
Humanitarian Intervention: Is There a Need for a Legal Reappraisal?

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Abstract

The breakdown of Yugoslavia and the ensuing war has called into question many formerly uncontested principles of international law. Perhaps the most far-reaching challenge to the traditional international law doctrine was brought about by the NATO intervention in Kosovo. Many authors cite this event as a proof that a new right to humanitarian intervention is evolving or has already come into being. The aim of this article is to show that conventional positions have been abandoned far too easily in this context. Not only is this change of position unwarranted on legal grounds but it is also counterproductive on the factual level. Despite all its shortcomings the prohibition of the use of force may constitute in the end a better protection for the weak than its abandonment prompted by an over-enthusiastic belief in the virtues of the intervenor.

1 Introduction

NATO intervention in Kosovo has brought about a flurry of contributions in legal literature suggesting the need to take a completely different stance towards the perennial controversial subject of humanitarian intervention. Kosovo has come to be regarded as a watershed dividing a former 'Hegelian', state-centred system of international relations, from an actual 'Kantian' model which is far more community-oriented. While the former model guaranteed a certain stability in interstate relations without being able to ensure satisfactory respect for core values, such as the protection of fundamental human rights by the state, it is hoped that the latter shall open a new chapter of legitimacy in the behaviour of international subjects, relegating the once paramount security issue to a second place in public attention. The protection of (fundamental) human rights has been assigned such an overwhelming importance that state sovereignty should no more stand in the way in order to prevent gross violations of these rights. At first glance, however, this new perspective collides with the principle of non-intervention as well as with the rule set forth in Article 2(4)

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of the United Nations Charter, according to which '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.¹

Commentators have, however, undertaken considerable efforts to overcome these constraints and to find legal justifications for measures which were prohibited in the past but which nonetheless seem morally commendable. The scope of this article is to assess these new approaches. It will be shown that on the legal level far less has changed than part of the literature claims. Nevertheless, this ongoing discussion merits close consideration as it is symptomatic of broader developments in international legal reasoning. The way the problem is presented and legal solutions are offered is the immediate product of a profound shift in the self-identification and the self-perception of the international lawyer and the results can, in the 'traditionalist's' eyes blur one's vision for the 'hard' law whenever due attention is not paid to this changed structure of the reasoning process.

2 The Kosovo crisis

The history of the Kosovo crisis has been told and retold again so that a short outline of the essential developments shall suffice here. The Kosovo crisis had been lingering for a long time. The first protests of the Albanian Kosovars against Serb oppression after the death of Tito date back to 1981 and continued to grow with the accelerating decay of the Yugoslav state entity at the end of the 1980s. In 1989, the autonomous status of Kosovo, granted in 1974, was revoked and in 1990 the regional parliament dissolved. Systematic discrimination in public service as well as in justice and in administration worsened the relationship between the Albanian and the Serb ethnic group even further. Although ethnic repression had been a daily experience of Kosovar Albanians throughout the whole Yugoslav conflict, large-scale discrimination and persecution became virulent in the 1990s, when the Albanians were subject to outright persecution by police forces which led hundreds of thousands of people to flee their country while Belgrade tried to promote the immigration of ethnic Serbs in Kosovo. Now an often experienced process in situations of a deteriorating group relationship set in: the discriminated group saw their only possibility to survive in having recourse to violence, while the central power interpreted this as proof justifying their fears and as a legitimation to increase violence in order to regain

¹ The exact scope of the principle of non-intervention is much harder to define than the rule prohibiting the use or threat of force set out in Article 2(4). It can, however, be said that both rules overlap as the provision of Article 2(4) is necessarily part of the principle of non-intervention. As will result from the following, it suffices to take Article 2(4) as a yardstick for assessing the legality of acts of humanitarian intervention. For a definition and delimitation of the concepts of intervention and non-intervention, see Oppermann, 'Intervention', 2 *EJIL* (1995) 1436.

control of the situation.² In February 1998, Serb police units started an offensive against the militant resistance and committed atrocities against the civil population. Now a civil war broke out. The international community was rather slow to act. Although this reluctant reaction was experienced throughout the whole Yugoslav crisis, this time the motive for such passivity can be found not only in a political unwillingness to take the necessary steps, but in a clear legal impediment which seemed to permit help for the oppressed Albanians only through the Yugoslav Government and not against its will: the *uti possidetis* principle. The Badinter Arbitration Commission, established by the European Community to find a common position with regard to the dissolution process of Yugoslavia and, not least, to contribute to a peaceful continuation and conclusion of this process, had applied this criterion of Latin American provenance to a controversy located geographically in Europe. The restrictive manner in which this principle was applied as a yardstick for resolving the problem left no leeway for the claim for independence for Kosovo. In a pragmatic, rather than legally compelling solution the internal (federal) boundaries became boundaries of the successor states even when the relevant borders had been drawn not much time before and, in part, arbitrarily.³ As a consequence, the ethnic strife between the various groups living on the Yugoslav territory, which was one of the main reasons for the implosion of the Yugoslav federation, was not considered at all when the boundaries between the newly created successor states were drawn. From this perspective, Kosovo could not be a candidate for independence and the international community was ill at ease when repression in this territory reached unbearable dimensions.

The Security Council took notice of the escalation of the conflict in Kosovo, first by Resolution 1160 of 31 March 1998 and later by Resolution 1199 of 23 September 1998. While the first Resolution was rather cautiously drafted, demanding in the first place a genuine, meaningful political process to be entered into without preconditions,⁴ the second pointed much more explicitly at the main culprit for the deteriorating situation, the Federal Republic of Yugoslavia which was now requested to come up to specific requirements. Nonetheless, the Security Council stopped short

² For a legal assessment of this phenomenon with regard to the often proclaimed 'right to secession', see Hilpold, 'Sezession und humanitäre Intervention — völkerrechtliche Instrumente zur Bewältigung innerstaatlicher Konflikte', 53 *Zeitschrift für Öffentliches Recht* (1999) 529. In this article, I have tried to point to the danger which is inherent in any concept which links the existence of a right to secession to the unleashing of a high intensity of violence as this may lead to extremely disruptive consequences.

³ See Opinion No. 3 of the Badinter Arbitration Committee, reprinted in 31 *ILM* (1992) 1499. The Badinter-Committee correctly pointed out that the ICJ in its Judgment of 22 December 1986 in the case between Burkina Faso and Mali (Frontier Dispute, 1986) qualified the *uti possidetis* principle as a general principle. It must, however, also be kept in mind that the ICJ has linked this principle to the 'gaining of independence', setting the whole matter in a colonial context. With regard to this matter, see also Bartos, 'Uti Possidetis. Quo Vadis?', 18 *Australian Yearbook of International Law* (1997) 37, at 74; Shaw, 'The Heritage of States: The Principle of Uti Possidetis Juris Today', 67 *BYIL* (1997) 76; and Nesi, 'L'uti possidetis hors du contexte de la décolonisation: Le cas de l'Europe', 44 *AFDI* (1998) 1.

⁴ Furthermore, a comprehensive arms embargo was imposed on the conflicting parties (para. 8) and the International Criminal Tribunal for the Former Yugoslavia was urged 'to begin gathering information related to the violence in Kosovo that may fall within its jurisdiction' (para. 17).

of a decision to take ‘all necessary means’ or to authorize member states to do so. The texts of these Resolutions, being of course the result of a difficult compromise in the Security Council, were half-hearted and ambiguous, thus permitting all the parties involved to safeguard their position, on the one hand, and, on the other hand, necessarily leading to a situation where the main controversy was only postponed. In any case, the warning that ‘should the concrete measures demanded in this resolution and Resolution 1160 (1998) not be taken [the Security Council would] consider further action and additional measures to maintain or restore peace and stability in the region’ could be safely interpreted as an indication that the last word had not yet been spoken on this issue and that Resolution 1199 was only a single step, albeit a significant one, in an ongoing process which should lead to a peaceful settlement of the conflict.

As Resolution 1199 brought no immediate result, NATO Secretary-General Javier Solana proclaimed on 9 October 1998 that NATO saw sufficient factual and legal grounds to threaten the use of force and, if necessary, to use force.⁵ From a legal point of view, these threats were not backed by the UN Charter⁶ but nevertheless they seemed, at least initially,⁷ to provide an important contribution to a peaceful solution of the problem. The end of 1998 was, however, again characterized by a continuing build-up of Serb forces in Kosovo, by ensuing massacres against Albanians⁸ and by the denouncement of the truce by the Albanian resistance. On 29 January 1999 in London, the Foreign Ministers of the Balkan Contact Group decided to put more pressure on the parties to the dispute, in order to bring them back to the negotiating table. NATO member states made clear that guaranteeing peace in Kosovo would require the deployment of their own troops in one way or the other. On 12 February 1999, the NATO Council decided to send 20,000 to 30,000 troops to ensure any peace settlement, having already authorized Secretary-General Javier Solana on 31 January to order the carrying out of air strikes against Yugoslavia in case it opposed negotiations.

After two rounds of peace talks between representatives of the FRY and the Kosovar Albanians at Rambouillet had failed as the FRY was unable to adhere to a sophisticated autonomy plan worked out by the members of the Contact Group, the Yugoslav army started, on 20 March, a large-scale operation to drive thousands of

⁵ For the text of this statement which is part of a letter from Solana, addressed to the permanent representatives to the North Atlantic Council, see Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’, 10 *EJIL* (1999) 1, at 7. NATO had already, on 24 September 1998, issued an ‘activation warning’ ‘for both a limited air option and a phased air campaign in Kosovo’. Cited according to Currie, ‘NATO’s Humanitarian Intervention in Kosovo: Making or Breaking International Law?’, 36 *Canadian Yearbook of International Law* (1999) 303, at 320.

⁶ These threats amounted to a ‘threat of the use of force’ within the meaning of Article 2(4). See Simma, *supra* note 5, at 11; and Currie, *supra* note 5, at 320.

⁷ See Simma, *supra* note 5, at 11.

⁸ On 15 January 1999, it became public that Serb forces had committed a massacre against the Albanian population of the village of Racak.

Kosovar Albanians from their homes.⁹ When even Richard Holbrooke's last-minute efforts as a special envoy to Belgrade aimed at making President Milosevic sign the Rambouillet agreement had failed, Javier Solana ordered the carrying out of air strikes against the FRY on 24 March. In the following weeks, Russia undertook further mediating efforts, but to no avail. The 11-week NATO air campaign lasted longer than initially predicted, and it seems that only after the attacks targeted more and more closely Milosevic's and his friends' private interests did the war come to an end, after about 32,000 air-missions. On 3 June 1999, the FRY accepted a peace plan drafted by the G8, officially proposed by the Finnish President Ahtisaari and Russian Special Envoy Cernomyrdin. It was also the G8 which drafted Security Council Resolution 1244 adopted on 10 June 1999 with 14 votes in favour and only China abstaining.¹⁰

Resolution 1244 seems to ignore the events and the forces that have brought about the situation as it existed at the beginning of June 1999. Just as in a bad movie, in which, notwithstanding an inextricable, contradictory plot, a happy ending is obtained by a cut which leaves out the main developments, so the Security Council regained control of the action only when the decisive steps had already been undertaken and behaved as if it always had had the control of the scene. While the value of this Resolution for the post-war rebuilding of a peaceful setting in Kosovo cannot be overestimated, the fact that the Security Council does not refer to the NATO military action can hardly be seen as evidence for an acquiescence to the intervention. The Security Council rather chose a pragmatic approach by which the most pressing problems were to be addressed while excluding the question of how to qualify certain events of the past which were within the competence of the Security Council but which this body was unable to tackle. This does not mean that the legal evaluation of these events is only of importance from an historical point of view. First of all, it has to be taken into account that the International Court of Justice has been seised of this matter.¹¹ It will be interesting to see whether the Court makes use of the opportunity to clarify thoroughly the much debated question of what place the proclaimed right of humanitarian intervention could have in the Charter system which prohibits the unilateral recourse to armed force.¹²

⁹ See Murphy, 'Contemporary Practice of the United States Relating to International Law', 93 *AJIL* (1999) 628, at 630.

¹⁰ See Fischer, *Weltalmanach* (2000) 417–418.

¹¹ The proceedings before the ICJ were instituted by the Federal Republic of Yugoslavia on 29 April 1999 against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United States after the FRY had recognized the compulsory jurisdiction of the ICJ under Article 36(2) of the Statute of the Court on 26 April 1999. The FRY demanded provisional measures to stop immediately the air strikes, a declaration of illegality of the intervention and compensation. As is known, the ICJ rejected the demand for provisional measures as it found it lacked the necessary *prima facie* jurisdiction. The Court remains, however, seised of eight of the ten cases instituted by Yugoslavia with regard to the remaining requests. With regard to the cases instituted against Spain and the United States, the Court held that it manifestly lacked jurisdiction.

¹² The first pronouncements of the Court with regard to the merit of the 10 cases instituted by the FRY could — even if they are made *obiter* — be seen as a sign that the Court is not prepared to set aside the prohibition of the threat or the use of force in favour of a right to humanitarian intervention, as it declared itself to be 'profoundly concerned with the use of force in Yugoslavia' and that 'under the present

But, also outside the ICJ, the discussion about this subject has attained a remarkable degree of attention. Worldwide reaction to NATO's air campaign over Kosovo was mixed from the very beginning. While, at least in Western countries, the action was overwhelmingly welcomed from a political standpoint, strong doubts persisted with regard to its legality. Even the successful completion of the military campaign could not really diminish the intensity of this discussion. At first glance, it seems astonishing that even a year after the fighting has ended a widespread self-sustaining interest regarding the question of whether the NATO operation was lawful is noticeable. A major cause for this continuing interest can be found in the fact that the events in the first half of 1999 reanimated the old discussions of whether there is a right to humanitarian intervention in international law. A considerable number of legal commentators have attributed the value of precedent to the NATO intervention in Kosovo; some are maintaining that there is a need to reinterpret the UN Charter with regard to the relationship between the core values it purports to defend, peace and human rights; others have argued outright that a unilateral right to humanitarian intervention in extreme cases exists. The number of writers criticizing the concept of a right to humanitarian intervention — once decisively preponderant — seems to dwindle; even writers with a long record of opposition against such a legal right were looking for suitable justifications. The rapidness with which long-established concepts seem to be abandoned is astonishing and qualifies this matter as an outstanding subject which merits closer attention, as it could indicate new trends in international law or, more precisely, a new approach in defining international law. This new approach can also be seen as evidence of a new self-perception by the international lawyers who — in part — attribute to themselves a more prominent role in the shaping of the substance of this branch of law compared to the past.

3 The Development of the Idea: Does Practice after the Second World War Constitute a Basis for a New Customary Rule?

A large number of inquiries into the law of humanitarian intervention make reference to the precedents prior to the First World War. Most of these inquiries are mainly interested in the question of whether there had been a rule of customary law permitting an armed humanitarian intervention. This question is of considerable importance as, beginning with the existence of such a rule in the nineteenth century

circumstances such use raises very serious issues of international law'. See, as an example for the orders issued on 2 June 1999, *Legality of Use of Force (Yugoslavia v. Belgium)*, 'Request for the Indication of Provisional Measures', ICJ Reports (1999), at para. 17; www.icj-cij.org. It is, however, very likely that the lack of jurisdiction is not of only a *prima facie* nature and that therefore the merits of these cases will never be heard. See in this regard C. Gray, 'Legality of Use of Force . . .', 49 *ICLQ* (2000) 730.

— so it is argued — it could perhaps be inferred that a customary exception to the strict prohibition of the use of force still survives in the Charter system. The whole discussion is beside the point. In fact, in a world order in which recourse to war was not legally regulated and in which the relevant decision was therefore part of the sovereign powers of each single state, a customary rule allowing interventions for humanitarian reasons was not needed nor could it develop under such conditions. True, each act of intervention was accompanied by an intensive discussion in the intervenor states and beyond. But this discussion was of a political nature and, even where sufficient evidence could be shown that on a political level a majority endorsed such a rule, this would still not establish a precedence in the ambit of the legal discussion. As is well known, after the First World War efforts were undertaken to restrict the power of states to go to war. This whole development worked against the creation of a rule allowing for measures of humanitarian intervention. After the Second World War the entire question seemed to have been settled once and for all. Following a ‘mainstream’ approach,¹³ the situation under the Charter system can be summarized as follows: unilateral acts of humanitarian intervention are — without doubt — prohibited; there is no way to find a justification for such measures. Whether the Security Council could use (or allow the use of) military force in a humanitarian crisis whose effects do not go beyond the borders of a single state is at least open to debate. However, this last question had not become a real issue until the beginning of the 1990s because of the virtual blockade of the Security Council in any such issue: each internal crisis was linked — directly or indirectly — to the great ideological disputes which, in the permanent members, had conflicting advocates most willing to exercise their veto power in questions like these which were considered to be of such essential importance.

This being the situation at the inception of the Charter system, it is furthermore necessary to examine whether subsequent developments now lead to a different legal assessment. There can be no doubt that in interpreting the Charter it is not an historical will which we have to look for, as the subsequent practice gives expression to the reality of the treaty. Particularly keeping in mind the judgment in the *Nicaragua Case*, it also cannot be denied that the rule contained in Article 2(4), prohibiting the threat or use of force ‘against the territorial integrity or political independence’, is potentially subject to change as a result of a customary law development.

A large number of cases of armed intervention after the Second World War have been associated in one way or another by the intervenor, his allies or in legal writing, during the act of intervention or in the aftermath, with humanitarian motives. The

¹³ Needless to say, this position, as is nearly every other position in international law, was also in part contested. It may, however, be argued that the ‘mainstream’ position has assumed a particularly authoritative role in this case. See, however, Jennings and Watts, *Oppenheim’s International Law*, vol. I (1992), one of the most recognized manuals of international law of the present, where the following statement can be found: ‘[W]hen a state commits cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, the matter ceases to be of sole concern to that state and even intervention in the interest of humanity might be legally permissible.’ *Ibid.*, at 442.

ideological divide between East and West, but also the almost religious importance of national sovereignty and territorial integrity, especially among newly independent countries, made sure on the other hand that a great part of these acts of intervention met with strong criticism or outright condemnation.

The most prominent cases of intervention with an — effective or alleged — humanitarian background in the period between 1945 and 1990 are the Belgian Congo intervention of 1964, the US intervention in the Dominican Republic of 1965, India's side-taking in the independence war of Bangladesh against Pakistan in 1971, Vietnam's intervention in Kampuchea in 1978 and 1979, Tanzania's intervention in Idi Amin's Uganda in 1979, and the US interventions in Grenada in 1983 and in Panama in 1989 and 1990. In none of these cases can it be denied that the intervention provided — to a greater or a lesser degree — some humanitarian relief. At the same time it must be acknowledged that additional — in most cases prevailing — elements were always present that prompted the intervenor to act. It is also interesting to note that, in those cases where humanitarian concerns were stressed the most in official declarations, as in the case of the US intervention in the Dominican Republic, they played only a minor role¹⁴ in reality, while in the case of Vietnam's intervention in Kampuchea, an act which probably saved millions of lives as the terror regime of the Khmer Rouge was intent on annihilating a great part of the people of Kampuchea, humanitarian intervention was not advanced by the Vietnamese as a justification. Rather, Vietnam tried to deny obvious facts and had recourse to a scarcely credible account according to which Vietnam had only made use of its right to self-defence after the Khmer Rouge had violated Vietnamese territory when the Khmer regime had been overthrown by the Cambodian resistance. The same is true for Tanzania's intervention in Uganda, although the result of this action was the removal of one of the bloodiest dictatorships modern Africa has known, and although this fact was widely welcomed by the international community, Tanzania's government also tried to justify its intervention as an act of self-defence. In both cases, it is clear that a military operation aimed at the deposition of a foreign government and at the installation of a government friendly to the intervenor can hardly be qualified as an act of self-defence according to Article 51 of the UN Charter as this provision implies that the measures adopted are proportional, i.e. strictly necessary to repel the attack.¹⁵

The fact that both Vietnam and Tanzania have tried to justify their actions by allegations that do not withstand an even rudimentary scrutiny while the humanitarian argument would have been at hand speaks volumes for the legal quality both

¹⁴ See Pauer, *Die humanitäre Intervention* (1985) 156; and Murphy, *Humanitarian Intervention — The United States in an Evolving World Order* (1996) 94. In hindsight, it has become clear that the primary goal of the US intervention has been the intent to halt the expansion of the communist influence in the Americas. If there were humanitarian interests, they concerned first of all the lives of American citizens in these countries.

¹⁵ See Randelzhofer, 'Article 51', in B. Simma (ed.), *The Charter of United Nations — A Commentary* (1995) 677, at para. 37.

states have attributed to this concept: it seems that neither of the two states attributed much reputation to this concept. The reactions to all of these interventions proved this assessment right: these acts were mostly met with strong protest by the international community and, in those cases where the reaction was more bland or protests were practically absent, it was apparent that this attitude was motivated by broader political considerations.¹⁶

Thus, it can be inferred from these events and reactions that the necessary elements for the formation of a customary rule allowing measures of humanitarian intervention were not only not present but relevant state practice was a thorough confirmation of the rule which excludes the permissibility of such interventions.

With the demise of the Eastern bloc Communist systems, the Security Council seemed to be able to give new life to the concept of humanitarian intervention — this time in a collective form and therefore *prima facie* consistent with the letter of the UN Charter.

As a starting point for an analysis of the humanitarian intervention practice which the Security Council has allegedly embarked on in recent years, reference is usually made to Resolution 688 of 1991 by which the Security Council demanded Iraq to end the repression against her own civilian population and especially against the Kurds. No mention is made in this Resolution of Chapter VII of the Charter or of an authorization 'to use all necessary means'.¹⁷ This resolution was regarded, however, as a sufficient basis to establish the so-called 'safe havens' in northern Iraq by the US and their European allied forces. It is true that Resolution 688 mentioned the existence of a 'threat to international peace and security in the region' but this statement was more connected to the 'massive flow of refugees towards and across international frontiers' and to the 'cross border incursions' than to the humanitarian crisis itself.¹⁸

A further, decisive step towards the development of a humanitarian intervention

¹⁶ This can be assumed, for example, with regard to the reaction to Tanzania's intervention in Uganda. First, this measure was accepted because it ended the isolation of Uganda provoked by the politics of Idi Amin and, secondly, because it put an end to a regime which revealed itself more and more as a destabilizing power in international relations.

¹⁷ See Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force* (1993) 18.

¹⁸ This is the prevailing interpretation of Resolution 688. See, for example, Alston, 'The Security Council and Human Rights: Lessons to be Learned from the Iraq-Kuwait Crisis and its Aftermath', 13 *Australian Yearbook of International Law* (1992) 107, at 132; Karl, 'Besonderheiten der internationalen Kontrollverfahren zum Schutz der Menschenrechte', 33 *Berichte der Deutschen Gesellschaft für Völkerrecht* (1993) 83, at 93; and Endemann, *Kollektive Zwangsmaßnahmen zur Durchsetzung humanitärer Normen* (1997) 197. But see also Tesón, 'Collective Humanitarian Intervention', 17 *Michigan Journal of International Law* (1996) 323, at 344: 'Aside from word games, this still is a human rights issue about Iraq's treatment of its own citizens. A reasonable interpretation of Resolution 688 is that the Security Council was centrally concerned with the human rights violations themselves, and the reference to the threat to peace and security was added for good measure.' This statement of Tesón is correct in the sense that, for the decision to intervene, the transfrontier effects of the Iraqi crisis were probably of secondary importance in comparison to the humanitarian crisis in Iraq. It is wrong if this statement should imply that the reference to the transborder effects was therefore more or less superfluous. In fact, the inclusion of this statement was decisive to convince China to refrain from the use of her veto power which would undoubtedly have been exercised if the draft resolution had referred exclusively to an internal crisis.

practice of the Security Council was set by Resolution 794 of 1992 in the context of the total breakdown of public order in Somalia. In this resolution, for the first time, a threat to international peace and security was found and the requirement of a consequential enforcement measure under Chapter VII stated without any recourse to the transborder effects of the crisis. At first glance, it may seem that the human tragedy taking place within Somalia was sufficient to justify an intervention. We should, however, not ignore the special circumstances under which this resolution was adopted, circumstances the Security Council was eager not only to emphasize but also to put into the centre of its reasoning. Thus the Security Council *recognized* the *unique character* of the situation in Somalia; it was *mindful* of the *deteriorating, complex and extraordinary nature* of these events, *requiring an immediate and exceptional response*. It is true that the Security Council referred directly to the *magnitude of the human tragedy* when determining the presence of a threat to international peace and security, but at the same time it pointed to the special situation prevailing in Somalia to which the term of ‘failed state’ was attributed in literature.

Another frequently cited document which is regarded as proof of the preparedness of the Security Council to consider a purely internal humanitarian crisis, and, more specifically, the violation of human rights, as a possible threat to peace and security, is Resolution 940 of 1994 with regard to the Haitian crisis and the attempt of the world community to restore the legitimate presidency of Jean-Bertrand Aristide, ousted from office by a military coup. Again, however, the Security Council referred to the ‘unique character’ of the situation in the country where the intervention should take place, the ‘deteriorating, complex and extraordinary nature’ of the crisis, ‘requiring an exceptional response’. Further special circumstances which characterize this situation corroborate the assumption that a generalization of the content of Resolution 940 is not warranted. First of all, there had been an invitation to intervene by the legitimate president, and, secondly, a UN-sponsored agreement, directed at resolving the crisis, had been violated.

Probably the most genuine case of a collective humanitarian intervention was realized with Resolution 929 (1994) authorizing ‘the Member States cooperating with the Secretary-General’ to conduct ‘a temporary operation under national command and control aimed at contributing, in an impartial way, to the security and protection of displaced persons, refugees and civilians at risk in Rwanda’. Without any reference to the transboundary effects of the crisis (which were undoubtedly present) or the presence of a ‘failed state’ (which Rwanda surely was), the Security Council stated purely and simply that ‘the magnitude of the humanitarian crisis in Rwanda constitu[ted] a threat to peace and security *in the region*’.¹⁹ In comparison to past cases this meant a clear refocusing of the priorities the Security Council had set for itself in the ambit of the recourse to Chapter VII measures. Also in Resolution 929 (1994) the Security Council stated, however, that the crisis in Rwanda constituted ‘a unique case

¹⁹ Emphasis added.

which demands an urgent response by the international community', thus denying precedential value to this measure.²⁰

On the whole, this development can be regarded as the expression of an increasing willingness by the Security Council to attribute more importance to internal conflicts if they give rise to an extraordinary humanitarian crisis. Nonetheless, the cases cited are more the proof of the latitude of the Security Council's powers to autodetermine its competences than an indication of a real humanitarian intervention practice.²¹

The Yugoslav crisis has shown that, notwithstanding the end of the Cold War, even in the presence of blatant violations of human rights and state-sponsored atrocities, the adoption of effective Chapter VII measures remains more a possibility than a probability.²²

With regard to the Kosovo crisis it was clear from the very beginning that the Security Council would never explicitly authorize measures which could be qualified as 'humanitarian intervention'.

As described above in the introductory section, at the beginning of 1999 the situation in Kosovo was deteriorating continuously and, given Milosevic's record on prior conflict spots in former Yugoslavia the worst was to be feared — and actually planned around this time.²³

NATO's military action could not prevent the committing of grave human rights abuses by Serb forces and it is a fact that they even accentuated their operations

²⁰ Further measures, qualified in literature as acts of humanitarian intervention, could be cited. In 1990 the Economic Community of West African States (ECOWAS) intervened in Liberia where public order had been totally disrupted by a civil war. ECOWAS had no authorization for this measure but the Security Council legitimized this action retroactively. Another unilateral intervention carried out by ECOWAS in Sierra Leone in 1998 was also approved subsequently by the Security Council. See Currie, *supra* note 5. See also Security Council Resolution 1101/1997 authorizing certain member states which had made an explicit offer, 'to establish a temporary and limited multinational protection force to facilitate the safe and prompt delivery of humanitarian assistance, and to help create a secure environment for the missions of international organizations in Albania, including those providing humanitarian assistance' and, acting under Chapter VII of the Charter of the United Nations, 'further authorize[d] these Member States to ensure the security and freedom of movement of the personnel of the said multinational protection force'.

²¹ We are faced here with the danger of over-generalization. One must be very careful not to over-generalize from past UN measures in these fields. This danger has already arisen subsequent to the two Security Council resolutions (217 (1965) and 221 (1966)) by which an internal situation (the establishment of a white, racist minority regime) was taken as immediate cause to declare the existence of a 'threat to the peace'. These statements by the Security Council did not mean that any illegitimate, anti-democratic and discriminatory government constitutes a 'threat to the peace', but were only an early reminder of the broadness of the Security Council powers and a demonstration of the willingness to use them especially in those cases which can be qualified as 'special' or 'unique' and which are not suited for an easy generalization.

²² So it is doubtful whether the war in Bosnia would have ended had single states (especially Croatia and the US) not undertaken unilateral actions.

²³ Evidence is mounting that Milosevic planned an operation of ethnic cleansing in Kosovo under the codeword *podgova* (horseshoe). This operation was planned well before the NATO air raids, during the Rambouillet negotiations and started at the end of this process. See 'Pressegespräch von BM Fischer zum Kosovo am 6 April 1999 im Welsaal des Auswärtigen Amtes', www.auswaertiges-amt.de/6_archiv/inf-kos/P990406a.htm; *Washington Post*, 11 April 1999; and *Die Welt*, 16 July 1999.

during the period NATO members carried out their air raids. On the other hand, neither can it be denied that intervention by NATO forces helped finally to stop the carnage and induced Serb forces to retreat from Kosovo. From a legal point of view, this whole action has given rise to two broad sets of questions. First of all, it must be examined whether there is a possibility to justify the intervention by NATO member states within the Charter system. The respective proposals advanced in literature will be examined in the next chapter. Should these attempts be dismissed, there still remains the question of whether the act of intervention — illegal *de lege lata* — could give rise to a new customary law norm or whether such a process is already under way.

4 Justifications for the NATO Intervention²⁴

As a starting point, it has to be ruled out that the NATO intervention could be justified by having recourse to the fact that the intervention was a collective act by several NATO member states, some of which are at the same time also members of the Security Council. The distinction between collective and unilateral measures refers to the question of whether the initiative has been authorized by the Security Council or not. The absolutely prevailing view is that such an authorization was not granted by the Security Council in the Kosovo conflict and that therefore the whole initiative has to be qualified as a unilateral measure. Louis Henkin, known as a convinced opponent of unilateral measures of humanitarian intervention, has recently played the role of the *advocatus diaboli* with regard to this question and formulated the arguments NATO could advance for its defence:

Human rights violations in Kosovo were horrendous; something had to be done. The Security Council was not in fact 'available' to authorize intervention because of the Veto. Faced with a grave threat to international peace and security within its region, and with rampant crimes reeking of genocide, NATO had to act. NATO intervention was not 'unilateral'; it was 'collective', pursuant to a decision by a responsible body, including three of the five permanent members entrusted by the UN Charter with special responsibility to respond to threats to international peace and security.²⁵

All those arguments cannot stand up under closer scrutiny. While the qualification of this intervention as 'collective' merits no further attention,²⁶ the reference to the

²⁴ Not all justifications that are theoretically possible can be discussed here. For example, it will not be examined whether NATO intervened in favour of a people exercising its right to self-determination, as no side ever made such a claim. It will only be remarked that such a claim would have no basis in international law, as has been shown elsewhere. See Hilpold, *supra* note 2; Hilpold, *Der Osttimor-Fall* (1996); and Hilpold, 'Das Selbstbestimmungsrecht der Völker vor dem IGH — der Osttimor-Fall', 53 *ZÖR* (1998) 263.

²⁵ See Henkin, 'Kosovo and the Law of "Humanitarian Intervention"', 93 *AJIL* (1999) 824, at 826.

²⁶ See Simma, *supra* note 5, at 19: 'Legally, the Alliance has no greater freedom than its member states.'

fact that three of the five permanent members participated in the intervention merits a few words, as this argument has been seriously advanced in literature.²⁷

To attribute some sort of a binding effect to the fact that individual members of the Security Council have set certain acts in their international relations, even if they were not able to bring about a corresponding decision within the Council, would be tantamount to ignoring the very essence of the decision process within the Security Council. The necessity for a draft resolution to obtain the endorsement of all permanent members of the Security Council, or at least not to be actively opposed by one of these states, was introduced with a view to the very far-reaching consequences a decision by the Security Council can entail. Any attempt to introduce a majority principle for the permanent members of the Council, too — if only indirectly or with weakened consequences — and thereby abolishing or at least softening their veto power, would not only run counter to the letter of Article 27 of the UN Charter but also to the spirit lying at the heart of the constitutional consensus which permitted the establishment of this new order.²⁸

Some authors defending the legality of the Kosovo intervention have buttressed their position with the concept of 'emergency help' (*Nothilfe*). It is hard to deny the good intentions that have given life to this concept; it has, however, no real basis in international law. The line of argumentation which the proponents of such a concept²⁹ follow is based on an analogous application of the right to self-defence regulated in Article 51 to a people that is victim of the oppression by its own government. This analogy should take the form of a right to grant emergency help to that people. Article 51 of the Charter, however, is to be interpreted restrictively³⁰ and

²⁷ See, for example, Zappalà, 'Nuovi sviluppi in tema di uso della forza armata in relazione alle vicende del Kosovo', 82 *Rivista di diritto internazionale* (1999) 975, at 1003, who argues that the veto power should inhibit a humanitarian intervention only in the case where the core spirit of Article 27(3) of the Charter was touched. As such, he identified the necessity to avoid a conflict between the permanent powers, which could threaten peace and international security. It appears, however, not warranted to restrict the veto power in this way. Nowhere in the Charter do we find a basis for such an approach. On the contrary, this distinction would introduce a subjective element in the Charter the founding members were keen to rule out: The veto expressed by a permanent member state must suffice to impede that an act is adopted by the Security Council and this individual decision by such a state cannot be overruled or set aside in the way of a subsequent distinction as to the greater or lesser importance of the relevant measure for the maintenance of peace and security. In fact, who should be responsible for this balancing of interests? Were it the single member state, the veto power would lose any real significance.

²⁸ These considerations can also be applied to the argument that the clear defeat of the draft resolution presented by Russia on 26 March 1999 and directed to condemning the NATO intervention could be interpreted positively as an approval of the intervention. The rejection of this draft simply meant that the majorities necessary for an approval were not reached. No further material consequences can be deduced from this fact.

²⁹ The principal proponent of this concept in German international literature has been Karl Doehring, *Völkerrecht* (1999) para. 1008 *et seq.* In the context of the Kosovo crisis, his position was soon taken up by other writers. See, for example, Delbrück, 'Effektivität des UN-Gewaltverbots', 74 *Die Friedens-Warte* (1999) 139. Without making explicit reference to this concept, the same line of reasoning is followed by Wedgwood, 'NATO's Campaign in Yugoslavia', 93 *AJIL* (1999) 828, at 833.

³⁰ See Randelzhofer, *supra* note 15.

it is surely not suited for an analogous application.³¹ In fact, such an analogy would not only put in doubt the central position which the prohibition of the threat or the use of force has been attributed in the Charter system, but it would give rise to the question of what is left of this principle. Moreover, no provisions can be found that would recognize the legal personality of single peoples, giving them legal subjectivity to exercise this right. Even when a catalogue of criteria is formulated that must be present in order to justify such an analogy ('fundamental rights must be grossly violated'; 'the intervention must be carried out by a group of states'; 'the intervention must regard only the closer humanitarian concern'; 'the principle of proportionality must be respected'; 'the Security Council must be informed immediately')³² the outcome of this evaluation remains the same. Each of these criteria seems to command full support from a political or a moral point of view, but, on the other hand, a great part of these criteria are vaguely formulated and they have either no clear foundation in international law or they are formulated in such a general way as to be of no practical value. Their 'politically correct' content seems mainly directed at detracting from the fact that the institution they should regulate, the 'emergency help', is itself unknown in international law.³³

Even if not explicitly spelled out, some sort of an 'emergency help' principle lies also at the basis of the argument according to which the inability of the Security Council to

³¹ But see Wedgwood, *supra* note 29, at 833: 'Whatever one's view of Article 2(4), one may profitably draw an analogy to Article 51, where the right of self-defense in the juridical state precedes and survives the Charter's collective mechanisms. The Council's willingness to expand the reach of Chapter VII to look at both internal and international conflicts may justify a broader interpretation of Article 51 as well, for surely the self-defense of a population warrants as much consideration as defense of a political structure.' It does not appear, however, that the structure of international law warrants such an analogy.

³² These criteria have been formulated by Delbrück, *supra* note 29.

³³ Ipsen, 'Der Kosovo-Einsatz — Illegal? Gerechtfertigt? Entschuldigbar?', 74 *Die Friedens-Warte* (1999) 19, has recently tried to find a foundation for this principle in international law referring to the concept of 'necessity' (*Notstand*) which, according to Ipsen, represents a general principle of international law and can therefore justify the Kosovo intervention. This position cannot be accepted. First of all, 'necessity' is a typical concept of criminal law and there are — as the ILC Draft on State Responsibility evidences (Article 33) — great difficulties in applying this concept, which regards the relationship between individuals, on the behaviour of states, or, respectively, on the relationship between states and groups in other states. Furthermore, 'necessity' has to be distinguished from 'necessity aid'. It does not appear that this concept — which in any case could not be identical to any form of collective self-defence — makes part of positive international law. The reference to the 'necessity' concept has been criticized recently also by Kohen, 'L'emploi de la force et la crise du Kosovo: Vers un nouveau désordre juridique international', 1 *Revue Belge de Droit International* (1999) 122, at 136, as an '[a]rgument d'esespéré des juristes en panne de causes de justification des comportements illicites'. Kohen cites also Le Fur 'La théorie du droit naturel depuis le XVIII siècle et la doctrine moderne', 18 *RCADI* (1927-III) 429, for whom the necessity concept was 'trop souvent en fait l'expression de la volonté du plus fort au nom de son intérêt prédominant; car ce n'est évidemment pas un petit État qui va pouvoir en pratique, au nom du droit de nécessité, opposer son intérêt, même majeur, au droit d'un grand État'. *Ibid.*, at 137.

act restores the freedom of each member state to act unilaterally.³⁴ Proceeding on the assumption that the UN member states renounced their sovereign right to go to war trusting that a new collective security mechanism would render unilateral acts obsolete, it is inferred that states regain their full sovereign rights in this field once the collective security mechanism has proved ineffectual. This position does not, however, seem to be a correct interpretation of the relevant provisions of the Charter. In fact, a limited functioning of the collective security mechanism was to be expected already at the time of the drafting of the UN Charter and it would have been utopian to think otherwise.³⁵

Despite these obvious deficiencies, the UN Charter was accepted in its present form: in the face of past experiences, the prohibition of the use of force was considered a value of such paramount importance that it seemed justifiable to agree to a system where nobody would be prepared to act in the face of a concrete breach of the peace, with the only (possible) advantage being to limit the use of force in this way.

Various writers have argued that this system may have been in force in the past; the slow but continuous enactment of a sophisticated set of human rights instruments, so this argument goes, has changed the priorities between the different goals of the United Nations.³⁶ As proof of these changes, reference is usually made to various new or improved instruments for the protection of human rights, but especially to the establishment of the two international criminal tribunals for Yugoslavia³⁷ and Rwanda³⁸ and of an International Criminal Court.³⁹

It cannot be denied that tremendous improvements in the protection of human

³⁴ For this thesis, see e.g. Stone, *Aggression and World Order* (1968) 96; Franck, 'Who Killed Article 2(4)?', 64 *AJIL* (1970) 809; Reisman, 'Coercion and Self-Determination: Construing Charter Article 2(4)', 78 *AJIL* (1984) 642; and Arend and Beck, *International Law and the Use of Force* (1993) 69.

³⁵ In 1973, Ian Brownlie very concisely addressed this issue: 'First, the efficacy argument loses weight to the extent that all rules are aspirations and performance naturally falls below the normative goal. There is a point beyond which automobile theft or hijacking, for example, cannot be checked by amending the rules. Secondly, the veto was a part of the Charter and not a subsequent fault in performance; moreover, positive votes can be abused as well as negative votes. Thirdly, the concept of effectiveness, particularly in relation to human rights, is superficial and deceptive. Situations like those in Ulster or Cyprus cannot be resolved by mere policing actions.' See Brownlie, 'Thoughts on Kind-Hearted Gunmen', in Lillich (ed.), *Humanitarian Intervention and the United Nations* (1973) 139, at 145.

³⁶ See, for example, Klein, 'Kosovo: Braucht die NATO ein UN-Mandat?', 4 *MenschenRechtsMagazin* (1999) 41; Tomuschat, 'Völkerrechtliche Aspekte des Kosovo-Konflikts', 74 *Die Friedens-Warte* (1999) 33, at 34; Thürer, 'Der Kosovo-Konflikt im Lichte des Völkerrechts: Von drei — echten und scheinbaren — Dilemmata', 38 *Archiv des Völkerrechts* (2000) 1. See also the declaration of the representative of the Netherlands before the Security Council: '[T]he Charter is not the only source of international law. The Charter, to be sure, is much more specific on respect for sovereignty than on respect for human rights, but since the day it was drafted the world has witnessed a gradual shift in that balance, making respect for human rights more mandatory and respect for sovereignty less absolute. Today, we regard it as a generally accepted rule of international law that no sovereign State has the right to terrorize its own citizens.' UN Doc. S/PV.4011, 12.

³⁷ See SC Res. 827 (1993).

³⁸ See SC Res. 955 (1994).

³⁹ See Rome Statute of the International Criminal Court, UN Doc. A/Conf.183/9 (1998); 37 *ILM* (1998) 999.

rights have been made over the last decades,⁴⁰ but it is doubtful whether these developments had an influence on the importance and interpretation of Article 2(4) of the Charter. There exists neither specific treaty law nor customary law in this regard, nor is it possible to find a subsequent practice according to Article 31(3)(b) of the Vienna Convention on the Law of Treaties which could be taken as proof of such a development. Even the much cited evolution of international criminal justice is of no specific relevance for this matter as the statutes of the respective tribunals do not touch upon this issue⁴¹ and the persecution of war criminals does not call into question the prohibition of the (unilateral) use of force.

The argument, according to which the UN Charter system can never be used as a justification for gross violations of human rights, sounds intriguing,⁴² but it misses the point. The Charter, in the first place, prohibits the threat or the use of force and the provision in Article 2(4) is meant to protect — at least indirectly — the same subjects as the human rights instruments. The problem of the collision between the two principles — protection of state sovereignty and protection of human rights — is, with regard to the question of whether measures of humanitarian intervention are permissible, a false one. Abandoning the strict rule of Article 2(4) could — in view of the possible abuses — jeopardize humanitarian issues as well. The strict interpretation of Article 2(4) therefore does not prejudice the effective implementation of the human rights ideals also enshrined in the Charter system, it is only — by far — an insufficient guarantee for their respect. This means that further instruments have to be sought that could supplement this order; it does not mean that the — albeit imperfect — rules in force should be abolished.

Other authors have not tried to indicate a specific legal source that would prove the alleged change in the goals of the Charter; they relied instead on the ‘spirit’ of the system, on an alleged new ‘minimum world public order’ or on a ‘structural change’ permitting each UN member state to enforce those principles which formed the ‘constitutional nucleus’ in the international relations. The search for the ‘spirit’ of the Charter system per se is far from being ‘extra-legal’; on the contrary, it leads us directly to the teleological interpretation method, a recognized interpretation approach applicable also to the Charter system.⁴³ On the other hand, a teleological interpretation is possible only within the framework of the treaty provisions and must never lead to results which are in breach of the wording of the Charter.⁴⁴ It is therefore not suited to proving a structural change in this system. Thus, the assumption that such a change has occurred brings us back to the allegation — discussed above — that new customary law rules, permitting acts of humanitarian intervention, have been formed. Ultimately, a new consensus between international subjects giving shape to this new rule has to be proved. This proof is totally lacking.

⁴⁰ See, for example, Henkin, ‘Human Rights’, 2 *EPIL* (1995) 886.

⁴¹ See Charney, ‘Anticipatory Humanitarian Intervention in Kosovo’, 32 *Vanderbilt Journal of Transnational Law* (1999) 1231.

⁴² See Ipsen, *supra* note 33, at 21.

⁴³ Ress, ‘Interpretation’, in Simma, *supra* note 15, 25, at 42, at para. 34.

⁴⁴ *Ibid.*

The same can be said of Fernando Tesón's main argument that states lose their legitimacy and sovereignty when they turn against their own citizens, as the protection of human rights and popular consent are constituent parts of both of these characteristics.⁴⁵ This line of reasoning may be a meaningful contribution in a moral discussion; in a legal discussion it is not compelling as it starts from a purely subjective assumption.

Another way to justify humanitarian intervention measures could be found by having recourse to the *erga omnes* principle, seemingly a very powerful tool first introduced by the ICJ in the *Barcelona Traction* Judgment of 5 February 1970, according to which there are 'obligations of a State towards the international community as a whole'.

While the content of this concept is still subject to heated debate, there are core elements which are necessarily part and parcel of this concept. Accepting the existence of this concept means that gross violations of human rights are necessarily a breach of *erga omnes* obligations. In a further step, it could be inferred from this concept that violations of the kind described — or the related injury to each member of the international community — create new justifications for measures of humanitarian intervention. Already this example may suffice to demonstrate the potentially disruptive force inherent in the idea of *erga omnes* obligations and — as a consequence — explain why it has not been possible to give more substance to this concept to date. Without being able to go here into a detailed analysis of this much disputed issue, it can be said that the prevailing opinion rules out that the use of force constitutes a permissible countermeasure in the case of the violation of obligations *erga omnes*.⁴⁶

Of course, the value of this institute must not be denied altogether. Especially with regard to the idea of community interests, which is of essential importance for the further development of international law in some much disputed areas (e.g. environmental law, human rights law, responsibility of states), this institute is of considerable help as an instrument to conceptualize the underlying problems and to allow for their better understanding. This is also true for the whole discussion about the problem of humanitarian intervention. The application of the *erga omnes* discussion to the field of humanitarian intervention evidences most clearly, however, the central problem of this area: we must be very careful not to create academic concepts which might faithfully describe a single aspect of international law only to attribute to them afterwards the status of a legal provision suited for extensive or even analogous application without requiring detailed evidence for a 'hard law' foundation.⁴⁷ In short, the concept of *erga omnes* obligations does not provide an immediate

⁴⁵ See Tesón, *Humanitarian Intervention: An Inquiry Into Law and Morality* (1997).

⁴⁶ See, for example, P. Malanczuk, *Akehurst's Modern Introduction to International Law* (1997) 271.

⁴⁷ Donald M. McRae in reviewing Delbrück (ed.), *New Trends in International 'Legislation' in the Public Interest* (1997), noted a divide between North American and European participants to the meeting, from which this collection of papers resulted, with regard to their approach to international law. While '[t]he Americans were wary of concepts unless they could ascribe specific content to them', he saw their European colleagues 'prepared to use concepts in a more fluid and somewhat amorphous way' (see 35

solution in the task of assessing whether measures of humanitarian intervention are lawful or not. It is no more than a discussion tool helpful in concretizing ideas but dangerous when seen with too much reverence so that one's perception for the norm itself is obscured.⁴⁸

5 Should Humanitarian Intervention become Permissible?

As a result of the foregoing discussion it appears safe to say that humanitarian intervention is not permissible *de lege lata*. Should these rules be changed? According to a considerable part of legal writings (or political writings, self-declared as legal), especially but not solely subsequent to the Kosovo conflict, they should. A recent article by Dino Kritsiotis,⁴⁹ intended, according to its author, to analyze the methods through which normative determinations in the relevant literature are reached, contains an interesting panoply of literary pronouncements rejecting the well-known position that the danger of abuse should operate as a shield against any change in the legal assessment of these measures.

Kritsiotis cites Rosalyn Higgins who writes: 'We delude ourselves if we think that the role of norms is to remove the possibility of abusive claims ever being made',⁵⁰ and who quotes another author with the following remark: 'It is a big mistake, in general, to stop short of recognition of an inherently just principle, [merely] because of the possibility of non-genuine intervention'.⁵¹ Kritsiotis proposes a two-tiered analysis in this field: first of all it has to be examined whether humanitarian intervention is a permissible head of intervention under international law; and, in a second stage, an inquiry should be made to determine whether the invocation of this institute is justified or lawful. In reality, the abuse problem cannot be relegated to a second stage of evaluation; it is of central importance for the question of whether any form of intervention should be allowed. The argument that a possibility of abuse should not impede the creation of a rule as any rule may be abused, convincing as it may seem at first glance, does not stand up to closer scrutiny. In fact, there are varying degrees to

Canadian Yearbook of International Law (1998) 543, at 545). Having due regard to the danger of generalization in this field, it can be said that this observation may partly explain why the concept of *erga omnes* obligations enjoys particular support among European lawyers and among lawyers particularly influenced by the European schools of thinking.

⁴⁸ Bruno Simma has aptly remarked: 'Viewed realistically, the world of obligations *erga omnes* is still the world of the "ought" rather than of the "is"; the concept marks the direction in which international law will have to move rather than a clear course already steered today.' See Simma, 'Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations *Erga Omnes*?', in Delbrück (ed.), *The Future of International Law Enforcement: New Scenarios — New Law?* (1993) 125.

⁴⁹ Kritsiotis, 'Reappraising Policy Objections to Humanitarian Intervention', 19 *Michigan Journal of International Law* (1998) 1005.

⁵⁰ Higgins, *Problems and Process: International Law and How We Use It* (1994) 247.

⁵¹ Higgins quotes Fonteyne, 'The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the UN Charter', 4 *California Western International Law Journal* (1974) 203, who himself cites Rolin-Jacquemyns, 'Note sur la Théorie du Droit d'Intervention', 8 *Revue de droit international et de législation comparée* (1876) 675, at 679.

which a norm is prone to be abused. In extreme cases, the relevant norm will provide an easy excuse for acts which otherwise would be outlawed and which are harmful for (national or international) society. This problem is particularly pressing in cases where a satisfactory control mechanism is lacking. International law has often been criticized in this regard. Even though this criticism is largely unjustified, in relation to the topic discussed here it should be heeded. It seems fair to assume that in and after a war situation it will be very difficult to assess the purity of the motives that have driven a state to go to war. This becomes even more true if we take into account the general destabilization of the world order probably resulting as a consequence of the return to the concept of the 'legitimate war'. It should not be forgotten that the prohibition of the unilateral resort to force was regarded as a value per se by the founders of the Charter system, and it is very doubtful whether one of the most important — albeit incomplete — achievements of the twentieth century in international law should be traded in for a set of rules which has already failed in the past. It could be objected that we dispose nowadays of a far more developed system of instruments to evaluate claims and counterclaims. These days, if humanitarian intervention were permitted, it would certainly not suffice to claim to wage a 'just war'. We dispose of a rich collection of human rights instruments and partly of a pertaining jurisprudence from which standards can be derived to evaluate the legitimacy of certain rules or of certain claims. Some writers have even moved beyond and tried to draw up a list of criteria which, should they be fulfilled, could transform an illegitimate intervention into a permissible one. Attempts of this kind can be traced far back into the past;⁵² it seems, however, that this approach has gained particular popularity after the Kosovo intervention.

One of the most authoritative catalogues dates back to the year 1974 and has been elaborated within the International Law Association:

1. There must be an imminent or ongoing gross human rights violation.
2. All non-intervention remedies available must be exhausted before a humanitarian intervention can be commenced. (See also criterion 9.)
3. A potential intervenor before the commencement of any such intervention must submit to the Security Council, if time permits, its views as to the specific limited purpose the proposed intervention would achieve.
4. The intervenor's primary goal must be to remedy a gross human rights violation and not to achieve some other goal pertaining to the intervenor's own self-interest.
5. The intent of the intervenor must be to have as limited an effect on the authority structure of the concerned State as possible, while at the same time achieving its specific limited purpose.
6. The intent of the intervenor must be to intervene from as short a time as possible, with the intervenor disengaging as soon as the specific limited purpose is accomplished.

⁵² See Pauer, *Die humanitäre Intervention* (1985) 197, who cites a large number of authors developing such kinds of catalogues on the basis of which he creates his own, highly detailed list of criteria.

7. The intent of the intervenor must be to use the least amount of coercive measures necessary to achieve its specific limited purpose.
8. Where at all possible the intervenor must try to obtain an invitation to intervene from the recognized government and thereafter cooperate with the recognized government.
9. The intervenor, before its intended intervention, must request a meeting of the Security Council in order to inform it that the humanitarian intervention will take place only if the Security Council does not act first. (See also criteria 2 and 3.)
10. An intervention by the United Nations is preferred to one by a regional organization, and an intervention by a regional organization is preferred to one by a group of States or an individual State.
11. Before intervening, the intervenor must deliver a clear ultimatum or 'peremptory demand' to the concerned State insisting that positive actions be taken to terminate or ameliorate the gross human rights violations.
12. Any intervenor who does not follow the above criteria shall be deemed to have breached the peace, thus invoking Chapter VII of the Charter of the United Nations.⁵³

At first glance, this list seems impressive, but at a closer look it appears doubtful whether these criteria can operate as an effective barrier against abuses. The ILA catalogue is formed of procedural and of material criteria; it is not unthinkable that a state only interested to find a justification to wage war can fulfil both types of criteria. In fact, the submission of 'views' to the Security Council, the request of a meeting of this body and the delivery of a clear ultimatum or 'peremptory demand' to the concerned state are hurdles which can be taken even by a state acting *malafide*. Where the prospective intervenor state is a permanent member of the Security Council, all these acts are a mere formality but in other cases also, given the notorious conflicts between some permanent members, it is very likely that this body will not be able to exercise its primary responsibility for the maintenance of peace, a fact undisputed also by the ILA criteria. All other criteria need further clarification. Even admitting that there is a huge UN practice on 'gross violations of human rights', we should always keep in mind that it is one thing when an UN organ has to assess, usually *ex post* and possibly with the help of fact-finding forces, whether such acts have occurred. It is another thing when a potential intervenor during an ongoing conflict has to accomplish this assessment unilaterally. Even if we disregard these practical difficulties, it has to be recognized that there will remain a broad area of uncertainty both for the international bodies which have to assess these situations and for the individual states or groups of states confronted with the same task. On the other hand,

⁵³ See the 'Third Interim Report of the Subcommittee on the International Protection of Human Rights by General International Law', *ILA Report of the Fifty-Sixth Conference (1974)* 217, cited according to Lillich, 'Humanitarian Intervention Through the United Nations. Toward the Development of Criteria', 53 *ZaöRV* (1993) 557, at 562.

an evaluation carried out by a UN organ is usually endowed with far higher international respect than that made by a particular state or group of states. It is this international legitimacy that ensures authority in the end. With regard to the requirement that all non-intervention (diplomatic) remedies are exhausted, this criterion superficially seems to resemble the requirement — given in the field of diplomatic protection or within the ambit of international human rights instruments — that local remedies be exhausted. While in both cases the primary intent is to safeguard national sovereignty, in reality these two concepts widely diverge in their content and mode of application. There is a vast literature and a huge amount of jurisprudence with regard to the question of whether local remedies are exhausted in the field of the protection of singular individual rights. Though even here some uncertainty remains the relevant questions are to be solved on the background of a national law system which should allow for more or less precise answers. On the other hand, diplomatic efforts to solve a national humanitarian crisis are characterized by their flexibility and more often than not by their secretness. Even in the case of Kosovo, where Slobodan Milosevic has given a rare demonstration of brinkmanship and of neglect for any diplomatic effort, NATO intervention has prompted several states to accuse the intervenors of interrupting a promising negotiating process. To put it briefly: even when the Security Council has to determine whether diplomatic efforts can still make sense, there remains a strong subjective element in this judgment. While with regard to this international body there seem to be — just from its institutional conception — sufficient guarantees that it will not fall into arbitrariness as a rule, the same is not true for individual states or groups of states prepared to assume the role of an intervenor.

This is not to contest the abstract possibility that these criteria can be further clarified, but it is up to the advocates of the rule-oriented models to furnish the necessary elements, which in any case have to be subject of an intense discussion.

Other criteria of the catalogue mentioned are necessarily subjective, such as the definition of the goals of the intervention, and no independent institution exists which could evaluate whether a specific claim is serious or specious. In the end, we are faced with the same evaluation problem as before with the only difference that this problem is less evident, hidden as it is behind a list of seemingly authoritative criteria. Without addressing the real problems lying beneath this issue, the only tangible effect of this approach consists in lowering the barriers to go to war and in conferring a more positive *prima facie* outlook towards the institute of humanitarian intervention.

On the occasion of the Kosovo intervention, various authors further elaborated on these criteria.⁵⁴ They tried to devise a series of conditions which measures of humanitarian intervention should respect to become morally and politically commendable though still remaining unlawful according to a 'traditional' interpretation

⁵⁴ For a very detailed exposition of these criteria, see Cassese, 'Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', 10 *EJIL* (1999) 21; Cassese, 'Le cinque regole per una guerra giusta', *L'Unità*, 9 April 1999, 4; and Charney, *supra* note 41, at 1243–1244.

of the UN Charter. These catalogues resemble each other as well as the ILA catalogue of 1974 very much, although a plethora of additional elements was intended to limit further the possibility of abuse. The criterion attributing an enhanced role to the ICJ deserves much interest, a sign of the growing importance this body has gained during the last quarter of a century:

Before intervening, the states that are to participate must consent both to suit in the ICJ by any directly injured state for violations of international law committed in the course of the humanitarian intervention, and to the jurisdiction of the international criminal court (once established) over their nationals for crimes within that court's reach that might be committed in the course of the intervention.⁵⁵

It is interesting to note that these catalogues, which, as noted, only slightly differ in their content,⁵⁶ applied to the situation in Kosovo, brought completely different results depending on the personal view taken by the various authors.⁵⁷ Again, we can conclude that the drafting of these catalogues does not really contribute to give an answer to the question why and when humanitarian intervention should be permissible. These criteria are partly stating generally accepted (or acceptable) principles (proportionality, withdrawal once the use of force has accomplished the appropriate objectives, exhaustion of remedies etc.) which per se are non contestable; they partly leave a broad margin of appreciation or their fulfilment is difficult to prove (again, we have to ask what constitutes a 'gross violation of human rights'; when are diplomatic remedies really exhausted?) and, finally, they are extremely difficult to

⁵⁵ See Charney, *supra* note 41, at 1244.

⁵⁶ While some catalogues require a previous attempt to let the Security Council exercise its 'primary responsibility' for the maintenance of peace, Cassese considers only the most common — and most difficult — case where this body is unable to take coercive measures.

⁵⁷ While Cassese, *supra* note 54, is of the opinion that the conditions for a (moral and political) legitimated humanitarian intervention in Kosovo are given, Charney, *supra* note 41, rejects this assumption emphatically. Some authors, such as Tomuschat, *supra* note 36, at 35 recognize a right to humanitarian intervention subject only to some basic conditions (all possibilities of negotiation must be exhausted; the violations of human rights must be of an extraordinary nature). It can be argued that these conditions were fulfilled with regard to the Kosovo intervention but the opposite view can also be maintained as they leave a considerable margin of appreciation. See also the conditions drafted by Daniel Thürer, *supra* note 36, at 8, who regards a unilateral intervention as permissible whenever the fundamental values of international society are threatened, the intervention is proportional, and the measures are authorized by a 'legitimate organ', and sets the additional condition that the measures must be brought back as soon as possible to the 'ordinary procedures' regulated in the UN Charter. Each of these criteria would need further specification in order not to lend itself to abuse. See, finally, a recent article by José Luis Jesus, 'Intervention in the Domestic Affairs on Humanitarian Grounds and International Law', in *Liber Amicorum Günther Jaenicke — zum 85 Geburtstag* (1998) 149, who, after having tried to establish some criteria for permissible interventions, concludes that the basic questions raised in this context cannot be answered in the abstract: 'Every situation has to be seen in its own context' (*ibid.*, at 160). Implicitly, the author questions, by this conclusion, the value of criteria catalogues for permissible acts of intervention as they necessarily have to be drafted in an abstract form.

achieve (such as the criterion cited above, calling for an establishment of the jurisdiction of the ICJ and of the International Criminal Court⁵⁸).

At the end of this section the conclusion seems sobering: on the one hand, the drafting of a catalogue specifying criteria which could ensure that acts of humanitarian intervention are carried out with a legitimate purpose and by appropriate means has brought about only unsatisfactory results; on the other hand, neither does it seem acceptable to stand idly by while gross human rights abuses unfold in other states. It is widely held that NATO intervention in Kosovo, with all its shortcomings and faults, has impeded the unfolding of a catastrophe and was therefore necessary and morally justified. At the same time, it was unlawful, but is it thinkable — as was the reasoning in the legal literature — that NATO had set by this intervention a precedent which could lead to the development of new customary law? This thesis is rejected here and it is argued that such a development would not even be desirable.

6 Humanitarian Intervention and Customary International Law

The idea that NATO intervention in Kosovo probably represents the first step towards the development of a customary law principle allowing acts of humanitarian intervention in an unilateral way — i.e. absent a Security Council permission — in cases of grave abuses of human rights amounting to egregious crimes against humanity was most vigorously spelled out by Antonio Cassese, first by setting out the required conditions as mentioned summarily above,⁵⁹ and, in a second article, by trying to lay the theoretical foundations he sees as a prerequisite for such a development.⁶⁰

Notwithstanding the clear wording of Article 2(4) of the Charter and the subsequent practice which confirmed, as pointed out above, that acts of humanitarian intervention are clearly prohibited by UN law, the development of new customary law, allowing such acts, cannot be ruled out, as was highlighted by the ICJ in the *Nicaragua Case* of 1986: 'Reliance by a state on a novel right or an unprecedented exception to the principle might, if shared in principle by other states, tend towards a modification of customary law.'⁶¹ The Court declared itself prepared to examine 'whether there might be indications of a practice illustrative of belief in a kind of general right for states to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another state, whose cause appeared

⁵⁸ With regard to interventions carried out by the US, this criterion could not be fulfilled as this state has in any case declared that it will not accept the jurisdiction of this court. It could further be examined whether the jurisdiction of the ICJ should be established not only for violations of international law committed in the course of the humanitarian intervention but also for the more fundamental question of whether the intervention fulfils the criteria set out in one of these catalogues. Probably, however, this would place too heavy a burden on the ICJ.

⁵⁹ See Cassese, *supra* note 54.

⁶⁰ See Cassese, 'A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*', 10 *EJIL* (1999) 791.

⁶¹ ICJ Reports (1986), at 109, at para. 207.

particularly worthy by reason of the political and moral values with which it was identified'.⁶² As is known, the Court could not find evidence for such a new rule, but by posing the question it left open the possibility to return to this matter at a future date.⁶³ It seems that, for this verdict, a decisive consideration was that 'states [had] not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition'.⁶⁴ The examination of the justifications given by the NATO members for their action and of the responses by other members of the international community is therefore a good starting point in the search for a possible new norm in this field. However, the results are, from a juridical point of view, meagre. While the intervention was ongoing, political justifications — mainly referring to grave human rights violations — prevailed.⁶⁵ Insofar as they had a juridical content, they emphasized the inability of the Security Council to act, or argued that Security Council Resolutions 1160 (1998) and 1199 (1998) had provided a sufficient basis.⁶⁶ It has already been shown that this position is untenable. It is true that a draft resolution sponsored by Russia, Belarus and India, directed at condemning the NATO intervention, was rejected by the Security Council with only three votes in favour (Russia, China and Namibia) and 12 votes against. On the other hand, a clear distinction has to be made between the willingness to avoid a condemnation of NATO members and the preparedness to accept that the intervention was in conformity with UN law. In fact, a consistent number of states have voiced doubts and criticism about this action.⁶⁷ The motives for why the NATO intervention was not condemned outright may be of a political nature, in part they may also reflect the conviction that this absolutely extraordinary situation could not be handled otherwise. But the criticism was strong enough and came from a sufficient number of states belonging to different regions of the world so as to bear sufficient evidence that there is no willingness to accept the coming into being of a customary law rule allowing unilateral acts of humanitarian intervention. Also, the proceedings instituted on 29 April 1999 by the Federal Republic of Yugoslavia before the ICJ against 10 NATO

⁶² *Ibid.*, at 108, at para. 206.

⁶³ *Ibid.*, at 109, at para. 209.

⁶⁴ *Ibid.*, at 109, at para. 207. See also Kritsiotis, *supra* note 49, at 1013.

⁶⁵ See, for example, NATO Press Release (1999) 041 of 24 March 1999 and the European Council Statement of 25 March 1999, where reference was made to 'moral duty'. Cited according to Duursma, 'Justifying NATO's Use of Force in Kosovo?', 12 *IJIL* (1999) 287, at 292.

⁶⁶ In the context of the Security Council (4011th Meeting, S/PV.4011 at 12) the delegate of the Netherlands has taken, however, a rather bold position when he stated that 'the Charter is not the only source of international law' and referred to a 'gradual shift ... in international law' whereby human rights were attributed a wholly new position. Furthermore, he spoke of a generally accepted rule of international law, on the basis of which 'no sovereign state has the right to terrorize its citizens'. It is obvious that this statement implies the existence of a right of (unilateral) humanitarian intervention. Totally lacking, however, were any substantiated specifications indicating the basis for these assumptions.

⁶⁷ See Nolte, 'Kosovo and Konstitutionalisierung: Zur humanitären Intervention der NATO-Staaten', 59 *ZaöRV* (1999) 941, at 946; and Krisch, 'Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council', 3 *Max Planck Yearbook of United Nations Law* (1993) 59, at 84.

member states with the accusation of bombing Yugoslav territory in violation of their obligation not to use force against another state have so far prompted only a few of the respondent states to give a detailed argument for why this intervention should be considered as lawful. Though the question of jurisdiction could be absorbing, if the respondents were convinced of the legality of their action, one would have expected a clear legal justification from the outset of the proceedings.⁶⁸

Even Cassese, who managed to gather an impressive collection of declarations, pronouncements and acts which could be useful in an attempt to prove the existence of a customary international law rule in favour of humanitarian intervention, concedes that it is premature to maintain that a customary rule has emerged as the element of *usus* is clearly lacking.⁶⁹ With regard to the psychological element, however, he expresses the opinion that this element has already in part materialized as it is not always necessary to search for *opinio iuris* in the sense of a conviction of states that a certain behaviour is required by a general legal norm. Cassese identifies situations in which *opinio necessitatis* is sufficient, i.e. the conviction that a state acts out of political, economic or moral necessity.⁷⁰ Cassese is right when he maintains that proclamations made by some intervenor states, referring to the absolute necessity to avoid a humanitarian catastrophe, could be interpreted in such a sense. It seems questionable, however, whether the law-creating effects, to which Cassese ascribes these assertions, can really be maintained. In fact, even Mendelsohn,⁷¹ whom Cassese cites as a reference for the explanation of the concept of *opinio necessitatis*, appears, at a closer look, very cautious (or caustic) when, referring to the linguistic 'clumsiness' and the relatively short history of this piece of Latin, he seems to recommend a prudent use of the concept itself:

It is quite common to dress up legal maxims and the like in Roman robes in order to give them an air of respectability, though only too often the toga can muffle thought. In this case, the robes seem not even to be genuine, and it is submitted that the linguistic incoherence of the phrase *opinio iuris sive necessitatis* reflects a certain incoherence of the thought behind it.⁷²

His main point is that necessity and reasonableness are extra-legal concepts which may play a certain role in the law-creating process, but 'an alleged rule is not law just because it is (alleged to be) socially necessary'.⁷³ To put too much emphasis on the element of necessity is very dangerous for a consensus-oriented order as it introduces a unilateral element disguised as a constitutional norm, a higher ranking provision which allows no further discussion, thereby implying that the values on which this

⁶⁸ For an attempt to justify this action, see the declaration of the Belgian representative who, in the first place, referred to the resolutions of the Security Council as a legitimation of NATO intervention and then tried to develop the idea of humanitarian intervention. See the Verbatim Record of the Public Sitting of 10 May 1999 in the *Case Concerning the Legality of Use of Force (Yugoslavia v. Belgium)*.

⁶⁹ See Cassese, *supra* note 54, at 796.

⁷⁰ *Ibid.*, at 797.

⁷¹ See Mendelsohn, 'The Formation of Customary International Law', 272 *RdC* (1998) 268 *et seq.*

⁷² *Ibid.*

⁷³ *Ibid.*, at 271.

norm rests are commonly shared. This is not to deny that some sort of necessity lies at the heart of a large number of international norms; what is important, however, is that this necessity is widely accepted as such and it is only at this stage, when a common opinion through an interaction of states takes root, that we can speak of a true law-formation process. Sociological requirements of an (alleged) particular intensity therefore offer no short-cut through this process. With regard to those NATO member states which presented their necessity arguments together with declarations according to which the Kosovo intervention should not set a precedent, it can be said that they explicitly excluded that necessity could even be an extra-legal impetus for the subsequent creation of a proper legal norm allowing measures of this kind. On the whole, should the creation of a customary law rule allowing humanitarian intervention only depend on *usus* while the psychological element was formed by the basically unilaterally defined element of necessity, it would only be a question of time before the Kosovo intervention was followed by further measures of intervention and a corresponding customary rule of law would come into being. As demonstrated above, this is not the case.⁷⁴

7 Conclusion: Are We Doomed to Stand Idly By?

UN Secretary-General Kofi Annan has given best expression to the dilemma faced by the international community with regard to the Kosovo intervention:

It is indeed tragic that diplomacy has failed, but there are times when use of force may be legitimate in the pursuit of peace. In helping to maintain international peace and security, Chapter VIII of the United Nations Charter assigns an important role to regional organizations. But as Secretary-General I have many times pointed out, not just in relation to Kosovo, that under the Charter the Security Council has primary responsibility for maintaining international peace and security — and this is explicitly acknowledged in the North Atlantic Treaty. Therefore the Council should be involved in any decision to resort to the use of force.⁷⁵

Perhaps this statement has also shown the way out of this dilemma. On the one hand, the primary responsibility of the Security Council for maintaining international peace and security has been confirmed — and, as set out at the end of the statement, this role of the Security Council has also been emphasized. On the other hand, the Secretary-General has opened an ‘escape clause’: ‘[T]here are times when use of force may be legitimate in the pursuit of peace.’⁷⁶ It is not a legal justification Kofi Annan

⁷⁴ See also Neuhold, ‘Die “Operation Allied Force” der NATO: rechtmäßige humanitäre Intervention oder politisch vertretbarer Rechtsbruch?’, in Reiter (ed.), *Der Krieg um das Kosovo 1998/99* (2000) 193, who, assessing various justifications for the Kosovo intervention which have been advanced in the literature or which could theoretically be proposed, comes to the same result excluding the legality of the NATO operation.

⁷⁵ See UN Press Release SG/SM/6938 of 24 March 1999.

⁷⁶ *Ibid.*

points to here, but an extra-legal principle deeply rooted in the moral conscience of mankind which — mainly because of the danger of abuse — could not (and, it is submitted here, will never) acquire the status of a legal norm. In the future, too, there will be cases of impelling necessity where world opinion will ask for intervention. At the same time there will be states willing to intervene in other states for purely or predominantly egotistic motives. It is very desirable that the basic rule governing this field, which says that unilateral humanitarian intervention is unlawful, remains untouched. If an intervention seems necessary, the best solution would be to carry it out under the strict surveillance of the Security Council. It seems, however, utopian to believe that the Security Council could assume such a role even in the most dramatic situations arising continuously around the globe. The Security Council was not constituted for this role;⁷⁷ it does not have the means for this task; it does not have the political approval by the international community to act as a ‘world policeman’; and it should not encourage factions of a national society to start an internal conflict with the promise of an intervention should the respective group not achieve their aims by their own means.⁷⁸ Even in a much improved international political climate characterized by a closer cooperation between the permanent members of the Security Council, it can therefore be expected that the Security Council will only sporadically authorize measures of this kind.

As things stand, unilateral humanitarian intervention is therefore here to stay and the Kosovo intervention did nothing to change the way these measures are to be qualified legally. If states resort to humanitarian intervention, they do so at their own peril. The intervention may be accepted by the international community but there is no guarantee. First of all, the intervenors are faced with the risk that the intervention fails — and success is probably still the most important yardstick when it comes to evaluating such an act.⁷⁹ But there are many other elements which influence the outcome of this evaluation process, most important of all, political considerations.⁸⁰

⁷⁷ See Kelsen, *The Law of the United Nations* (1950) 294.

⁷⁸ For some refreshing thoughts on the desirability of entrusting the Security Council with the humanitarian intervention task, see Murswiek, ‘Souveränität und humanitäre Intervention’, 35 *Der Staat* (1996) 31.

⁷⁹ See Isensee, ‘Weltpolizei für Menschenrechte — Zur Wiederkehr der humanitären Intervention’, 50 *JZ* (1995) 421. See also Harcourt, ‘Neutrality of Intervention?’, in *Letters by Historicus on Some Questions of International Law* (1863) 41, cited according to Crawford, ‘Democracy and International Law’, 64 *BYIL* (1994) 113, at 127–128: ‘[I]ts essence is illegality, and its justification is its success. Of all things, at once the most unjustifiable and the most impolitic is an unsuccessful Intervention.’

⁸⁰ In this regard, reference has to be made to the intervention of Vietnam in Kampuchea. In this context, Richard Falk described the political elements influencing the reaction of the world community as follows: ‘When Vietnam invaded Cambodia in 1975, presumably for security reasons, but effectively removed a genocidal regime from power, it was widely condemned. Vietnam was called upon to withdraw by the United Nations despite the danger, that by so doing, it would revive the influence of the Khmer Rouge. In fact, the successor Cambodian government, installed as a result of the Vietnamese intervention, was precluded from representing Cambodia in the United Nations. The anti-Vietnam posture was based on geopolitical calculations in the face of the extremity of humanitarian considerations: it was deemed more important, in effect, to avoid the extension of Vietnamese influence and to placate China (then hostile to Vietnam) than to relieve the people of Cambodia from the grotesque burden imposed on their lives by the Khmer Rouge regime.’ See Falk, ‘The Complexities of Humanitarian Intervention: A New World Order

Does an analysis of the motives behind an act of humanitarian intervention make sense? ‘Purity of motives’ is hard to assess. Dino Kritsiotis has noted that states never act for purely humanitarian reasons.⁸¹ It may be argued, on the other hand, that more and more governments are under close scrutiny in their actions by the international community, by the media, by NGOs and especially by their own people. Nonetheless, it is neither possible nor necessary to ascertain whether an act of humanitarian intervention has been carried out mainly or exclusively for purely humanitarian reasons. What really matters is whether the act of intervention has brought relief to the endangered population and to what extent the pursuit of self-interests — an element present in any act of intervention in a more or less accentuated form — constitutes a real threat to the peace order established by the Charter.

In the end, we are faced here with a balancing of interests carried out not by an independent judge but by a myriad of actors who together form the prevailing international opinion of which governments and international institutions such as the UN, but also the EU — influencing this opinion and being influenced by it at the same time — give the main expression. In view of this situation we must be very careful not to use standards that are all too high with regard to the ‘fairness’ of the judgment which results from this process. From a ‘neutral’ point of view, this judgment is often considered as partial and biased; in one case it is seen as too indulgent towards the self-interested goals pursued by the intervenor, in the other as too critical towards the intervenor in the light of the indisputable humanitarian benefits the action has brought. If we consider the multi-layered nature of the decision process described above, by which some sort of an international assessment of an intervention may take hold, ‘objectivity’ is hardly a necessary quality of this process. The intervenor acting (mainly) out of a genuine humanitarian intent can only hope to be treated objectively, while the international community as a whole should hope that any abusive reliance on this concept is firmly countered. This ‘veil of ignorance’ the intervenor is confronted with before the intervention is of indisputable value as it shows that the acceptance of the intervention by the international community is a mere possibility and the intervenor is well advised not to act overhastily as a humanitarian intervention is regularly regarded by a consistent number of states with suspicion.⁸² Even if one state believes it is acting in the interest of humanity, it must consider that other states may come to different assessments of the situation. Might this uncertainty, on the other hand, favour abusive forms of intervention, as the

Challenge’, 17 *Michigan Journal of International Law* (1996) 491, at 504. See also the declarations the representative of the Netherlands made before the ICJ (UN Doc. S/PV.4011, 10 June 1999, 12): ‘[One] simply cannot imagine a replay in the twenty-first century of the shameful episode of the 1980s, when the United Nations was apparently more indignant at a Vietnamese military intervention in Cambodia, which almost all Cambodians had experienced as a liberation, than at three years of Khmer Rouge genocide.’

⁸¹ See Kritsiotis, *supra* note 49, at 1035.

⁸² Oscar Schachter stated that an intervenor who uses force ‘to put an end to atrocities when the necessity is evident and the humanitarian intention is clear is likely to have its action pardoned’ even without a provision allowing such a measure. See *International Law in Theory and Practice* (1991) 126.

intervenor can expect that in his case also 'reality' may not be grasped by the international community? This danger can be countered by upholding the strict prohibition of the threat or the use of force. As long as the use of force is permitted only within the narrow limits of the Charter, the intervenor who hides *mala fide* behind the shield of the political concept of humanitarian intervention will always face a difficult task when trying to convince a suspicious international community of the necessity of the intervention.

Of course, these results are not fully satisfactory as they cannot exclude that a grave humanitarian crisis remains unaddressed by the international community, that widespread violations of human rights take place without any state feeling morally responsible and materially able or prepared to take the risk of being subject to international criticism or even sanctions only for having tried to act for the common good.

But trying to overcome this dismal situation by a reinterpretation of the Charter system would be tantamount to ignoring the realities of the international order. This conclusion is even more warranted if these law-creating attempts find their basis only in legal writings and not in a consensus between the main subjects of the international community, the states. As shown above, one must take care not to confound a unilateral attempt to justify politically and morally an act of intervention with legally relevant elements of state practice. The former are nothing more than acts directed at having the intervenor exempted from the sanctions that in principle apply to measures of forcible intervention and whose general applicability the intervenor of today has no real interest in challenging as he or his allies may be the victims of an intervention tomorrow.⁸³

When it comes to giving an answer to the question why the intervention in Kosovo has engendered such a large stream of legal writings one must first of all refer to the obvious circumstance that this crisis took place in Europe and that the tragedy of this people was felt very strongly in many European countries. A second reason has been mentioned already in the introductory section, and shall be briefly developed here in the final part of this article: it regards the role of the international lawyer. A category not precisely defined, it is characterized by a very easy accessibility. Perhaps no other branch of law knows so many participants in doctrinal discussions; experts from a rich panoply of fields feel qualified to make their contributions. What is more, in no other field of law is the academic lawyer regarded as having so much influence on the creation of law as in this branch.⁸⁴ It comes as no surprise that persons with the highest moral ambitions wish to make contributions to the progressive development of international law, recognizing rights of the oppressed that are not yet part of the *lex*

⁸³ As Mohammed Bedjaoui, *The New World Order and the Security Council: Testing the Legality of Its Acts* (1994) at 127, has written, 'it is time to begin appreciating that *observance of laws and of the Charter is not the enemy of peace and does not necessarily compromise its rightful priority*' (emphasis in the original).

⁸⁴ See Jennings, 'International Lawyers and the Progressive Development of International Law', in Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century* (1996) 413, at 414.

lata.⁸⁵ The aim of this article has been to show that these efforts are counterproductive as they blur one's perception of the applicable law, they create hopes that cannot be fulfilled and they ultimately lead to the growth of disaffection with international law, thereby leaving many other instruments untried that international law offers and which are not based on the use of force but on more subtle forms of coercion or on institution-building. It is true that these instruments require far more patience and diplomatic skills than the resort to force and therefore they do not always respond to the impatience of the people of modern democracies, who, used to benefiting from highly evolved judicial systems, expect that even a minor injustice is quickly and effectively addressed. But these expectations are unrealistic when applied to international relations.⁸⁶

Finally, the effective influence of academic lawyers on the law-creating process is overstated, as this influence is closely connected to the practicability of the solutions proposed, and depends on the question of whether due regard has been given to other law-creating forces. As Martti Koskenniemi has convincingly shown, the international lawyer is continuously torn between the various roles and functions he has to fulfil. He has to take care not only to describe state practice but to keep in touch with reality at the same time.⁸⁷ He also points out that the lawyer can be part of the evolutionary process of international law through his imaginative contributions. At present, however, it seems that the pendulum has swung too far towards the utopian

⁸⁵ It follows also that authors who are critical about the capability of international law to address modern moral (or ideological) ambitions (see, for example, the often cited contribution by Prosper Weil, 'Towards Relative Normativity?', 77 *AJIL* (1983) 413) find themselves touted as apologists while writers prepared to take a progressive stance can hope to be warmly greeted by the public. In reality, it can be assumed that the final goals (guarantee of peace, security, human rights etc.) are broadly shared, but, as Brownlie, *supra* note 35, at 148, puts it, 'it is the vehicle for attaining the shared objective that is the matter of controversy'.

⁸⁶ As is known, international law knows a myriad of methods, procedures and instruments that, applied in time, can prevent the outbreak of a crisis which in its ultimate development could leave no other choice but the recourse to force. One can cite as examples institution-building, the intensification of universal and regional cooperation in the field of human rights, the creation of monitoring bodies and agencies, the linkage of trade cooperation with the requirement to respect certain human rights criteria and the commitment to apply economic and political pressure. Again, this is not to say that these measures will be effective in all cases. Even when one has to admit that the long list of non-forcible sanctions and instruments that have been tried against Milosevic have been applied by some states only half-heartedly, it is by no means certain whether they can really prevent an unscrupulous government under full control of all state powers to drive a country towards a catastrophe. On the other hand, to attribute a vestige of legality to the institute of humanitarian intervention will be counterproductive in the sense that the arduous task to search for alternative conflict solution instruments or to engage in a costly and often time-consuming institution-building process could appear obsolete. Far more calls for the *ultima ratio* instrument will be heard while it is foreseeable that a great part of these calls have to be left unconsidered. In the end, the international community will be more unstable and more insecure than today and a lot of conflicts, otherwise controllable, could escalate. In the face of these possible developments, it appears to be very much debatable whether one of the basic tenets of the Charter (if not *the* basic tenet), the outlawing of the recourse to force, which knows only very limited exceptions, should be dumped so easily.

⁸⁷ See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989).

side, thus undermining the authority of doctrine.⁸⁸ But, even if utopia should become reality, it would hardly be paradise.

The unilateral recourse to force to end a grave humanitarian crisis can hardly be disapproved of morally, but there is no point in attributing to it legal status, revitalizing an instrument of the nineteenth century that would — in a completely different legal setting — do more harm than good and thus threaten those traits of a still imperfect system that it seems valid to maintain in the ultimate interest of the individual.

⁸⁸ As Ulrich Fastenrath has shown, the works of academic lawyers exert considerable influence on the definition and understanding of international law rules, but this influence is of an indirect nature. As long as the academic lawyer can pretend to adhere to the realities of state practice his works will be broadly used as *prima facie* evidence of this practice. As soon as he tries to base his assertions directly on his own authority, he will lose considerable influence. See Fastenrath, *Lücken im Völkerrecht* (1990) 123.