[51].

This basic rule allows, as it stands, no exception. However, its scope cannot be determined by an exclusive reading of the Article, but has to be read in conjunction with the exceptions on the use of force enshrined in Articles 39-51. Despite the use of force for 'individual or collective' self-defence, the latter Articles also provide for collective measures against any offender, or situations determined by the Security Council as Article 39 situations, namely as a threat to peace and security.[52] Thus, the legitimate use of force was aimed for the conservation of values, but also to preserve the existing political and territorial status quo.[53]

During the preparatory work of the Charter, and particularly of the respective Article, attempts were made to define specific acts which would go against 'the territorial integrity' or 'political independence' of a state. In the end it was decided to leave the terms as broad as possible, so as to allow the Security Council greatest flexibility when dealing with a 'threat to the peace, breach of the peace, or act of aggression' under Article 39.[54]

It has been argued that by leaving out such definition, the drafters did not intended to restrict the threat or use of force to situations where a state's 'territorial integrity' or 'political independence' were at issue. Quite the reverse, where these two phrases were coupled together, it was to indicate the extent of the provision, namely to territorial

[49] Waldock, cited in A. Randelzhofer, *Article 2(4),* in B. Simma, *The Charter of the United Nations – A commentary,* 2nd ed., Oxford, Oxford University Press, 2002, p. 117.
[50] Fairley, *Supra* note 45, p. 62.
[51] Article 53 of the Vienna Convention on the Law of Treaties defines *jus cogens* as "a pre-emptory norm of general international law (...) accepted and recognized 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 character"; Vienna Convention on the Law of Treaties, 1155, U.N.T.S. 331, (1969).
[52] Article 39 and Chapter VII measures will be elaborated in Paragraph 2.
[53] Arend, Beck, *Supra* note 3, p. 34.
[54] *See* Griffiths, et. al., *Supra* note 6, p. 39.

inviolability.[55] Moreover, the wordings were included upon the desire of smaller states to emphasize the importance of being protected against violation by the more powerful states and, according to the *travaux préparatoires,* the terms were added exclusively to shield them, not to limit the scope of the prohibition.[56]

Gaps that possibly might have been left within the prohibition were filled by the inclusion of the phrase 'or in any other manner inconsistent with the Purposes of the United Nations.' The Purposes of the UN, stipulated in Article 1(1) of the Charter, are foremost the maintenance of international peace and security, and to that end prevention and removal of any threats to the peace.

1.1.3. Article 2(7) of the UN Charter

Article 2(7) was created to define the basic relationship between a member state and the Organisation, so as to safeguard to some extent a state's domestic jurisdiction[57] from the latter's actions.

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

Intervention, as has been defined by the General Assembly in its 1970 *Declaration on Friendly Relations*, comprises not only military intervention, but also 'all other forms of interference or attempted threats against the personality of a State or against its

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[55] Oppenheim cited in S. Chesterman, *Just War or Just Peace? – International Law and Humanitarian Intervention*, Oxford, Oxford University Press, 2001, p. 50; Randelzhofer, *Supra* note 49, p. 123, para. 35-36. 'Territorial inviolability' can be explained as "[t]he territory of a State is its legally protected preserve over which it enjoys an exclusive right to exercise authority where this is not limited by a valid international obligation." (B. Asrat, *Prohibition of Force under the UN Charter; A study of Article 2(4)*, Uppsala, Studies in International Law, 1991, p. 148).

[56] Randelzhofer, *Supra* note 49, p. 123, para. 36; D. Schweigman, *Humanitarian Intervention under International Law: The Strife for Humanity*, in « Leiden Journal of International Law», vol. 6, 1993, p. 101. However, as will be argued later, the inclusion of these phrases opened the Article for debate.

[57] The scope of domestic jurisdiction has already been discussed in Chapter I, para. 1.2.

political, economic and cultural elements'.[58] This definition has also been reassured by the International Court of Justice in the *Nicaragua* decision, by stating:

> *"[a] prohibited intervention must accordingly be one bearing on matters on which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices which must remain free ones. The element of coercion which defines and indeed forms the very essence of prohibited intervention is particularly obvious in the case of intervention which uses force."*[59]

Concerning the 'matters which are essentially within the domestic jurisdiction' of a state, the above elaboration of 'domestic jurisdiction' in Chapter I, Paragraph 1.2. is consistent with the *travaux préparatoires* of the respective Article. The term 'essentially' was included to ensure that the scope of domestic jurisdiction "is subject to evolution (...) as the state of the world, the public opinion of the world, and the factual interdependence of the world makes it necessary and appropriate that it should evolve."[60]

However, as embodied clearly in the Article, the prohibition of intervention is limited by Security Council actions under Chapter VII.

2. A Legal Framework For Humanitarian Intervention Under The UN Charter: Art. 39 and Chapter VII measures

As already mentioned above, the Charter provides for two exceptions on the prohibition of the use of armed force. The first exception is to be found under Chapter VII of the Charter. The second exception is provided by Article 51, which gives states that have become the victim of an act of aggression the possibility to act in self-defence.[61]

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[58] Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, U.N. Doc. A/8082 (1970), G.A. Res. 2625, 25th Sess. The Declaration repeatedly emphasized the importance of the strict observance by States not to intervene in the affairs of any other States as an essential condition to ensure that nations live together in peace.

[59] Nicaragua, ICJ Reports (1986), pp. 14, 107, para. 205, quoted in Nolte, *Supra* note 13, p. 155.

[60] John Foster Dulles, quoted in *Ibid.*, p. 158, para. 32.

[61] Article 51 UN Charter states:

> "*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security*

Article 39 authorizes the Security Council to determine a given situation as 'threat to the peace, breach of the peace, or act of aggression' and, according to the situation, to take appropriate measures to restore international peace and security.[62] Article 41 provides for the use of peaceful measures, or, if warranted by the situation, the Security Council can authorize a military intervention under Article 42.

If such determination is lacking, Article 2(7) supersedes and precludes any involvement of the Security Council.[63] Thus, Article 39 is also the only exception to Article 2(7) and its domestic jurisdiction clause.[64] This means that under the present view of the Charter, the forcible maintenance of international peace and security is exclusively the responsibility of the Security Council. Consequently, any state or group of states deciding to take action outside this framework, even on humanitarian grounds, would be in violation of the Charter.

2.1. A New 'Threat To International Peace And Security'

Initially, 'threat to international peace and security' was held to denote any 'threat to the peace, breach of the peace, or act of aggression' in "the international, trans-border relations of states"[65]. However, already during the Cold War this scope was broadened

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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."

This Article will not be discussed in further detail, as it is not relevant for the purposes of the present work. However, it is worth mentioning that during the Cold War this Article was often invoked by states for the unilateral use of force for humanitarian purposes. See for instance the Indian intervention into Pakistan in 1971. Initially, the Indian government claimed humanitarian motives to justify its intervention. However, in the end India argued to have acted in self-defence under this Article to defend its use of military force. The same justification was used by Tanzania when it intervened in Uganda in 1979.
It is also interesting to note that since 11 September 2001, self-defence in conjunction with humanitarian purposes has been invoked by the United States in its war against terrorism. *See further* pp. 30-31 of this thesis.

[62] Art. 39 UN Charter states:

> *"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."*

[63] *See* Delbrück, *Supra* note 22, pp. 891-896.
[64] *See* Chesterman, *Supra* note 55, p. 125.
[65] *See* Delbrück, *Supra* note 22, pp. 898-899.

when the systematic violation of fundamental human rights in Rhodesia[66] and South Africa[67] were determined by the Security Council as such threat and consequently invoked measures under Chapter VII.

However, as the UN Charter, in particular Chapter VI and VII, was created to regulate the conduct *between* states[68], the decreasing occurrence of inter-state conflicts and the proliferation of internal conflicts led to a changing definition of threat to the peace. Since the nature of the obstacles to the maintenance of international peace and security had changed, also the responsibility and role of the Security Council had been transformed. The Security Council noted, "[t]he absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological field have become threats to peace and security."[69] Especially in the post-Cold War era the scope of 'threat to peace and security' has been broadened so as to cover a wide range of activities that involve internal matters – civil wars or gross human rights violations – of a state.[70] It has also been recognized that the continuance of gross human rights violations within a state, although lacking an explicit international dimension[71], can pose such a threat.[72] Thus, the protection of human rights became a keystone in the concept of the maintenance of peace. This re-conceptualisation of international peace and security had led to a more active Security Council and therewith signed a new era

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[66] The Security Council responded to the illegal white-minority government in Rhodesia with mandatory sanctions.
UN Doc. S/Res/232 (1966), 16 December 1966; UN Doc. S/Res/253 (1968), 29 May 1968, cited in F. Grünfeld, *Human Rights Violations: A Threat to International Peace and Security",* in M. Castermans, F. van Hoof, J. Smith (eds.), *The Role of the Nation-State in the 21st Century,* Netherlands, Kluwer Law International, 1998, p. 429.
[67] Mandatory sanctions were also imposed against South Africa due to its *Apartheid* regime.
UN Doc. S/Res/418 (1977), 4 November 1977, cited in *Ibid*.
[68] Nolte, *Supra* note 13, p. 164, para. 51.
[69] Security Council Summit Statement Concerning the Council's Responsibility in the Maintenance of International Peace and Security, 47 UN SCOR (3046th mtg) UN Doc. S/23500 (1992), quoted in Chesterman, *Supra* note 55, p. 128.
[70] See Griffiths, et. al., *Supra* note 6, p. 40.
[71] An international dimension of an internal conflict would be for instance the threat of spillover of the conflict into neighbouring countries due to the flow of refugees. The intervention into Iraq in 1991 was in that respect the first time in the post-Cold War era that the internal situation, the ill treatment of a state's own people, was addressed by the Security Council. However, the internal situation had been internationalised due to the huge refugee flows and was thus threatening international peace and security.
[72] The case of Somalia in 1992 was ground-breaking, in the respect that the scope of invoking Chapter VII measures was extended to include human rights abuses, without actually having apparent internationally repercussion. In its Resolution 794, the Security Council determined that "the magnitude of human tragedy caused by the conflict in Somalia (...) constitutes a threat to international peace and security." (UN Doc. Res. 794, 3145th meeting 1992).

in which humanitarian purposes would be of an international concern.[73] Interventions, for humanitarian purposes, as we have examined, can be lawful and in conformity with the UN-Charter, under the formal requirements that the Security Council determines a situation as a threat to the peace and security and authorizes the use of force.

2.2. Problems Related To Humanitarian Intervention under Chapter VII

This development might be seen very positive from a human rights perspective. The Security Council has expanded its understanding of 'internal affairs' of a state and would – theoretically – intervene in the above mentioned situations. However, this is limited by the simple notions of *Realpolitik*. It is difficult to unlink the determination of a situation constituting a threat to international peace and security to the political willingness of states to actually take steps to remedy the situation, especially when there is no geopolitical interest in a particular area. However, the purpose of this work is not to scrutinize the geopolitical interests of Member states of the UN, but rather to address the problem connected with that, the actual [un-] willingness of Member states to take action under the legal framework of the UN Charter in situations of great human suffering. The arbitrariness of the current system – whose live is worth to intervene and whose not – is not only undermining international law but also the credibility of the UN. It is also at this intersection that the discussion as to whether there should be a doctrine of humanitarian intervention under the UN Charter, outside Chapter VII, has merit.

This question, if the use of force for humanitarian purposes humanitarian intervention conducted outside Chapter VII, can be compatible with the UN Charter will be tackled in the next Chapter. As I will argue, the Charter has to be read in a 'modern' rather than restrictive and textual way.

[73] To give a picture, in the period between 1946 – 1990 the Security Council had passed 24 resolutions citing the terms of Chapter VII, while in the post-Cold War era up till 1999 it has passed 166 resolutions of the same nature. Chesterman, *Supra* note 55, p. 12.

3. The Need for 'Updating' the UN Charter

It is arguable that as opposed to the very textual reading of the UN Charter, its provisions, especially Article 2(4) and 2(7), need to be re-read in the light of world developments since its adoption. Compared to today's situation, the Charter was drafted in a time of strong nation-states and limited international interaction.[74] As has been shown, the international world order based on sovereign states has been weakened in particular by the development of international human rights law since the adoption of the UDHR. The nature of conflicts has changed and the world has to deal more with intra-state conflicts rather than with inter-state ones. Taking into account all these developments, it is hard to argue that the UN-Charter has to be read the same manner, as in the days of its creations. Thus, it is not unreasonable to argue that the terms, which have been used by the drafters, have to be used in a modern context, since

> *"a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used."*[75]

The need for reinterpretation has been reassured by the Vienna Convention on the Law of Treaties, which came into force in 1969.[76] The ICJ has determined the Vienna Convention as custom and shads some light on the interpretation of treaties. The UN Charter, since being a multilateral treaty, the Vienna Convention is also applicable for the latter under the rules of interpretation stipulated in Article 31.[77] According to this Article, treaties have to be interpreted in their context and in the light of their object and purpose. The UN Charter and particularly its provisions, as a unique international instrument, must be given an interpretation that makes them relevant in a certain time period. Besides, "international law, to the contrary, must at all times reflect the cultural, political, economic and security policy positions of the international community"[78].

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[74] Reisman (1990), *Supra* note 11, p. 873.
[75] Towne v. Eisner, 245 U.S. 372, 376 (1918), quoted in *Ibid.*
[76] Article 4 of the Vienna Convention on the Law of Treaties stipulates that it applies only to treaties that have been concluded by states after the entry into force of the Convention. However, it applies also to treaties, which are subject under international law independently of the Convention, and thus applies also to the UN Charter.
[77] *See* Chesterman, *Supra* note 55, p. 48.
[78] Harhoff, *Supra* note 42, p. 81.

3.1. A reinterpreted United Nations Charter

Due to the development of international human rights law, it would be obsolete to exclude the human rights provisions when reading the UN Charter. Thus, in the context of humanitarian intervention, the most important Articles of the Charter, Articles 2(4) and 2(7), have to be read in conjunction with these human rights provisions.

Referring to the Preamble, among the main purposes of the members of the United Nations was 'to reaffirm faith in fundamental human rights'. Furthermore, Article 1(3) reiterates the purpose and requires members of the UN to promote and encourage respect for human rights and for fundamental freedoms. However, many states argued that the human rights provisions in the Charter did not impose any obligations, as they were rather *declarations* of purposes and principles.[79] However, due to the extensive and constantly increasing consideration of human rights within the UN reassured that the UN Charter designated the centrality of human rights as a matter of international concern.

In addition, and maybe more convincing, Article 55(c) requires that 'the United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms'. Followed by the provision in Article 56, its significance is emphasized, by calling upon all Members to 'pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55'. Thus, it would not be completely unreasonable to assume that the Charter itself imposes an obligation to act in relation to human rights.[80] By reading the other relevant provisions in the Charter in the light of these provisions, it will demonstrate that an intervention for humanitarian purposes is compatible with Charter.[81]

The very textual reading of Article 2(4) with its reference to the *trauvaux préparatoires* indicates that there was no intention at all but to exclude any possibility for the use of

[79] Nolte, *Supra* note 13, p. 160, para. 38. (Emphasis added).
[80] Abiew, *Supra* note 10, p. 76; Schweigman, *Supra* note 56, p. 101; F. Téson, *Humanitarian Intervention: an inquiry into law and morality*, New York, Transnational Publishers, Inc., 1997, p. 151, [hereinafter Téson (1997)].
[81] *See e.g.* B.M. Benjamin, *Unilateral Humanitarian Intervention: Legalizing the use of force to prevent Human Rights atrocities*, in «Fordham International Law Journal», vol. 16, no. 120, 1993, pp. 576-579; This view is further shared by Lillich, *Supra* note 12; Reisman (1990), *Supra* note 11; Téson (1997), *Supra* note 80; M. Bazyler, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, «Stanford Journal of International Law», vol. 23, 1987.

force outside the endorsed exceptions.[82] Having said that, and again taking into account all the changes in international relations and international law, one cannot read the Article in the light of 1945 conditions. One might find the argument curious - but the drafters of the Charter certainly did not have the same in mind with the words they were using than someone nowadays. Recalling the time when the Charter was drafted, this argument becomes fairly reasonable.[83] The prohibition in Article 2(4) was created by the aspiration of the superpowers in the aftermath of World War II and has therefore to be understood as to primarily outlaw aggression and territorial conquest. Thus, their intention was more concerned with the use of force for the purposes of forcefully annexing territory or of overthrowing a foreign government than with internal conflicts and gross human rights violations.[84] Consequently, I suggest that an intervention that is neither contrary to the territorial integrity nor to the political independence of the target state could be permissible. The use of force to protect human rights thus may be such manner.[85]

In addition, paragraph 7 of the Preamble states that 'armed force shall not be used, save in the common interest'. Taking into consideration all the human rights provisions in the Charter and being one of the purposes of the UN, the use of force for humanitarian purposes can consequently not be a 'manner inconsistent with the Purposes of the United Nations'. This is especially true since it has been increasingly recognized that the protection of human rights and international peace and security are interrelated.[86] It could be concluded that actions of this kind would then fall outside the scope of Article 2(4).[87]

Relating human rights to Article 2(4), the latter needs "to be construed in a manner that accords an important consideration to good faith."[88] This good-faith principle is sought,

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[82] Hereof, *Supra* note 42, p. 82; I. Brownie, *International Law and the Use of Force by States*, Oxford, Clarendon Press, 1963, p. 267.
[83] Téson describes the proposition to interpret international law in the light of the 1945 intentions of the drafters as "venturous". (*See* Téson (1997), *Supra* note 80, p. 154.
[84] Harhoff, *Supra* note 42, p. 81; N. Donizetti, *Lessons of International Law From NATO's armed Intervention against the FRY*, in «The International Spectator», vol. 34, no. 3, July - September 1999, p. 46; Amend, Beck, *Supra* note 3, p. 36; Téson (1997), *Supra* note 80, p. 151.
[85] *See* Abiew, *Supra* note 10, pp. 93-94.
[86] *See e.g.* Lillich, *Supra* note 12, p. 338.
[87] Schacht takes the position that the use of force in cases of gross human rights violations does not rest on an interpretation of Article 2(4) and its phrases, but solely "on an overriding need to act in the interest of basic humanitarian values." (O. Schacht, *The Right of States to Use Armed Force*, in «Michigan Law Review», vol. 82, 1983-1984, p. 1629).
[88] *See* Asrat, *Supra* note 55, p. 243.

on the one side, to protect the values that were initially included in the prohibition and, on the other, to expand the restrictive view on the Article in a manner, that any acts committed under the respective Article has been conducted in good faith.[89] This indicates that the prohibition on the use of force is not as comprehensive and absolute anymore in the sense as it was at the time of the drafting of the Charter. Therefore, it cannot mean that any unilateral[90] force is ruled out, especially since the political climate has changed significantly to one where the observance of human rights has obtained "the status of prevailing and cogent principle in international relations."[91]

Overriding Article 2(7) in relation to humanitarian intervention, the systematic and widespread violations of human rights of one's own nationals will today no longer fall within its scope. Its counterargument has lost ground with all the human rights provisions in the Charter and the tendency in international law regarding human rights.[92] Thus, one may draw the conclusion that since the matter does not fall within the domestic jurisdiction any longer, the use of force would not constitute a violation of the non-intervention principle.[93]

Article 24 further strengthens the assumption, that humanitarian intervention outside the traditional Chapter VII enforcement would be compatible with the Charter. This Article confers the primary responsibility for the maintenance of peace and security on the Security Council. Thus, one would suggest that this obliges the Security Council to impose collective action under Chapter VII in cases of 'threats to the peace', 'breaches of the peace', or 'acts of aggression'.[94] It could be concluded that the UN had failed to realize its original aims. The collective security system and its enforcement mechanism have been not very efficient if not indeed hardly existent. It therefore has been suggested that, due to the failure of the UN to implement such mechanism, and the consequent failure of the Security Council to fulfil its primary responsibility, a secondary responsibility, in the present case to protect human rights, would rely on

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[89] *Ibid*.
[90] The word "unilateral" here is meant in the sense as without authorization from the Security Council.
[91] Harhoff, *Supra* note 42, p. 82.
[92] Schweigman, *Supra* note 56, p. 96.
[93] *Ibid.* p. 98.
[94] The International Commission on Intervention and State Sovereignty (ICISS) believes that the Security Council has a responsibility to protect a population that is suffering serious harm under its state. (International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty,* Ottawa, International Development Research Centre, 2001, p. 52, para. 6.24., pp. 54-55, para. 6.37-6.39, [hereinafter ICISS Report].

states, which would then again be compatible with Article 2(4), at least in the most serious cases.[95]

4. Conclusion

Humanitarian intervention under the UN Charter can thus be seen compatible with its Articles 2(4) and 2(7) – in the light of the world's development since 1945. Moreover, being one of the purposes of the UN and taking together all the human rights provisions in the Charter, it may be concluded that the Charter imposes an obligation to intervene in order to restore human rights. Since the Security Council often fails to take its responsibilities under the Charter, it is not obsolete to assume that this obligation not only rests upon the Security Council but on the international community as a whole. I will explore the international community's responsibility in the next Chapter and, with the conclusion drawn in this and the former Chapter, I will demonstrate why a non-interventionist position is not feasible.

[95] *See* Abiew, *Supra* note 10, p. 100; Harhoff, *Supra* note 42, pp. 82-83; Bazyler, *Supra* note 81, pp. 578-579; R.G. Wright, *A Contemporary Theory of Humanitarian Intervention*, in «Florida International Law Journal», vol. 4, 1989, p. 439.
Even within the Security Council such position has been taken, by the representative of Slovenia. It was stated that the Security Council does not have the monopoly on decision-making regarding the responsibility of keeping international peace and security. *See* Account of the Security Council debate, UN Press Release SC/6659, 26 March 1999, cited in Roberts, *Supra* note 21, p. 28.
In the light of the UN's effectiveness it has been put forward by Asrat that Article 2(4) has "a conditional relationship with the collective security scheme of the Charter, and its scope would need to reflect the degree of that scheme's effectiveness. The more the UN is effective, the smaller will be the area left for the unilateral resort to force." (Asrat, *Supra* note 55, p. 243).

CHAPTER III

1. A Call for Humanitarian Intervention

1.1. International Responsibility

When within the boundaries of a state gross human rights violations are committed "which shock[] the conscience of mankind"[96], one might argue that the state loses its legitimacy under international law. If the state is unwilling or unable to protect the basic rights of its citizens, this duty to protect is passed on to the international community, at least in "exceptional circumstances".[97]

It has been increasingly recognized that every member of the international community has a dual responsibility: an external one, to respect the sovereignty of other states, but also an internal one, to respect the dignity and basic rights of the people inside the state.[98] If this responsibility is neglected, one will get the impression that in the absence of an effective machinery to protect human rights, individuals are less protected than ever before.[99] But if the above outline is correct, state sovereignty cannot be regarded as absolute anymore, and together with the human rights provisions in the Charter and the human rights instruments themselves a limit is posed to the sovereignty, preventing States from using it as a shield to hide their violations of human rights.

Given the shift away from the absolute principle of sovereignty towards a greater moral engagement and towards an international community that is based on common values and norms, there is also a common willingness to uphold these norms. Consequently, it is hard to morally justify a strict non-interventionist position, while people are slaughtered, and it was well known that this could have been stopped or even prevented

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[96] H. Lauterpacht, *International Law and Human Rights,* 1950, p. 32 quoted in Lillich, *Supra* note 12, p. 332.
[97] Holzgrefe, *Supra* note 1, p. 52.
[98] *See* ICISS Report, *Supra* note 94, p. 8, para. 1.35.
The duty of a state is not only to respect, but also to protect human rights or to respond to the violations and is owed *erga omnes*. (*See* J.I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, in «Vanderbilt Journal of Transnational Law», vol. 32, no. 5, November 1999, p. 1232; Téson (1997), *Supra* note 80, p. 16).
[99] *See* Lillich, *Supra* note 12, p. 344; Bazyler, *Supra* note 81, p. 602.
Especially in cases where the UN fails to act and additionally the flaws in the human rights protection mechanisms must give the impression that gross human rights violations are tolerated. *See* Bazyler, *Supra* note 81, p. 596.

through intervention.[100] "[T]o require a state to sit back and watch the slaughter of innocent people in order to avoid violating blanket prohibitions against the use of force is to stress black letter at the expense of far more fundamental values."[101] In his speech, the former Secretary-General Pérez de Cuéllar acknowledged "we have probably reached a stage in the ethical and psychological evolution of Western civilization in which the massive and deliberate violation of human rights will no longer be tolerated."[102]

1.2. Severity of Human Rights Violations

The question that springs into mind is how severe human rights violations must be to justify an intervention. Humanitarian intervention is based on the shared value of preserving humanity. Thus, generally speaking, if a state violates this value other states of the international community are authorized to intervene on the grounds of humanity.[103] The problem arising here is, that there is no consensus regarding human rights norms.[104] Nonetheless, it has been suggested that in cases of crimes against humanity, massacres, mass expulsions but also assassination of political opponents, terrorising the society, disappearances of individuals intervention could be justified.[105] Undoubtedly, there has to be a limitation, as this list of crimes would also include the repressive conduct of non-democratic regimes. Certainly, their conduct constitute clear violations of international law and should be condemned by the international community through, for instance, diplomatic or even economic sanctions.[106]

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[100] *Ibid.*, p. 592.
[101] Lillich, *Supra* note 12, p. 344.
[102] Speech of the former Secretary-General Pérez de Cuéllar, 22 April 1991, quoted in N. Rodley, *Collective intervention to protect human rights and civilian populations: the legal framework*, in N. Rodley (ed.), *To Loose the Bands of Wickedness - International Intervention in Defence of Human Rights*, London, Brassey's, 1992, p. 35.
[103] This position was already taken in the pre-Charter era, where natural law and later legal positivism formed the basis of international law. *See* Bazyler, *Supra* note 81, pp. 570-572.
[104] This problem becomes even greater, if one assumes that the Security Council is the only organ that has enforcement power. The lack of consensus regarding human rights norms among the permanent members will, in cases that ask for remedial action because of gross human rights violations, be very unlikely. *See* T.J. Farer, *Humanitarian Intervention before and after 9/11: legality and legitimacy*, in J.L. Holzgrefe, R.O. Keohane (eds.), *Humanitarian Intervention – Ethical, Legal, and Political Dilemmas*, Cambridge, Cambridge University Press, 2003, pp. 66-67.
[105] J. Slater, T. Nardin, *Nonintervention and Human Rights*, in «The Journal of Politics», vol. 48, 1986, pp. 89-91.
[106] *Ibid.*; *See also* Bazyler, *Supra* note 81, p. 600; ICISS Report, *Supra* note 94, p. 34, para. 4.25.

By using such a broad record, the system of prohibiting foreign intervention would likely collapse and be open for abuse.[107] Therefore, the suggestion, that human rights violations should be gross, systematic and persistent[108] limits the record to an extent, so that a balance can be found between combating the most severe human rights violations while maintaining international stability and state sovereignty by restricting intervention to the most severe cases.[109]

1.2.1. The "Criminalization"[110] of Human Rights: Holding Perpetrators Accountable

Some human rights have evolved so far, that they have reached the 'criminalization stage', and their violation is punishable under international criminal law.[111] This system of accountability has especially been applied in the post-Cold War era with the establishment of international *ad hoc* criminal tribunals - the International Criminal Tribunal for Former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994, where gross human rights violations or crimes against humanity are being punished.[112] The development in this particular area has already proven that the slaughter by an authority of a state of its own people will not remain unpunished for the notion of its sovereignty.[113]

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[107] *See* Slater, Nardin, *Supra* note 105, pp. 88-89.
[108] *See e.g*. Benjamin, *Supra* note 81, p. 126; Wright, *Supra* note 95, p. 454.
What constitute gross, systematic and persistent human rights violations will be further elaborated in Chapter IV, Paragraph 3.
[109] The state itself is seen as the best provider for upholding human rights, due to the reason that states can – to a certain extent – be held responsible while the international community is lacking such accountability. The respect for human rights depends also on international stability and therefore it is of utmost importance to keep the state system but to find a balance with the human rights system. *See* Advisory Council on International Affairs, Advisory Committee on Issues of Public International Law, *Humanitarian Intervention*, no. 13, The Hague, April 2000, p. 9, [hereinafter AIV/CAVV Report].
[110] M.C. Bassiouni *The Proscribing Function of International Criminal Law in the Processes of International Protection of Human Rights,* in «Yale Journal of World Public Order», vol. 9, 1982-1983.
The term is used in the connection of the development of certain human rights, from being a non-binding norm to the final level, of being articulated in a penal proscription.
[111] *Ibid.* pp. 195-196.
Human rights of such a penal nature are for instance war crimes, crimes against humanity, genocide, torture. It is worth mentioning that holding perpetrators of gross human rights violations accountable became one of the strongest enforcement mechanisms of human rights.
[112] Skogley, Gibney, *Supra* note 8, p. 788.
[113] *See* Roberts, *Supra* note 21, p. 21.

It is important to mention here, in the context of humanitarian intervention, the 1948 Genocide Convention[114]. With this Convention the international community had recognized the limits of state sovereignty, as it is the responsibility of the international community "to take such action as they consider appropriate for the prevention or suppression of genocide" and to punish its perpetrators (within the framework of the United Nations). Some of the Convention's provisions are considered as customary today[115] and hence it has been widely recognized that, on the level of state responsibility, it imposes an obligation towards all member states to require putting an end to the acts of genocide.[116]

The point to be made here is, that on the one side these acts are condemned by the international community and, even more, are punishable under international criminal law. On the other side, one might argue, keeping a strict non-interventionist position seems contradictory and opens the door to a "morally intolerable proposition that the international community, (...), is impotent to combat massacres, acts of genocide, mass murder and widespread torture."[117]

Combined with the aforementioned, a legal doctrine of humanitarian intervention with a clear working set of standards would, in the first place, make it easier to determine whether an intervention is justified and would also assist in setting up the intervention. Moreover, the possibility of abusing the doctrine will be minimized because of the required criteria. In addition, states will have to justify their actions in front of the international community and other international and national actors. In a world of modern technology and a crucial role of the media, it is unlikely that a state can hide its purely self-interests and pretend to intervene for humanitarian purposes. Besides, interveners also face the risk that a messy or unsuccessful humanitarian intervention will increase their own potential costs not only in economic terms but above all in human lives.[118]

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[114] Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948), [hereinafter Genocide Convention].
[115] See Chapter I, para. 2.
[116] Cassese, *Supra* note 36, p. 253; judgement of the ICJ in the *Genocide (Bosnia-Herzegovina v. Yugoslavia)* case (1996), cited in Simma, *Supra* note 35, p. 2.; Holzgrefe, *Supra* note 1, p. 44.
However, this does not conclude, that the Convention as such establishes a right to humanitarian intervention.
[117] Téson (1997), *Supra* note 80, p. 4.
[118] Wright, *Supra* note 95, p. 448. See for instance the US failure in Somalia in 1992. It has often been argued that the loss of 18 US soldiers in Somalia has made the US government reluctant to engage in humanitarian or peacekeeping operations. *See* http://www.pbs.org/wgbh/pages/frontline/shows/evil/, 20.06.2003.

2. The Non-Interventionist Position

The main objective to humanitarian intervention as an exception on the use of force is the fear that powerful states would use it under the pretext of human rights, while their real motives would be to pursue their own state interests. A dangerous development backwards to the pre-Charter era could then arise,[119] as the past practices of states that have invoked the doctrine of humanitarian intervention reveal.[120]

In fact this position is not so mistaken. The end of the Cold War "opened the prospect of effectively reasserting a three-fold division of the universe of force into aggression, self-defence, and enforcement action authorized by the Security Council."[121] However, this 'effective enforcement', has now come under an increasing challenge in the 'war against terrorism' launched post-events of 11 September 2001.

Acting in self-defence under Article 51 of the UN Charter, the United States has affirmed not only to act forcefully in response to an armed attack, but would also make use of force for pre-emptive measures. Such measures would go against terrorists themselves, states that host terrorists or states that possess or produce weapons of mass destruction. Its use of force since then, to overthrow a regime that has been labelled as 'aggressive' and to pre-empt suspected terrorists has in particular opened the debate on 'self-defence' and Article 51, and in general the debate on the legitimate use of force.

Linked to humanitarian intervention, advocates of a non-intervention doctrine see themselves reassured in the wake of 11 September events. The widening on the use of force (without Security Council enforcement) would just open another loophole under whose pretext national interests can be enforced[122], and thus, as an accepted consensus

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[119] *See* J.E. Rytter, *Humanitarian Intervention without the Security Council: From San Francisco to Kosovo -and Beyond*, in «Nordic Journal of International Law», vol. 70, 2001, p. 135.

[120] One example frequently cited is Hitler's intervention into former Czechoslovakia in 1938, which was claimed to be for humanitarian purposes to protect the minority.
However, it has been argued that the harm would have occurred anyway, with or without the doctrine of humanitarian intervention, but under the guise of e.g. self-defense. *See e.g.* Wright, *Supra* note 95.

[121] Farer, *Supra* note 104, p. 58.

[122] For further details on the impact of the 11 September events on humanitarian intervention, see *Ibid.*
It is interesting to note that due to the claims of the United States, in its war against terrorism, to act also in humanitarian purposes, it is questioned whether such legal doctrine of humanitarian intervention would not be misused. However, it is seen as rather unlikely "that the conditions likely to foster interventions for purposes of counter-terrorism would frequently coincide with latent or actual gross violations of human rights of the kind that have in the recent past fuelled calls for humanitarian intervention". (*Ibid.*, p. 85).

of the international community, a legal doctrine of humanitarian intervention should remain absent.[123]

2.1. The 'Excusable Breach'[124] Approach

Under the current system, states may refrain from intervention when their interests are not at stake, in the absence of a clear legal basis or when they are likely to be condemned by the international community for acting outside of the UN authority.[125]

Some Non-interventionists have however acknowledged, that there may be 'extraordinary circumstances', which warrant intervention. Being opposed to the development of a legal doctrine of humanitarian intervention, they see the best alternative in an unauthorized intervention, based on an *ad hoc* assessment of the situation, while clearly acknowledging that this conduct is in violation of international law. This approach emphasizes the 'exceptional circumstances' of the intervention and thus recognizes its legitimacy.[126] However, any codification of humanitarian intervention or modification of existing legal rules is condemned.

One clear advantage of such an approach is that whilst it primarily tends towards the preservation of the existing international order and rules, it still allows some room for manoeuvre when the Security Council is deadlocked.[127] In case of emergencies and when there is the need to halt gross human rights violations, but "when the dictates of morality conflict with those of international law, it is the dictates of morality that must control."[128] This justification, based on morality that the value of human life has to take precedent over the legal principles[129], will not accept an exception on the use of force but will leave

[123] Fairley, *Supra* note 45, p. 61; Arend, Beck, *Supra* note 3, p. 37.
[124] J. Stromseth, *Rethinking humanitarian intervention: the case for incremental change*, in J.L. Holzgrefe, R.O. Keohane, *Humanitarian Intervention – Ethical, Legal, and Political Dilemmas*, Cambridge, Cambridge University Press, 2003, p. 243.
[125] *See e.g.* AIV/CAVV Report, *Supra* note 109, pp. 12-13.
[126] *See* Stromseth, *Supra* note 124, pp. 242-243; Rytter, *Supra* note 119, pp. 150-151.
[127] *See e.g.* Rytter, *Supra* note 119, p. 150.
[128] Wright, *Supra* note 95, p. 444.
[129] *See* Abiew, *Supra* note 10, p. 99.

a small loophole for interventions.[130] Above all, the exclusive legal authority of the Security Council is maintained.

This approach, however, has shown to be likely to fail. It is arguable that this approach of dealing with gross human rights violations is very 'selective' and additionally gives states a loophole for abusing the doctrine for their own interests. Advocates of keeping the current system and justifying an intervention as 'excusable breach' in face of large-scale human rights violations and mass-killings,[131] will be faced with the same troublesome question, as when looking for a humanitarian intervention outside the provided UN Charter framework; the question of who is going to determine the necessity of a situation and who will decide of whether to intervene or not? It can therefore not be denied, that the establishment of clear criteria would to a large extent tackle such a misuse.

Additionally, non-interventionists in favour of the 'excusable breach' fail to address that conducting unauthorized humanitarian interventions *in the long-run,* would call the existing legal rules into question. By denying the formulation of a doctrine of humanitarian intervention, the likely result will be "a vacuum of international "lawlessness" in the field of use of force."[132]

Therefore, this position cannot be maintained any longer. Admittedly, there are only a few states that are powerful enough to engage in humanitarian interventions, while a lot more would be subject to it. And it is also true that the doctrine has been invoked by states to secure their interests.

Yet, by abolishing the doctrine of humanitarian intervention, the abuses associated with such doctrine, such as the intervention in weak states by the strong ones, will not be abolished. If not under the pretext of humanitarian intervention, and by referring back to the example of the 'war against terrorism', "the iniquitous abuse will occur anyway under the guise of some other equally suitable doctrine."[133] Therefore focus should be given on how best to avoid abuse of such a doctrine by a powerful state. The clearest

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[130] This view is shared by *e.g.* Rytter, *Supra* note 119; Schweigman, *Supra* note 56, T.M. Franck, N.S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, «American Journal of International Law», vol. 67, 1973, pp. 299-300.

[131] *See e.g.* Franck, Rodley, *Ibid.*, p. 276.

[132] Rytter, *Supra* note 119, p. 151.

[133] Wright, *Supra* note 95, p. 443. *See also* V.P. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti – Revisiting the Validity of Humanitarian Intervention Under International Law – Part I,* in «Denver Journal of International Law and Policy», vol. 20, no. 2, 1992, p. 309, [hereinafter Nanda - Part I].

way forward would be to establish a coherent doctrine with clear criteria, which would also help to strengthen the existing mechanisms.[134]

3. Peaceful Settlement of Conflicts

Lastly, it has to be mentioned that without doubt the use of force to solve a conflict is a clear resignation on the use peaceful means when a conflict is about to evolve. Once a certain conflict or mass human rights violations in a state captures the international agenda, the dispute has often come beyond the point where peaceful means would remedy the situation. Therefore, it can be undoubtedly said that the use of armed force is "by definition a failure of prevention."[135] It is unquestionable that in the long-term interest of maintaining international peace the establishment of an effective conflict prevention and management mechanism would be more successful.[136] To use armed force for humanitarian purposes is against the purposes of the United Nations "to save succeeding generations from the scourge of war".[137] In the light of human rights, the ICJ added, "the use of force could not be the appropriate method to monitor or ensure such respect".[138] The plan for such a mechanism has already been raised in 1992 and again in 2001, where a Commission was set up to deal with the subject.[139]

But until such mechanism is deployed, it has been sufficiently proven that an exception on the use of force for humanitarian purposes is needed. This will be demonstrated in the next Chapter by examining the cases of Rwanda in 1993-4 and Kosovo in 1998-9.

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[134] *Ibid*.
[135] Harhoff, *Supra* note 42, p. 103.
[136] See e.g. Boutros-Boutros Ghali, *An Agenda for Peace – Preventive Diplomacy, Peace-making and Peace-keeping,* A/47/277 - S/24111, 17 June 1992, [hereinafter Boutros Ghali]; ICISS Report, *Supra* note 94, pp. 19-27; Harhoff, *Supra* note 42, pp. 104-105.
[137] *See* Preamble of the UN Charter.
[138] Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement, ICJ Reports 1986, para. 243, cited in A. Ryniker, *The ICRC's position on "humanitarian intervention"*, in «International Review of the Red Cross», vol. 83, no. 842, June 2001, p. 529.
[139] *See* Boutros Ghali, *Supra* note 141; ICISS Report, *Supra* note 94.

CHAPTER IV

1. Case Study – Rwanda 1994

1.1. Background to the Conflict in Rwanda

The population of Rwanda consisted of two ethnic groups, the Hutus, forming the majority of the population, and the Tutsis. Until 1961, where the Hutus gained control over Rwanda upon its independence[140], the Tutsis minority was in power. In fear of the Hutus-government, over 200,000 Tutsis fled to Uganda and other neighbouring countries.[141]

In a military coup in 1973, General Habyarimana, a Hutu, assured power and ruled over Rwanda for the next 20 years. To some extent he was able to maintain control by refusing repatriation to Tutsis who had earlier fled to other countries. Therefore, as a result of numerous human rights violations against Tutsis and moderate Hutus, in 1990, the Organisation of African Unity (OAU) and the United Nations High Commissioner for Refugees (UNHCR) entered into negotiations with Rwanda's authorities to encourage political reforms. Shortly after, Tutsis, that had earlier fled the country, had organized themselves in the Rwandese Patriotic Front (RPF) and invaded from Uganda, killing and displacing several thousands. On 4 August 1993, the government of Rwanda and the RPF reached consent and signed the Arusha Peace Agreement. Whilst the Habyarimana government ostensibly cooperated with those interested in reforms, at the same time the aim was to promote hatred against Tutsis and moderate Hutus. The Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions in his April 1993 report determined that there were serious human rights violations committed, primarily against people belonging to the ethnic group of Tutsis and that a promotion of hatred was waged. All Tutsis that were living in Rwanda

[140] Prior to that date, Rwanda had been colonized by Germany and Belgium after World War I. Only its colonizers exploited ethnic differences between the two homogenous groups. After instituting democratic reforms, a continuing fight between the two groups commenced. For details on Rwanda's history and a comprehensive background to the conflict, S*ee* Human Rights Watch, *Leave None to Tell the Story – Genocide in Rwanda,* March 1999, available from http://www.hrw.org/reports/1999/rwanda/, 20.06.2003, [hereinafter HRW Report].

[141] V.P. Nanda, T.F. Jr. Muther, A.E. Eckert, *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia – Revisiting the Validity of Humanitarian Intervention Under International Law – Part II*, «Denver Journal of International Law and Policy», vol. 26, no. 5, 1998, p. 847, [hereinafter Nanda – Part II].

were associated with the RPF and Hutus that were members of the opposition party were labelled as collaborators.[142] The situation deteriorated and killings based on ethnic and political motives increased.

"The floodgate of ethnic hatred"[143] was opened when the plane of President Habyarimana was shot down on 6 April 1994. Within a few hours the Presidential Guard, members of the Hutu-government, the police, the military and the Interahamwe militia - a Hutus militia group - responded to the assassination of their President by executing members of the opposition party or people that were considered as posing a threat in their campaign of maintaining power. Lists with names of political opponents were distributed and were "hunted down in a house-to-house operation."[144] Having executed the Tutsi leadership and the intelligentsia, everyone whose identity card verified Tutsi ethnicity was killed, and when this became too time-consuming, everyone physically resembling as a Tutsi was murdered.[145] Roadblocks were set up to prevent the invasion of the RPF. The latter responded with violence, but on a much lesser scale. During this time the Hutu radio station Radio Télévision Libre Milles Collines incited and coordinated the killings.

The genocide lasted until July 18, when the RPF took control over the country and soon after established a government with a broad representation. During this period of time, from April to July 1994, within about 100 days, more than 800,000 people had been killed[146] and around 1.5 million people had been displaced.[147]

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[142] *See Ibid.*, p. 848; Independent International Inquiry on Rwanda, *Report of the Independent Inquiry into the Action of the United Nations during the 1994 Genocide in Rwanda,*15 December 1999, para. 'Arusha Peace Agreements', available from http://www.ess.uwe.ac.uk/genocide/Rwanda.htm, [hereinafter IIIR Report]
[143] Nanda – Part II, *Supra* note 141, p. 848.
[144] Holzgrefe, *Supra* note 1, p. 15.
[145] *Ibid*.
[146] *See* IIIR Report, *Supra* note 142, para. 'Introduction'.
[147] *See* Nanda – Part II, *Supra* note 141, p. 848.

1.2. The Role of the International Community in the Conflict

Early UN efforts, commencing in 1990, primarily focused on a liberalisation and a cease-fire between the Hutus-government and the RPF. Its apex was reached in 1993, when both belligerent parties signed the Arusha Peace Agreement. The agreement, together with a request of both parties, provided for UN assistance in implementing the agreements, including a broad-based transitional government.[148] It is worth mentioning, that only several weeks later, a report was published concerning the ongoing violence in Rwanda, which at that early stage discussed the applicability of the term 'genocide'. However, this was largely ignored by the international community.[149] At the beginning of October 1993, the UN assistance was formally established with the unanimous adoption of Resolution 872, which provided for the set up of the "United Nations Assistance Mission for Rwanda" (UNAMIR).[150] The UN mission's task was first, to establish a transitional government, second, to demobilize the armed forces, third, to expand and monitor the Demilitarized Zones (DMZs) and fourth, to conclude with nationwide elections.[151] Initially succeeding in its task, already in November, after two mass slaughter that had occurred in and around the DMZs, the Force Commander of UNAMIR requested an expanded mandate that would allow the mission to use force in responding to the ongoing crimes. The request was basically ignored, not least to the decreasing support and cooperation of the UN Member States, which was replicated in the vast logistical and material problems UNAMIR was facing.[152]

Although a second battalion of UN troops was to be deployed with the adoption of Resolution 893 in early January[153], the task of installing the transitional government was delayed and the situation in the country deteriorated further. Just five days after this Resolution was adopted, the Force Commander informed the UN that he had

[148] This task was carried out by the Neutral International Force (NIF), which, apart from supervising the implementation of the agreement, also was supposed to provide security throughout the country and to ensure security of the delivery of humanitarian assistance. Previously both, the government and the RPF had requested for such a force. For further details *see* IIIR Report, *Supra* note 142, para. 'Arusha Peace Agreement'.
[149] Report of the Special Rapporteur of the Commission on Human Rights on extra judicial, summary or arbitrary executions, Mr Waly Bacre Ndiaye, visit from 8 to 17 April 1993. Even if the violence did not meet the threshold to be fully considered as genocide, he, however, pointed to the serious risk of it. Yet, his report had been largely ignored. For further details *see Ibid.*
[150] UN Doc. S/RES/872 (1993), 5 October 1993, 3288th meeting.
[151] For UNAMIR's detailed mandate, *See Ibid.*
[152] UN members had agreed that a peacekeeping force was needed, but wanted to keep it at low costs. Especially the United States demanded for economy, but also Belgium tried to keep its costs low and only sent half of the initially recommended forces. (See HRW Report, *Supra* note 140, para. 'Economies and Peacekeeping').
[153] UN Doc. S/RES/893 (1994), 6 January 1994, 3326th meeting.

received information from a secret, but highly reliable source, indicating that the Hutu militias were preparing a massacre in Kigali, upon which the Commander requested permission to disarm the group. This demand was also turned down for the reason that it would have constituted a hostile act against the Rwandan government.[154]

Until the assassination of President Habyarimana, several reports were directed to the UN, reporting on the daily worsening situation, the stockpiling of ammunition, and also the increasing danger to the security of the UN military and civilian personnel, followed by repeated requests for an expanded mandate for UNAMIR. As the deployment of the transitional government had not occurred yet, one day before the president's plane was shot down, the Security Council adopted Resolution 909, urging the belligerent parties to immediately implement the agreements, and further expanded UNAMIR's mandate.[155]

All the efforts by UNAMIR to get the parties to agree on a cease-fire and to implement the Arusha Agreements broke down entirely with the assassination of the President. The killings of ten Belgium soldiers, one day after, led to withdrawal of the Belgium contingent and reduced the forces from 2165 to 1515.[156] Another request from the Force Commander, to stop the genocide was disapproved. Priority had to be given to avoiding putting UNAMIR forces at risk, rather than to protecting civilians. Due to this order, troops were removed from areas that had been under UN protection and left civilians to their assassins. More than one thousand people died due to this order.[157]

In his special-report submitted to the Security Council on 20 April 1994, the Secretary-General proposed three options for further action:

The first option was, acting under Chapter VII, to massively expand the military presence and to force the belligerent parties, by using all necessary means, including the use of force, to a cease-fire and the implementation of the Arusha peace plan.

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[154] *See* R.A. Dallaire, *The end of Innocence – Rwanda 1994,* in J. Moore, *Hard Choices – Moral Dilemmas in Humanitarian Intervention,* Oxford, Rowman & Littlefield Publishers, Inc., 1998. p. 78. For details on the received information see: IIIR Report, *Supra* note 142, 'The 11 January Cable'.

[155] UN Doc. S/RES/909 (1994), 5 April 1994, 3358th meeting.

[156] *See* Nanda - Part II, *Supra* note 141, p. 850.
Belgium actually strongly urged for a complete and collective withdrawal of all UNAMIR forces.
It is worth mentioning, that the secret informant in January had informed the Force Commander also about the planned killings of the Belgium soldiers. The Hutus militia had calculated that on behalf of that incident, Belgium would withdraw all its forces.

[157] HRW Report, *Supra* note 140, para. 'Military Action and Inaction'.

Needless to say, this would have required the consent of the Security Council members, and the supply of troops. The second option provided for a complete withdrawal of UNAMIR, while the third option was to keep UNAMIR's intermediate status.[158] In its Resolution 912, the Security Council decided for option three, by adjusting the mandate[159], though reducing the personnel to 270.[160]

The continuing massacres compelled the Security Council to reconsider the situation and only a month later, on 17 May 1994, Resolution 918 was adopted. This Resolution not only expanded the responsibilities under the UNAMIR mandate, but also increased its force level up to 5,500 troops. Moreover, the situation was determined as a threat to peace and security and thus, acting under Chapter VII, finally an arms embargo was imposed.[161] The Secretary-General's "invitation", embedded in the Resolution, asked member states to respond promptly and to provide the required equipment for the operation. His request was resisted and severely delayed the deployment of the troops.[162]

On 15 June 1994, as there was still no end in sight to the massacre, France stepped forward and offered to take the lead in an intervention. It declared that the intervention would not aim at separating the belligerent parties but at protecting the civilians. The plan was met with quite some scepticism, as the friendly relationship between France

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[158] *See Ibid.*

[159] UN Doc. S/RES/912 (1994), 21 April 1994, 3368th meeting, [hereinafter SCR (912)].
The meeting held prior to the adoption of the respective document reflected the lack of concern of the members of the Security Council towards the conflict. Nigeria did not find any of the proposals satisfactory, also pointing out that a coercive action would be unfeasible, as such force could not be raised in the warranted time period. Oman urged for the reduction of UN presence to a minimum. Only the representative of Djibouti pledged for an option between keeping UNAMIR to intermediate and to use force, but only to protect civilians in the established safe areas. He further pointed out that a withdrawal of the forces would be "inhumane and unacceptable." The Rwandan representative, lastly, condemned the reaction of the international community as controversial, selective and inappropriate. However, Rwanda voted in favour of the Resolution to indicate that "the people of Rwanda continue to hope that the Council will realize that it has a duty to act resolutely to maintain peace in Rwanda and to guarantee stability in the region." (Security Council 3368th meeting, 21 April 1994).

[160] *See* Nanda - Part II, *Supra* note 141, p. 850.

[161] *See* UN Doc. S/RES/918 (1994), 17 May 1994, 3377th meeting, [hereinafter SCR (918)].

[162] Already prior to the adoption of Resolution 918, the increase of troops was met with resistance, largely by the United States. The latter argued that no state had explicitly offered to send troops to Rwanda. Moreover, the operation lacked a clear consent of the two belligerent parties. (*See* S.D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*, Philadelphia, University of Pennsylvania Press, 1996 p. 245). The US's reluctance to provide assistance was merged with their refusal to even acknowledge that genocide was committed, but rather described the events as "acts of genocide". (Mike McCurry, State Department spokesman, 25 May 1994, quoted in http://www.pbs.org/wgbh/pages/frontline/shows/evil/, 20.06.2003.

and the Hutu-government raised questions as to whether France would be impartial.[163] In response, the French Foreign Minister stated that France would act impartially with the aim of saving the population and that the situation in Rwanda constituted "a real duty to intervene", thus "it is no longer time to deplore the massacres with our arms folded, but to take action."[164]

Although initially France was supposed to have the support of its European and African allies, none of the latter actually intended to join France in the operation and three of Rwanda's neighbours even prohibited France to use their territory for the operation. A number of them nevertheless offered to provide the equipment, but not troops.[165] In the end France announced, that it would act anyway, regardless of the negative response of other states. It nonetheless insisted that it could not launch the operation without the help of African countries and that it would definitely not act without a clear mandate from the Security Council.

On 21 June 1994 French troops were ready stationed in Zaire and the Central African Republic, waiting for an explicit authorization by the Council. Although the Tutsi strongly denounced a French intervention and continuously threatened to combat the troops, the Council eventually passed Resolution 929, giving its authorization to the operation known as 'Opération Turquoise'. It determined the situation as "a unique case which demands an urgent response by the international community" and thus, acting under Chapter VII, authorized the operation "by using all necessary means to achieve the humanitarian objectives set out in subparagraphs 4 (a) and (b) of resolution 925 (1994)." [166] It further stressed the strictly humanitarian character of the operation, which was to be conducted in a neutral and impartial manner. Additionally, due to the slow supply, the resolution called upon the Member States "to respond urgently to the

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[163] France, to some extent, was held responsible for the killings in Rwanda, as it had, provided the latter's forces with arms and training. Moreover, the intent was vehemently rejected by the Tutsi rebels and declared that they would consider the French as a hostile group and would fight against with all means. (*See* Murphy, *Ibid*, p. 248).
[164] Foreign Minister Alain Juppin quoted in *Ibid.*
[165] At that point only Ethiopia had offered full-equipped forces. Téson (1996), *Supra* note 23, p. 364.
[166] UN Doc. S/RES/929 (1994), 22 June 1994, 3392nd meeting.
Resolution 925 subparagraphs 4 (a) and (b) reaffirmed UNAMIR's status as being an intermediary between the belligerent parties. Its mandate was to:

(a) Contribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, including through the establishment and maintenance, where feasible, of secure humanitarian areas; and
(b) Provide security and support for the distribution of relief supplies and humanitarian relief operations.

See UN Doc. S/RES/925 (1994), 8 June 1994, 3388th meeting.

Secretary-General's request for resources, including logistical support, in order to enable expanded UNAMIR to fulfil its mandate effectively as soon as possible".

On 23 June 1994 French troops entered Rwanda and less than a month later, the Hutu government collapsed with the Tutsi rebels gaining control of Kigali. This event set off another refugee flow, this time with the Hutus fleeing across the western border into Zaire fearing reprisal by the Tutsis. On 18 July the Tutsi rebels announced a cease-fire and, one day later, a government, consisting of both Tutsis and Hutus, was set in place and was recognized as the legitimate government by the international community. The vast number of refugees posed a continuing problem, which most parties agreed would only be resolved if they could convince the population that it was safe to return to Rwanda. The French troops therefore did not withdraw until 22 August. After the latter had left, the refugee problem had still not been solved and therefore the Security Council decided to maintain UNAMIR's presence in Rwanda until early 1996, to provide security and to protect displaced persons and to support relief operations.

In the end, the UN took the step, also upon the request of the Rwandan government, to show that those responsible for the massacres would not be left unpunished and hence, passed Resolution 955, which provided for the establishment of an international tribunal to bring to trial those responsible for the genocide and other violations of humanitarian law.[167]

1.2.1. An Evaluation of the International Response to the Rwandan Genocide

Throughout the massacres, focus was given on diplomatic efforts as the situation was rather considered as a war between two belligerent parties. The genocide itself was considered as a "tragic by-product of the war".[168] Thus, it was sought to get the parties to agree on a cease-fire and to implement the Arusha peace plan, rather than to put an end to the large-scale and systematic killings.

[167] UN Doc. S/RES/955 (1994)*, 8 November 1994, 3453rd meeting. See also for the statute of the tribunal.
[168] HRW Report, *Supra* note 140, para. 'Genocide and War'.

In the first weeks the Security Council took a somewhat cautious stance on the situation. It stated that it was "appalled at the ensuing large-scale violence" and concerned about the significant increase of refugees into neighbouring countries[169], and condemned the ongoing violence, particularly the very numerous killings of civilians.[170] By the end of May a report had been submitted by the Secretary-General to the Security Council stating that civilians were being killed on a widespread and systematic basis and that there was "little doubt" that these acts constituted genocide.[171] However, it seems rather obvious that the unwillingness of the Member States of the Security Council to use the term "genocide" was largely due to the fact that if the term would have been used in any Resolution, the UN would have been legally obliged to prevent and punish the perpetrators.[172] The only states that acknowledged officially, after having received sufficient information at the end of April, that the ongoing slaughter constituted genocide were the Czech Republic, Spain, New Zealand and Argentina. It was largely their insistence that pushed the Security Council into prolonging the peacekeeping operation and giving UNAMIR a stronger mandate.[173]

International apathy towards the slaughter was further emphasised by the fact that in the first weeks international leaders and politicians refused, in their political and moral authority, to condemn the legitimacy of a government that was exterminating its citizens. In addition, all member states can be blamed for tolerating a representative of the genocidal government of Rwanda to be present in the Security Council.[174] That not even its membership had been suspended could only be interpreted as an implicit authorization for Rwanda's genocidal policy and brought great discredit to the Security Council.

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[169] *See* SCR (912), *Supra* note 164.
[170] See SCR (918), *Supra* note 166.
[171] *See* IIIR Report, *Supra* note 142, para. 'UNAMIR II established'.
[172] *See* Genocide Convention Article 1.
[173] See HRW Report, *Supra* note 140, para. 'Warnings, Information and the UN staff'.
[174] It is worth mentioning that only New Zealand stood up, more than a month later after the slaughter had started, and criticized Rwanda's privileged position for having a seat in the Security Council. *See further* Security Council 3377th meeting, 16 May 1994.

1.3. Conclusion

As the information demonstrates, Rwanda constituted a "clear-cut case"[175] for intervention. The evident widespread and systematic massacre of Rwanda's citizens was undeniable, but due to the political unwillingness of the Member States of the Security Council, the genocide continued undisputed. When France took the lead for action, which admittedly was not preferable for the aforementioned reasons, States refused their support and France would not act without a clear legal basis. These impediments prevented any form of intervention until more than two months after the genocide had started.

As the Secretary-General stated:

> *"We must all recognise that ... we have failed in our response to the agony of Rwanda, and thus have acquiesced in the continued loss of human life. Our readiness and capacity for action has been demonstrated to be inadequate at best, and deplorable at worst, owing to the absence of the collective political will."*[176]

[175] Nanda - Part II, *Supra* note 141, p. 851.
[176] Report of the Secretary-General on the Situation in Rwanda, S/1994/640, 31 May 1994, UN and Rwanda 1993-1996, p. 291, quoted in Holzgrefe, *Supra* note 1, p. 17.

2. Case Study – Kosovo 1999

2.1. Background to the Crisis in Kosovo

Until its break-up in 1991, the Federal Republic of Yugoslavia (FRY) consisted of six republics.[177] Kosovo was granted full autonomy in 1974, which gave it the status of a republic. The crisis in Kosovo began in 1989 when the Serbian government under Milosevic rescinded Kosovo's autonomy. The regional self-governance was abolished and so was the official language, Albanian, which was spoken by 90% of its population. This campaign was largely due to the Serbian fear of Albanian ethnic domination. Still, in 1990 ethnic Albanian politicians declared Kosovo's independence and commenced establishing parallel institutions, which were not recognized by the Serbs. Throughout the 1990's unrest continued between the government's policy to "Serbianize" Kosovo[178] and the League for a Democratic Kosovo (LDK). The LDK was the dominant Kosovar Albanian political organisation, which tried in a peaceful way to regain Kosovo's independence and to influence the international community to deny the legitimacy of Belgrade's policy.[179]

During 1992-1993 several attempts were made by international organisations such as the Organisation for Security and Cooperation in Europe (OSCE) to open a dialogue and to bring the situation to international attention. However, with the ongoing wars in Bosnia and Croatia, Kosovo was left outside the centre of attention. By the end of 1995 the Dayton Peace Agreement was signed resolving the issues concerning Bosnia-Herzegovina (BiH) but, although it had been acknowledged that Kosovo was one of the

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[177] Montenegro, Croatia, Slovenia, Bosnia and Herzegovina, Macedonia and Serbia, while within the latter the two autonomous regions Vojvodina and Kosovo existed.

[178] From 1989 onwards several decrees had been approved aiming to change the ethnic composition of Kosovo. This was attempted through restrictions on the sale of property to Albanians, incentives for Serbs and Montenegrins to return, family planning for Albanians, and encouragement to Albanians to seek work elsewhere in Yugoslavia. This was combined with increased human rights abuses and discriminatory language policies, such as the closure of Albanian language newspapers, radio, and television; the closure of the Albanian Institute; and the change of street names from Albanian to Serbian and the introduction of a new Serbian curriculum for universities and schools. *See* Independent International Commission on Kosovo, *Kosovo Report: Conflict, International Response, Lessons Learned,* 2000, available from http://www.kosovocommission.org/reports/, pp. 41-42, [hereinafter IICK Report].

[179] It is worth mentioning that the LDK tried from the very beginning to gain support from the international community to deal with the tensions in Kosovo. Their willingness to solve the situation in a peaceful way until the incidence in 1998 was a chance for non-forcible intervention by the international community that was certainly missed. (*See Ibid.* pp. 55-61).

most sensitive issues in the Balkans, it was completely left out.[180] In this respect, the conclusion drawn from that Agreement was that "ethnic territories have legitimacy [and that] international attention can only be obtained by war"[181]. A clear sign was given to Milosevic that his policy towards Kosovo was legitimate, while the Kosovo Albanians had to face that the Kosovo problem was definitely off the international agenda.

In the early 1990's deadly violence had been quantitatively low but the end of that came in the beginning of 1998 when Serbs arrested a member of the Kosovo Liberation Army (KLA) and his family consisting of 58 members were executed. With this act, Kosovars had realized that their peaceful tactics to reach independence was not feasible any longer and village militias in Kosovo sprang up to defend their villages. The Yugoslav army entered into Kosovo with a large-scale operation aiming to stop the spread of the KLA by directly targeting the Albanian civilian population. Evidence attested that widespread torture and rape, looping, pillaging and extortions were committed against Kosovo Albanians and forced 200,000 people to flee in the hills.[182] In May 1998, only two months after, already around 300 people had been killed and approximately 12,000 people had fled into Albania.[183]

Throughout 1998 the so-called contact group[184] tried to solve the situation with diplomacy. In October, with hostility continuing, the North Atlantic Treaty Organisation (NATO) for the first time threatened Milosevic with the use of force if he did not withdraw his forces and brings a political settlement for the region. Four days later, on October 14, the Holbrook - Milosevic agreement[185] was signed and initially also implemented. However, this did not lead to the cessation of the hostilities. A second attempt was made by the contact group in the beginning of 1999 in Rambouillet to reach a political agreement between the FRY and the Kosovars. However, this

[180] The international community, in its desperation to stop the war in BiH, was concerned that by raising the issue of Kosovo it would have jeopardized the chances of reaching an agreement. There was consensus that Milosevic would have refused to consider the issue.
[181] Veton Surroi, quoted in *Ibid.* p. 50.
[182] R. Wedgwood, *NATO's campaign in Yugoslavia*, in «American Journal of International Law» vol. 93, 1999, p. 829.
[183] *See* IICK Report, *Supra* note 178, p. 24.
[184] The contact group consisted of the following states: United States, the United Kingdom, Germany, France, Italy and the Russian Federation.
[185] The Agreement allowed NATO to over fly the region and provided for the establishment of a 'Kosovo Verification Mission' deployed by the Organisation for Security and Co-operation in Europe (OSCE) to monitor the cease-fire. The political settlement was then to be discussed at Rambouillet, France.

attempt also failed as the FRY-authorities refused to sign the proposal.[186] The final warning bell for full-scale violence came with the massacre in Racak, where forty civilians were executed.[187] NATO made its threat real and started its bombing campaign against the FRY on 24 March 1999.

However, the war took an unexpected turn as the FRY military engaged in an even more vicious and well-planned campaign against the Kosovars.[188] Well-organised mass deportations began, that resembled "the policies and methods of Hitler and Stalin"[189]. This action forced about 863,000 people into refuge and internally displaced other 590,000 people, which together left 90% of the total population of Kosovo displaced.[190] The number of deaths was estimate around 10,000 while around 3000 were missing. The end to this disaster was brought by another peace plan worked out by western leaders and the Russian Federation at the 'G8' meeting, which led, on 10 June 1999, to the withdrawal of the FRY forces and the end of the NATO-bombing campaign.

2.2. The Role of the UN and the Security Council in the Conflict

In 1991 a conference on Yugoslavia took place in The Hague where the Kosovo-problem was defined as being a clear internal matter and thus any international interest and involvement in the issue was discouraged.[191] Until 1998 few attempts were made by the UN to deal with the Kosovo issue[192], not least due to the ongoing conflicts with

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[186] The proposal included the restoration of Kosovo's autonomy and its independent institutions, while the issue of its independence was to be reconsidered in three years time.
[187] This event, together with earlier tactics of the Serbs used in Bosnia, e.g. the use of concentration camps, massacres and crimes against humanity, led to the well-founded assumption that the same was about to happen in Kosovo.
[188] This campaign, often referred to as "ethnic-cleansing" intended to chase Kosovo Albanians away from Kosovo, prevent their return and destroy their social foundation. As it was conducted on such a well-organised and large-scale, there was strong believe that this had been intended long before. *See e.g.* Wedgwood, *Supra* note 182, p. 829.
[189] United Kingdom House of Common Foreign Affairs Committee, *Fourth Report from the Foreign Affairs Committee, Session 1999-2000, Kosovo,* August 2000, available from http://www.publications.parliament.uk/pa/cm199900/cmselect/cmfaff/28/2802, para. 13, [hereinafter UK Report].
[190] That these deportations were well planned and organised was well illustrated by the trains going from Pristina to the Macedonian border. Before March there were two daily trains with 3 carriages each. When the deportations began three to four extra trains were added, with 13 to 20 carriages. IICK Report, *Supra* note 178, p. 90.
[191] *See Ibid*. p. 57.
[192] The UN Special Rapporteur on Human Rights handed in several reports on the situation in Kosovo and further tried to establish an office. Several Resolutions were passed by the General Assembly, and in 1993 the

Croatia and Bosnia. Moreover, the FRY was strongly opposed to attempts to internationalise its internal conflict.[193]

The first substantial Resolution, Resolution 1160, which imposed a mandatory arms embargo against both parties, was passed on 31 March 1998. The Security Council acted under Chapter VII, without expressly determining that the crisis in Kosovo caused a threat to international peace and security. It called upon the parties to immediately take steps to achieve a political solution and emphasized that a "failure to make constructive progress towards the peaceful resolution of the situation in Kosovo will lead to the consideration of additional measures."[194] The UN Ambassador for the FRY strongly condemned the adoption of this Resolution, in particular the threat of considering additional measures, as highly unreasonable due to the non-existence of an armed conflict.[195]

In April, the Contact Group, with the exception of the Russian Federation, imposed additional sanctions on the FRY. As the situation deteriorated, Resolution 1199[196] was adopted in September by the Security Council. It is worth mentioning that in the meantime the UN Secretary-General had informed NATO that any action involving the use of force would need a Security Council authorization. Already at that stage, it was clear that Russia would not agree to such a measure.[197]

In its Resolution 1199, the Security Council determined the deterioration of the situation in Kosovo as a threat to peace and security in the region. The Council requested an immediate cease-fire and urged both parties to take steps to improve the humanitarian situation. Moreover, it demanded the parties enter instantly into negotiations with international involvement and requested the direct implementation of a series of measures for achieving a political solution. It concluded, "should the concrete measures demanded in this resolution and resolution 1160 (1998) not be taken,

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UN Security Council passed a Resolution calling for the return of the OSCE mission, whose members had been forced to leave the country when the authorities refused to renew their visas.

[193] *See* IICK Report, *Supra* note 178, p. 69.

[194] UN Doc. S/RES/1160 (1998), 31 March 1998, 3868th meeting.

[195] *See* IICK Report, *Supra* note 178, p. 70.

[196] UN Doc. S/RES/1199 (1998) 23 September 1998, 3930th meeting, [hereinafter SCR (1199)].

[197] *See* Simma, *Supra* note 35, p. 6; S. Wheatley, *The NATO Action against the FRY: Humanitarian Intervention in the Post Cold War Era*, in «Northern Ireland Legal Quarterly», vol. 50, no. 4, 2000, p. 488.
Note that Russia even had refused to implement additional sanctions against the FRY.

to consider further action and additional measures to maintain or restore peace and stability in the region."[198]

During the following weeks, Russia opposed any attempt that was made to authorize the use of force and made clear that it would veto any Resolution that would contain such enforcement action.[199] It follows, that the Security Council was in no position to actually authorize the threat or use of force if the two parties would fail to implement the request of the respective Resolutions.[200]

This was the point when NATO took over threatened with the use of force if the FRY would refuse to comply with the Resolutions. After having concluded the Holbrook agreement, the Security Council returned with its adoption of Resolution 1203[201]. Still acting under Chapter VII, the Council welcomed the agreement and demanded "the full and prompt implementation of these agreements by the Federal Republic of Yugoslavia."[202] It also reaffirmed that the situation continued to pose a threat to peace and security in the region.

Once more, the situation in Kosovo remained unresolved. In January 1999 the Contact Group tried yet again to reach a political settlement and established a framework for that purpose. The Secretary-General of NATO made a statement upon this, saying that if the diplomatic efforts by the international community remained without response and the requirements of the Security Council Resolutions were not observed, NATO would begin with its air strikes.[203] The FRY replied to the threat with a request for an emergency meeting of the Security Council, stating that the threat of force by NATO would constitute an act of aggression against the sovereign and independent state of the FRY. Moreover, the FRY made aware that any enforcement action would need the authorization of the Security Council.[204] NATO states, however, in that situation, did not see the absence of an express authorisation by the Security Council as a "categorical impediment" to make use of military force.

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[198] SCR (1199), *Supra* note 201, p. 5.
[199] Wheatley, *Supra* note 197, p. 486.
[200] *See* Simma, *Supra* note 35, p. 6.
[201] UN Doc. S/RES/1203 (1998), 24 October 1998, 3937th meeting.
[202] *Ibid*. p. 2.
[203] Simma, *Supra* note 35, p. 9.
[204] *Ibid.*

The need for more decisive actions was felt, but even with states pressing for a Security Council Resolution to authorize military force, it was still clear that Russia was strongly opposed. However, a month later, on 24 March 1999, as there was no amelioration in the conflict, and with the prospect of a veto if NATO would have attempted to gain authorisation from the Security Council, NATO started its air strikes without the Council's consent.

The same day the air strikes had started, a Security Council meeting was held. Although expressing concern that the Security Council was not involved in the decision-making on that matter, the UN Secretary-General acknowledged that the use of force might sometimes be legitimate, since diplomacy had failed.[205] Assessing an inactive Security Council, he also emphasized that the latter "has primary responsibility for maintaining international peace and security [and] should be involved in any decision to resort to the use of force."[206] However, "the imperative of effectively halting gross and systematic violations of human rights with grave humanitarian consequences [is an] equally compelling interest."[207]

Again, Russia strongly opposed that position and was supported by several other states that refuted the argument justifying military aggression for the reason of humanitarian necessity.[208] On March 26, Russia, together with Belarus and India, submitted a draft resolution demanding the immediate cessation of the hostilities. The draft was voted down by only 3 - Russia, China, and Namibia - in favour of it, and 12 against.[209]

On 10 June1999, Resolution 1244 was adopted, acting under Chapter VII and authorised "Member States and relevant international organisations to establish the international security presence in Kosovo."[210] NATO was not expressively mentioned

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[205] UN Press Release SG/SM/6938 of 24 March 1999, cited in N. Krisch, *Unilateral Enforcement of the Collective Will: Kosovo, Iraq and the Security Council*, in «Max Planck United Nations Yearbook», vol. 3, 1999, p. 83.
[206] Secretary-General's statement on NATO military action against Yugoslavia, March 25 1999, quoted in Wedgwood, *Supra* note 182, p. 831.
[207] Secretary-General Presents His Annual Report to General Assembly, UN Press Release SG/SM/7136, GA/9596, 20 September 1999, quoted in *Ibid.*
[208] China, Namibia, Belarus, Ukraine, India are only some to be mention that were opposed to NATO's action.
[209] Although opinion had hardened among Member States that there was an impending need to prevent a humanitarian catastrophe, it has been argued that the rejection of the draft resolution could not, however, be interpreted as support for NATO air strikes. It was felt that, in case of adopting such a resolution, it would seem as the repressive actions of Milosevic would receive international support, especially since there was no condemnation of his conduct included in the draft. *See* Krisch, *Supra* note 205, pp. 84-85.
[210] UN Doc. S/RES/1244 (1999) 10 June 1999, 4011th meeting, p. 2.

in the Resolution, which often has been regarded - after having conducted an intensive air strike to induce Serb authorities to comply with the Resolutions - as an approval of the NATO's presence in a foreign territory.[211]

China strongly contested the fact that no mentioning had been made of NATO's bombing, and that "the resolution failed to impose necessary restrictions on invoking Chapter VII of the United Nations Charter."[212] However, few states contested NATO's action, and even states that had criticised the latter's conduct in the end voted for the Resolution. It is worth mentioning that some states, that were usually critical towards Western positions, shared the Gambian view that "the international community could no longer afford the luxury of being a helpless spectator, while the policy of ethnic cleansing continued [and that] it was regrettable that force had to be used to arrive at the current situation."[213]

In short, the world was faced with an imminent humanitarian catastrophe but the Security Council was deadlocked due to the intransigence of one of its Permanent Members. NATO therefore took the initiative on its own behalf and forced the government of the FRY to comply with the previous Resolutions by using military force. In none of the Resolutions was explicit reference made to the authorization on the use of force and yet, as will be pointed out in the next chapter, NATO based its justification for the intervention on these Resolutions.

In between all the discussions about the legitimacy and legality of NATO action, one important question remained unanswered. Could the international community have faced the consequences of another humanitarian catastrophe as in Rwanda and earlier in Bosnia? If not, could it then not be justifiable that NATO, at that particular point of time the only body able to react to the ongoing atrocities in Kosovo, went ahead without a Security Council authorization?

It is worth mentioning in this respect that, although this document reaffirmed the sovereignty, independence and territorial integrity of the FRY, it more or less imposed a peace treaty on the respective state, calling for "substantial autonomy and meaningful self-determination for Kosovo" and thus demonstrated the significant change in respect of state sovereignty.

[211] *See e.g.* Ronzitti, *Supra* note 84, p. 50. *See also* para. 2.3. p. 51 of this thesis.

[212] *Ibid.*

[213] Security Council Press Release SC/6686, 4011th Meeting (PM), June 10 1999. quoted in *Ibid.*, p. 51.

2.3. NATO's Action - A Precedent for the Future?

Member states of NATO gave two lines of justification for the intervention. One was based on the Resolutions 1160, 1199, and 1203. The other was founded on the doctrine of humanitarian intervention, to avert a further humanitarian catastrophe.

As to the former, all three Resolutions determined the situation as a threat to peace and security in the region and acted under Chapter VII. The FRY had refused to comply with the Resolutions, wherein the Council had explicitly stated that should the "concrete measures demanded in this resolution [1199] and resolution 1160 (1998) not be taken, to *consider* further action and additional measures to maintain or restore peace and stability in the region."[214] However, one must ask what form this "further action" could realistically take. The Security Council was not in the position to authorize additional measures due to the prospect of a veto by Russia, which effectively hamstrung their ability to respond adequately to the situation. Reacting to this, NATO as a democratic organisation, working on consensus basis, received authorisation from its 19 member states and conducted its attacks within the *framework* of*,* "in support of" or "consistent with" the respective Resolutions.[215] This "collective character of the organization provided safeguards against abuse by single powerful states [Russia] pursuing egoistic national interests."[216] Given the Resolutions and the FRY's conduct of flat non-compliance with the latter, NATO governments concluded that the intervention was justified.

In addition, the omission of a reaction on behalf of the Security Council to condemn NATO's initial threat and later actual use of force, as well as the down-voting of the draft resolution, could be interpreted as a *post facto* authorization.[217] First of all, NATO action was monitored by the Security Council and could have been ordered to be terminated. No such attempt had been made. It would also not have been the first time it was asserted that the maintenance of silence by the Security Council implied such an

[214] See *Supra* note 198. Emphasis added
[215] *See* Chesterman, *Supra* note 55, p. 218.
Opponents to the intervention argued that although there had been a determination of threat to peace and security in the region, it did not constitute an authorization *per se. See e.g.* Cassese, *Supra* note 47.
[216] L. Henkin, *Kosovo and the Law of Humanitarian Intervention*, in «American Journal of International Law», vol. 93, 1999, p. 826.
[217] See for instance Ibid.; Simma, *Supra* note 35, p. 10; T.M. Franck, *Interpretation and change in the law of humanitarian intervention,* in J.L. Holzgrefe/ R.O. Keohane «Humanitarian Intervention», Cambridge University Press, 2003, p. 225.

authorization.[218] The Secretary-General moreover went on that " (...) there are times when the use of force may be legitimate in the pursuit of peace"[219], but also emphasized the need of a Security Council Resolution. In the event, neither the Secretary-General nor the Security Council itself criticised in any way the behaviour of NATO countries. Secondly, the assumption of a *post-facto* authorization was further assured by the failure to pass the drafting Resolution submitted by Russia on 26 March 1999.

The conclusion can be drawn, that the Resolutions constituted the foundation for authorising the use of force, but the actual act of authorising military force never occurred.[220] Lastly, reference can be made to the "amnesty argument"[221] in relation with Resolution 1244, where the technical violations of the UN Charter were ignored by the international community, and thereby giving at least a formal blessing to the intervention.[222]

Thus, in this respect it could be concluded, that NATO's action was illegal to the extent that it did not fulfil the Charter's technical requirement of explicit authorization. Otherwise, this caveat notwithstanding, the intervention could be considered as a lawful humanitarian intervention.[223]

Still, as is evident, the legal justification based on the Resolutions and on the principle of implicit authorization is rather weak due to the lack of an *explicit* Security Council authorization. Thus, most of the NATO member states relied on a political justification for their action, namely the avoidance of a humanitarian catastrophe.

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[218] Such an assertion had been made for instance back in 1991 with the creation of safe heavens in Northern Iraq on behalf of the Kurds. *See* C.M. Chinkin, *Kosovo: A "Good" or "Bad" War?*, in «American Journal of International Law», vol. 93, 1999, p. 842.

[219] Press Release SG/SM/6938, 24 March 1999, quoted in Ronzitti, *Supra* note 84, p. 47.

[220] Opponents to this view argue that the "approval of the result does not imply approval of the means" (Krisch, *Supra* note 205, pp. 85-86). This was further reinforced by the fact that Russia and China were strongly opposed to the use of military force. (Note that initially China even refused to regard the conflict as an international one.) Additionally, the rejection of the draft resolution was not meant to approve the air strikes. Finally, the Charter calls for a positive decision and thus requires explicit authorization by the Security Council for the use of force and not the absence of such an approval or condemnation. Otherwise, the veto power of the Permanent Members becomes pointless. *See also* M. Byers, S. Chesterman, *Changing the rules about rules? Unilateral humanitarian intervention and the future of international law,* in J.L. Holzgrefe/ R.O. Keohane, «Humanitarian Intervention», Cambridge University Press, 2003, pp. 182.

[221] The 'amnesty argument' was first used for justifying the Tanzanian intervention in Uganda in 1979 and the intervention was not even discussed in the Security Council. *See* Ronzitti, *Supra* note 84, p. 54.

[222] *See e.g. Ibid*., pp. 50-51, Simma, *Supra* note 35, p. 10. The same had occurred with the intervention into Iraq in 1991 for the protection of the Kurds. Although Resolution 688 never explicitly authorized the use of force, the interveners based their justification on the latter as to acting in its framework. Also this action was not condemned by the Security Council.

[223] Wheatley, *Supra* note 197, p. 514.

> *"It goes without saying that a country – or alliance – which is compelled to take up arms to avert such a humanitarian catastrophe would always prefer to be able to base its action on a specific Security Council resolution ... If, however, due to one or two permanent members' rigid interpretation of the concept of domestic jurisdiction, such a resolution is not attainable, we cannot sit back and simply let the humanitarian catastrophe occur ...".*[224]

NATO member states clearly would have preferred a Security Council Resolution. Having had enough evidence that crimes against humanity and crimes that almost reached the scale of genocide were being committed[225], there were faced with a simple choice: to act, or to do nothing. Given all the facts of a foreshadowed humanitarian catastrophe, NATO members concluded that, despite the lack of an authorization, an intervention would be justified.

However, when it came to justify their action, most NATO member states were reluctant to claim a "right" to humanitarian intervention without Security Council authorization. Obviously, there was an attempt to fill the gap between the humanitarian necessity and the lack of the latter's authorization[226], by arguing that "[i]n these circumstances, and as an exceptional measure on overwhelming humanitarian necessity, military intervention is legally justifiable."[227] This approach was based, on the one side, on the Resolutions and the Security Council acting under Chapter VII and, on the other, on fundamental human rights norms.

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[224] Mr. Van Walsum, Netherlands, quoted in *Ibid.*, p. 487.

[225] Throughout the conflict and even earlier on, Non-governmental Organisations (NGO), both local and international ones, and Human Rights Groups were established in Kosovo and monitored human rights violations. A number of them were making statements about the situation and even called for a UN protectorate. Subsequently, there was a reliable source of information available to the international community. Moreover, there was also a wide coverage of the conflict by the media. *See for more details* IICK Report, *Supra* note 178, pp. 60-61.

[226] Note that NATO was trying to force the FRY to comply with the policies set out by the international community, namely the Resolutions and the former "*acted in conformity* with the "sense and logic" of the resolutions that the Security Council had managed to pass." (Simma, *Supra* note 35, p. 12, emphasis added).

[227] Statement of Sir Jeremy Greenstock to the Security Council, 24 March 1999, S/PV3988, quoted in Stromseth, *Supra* note 124, p. 236.
It has to be noted that the UK's stance was the strongest among NATO members, while e.g. France and Germany made cautious statements based on the FRY's non-compliance with the Resolutions and the need to prevent a humanitarian catastrophe, thus leaving the legality all aside.

Belgium pushed this argument even further, and reaffirmed of what has been said earlier in Chapter I of this thesis, by stating:

> *"Donc ce [the intervention against the FRY] n'est pas une intervention dirigée contre l'intégrité territoriale, l'indépendance pour l'ex-République de Yougoslavie, c'est une intervention pour sauver une population en péril, en détresse profonde. C'est la raison pour le Royaume de Belgique estime que c'est une intervention humanitaire armée qui est compatible avec l'article 2, paragraphe 4 de la Charte qui ne vise que les interventions dirigées contre l'intégrité territoriale et l'indépendance politique de l'État en cause."*[228]

Belgium, although cautiously, defended the NATO action as a lawful armed humanitarian intervention, even though it had breached the technical rule of the need of authorization by the Security Council. Belgium's stance, however, is in accordance with the outline in Chapter I, namely, by intervening, there was no attempt to challenge the FRY' s integrity or independence, and neither was there an attempt to interfere with its internal affairs.

In this light, it can be argued that the Kosovo intervention embodied the shift away from the interstate relations established after World War II, challenged by the dynamics of the new human rights discourse. The Kosovo intervention highlighted the need for a new interpretation of the UN Charter, which would demonstrate that nowadays there exists a limited exception to the prohibition contained in Article 2(4) of the UN Charter. Namely, that in situation characterized by gross human rights violations, a limited use of force is permissible in conjunction with the purposes laid down in the respective Resolutions, even without the explicit authorization of the use of force.[229]

2.4. Conclusions to be drawn from Kosovo

There was a general consensus among NATO members, the Secretary-General and most of the Security Council members that, in the case of Kosovo, force was necessary. UN neutrality or disinterest as in Rwanda was not an acceptable option. And so was not the possibility of leaving the actions of the FRY to go unchecked and, in the words of

[228] Cour international de Justice CR 99/15 (10 mai 1999), quoted in Ronzitti, *Supra* note 84, p. 47.
[229] See Wheatley, *Supra* note 197, pp. 513-514.

the Secretary-General, allow "ethnic cleansers [and those] guilty of gross and shocking violations of human rights" find justification or protection in the UN Charter.[230] It had been repeatedly regretted by several Security Council members, that they had failed to respond adequately to the situation. They had also concluded that something had to be done to avoid another humanitarian catastrophe. In short, they agreed that in times of overwhelming humanitarian necessity the use of force might be necessary, even if were not in strict conformity with the UN Charter.

Although most states agree that gross human rights violations have to be halted, it raises the dilemma of whether current international law should be sacrificed "for the altar of human compassion".[231] In the aftermath of Kosovo, most NATO states concluded that the situation was a completely special case and was in no way to set a precedent for the future and that it would lead to "a slippery slope"[232] if the Security Council's monopoly was to be diminished. But at the same time, since the Security Council is a *political organ*, that is supposed to maintain or restore peace, it has to accept or be prepared for situations that will be based, as Kosovo, on illegalities.[233] Foremost, amongst these are situations where its Permanent Members are not able to reach a consensus and are thus unable to carry out their overriding responsibility of keeping or restoring international peace and security. If a unified Security Council action is not possible, the international community will once again be faced with the dilemma that certain states will set the humanitarian imperatives against the UN Charter and its rules governing the use of force.

Under the current system, the simple conclusion can be drawn that "the human rights of some people are more worth protecting than those of others."[234] In this light, the Kosovars were the "lucky" ones, and their foreshadowed humanitarian crisis led NATO to act, even though its member states could have faced a condemnation by the Security Council for the reason of having breached a rule in the UN Charter. Rwandans and Bosnians, at the same time, can then be considered as the "unlucky" ones. The question remains, what will happen in the future? Will we be faced once more with the terrifying catastrophe as occurred in the two latter cases, because there was no political will, no

[230] Kofi Annan, cited in Stromseth, *Supra* note 124, p. 238.
[231] Cassese, *Supra* note 47.
[232] German Foreign Minister Kinkel, quoted in Simma, *Supra* note 35, p. 13.
[233] *Ibid.*, p. 12.
[234] Chinkin, *Supra* note 218, p. 847.

action of the Security Council, no will of a group of states to breach the law for the sake of humanity? What will be the cost of future credibility of the normative system where the upholding of the laws will be a contributor to the mass slaughter of innocent people?

Such arbitrariness in selecting humanitarian catastrophes cannot be kept for the future. The answer to that can definitely not be found in a simplistic choice between upholding the law or sacrificing the latter for our moral understanding. The gap between legality and legitimacy, "between strict legal positivism and a common sense of moral justice"[235], as was attempted in the Kosovo case, has to be challenged. We will address this in the next Chapter, when we explore new scenarios for future humanitarian interventions.

[235] Franck, *Supra* note 217, p. 216.

3. A Doctrine of Humanitarian Intervention

As has been detailed, current international law with its two competing systems - the respect for state sovereignty and the non-use of force, and the protection of human rights - lacks of a bridge that would close the gap between those two. The codification of such a doctrine, with clear criteria when such intervention would be justified, would clarify provisions under the UN Charter and the Vienna Convention, which relate to the duties of Member States to protect human rights. Additionally, this criteria can be used to strengthen and regulate cases which compel andexceptional breach', where the Security Council is unable or unwilling to authorize such action. This combined, assist in closing the gap between the current legality and morality, while at the same time would enhance the legitimacy of international law.[236] Such codification would furthermore help to control unwarranted and disguised interventions, while at the same time counteract the 'selectivity' of conflicts according to their economic, political and strategically status, by providing a coherent framework of evaluation.

3.1. A Set of Guiding Principles

3.1.1. Human Rights Violations

To start with such a codification, it has to be determined which human rights violations should allow for intervention. As has been noted earlier on, there has to be a limitation to the most severe ones, otherwise the international system would likely break down.[237] To allow for an intervention for humanitarian purposes, a "commission of genocide, serious violations of the international humanitarian law applicable to internal armed conflicts, widespread or systematic attacks against a civilian population, or serious violations of recognised and fundamental international human rights standards must be established in the territory of the target State to such an extent and gravity."[238]

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[236] Interventions, as in Kosovo, carried out in the future will call the legitimacy of the existing legal rules into question as the states, that intervene, are not being condemned but their action is seen as an 'excusable breach'. *See* on the current doctrine of 'excusable breach' Chapter III, para. 2.1.

[237] For what is excluded *See* Chapter III, Paragraph 1.2. and *Supra* Notes 108-111.

[238] Harhoff, *Supra* note 42, p. 114. This list of crimes was also provided by Secretary-General Kofi Annan in 1999, (*See* Stromseth, *Supra* note 124, p. 262).

In more precise terms, an intervention would be justified, in case of large-scale killings, or related activities such as deprivation of food or massive deportations that would result to a large loss of lives. [239]

Secondly, when there is a policy to destroy or threaten a part of the population, which is part of a national, ethnic or religious group, even if the committed acts do not meet the threshold of the definition of "genocide" under the Genocide Convention.[240]

Admittedly, it is difficult to find a consensus among the international community on a precise definition of such crimes, but some guidance can be found under International Criminal Law. Genocidal acts and crimes against humanity conducted on a widespread or systematic scale can be subject to international persecution.[241] Thus, these crimes are already codified and could therefore form a first step towards a coherent basis for the determination of when to intervene.[242]

3.1.2. Conduct of the Target State

Directly linked with the latter criterion is the requirement that the target state has to be either unwilling or unable to stop the ongoing atrocities. The responsible government or the *de facto* authorities have to directly participate in, or implicitly support the atrocities committed. Such atrocities can also be committed by non-state actors, over which the government has lost control and is thus unable to stop the acts of violence.

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[239] See for instance the case of Somalia in 1992. For details see e.g. W.Clarke/ J. Herbst, *Learning from Somalia,* Oxford, WestviewPress, 1997.

[240] *See* the "ethnic cleansing" campaign committed by the Serbs throughout BiH or Kosovo, or the brutal repression of the Kurds in Iraq in 1991. *See also* ICISS Report, *Supra* note 94, pp. 32-34.

[241] Note again the establishment of the Tribunals for Yugoslavia (ICTY) and Rwanda (ICTR) and lately the establishment of the ICC. Although the two former tribunals relate to specific situations, its interpretation and prosecution of the respective crimes could serve as a denominator for future determinations. The significance of especially the ICTY lies in its requirement of being related to internal conflicts. The statutes of the ICC and the ICTR as well provide for the list of crimes against humanity and war crimes punishable, even when committed in times of peace. Therefore, not all of their listed crimes could serve as a determining basis for humanitarian intervention. See AIV/CAVV Report, *Supra* note 109, p. 29 para. 2(b).
It is moreover acknowledged, that not all states have become parties to the ICC, and thus the Rome Statute, in particular its Articles 5-8, cannot be considered as being recognized by the whole international community. The same has to be said for the statutes of the ICTY and the ICTR. Still, as being codified on the international level, it might well be helpful for the development of defining the scope of the crimes, which would justify intervention . *See also* Charney, *Supra* note 98, p. 1243.

[242] It is admitted that this approach limits the flexibility of determination and might ignore "less acute" cases, but would however provide a defined basis, which is already codified. *See further* Harhoff, *Supra* note 42, pp. 114-115.

However, for the decision whether to intervene, no distinction is made whether state or non-state actors conduct the violations. This threshold is even lower in cases where the state has collapsed and there is no actual government that can effectively protect its population.

Additionally, no distinction is made as to if the atrocities are committed exclusively within state borders or if they actually have cross-border effects.[243] Both situations can constitute a threat to international peace and security as has been sufficiently demonstrated in the past. The elements of such a threat and its assessment can be derived from former Security Council practice, such as the massive flow of refugees into neighbouring countries, the scale of the committed crimes or the destabilizing effects of the conflict on the region.[244]

3.1.3. Exhaustion of peaceful remedies

Having determined this, it is firmly rooted in the international community that peaceful measures must always supersede the resort to the use of force to safeguard the overriding goal of peace. Therefore, it has to be sufficiently proven that there has been a consistent refusal by the *de facto* authorities to cooperate with the UN or other international organisations trying to resolve the conflict. A military intervention can thus only be justified, if all peaceful means, such as diplomatic efforts, negotiations or sanctions have been exhausted.[245]

However, it is worth mentioning that often, until attention is given to a specific conflict, the effectiveness of applying peaceful means is predicted to have a zero-effect, since the situation has already deteriorated so far, that there is almost no negotiation space left.[246] This again refers back to the need of an effective conflict prevention or conflict

[243] *See* AIV/CAVV Report, *Supra* note 109, pp. 29-30, para. 2(c)-(d); ICISS Report, *Supra* note 94, p. 33, para. 4.22.
[244] *See* Harhoff, *Supra* note 42, p. 114.
[245] This might also be a safeguard against abuse. Due to the high costs of a military intervention and the unclear outcome, the intervening states, if their motives are overriding humanitarian, might well exhaust first all peaceful means and keep the use force as a last option. *See* Benjamin, *Supra* note 81, pp. 156-157.
[246] The IICK and the UK Report both argued that would the international community had given more attention to the developing conflict in Kosovo already in the early 1990s and had started its negotiations at that stage of time,

management mechanism, where through peaceful measures maximum pressure can be exercised on the target state, rather than insisting on the use of force in humanitarian emergencies.

On the other hand, and at this certain point of time, such a mechanism is lacking and the possibility on having the use of force to combat humanitarian crisis is necessary. Regarding the criteria of exhausting peaceful means, it has to be taken into account, that a situation can deteriorate very rapidly and might need immediate action. Exhausting all peaceful means is very time consuming and can lead in certain situations to a "morally unjustifiable delay"[247], especially where the violations of human rights have already reached an horrendous scale and diplomatic efforts or sanctions would not be applicable anymore. Thus, it is difficult to set a time limit or a list of peaceful means that has to be exhausted before forcefully intervening and consequently, it is also difficult to agree among the international community on when such efforts are not successful anymore.[248]

Concluding, this requirement has to be carefully balanced against the costs and gains and be individually applied according to each conflict. In short, it has to be carefully assessed if peaceful means would actually have any effects and could remedy the situation or would produce worse results than a forceful intervention.[249]

3.1.4. Overriding Humanitarian Purpose

The temptation of states to intervene on grounds of their own political, economic and security interests is strong and thus in need of an effective control mechanism. It is not acceptable any longer that a humanitarian intervention is only raised when it fits national state interests. Having said that, it is also very unlikely that an intervention will be purely humanitarian, yet, the overriding motive of the operation has to be aimed at halting the humanitarian crisis. Having a certain degree of self-interest is unavoidable

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the conflict would not have reached such an horrendous scale. They both agreed, that the international community had failed in that respect. See IICK Report, *Supra* note 178, pp. 56-60; UK Report, *Supra* note 189, 'The Diplomatic Process' para. 2.

[247] Wright, *Supra* note 95, p. 456.

[248] In the case of Kosovo, for instance, it was very disputed if all peaceful means had been exhausted.

[249] *See* K. Ryan, *Rights, Intervention, and Self-Determination,* in «Denver Journal of International Law and Policy», vol. 20, no. 1, 1991, p. 69.

as long as it is limited. In any case, the intervening states would have to justify their action in front of the international community and would thus be open to international scrutiny.

3.1.5. Purpose of the Intervention

The purpose of such intervention has to be exclusively aimed at putting an end to the atrocities. In some cases, this might only be achieved by changing the power structure of the target state. Often governments play a crucial part in the large-scale violations of human rights, and thus to restore respect for human rights may only be achieved by directly attacking the authorities in power.[250] However, this is a very controversial point and thus it is difficult to define when such act is deemed necessary and the only solution to halt the atrocities.[251]

3.1.6. Conduct of the Intervening States

The intervention has to be carried out in proportion to the severity of the situation. This implies to what extent the use or threat of force is used. Needless to say that the intervening states have to fully comply with international humanitarian law and the intervention has to be suspended immediately after the respect for human rights has been restored.

Moreover, in this respect and before intervening, the loss of lives has to be carefully considered. If the intervention clearly results in more harm than good, states should abstain from intervening.[252]

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[250] *See e.g.* AIV/CAVV Report, *Supra* note 109, p. 31 para. 3(c).

[251] As has been outlined above, overthrowing a foreign government can be seen as a violation of the political independence of a state. Thus, as the assessment of such need is very difficult, it should be considered as the ultimate option.

[252] Bazyler, *Supra* note 81, p. 601.

3.2. An 'Exceptional Breach' under the Guiding Principles

In cases, which compel an exceptional breach, additional criteria would, first, include that interventions be taken on a multilateral basis that is carried out by a group of states. The criterion of multilateralism is considered as the best safeguard against potential abuses to use the doctrine as disguise for their national interests. Intervention by a single state would make it "at the critical time both the actor and the sole judge in its own cause."[253] Consequently, a collective determination and judgement of a particular conflict, whether intervention by third states is warranted, is more solid and superior than the judgement of a single state. Yet, this raises the question of how many states have to join for an action to be considered as collective or multilateral? For certain it can be said that it is not the actual number of e.g. two or five intervening states that constitute a multilateral intervention.

Nevertheless, it has been suggested that a hegemonic Power "with the support of a client state or an ally"[254] should abstain from intervention. In reality, it has to be recognized, that there exist only few states that posses the economic and military capacity for such an intervention, especially for conflicts that take place in remote places. Thus, it has to be accepted that there will be situations of unacceptable human rights abuses where the 'hegemonic power's' action is warranted, due to simple practical matters. Multilateralism cannot be seen in an exclusive numerical context, but rather has to be considered in a broader framework surrounding the circumstances.

Concluding, multilateralism is best achieved if the intervention is undertaken by a group of states, supported, or at least not receiving opposition, by the majority of states or members of the UN.[255]

Another focus is recently given on regional organisations or agencies as potential interveners.[256] Not only do they claim a particular geographical and political interest in

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[253] Fairley, *Supra* note 45, p. 61.
Concerning unilateral actions – acts carried out by a single state – it has been suggested that there should be at least authorisation by the international community, if not even by the UN. (*See* S.A. Garrett, *Doing Good And Doing Well – An Examination of Humanitarian Intervention,* London, Praeger, 1999, p. 153).

[254] Cassese, *Supra* note 47; Franck and Rodley suggested in that context that "(...) humanitarian intervention are more likely to be terminated and the sovereign rights of the victim of intervention will be restored more speedily if the action occurs under the multilateral auspices *of a group of sovereign, equal, and, to some extent, rival states* which are, at the very least, reluctant to see any one of their number derive undue advantage from the intervention." (Franck, Rodley, *Supra* note 130, p. 281, emphasis added).

[255] *See* Cassese, *Supra* note 47; Garrett, *Supra* note 253, p. 150.

resolving the conflict, but they may also have a deeper understanding of the roots causing and the complexities surrounding the conflict. Moreover, the possibility of invoking national interests is further reduced by the procedures of decision-making within such organisations. In addition, their intervention is more likely to be accepted by the target state precisely because the intervening body being from the region.[257]

Second, States that engage in a humanitarian intervention without authorisation would be required to submit immediately a report to the Security Council, outlining their reasons and purposes of the intervention, as required under Article 51 of the UN Charter when invoking the doctrine of individual or collective self-defence.[258]

3.3. Implementing the Guiding Principles

Such a framework could be very useful for future interventions as it gives some guidelines for the intervening states. These guidelines would find its best establishment in a formal document, such as a Declaration or even an amendment to the UN Charter, and would provide a basis for lawful interventions.[259] However, it would be premature to assume that such a document as a third option on the exception on the use of force would occur in the near future.

That said, by having accepted that the "protection of international humanitarian standards has become an imperative responsibility"[260] together with these guiding principles adopted in a non-binding document, there is reason enough to believe, that such framework could be a feasible option for the future.

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[256] Chapter VIII of the UN Charter provides for the existence of regional arrangements "for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action" and offers the Security Council the possibility to "utilize such regional arrangements or agencies for enforcement action". No action however can be taken without the authorization of the Security Council.
On regional organisations as potential interveners *see further* Garrett, *Supra* note 253, pp. 155-159.
[257] A good example is the intervention of the Economic Community of West African States (ECOWAS) in Liberia in 1990. The intervention by the regional organisation was welcomed by the international community, as it was believed that "an African problem" would require "an African solution". (*Ibid.* p. 156)
[258] *See e.g.* Lillich, *Supra* note 11, p. 350; AIV/CAVV Report, *Supra* note 109, p. 31 para. 3(d).
[259] *See* IICK Report, *Supra* note 178, p. 187; Stromseth, *Supra* note 124, p. 258.
[260] Harhoff, *Supra* note 42, p. 69.

However, the problem that springs to mind is if the Security Council is not able to decide on a matter, or to decide whether a situation constitutes a threat to international peace and security, and consequently to decide whether to intervene or not – who will take that decision, and how will any use of force be regulated?

Some of the outlined principles have a very high threshold, and by being interrelated, this could be a solid framework, whose possibility of being abused is very limited.
One factor that may reduce the abuse is, as outlined, the requirement of multilateralism and the implicit support of the majority of the international community. In that sense, NATO's intervention in Kosovo certainly could be considered as a precedent for the future, not least for the reason that in the "continuing tension between the necessity to act in the face of humanitarian crises, and the often cumbersome decision-making procedures of general international organisations, reliance on regional groupings is an attractive compromise".[261]

Leaving such compromise aside, it is undeniable that these guiding principles lack an effective and responsible enforcement mechanism and leaving states to take that responsibility - to evaluate the situation and the necessity of intervention - is not an option. Therefore, the solution has to be found in the existing mechanisms of the UN, rather than seeking for alternatives outside its framework.

[261] Garrett, *Supra* note 253, p. 157.

Conclusion – A compromised Solution

Still today, many states claim that the treatment of their citizens fall exclusively in their domestic sphere and therefore excludes any international involvement whatsoever. The redefinition of State sovereignty, not least through the forces of globalisation, increasing interaction between states, and a new commitment towards the individual and the protection of his human rights at the end of the 20th century, has made this claim obsolete. The concept of the state has altered to an extent, that today it has to be understood as "the servant[] of [its] people, and not vice versa."[262]

The respect of basic human rights of the individual has become a universal value, one that the international community shares as a whole. Therefore, in cases of gross human rights violations, it is not only the responsibility of the respective state, but also one of the international community, and one which is not just morally compelling but legally binding. This new approach of a shared responsibility has created new pressures that demand of the United Nations to rise to new challenges and to leave the traditional understanding of threats and move towards a new approach, adjusted to the challenges the international community is facing today. I argue that the responsibility to put an end to gross human rights violations and the legitimacy to take action, two equally compelling interests, can be unified under a comprehensive doctrine.

Still, one problem that can not be ignored, is the fact that when it comes to which states will intervene or have the military capacity to do so, at least on the global level, the choice is basically limited down to one: the United States as the sole remaining superpower which gains significant support from Western states for its exercise of hegemonic power.[263]

For the general debate on the legitimate use of force and, also in relation to the current 'war against terrorism', the UN can only be seen as the most appropriate mechanism to regulate these challenges. Therefore, the system has to be strengthened to compel the UN to take its responsibilities under the Charter. The solution for humanitarian

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[262] Kofi Annan, *The legitimacy to intervene – International action to uphold human rights requires a new understanding of state and individual sovereignty,* Financial Times, 31 December 1999.
[263] *See* Krisch, *Supra* note 205, p. 96. See also on the United States position towards international law Byers, Chesterman, *Supra* note 220, p. 195.

intervention has to be found within the existing institutions, but in a compromised way within the proposed framework.

As I have argued, despite its limitations and need for reform, the UN and the Security Council, "the heart of the international law-enforcement system", and for the foreseeable future remaining, are the most appropriate body to regulate the use of force. Whilst the UN record may suggest a need to seek alternatives, the pressing current needs mandate that we endeavour to make the existing institutions more efficient and workable.

Articulating such criteria for future interventions is of utmost importance and would constitute one such step towards an increasing efficiency. Such attempt would rather aim to establish a *political* consensus to respond to gross human rights violations rather than to establish a legal basis in the absence of a Council authorisation.[264]

The use or threat to use their veto power by the Permanent Members has frequently been the main obstacle, when rapid and decisive action was warranted. In the light of such guidelines for humanitarian intervention, it would make it more difficult for Permanent Members to use or threat with their veto power. Moreover, France, one of the Permanent Members, has proposed a "code of conduct" implying the abstention from the use of veto power in humanitarian crisis. This certainly will not lead to the desired outcome of a formal agreement among them, but will undoubtedly put some political pressure on them, to withhold their veto power when facing situations like Kosovo or Rwanda.[265]

As has been already determined in Chapter II, Paragraph 2, especially since the end of the Cold War, the Security Council has broadened its understanding of threat to international peace and security and has considered internal conflicts and severe human rights abuses as such, making them subject to actions under Chapter VII. By enunciating such clear set of criteria this trend could be further reinforced by considering certain human rights violations as a subject clearly falling within Chapter VII actions. It would not only facilitate the Security Council to reach consensus in

[264] Stromseth, *Supra* note 124, p. 261.
[265] *See* ICISS Report, *Supra* note 94, p. 51; *Ibid*., pp. 264-265.

times of such a crisis but would further trigger an effective and timely response by the international community.[266]

Secretary-General Kofi Annan has urged member states of the Security Council to be ready to act under Chapter VII in cases of gross human rights violations and encouraged its members to reorient their thinking about the meaning of sovereignty. In view of the outlined conditions, it would encourage "to reinforce political support for such efforts, enhance confidence in their legitimacy and deter perceptions of selectivity or bias toward one region or another."[267] Thus, it has been reinforced that such guidelines would not only enhance the effectiveness and legitimacy of an intervention, but would also counteract the prevailing 'selectivity' of conflicts. Hence, the Secretary-General's effort so far has not only put pressure on the Security Council Members to consider humanitarian crisis further, but has also made a clear stance on the diplomatic level that intervention in the face of atrocities is an outstanding and legitimate subject.[268]

Conversely, this certainly does not preclude situations where no consensus on a situation in the Council can be found. Thus, as in Kosovo, where action proves to be necessary, and the Security Council demonstrates to be unable or unwilling to give authorization, the guidelines would deem as a solid basis for evaluation and justification of the intervention.

Yet, facing today's situation, "we cannot allow the world to again degenerate into a place where the will of the powerful dominates over all other considerations. That will surely prove to be a recipe for growing anarchy in world affairs."[269] However, standing aside when gross human rights violations take place is not acceptable either, but has to be based on legitimate principles. The given compromised solution, "[f]or all its limitations and imperfections, it is testimony to a humanity that cares more, not less, for the suffering in its midst, and a humanity that will do more, and not less, to end it."[270]

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[266] *See* Foreign Secretary Robin Cook, cited in Stromseth, *Supra* note 124, pp. 262-263.
[267] Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflicts, S/1999/957, 8 September 1999, p. 21, quoted in *Ibid*., p. 262.
[268] *See Ibid.*, p. 267.
[269] Nelson Mandela, *Address by former President Nelson Mandela during the honorary doctorate ceremony,* National University Ireland, Galway, 20 June 2003.
[270] Kofi Annan, *Supra* note 262.

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I CERTIFY THAT THE ATTACHED WORK IS ALL MY OWN WORK. I UNDERSTAND THAT I MAY BE PENALISED IF I USE THE WORDS OF OTHERS WITHOUT ACKNOWLEDGEMENT.

Galway, 15 July 2003 Marinella Bebos