DIPL-JUR (GÖTTINGEN) BJÖRN RAAP

THE RIGHT TO HUMANITARIAN INTERVENTION AS A RULE OF CUSTOMARY INTERNATIONAL LAW

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ABSTRACT

The question of whether humanitarian interventions are a lawful use of armed force is an important topic in contemporary international law. The elevated status of human rights and their international acceptance have led to an emergence of the use of military means when human rights are infringed. Thus, there is a nexus between human rights law and the law of armed conflict.

At first glance, a right to humanitarian intervention runs directly counter to the UN-Charter's basic principles of the prohibition of the use of force and non-intervention. However, these principles are not absolute ones but allow exceptions. One such exception can be found in customary international law. An examination of several multilateral interventions which took place since the 1990s, with particular regard to NATO's military actions in Kosovo, shows that a customary right to humanitarian intervention has emerged at least in the "western" world. This local customary international law exists alongside international treaty law.

Respect for the strict limitations which the UN-Charter sets on the legality of the use of armed force and anticipation of a possible abuse of a right to humanitarian intervention make it necessary to clarify strict elements for the justification of the use of armed force on humanitarian grounds. The danger of improper use of the right to humanitarian intervention is contained when stringent rules are set and also kept. Thus, from the academic debate a test of whether humanitarian interventions are justified consists of the following elements:

- Convincing evidence of massive human rights violations;
- Priority of conflict prevention;
- Priority of self-help;
- Actions must be taken by a legitimate actor;
- Actors show respect for the territorial integrity and sovereignty rights of the intervened state;
- Actions are necessary;
- Actions are proportional.

However, the complexity of international relations requires the maintenance of a certain grade of flexibility when the lawfulness of humanitarian intervention is investigated. The determination of whether a humanitarian intervention is a lawful act or a breach of international law remains on a case by case basis.

STATEMENT ON WORD LENGTH

The text of this paper (excluding title page, abstract, table of contents, footnotes and bibliography) comprises approximately 15, 889 words.

Humanitarian intervention, or
Human rights.

I INTRODUCTION

There is much debate on the question of whether the use of armed force on the territory of a foreign state can be justified on humanitarian grounds, and whether it is a breach of international law. It is of special interest as the United Nations and its legal framework regained international importance after the end of the Cold War. "The new harmony on the Security Council following the end of the Cold War enabled States acting under the authority of the Security Council to undertake forceful actions on humanitarian grounds."[1]

While one stream in the literature accepts the use of armed force on behalf of the protection of human rights only if the strict rules of international law and especially of the Charter of the United Nations (UN-Charter) are kept,[2] the other opinion regards the use of armed force in humanitarian interventions as compatible with the provisions of international law even in cases where the narrow wording of the international legal framework does not apply.[3] This dispute reached its peak after the Kosovo crisis where international forces led by the North Atlantic Treaty Organization (NATO) started air strikes against former Yugoslavia because the Yugoslavian government committed violations of human rights against the Albanian population in Kosovo. The use of armed force in the Kosovo crisis was the first humanitarian intervention without a resolution by the United Nations Security Council (UN-SC) after the UN-Charter came into force in 1945[4] and also "the first internationally sanctioned military action in the name of human rights … rather than

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[1] Judith Gardam *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, Cambridge, 2004) 147-8; see also UNGA "A more secured world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Changes" (2 December 2004) A/ 59/ 565, para 12 ["UN High-level Panel"] www.un.org/secureworld/report.pdf (accessed 18 February 2008); Brian Urquhart "The UN and International Security after the Cold War" in Adam Roberts and Benedict Kingsbury *United Nations, Devided World* (2 ed, Clarendon Press, Oxford, 1993) 81-2; see also David J Scheffer "Toward a Modern Doctrine of Humanitarian Intervention" (1991-1992) 23 U Tol L Rev 253, 258.

[2] Albrecht Randelzhofer in Bruno Simma (ed) *Charter of the United Nations: A Commentary* (2 ed, Oxford University Press, Oxford, 2002) Article 2 (4), para 55; Brownlie, "Humanitarian Intervention" in John Norton Moore (ed) *Law and Civil War in the Modern World* (Johns Hopkins University Press, Baltimore, 1974) 217; Yoram Dinstein *War, Aggression and Self-Defence* (4 ed, Cambridge University Press, Cambridge, 2005) 71-3 and 90.

[3] Richard B Lilich "Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives" in John Norten Moore (ed) *Law and Civil War in the Modern World* (John Hopkins University Press, Baltimore, 1974) 229; Fernando R Téson *Humanitarian Intervention: An Inquiry into Law and Morality* (3 ed, Transnational Publishers, Ardsley, 2005); see also Budislav Vukas "Humanitarian Intervention and International Responsibility" in Maurizio Ragazzi (ed) *International Responsibility Today Essays in Memory of Oscar Schachter* (Martinus Nijhoff Publischers, Leiden, 2005) 238 who pleads for a "duty to intervene".

[4] Charlotte Ku and Harold K Jakobson (eds) *Democratic Accountability and the Use of Force in International Law* (Cambridge University Press, Cambridge, 2003) 98.

international security."[5] At the centerpoint of the discussion is the lack of an easily identifiable legal basis for humanitarian interventions in international law.

After providing background information about the term and the history of humanitarian interventions, this paper explains the role of human rights as a catalyst for the use of armed force. Following this, the regulations for the use of armed force are investigated. In the centre of such an explanation is Article 2 (4) of the UN-Charter which contains two basic principles of international law namely the prohibition of the threat or the use of force[6] and the principle of non-intervention.[7] This paper will examine these principles and also take into account the exceptions which are explicitly mentioned in the UN-Charter.

Beside the analysis of the explicit wording of the Charter the question is raised as to whether a customary international law to humanitarian intervention has emerged.[8] The idea of humanitarian intervention as part of customary international law arose after the NATO troops acted in Kosovo without authorization by the UN-SC. This paper investigates whether a customary international law of humanitarian intervention exists. Special attention will be given to a further description of the elements and boundaries of such a customary law. If humanitarian interventions are a lawful use of armed force, then their limits need to be determined.

II THE TERM "HUMANITARIAN INTERVENTION"

Before coming to a closer description of what the term "humanitarian intervention" means it is important to state that definitions in international law are typically disputed and not as clear as the terms in domestic jurisdictions. "With no centralized legislature, the rules and norms of international law … are less apparent and less precise than those found in national laws."[9] This also means that the term of "humanitarian intervention" is at the centre of various academic discussions.

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[5] David Chandler *From Kosovo to Kabul and Beyond* (2 ed, Pluto Press, London, 2006) 50; John J Merria "Kosovo and the Law of Humanitarian Intervention" (2000) 33 Case W Res L Rev 111, 113; see also Richard A Falk "Kosovo, World Order, and the Future of International Law" (1999) 93 Am J Int'l L 847, 848.

[6] Ulrich Beyerlin "Humanitarian Intervention" in Rudolf Bernhardt (ed) *Encyclopaedia of Public International Law* (Elsevier, Amsterdam, 1995) 927.

[7] Georg Nolte in Bruno Simma (ed) *Charter of the United Nations: A Commentary* (2 ed, Oxford University Press, Oxford, 2002) Article 2 (7), para 7.

[8] See Antonio Cassese "A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Neccessitatis" (1999) 10 EJIL 792, 798; Randelzhofer, above n 2, para 56.

[9] Sean D Murphy *Humanitarian Intervention* (University of Pennsylvania Press, Phildadelphia, 1996) 7.

The definition of "humanitarian interventions" developed by Ian Brownlie as "the threat or use of armed force by a state, a belligerent community, or an international organization, with the object of protecting human rights"[10] is helpful. Within this sentence it becomes clear, that there are at least three different types of humanitarian interventions on behalf of the protection of human rights. First, there are unilateral humanitarian interventions which are lead by a single state. Secondly, multilateral humanitarian interventions are lead by a confederation of states and thirdly there are multilateral humanitarian interventions lead by international organizations such as the UN.

Nevertheless, Brownlie's definition can not be seen as an exhaustive one because it leaves out the important delineation of humanitarian intervention from rescue operations for the State's own nationals abroad.[11] "Unlike efforts to protect a State's national abroad, which also usually occur on humanitarian grounds, the objective of humanitarian intervention is the protection of foreign nationals."[12] A more precise definition can be found in Murphy when he says that:[13]

> Humanitarian intervention is the threat or use of force by a state, group of states or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights."

It is important to distinguish rescue operations for the state's own nationals from humanitarian intervention for nationals of the state in which the intervention occurs because those two possible infringements of a state's territorial integrity have to be weighed differently. Rescue operations are typically of a short nature and therefore have less effect on the power and sovereignty of a foreign government than humanitarian interventions have. Some authors link the protection of the state's own nationals abroad with the state's right to self defence and Article 51 UN-Charter[14] while others understand the rescue operations to be a rule of customary international law.[15] However, in both opinions rescue operations for the security of the population of the intervening state appear easier to justify than humanitarian interventions in the

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[10] Brownlie, above n 2, 217.
[11] See Vukas, above n 3, 236 who uses the term of "humanitarian assistance".
[12] Randelzhofer, above n 2, Article 2 (4) para 53.
[13] Murphy, above n 9, 11-2.
[14] Dinstein, above n 2, 324; Beyerlin, above n 6, 926.
[15] Randelzhofer, above n 2, Article 51, para 27.

common sense "and [therefore] have gained ... acceptance as a lawful act"[16] in international law.[17]

Another advantage of Murphy's definition of a humanitarian intervention is the necessity of "internationally recognized" human rights. This contributes to the fact that each nation interprets the value of every single human right differently. The international acceptance of a human right helps to measure the value of the right in question and therefore is useful to determine whether a justifiable humanitarian intervention took place. Typically humanitarian interventions are regarded as a lawful use of armed force only when a violation of a certain degree of international accepted human rights took place.

III HISTORICAL BACKGROUND OF HUMANITARIAN INTERVENTION

The analysis of the historical background of humanitarian interventions has to be separated into two parts. When the UN-Charter came into force in 1945, this was an important step for the codification of international law. The wording of the Charter contributed to the certainty of the letter of the law and also set limits to the rights of the states in international relationships. Nevertheless, the law on the legitimacy of the use of armed force is not "simply a product of the United Nations Charter"[18] but has to be investigated also in a pre-Charter context as the "pre-1945 rules still affect the scope of a state's rights and obligations under current international law."[19] Therefore, the explanation of the historical background of humanitarian interventions is divided in a pre- and a post-Charter part.

A Humanitarian Intervention pre 1945

The question whether humanitarian interventions are a legal use of armed force has already been discussed before the UN-Charter came into force. The justifiable use of armed force has always been an important part of international law. The doctrine of just wars, which means that the use of force can be legal under certain circumstances, "can be traced back ... [to the times of] ancient Rome"[20] and

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[16] Murphy, above n 9, 16; see also Robert Jennings and Arthur Watts (eds) *Oppenheim's International Law* (9 ed, Longman, Harlow, 1992) 440-2.
[17] Compare Beyerlin, above n 6, 928.
[18] Martin Dixon *Textbook on International Law* (5 ed, Oxford University Press, Oxford, 2005) 290.
[19] Ibid.
[20] Dinstein, above n 2, 63; see also Murphy, above n 9, 39.

has been discussed ever since.[21] By the end of the 20th century the just war theory regained importance especially in international human rights law because "strong doctrinal support developed in favour of legitimizing"[22] the use of armed force when human rights are violated.

Although many authors in the present literature argue for the lawfulness of humanitarian interventions by quoting pre-Charter literature as a proof, it is doubted that humanitarian interventions were generally accepted as a legal use of force or even as customary international law.[23] Only a few of the cases which were taken as a reference for the acknowledgement of humanitarian intervention in the pre-Charter period "really prove to be genuine examples of humanitarian intervention."[24] In this respect, Hugo Grotius examined that humanitarian intervention "may often be used as the cover of ambitious designs."[25] The excuse of humanitarian intervention has often been used "to trump sovereignty."[26] The long history of misuse of armed force which was under the guise of humanitarian reasons has contributed to the difficulties of justifying humanitarian interventions in our present time.

Nevertheless, there exist examples of "true" humanitarian interventions on behalf of the protection of human rights in the pre-Charter period.[27] Maybe the most obvious example for an early humanitarian intervention which did not aim at territorial advantages but only on the protection of human rights, in particular the protection of the Christian population, was the French intervention in Syria in 1860.[28] The French intervention was supported by Austria, Great Britain, Prussia and Russia who signed up two protocols in August and September 1860 "wishing to stop

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[21] Dinstein, above n 2, 63-73; see also Malcolm N Shaw *International Law* (5 ed, Cambridge University Press, Cambridge, 2003) 1013-17; Rebecca M M Wallace *International Law* (5 ed, Sweet and Maxwell, London, 2005) 277; Joseph Boyle "Traditional Just War Theory and Humanitarian Intervention" in Terry Nardin and Melissa S Williams (eds) *Humanitarian Intervention* (New York University Press, New York, 2006) 31, 44-54, who analyses the legitimacy of humanitarian intervention in the light of the just war theory.

[22] Dinstein, above n 2, 71.

[23] J L Holzgrefe "The humanitarian intervention debate" in J L Holzgrefe and Robert O Keohane (eds) *Humanitarian Intervention. Ethical, Legal and Political Dilemmas* (Cambridge, Cambridge University Press, 2003) 15, 46.

[24] Vukas, above n 3, 235; Beyerlin, above n 6, 927.

[25] 2 H. Grotius, DE JURE BELLI AC PACIS LIBRI TRES (On the Law of War and Peace), bk. 3, ch. 15, para. 8.

[26] Ramesh Thakur *The United Nations, Peace and Security* (Cambridge University Press, Cambridge, 2006) 251.

[27] See Robert Kolb "Note on humanitarian intervention" in *International Review of the Red Cross* 849 (March 2003) 119, 122 www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5LPKFQ/$File/irrc_849_Kolb.pdf (accessed 18 February 2008).

[28] Beyerlin, above n 6, 927; Francoise Bouchet-Saulnier *The Practical Guide to Humanitarian Law* (2 ed, Rowman and Littlefield Publishers, Lanham, 2007) 231; Merria, above n 5, 119.

the effusion of blood in Syria."[29] The first protocol[30] contained the agreement that up to 12, 000 European troops may be sent to Syria to re-establish a state of law while in the second protocol it was ensured that "the contracting powers do not seek for ... any territorial advantages, any exclusive influence, or any concession with regard to the commerce of their subjects."[31]

This historical example stresses that humanitarian interventions were known in the pre-Charter period. Nevertheless, one problem of this time was that "prior to 1945 there was no meaningful law of human rights."[32] However, even in this period where "individuals were then only objects and not subjects of international law"[33] one document of international law has to be mentioned which is important on the question of whether humanitarian interventions are a lawful use of armed force in present times. This is the Kellog-Briand Pact which lastingly influenced the historical development of the right to use armed force. Inspired by the devastating results of the brutal World War I the idea for "the creation of an institution that would prevent future wars"[34] came up. The Kellog-Briand pact, named after the French Foreign Minister Briand and the United States Secretary of State Kellog, was adopted in Paris on the 27th of August 1928. The treaty was originally signed by 15 states, among them "great powers" such as France, Great Britain and the United States. Later, "nearly all States existing at the time became parties to the Pact."[35] The Parties agreed to "outlaw war and renounce it as an instrument of national policy"[36] apart from defensive wars. Although this treaty could not prevent World War II it is still "a milestone in the history of the law of war and general international law [as i]t represents a revolutionary change of attitude towards war in the international community."[37] The pact showed for the first time "that a general ban on 'war' was politically and legally possible."[38]

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[29] Louis B Sohn and Thomas Buergenthal *International Protection of Human Rights* (Bobbs-Merrill Company, Indianapolis, 1973) 156, who reprints an extract of the original documents.
[30] Ibid, 157.
[31] Ibid, 158; see also Murphy, above n 9, 53-4.
[32] Téson, above n 3, 220.
[33] Ibid; see also Hersch Lauterpacht (ed) *International Law* (8 ed, Longmans, London, 1955) 640-1 and 736-8.
[34] Murphy, above n 9, 57.
[35] Randelzhofer, above n 2, Article 2 (4), para 10.
[36] Cynthia D Wallace "Kellog-Briand Pact" in Rudolf Bernhardt (ed) *Encyclopaedia of Public International Law* (Elsevier, Amsterdam, 1995) 77.
[37] Ibid, 79.
[38] Dixon, above n 18, 291.

Connecting the provisions of the Kellog-Briand Pact with the question of the lawfulness of humanitarian interventions, it must be noticed that even if the treaty did not explicitly regulate the right to humanitarian intervention "its tenor is to preclude the initiation of war by any nation when an international controversy arises."[39] This means that the justification of humanitarian interventions has become more difficult than it was before.[40] As "the principles of the Kellog-Briand Pact are now embodied in the United Nations Charter"[41] this effect of the Pact leads us to the analysis of the post-Charter period.

B Humanitarian Intervention post 1945

For the investigation of the historical development in the post-Charter period it is important to note that the context around the threat of human rights' violations has changed. While until the middle of the 20th century it was colonialists (predominantly European ones) who violated human rights of the people in colonised countries, by the end of the 20th century threats to human rights have mostly been caused by the people's own governments.[42] The threat of human rights through a state's own government as a major current human rights concern was also influenced by the end of the Cold War. The end of the Cold War led to a rise of intrastate wars and the destabilization of broader areas.[43] These internal conflicts often go hand in hand with the suppression of a particular ethnic group and therefore human rights violations which do not necessarily cross borders.

The invention of the UN-Charter in 1945 "had a dramatic impact on classic international law."[44] Article 1 of the UN-Charter lays down its main purpose which is to "maintain international peace and security." This demands "the suppression of acts of aggression or other breaches of peace." Even though the Charter does not contain any explicit rules for humanitarian interventions, the wording of Article 1 of

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[39] Murphy, above n 9, 60.
[40] Beyerlin, above n 6, 927.
[41] Cynthia D Wallace, above n 36, 78.
[42] Dinstein, above n 2, 70-1; see also Christine Gray "The Use of Force and the International Legal Order" in Malcolm D Evans (ed) *International Law* (2 ed, Oxford University Press, Oxford, 2006) 591 ["The Use of Force and the International Legal Order"]; see also "UN High-level Panel", above n 1, paras 2-3, where an explanation of the colonial systems in the first 30 years of the UN is given.
[43] Shepard Foreman and Andrew Grene "Collaborating with Regional Organizations" in David M Malone (ed) *The UN Security Council* (Lynne Rienner Publishers, London, 2004) 302; Emily Schroeder "The Kosovo Crisis: Humanitarian Imperative versus International Law" (2004) 28 Fletcher F World Aff 179, 179; see also Rebecca M M Wallace, above n 21, 287; Urquart, above n 1 87; compare "UN High-level Panel", above n 1, para 11 and 74 where the decrease of inter-state wars since the end of the Cold War is described.
[44] Téson, above n 3, 219; see also Beyerlin, above n 6, 927.

the UN-Charter and especially the prohibition of the threat or use of armed force in Article 2 (4) UN-Charter, seems to preclude the justification of humanitarian interventions.[45] However, Chapter VII of the UN-Charter, which regulates actions of the UN when there are threats to peace, and especially Article 51 with the right to self defence contains exceptions from Article 2 (4) which means that the prohibition of the use of force is not an absolute one.[46]

Within the more than 50 years of existence of the UN-Charter various interventions took place in which the use of armed force claimed to be justified because of the protection of human rights. A few prominent examples are the intervention of India in Bangladesh on behalf of the protection of East Pakistan's population in 1971, the 1979 invasion of Vietnamese forces in Cambodia where the Khmer Rouge led by Pol Pot killed more than 1 million people within only 4 years or Tanzania's intervention in Uganda to overthrow the regime of Idi Amin in the same year. All of these interventions have been an object of controversial legal disputes with regards to their character as humanitarian interventions.[47] While some authors consider them to be genuine examples for humanitarian interventions,[48] others reject this opinion.[49] However, it is beyond the scope of this paper to provide an analysis about this dispute. But the given examples plus the recent case of NATO bombardments in Kosovo, which also is a highly controversial issue,[50] illustrate that the discussion on whether the use of armed force can be justified as a humanitarian intervention is an important question in contemporary human rights law.

V HUMAN RIGHTS AS A CATALYST FOR THE USE OF ARMED FORCE

Events in contemporary history as, for example, NATO's actions in Kosovo have shown that the international community accepts more and more the use of

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[45] See Dinstein, above n 2, 71.
[46] See Shaw, above n 21, 1017.
[47] Among others compare Téson, above n 3, 219-78; Murphy, above n 9, Chapter 4; see also Barry M Benjamin "Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities" (1992) 16 Fordham Int'l L J 120, 133-4, 137-8 and 143.
[48] Merria, above n 5, 123-4; Benjamin, above n 47, 151.
[49] Christine Gray *International Law and the Use of Force* (2 ed, Oxford University Press, Oxford, 2004) 32.
[50] See Schroeder, above n 43; Bruno Simma "NATO, the UN and the Use of Force: Legal Aspects" (1999) 10 EJIL 1; Antonio Cassese "Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" (1999) 10 EJIL 23 ["Ex inuria ius oritur"]; Gray, above n 49, 37.

extreme measures, including the use of armed force, to protect human rights.[51] This could mean that human rights serve as a catalyst for the use of armed force.

A cornerstone for the increasing importance of human rights within the last 50 years is the Universal Declaration of Human Rights (UDHR), which was approved by the UN General Assembly (UNGA) on the 10th December 1948.[52] Even though not a binding treaty, this document is the first codification of human rights that formulated "a unitary and universally valid concept of what values all States should cherish."[53] Since then, several other international documents concerning fundamental human rights have been adopted. Examples are the International Covenant on Civil and Political Rights,[54] the International Covenant on Economic, Social, and Cultural Rights[55] or the recently adopted Declaration on the Rights of Indigenous Peoples.[56] The trend in the international community to codify human rights proves their raising importance in international law.[57] This is underlined by the fact that some basic human rights have emerged even on the level of jus cogens norms.[58]

The emergence of the value of human rights in the international community had a deep impact on the international law on the use of armed force. This becomes obvious when the UN's tendency to consider human rights violations as a threat to peace as in the meaning of Chapter VII of the UN-Charter is taken into account.[59] For example, atrocities of the Iraqi government against the Kurdish minority in Northern Iraq were constituted by the UN-SC to be a threat to peace.[60] According to

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[51] See "Ex iniuria ius oritur", above n 50, 26; see also Rebecca M M Wallace, above n 21, 289; Gray, above n 49, 33-7; Merria, above n 5, 121.
[52] UNGA Resolution 217 A (III) (10 December 1948).
[53] Antonio Cassese *International Law* (2 ed, Oxford University Press, Oxford, 2005) 380 ["International Law"]; see also Leland M Goodrich, Edvard Hambro and Anne Patricia Simons *Charter of the United Nations* (3 ed, Columbia University Press, New York, 1969) 377-8.
[54] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.
[55] International Covenant on Economic, Social, and Cultural Rights (16 December 1966) 993 UNTS 3.
[56] UNGA "United Nations Declaration on the Rights of Indigenous Peoples" (12 September 2007) A/61/L.67.
[57] See Thomas M Franck *Fairness in International Law and Institutions* (Clarendon Press, Oxford, 1995) 264; "International Law", above n 53, 396-8.
[58] See Lauri Hannikainen *Peremptory Norms (Jus Cogens) in International Law* (Finish Lawyers' Publishing Company, Helsinki, 1988) 718, who lists norms about, for example, slavery, genocide, torture and arbitrary killings as jus cogens norms.
[59] Jochen Frowein and Nico Krisch in Bruno Simma (ed) *Charter of the United Nations: A Commentary* (2 ed, Oxford University Press, Oxford, 2002) Article 39, paras 19-21; "International Law", above n 53, 383; but see Pratap Bhanu Meta "From State Sovereignty to Human Security (via Institutions?)" in Nardin and Williams, above n 21, 259, 273.
[60] UNSC Resolution 688 (5 April 1991) S/RES/688/1991 para 1; Franck, above n 57, 235; Frowein and Krisch, above n 59, para 20; see also UNSC Resolution 794 (3 December 1992) S/RES/794/1992

Article 43 of the UN-Charter, the determination of such a threat to peace entitles the UN-SC to authorize the use of armed force, even though it is only a possible last resort.

All in all, the elevated status and high value that human rights have gained within the last 50 years has lead to the emergence of the use of military means when human rights are infringed. Thus, human rights law and the law of armed conflict are no more seen as two isolated aspects of international law, as they were until the middle of the 20th century.[61] Rather there is a nexus. It has become accepted that the international mandate to protect human rights also "requires the use of force."[62] "In other words, the human rights regime has gone over to the offensive"[63] and human rights have become a catalyst for the use of armed force.

V INTERNATIONAL RULES ON THE USE OF FORCE

The use of armed force is subject to several rules of international law which regulate the circumstances under which it is lawful to use military means against another sovereign state. Even though the right to use force in the special case of humanitarian intervention is not explicitly regulated, these rules give important indications for the legality or illegality of interventions on behalf of the protection of human rights. The most important piece of international legislation which has to be taken into account is Article 2 (4) of the UN-Charter. Randelzhofer observes that "today Art[icle] 2 (4) constitutes the basis of any discussion on the problem of the use of force."[64] Another part of international legislation which allows the use of armed force when human rights are violated is the Convention on the Prevention and Punishment of the Crime Genocide.[65]

A Provisions of Article 2 (4) and Article 2 (7) of the UN-Charter

Article 2 (4) of the UN-Charter contains the principle of the prohibition of the use of force. Moreover, the principle of non intervention can be derived from this

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page 1 on Somalia; UNSC Resolution 929 (22 June 1994) S/RES/929/1994 on Rwanda; UNSC Resolution 1296 (19 April 2000) S/RES/1296/2000 para 5.

[61] Colonel Draper "The Relationship between the Human Rights Regime and the Law of Armed Conflicts" (1971) 1 Israel Yearbook on Human Rights 191, 193.

[62] W Michael Reisman "Kosovo's Antinomies" (1999) 93 Am J Int'l L 860, 862.

[63] Draper, above n 61, 195.

[64] Randelzhofer, above n 2, Article 2 (4) para 12.

[65] UNGA Resolution 260 A (III) (9 December 1948); compare Vukas, above n 3, 237; Dinstein, above n 2, 71.

article in connection with Article 2 (7) UN-Charter.[66] As every single element of these two basic principles is the focus of academic disputes which can not be solved within this work, this paper will be content with a short explanation of these principles and then explain the principles' exceptions.

1 The principle of the prohibition of the use of force

The prohibition of the use of force has its origin in the Kellog-Briand Pact but improved the prohibition of "only" war to a more general prohibition of the use of armed force.[67] "The reference to 'force' rather than war is beneficial and covers situations in which violence is employed which fall short of the technical requirements of the state of war [as for example reprisals]."[68] Furthermore, it covers not only an actual use of force but also the mere threat of force which means that the scope of Article 2 (4) of the Charter also glances at future events when "the envisaged use of force … itself [is] unlawful."[69]

This wide wording of Article 2 (4) indicates that the principle of the prohibition of the use or the threat of force has to be interpreted in a broad sense and has to be seen as the elementary rule for international relationships. Therefore, "states and commentators generally agree that the prohibition of the use of force is not only treaty and customary law but also ius cogens."[70] The significance of Article 2 (4) becomes obvious when Henkin describes it as "the heart of the United Nations Charter."[71]

2 The principle of non-intervention

The Declaration of Principles of International Law concerning Friendly relations and Cooperation between States explains the principle of non-intervention as "no State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of another State."[72] The

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[66] Nolte, above n 7, Article 2 (7) para 7.
[67] Randelzhofer, above n 2, Article 2 (4) para 14.
[68] Shaw, above n 21, 1018.
[69] Ibid, 1020.
[70] Gray, above n 49, 29; see also *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Nicaragua case)* (Juridiction and Admissibility) [1986] ICJ Rep 14, para 190 Judgment of the majority; Hannikainen, above n 58, 717; see also *Corfu Channel Case (United Kingdom v Albania)* (Jurisdiction and Admissibility) [1949] ICJ Rep 4, 35.
[71] Louis Henkin "The Reports of the Death of Article 2 (4) are Greatly Exaggerated" (1971) 65 Am J Int'l L 544.
[72] UNGA Resolution 2625 (XXV) (24 October 1970); see also Jennings and Watts, above n 16, 430, who list several other documents with similar provisions.

principle of non-intervention is based on the idea of the territorial integrity and sovereignty of the state and is a "part of customary international law."[73] This idea first was realized after the Peace of Westphalia in 1648 when nation states started to develop in Europe. "It is at that stage that the idea of sovereignty was first enunciated, proclaiming that sovereign rulers alone where responsible for administering their internal affairs as they see fit to advance the interests of the state."[74]

Today, the idea of sovereignty is laid down in Article 2 (7) of the UN-Charter even if the wording of the Charter does not explicitly mention it.[75] Article 2 (7) says that "nothing ... in the ... Charter shall authorize the United Nations to intervene in matters ... within the domestic jurisdiction" and therefore embodies "a most important aspect of the basic relationship between the Organization and the member States."[76] Furthermore, Article 2 (4) of the Charter is a legal source of this principle. The use of force is the most drastic violation of the territorial integrity of a foreign country and when Article 2 (4) prohibits the use of force this also means a protection of the sovereignty of states. This is underlined when the ICJ states in the *Nicaragua* case that "a breach of the customary principle of non-intervention will also ... constitute a breach of the principle of non-use of force in international relations."[77]

3 Interim result

The prohibition of the use of force and the principle of non-intervention and therefore Article 2 (4) respectively Article 2 (7) of the Charter "run directly counter"[78] to the legality of humanitarian intervention. According to Murphy's definition,[79] humanitarian intervention means a use of armed force and an intrusion in the territorial integrity of a foreign country even if they take place on behalf of the protection of human rights. However, the ban on the use of force and the principle of non-intervention are not absolute prohibitions as the Charter allows exceptions.

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[73] Shaw, above n 21, 1039.
[74] Murphy, above n 9, 42.
[75] Sabine von Schorlemer "Menschenrechte und 'humanitäre Interventionen'" (2000) 2 Internationale Politik, 41-2; Bouchet-Saulnier, above n 28, 230.
[76] Nolte, above n 7, Article 2 (7) para 3.
[77] *Nicaragua* case, above n 70, para 209 Judgment of the majority.
[78] Dixon, above n 18, 305; see also Jennings and Watts, above n 16, 428.
[79] See above II, page 6.

B Exceptions to the Prohibition of the Use of Force and the Principle of Non-Intervention

The most important justification for an armed intervention in a foreign country and therefore exception to the prohibition of the use of force and the principle of non-intervention is the right to self defence which is laid down in Article 51 of the UN-Charter. Furthermore, Chapter VII of the UN-Charter contains rules for the UN-SC to take action in cases of threats to peace. This paper does not aim at an exhaustive analysis of the relevant provisions of the Charter but will give an explanation of the most important elements which it demands for a legal use of armed force. Furthermore, attention will be given to the legal sources of the exceptions from the basic principles of Article 2 (4) and (7) UN-Charter. The legal source of the explicitly regulated exceptions on the prohibition of the use of force could give a clue to the lawfulness of humanitarian intervention as a non-written exception of the Charter.

1 Right to self defence, Article 51 UN-Charter

Article 51 of the UN-Charter grants "the inherent right of individual or collective self-defence if an armed attack occurs" and therefore explicitly regulates the right to self defence. The right to self defence has a long history. In 1837, where a legal dispute between the American and the British government about the justification of the destruction of the American steam boat "Caroline" took place,[80] "the American Secretary of State laid down the essentials of self defence."[81] In a letter he demanded from the British government "to show a necessity of self defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation [and that the attack on the boat was not] unreasonable or excessive ... and kept within [the rules of necessity]."[82] The elements of necessity and proportionality, which can be found within this letter, "are at the heart of self-defence in international law"[83] and are acknowledged as elements for Article 51 of the UN-Charter.[84] Therefore, the ICJ stated in the *Nicaragua* case that "self-defence would warrant only measures which are proportional to the armed attack and necessary to respond

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[80] See R Y Jennings "The Caroline and McLeod Cases" (1938) 32 Am J Int'l L 82, 82.
[81] Shaw, above n 21, 1025.
[82] Jennings, above n 80, 89.
[83] Shaw, above n 21, 1031.
[84] Randelzhofer, above 2, Article 51 para 42; Dinstein, above n 2, 208-10; Gray, above n 49, 120; Gardam, above n 1, 6.

to it."[85] "Necessity" in context of the right to self defence means "that the action must be by way of a last resort after all peaceful means have failed"[86] while "proportionality" in international humanitarian law is understood as "prohibiting disproportionate attacks and means and methods of warfare causing superfluous injury or unnecessary suffering."[87]

In the *Nicaragua* judgement the ICJ not only gave a description of the basic elements for a right to self defence but went beyond the scope of the treaty law of the UN-Charter when it "acknowledged the existence of [the right to self defence] under customary law."[88] Therefore, the ICJ delivered an analysis of the source of the right to self defence when it stated that "it cannot … be held that Article 51 [UN-Charter] is a provision which 'subsumes or supervenes' customary international law."[89] Accordingly, the right to self defence has its foundations not only in treaty law as a legal source but also in customary international law and this "customary law continue[s] to exist alongside treaty law"[90] and "independently of Article 51 [UN-Charter]."[91] This determination is important as "customary self-defence may go beyond the right guaranteed by the Charter"[92] and therefore may justify exceptions on the prohibitions on the use of force or the principle of non-intervention that are not explicitly listed in the UN-Charter.

2 Collective enforcement actions authorized by the UN-SC, Chapter VII of the UN-Charter

The second exception to the prohibition of the use of force can be found in Chapter VII of the UN-Charter which lays down "Actions with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." According to Article 25 of the UN-Charter, UN member states "agree to accept and carry out the decisions of the Security Council." Chapter VII of the Charter provides far reaching powers for the UN-SC and constitutes its function as an "international policeman". Therefore, Article 39 of the UN-Charter contains the task for the UN-SC "to determine the

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[85] *Nicaragua* case, above n 51, para 176 Judgment of the majority; affirmed in *Case Concerning Oil Platforms (Iran v United States of America)* (2003) 42 ILM 1334, 1361 Judgment of the majority (ICJ); *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion)[1996] ICJ Rep 226, para 41.
[86] Gardam, above n 1, 5.
[87] Ibid, 10.
[88] Randelzhofer, above n 2, Article 51 para 43.
[89] *Nicaragua* case, above n 70, para 176 Judgment of the majority.
[90] Shaw, above n 21, 1026.
[91] Rebecca M M Wallace, above n 21, 284.
[92] Dixon, above n 18, 296.

existence of any threat to peace ... and ... [to] make recommendations ... to maintain or restore international piece and security." According to Articles 41 and 42 of the Charter, it is up to the UN-SC to decide about possible reactions on the threat of peace. Under Article 41 the use of armed force as a possible measure is excluded and therefore possible actions are restricted to economic or diplomatic sanctions for example, while Article 42 stipulates the use of armed forces if the measures listed in Article 41 have proved to be inadequate. These two steps of possible actions against a threat to peace stress the importance of the element of necessity which is required for the justification of the use of armed force. In this respect, "the Charter ... sets up an elaborate system that is designed to ensure that the use of force is indeed the last resort available to the [UN Security] Council."[93]

3 Convention on the Prevention and Punishment of the Crime of Genocide

Another example for exceptions to the principles of the prohibition of the use of armed force and non-intervention can be found in the Convention on the Prevention and Punishment of the Crime of Genocide.[94] Article 8 of this Convention enables the UN "to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide." "Action" in the meaning of Article 8 of the Convention "include[s] the use of force [which] can be undertaken on the basis of a decision of the UN-SC or the General Assembly, in order to prevent and suppress genocide."[95] The reference of Article 8 of the Convention to the provisions of the UN-Charter indicates that also in the case of genocide the provisions of the UN-Charter as basic legal framework apply.

C Interim Result

The provisions of the UN-Charter show that the justification of the use of armed force underlies strict rules and only complies with the basic principle of the prohibition of the use of armed force and the principle of non-intervention if the narrow elements of the UN-Charter and especially of its Chapter VII are kept.

According to Murphy's definition of humanitarian intervention, which is the basis of this paper, the right to self defence and therefore Article 51 of the UN-

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[93] Gardam, above n 1, 6.
[94] UNGA Resolution 260 A (III) (9 December 1948).
[95] Vukas, above n 3, 237; see also Jennings and Watts, above n 16, 995; Bouchet-Saulnier, above n 28, 234.

Charter is not suitable to justify humanitarian interventions as the protection of human rights of the nationals from a foreign state is not "an armed attack ... against a Member State of the United Nations" as in the meaning of Article 51 of the Charter. In fact the population of a foreign country are subject to human rights, but they are not a subject of international law and therefore not a member of the United Nations. This could lead us to the conclusion that the use of armed force even on behalf of the protection of human rights is only justifiable when the UN-SC authorized the member state to take action and the strict procedures of Chapter VII of the Charter are kept.[96] For example, this would mean that the NATO led air campaign in former Yugoslavia is a breach of international treaty law.[97] However, this conclusion does not sufficiently take the importance of customary international law as a second basic source of international law into consideration.

VI HUMANITARIAN INTERVENTION AS CUSTOMARY INTERNATIONAL LAW

In international law not only are treaties a basic legal source but so is customary international law which contains obligations, permissions and prohibitions for the states. This becomes obvious when Article 38 (1) of the Statute of the International Court of Justice (ICJ) is taken into account. There it says that "the Court ... shall apply (a) international conventions ... [and] (b) international custom ... as a subsidiary means for the determination of rules of law." "Although this statute is technically only binding on the International Court of Justice, it is widely accepted as the authoritative statement of the sources of international law."[98] Therefore, it is important not only to analyse the text of the UN-Charter as to whether humanitarian interventions are a legal use of armed force, but also customary international law which "is the older and the original source of International Law."[99]

Customary international law is defined as "that law which has evolved from the practice or customs of the state."[100] The rules of customary international law are often of a great flexibility which is advantageous. In comparison, treaty law is often

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[96] Dinstein, above n 2, 71-2; Louis Henkin "Kosovo and the Law of Humanitarian Intervention" (1999) 93 Am J Int'l L 824, 826.
[97] Randelzhofer, above n 2, Article 2 (4) para 56.
[98] J L Holzgrefe "The humanitarian intervention debate" in Holzgrefe and O Keohane, above n 23, 37.
[99] Lauterpacht, above n 33, 25; Merria, above n 5, 118.
[100] Dixon, above n 18, 28.

bound by its narrow wording while customary international law "enables international law to develop in line with the needs of the time."[101] In this respect, especially the question of whether humanitarian interventions which were not authorized by the UN-SC are a lawful act or a breach of international law is an important aspect of contemporary international human rights law. There might be a present need for the justification of the use of armed force even in cases where the written rules of the strict international legal framework are not kept. Especially after 1999 with the unauthorized NATO lead air strikes in the Kosovo conflict, where the provisions of Chapter VII of the UN-Charter were not applied, the need for a less formal understanding of the right for the use of armed force was formulated. For example, Wedgwood argues "against procedural perfectionism in times of emergency, when key normative principles [of the UN-Charter] are at stake, and United Nations security machinery fails to work."[102]

Even though the Kosovo crisis gives important clues for the further analysis of the existence of an international custom of humanitarian intervention, it is beyond the scope of this paper to find an answer as to whether the actions of NATO in former Yugoslavia were a lawful act or a breach of international law. Rather this paper will investigate more generally whether humanitarian interventions have elevated to the level of customary international law. Therefore, further examination of the single elements of customary international law and whether they are fulfilled with regard to humanitarian interventions is needed.

A Elements of Customary International Law

Customary international law consists of two main elements. First, there is a need for a consistent state practice and secondly, the development of a binding rule of customary international law needs an opinio juris.[103]

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[101] Ibid.

[102] Ruth Wedgewood "NATO's Campaign in Yugoslavia" (1999) 93 Am J Int'l L 828, 833; see also Christine M Chinkin "Kosovo: A "Good" or "Bad" War? (1999) 93 Am J Int'l L 841, 843.

[103] Enzo Cannizzaro and Paolo Palchetti "Customary International Law on the Use of Force … at a Time of Perplexity" in Enzo Cannizzaro and Paolo Palchetti *Customary International Law on the Use of Force* (Martinus Nijhoff Publishers, Leiden, 2005) 1, 2; Michael Byers and Simon Chesterman "Changing the rules about rules? Unilateral humanitarian intervention and the future of international law" in Holzgrefe and Keohane, above n 23, 177, 179; "International Law", above n 53, 157.

1 Consistent state practice as material element

For the examination of whether there is a consistent state practice with regard to humanitarian intervention it is necessary to analyse material sources of international law. Possible guidelines for such an analysis are, for example, "diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, ... legislation, ... judicial decisions ... and resolutions [of] the United Nations General Assembly."[104] In addition, the examination of contemporary interventions is a helpful clue for the determination of a consistent state practice. For example, in the legal dispute about the lawfulness of NATO operations in Kosovo, Cassese formulates the question of whether "the NATO ... intervention at least rooted in and partially [was] justified by contemporary trends of the international community."[105]

The ICJ stresses the importance of the consistency of the state's practice as being essential for the formation of customary international law. Therefore, it formulated in the *Asylum* case "that the rule invoked [must prove to be] in accordance with a constant and uniform usage practised by the States."[106] This element causes difficulties especially in the area of humanitarian intervention "due to the highly political character of the law governing the use of force."[107] Nevertheless, relief is brought to this element when Brownlie states that "complete uniformity is not required."[108]

In the following part, this paper refers to certain cross-border interventions which took place in contemporary history which are regarded as important issues for the further determination of state practice on the use of armed force on behalf of the protection of human rights. In this regard, further analysis differentiates between the unilateral[109] interventions of the 1970s and multilateral[110] interventions which took place especially in the 1990s. Moreover, the European approach to humanitarian intervention shall be investigated.

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[104] Iain Brownlie *Principles of Public International Law* (6 ed, Oxford University Press, Oxford, 2003) 6 ["Principles of Public International Law"]; see also Rebecca M M Wallace, above n 21, 5; Dixon, above n 18, 29.
[105] "Ex iniuria ius oritur", above n 50, 25.
[106] *Asylum Case (Colombia v Peru)* (Jurisdiction and Admissibility) [1950] ICJ Rep 266, 276 Judgment of the majority.
[107] Cannizzaro and Palchetti, above n 103, 4.
[108] "Principles of Public International Law", above n 104, 7; see also Andreas Laursen *Changing International Law to Meet New Challenges* (DJØF Publishing, Copenhagen, 2006) 90.
[109] Unilateral in this context means interventions lead by a single state.
[110] Multilatreal means interventions lead by a group of states which are organized in an international organization such as NATO and UN or other multinational alliances of states.

(a) Unilateral interventions in the 1970s

As Wedgwood reports, "humanitarian reasons have served as justification in ... Vietnam's displacement of the Khmer Rouge in Cambodia, India's invasion of East Pakistan in support of Bangladeshi independence [or] Tanzania's overthrow of Idi Amin in Uganda."[111] But whether these incidents, which all took place in the 1970s, can serve as examples for a consistent state practice of humanitarian intervention is doubted in international literature. Some authors criticise, that the use of armed force in these cases was not justified by the intervening countries "on the basis of humanitarian action; rather the states using force focused mainly on self-defence."[112] Critics also claim that the use of armed force for India, Vietnam and Tanzania was likely for more "egoistic" and national motives than humanitarian.[113]

However, these incidents are classical examples for unilateral interventions in which Murphy's definition of humanitarian interventions also applies. Nevertheless, they are a special case of the use of armed force because these interventions were led by single states. Therefore, they are hardly comparable with the multilateral interventions which took place within the last twenty years, for example, in Northern Iraq, Somalia or in the Kosovo. Therefore, "any scepticism of motive or result [of these unilateral interventions] does not necessarily impeach multilateral action"[114] and at least the actions taken by India, Vietnam and Tanzania and the criticism thereof do not say anything against a consistent state practice of humanitarian intervention.

As the author is of the opinion that unilateral interventions are hardly comparable with the use of force by multilateral actors, the following part of this paper only refers to multilateral interventions. The lawfulness of unilateral military actions on humanitarian grounds has to be questioned separately.

(b) Multilateral interventions in the 1990s

It is important to take the 1990s multilateral interventions into account when considering the consistency of state practice. Examples of multilateral use of armed

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[111] Wedgwood, above n 102, 833; but see Murphy, above n 9, 104, who states that Vietnam's primary justification for taking action in Cambodia was self defence and that the Vietnamese government only referred to human rights violations "in passing"; Scheffer, above n 1, 255, who states that Vietnam's "humanitarian considerations may have been minimal" but are nevertheless "noteworthy".

[112] Gray, above n 49, 32; see also Holzgrefe in Holzgrefe and Keohane, above n 23, 48; D J Harris *Cases and Materials on International Law* (6th ed, Sweet and Maxwell, London, 2004) 948.

[113] Chandler, above n 5, 164; see also Jonathan Charney "Anticipatory Humanitarian Intervention in Kosovo" (1999) 93 Am J Int'l L 834, 836.

[114] Wedgwood, above n 102, 833.

forces on behalf of the protection of human rights are the intervention in Liberia in 1990 which was lead by the African Union and the UN and should protect the civil population from the consequences of a bloody civil war; the UN operated interventions in Iraq and Somalia in 1991 and 1992 to protect the human rights of minorities such as Kurds and Shiites in Iraq respectively to avoid widespread human rights violations in Somalia; the UN lead interventions in Bosnia-Herzegovina from 1992 until 1995 on behalf of the protection of the civilian population and the 1994 intervention in Rwanda to protect the Tutsi minority from genocide by the Hutu. All these events serve to show the consistent trend in contemporary history that "the international community is increasingly intervening, through international bodies, in internal conflicts where human rights are in serious jeopardy."[115] Within the last 20 years the idea emerged "in the international community that large-scale and systematic atrocities ... give rise to an aggravated form of state responsibility."[116] Therefore, Wallace concludes that "the alleviation of human suffering appears to be taking precedence over the principle of State sovereignty, and there is evidence of a shift in the international's community's position regarding humanitarian intervention."[117]

(c) Special case: Kosovo crisis

Although the Kosovo crisis belongs in the same period of time and the NATO lead intervention was also a multilateral use of armed force, it does not fit in the series of interventions which were mentioned before. The lack of authorization by the UN-SC in the meaning of Chapter VII of the UN-Charter was new ground in history and makes the Kosovo conflict a special case. Nevertheless, even the lack of authorization by the UN-SC and therefore the special circumstances of the Kosovo intervention is an important clue for the analysis of whether a consistent state practice of humanitarian intervention exists.

First, it has to be stressed that the NATO operation was not "decided by a sole hegemonic power, but has been freely agreed upon by a group of countries, namely the 19 member states of NATO,"[118] which indicates a continuation in the practice of states on behalf of human rights' protection by international

[115] "Ex iniuria ius oritur", above n 50, 26; see also Rebecca M M Wallace, above n 21, 289.
[116] "Ex iniuria ius oritur", above n 50, 26.
[117] Rebecca M M Wallace, above n 21, 289.
[118] Ibid; Wedgwood, above n 102, 833.

organizations. "NATO can claim the legitimacy of a nineteen-nation decision process, and the normative commitments of a democratic Europe that even Yugoslavia wishes to join."[119] The then Secretary-General of the NATO, Javier Solana, stated in a press conference at the beginning of the military actions in Kosovo that the objective of the NATO allies is "to prevent more human suffering and more repression and violence against the civilian population of Kosovo."[120] This emphasizes the justification of the use of armed force on humanitarian grounds and therefore points out certain state practice by alliances to protect human rights.

Secondly, even if the use of armed force was not authorized by the UN-SC, the NATO member states were not condemned by the majority of the international community for taking action in Kosovo.[121] Rather, on the third day of air strike operations by the NATO forces, the UN-SC refused a request of Belarus, India and Russia to condemn the actions taken in Kosovo.[122] The draft of a resolution[123] which claimed violations of Articles 2 (4), 24 and 53 of the UN-Charter was defeated 12 to 3 votes. This means that even the permanent members of the UN-SC "did not have occasion to exercise a veto, since the numerical tally fell far short of passage."[124] This is proof of the widespread international acceptance of the use of armed force on behalf of the protection of human rights at least when multilateral actions take place. This is underlined when the then Secretary-General of the UN, Kofi Annan, concluded on the second day of NATO operations in former Yugoslavia that he regrets that "diplomacy has failed but [that] there are times when the use of force may be legitimate in the pursuit of peace."[125] Even though he emphasised the prior responsibility of the UN-SC for the lawful use of armed force,[126] he acknowledged:
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[119] Wedgwood, above n 102, 833; Chinkin, above n 102, 843.
[120] NATO Press release (1999) 040, 24 March 1999 www.nato.int/docu/pr/1999/p99-040e.htm (accessed 18 February 2008).
[121] Cassese, above n 8, 792; Schroeder, above n 43, 185; Jane Stromseth "Rethinking humanitarian intervention: the case for incremental change" in Holzgrefe and Keohane, above n 23, 232, 249.
[122] Wedgwood, above n 102, 830-1.
[123] UN Doc S/1999/328, 26 March 1999, reprinted in UN Press release SC 6659 www.un.org/News/Press/docs/1999/19990326.sc6659.html (accessed 18 February 2008).
[124] Wedgwood, above n 102, 831.
[125] UN Doc SG/SM/6938, 24 March 1999, Secretary-General's statement on NATO military action against Yugoslavia www.un.org/News/Press/docs/1999/sgsmxxxx.doc.htm (accessed18 February 2008); quoted by Schroeder, above n 43, 186.
[126] Ibid.
[127] UN Press release SG/SM 7136, GA/9596 of 20th of September 1999, Secretary General Presents His Annual Report to General Assembly www.un.org/News/Press/docs/1999/19990920.sgsm7136.html (accessed 18 February 2008).

> The imperative of effectively halting gross ... human rights violations ... [as an] equally compelling interest ... [and demands for the future] to forge unity behind the principle that massive and systematic violations of human rights - wherever they may take place - should not be allowed to stand.

As a result, even if the multilateral use of force in the Kosovo conflict was not authorized by the UN-SC, it indicates there is a consistent state practice of humanitarian intervention.

(d) European approach to humanitarian intervention

Furthermore, the examination of the European approach to humanitarian intervention could give an important clue as to the existence of consistent state practice. On the 20th of April 1994, the European Parliament (EP) adopted a resolution on humanitarian interventions.[128] The EP consists of representatives from all member states of the European Union (EU) who have been chosen as members of parliament by the European population in a direct election.[129] Therefore the EP can be seen as "the" democratic institution of the EU and therefore the resolutions adopted by the EP can be regarded as reflecting the opinion of the majority of the European population. The representation of the opinion of 492 million[130] citizens of the EU is an important source for the determination that certain state practice exists.

Within its 1994 resolution, the EP took into account that international law is importantly influenced by the practice of the states and stressed the opinion that the present international law does not contradict the acknowledgement of lawful humanitarian intervention. Although the EP accepts the prior responsibility of the UN-SC to coordinate the use of armed force, it expresses the opinion that interventions for the protection of human rights also have to be possible without authorization by the UN-SC if no other course of action is possible. Finally, the EP demands that the European Commission and the Council of the European Union, who are two main organs of the EU, take a positive attitude on behalf of the acknowledgement of a right to humanitarian intervention.[131] This positive attitude of the member states of the EU to the acknowledgement of a right to humanitarian

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[128] Official Journal of the European Communities, C-Series 128, 09.05.1994, pages 225-227; reprinted in the German language in the official documents of the German Parliament, BT-Drucksache 12/7513 ["BT-Drucksache 12/7513"].

[129] Jo Steiner, Lorna Woods and Christian Twigg-Flesner *Textbook on EC Law* (8 ed, Oxford University Press, Oxford, 2003) 20.

[130] www.europarl.europa.eu/parliament/public.do?language=en (accessed 18 February 2008).

[131] "BT-Drucksache 12/7513", above n 128, para 15.

intervention acts as a further indicator for consistent state practice of human rights protection using the instrument of armed force.

The European point of view on the legality of the use of force is also underlined in the legal disputes around the Kosovo crisis and especially in the ICJ case of *Yugoslavia v Belgium*.[132] In this case, Belgium argued in a preliminary hearing before the Court that the bombing in Kosovo was "a case of a lawful armed humanitarian intervention for which there is a compelling necessity."[133] Referring to this, O'Connell observes that "this argument is an example of state practice that helps to build a customary right."[134]

(e) Interim result

The examination of the UN and respectively NATO lead interventions for humanitarian reasons which took place in the 1990s plus the European attitude on the legitimacy of humanitarian intervention leads to the conclusion that a consistent state practice for the use of armed forces on behalf of the protection of human rights exists at least for multilateral interventions. This result cannot be adopted off-hand for unilateral interventions as the question of their legitimacy is still the subject of intense academic disputes.[135]

2 Duration of state practice

Beside consistency of state practice, the duration of state practice might be a second element of an emerging customary international law. The idea of humanitarian intervention being elevated to the level of customary international law especially arose after the unauthorized NATO bombardments in former Yugoslavia only 9 years ago. This suggests that for state practice to become customary international law a certain period may be required and 9 years in the case of Yugoslavia might not be enough. In the same way, the unilateral interventions which occurred in the 1970s can not serve as undisputed evidence for the existence of a consistent state practice of humanitarian intervention while the multilateral

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[132] *Case Concerning Legality of Use of Force (Yugoslavia v Belgium)* (Jurisdiction and Admissibility) [1999] ICJ Rep 124, documents available under www.icj-cij.org/docket/index.php?p1=3&p2=3&code=ybe&case=105&k=d6 (accessed 18 February 2008).

[133] www.icj-cij.org/docket/files/105/4515.pdf (accessed 18 February 2008).

[134] Mary Ellen O'Connell "Re-Elashing the Dogs of War" (2003) 97 Am J Int'l L 446, 448, there within footnote 10 ["Re-Elashing the Dogs of War"].

[135] Among others compare Téson, above n 3, 219-78; Murphy, above n 9, 97-107; but see Merria, above n 5, 126, who also regards the unilateral intervention of the 1970s as proof for the existence of a customary right to humanitarian intervention.

interventions of the 1990s pass this demand. This raises the question of whether the period of only 20 years of practised multilateral humanitarian interventions is long enough to create a binding rule of customary international law.

However, "a long ... [or] immemorial practice is not necessary ... [and] the International Court does not emphasize the time element as such in its practice."[136] The ICJ says in the *Continental Shelf* case that "the passage of only a short period of time is not necessarily ... a bar to the formation of a new role of customary international law."[137] Therefore, we can conclude that even a relatively short period of 20 years of state practice is sufficient to become a rule of customary international law. Even if one regards humanitarian interventions to be state custom only since the Kosovo conflict, this is not a bar for its acknowledgement as customary international law. However, the other elements of customary international law need to be fulfilled.

3 Opinio juris et necessitates

The second essential requirement of the emergence of customary international law is "opinio juris et necessitates" as the subjective element of customary international law. Opinio juris can be defined as the state's "belief in a legal obligation."[138] It was "introduced as a legal formula in an attempt to distinguish legal rules from mere social usage."[139] Therefore, the ICJ stated in the *Continental Shelf* case that:[140]

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. The need for such a belief ... is implicit in the very notion of opinio juris sive necessitates. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.

Although the ICJ demands opinio juris, it did not explain how this element of customary international law "can be established in practice."[141] In law, the

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[136] "Principles of Public International Law", above n 104, 7; see also Rebecca M M Wallace, above n 21, 10; Laursen, above n 108, 35-6.
[137] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (Continental Shelf case)* (Jurisdiction and Admissibility) [1969] ICJ Rep 3, 44 para 74 Judgment of the majority.
[138] Mary Ellen O'Connell "Taking Opinio Juris Seriously" in Cannizzaro and Palchetti, above n 103, 14.
[139] Wallace, above n 21, 16.
[140] *Continental Shelf* case, above n 137, 45 para 77 Judgment of the majority.
[141] Dixon, above n 18, 32.

determination of subjective elements typically causes more evidential problems than the determination of objective ones. So, "some controversy prevails among international lawyers regarding what types of evidence are appropriate for demonstrating [an opinio juris]."[142] There are basically two different academic approaches to finding a more defined description of what opinio iuris is. While some international lawyers, for example the dissenting judges in the *Continental Shelf* case, are of the opinion "that opinio iuris can be presumed from the state practice, unless a contrary intention [is] apparent",[143] the other stream in literature does not accept this presumption but sees the opinio iuris element as "a distinct requirement [of customary international law] which has to be independently and positively established."[144] As it is beyond the scope of this paper to find a solution for this academic dispute about the "right" approach to opinio juris, this work will be content with determining that consistent state practice of the use of armed force on behalf of the protection of human rights has to be regarded by the states as a legal obligation and not only as an act of "mere courtesy, convenience or tradition."[145] Evidence of such a state's opinio juris may "be found explicitly in some statements or implicitly in other statements, acts or omissions."[146]

(a) Belgium's approach

Maybe the most obvious clue for a state regarding the use of armed forces on behalf of the protection of human rights as a legally binding task, can be found in Belgium's arguments for the justification of the intervention in Kosovo in which it took part as a member state of the NATO. "Throughout its argument Belgium acknowledges the developing nature of the idea of [a customary right to humanitarian intervention]."[147] In a hearing before the ICJ, Belgium's representative acknowledged the actions taken by the UN-SC under Chapter VII of the UN-Charter but at the same time demands the "need to go further and develop the idea of armed humanitarian intervention."[148] This indicates the Belgian understanding of humanitarian intervention to be not a mere moral act but a legally binding obligation.

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[142] O'Connell, above n 134, 14.
[143] Dixon, above n 18, 32.
[144] Ibid, 32; see also "Principles of Public International Law", above n 104, 8.
[145] Wallace, above n 21, 16.
[146] O'Connell, above n 134, 16.
[147] "Re-Elashing the Dogs of War", above n 134, 448.
[148] www.icj-cij.org/docket/files/105/4515.pdf (accessed 18 February 2008); reprinted by Harris, above n 112, 956.

In this respect, Belgian's counsel stated before the Court that "NATO ... felt obliged to intervene to forestall an ongoing humanitarian catastrophe."[149]

Moreover, the Belgian agent before the ICJ alternatively claimed to justify the use of armed force by means of necessity "if the court decided not to recognize [a customary right to humanitarian intervention]."[150] The fact that Belgium made this great effort to justify NATO's actions in Kosovo and therefore developed two different lines of legal arguments underlines Belgium's belief in an existing legal force behind the idea of use of armed force for humanitarian grounds. This too indicates an opinio iuris on humanitarian intervention being a legal obligation.

Beside the use of legal arguments before the ICJ, Belgium's decision in the Atlantic Council to vote for the use of armed force in Kosovo infers that Belgium's government was convinced of a legal obligation to take action. As not only Belgium but also the 18 other member states of the NATO voted for the armed humanitarian intervention in Kosovo, this argument can be applied to the determination of opinio juris of all these states. This leads to an analysis of the NATO's approach to humanitarian interventions.

(b) NATO's approach

NATO's understanding of humanitarian interventions as a legal obligation is underlined when the then Secretary-General of the NATO, Javier Solana, formulated in a press statement in the context of the Kosovo conflict as an obligation of the NATO allies that they "must halt the violence and bring an end to the humanitarian catastrophe ... unfolding in Kosovo."[151] Moreover, even though the United States of America did not refer to military actions in Kosovo as a humanitarian intervention, a statement made by the United State's representative before the UN-SC indicates that human rights issues were an important part of the United States government's decision to take action. He stated that the United States and its allies believe that "action by NATO [in Kosovo] is justified and necessary to ... prevent ... [a] humanitarian disaster."[152] The legal terms of "necessity" and "justification" therefore express an opinio iuris which underlines that NATO members understand

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[149] Ibid.

[150] www.icj-cij.org/docket/files/105/4515.pdf (accessed 18 February 2008); quoted in "Re-Elashing the Dogs of War", above n 134, 448.

[151] NATO Press release 1999 (040), 23 March 1999 www.nato.int/docu/pr/1999/p99-040e.htm (accessed 18 February 2008).

[152] Security Council, 3988th Meeting, UN Doc S/PV 3988, 24 March 1999, reprinted in Harris, above n 112, 953.

humanitarian interventions to be an act of law rather than a mere moral or political act.

In this context, also the debates within the German parliament that dealt with the participation of German armed forces in NATO lead operations in Kosovo have to be taken into account. Simma reports that these debates were full of respect for the provisions of the UN-Charter, but nevertheless the German government argued that the despite situation in Kosovo left no other choice than intervening by use of armed force.[153] "In this regard, differently from the NATO Secretary-General, the [German] government called the spade a spade and spoke of the NATO threat as an instance of 'humanitarian intervention'." [154] Even though the German government regarded "the Kosovo case as exceptional,"[155] this is a proof for the German opinio juris that in certain situations the use of armed force on humanitarian grounds can be justified and seen as a legally binding task.

(c) United Kingdom's approach

Another clue for the acceptance of humanitarian intervention being customary international law can be found in the United Kingdom. Even though the United Kingdom's Attorney General Lord Goldsmith expresses doubts about a justification on humanitarian grounds for recent military actions in Iraq,[156] the United Kingdom's government has made great efforts to establish an opinio juris and therefore a positive attitude towards a right to humanitarian intervention. For example, the *United Kingdom Guidelines on Humanitarian Intervention*,[157] which were produced by the Ministry of Foreign Affairs and list strict rules for the use of armed force on behalf of the protection of human rights, prove the United Kingdom's belief in humanitarian intervention to be an act of law and not a mere moral obligation.

In 1991 France, the United States of America and the United Kingdom initiated no-fly zones in Northern Iraq to protect the Kurdish minority. These actions

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[153] Bruno Simma "NATO, the UN and the Use of Force: Legal Aspects" (1999) 10 EJIL 1, 12.
[154] Ibid, 12-3.
[155] Harris, above n 112, 958; see also Simma, above n 153, 13; Byers and Chesterman, above n 103, 199; Robert Uerpmann "La primauté des droits de l'homme: licéité ou illicéité de l'intervention humanitaire" in Christian Tomuschat (ed) *Kosovo and the International Community* (Kluwer Law International, The Hague, 2002) 72; compare Chinkin, above n 102, 844.
[156] Report of Attorney General about military action in Iraq (7 March 2003) page 2 No 4, www.pm.gov.uk/files/pdf/Iraq%20Resolution%201441.pdf (accessed 18 February 2008); see also "The Use of Force and the International Legal Order", above n 42, 597.
[157] United Kingdom Guidelines on Humanitarian Intervention, reprinted in Harris, above n 112, 957-8 ["UK Guidelines on Humanitarian Intervention"].

were not covered by the UN-SC resolution 688[158] and therefore the House of Commons Foreign Affairs Committee questioned the Ministry of Foreign Affairs. Within this questioning the counsellor of the Ministry for Foreign Affairs conceded that the actions in Iraq were "not specifically mandated by the United Nations."[159] However, within the same sentence he justified the actions as having been taken "in exercise of the customary international law principle of humanitarian intervention."[160]

This stresses the UK's opinio juris that humanitarian interventions are not a mere social act but an act of law:[161]

> The UK more than any other State has developed a doctrine of humanitarian intervention as an autonomous institution ... [by arguing] that the interpretation of Article 2 (4) UN-Charter has changed over time [and] that international law in this field has developed to meet new situations.

(d) European approach

In addition to the opinio iuris of single European states, the 1994 resolution on the right of humanitarian intervention adopted by the EP serves as proof of the acceptance of humanitarian intervention as an act of law. The EP developed several criteria which have to be taken into account to legalize the use of armed force on behalf of the protection of human rights.[162] The formulation of such strict elements as a requirement for certain actions indicates the understanding of humanitarian intervention to be a legal tool and not a mere social one. Moreover, since the amendments of the Treaty of Amsterdam on the Treaty on European Union (EUT) came into force on the 1st of May 1999, Article 17 EUT stipulates that among the tasks of the EU there are also "humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking." The spectrum of possible actions under Article 17 EUT contains the possibility to run combat missions.[163] The decision of the EU member states to admit these provisions

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[158] Rebecca M M Wallace, above n 21, 287; Harris, above n 112, 950.
[159] Parliamentary Papers, 1992-1993, HC, Paper 235-iii, 85, 92, reprinted in Harris, above n 112, 950.
[160] Ibid.
[161] "The Use of Force and the International Legal Order", above n 42, 595.
[162] "Bundestagsdrucksache 12/7513", above n 128, para 10.
[163] See Christian Calliess and Mathias Ruffert (eds) *Das Verfassungsrecht der Europäischen Union* (3 ed, Verlag C H Beck, München, 2007) Article 17 EUV, para 25 "Die 'Petersberg-Aufgaben'" http://rsw.beck.de.helicon.vuw.ac.nz/bib/default.asp?vpath=%2Fbibdata%2Fkomm%2FCalliesRuffertEUVEGV%2FEUV%2Fcont%2FCalliesRuffertEUVEGV%2EEUV%2EA17%2EV%2Ehtm (accessed 30 November 2007).

in the basic European document also implies the acceptance of the use of armed force on behalf of the protection of human rights and serves as a proof for an opinio juris.

4 Interim Result

So far, the analysis of the elements of customary international law leads to the interim result that a new customary law of humanitarian intervention has emerged. Nevertheless, there are states which do not accept the right of multilateral alliances to intervene in the territory of a sovereign state without authorization by the UN-SC. For example, the Ministerial Declaration of the Ministers of Foreign Affairs of the Group of 77,[164] which was adopted in New York three months after the NATO bombing against Yugoslavia ended, "rejected the so-called right of humanitarian intervention ... [because it lacks a] basis in the UN-Charter or international law."[165]

The resistance of several states to the acknowledgment of a right to humanitarian intervention raises two questions. First – requires the emergence of a new customary law the unity of all states in the world's community? And secondly – can a rule of customary international law be "only binding upon States of a certain geographical area or region"[166] respectively of a certain alliance and therefore have an effect only on local law in the international context?

5 Requires a new custom the unity of all states?

The approach of assuming that the unity of all states is required for the birth of a new custom "is no longer tenable today. ... Customary rules do not need to be supported or consented by all States."[167] The ulterior motive of this statement becomes clear when the development of the world community in the post-World War II period is taken into account. Within this period, the number of UN member states grew from 51 in 1945 up to 191 in 2005.[168] "With the new actors ... has come

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[164] Ministerial Declaration, 23rd Annual Meeting of the Ministers of Foreign Affairs of the Group of 77, 24 September 1999 ["Ministerial Declaration G 77"] www.g77.org/doc/Decl1999.html (accessed 18 February 2008).
[165] Ibid, para 67, see also "Principles of Public International Law", above n 104, 712; Kolb, above n 27, 126, there footnote 30; Byers and Chesterman, above n 103, 184, there footnote 25.
[166] "International Law", above n 103, 163.
[167] Ibid 162.
[168] "UN High-level Panel", above n 1, para 2; see also Gareth Evans and Mohamed Sahnoun *The Responsibility to Protect* (International Development Research Centre, Ottawa, 2001) 3 para 1.13 ["Responsibility to Protect"] www.iciss.ca/pdf/Commission-Report.pdf (accessed 18 February 2008).

a wide range of new voices, perspectives, interests, experiences and aspirations"[169] which creates challenges "within the field of human rights."[170] Therefore, it is almost impossible to unite the opinions of all states of the world community with their wide range of varying interests. The claim for complete unity of all states as a requirement for a new custom would make new customary international law impossible to come into being.

6 The right to humanitarian intervention as local custom

This paper shows consistent state practice and opinio juris mainly by the example of the Kosovo crisis where NATO member states justified their actions as humanitarian intervention. These actions in Kosovo have "produced a fundamental split between NATO States on the one hand and China, Russia and the Non-Aligned Movement on the other."[171] For example, the 1999 Ministerial Declaration adopted by the Group of 77 Foreign Ministers[172] stresses the refusal of a right to humanitarian intervention by African, Asian, Latin-American and Arab States.[173]

However, the argument delivered by critics of a customary right to humanitarian intervention, that the refusal of such a right by the Non-Aligned states prevents the emergence of a custom of humanitarian intervention at all,[174] is not necessarily convincing. Rather the split between acceptance and refusal of humanitarian intervention could mean that the right to humanitarian intervention exists not as a universal but as a local custom.

The ICJ dealt with the question of whether non-universal but local rules of customary international law do exist in its judgment on the *Asylum case*. In this case, "the Columbian government ... has relied on ... regional or local custom peculiar to Latin American States."[175] Although Columbia failed to prove the existence of a local custom,[176] the "ICJ has admitted ... that such rules may exist."[177] In the *Case Concerning Right of Passage over Indian Territory* the Court said that "it is difficult

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[169] Ibid.
[170] Rebecca M M Wallace, above n 21, 5.
[171] "The Use of Force and the International Legal Order", above n 42, 594.
[172] "Ministerial Declaration G 77", above n 164.
[173] "Principles of Public International Law", above n 104, 712.
[174] See Byers and Chesterman, above n 103, 184; "Principles of Public International Law", above n 104, 712.
[175] *Asylum case (Colombia v Peru)* (Jurisdiction and Admissibility) [1950] ICJ Rep 266, 276 Judgment of the majority; see also Michael Akehurst *A Modern Introduction to International Law* (6 ed, Unwin Hyman, London, 1988) 32.
[176] Ibid, 276-77.
[177] "International Law", above n 53, 163.

to see why the number of States between which a local custom may be established ... must necessarily be larger than two."[178] The acceptance of customary international law existing only between two countries underlines that local customary international law in general has to be acknowledged.[179]

The acknowledgment of local customary international law leads to a further question – does such local custom only apply within the confines of that locality? For example, does the existence of a local custom of humanitarian intervention in the NATO member states mean an entitlement to take action only within the alliance, or could it legalize the use of force against China, Russia or India who explicitly rejected the existence of a right to humanitarian intervention? If local customary law only applies in the relevant locality, NATO's actions in Kosovo might have been illegal because former Yugoslavia was a non allied state and therefore not bound on intra alliance customs.[180]

This approach, to apply rules of local custom restrictively and only within a geographical region or between members of a certain alliance, is underlined by the argument that local customary law "is of a more contractual nature than a general [custom]."[181] This contractual character of local custom requires the consent of all parties between whom the local rule of customary international law is to be applied, while an application of this custom to a third party remains illegal.[182] On the contrary, in certain circumstances human rights go beyond local custom and have to be seen in a more universal perspective.[183] The value of human rights and its international dimension could outweigh mere local interests.[184] Therefore, a restrictive understanding of rules of local custom could restrict the justifiability of the use of armed force on humanitarian grounds too much.

However, it is beyond the scope of this paper to give an exhaustive analysis of the application of rules of local customary law. Because of the complexity of

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[178] *Case Concerning Right of Passage over Indian Territory (Portugal v India)* (Jurisdiction and Admissibility) [1960] ICJ Rep 6, 39 Judgment of the majority.

[179] Michael Akehurst "Custom as a Source of International Law" (1974-75) 47 BYIL 1, 28 ["Custom as a Source of International law"], who states that local customs can emerge because of geographical, historical, racial, political, religious "or other affinities" and therefore pleads for the term "special custom" instead of "regional" or "local" custom.

[180] But see "Custom as a Source of International Law", above n 179, 29, where it says that only those states are not bound "who consistently opposed the custom from its inception."

[181] Rebecca M M Wallace, above n 21, 12.

[182] Ibid, see also Shaw, above n 21, 87-8; "Custom as a Source of International Law", above n 179, 29.

[183] See Wedgwood, above n 102, 832, who explains that NATO's actions in Kosovo were justified because the stability of a whole region in central Europe was in danger.

[184] Kok-Chor Tan "The Duty to Protect" in Nardin and Williams, above n 21, 84, 90.

humanitarian interventions, the question of whether a local application is sufficient to protect human rights or a wider perspective is needed, remains a case by case decision and can not be confined within a general clause.

B Interim Result

As an interim result, we can state that the multilateral use of armed force when human rights are infringed fulfils the elements which are required for evolving customary international law. Even though this result is doubted by some authors, who refer to the rejecting opinion of for example Russia and India,[185] the acknowledgement of local rules of customary international law underlines the emergence of a custom of humanitarian intervention at least in the "western" world. Consistent state practice of multilateral humanitarian interventions especially since the 1990s and opinio iuris of the states contributes to the "willingness [of the international community] to use humanitarian concerns as a basis for intervention into what are essentially civil-war conflicts."[186]

This result can be underlined by a systematic argument. The acknowledgement of at least a local customary right to humanitarian intervention does not mean a breach in the system of exceptions to the principles of prohibition of the use of armed force and non-intervention. As already indicated, the right to self-defence, which is undoubtedly an exception to Article 2 (4) and (7) of the UN-Charter, has its source in treaty law as well as in customary international law. This means, exceptions to the prohibition of the use of armed force and the principle of non-intervention that are not explicitly listed in the UN-Charter already exist. The acceptance of a customary right to humanitarian intervention is nothing but a further unwritten exception to these basic rules of international law and is in accord with the rule-exception system in the law on the use of armed force. As the Netherlands stated before the UN-SC, "the Charter is not the only source of international law"[187] which implies "that general norms may exist … [even also] outside the UN-Charter."[188]

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[185] See "Principles of Public International Law", above n 104, 712; Byers and Chesterman, above n 103, 184.
[186] Rebecca M M Wallace, above n 21, 289; see also Mark W Janis and John E Noyes *Cases and Commentary on International Law* (West Publishing, St Paul Minnesota, 1997) 422; "UN High-level Panel", above n 1, para 201.
[187] UN-SC, 4011th meeting, S/PV 4011, 10 June 1999, p 12 www.un.org/Depts/dhl/resguide/scact1999.htm (accessed 18 February 2008).
[188] Cassese, above n 8, 795.

However, the acceptance of a custom of humanitarian intervention creates a potential conflict between customary international law and international treaty law. This conflict erupts when the multilateral use of armed force is not explicitly authorized by the UN-SC in the meaning of Chapter VII of the UN-Charter as, for example, in Northern Iraq in 1991 or in the Kosovo crisis in 1999. This raises the question of the relationship between the UN-Charter on the one hand and the customary rules of humanitarian intervention on the other.

C Relationship of UN-Charter and Customary Law of Humanitarian Intervention

First of all, "there is no generally established hierarchy between treaty and custom, because they both emanate from States and are equivalent expressions of their consent to be bound internationally."[189] However, the relationship of treaty and customary law, where the customary law is later in time than the treaty, is not undisputed.

On the one hand, the lex posterior rule, which means that the later law prevails over the earlier law,[190] could lead to the conclusion that the customary acceptance of humanitarian intervention has precedence over the UN-Charter just because it is the newer law. On the other hand, such an understanding of the relationship in the case of a conflict of treaty and customary law "cuts against the certainty and vitality of obligations freely and deliberately undertaken in a treaty."[191] An approach of simply applying the lex posterior rule does not sufficiently take into account that the regulations of the UN-Charter are of a special character that makes Charter law stand out against "normal" treaty law.[192] The special status of the UN-Charter becomes obvious when Article 103 UN-Charter is taken into account. This stipulates that in a conflict with other international agreements the Charter

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[189] Nancy Kontou *The Termination and Revision of Treaties in the Light of New Customary International Law* (Clarendon Press, Oxford, 1994) 20; Laursen, above n 108, 99; "Custom as a Source of International Law", above n 179, 40; contrast John O McGinnis "The Appropriate Hierarchy of Global Multilateralism and Customary International Law" (2003) 44 Virginia J Int'l L 229, 232.

[190] Hugh Thirlway "The Sources of International Law" in Evans, above n 39, 132; Shaw, above n 21, 116; Michael Akehurst "The Hierarchy of the Sources of International Law" (1974-75) 47 BYIL 273 ["Hierarchy of Sources"].

[191] Dixon, above n 18, 36.

[192] See Wolfram Karl "Treaties, Conflict Between" in Rudolf Bernhardt (ed) *Encyclopaedia of Public International Law* (Elsevier, Amsterdam, 1995) 935, 938, who says that the "UN-Charter ... contains law of higher rank"; see also Rudolph Bernhardt in Bruno Simma (ed) *Charter of the United Nations: A Commentary* (2 ed, Oxford University Press, Oxford, 2002) Article 103, para 37.

obligations shall prevail. Moreover, the character of the prohibition of the aggressive use of armed force as being a jus cogens rule[193] has to be considered and might preclude a simple application of the lex posterior rule. Thus, taking the special character of the UN-Charter provisions about the use of armed force into account, it is a better solution to accept the international treaty as still "govern[ing] between the parties even though a new practice has developed [in a different direction]."[194] This appears to be more convincing than simply applying the lex posterior rule.

As a result, treaty law and customary international law exist in parallel and it can be suggested that "the ICJ will attempt to interpret the treaty as complementary to the new custom as far as possible."[195]

VII REQUIREMENTS FOR LAWFUL HUMANITARIAN INTERVENTIONS

The acknowledgement of humanitarian interventions as a rule of at least local customary international law, which exists side by side with the treaty law of the UN-Charter, leads to the further question of which requirements are necessary to justify the use of armed force against a sovereign state on a foreign territory. Even though rules of customary international law are advantageous because of their flexibility, "along with this flexibility comes a certain amount of uncertainty."[196] The danger of legal uncertainty makes it necessary to clarify single elements for the justification of humanitarian interventions. The need for a development of rules in context with human rights violations is underlined by the former UN Secretary-General Kofi Annan when he demands that "the United Nations and its Member States must strengthen the [international] normative framework"[197] and by help of that "move towards embracing and acting on the 'responsibility to protect' potential or actual victims of massive atrocities."[198]

This paper has shown that the UN-Charter accepts the use of armed force only in extraordinary situations. This gives rise to the sharp contrast between the written treaty law and the justification of the use of armed force in customary international law. Just as there are strict treaty requirements in the UN-Charter for

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[193] Hannikainen, above n 58, 356 and 717; Shaw, above n 21, 1018.
[194] Dixon, above n 18, 36.
[195] Ibid, 37; Laursen, above n 108, 99.
[196] Dixon, above n 18, 28.
[197] In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General" (21 March 2005) A/59/2005, para 131 ["In Larger Freedom"] www.un.org/largerfreedom/ (accessed 18 February 2008); see also "UN High-level Panel", above n 1, para 89.
[198] "In Larger Freedom", above n 197, para 132.

the use of armed force, so too, should humanitarian interventions as customary international law demand stringent rules to make them a lawful act.[199] Moreover, the danger of abusing human rights as an excuse for the use of armed force gives rise to the need for strict elements and a wide limitation of humanitarian interventions. Those voices in the literature that criticise the acknowledgement of a right to humanitarian intervention argue that "once established such a right would be difficult to check ... and therefore raises serious difficulties despite its noble objectives."[200] The danger of an improper use of the right to humanitarian intervention is contained when stringent rules are set and also kept.[201]

In international literature, there exist several documents and various different approaches which list different elements as requirements for legal humanitarian intervention. This emphasises an "increasing international interest in the development of a detailed framework for humanitarian intervention [where] some even suggest that there should be a duty to intervene."[202] For example, the EP formulated certain rules when it acknowledges the right to humanitarian intervention without authorization by the UN-SC but at the same time asks for a strict and objective measure to justify the use of armed force.[203] Other examples are the *United Kingdom Guidelines on Humanitarian Intervention*[204] or the Canadian *Principles for Military Intervention*.[205] Wallace reinforces this demand for strict rules when she states that "what is required are accepted principles setting out the circumstances in which such international intervention would be lawful."[206]

In the following part, this paper tries to point out which elements are useful measures to define whether the use of armed force in a certain situation was a lawful act. This examination is based on the fact that the use of armed force is not the rule but only is lawful in extraordinary situations.[207] Therefore, a careful analysis of the different approaches in international literature is given.

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[199] "Ex inuria oritur", above n 50, 27; Cassese, above n 8, 798; Jennings and Ward, above n 16, 439; see also von Schorlemer, above n 75, 47 who asks for an enabling statute for humanitarian interventions that grants objectivity and legal certainty.
[200] Charney, above n 113, 837; see also Dixon, above n 18, 305.
[201] Merria, above n 5, 126.
[202] "The Use of Force and the International Legal Order", above n 42, 596; see also Vukas, above n 3, 238 who pleads for a "duty to intervene".
[203] "BT-Drucksache 12/7513", above n 128, para 12.
[204] "UK Guidelines on Humanitarian Intervention", above n 157, 957-8.
[205] "Responsibility to Protect", above n 168, XII, Synopsis.
[206] Rebecca M M Wallace, above n 21, 289.
[207] See "Responsibility to Protect", above n 168, XII, Principles for Military Intervention (1).

A Convincing Evidence of Massive Human Rights Violations

The first element for the justification of armed interventions on humanitarian grounds is convincing evidence of massive human rights violations. When the United Kingdom's government set out the *United Kingdom Guidelines on Humanitarian Intervention*, it concluded that there "must be convincing evidence of extreme humanitarian distress on a large scale, requiring urgent relief."[208] The importance of convincing evidence becomes obvious when the representatives of NATO members referred to UN body reports of gross human rights violations in Kosovo, before coming to the legal justification of the use of armed force itself. For example, in the preliminary objections held by Germany in the *Case Concerning Legality of Use of Force*,[209] Germany referred to the various statements made by UN bodies which serve as evidence for massive human rights violations caused by Yugoslavian public authorities. Therefore, convincing evidence of gross human rights violations is the background for every justification of the use of armed force on behalf of the protection of human rights.

However, it is hard to measure at what point human rights violations are intense enough to justify military actions on the territory of a foreign country.[210] The examples of "the loss of life of hundreds or thousands of innocent people and ... crimes against humanity"[211] as well as "large scale 'ethnic cleansing'"[212] can only serve as possible clues. Beside that, the scale and number of breaches of international obligations, which can either be part of treaty or be part of customary international law, weigh into the determination of whether a humanitarian intervention is justifiable. The definition of humanitarian intervention, which is used as the basis of this paper, demands "widespread deprivations of internationally recognized human rights."[213] Therefore, human rights which are evidentially violated must have an international dimension and find support in the international community. This, at least, applies to the breach of jus cogens norms which prohibit "gross offences against the life, integrity and dignity of human beings ... [such as, for example,]

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[208] "UK Guidelines on Humanitarian Intervention", above n 157, 958; see also Charney, above n 113, 838; "UN High-level Panel", above n 1, para 207 (a); Stromseth, above n 121, 248; Benjamin, above n 47, 152.
[209] See *Case Concerning Legality of Use of Force (Yugoslavia v Germany)*, Preliminary Objections, for example paras 2.7, 2.21, 2.26, 2.35 www.icj-cij.org/docket/files/108/10875.pdf (accessed 18 February 2008).
[210] See Reisman, above n 62, 861.
[211] "Ex inuria ius oritur", above n 50, 27.
[212] "Responsibility to Protect", above n 168, XII, Synopsis; see also Tan, above n 184, 89.
[213] See above II, page 6.

genocide; ... severe forms of collective punishment; torture ... or mass extermination, arbitrary killings and summary executions."[214]

The international dimension of human rights or the scale of breaches of international obligations are no more than a clue for the justification of the use of armed force. The final determination of whether a humanitarian intervention is lawful because of proved massive human rights violations going on in the particular country, remains a case by case decision. At least, it is clear that for the justification of the use of armed force on a foreign territory the mere initial idea of human rights violations possibly taking place is not enough. The infringement of a sovereign territory demands convincing evidence that human rights violations of an international dimension are going on.

B Priority of Conflict Prevention

The first argument which is set out in the *United Kingdom Guidelines on Humanitarian Intervention* proceeds from the assumption that "any [armed] intervention ... is an admission of failure of prevention."[215] The United Kingdom's government demands "a strengthened culture of conflict prevention ... [and, for example,] to stop the trade in ... arms ... and diamonds,"[216] which often causes and escalates conflicts and therefore increases the threat to human rights of the civil population. In respect thereof, "prevention options should always be exhausted before intervention is contemplated, and more commitment and resources must be devoted to it."[217]

The idea of supremacy of conflict prevention might indicate that this element is fulfilled as long as prior to the use of armed force every effort has been made to avoid the conflict and therefore the use of armed force only serves as a last resort. However, the requirement of conflict prevention contains an ongoing time element and is not just fulfilled at that point of time where certain actions were taken prior to the use of armed force:[218]

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[214] Hannikainen, above n 58, 717-18.
[215] "UK Guidelines on Humanitarian Intervention", above n 157, 957.
[216] Ibid; see also "UN High-level Panel", above n 1, para 95-6; Urquart, above n 1, 96-7 who writes about arms control.
[217] "Responsibility to Protect", above n 168, XI, Core Principle (4) A; see also Benjamin, above n 47, 153.
[218] Michael Ignatieff "State failure and nation-building" in Holzgrefe and Keohane, above n 23, 299, 320.

> [A] responsibility to prevent [also indicates] a responsibility to follow through. Action ... of a coercive kind lacks legitimacy unless every effort has been made to avert the catastrophe; once action is taken, its legitimacy depends on staying the course until the situation is on the mend. [A legitimate intervention] begins with prevention and ends with sustained follow-up.

Taking a limited time view that concentrates only on pure prevention and not considering ongoing support, is dangerous. Ethnic conflicts, which are a main reason for the use of armed force in contemporary human rights law, are of such a nature "that the perpetrators of atrocities will simply retreat ... and await future opportunities to resume hostilities."[219] For example, the ethnic melting pot Kosovo still needs the presence of international peacekeeping forces even though almost 9 years have passed since NATO started their actions in that area. Thus, "political as well as economic reconstruction will be sorely needed for years to come."[220] The protection of human rights of the Albanian population in Kosovo would not have been effective if NATO had simply stopped their actions after bombing out the Serbian forces.

In respect thereof, the then British Prime Minister, Tony Blair, acknowledged the responsibility of the NATO members "to reconstruct the Balkans [and stressed that] the promises that [were] made during the course of the conflict [have to be] honoured post-conflict."[221] The existence of a plan that outlines reconstruction and withdrawal in the intervened country[222] is important to determine whether a justifiable humanitarian intervention took place. However, the planning for a humanitarian intervention must always have a certain degree of flexibility. This contributes to the complexity of humanitarian interventions in international relations.

We can conclude that not mere conflict prevention is sufficient to justify humanitarian interventions but also a minimum future strategy to prevent further human rights violations is needed.[223] As Kofi Annan stated, "the aftermath of war

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[219] Stromseth, above n 121, 269.
[220] Bartam S Brown "Humanitarian Intervention at a Crossroads" (1999-2000) 41 Wm & Mary L Rev, 1737-8.
[221] Ibid, 1737, there reprinted within footnote n 204; see also "Responsibility to Protect", above n 168, XI, Core Principles (3) C; Terry Nardin "Introduction" in Nardin and Williams, above n 21, 20.
[222] See Charney, above n 113, 839.
[223] Stromseth, above n 121, 269; compare Michael W Doyle and Nicholas Sambanis *Making War and Building Peace* (Princeton University Press, Princeton, 2006) 10-1, who list the elements of "preventive diplomacy" and "postconflict reconstruction".

requires no less skill, no less sacrifice, no fewer resources than the war itself, if lasting peace is to be secured."[224]

C Priority of Self-Help

Another element for the justification of humanitarian intervention might be the priority of self-help. This element contributes to the fact that the elimination of internal human rights violations is subject to the main responsibility of the state's own government. It is part of the territorial integrity and sovereignty of a state that it "has power and authority over all persons, property and events occurring within its territory"[225] which also includes the protection of human rights. Therefore, "the immediate responsibility for halting violence rests with the state in which it occurs."[226]

However, the priority of the self-help element is a very limited one.[227] Obviously, it must be restricted to cases in which the sovereign state in question has the necessary power to stop the human rights violations. Moreover, this element can not be applied where the sovereign state itself causes and increases humanitarian disasters. In cases:[228]

> Where a population is suffering serious harm, [for example,] as a result ... of state failure, and the state ... is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect [human rights].

This leads us to the conclusion that the priority of self-help is a restricted element for the justification of humanitarian interventions. Cases of interventions in which human rights violations are not caused by the state's own government respectively where the government has the power to put a stop to those violations, remain an exception.

D Legitimate Actor

The justification of the use of armed force to protect human rights raises the question of who is a legitimate actor to stop massive human rights violations.

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[224] Brown, above n 220, 1738, there reprinted within footnote n 207.
[225] Dixon, above n 18, 135; see also Jennings and Ward, above n 16, 442.
[226] "UK Guidelines on Humanitarian Intervention", above n 157, 957; Stromseth, above n 121, 270.
[227] Compare "UN High-level Panel", above n 1, paras 24-28, where more general "The limits of self protection" are described.
[228] "Responsibility to Protect", above n 168, XI Core Principles (1) B.

According to Murphy's definition of humanitarian intervention, possible actions to protect fundamental rights might be taken by the UN as an international organization, by other alliances of states or by a single state.[229] In this context, the prior competence of the UN-SC as a legitimate actor on behalf of the protection of human rights requires discussion.

1 Prior competence of the UN-SC

The prior competence of the UN-SC to authorize the use of armed force is a result of the provisions of Chapter VII of the UN-Charter. For example, Article 51 of the Charter grants the right to self-defence, but limits this right when it says that self-defence is only appropriate "until the Security Council has taken the measures necessary to maintain international peace and security." Moreover, Article 51 of the UN-Charter stipulates that the right to self defence "shall not in any way affect the authority and responsibility of the Security Council ... ." Articles 41 and 42 of the Charter regulate possible reactions of the UN against threats to peace and that these reactions require authorization by the UN-SC. In respect of these competences of the UN-SC and the system regulated in Chapter VII of the Charter, the Canadian report on the *Responsibility to Protect* outlines that "there is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes."[230] Moreover, the EP considers the competence of the UN-SC and acknowledges humanitarian interventions without its authorization only in a situation, where the UN bodies are not able to react effectively and in due time.[231] Most important examples of the inability of the UN-SC to prevent gross human rights violations are disagreements among the UN-SC members or the exercise of veto powers.[232]

The requirement of prior consultation of the UN-SC contributes to legal certainty. As already said above, a great advantage of international treaty law is the certainty of the letter of the law.[233] As treaties are in general "the result of a conscious and deliberate act [and therefore] are more likely to be respected,"[234] also the UN-Charter expresses a legal framework which is likely to be accepted all over

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[229] See above II, page 6.
[230] "Responsibility to Protect", above n 168, XI, Principles for Military Intervention (3) A.
[231] "BT-Drucksache 12/7513", above n 128, para 10 letter b); see also Stromseth, above n 121, 248.
[232] "Ex inuria ius oritur", above n 50, 27, see also Wedgwood, above n 102, 834.
[233] Dixon, above n 18, 28.
[234] Ibid, 25; see also Rebecca M M Wallace, above n 21, 20.

the world. With regard to this, the provisions of the Charter and especially of its Chapter VII have to be kept wherever this is possible. This is accepted by the United Kingdom's government even though they took part on the unauthorized NATO actions in Kosovo. The *United Kingdom Guidelines on Humanitarian Intervention* state that "our own preference would be that, wherever possible, the authority of the Security Council should be secured."[235]

2 Subordinated competence of other multilateral alliances

This statement indicates the subordinated competence of other multilateral alliances, such as NATO or the African Union, to take action when gross human rights violations occur. The decision taking process in such multilateral alliances is organized in a democratic way and takes the varying opinions of several states into consideration. "The intervenors [have] to justify their action not only to their domestic publics but also ... to the larger international community."[236] This means that actions lead by state alliances can rely on a broad international acceptance. This international acceptance is very important for the credibility of human rights policies and the protection of human rights in general. For example, the insight into the need for international acceptance has served as justification of the NATO bombardments in Kosovo:[237]

> NATO can claim the legitimacy of a nineteen-nation decision process, and the normative commitments of a democratic Europe. ... [Moreover,] NATO includes the vast majority of countries in Europe [and therefore] NATO's decision deserves greater defence than purely unilateral action.

3 Unlawfulness of unilateral interventions

This already seems to indicate the unlawfulness of unilateral interventions, especially what is outlined by the *United Kingdom Guidelines on Humanitarian Intervention* where it says that "no individual country can reserve to itself the right to act on behalf of the international community."[238] However, one might claim that the refusal of unilateral interventions is not convincing in cases where a former colonial

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[235] "UK Guidelines on Humanitarian Intervention", above n 157, 958.
[236] Stromseth, above n 121, 251.
[237] Wedgwood, above n 102, 833; quoted by Schroeder, above n 43, 185; see also "Ex inuria ius oritur", above n 50, 28; Chinkin, above n 102, 843.
[238] "UK Guidelines on Humanitarian Intervention", above n 157, 958; Rebecca M M Wallace, above n 21, 289; see also Schroeder, above n 43, 186; Bouchet-Saulnier, above n 28, 231.

power decides to take action in a country which was under its administration for a longer period of time.[239] The ongoing responsibility for former colonies might justify military actions to protect the colony's population and therefore outweigh the criticism about unilateral humanitarian interventions. But this argument is not sufficient to take the dangers of unilateral use of armed forces into consideration.

The illegality of unilateral interventions is based on two main arguments. First, the use of armed force only by a single actor can not rely on an international democratic decision-making process and therefore often lacks international acceptance.[240] The use of armed force by a big country to intervene in the policies of a less powerful state always has the danger of appearing arbitrary even if human rights are protected. This can give the impression that human rights are just an excuse to overthrow a foreign government. This already indicates the second argument against unilateral interventions which is that these contain the threat of misuse of armed force.[241]

Therefore, the counterarguments against unilateral interventions, the lack of international acceptance and the danger of abuse of military powers, must outweigh the responsibilities of former colonial powers with regard to their colonies. Additionally, events in Rwanda have shown that former colonial powers do not prioritise having a responsibility for the population of the former colony. In Rwanda, the Belgian government decided to withdraw its troops because Hutus killed 10 Belgian soldiers in the beginning of the genocide.[242] This delivers a practical argument against the lawfulness of unilateral interventions even in cases where former colonial powers take military actions.

4 Interim result

As a result, it has to be stated that multilateral humanitarian intervention generally have to be authorized by the UN-SC and unauthorized multilateral interventions lead by an alliance of states are only lawful if an authorization according to Chapter VII of the UN-Charter is not possible in due time. Mere unilateral interventions are illegal as single states, whether they are former colonial

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[239] See Tan, above n 184, 97, who lists as examples Britain's responsibilities in Sierra Leone, France's responsibilities in the Ivory Coast and Portugal's responsibilities in East Timor.
[240] Terry Nardin "Introduction" in Nardin and Williams, above n 21, 18.
[241] See von Schorlemer, above n 75, 43.
[242] Human Rights Watch *Shattered Lives* www.hrw.org/reports/1996/Rwanda.htm (accessed 18 February 2008).

powers or not, are not legitimate actors in order to protect human rights by the use of armed force.

E Respect for the Territorial Integrity and Sovereignty Rights of the Intervened State

The territorial integrity and sovereignty of a state is a basic principle of international law, embodied in Article 2 (7) of the UN-Charter.[243] However, the territorial integrity and sovereignty of a state not only means a right of the state to demand an acknowledgment of its national borders but also contains obligations. The principle of "state sovereignty implies ... the primary responsibility [of the government] for the protection of its people."[244] The respect for the territorial integrity and sovereignty of the state which is to be intervened reaches its limit when this state fails to fulfil its obligations in regards to the own population or even actively commits human rights violations.[245] "The defence of state sovereignty ... does not include any claim of the unlimited power of a state to do what it wants to its own people."[246]

When the Belgian government justified its participation in the actions taken in Kosovo, it argued before the ICJ that "NATO has never questioned the political independence or territorial integrity of Yugoslavia."[247] As an extreme, this could indicate the argument that a "true" humanitarian intervention, which solely aims on the protection of human rights, does not affect the sovereignty of the intervened state. However, this statement is obviously too general. If a multilateral alliance makes use of armed force to push through a different behaviour of the foreign state this means an invasion of sovereignty even if the force is used on behalf of the protection of human rights.

The ascertainment of a correct balance between the territorial integrity of an intervened state and the right of multilateral alliances to prevent gross human rights

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[243] See above V A 2, page 15.
[244] "Responsibility to Protect", above n 168, XI Core Principles (1) A; "UN High-level Panel", above n 1, para 29.
[245] See "UN High-level Panel", above n 1, para 200; Jennings and Ward, above n 16, 442.
[246] "Responsibility to Protect", above n 168, 8 para 1.35.
[247] CR 1999/15, Public sitting held on Monday 10th May 1999, at 3 pm, at the Peace Palace, Vice-President Weeramantry, Acting President, presiding www.icj-cij.org/docket/files/105/4515.pdf (accessed 18 February 2008).

violations has to take into account that the classical concept of state sovereignty has to face challenges in contemporary history:[248]

> The protection of human rights does not belong any more to the domain reserve of States. This is particularly clear in States where there is no central Government, or the Government is engaged in a civil war. Many African States are today faced with such situations.

There, conflicts are often caused by ethnical, ideological or religious reasons and seldom have a mere territorial context. Not only in Africa but even in central Europe the international dimension of conflicts became obvious when massive human rights violations in Kosovo committed by Yugoslavian armed forces caused the flight of refugees over the borders to Bosnia, Macedonia, Albania and many other European Countries.[249] The NATO member states feared a destabilization of a whole region in central Europe and this served as an argument for the justification of the use of armed force.[250]

These examples plus today's high value of human rights[251] stress that many conflicts of contemporary history have an international dimension which contradicts the traditional concept of a state's unimpeachable sovereignty over the own territory.[252] If massive human rights violations cause a crisis of international dimension, the concerned state can not insist on its territorial sovereignty when an intervention is necessary to re-establish international stability. In respect thereof:[253]

> The international legal system has radically changed since the founding of the United Nations, resulting in the development of a right of humanitarian intervention. At the time the Charter entered into force ... the independence of states ... was of foremost importance. New developments in international human rights law, particularly with regard to international crimes, authorize ... all states to take action in the face of widespread grave violations of human rights amounting to such crimes.

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[248] Vukas, above n 3, 237; see also "UN High-level Panel", above n 1, paras 17-23, where more general the international dimension of threats for the international community, for example, by diseases or terrorist attacks is described; "International Law", above n 103, 385-6, where an "extraterritorial scope" of human rights is described.

[249] "Ex inuria ius oritur", above n 50, 25; Wedgwood, above n 102, 832.

[250] Wedgwood, above n 102, 832; see also NATO Press release (1999) 040, 24 March 1999 www.nato.int/docu/pr/1999/p99-040e.htm (accessed 18 February 2008), where the then Secretary-General of NATO justifies the actions taken in Kosovo with the aim "to prevent instability spreading in the region".

[251] See above IV, page 12; see also Merria, above n 5, 115 and 116.

[252] Merria, above n 5, 117.

[253] Charney, above n 113, 837.

This suggests that even if the use of armed force on humanitarian grounds has to respect the sovereignty rights of the intervened state and these sovereignty rights have to be balanced against humanitarian reasons, humanitarian interventions are justified if the traditional concept of territorial integrity of a sovereign state reaches its limit. This applies, for example, to conflicts which contain an inherent danger of cross-border effects and therefore an international dimension.

F Necessity

The element of necessity has a long history especially in context with a states' right to self defence.[254] It is a general principle of international law that "may excuse the non-observance of international obligations."[255] Connecting the element of necessity with the law on the use of armed force, it becomes obvious that the actions of the military can only be legal when no other solution, which is short of armed force, is possible to resolve the conflict. Such an understanding sufficiently respects the dangers which result from the use of armed forces. The use of military weapons can only be legal "by way of a last resort after all peaceful means have failed."[256]

The *United Kingdom Guidelines on Humanitarian Intervention* acknowledge this and list other possible instruments short of armed force to protect human rights such as "mediation ..., sanctions ..., observer missions ... and international condemnation."[257] Other possible means are classic diplomatic tools such as negotiation and discussion.[258] Also the EP and the report on *The Responsibility to Protect* refer to the idea of the use of armed force only being an ultima ratio even if it is used to protect human rights.[259] This proves the international acceptance for this element and its foundation in international law as a basic legal principle.

Even though this paper discusses the possible elements of a legality test for humanitarian intervention independent of the written treaty law, the provisions of Chapter VII of the UN-Charter serve as a further clue that the element of necessity also has to be applied in context with humanitarian interventions. Article 41 of the

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[254] See above V B 1, page 16.
[255] Bin Cheng *General Principles of Law* (Stevens and Sons, London, 1953) 71.
[256] Gardam, above n 1, 5; see also "UN High-level Panel", above n 1, 207 (c); Jennings and Ward, above n 16, 439.
[257] "UK Guidelines on Humanitarian Intervention", above n 157, 957.
[258] See "Ex inuria ius oritur", above n 50, 27; "UN High-level Panel", above n 1, para 100.
[259] "Responsibility to Protect", above n 168, XII Principles for Military Intervention (2) B; "BT-Drucksache 12/7513", above n 128, paras 6 and 10 c).

UN-Charter excludes the use of armed force as a possible international means of coercion and lists other measures, such as "interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and severance of diplomatic relations", while Article 42 of the Charter allows the use of armed force "as may be necessary" when peaceful measures have shown to be inadequate. This graded system of possible actions of the United Nations stresses the importance of the element of necessity, which also should be adopted as an element of a customary law of humanitarian intervention.

The efforts of the international community to find a solution in the Kosovo conflict, which is short of armed force, serve as an example for putting the element of necessity into action. Prior to the military actions by armed NATO forces a lot of diplomatic negotiations with the Yugoslavian government took place. For example, the UN envoy Richard Holbrooke "had visited Belgrade repeatedly in 1998 and early 1999 ... to induce Milosevic to accept a diplomatic solution."[260] This "diplomatic effort ... culminated in the Rambouillet Agreement ... [which was not signed by Belgrade and therefore] maintains that diplomatic options were exhausted."[261] The Rambouillet Agreement stipulated the autonomy of the Kosovo region while at the same time maintaining the territorial integrity of the Federal Republic of Yugoslavia.

As a result, the element of necessity is a basic principle of international law which also has to be adopted for the test of whether a humanitarian intervention was lawful. Already the elements of priority of self-help and priority of conflict prevention describe that there exist measures in international law which have to be applied prior to the use of armed force. In respect thereof, these two elements are special appearances of the element of necessity. The justification of military actions for the protection of human rights presupposes the exhaustion of peaceful efforts made by the international community to find a conflict solution.

G Proportionality

Similar to the element of necessity, the element of proportionality has a long history in international law.[262] This element "prohibit[s] disproportionate attacks and means and methods of warfare causing superfluous injury or unnecessary

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[260] Falk, above n 5, 850; see also Schroeder, above n 43, 186.
[261] Schroeder, above n 43, 186; see Falk, above n 5, 850; Stromseth, above n 121, 249.
[262] See above V, B, 1, page 16.

suffering."[263] The legitimacy of the use of armed force requires "at the very least, that it do[es] more good than harm."[264]

The main purpose of this element in context with humanitarian interventions is to avoid losses or injuries among the troops of the intervener and among the civilian population of the intervened state. It encompasses "the obligation to respect the civil, political, economic, social and cultural rights of all civilians."[265] "The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective."[266] This indicates that there must be a balance between the used means for the protection of human rights and the evils that shall be eradicated by the use of this means.[267] The justification of the use of armed force therefore always has to take the violence it generates itself into consideration.

1 Example Kosovo conflict

An example of the importance of the element of proportionality can be found when NATO actions in Kosovo were discussed. One of the main arguments of the critics, which regard the actions of NATO in Kosovo as a breach of international law, was that NATO disregarded the element of proportionality. Even if NATO wanted to avoid collateral damages, the bombing operations in Kosovo resulted in at least 500 reported deaths within the civilian population. Moreover, the air strikes led to huge environmental damage in the Kosovo region. These were main arguments against the proportionality of the use of armed force in Kosovo.[268] Contrary to that, the supporters of the Kosovo intervention argued that the element of proportionality was kept by the NATO forces because "the duration of NATO's action was limited and the overall operation was placed under UN authority within a reasonable period."[269]

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[263] Gardam, above n 1, 10; see also Charney, above n 113, 839.
[264] Stromseth, above n 121, 267-8; see also Chinkin, above n 102, 844; Henry F Carey "States, NGOS and Humanitarian Intervention" in John Carey, William V Dunlap and R John Pritchard (eds) *International Humanitarian Law: Challenges* (Transnational Publishers, Ardsley, 2004) 155 who describes that "the cure cannot be worse than the disease".
[265] Chinkin, above n 102, 844.
[266] "Responsibility to Protect", above n 168, XII Principles for Military Intervention (2) C; see also "UK Guidelines on Humanitarian Intervention", above n 157, 958; "UN High-level Panel, above n 1, 207 (d).
[267] See Schroeder, above n 43, 187.
[268] Schroeder, above n 43, 188; see also Cassese, above n 8, 796; compare Chinkin, above n 102, 844.
[269] Stromseth, above n 121, 249.

2 *Prospects of success*

Prior to an analysis of whether the used means are proportional in relation to the evils that are to be eradicated, the prospects of success of the use of armed force have to be examined. The intervening actor in a humanitarian intervention always has to consider whether "there is a reasonable chance of the military action being successful in meeting the threat in question."[270] A pointless use of armed forces can never be proportional because the losses of human life, which usually occur when military actions are taken, can not be weighed up against a possible elimination of human rights violations. Rather, "the interveners will simply be exposing their soldiers and the target population to life-endangering situations without the hope of success that justifies the risks to be borne."[271] Therefore, a sufficient balance between the used means and the evils that shall be removed needs to consider the level of likely success.

It is difficult to define within one general clause when the prospects of success are sufficient to justify military actions. Because of the complexity of humanitarian interventions there will always remain some uncertainty about the chances of stopping human rights violations by the use of armed force. Therefore, the determination of the prospects of success of a humanitarian intervention has to be made on a case by case basis.

3 *Limitation of the purpose of military actions*

Another important aspect of the element of proportionality is the limitation of the purpose of military actions. The use of armed force has to be used "exclusively ... for the limited purpose of stopping the atrocities and restoring respect for human rights [and] not for any goal going beyond this limited purpose."[272] This is also stressed by the EP, when it states that the intervention has to be limited to specific aims and is allowed only to have trivial political effects on the authority of the intervened state.[273] The need for a strictly limited purpose of humanitarian interventions prevents the emergence of the prejudice that humanitarian grounds serve only as a cover for more egoistic motives of military action.

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[270] "UN High-level Panel", above n 1, para 207 (e); "Responsibility to Protect", above n 168, para 4.41, page 37.
[271] Stromseth, above n 121, 268.
[272] "Ex inuria ius oritur", above n 50, 27; see also "UN High-level Panel", above n 1, para 207 (b); compare Jennings and Ward, above n 16, 439, who claim that interventions have to raise issues "that are justifiable before an international tribunal".
[273] "BT-Drucksache 12/7513", above n 128, para 10 f).

However, the claim that only a trivial effect on the politics of the intervened country is allowed, is difficult. The use of armed force to enduce a different behaviour in a foreign state invariably means a change of the foreign government's politics, even if the force is used to protect human rights. An example for this can be found in the aftermath of the Kosovo conflict. Although the UN-SC Resolution 1244 on the situation in Kosovo reaffirmed "the sovereignty and territorial integrity of the Federal Republic of Yugoslavia"[274] "it was not possible to stop the ethnic cleansing ... without a significant impact upon [Yugoslavia's] governmental authority structures and [its] territorial integrity."[275]

4 Interim result

The discussion about the element of proportionality has indicated, that it is not possible to state within one general clause whether a humanitarian intervention was proportional or not. This element stresses the need for weighing up all possible circumstances that surround certain humanitarian interventions. The determination of whether a humanitarian intervention was proportionate and therefore lawful has to remain as a case by case decision.

VIII CONCLUSION

This paper has shown that at least in the "western" world a local custom of humanitarian intervention has emerged. The series of interventions on humanitarian grounds, which took place within the last 20 years, prove the existence of a consistent state practice. Moreover, an opinio juris of the states regarding humanitarian interventions as an act of law and, under certain circumstances, as an international obligation has to be ascertained when the states' behaviour and statements in international relations are investigated.

The customary right to humanitarian intervention exists alongside treaty law. In respect of the strict limitations which the UN-Charter sets on the legality of the use of armed force, this paper has pointed out 7 elements which have to be observed when military actions are taken for humanitarian reasons. Thus, a test of whether humanitarian interventions can be justified consists of the following elements:

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[274] UNSC Resolution 1244 (10 June 1999) S/RES/1244 (1999) page 2 http://daccessdds.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement (accessed 18 February 2008).

[275] Stromseth, above n 121, 250; see also Chinkin, above n 102, 845.

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- Convincing evidence of massive human rights violations;
- Priority of conflict prevention;
- Priority of self-help;
- Actions must be taken by a legitimate actor;
- Actors show respect for the territorial integrity and sovereignty rights of the intervened state;
- Actions are necessary;
- Actions are proportional.

Even though the author regards these elements to be sufficient for a determination of whether a legal use of armed force took place, the complexity of international relations requires the maintenance of a certain grade of flexibility when the lawfulness of humanitarian intervention is investigated. The discussion in this paper has shown that the application of every single element of the test of justification requires detailed observance of the circumstances that surround the respective intervention. Therefore, the determination of whether a humanitarian intervention is a lawful act or a breach of international law remains on a case by case basis.

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