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HUMANITARIAN INTERVENTION: NEED TO INTERVENE NEEDS CODIFICATION

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The topic of the paper is the use of force in international law. In the first part it examines several aspects of intervention in the past and present. The main emphasis is put on a brief description of the causes of the humanitarian crisis and the reaction of the international community as well as the action of the United Nations. The author also discusses the point of view that a moral duty to intervene has now arisen. However, it is still in question how such interventions are legally justified. The reaction of the Security Council and its mission to do so, mainly to determine a 'threat to international peace and security', are analyzed. Although Security Council authorization is the most legitimate and strongest justification, it shows some grave drawbacks, which are pointed out in detail. Further on the paper refers to humanitarian intervention under customary international law. It takes the point of view that such a concept might be on the way, but is still not sufficient to provide individual and state authorization. Nevertheless, the paper agrees for a 'right of intervention in humanitarian grounds'. The dilemma between this need, the shortcomings of Security Council intervention and the lack of sufficient customary law calls for action 'improvement' of the international community. The paper argues for the creation of a tool under international law authorizing humanitarian crises, clearly and authorizing the use of force as last resort, if all other measures included in the tool fail.

This paper contains approximately 11,500 words.

Humanitarian Intervention Abstract Intervens Needs Certification

The topic of this paper is humanitarian intervention. In the first part it scrutinizes several cases of intervention in the last decades. The main emphasis is put on a brief description of the causes of the humanitarian crisis and the reaction of the international community as well as the reaction of the United Nations. The results are used to support the point of view that a moral duty to intervene has start to arise. However, it is still in question how such interventions are legally justified. The reaction of the Security Council and its means to do so, mainly to determine a "threat to international peace and security", are analysed. Although Security Council authorisation is the most legitimate and recognised justification, it shows some grave disadvantages, which are pointed out in detail. Further on the paper takes a look at humanitarian intervention under customary international law. It takes the point of view that such a custom might be on the rise, but is until now not sufficient to provide undisputed and clear authorisation. Nevertheless the paper argues for a need of intervention on humanitarian grounds. The dilemma between this need, the shortcomings of Security Council Intervention and the lack of sufficient customary law calls for active 'intervention' of the international community: This paper argues for the creation of a tool under international law addressing human rights abuses explicitly and authorising the use of force as last resort, if all other measures included in this tool fail.

This paper contains approximately 12.500 words.

Humanitarian Intervention: A Need to Intervene Needs Codification

I INTRODUCTION

In May 2003 the German Federal President Johannes Rau stated: international law has to be advanced 'where it turns out to be law against nations, because it protects dictatorships that torture their population'.¹ This was stated in regard to the situation in Iraq and, indeed, that regime seemed to be in severe breach of humanitarian law.² British Prime Minister Tony Blair emphasized that as further justification to go to war.³ Massive violations of human rights occur in various forms, which might even widen the need for modification of international law. Liberia and Congo are just recent examples, where it took a long time for the United Nations Security Council to pass resolutions concerning intervention.⁴ Somalia, Haiti and, most of all, the Rwanda are further examples. Intervention took place even without Security Council authorisation in Cambodia, Uganda and Kosovo; the reactions varied from tacit agreement to condemnation. In other cases the authorisation remained ambiguous or humanitarian concerns were even secondary: Iraq and Afghanistan are recent examples.

These cases show a lack of uniform criteria for applying humanitarian intervention and prove more or less, that decision making about whether to intervene or not is highly based on political concerns. Whether humanitarian intervention is legal under international law is highly disputed until now. The cases

¹ Johannes Rau, German Federal President, "Berlin Speech" (Maxim Gorki Theatre, Berlin, 19 May 2003); can be found at: <<http://www.bundesregierung.de/dokumente/,-488168/Bulletin.htm>> (last accessed 21 July 2003), translated by the author.

² Foreign and Commonwealth Office of Britain *Saddam Hussein: Crimes and Human Rights Abuses* (2 December 2002), can be found at: <<http://www.fco.gov.uk/Files/kfile/hrdossier.pdf>> (last accessed 3 August 2003).

³ Tony Blair, British Prime Minister, "Speech to the Commons" (House of Commons, London, 18 March 2003), can be found at: <<http://politics.guardian.co.uk/iraq/story/0,12956,916790,00.html>> (last accessed 28 July 2003).

⁴ SC Res 1497, UN Doc S/RES/1497 (2003);

show, however, that humanitarian interventions took place in the past, but they also show that there is, up until now, no common legal ground for intervention and that the legality of humanitarian intervention remains unclear. Humanitarian intervention in this paper equates to be forceful measures.

In scrutinizing the listed cases of humanitarian intervention this paper will argue for a need and a duty to intervene as means of last resort to prevent severe humanitarian catastrophes, but will also show that there has been no legal obligation up until now, even though it might be morally desirable. In the second part it will describe means to authorise humanitarian intervention under the UN Charter and will demonstrate with these cases the deficiencies and dangers of the line taken by the Security Council. Also it will show the shortcomings and flaw of humanitarian intervention under customary international law and its problems concerning state responsibility, and therefore argue a need for strong and clear liability of the United Nations. However, it will not describe customary law of humanitarian intervention too detailed as the literature about that is already various as well as the outcomes of it. Instead, this paper will suggest the implementation of a legal instrument under the umbrella of United Nations to address honestly what is now often done in a hidden form: Stronger recognizing of human rights when life is at stake at expense of the doctrine of sovereignty.

II INTERVENTION AND MORAL DUTY

A Cases of Humanitarian Intervention

Even though the UN Charter narrowed down the legality of use of force after World War II, several cases of forceful interventions occurred. Some of them are considered to be justified by humanitarian grounds. To scrutinize some of these cases serves the purpose of establishing similarities and differences with regard to the human rights abuses, the reaction of states and the reaction of the community of states. In the last half of the century several interventions took place. This questions whether a duty to intervene arises.

1 *Genocide in Cambodia*

In 1975 the Khmer Rouge regime by Pol Pot seized power in Cambodia and implemented a leadership by torture, displacement and extensive killing. It is assumed that in less than four years two million people were killed, about one-quarter of the population.⁵ The Security Council discussed this issue but could not decide whether or not to intervene.⁶ In 1977 troops of the Khmer Rouge occasionally crossed the border and attacked Vietnamese villages. As a result Vietnamese troops marched into Cambodia in 1978.⁷ Vietnam not only replaced the Pol Pot regime, but also established a government strongly dependent on Vietnam.⁸ The international community condemned Vietnam's assumption of power and also rejected Vietnam's right of intervention based on humanitarian concerns. For example, New Zealand stated on the 2110th meeting of the Security Council on 13 January 1979: "[T]he misdeeds of one State do not...justify the invasion of its territory by another".⁹ In fact the Vietnamese government never tried to legitimise its intervention on humanitarian grounds. Due to the political differences during the cold war period a condemnation of the Vietnamese invasion by Security Council resolution was impossible to draft, as the Soviet Union vetoed it.¹⁰ The General Assembly however condemned the invasion, called for withdrawal, and pointed out that even if human rights are at stake intervention is not a legal means.¹¹ The Vietnamese puppet regime in Cambodia was also known for

⁵ Natalino Ronzitti *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Martinus Nijhoff Publishers, Dordrecht, 1985) 98.

⁶ Douglas Eisner "Humanitarian Intervention in Post-Cold War Era" (1993) 11 *Boston U Int' L J* 195, 206.

⁷ Douglas Eisner "Humanitarian Intervention in Post-Cold War Era" (1993) 11 *Boston U Int' L J* 195, 206.

⁸ W Michael Reisman "Article 2 (4): The Use of Force in Contemporary International Law" (1984) 78 *Am Soc Int' L Proceedings* 68.

⁹ SC 2110th Meeting, UN Doc S/PV.2110 (1979).

¹⁰ Natalino Ronzitti *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Martinus Nijhoff Publishers, Dordrecht, 1985) 99.

¹¹ 34th Session of the General Assembly, UN Doc A/RES/3422(XXX) (1979).

human rights violations as well. However, they paled into insignificance in contrast to the monstrous slaughter of the Pol Pot regime.

2 *Intervention in Uganda*

Since 1971 the dictatorship of Idi Amin was responsible for the killing of about 300,000 Ugandans and severe cruelties among his people.¹² At the end of 1978, Ugandan forces seized parts of Tanzanian territory in the Kagera River region. In response Tanzania attacked Uganda together with Ugandan rebels, gained control over the capital Kampala in April 1979, and ousted Amin from power.¹³ The justification for the use of force remained unclear. However, Tanzanian President Nyerere emphasised the right of self-defence as well as humanitarian concerns.¹⁴ Among scholars it is contentious which justification prevails and which one is to follow, but a separation of both motives seems impossible, therefore it has to be acknowledged that both played a role in deciding to attack Uganda and overthrow the government.¹⁵ After all, this was the most secure measure to prevent further attacks against Tanzanian territory. In any event, the international community was quick to recognize the new government of Uganda, welcomed the change and did not discuss the invasion within the Security Council or the General Assembly.¹⁶ Therefore it must be assumed that the international community tacitly understood the cause as just; only Sudan and Nigeria objected to Tanzanians intervention.¹⁷

¹² Douglas Eisner "Humanitarian Intervention in Post-Cold War Era" (1993) 11 Boston U Int' L J 195, 203.

¹³ Fernando R Teson *Humanitarian Intervention: An Inquiry into Law and Morality* (2nd Ed, Transnational Publishers, New York, 1997) 180 – 182.

¹⁴ Natalino Ronzitti *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Martinus Nijhoff Publishers, Dordrecht, 1985) 102 – 105.

¹⁵ Compare also: Douglas Eisner "Humanitarian Intervention in Post-Cold War Era" (1993) 11 Boston U Int' L J 195, 204.

¹⁶ Fernando R Teson *Humanitarian Intervention: An Inquiry into Law and Morality* (2nd Ed, Transnational Publishers, New York, 1997) 186.

¹⁷ Nigerias objection was based on discomfort about the use of force in general, rather than on overthrow the Amin dictatorship, see Nigerias statement: Natalino Ronzitti *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Martinus Nijhoff Publishers, Dordrecht, 1985) 105 - 106.

3 *The Somalia Disaster*

In January 1991 despotic Somali President Barre was overthrown. The already violent and poor country drifted into a bloody civil war where several bands fought against each other and civil order broke down completely.¹⁸ A reconciliation conference took place in Djibouti in July 1991, where Omer Arteh was appointed as interim Prime Minister but his success of settling the war and restoring peace was limited.¹⁹ In January 1992 he requested action by the Security Council, which was followed by numerous resolutions.²⁰ A ceasefire agreement in March was ignored by the warlords. In August Resolution 751 created UN Operation in Somalia (UNOSOM) and an agreement about their deployment was reached with the warlord Aidid.²¹ Nevertheless, the civil war continued and humanitarian disaster increased. The Secretary General predicted that by the end of 1992 over 500,000 civilians would be refugees. He also reported that 4.5 million people were starving and that no functional health-care system existed.²²

The situation declined, high numbers of civilians died of starvation and the armed gangs prevented the United Nations from carrying out help.²³ This led to the deployment of armed forces in September.²⁴ Again, this did not stop the anarchistic conditions. In December the Security Council defined the situation as a 'threat to international peace and security', justifying the use of force under chapter VII of the Charter.²⁵ Under the rule of the United States the Unified Task Force (UNITAF)

¹⁸ Jane Perlez "2 Months after Ousting Despot, Somalia Faces Life as an Abandoned Pawn" (4 April 1991) *New York Times* A 3.

¹⁹ Mark R Hutchinson "UN Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention" (1993) 34 *Harv Int' L J* 624, 626.

²⁰ SC Res 733, UN Doc S/RES/733 (1992); SC Res 746, UN Doc S/RES/746 (1992); SC Res 751, UN Doc S/RES/751 (1992); SC Res 767, UN Doc S/RES/767 (1992); SC Res 775, UN Doc S/RES/775 (1992).

²¹ SC Res 751, UN Doc S/RES/751 (1992).

²² *Report of the Secretary General on the Situation in Somalia* (22 July 1992), UN Doc S/24343.

²³ *Report of the Secretary General on the Situation in Somalia* (24 August 1992), UN Doc S/24480.

²⁴ SC Res 775, UN Doc S/RES/775 (1992).

²⁵ SC Res 794, UN Doc S/RES/794 (1992).

was sent to Somalia, which was, at first, successful in establishing an order allowing delivery of food and supply to the impoverished population. After this military intervention another peacekeeping mission, UNOSOM II, was implemented in March 1993.²⁶ Riots broke out again and in July 1993 25 Pakistani peacekeepers were killed.²⁷ The Security Council agreed in resolution 865 to follow the recommendations of the Secretary General,²⁸ that disarming of the gangs would be essential to enforce peace.²⁹ Nevertheless attacks on UNOSOM II forces went on and in October the well-known disastrous mission to capture Aidid was started, which culminated in a daylong street fight leaving 12 US soldiers and 60 Somalis dead behind, raising the death-toll of UN forces to sixty.³⁰ The psychological impact was great and led finally to the withdrawal of foreign troops until March 1995.³¹

The involvement of the United Nations in Somalia was unique. It started as a usual peacekeeping mission, violently opposed within the country.³² For the Security Council it seemed necessary to authorise the use of force under Chapter VII of the Charter to reinstall an environment where peacekeeping and humanitarian help could be carried out.³³ The UNOSOM II mission in turn shifted from a humanitarian to a military mission, increasingly criticized by UN members.³⁴ Looking back at the three years of intervention in Somalia it seems to

²⁶ SC Res 814, UN Doc S/RES/814 (1993).

²⁷ Kenneth S Freeman "Punishing Attacks on United Nations Peacekeepers: a Case Study of Somalia" (1994) 8 *Emory Int' L Rev* 845, 845.

²⁸ SC Res 865, UN Doc S/RES/865 (1993).

²⁹ *Further Report of the Secretary General* (17 August 1993), UN Doc S/26317.

³⁰ John H Cushman "5 GI's Killed as Somalis Down 2 US Helicopters" (4 October 1993) *New York Times* A 1.

³¹ SC Res 954, UN Doc S/RES/954 (1995).

³² Sonia K Han "Building a Peace That Lasts: The United Nations and Post-Civil War Peace-Building" (1994) 26 *NYU J Int' L & Pol* 837, 862 - 867.

³³ Sonia K Han "Building a Peace That Lasts: The United Nations and Post-Civil War Peace-Building" (1994) 26 *NYU J Int' L & Pol* 837, 862 - 867.

³⁴ Keith B Richburg "UN Report Criticizes Military Tactics of Somalia Peace Keepers" (5 August 1993) *The Washington Post* A 22.

be a great disaster and it is questioned, whether the Security Council exceeded their authority, and intervened illegally in internal affairs.³⁵ For the purpose of this paper it is notable, that intervention in general always has to deal with this balance between humanitarian concerns and sovereignty, which will be addressed in more detail later on. However, the UN involvement, at least in the beginning, helped to prevent a worsening of humanitarian catastrophe. Also noticeable is the emphasis of the unique situation by the Security Council itself, concerned about not setting a precedent.³⁶ This is not unfounded, as the Council had to fall back upon addressing a 'threat to international peace and security', instead of pointing out the real motivation: humanitarian concerns about Somalia, but not so much the impact of refugees on the stability of Kenya, Ethiopia and Djibouti.

4 *Haiti Intervention*

Haiti suffered under the dictatorship of the Duvalier family for decades. This dictatorship was overthrown in 1986 and in 1990 Jean – Bertrand Aristide was democratically elected as president, but his presidency was short lasting. A military coup in 1991 drove him out of his office and the country.³⁷ The following military rule was accompanied by a high rate of refugees and a great toll of lives among civilians, causing a humanitarian catastrophe.³⁸

The Security Council responded with a resolution implementing an embargo.³⁹ They also called the humanitarian crisis a 'threat for international peace and security'.⁴⁰ In 1993 an agreement between the military regime and Aristide was reached, aiming for the re-instalment of the democratic government and the

³⁵ Marc M Boutin "Somalia: The Legality of UN Forcible Humanitarian Intervention" 17 *Suffolk Transn' L Rev* 138,159 – 162.

³⁶ Ruth Gordon *United Nations Intervention in Internal Conflicts: Iraq, Somalia and Beyond* (1994) 15 *Mich J Int' L* 138, 550 – 558.

³⁷ Howard W French "Haitian Military and Aristide Sign Pact to End Crisis" (4 July 1993) *New York Times* 1,1.

³⁸ Daniel James "What Next in Haiti?" (28 May 1993) *The Washington Post* F 3.

³⁹ SC Res 841, Un Doc S/RES/841 (1993).

⁴⁰ SC Res 841, Un Doc S/RES/841 (1993).

deployment of UN troops on the island.⁴¹ Notwithstanding the promise of the military leader to accept a multinational force called 'UN Mission on Haiti' (UNMIH), he organised civil bands to block the harbour and to initiate riots to prevent their arrival.⁴² Violence continued, members of the former democratic government were assassinated and the number of refugees from Haiti rose.⁴³ Meanwhile the Security Council re-employed the embargo.⁴⁴ However, mostly civilians seemed to suffer from the embargo. Nevertheless even harder sanctions were imposed in 1994.⁴⁵ In July 1994 the Security Council finally authorised the use of force and in September United States troops landed in Haiti.⁴⁶

The intervention in Haiti is now often referred to as a 'pro-democratic' intervention, rather than humanitarian intervention.⁴⁷ Indeed, the United States President addressed the humanitarian aspect of intervention only at the beginning of the military invasion.⁴⁸ It is arguable that vested interests also motivated United States involvement. The United States, main initiator of Security Council actions, was receiving thousands of Haitian refugees and was also concerned about drug trafficking. Nevertheless, the humanitarian crisis in Haiti cannot be denied and therefore the intervention also had humanitarian importance. Negotiations with the

⁴¹ Howard W French "Haitian Military and Aristide Sign Pact to End Crisis" (4 July 1993) *New York Times* 1,1; SC Res 867, UN Doc S/RES/867 (1993).

⁴² D J Lecce "International Law Regarding Pro-Democratic Intervention: A Study of the Dominican Republic and Haiti" (1998) 45 *Naval L Rev* 247, 255.

⁴³ Howard W French "Justice Minister Slain in Defiance of US Warning to Military to Keep Peace" (15 October 1993) *New York Times* A 1.

⁴⁴ SC Res 873, UN Doc S/RES/873 (1993).

⁴⁵ SC Res 917, UN Doc S/RES/917 (1994).

⁴⁶ SC Res 940, UN Doc S/RES/940 (1994); Larry Rother "3000 Troops Land Without Opposition and Take over Ports and Airfields in Haiti" (20 September 1994) *New York Times* A 1.

⁴⁷ Richard Falk "The Haiti Intervention: A Dangerous World Order Precedent for the United Nations" (1995) 36/2 *Harv Int' L J* 341,343 - 346.

⁴⁸ William J Clinton, President of the United States, "Remarks by the President in Television Address to the Nation" (Oval Office, Washington DC, 15 September 1994), can be found at: <<http://clinton6.nara.gov/1994/09/1994-09-15-president-in-tv-address-to-nation-on-haiti.html>> (last accessed 18 August 2003).

military junta turned out to be fruitless and sanctions in form of embargoes hit innocent inhabitants, but did not achieve their purpose of removing a cruel leadership. The military intervention therefore seemed to be the last possible means to resolve the situation. It was legitimised by explicit Security Council authorisation, although it was questioned if the Security Council, for its part, went beyond what is permissible.⁴⁹ However, the Council took the point of view that there was a threat for international peace and security and acted within its discretionary power.

5 *The Rwanda Slaughter*

In the early 1990s a civil war broke out in Rwanda between the Hutu, the majority, and the Tutsi, the minority, who nevertheless had ruled the country since independence in the 1960s. The Tutsi increasingly lost power in the following decades.⁵⁰ A ceasefire was negotiated in August 1993. However, with the lethal shooting of Hutu President Habyarimana's plane on 6 April 1994,⁵¹ war broke out again accompanied with massive slaughter and outstanding cruelty by Hutu paramilitary groups and militias. Victims included the Tutsi and moderate Hutu.⁵² In August 1994 United Nations Secretary General reported: "Of a total population of approximately 7 million, as many as 500,000 people have been killed, 3 million displaced internally and more than 2 million have fled to neighbouring countries."⁵³ A United Nations Assistance Mission for Rwanda (UNAMIR) of 2,500 men, deployed in 1993 to watch the ceasefire, remained nearly inactive, due to their light arming and the fact they were scared by the murder of 10 Belgian peacekeepers.⁵⁴

⁴⁹ Richard Falk "The Haiti Intervention: A Dangerous World Order Precedent for the United Nations" (1995) 36/2 Harv Int' LJ 341, 356.

⁵⁰ Tom Masland, Joshua Hammer "Corpses Everywhere" (18 April 1994) *Newsweek* United States 33; Marguerite Michaels "Descent into Mayhem" (18 April 1994) *Time Magazine* United States 44.

⁵¹ Paul Lewis "2 Africa Leaders Die, UN Says: Rocket may have Downed Plane" (7 April 1994) *New York Times* A 1.

⁵² Marguerite Michaels "Streets of Slaughter" (25 April 1994) *Time Magazine* United States 44.

⁵³ *Report of the Secretary General on the Situation in Rwanda* (3 August 1994), UN Doc S/1994/924.

⁵⁴ Fernando R Teson "Collective Humanitarian Intervention" (1996) 17 Mich J Int' L 323, 362.

By May 1994 the Secretary General called for a 5,500 all African troop under UNAMIR, but the Security Council was reluctant to authorise this plan, driven by critics of the United States;⁵⁵ agreement could only be reached about the deployment of further 500 troops.⁵⁶ Finally in June 1994 objections to the deployment of more troops were dropped, but the mandate was restricted to protecting refugees and securing the delivery of aid-supplies.⁵⁷ In July 1994 France offered 2,500 troops. The Security Council authorised the instalment of these troops and found, in Resolution 929, a 'threat to peace and security in the region' and authorised the use of 'all necessary means to achieve the humanitarian objectives', the common term to authorise the use of force.⁵⁸ The worst butchery stopped but the refugee disaster went on. Subsequently millions of Hutus fled to Zaire, afraid of revenge by Tutsis.⁵⁹ Nevertheless, France withdrew once a new government was established, although it was an unstable one. The Secretary General's calls for additional troops to safeguard refugee camps were rejected,⁶⁰ although occasional atrocities occurred and disastrous conditions prevailed.⁶¹

The Security Council's reaction to the atrocities was slow and ineffective; it took nearly four months, till Resolution 929 was passed. They were even afraid of naming the slaughter what it was: genocide. Resolution 918 addressed "systematic, widespread and flagrant violations of international humanitarian law",⁶² although a draft of this resolution contained the term 'genocide', but was dropped later on.⁶³

⁵⁵ *Report of the Secretary General on the Situation in Rwanda* (13 May 1994), UN Doc S/1994/565.

⁵⁶ SC Res 918, UN Doc S/RES/918 (1994).

⁵⁷ SC Res 925, UN Doc S/RES/925 (1994).

⁵⁸ SC Res 929, UN Doc S/RES/929 (1994).

⁵⁹ David van Biema "Exodus from Rwanda" (25 July 1994) *Time Magazine* United States 34; Kevin Fedarko "In Fear of a Nation's Revenge" (29 August 1994) *Time Magazine* United States 56.

⁶⁰ "UN Force for Camps in Zaire is Doubtful" (1 January 1995) *New York Times* 1, 3.

⁶¹ Joshua Hammer "Death Watch" (8 August 1994) *Newsweek* United States 14.

⁶² SC Res 918, UN Doc S/RES/918 (1994).

⁶³ Joshua Hammer "The Killing Fields" (24 May 1994) *Newsweek* United States 46.

Article II of the *Convention on the Prevention and Punishment of the Crime of Genocide* defines genocide as:⁶⁴

“...any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;”

The incidents in Rwanda seem to perfectly fit this definition and the slaughter seems to be one of the most obvious genocides beside the Cambodian killings by the Khmer Rouge after World War II. An United Nations expert commission ascertained later on, that “[t]hese acts of mass extermination against the Tutsi group as such constitute genocide within the meaning of article II of the [Genocide] Convention”.⁶⁵ One reason for the reticence to call it genocide may have been, that the Genocide Convention demands from the parties in Article I ‘to undertake to prevent’ this crime under international law,⁶⁶ a measure the ‘key players’ in the Security Council were very reluctant to enforce. Rwanda might have been of far less interest for them to intervene militarily.⁶⁷ On the other hand one should not

⁶⁴ *Convention on the Prevention and Punishment of the Crime of Genocide 1948*, adopted by Resolution 260 (III) A of the UN General Assembly on 9 December 1948, hereinafter Genocide Convention.

⁶⁵ *Letter from the Secretary General to the President of the Security Council* (4 October 1994), UN Doc S/1994/1125.

⁶⁶ *Convention on the Prevention and Punishment of the Crime of Genocide 1948*, adopted by Resolution 260 (III) A of the UN General Assembly on 9 December 1948, hereinafter Genocide Convention; See also: Bruno Simma “NATO, the UN and the Use of Force: Legal Aspects” (1999) *European J Int’ L* 10 1, 3.

⁶⁷ See: Marguerite Michaels “Sorry, Wrong Country” (6 June 1994) *Time Magazine* United States 34.

forget that the Rwanda genocide took place shortly after the involvement in Somalia. This intervention was considered to be a disaster and was criticised for its military over humanitarian character. For that reason it is understandable that the UN members were very cautious not to make the same mistakes and therefore acted hesitantly. Nevertheless, Resolution 929 authorised the use of force by French troops,⁶⁸ but again the Security Council was cautious enough to stress that the “situation in Rwanda constitutes a unique case”,⁶⁹ anxious not to set a precedent.

6 *The Kosovo Crisis*

Kosovo is a part of former Yugoslavia, which is dominantly populated by ethnic Albanians. Nevertheless, the Serbs consider it their indigenous territory.⁷⁰ In 1974 President Tito conceded the Albanians had autonomous status in Kosovo to prevent future ethnic riots.⁷¹ In 1991 nationalist Prime-Minister Slobodan Milosevic abolished this autonomy and drove the Albanians out of economic and political life. Meanwhile the Albanians established a nearly complete underground government and army in Kosovo. In 1997 the Albanians started to fight the Serbs, which not only used this situation to fight the armed forces but to banish the civilian population.⁷² Fearing a similar disaster to that in Bosnia-Herzegovina, where the EU, NATO and the UN had done nothing to prevent the genocide that took place, NATO considered military action.⁷³ On 1 April 1998 the UN Security Council made Resolution 1160 but did not find any threat to international peace or security, which would have been necessary for the UN to take military action in relation to

⁶⁸ SC Res 929, UN Doc S/RES/929 (1994).

⁶⁹ SC Res 929, UN Doc S/RES/929 (1994).

⁷⁰ news.bbc.co.uk <http://news.bbc.co.uk/1/hi/special_report/1998/kosovo/110492.stm> (last accessed 10 August 2003).

⁷¹ G Richard Jansen (1999) “Albanians and Serbs in Kosovo. An Abbreviated History” <http://lamar.colostate.edu/~grjan/kosovohistory.html> > (last accessed 10 April 2003).

⁷² Joachim Krause (2000) “Deutschland und die Kosovokrise”. <http://www.dgap.org/texte/jkkosovo.pdf> > (last accessed 10 April 2003).

⁷³ Joachim Krause (2000) “Deutschland und die Kosovokrise”. <http://www.dgap.org/texte/jkkosovo.pdf> > (last accessed 10 April 2003).

Kosovo later on.⁷⁴ Russia rejected the use of force categorically. Meanwhile the Serbs proceeded with the displacement of ethnic Albanians. The NATO members started to threaten the use of force.⁷⁵ In September 1998 Sadako Ogata, the UN High Commissioner for Refugees, predicted a humanitarian disaster, because 270 000 Albanians were displaced.⁷⁶ The UN Security Council issued another Resolution (1199), which now defined the situation in Kosovo as a 'threat for international peace and security'.⁷⁷ However, Russia was still against the use of force, so the UN could not authorise military action. The Serbs started to withdraw their troops, but it did not turn out to be successful in the long term.⁷⁸ The Albanians used the withdrawal to seize formerly lost territory. In December 1998 and January 1999 Belgrade decided to intervene in Kosovo with armed forces again. There were hints that the Serbs had developed a plan to displace the Albanians in a systematic manner. This was called "Operation Horseshoe".⁷⁹ Even if the existence of such a plan is disputed now, the enormous speed of the ethnic cleansing was highly visible.⁸⁰ A last diplomatic effort was, the peace negotiations of Rambouillet, France (6 February 1999), failed and in March 1999 the ethnic cleansing continued.⁸¹ In response, the NATO members began air strikes on 24 March 1999 against targets in Kosovo and Yugoslavia.⁸²

⁷⁴ SC Res 1160, UN Doc S/RES/1160 (1998).

⁷⁵ Ian Black "Nato plans Kosovo action" (7 July 1998) *The Guardian* London 12.

⁷⁶ Kurt Schork, Paul Webster "Belgrade 'blocks food to Kosovo'" (9 September 1998) *The Guardian* London 11.

⁷⁷ SC Res 1199, UN Doc S/RES/1199 (1998).

⁷⁸ Osce.org <<http://www.osce.org/kosovo/overview/>> (last accessed 10 April 2003).

⁷⁹ parliament.the-stationery-office.co.uk <<http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmffaff/28/2811.htm>> (last accessed 10 April 2003).

⁸⁰ "Milosevic and Operation Horseshoe" (18 July 1999) *The Observer* London. <<http://www.guardian.co.uk/Kosovo/Story/0,2763,207919,00.html>> (last accessed 10 April 2003); Guy Dinmore "Villagers Slaughtered in Kosovo 'Atrocity'; Scores Dead in Bloodiest Spree of Conflict" (17 January 1999) *The Washington Post* Washington A 1.

⁸¹ parliament.the-stationery-office.co.uk <<http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmdfence/347/34709.htm>> (last accessed 10 April 2003).

⁸² Nato.int <<http://www.nato.int/kosovo/history.htm>> (last accessed 10 April 2003).

The legality of the intervention was highly disputed in the aftermath, because it was not authorised by the Security Council. However, after the event the Security Council drafted a resolution concerning the situation without mentioning the interference at all.⁸³ Some consider this as implicit toleration and therefore ex post de facto legal authorisation of the NATO intervention.⁸⁴ This seemed to be based on moral endorsement rather than on legal considerations.⁸⁵ Therefore it is no sufficient justification for intervention, regarding the fact that the threshold for use of force under the UN Charter is quite high. Hence explicit authorisation is needed. Given the lack of Security Council authorisation the only possible justification for the intervention can be found in customary international law. If such a doctrine exists will be examined below.

7 *The Cases of Iraq and Afghanistan*

Immediately after the ceasefire of the first Gulf War on 28 February 1991 Kurds in the northern part and Shiites in the southern part of Iraq started an uprising against the Hussein regime.⁸⁶ The rebellion in the southern part was soon quelled, accompanied by brutal excesses against civilians, proved now by the finding of several mass graves and eyewitness accounts.⁸⁷ Afterwards Iraqi forces, mainly the notorious Republican Guard, concentrated on the Kurds. They were not only fighting rebels, but also committed systematic atrocities against civilians. Expulsion, poison gas attacks, air raids, and attacks against villages were on the agenda.⁸⁸ It is estimated that about 2,000 Kurds died per day.⁸⁹ Massive flight

⁸³ SC Res 1244; UN Doc S/RES/1244 (June 1999).

⁸⁴ A Mark Weisburd "International Law and the Problem of Evil" (2001) 34 Vand J Transn L 225, 232 – 233; Nuala Mole "Who Guards the Guards – The Rule of Law in Kosovo" (2001) 3 European Hum Rights L Rev 280, 293.

⁸⁵ Peter Hilpold "Humanitarian Intervention: Is There a Need For a Legal Reappraisal?" (2001) 12 European J Int' L 437, 440.

⁸⁶ Amir A Majid "International Human Rights and the Kurds" (1995) 2 Annual Survey Int' L & Comp L 53, 53 – 55.

⁸⁷ Susan Sachs "A Grim Graveyard Window in Hussein's Iraq" (1 June 2003) *New York Times* 1, 1.

⁸⁸ "Double Trouble for the Kurds (1 April 1992) *New York Times* A 24.

towards Iran and Turkey started and thousands of Kurds found themselves trapped in the mountains due to the blocking of the border by Turkish troops.⁹⁰

On 5 April 1991 the Security Council issued resolution 688, addressing a threat to "international peace and security".⁹¹ Iraq was requested to stop the atrocities, but the resolution did not contain the phrase 'by all necessary means', the explicit language-use to authorise the use of force. In contrast it expressively affirmed Iraq's sovereignty and asked other countries not to breach it. Members of the Security Council were reluctant to use that expression, because they were afraid to set a precedent.⁹² After all, Iraq had a recognized and functioning government, unlike Somalia or Haiti. Authorising use of force would have meant an incursion on state sovereignty, as it was not in question that Iraq was not a failed state. Nevertheless did the United States, Britain, and France sent troops to the northern part of Iraq and established safe havens for the Kurds.⁹³ In the meantime, the UN took another approach and arranged the deployment of UN helpers and non-governmental relief agencies with the consent of Iraq.⁹⁴ These two attempts clashed with each other as the allied troops wanted to withdraw very quickly and leave the relief groups behind, who therefore were adamant to consent with Iraq for their own safety.⁹⁵ However, after these struggles the Kurdish refugees were able to return to their homes, but subtle oppression in Iraq continued.

⁸⁹ Amir A Majid "International Human Rights and the Kurds" (1995) 2 Annual Survey Int' L & Comp L 53, 55.

⁹⁰ Ron Mureau "Saddam's Slaughter" (15 April 1991) *Newsweek* United States 22.

⁹¹ SC Res 688, UN Doc S/RES/688 (1991).

⁹² Ruth E Gordon "Intervention by the United Nations: Iraq, Somalia, and Haiti" (1996) 31 *Tex Int' L J* 43, 50.

⁹³ Douglas Eisner "Humanitarian Intervention in Post-Cold War Era" (1993) 11 *Boston U Int' L J* 195, 214.

⁹⁴ Agreement called 'Memorandum of Understanding' (18 April 1991), Annex to: *Letter from the Secretary General to the President of the Security Council* (31 May 1991), UN Doc S/22663 (1991).

⁹⁵ Gleen Frankel "Relief Agencies Balk at US Enclave Plan; UN, Private Aid Groups Reluctant to Take Part Without Baghdad's Acquiescence" (25 April 1991) *The Washington Post* A 17.

Atrocities in the southern part also continued. Civilians were bombarded throughout the whole of March 1991 and Army Generals were ordered to wipe out whole tribes.⁹⁶ The allied forces installed a no flight zone, which prevented further air raids, but not assaults on the ground. In 2003 the second Gulf War started. It was fought under the so-called 'war on terrorism' and humanitarian issues were addressed only from time to time. The British Government released a report containing the complete work of human rights violations of Iraq of the last couple of years and Prime Minister Tony Blair pointed out the cruelty of the regime several times in the preliminary stages of the war.⁹⁷ United States President Bush also expressed his will to free the suppressed people of Iraq and addressed several human rights abuses and the ignorance of resolution 688, demanding a stop to these violations.⁹⁸ In Resolution 1441 the Security Council recalled resolution 688 and diagnosed that Iraq "failed to comply with its commitments...pursuant to Resolution 688 (1991) to end repression of its civilian population".⁹⁹ However, Resolution 1441 mainly dealt with the failure to comply with resolution 687, addressing the threat of weapons of mass destruction.¹⁰⁰ It did not determine a 'threat to international peace and security' and contains therefore no authorisation under Chapter VII of the UN Charter. Humanitarian concerns were no decisive factor for the attack, but only a side effect.

⁹⁶ *Interims Report on the Situation of Human Rights in Iraq*, Annex to *Letter from Belgium to the United Nations* (5 August 1992), UN Doc S/24386 (1992).

⁹⁷ See for example: Tony Blair, British Prime Minister, "Speech to the Commons" (House of Commons, London, 18 March 2003), can be found at: <<http://politics.guardian.co.uk/iraq/story/0,12956,916790,00.html>> (last accessed 28 July 2003); Foreign and Commonwealth Office of Britain *Saddam Hussein: Crimes and Human Rights Abuses* (2 December 2002), can be found at: <<http://www.fco.gov.uk/Files/kfile/hrdossier.pdf>> (last accessed 3 August 2003).

⁹⁸ George W Bush, President of the United States, "Speech to the United Nations" (United Nations General Assembly, New York, 12 September 2002), can be found at: <<http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>> (last accessed 23 August 2003).

⁹⁹ SC Res 1441, UN Doc S/RES/1441 (2002).

¹⁰⁰ See: SC Res 687, UN Doc S/RES/687 (1991).

The case in Afghanistan is similar, where severe breaches of human rights were not a decisive factor for the attack of the United States and Britain in October 2002. Nevertheless the invasion ousted one of the most ruthless regimes: Since 26 September 1996 Kabul was in the hands of the Taliban. They killed the former President Najibullah and put in place a rigid Islamic legal system.¹⁰¹ By 1998 they controlled 90 per cent of the country and seized Mazar I Sharif, the former bastion of the Northern Alliance, until then the only remaining opponent of the Taliban.¹⁰² Suffering such as starvation and displacement went hand in hand with the war.¹⁰³ The Taliban tortured and murdered civilians in occupied territories.¹⁰⁴ Massacres, abuses of women rights, and atrocities against other religious groups were widespread.¹⁰⁵ Humanitarian concern was addressed in several Security Council Resolutions,¹⁰⁶ and in July 2001 the Security Council finally resolved in Resolution 1363 that the situation constituted a 'threat to international peace and security'.¹⁰⁷ This threat, however, not only arose from violations of human rights, but also from the extensive cultivation and traffic with opium, and most of all, from the harbouring and supporting of Al Qaeda.¹⁰⁸ It is most likely, that the last was the principal reason for describing the circumstances as a threat to peace and security. After the United States invasion in October 2001 the Security Council remained silent, only addressing in a press statement its deep concern "at the humanitarian

¹⁰¹ "Afghan Militia Halts Advance After Kabul" (29 September 1996) *The Washington Post* A 29.

¹⁰² Dana Priest "Iran Poises Its Force On Afghan Border" (5 September 1998) *The Washington Post* A 1.

¹⁰³ See: *Report of the Secretary General on the Situation in Afghanistan* (17 September 1997), UN Doc S/1997/719; *Report of the Secretary General on the Situation in Afghanistan* (18 March 1998), UN Doc S/1998/222.

¹⁰⁴ *Interims Report of the Special Rapporteur of the Commission on Human Rights on the Situation on Human Rights in Afghanistan* (26 September 2001), UN Doc A/56/409 (1991).

¹⁰⁵ Commission on Human Rights Res 2000/18, *Situation of Human Rights in Afghanistan*, UN Doc E/CN.4/RES/2000/18.

¹⁰⁶ SC Res 1267, UN Doc S/RES/1267 (1999); SC Res 1333, UN Doc S/RES/1333 (2000).

¹⁰⁷ SC Res 1363, UN Doc S/RES/1333 (2001).

¹⁰⁸ See: Res 1363, UN Doc S/RES/1333 (2001).

situation in Afghanistan".¹⁰⁹ However, the United States' justification for the intervention was mainly self-defence.

8 *Liberia's Suffering*

In 1989 former member of the Liberian government Charles Taylor started a rebellion against the dictator Samuel Doe.¹¹⁰ Taylor's National Patriotic Front (NPFL) soon conquered large parts of the country and pushed back the opponent into Monrovia. Fighting against Doe's Armed Forces of Liberia (AFL) was accompanied by cruel slaughter of civilians.¹¹¹ A third force entered the conflict, the Independent National Patriotic Front (INPFL) of Prince Johnson, which aggravated the situation. Tribes supported different groups¹¹² and numerous splinter groups formed: until 1995 about six major warring fractions occupied parts of the country and fought each other.¹¹³ Approximately 750,000 people fled the country, over one million were regarded as displaced within the country, and about 200,000 died. The Liberian population at that time was estimated at 2,5 million.¹¹⁴

Soon after the civil war broke out the Economic Community of West African States (ECOWAS) considered intervening in the conflict. It established an ECOWAS Cease-fire Monitoring Group (ECOMOG) and troops entered Liberia in August 1990, soon gaining control over Monrovia and installing an interim government.¹¹⁵ However, ECOMOG became famous for stealing and looting.¹¹⁶

¹⁰⁹ *Press Statement on Terrorist Threats by the Security Council President* (8 October 2001), UN Doc SC/7167 (2001).

¹¹⁰ Levi Woodward "Taylor's Liberia and UN Involvement" (2003) 19 N Y L Sch Human Rights 923, 926 – 927.

¹¹¹ Kenneth B Noble "Masses of Liberian Refugees Flee Rebellion and Reprisal Killings" (31 January 1990) *New York Times* A 1.

¹¹² Kenneth B Noble "From Liberian War, Tales of Brutality" (9 July 1990) *New York Times* A 3.

¹¹³ Binaifer Nowrojee "Joinnign Forces: United Nations and Regional Peacekeeping – Lessons from Liberia" (1995) 8 Harv Human Rights J 129, 133.

¹¹⁴ Binaifer Nowrojee "Joinnign Forces: United Nations and Regional Peacekeeping – Lessons from Liberia" (1995) 8 Harv Human Rights J 129, 134.

¹¹⁵ Kofi Oteng Kufuor "The OAU and the Recognition of Governments in Africa: Analyzing its Practise and Proposals for the Future" (2002) 17 Am U Int' L Rev 369, 386.

However, its involvement made it possible for humanitarian aid to reach suffering people.¹¹⁷

Nevertheless Taylor remained in control over most parts of the country.¹¹⁸ No less than 12 unsuccessful cease-fire agreements were negotiated till 1995.¹¹⁹ United Nations involvement was at first minor, ECOWAS involvement was appreciated, but it continued its passive attitude.¹²⁰ By the end of 1992, in the light of continuing fighting, the atrocities against civilians, and the refugee disaster, the Security Council determined in Resolution 788 that the situation constituted a "threat to international peace and security".¹²¹ It installed an observer mission in Liberia, UNOMIL, in 1993.¹²² Finally, in August 1995, another cease-fire agreement, the 'Abuja Accord', was signed under the auspices of ECOWAS and was recognised by United Nations.¹²³ This ceasefire lasted only a couple of weeks.¹²⁴ Civilians suffered further from rebel troop encroachments; they killed for food, raped, and murdered at random.¹²⁵ In August 1996 the 'Abuja Accords' were re-established and Charles Taylor was elected as President.¹²⁶

¹¹⁶ Jushua Hammer "Into Anarchy" (29 April 1996) *Newsweek* United States 39.

¹¹⁷ *Report of the Secretary General on the United Nations Observer Mission in Liberia* (9 January 1995), UN Doc S/1995/9.

¹¹⁸ T Modibo Ocran "The Doctrine of Humanitarian Intervention in the Light of Robust Peacekeeping" (2002) 35 *Bost C Int' & Comp L Rev* 1, 39.

¹¹⁹ Binaifer Nowrojee "Joinnign Forces: United Nations and Regional Peacekeeping – Lessons from Liberia" (1995) 8 *Harv Human Rights J* 129, 134.

¹²⁰ *Note by the President of the Security Council* (22 January 1991), UN Doc S/22133 (1991).

¹²¹ SC Res 788, UN Doc S/RES/788 (1992).

¹²² SC Res 856, UN Doc S/RES/856 (1993).

¹²³ *Report of the Secretary General on the United Nations Observer Mission in Liberia* (13 September 1995), UN Doc S/1995/781.

¹²⁴ Jushua Hammer "Running for the Exit" (22 April 1996) *Newsweek* United States 48.

¹²⁵ James Geary "Last Chance for Liberia" (4 November 1996) *Time Magazine* United States 36.

¹²⁶ Levi Woodward "Taylor's Liberia and UN Involvement" (2003) 19 *N Y L Sch Human Rights* 923, 930 – 931.

However, peace remained illusive. Occasional fighting within Liberia continued, mostly accompanied by a large number of child soldiers.¹²⁷ The Taylor regime supported the destabilization of neighbouring countries, such as Sierra Leone, Ivory Coast, and Guinea.¹²⁸ In recent times, one rebel force, Liberians United for Reconciliation and Democracy (LURD), gained strength in Liberia and was able to gain control of considerable parts of the country and began to seize Monrovia.¹²⁹ The numbers of refugees increased again and people also fled from the Ivory Coast to Liberia, trying to escape the civil war in their country.¹³⁰ 350,000 are displaced around Monrovia. Rape, violence, and killing were widespread.¹³¹

After another unsuccessful cease-fire agreement on 17 June 2003 the Liberians called desperately for United States help. Nevertheless the United States was reluctant to take the lead in a peacekeeping mission.¹³² Meanwhile fierce fighting in Monrovia killed hundreds of civilians.¹³³ On 1 August 2003 Security Council Resolution 1497 determined a "threat to international peace and security" and authorised the establishment of a multinational force to implement the cease-fire agreement from 17 June 2003.¹³⁴ Nigeria agreed to send 1,500 troops under control of UNOMIL.¹³⁵ After Taylor left the country the United States deployed 200 troops, but left the main responsibility to African troops in the hands of UNOMIL.¹³⁶ The current situation is that the United States withdrew their 200 troops, leaving the

¹²⁷ Daniel Eisenberg "Who will Stop the Killing?" (4 August 2003) *Time Magazine* United States 32.

¹²⁸ J Stephen Morrison "A Rare Chance for Change" (28 July 2003) *Newsweek* United States 20.

¹²⁹ Tom Mansland "Taylor's Last Stand" (28 July 2003) *Newsweek* United States 16.

¹³⁰ *Report of the Secretary General on the Situation in Liberia* (23 February 2003), UN Doc S/2003/227.

¹³¹ See: *Report of the Secretary General in Pursuance of Paragraph 19 of Resolution 1478 (2003) concerning Liberia* (5 August 2003), UN Doc S/2003/793.

¹³² Christopher Marquis "US Resists to Send Peacekeepers to Liberia" (22 July 2003) *New York Times* A 3.

¹³³ "Liberia Rejects Ceasefire Offer as Rebels Pound Capital Anew" (30 July 2003) *New York Times* A 4.

¹³⁴ SC Res 1497, UN Doc S/RES/1497 (2003).

¹³⁵ Somini Sengupta "Peacekeeping Unit Arrives in Liberia" (5 August 2003) *New York Times* A 1.

¹³⁶ Karl Vick "Taylor Resigns, Leaves Liberia" (17 August) *Washington Post* A 3; Karl Vick "Liberian Forces Let Aid into Rural Areas; Request for More US Troops Denied" (18 August) *Washington Post* A 12.

African troops behind,¹³⁷ who tried to disarm the country. An interim government was installed.¹³⁸

9 Destabilized Democratic Republic of Congo

In 1997 the Alliance of Democratic Forces for the Liberation of Congo-Zaire (ADFL) under the Leadership of Laurent Kabila seized power in Zaire. Long-standing dictator Mobutu Sese Seko fled the country; Kabila became President, and renamed Zaire into Democratic Republic of Congo.¹³⁹ The Tutsi dominated Rwandan government supported Kabila. However, his government could not establish a stabilized system and was unwilling to recognize human rights. The western part was still destabilized by Hutu refugees from Rwanda and Rwandan and Ugandan Tutsi dominated troops were present in the country, committing atrocities against Hutus.¹⁴⁰

Kabila turned against his former allies and started to co-operate with the Hutu militia. Congolese Tutsi forces now turned towards the Ugandan and Rwandan forces and in 1998 a second civil war broke out, accompanied by severe atrocities against civilians. Rwanda, Burundi, and Uganda supported the rebelling warring fractions, while Kabila was supported by Angola, Chad, Zimbabwe, and Namibia.¹⁴¹ A statement of the President of the Security Council determined a 'threat to regional peace and security'.¹⁴² On 10 July 1999 the *Lusaka Ceasefire Agreement* was signed by the warring fractions, strongly demanded and supported

¹³⁷ "Marines Leave Monrovia after 10 Days Deployment" (25 August 2003) *Washington Times* A 14.

¹³⁸ Tim Weiner "Interim Liberian Government Head Named" (21 August 2003) *New York Times* A 8.

¹³⁹ See: [www.MONUC.org](http://www.monuc.org) <http://www.monuc.org/HistoryEn.aspx>; (last accessed 28 October 2003).

¹⁴⁰ [www.Pcusa.org](http://www.pcusa.org) <http://www.pcusa.org/pcusa/wmd/ep/country/demrhis.htm>; (last accessed 28 October 2003).

¹⁴¹ [www.MONUC.org](http://www.monuc.org) <http://www.monuc.org/HistoryEn.aspx>; (last accessed 28 October 2003).

¹⁴² *Statement by the President of the Security Council* (31 August 1998), UN Doc S/PRST/1998/26.

by the United Nations.¹⁴³ Further on the United Nations deployed liaison personnel to help to implement the ceasefire agreement. In the following months the Security Council expanded the mandate further on and finally deployed the United Nations Organisation Mission in the Democratic Republic of Congo (MONUC).¹⁴⁴ However, MONUC had no authorisation to intervene by the use of force.

The ceasefire agreement remained unsuccessful.¹⁴⁵ Foreign troops refused to withdraw, rebel troops continued fighting, the refugee situation became worse, and the Security Council emphasized a 'threat to international peace and security'.¹⁴⁶ In the meantime Laurent Kabila was assassinated. He was succeeded by his son Joseph Kabila. Nevertheless, fighting went on in different regions of the country, massacres against civilians occurred, and large numbers of child soldiers were involved in the combats.¹⁴⁷ However, MONUC had minor success in the withdrawal of official foreign troops,¹⁴⁸ but by the end of 2002 rebel fighting in the eastern and north-eastern region intensified.¹⁴⁹ Another peace deal was signed, but remained once again unsuccessful.¹⁵⁰ Atrocities against civilians became more

¹⁴³ SC Res 1234 (1999), UN Doc S/RES/1234; *Report of the Secretary General on the United Nations Preliminary Deployment in the Democratic Republic of Congo* (15 July 1999), UN Doc S/1999/790; *Letter from the Permanent Representative of Zambia to the United Nations* (23 July 1999), UN Doc S/1999/815; SC Res 1258 S/RES/1258.

¹⁴⁴ SC Res 1258 (1999), UN Doc S/RES/1258; SC Res 1279, SC Res 1279 (1999), UN Doc S/RES/1279; SC Res 1291 (2000), UN Doc S/RES/1291.

¹⁴⁵ SC Res 1332 (2000), UN Doc S/RES/1332.

¹⁴⁶ SC Res 1341 (2001), UN Doc S/RES/1341; SC Res 1355 (2001), UN Doc S/RES/1355.

¹⁴⁷ *Tenth Report of the Secretary General on the United Nations Organisation Mission in the Democratic Republic of the Congo* (15 February 2002), UN Doc S/2002/169.

¹⁴⁸ *Twelfth Report of the Secretary General on the United Nations Organisation Mission in the Democratic Republic of Congo* (18 October 2002), UN Doc S/2002/1180.

¹⁴⁹ Rory Carroll "Outbreak of Fighting in Congo Puts Fragile Peace in Danger" (18 October 2002) *The Guardian* London 20.

¹⁵⁰ Rory Carroll "Warring Congo Fractions Sign Peace Deal" (18 December 2002) *The Guardian* London 13.

severe. Rape, cannibalism, and mass slaughter were reported.¹⁵¹ In the four years of war an estimated three million civilians were killed.¹⁵²

The United Nations Secretary General proposed to deploy combat-ready multinational troops in the worst affected region Bunia, Ituri.¹⁵³ In this area thousands of civilians were abused and slaughtered.¹⁵⁴ Finally the European Union agreed to provide troops with France as the framework nation. In Resolution 1484 the Security Council authorised the deployment this emergency force, allowing "to take all necessary measures to fulfil its mandate".¹⁵⁵ This mandate was to pacify the region till 30 September 2003. Afterwards MONUC should have taken command and carried out its mission defined in previous Resolutions.¹⁵⁶ However, the European led force could stop the worst atrocities, but occasional massacres by rebel troops still continued.¹⁵⁷

¹⁵¹Human Rights Watch Report "Covered in Blood: Ethnically Targeted Violence in Northern DRC" (8 July 2003), can be found at: <http://hrw.org/reports/2003/ituri0703/DRC0703-05.htm#P508_74939>; (last accessed 28 October 2003); "UN Says Congo Rebels Carried Out Cannibalism and Rapes" (16 January 2003) *New York Times* A 5; "966 Congolese are Killed in Attacks on Villagers" (7 April 2003) *New York Times* A 6.

¹⁵²Somini Sengupta "Congo War Toll Soars as UN Pleads for Aid" (26 May 2003) *New York Times* A 1.

¹⁵³Somini Sengupta "Congo War Toll Soars as UN Pleads for Aid" (26 May 2003) *New York Times* A 1.

¹⁵⁴*Report of the United Nations High Commissioner for Human Rights to the Security Council on the Situation of Human Rights in the Democratic Republic of Congo* (13 February 2003), UN Doc S/2003/216; James Astill "UN Troops wait Behind Razor Wire as Congo's Streets Run with Blood" (23 May 2003) *The Guardian* London 1.

¹⁵⁵SC Res 1484, UN Doc S/RES/1484 (2003).

¹⁵⁶"Security Council Beefs Up Force in Congo and Broadens Mandate" (29 July 2003) *New York Times* A 8.

¹⁵⁷"UN Finds New Massacre" (11 October 2003) *New York Times* A 8; "New Massacre Reported" (7 October 2003) *New York Times* A 9.

B Human Rights and Their Protection

The purpose of Human Rights is to protect Individuals. This questions in how far individuals are legal entities under international law. Following the positivist point of view, which dominated the nineteenth century and the first half of the twentieth century, only states are recognised subjects under international law.¹⁵⁸ The growing number of Human Rights Treaties, Declarations and Conventions, however, shows the growing recognition of individuals. This demonstrates, that individuals at least are increasingly recognised as subjects under international law.¹⁵⁹

One of the first Convention concerning human rights beside the Convention dealing with rights during war times, was the *Convention on the Prevention and Punishment of the Crime of Genocide* drafted in 1948. It states in Article I: "The contracting parties confirm that genocide,..., is a crime under international law which they undertake to prevent".¹⁶⁰ The same year the *Universal Declaration of Human Rights* was drafted by the General Assembly.¹⁶¹ Other important agreements are, inter alia, the *International Convention on the Elimination of All Forms of Racial Discrimination*,¹⁶² the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*,¹⁶³ or the *Declaration on the Elimination of Violence against Women*.¹⁶⁴ In 1987 the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* entered into

¹⁵⁸ Malcolm N Shaw *International Law* (4th Ed, Cambridge University Press, Cambridge, 1997) 182 – 184.

¹⁵⁹ Malcolm N Shaw *International Law* (4th Ed, Cambridge University Press, Cambridge, 1997) 182 – 184

¹⁶⁰ *Convention on the Prevention and Punishment of the Crime of Genocide 1948*, adopted by Resolution 260 (III) A of the UN General Assembly on 9 December 1948.

¹⁶¹ *Universal Declaration of Human Rights* (1948), UN Doc A/810

¹⁶² *International Convention on the Elimination of All Forms of Racial Discrimination* (1969), 660 UNTS 195.

¹⁶³ *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities* (1993), UN Doc A/47/49.

¹⁶⁴ *Declaration on the Elimination of Violence against Women* (1993), UN Doc 48/49.

force. The participating states recognise, "that those rights derive from the inherent dignity of the human person".¹⁶⁵ This is expressed in similar words in the other Conventions and Declarations as well and reflects the preamble of the United Nations Charter, which determined: "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person". However, these Conventions and Declarations do not authorise states to intervene in other states affairs if in breach with this rules, but stipulates the participating states to take measures against such abuses or to punish such atrocities.

In 1992 the General Assembly drafted the *Declaration on the Protection of All Persons from Enforced Disappearances*. Although Declarations are not legally binding, they have high moral weight under international law and give guidelines how to interpret it.¹⁶⁶ The Declaration reads in Article 1 (2):¹⁶⁷

It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.

This at least proves that there is no more doubt about the status of individuals as recognised entities under international law. Also notable is Article 2 (2) of the Declaration stating, "States shall act at the national and regional levels and in cooperation with the United Nations to contribute by all means to the prevention and eradication of enforced disappearance."¹⁶⁸ That states should act on a regional level to prevent such disappearances is a clear push back of state sovereignty in favour of human rights.

¹⁶⁵ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984, UN Doc A/39/51.

¹⁶⁶ Malcolm N Shaw *International Law* (4th Ed, Cambridge University Press, Cambridge, 1997) 90.

¹⁶⁷ *Declaration on the Protection of All Persons from Enforced Disappearances* (1992), UN Doc A/47/49.

¹⁶⁸ *Declaration on the Protection of All Persons from Enforced Disappearances* (1992), UN Doc A/47/49.

One further proof for the increasing awareness of the responsibility to protect basic human rights is the establishment of the International Criminal Court. In Article 5 of the Rome Statute the crimes, which are within the jurisdiction of the Court are listed as they are: Genocide, crime against humanity, war crimes, and crime of aggression.¹⁶⁹ Even the Security Council addressed in all Resolutions mentioned above their concern about the breach of human rights.¹⁷⁰ All this indicates the willingness to counter human rights abuses and the already decreasing significance of the former absolute doctrine of state sovereignty. Finally, in a report of the International Commission of Intervention and State Sovereignty it is stated:

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“Where a population is suffering serious harm, as a result of internal war, insurgency, repression, or state failure, and the state in question is unwilling to halt and avert it, the principle of non-intervention yields to the responsibility to protect.”

C Conclusion

The described cases all have something in common: humanitarian concerns were at stake. All conflicts provided lethal consequences for civilians up to severe Genocide. However, causes and responses are various. The causes can roughly be separated into abuses committed by a criminal and authoritarian government against its people and those committed by rebel groups or outside forces in a destabilized country. In all trouble spots intervention by outside forces took place. Intervening powers were either single countries, international bodies like NATO or ECOWAS, coalition forces backed by the United Nations, coalition forces without backing, or the United Nations by itself.

¹⁶⁹ *Rome Statute of the International Criminal Court* (1998), UN Doc A/CONF.183/9.

¹⁷⁰ For example: SC Res 775, UN Doc S/RES/775 (1992); SC Res 841, UN Doc S/RES/841 (1993); SC Res 918, UN Doc S/RES/918 (1994); SC Res 1199, UN Doc S/RES/1199(1998); SC Res 688, UN Doc S/RES/688 (1991); SC Res 1497, UN Doc S/RES/1497 (2003).

¹⁷¹ *The Responsibility to Protect* (December 2001) Report of the International Commission of Intervention and State Sovereignty.

This questions in how far a duty to intervene arises. The Intervention in Cambodia was highly criticised, even humanitarian abuses like the ongoing Genocide were not recognised as justification. However, this changed in the later cases. The international community tolerated Tanzanians action in Uganda. Since Somalia the United Nations has determined in all cases a 'threat to international peace and security' or at least a 'threat to peace and security in the region'. However, how to respond remained unclear and non-uniform for several reasons. After the Somalia incidence the United Nations seemed to be afraid to get in the same kind of disaster and reacted hesitantly. Further on some regions are obviously of more interest for those states that have the power to intervene. Another striking feature is that authorisation of intervention is more dependant of how strong and stable the opposed government is, rather than on the kinds of abuses committed. In Haiti the atrocities were less severe than in Iraq in 1991, but Resolution 940 allowed the use of force explicitly while Resolution 688 did not.

The fear to infringe upon the old and strong doctrine of 'state sovereignty' is obvious. As already stated above, the members of the Security Council or the intervening parties were always cautious to point out the unique situation, although it is hard to not see similarities at all in the different cases. This will be addressed in more detail later on in this paper. However, right now it is important to point out that the United Nations are increasingly willing to address lethal human rights abuses and they even see a duty to do so.¹⁷² While doing this, the responsible bodies recognise individual human beings as protected entities under international law, at least when it comes to lethal consequences for the threatened people. The increasing number of Treaties and Conventions concerning human rights also support this view. When doing so, however, the same standards have to apply for everybody. It cannot be that people under one regime are less protected than under another. The establishment of the International Criminal Court also shows the willingness to

¹⁷² See: *Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, UN Doc S/24111 (1992); *Report of the Secretary General on the Work of the Organisation* (13 September 1991), UN Doc A/46/1 (1991).

punish certain acts. The punishable offence is defined by the act, rather than by who committed the act.

A duty can be separated into a legal and a moral one. At first only a possible moral duty is under scrutiny. As already pointed out the protection of human rights of individuals has become a new area of international law. The most recent step was the establishment of the International Criminal Court. State sovereignty is already not an absolute doctrine anymore. Although the reactions to human right abuses are various and the responsible bodies seem to be uncertain how to react, there are, at least, attempts to address severe atrocities. These were driven by the consolidation of human rights as part of protected international law. It can be determined, that nowadays every severe human rights abuse that is comparable to the cases above causes a reaction by the United Nations. On the other hand rights remain a toothless tiger if there is no possibility to enforce them. Again, the establishment of the International Criminal Court proves that if a punishment system for certain crimes exists it is only logical, that the prevention of such acts must be a goal as well.

So a moral duty to react to severe human rights abuses such as the ones punishable under the Rome Statute arises by recent practise of the international community and by the strengthening of human rights in international law in the past decades. That the United Nations also assumes such a moral duty exists can be derived from the comments of the Secretary General, who stated in 1991: "It is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity" and that it would be false, if "sovereignty, even in this days and age, includes the right of mass slaughter or of launching systematic campaigns of decimation or forced exodus of civilian populations in the name of controlling civil strife or insurrection."¹⁷³ A statement of the European Council to the United Nations in 1999 concerning the Kosovo also expresses that such a moral duty of the international community is on

¹⁷³ *Report of the Secretary General on the Work of the Organisation* (13 September 1991), UN Doc A/46/1 (1991).

the rise: "We...are under a moral obligation that indiscriminate behaviour and violence...are not repeated. ...An aggressor must know that he will be punished."¹⁷⁴

However, it became obvious that most interventions not carried out in consent, were disputed. Another disadvantage of this is a lack of coordination, which can even endanger humanitarian missions and therefore be counterproductive. The Iraq case of 1991 is such an example, where military involvement and humanitarian relief were not mutually agreed. Another dilemma so far seems the intervention by forces not from the region. The Somalia intervention became a disaster, inter alia, because of a lack of knowledge about the complicated situation within the country and the non-understanding of the warlord and tribes system. On the other hand the sole intervention by regional entities seemed to be disadvantageous as well. In Liberia, for example, ECOMOG troops were involved in human rights abuses.¹⁷⁵ Therefore the Security Council finally shifted to a more international solution rather than trusting in a regional one. Further on regional interventions were mostly driven by own interests rather than by honest humanitarian concerns or at least these concerns were just marginal release. A combination of regional and more international solutions seems to be desirable. The reference to humanitarian abuses by a regime was often used as additional argument for intervention, but the way it was carried out showed that it was not a main concern. This shows that humanitarian intervention is still flawed by a lack of rules concerning how to carry it out.

III HUMANITARIAN INTERVENTION UNDER THE UN CHARTER

Obviously the Security Council got increasingly involved in intervention on humanitarian grounds. It is worthwhile to take a closer look on how this might be legitimized under international agreements and the UN Charter. It is also necessary to scrutinize the Security Council's determination of humanitarian catastrophes and its different approaches to react to these.

¹⁷⁴ *Letter of the Permanent Representative of Germany to the United Nations*, UN Doc S/1999/342.

¹⁷⁵ See: Levi Woodward "Taylor's Liberia and UN Involvement" (2003) 19 N Y L Sch Human Rights 923, 931.

A Use of Force under the UN Charter

In general the use of force is prohibited under the UN Charter as stated in Article 2 (4).¹⁷⁶ Article 2 (7) protects state sovereignty in stating that the United Nations are not authorised to “intervene in matters which are essential within the jurisdiction of any state”. Within the United Nations Charter only Chapter VII allows to authorise the use of force in exemption to Article 2 (4). The responsible body is the Security Council. Article 42 allows the Security Council to take such means ‘necessary to maintain or restore international peace and security’ after non-forceful measures subject to Article 41 turned out to be insufficient. As an own UN Force under Chapter VII was never established, the Security Council delegates responsibility to member states, subject to Article 53. Anyway Article 53 states preference for settlement within a local framework.¹⁷⁷ A prime example is the support of ECOWAS involvement in Liberia.

According to Article 39, however, it is essential to determine a ‘threat to peace’ and practise during the last decades shows that use of force was only indisputably authorised, when addressed explicitly in using phrases like ‘by all necessary means’ or in giving detailed guidelines about structure, command, and competence of the force.¹⁷⁸ Although Article 39 does not refer to ‘international peace’ it is undisputed that this is a precondition.¹⁷⁹ This can also be deduced from Article 1 in general, referring to “international peace”, and Article 2 (7) in special, forbidding intervening in domestic affairs. Further on Article 24 (1) describes the function of the Security Council as to be responsible “for the maintenance of

¹⁷⁶ See detailed: Ingrid Detter *The Law of War* (2nd Ed, Cambridge University Press, Cambridge, 2000) 62 – 65.

¹⁷⁷ Article 53 (2) of the Charter: ‘The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council’

¹⁷⁸ See for example: SC Res 678, UN Doc S/RES/678 (1990).

¹⁷⁹ See for further reference: Tania Voon “Closing the Gab Between Legitimacy and Legality of Humanitarian Intervention: Lessons from East Timor and Kosovo” (2002) 7 *UCLA J Int’ L Foreign Aff* 31, 38.

international peace".¹⁸⁰ It is noticeable, that there is no explicit authorisation for intervention on humanitarian grounds mentioned. However, authorisation by the Security Council is the most legitimate and least disputed measure concerning the use of force and is therefore most desirable. The Interventions in Liberia, Congo, Rwanda, Haiti, and Somalia were possibly criticised, but their legality was not seriously questioned compared with the unauthorised interventions in Cambodia, Iraq, and Kosovo.

B Threat to International Peace and Security

The Intervention of Tanzania in Uganda was the last one where the Security Council did not assess a threat to international or regional peace and security. Although according to the Charter this determination is a precondition to authorise the use of force, not in every case was the use of force finally authorised. However, in every Resolution human rights violations were the main concern. In Resolution 1484 regarding the situation in the Congo, the Security Council expressed its concern at the ongoing "fighting as well as the gravity of the humanitarian situation".¹⁸¹ In the case of Liberia the Security Council stressed out its concern at "the conflict in Liberia and its effects on the humanitarian situation, including the tragic loss of countless innocent lives, in that country, and its destabilizing effect on the region".¹⁸² Nevertheless Resolution 1497 addressed also a threat for peace *within* Liberia, beside stability for sub-region West Africa.¹⁸³ In fact, these two cases are the only ones where the effects on the region were indeed grave. The whole Great Lakes region became destabilized and in Liberia the surrounding countries were strongly involved in aggravating the situation.

The slaughter in Rwanda had its effects on neighboring states as well, but the states were not involved actively like in the cases above. The Security Council strongly concentrated on the humanitarian crisis when eventually authorizing the

¹⁸⁰ UN Charter Article 24.

¹⁸¹ SC Res 1484, UN Doc S/RES/1484 (2003).

¹⁸² SC Res 1497, UN Doc S/RES/1497 (2003).

¹⁸³ SC Res 1497, UN Doc S/RES/1497 (2003).

use of force.¹⁸⁴ Also it emphasized the “unique case” demanding immediate action.¹⁸⁵ To point out the uniqueness shows, in a way, the struggle of the Security Council to bring the use of force in line with state sovereignty. Nevertheless the Security Council stressed out that the “magnitude of the humanitarian crisis in Rwanda constitutes a threat to international peace and security.”¹⁸⁶ So the humanitarian crisis *constituted* the threat and did not *cause* a threat or was caused by a threat.

In the case of Kosovo and Somalia the threat to international peace was minor. Nevertheless the Security Council determined in Resolution 775 concerning the situation in Somalia that it was a threat to international peace and security.¹⁸⁷ However, this threat was not specified within the Resolution, but the humanitarian crisis was addressed five times, including how to carry out humanitarian relief.¹⁸⁸ That the humanitarian catastrophe was the reason for intervention became obvious with Resolution 794: It demanded stepping in to maintain humanitarian deliverance. It also stated, that the “human tragedy” and the prevention of “humanitarian assistance” *constitutes* a “threat to international peace and security”.¹⁸⁹ Logically, the Security Council also stressed the “unique character of the situation” and its “extraordinary nature” and therefore called for an “exceptional response”.¹⁹⁰ Precedence shall be prevented under all circumstances. In the Resolution concerning the situation in Kosovo again the effect on surrounding countries by the wave of refugees was emphasized,¹⁹¹ although these effects were secondary regarding the threat to peace. Effected countries were, for example, Germany, France, Italy and Austria, all stable states, which were not threatened by the refugees. In Albania the Organization for Security and Co-Operation in Europe

¹⁸⁴ See: SC Res 929, UN Doc S/RES/929 (1994).

¹⁸⁵ SC Res 929, UN Doc S/RES/929 (1994).

¹⁸⁶ SC Res 929, UN Doc S/RES/929 (1994).

¹⁸⁷ SC Res 775, UN Doc S/RES/775 (1992).

¹⁸⁸ See: SC Res 775, UN Doc S/RES/775 (1992).

¹⁸⁹ SC Res 794, UN Doc S/RES/794 (1992).

¹⁹⁰ SC Res 794, UN Doc S/RES/794 (1992).

¹⁹¹ SC Res 1199, UN Doc S/RES/1199 (1998).

(OSCE) was involved since 1997,¹⁹² and in Bosnia and Herzegovina since 1995.¹⁹³ With regard to the content, the Resolution deals exclusively with the refugee disaster within the Kosovo.¹⁹⁴ The reference to the threat to international peace only seemed to be driven by the lack of other means than by a real fear for international peace.

Finally in the cases of Iraq and Haiti this threat did not exist at all. The Security Council emphasized in Resolution 688 the consequences for the region caused by the refugee disaster: "the repression...led to a massive flow of refugees towards and across international frontiers and to cross-border incursions which threaten international peace and security"¹⁹⁵ In fact did Iran and Turkey blocked their borders successfully. A massive flow of refugees *towards* international borders took place, but not so much *across* international borders. Therefore to revert to emphasising the threat to other countries seems more like avoiding addressing the true reason for drafting the Resolution: the humanitarian disaster.¹⁹⁶ In the case of Haiti the only threatened country in regard to refugees was the United States. It is unlikely that these refugees threatened the peace and freedom of the United States. Nevertheless the Security Council authorised the use of force.¹⁹⁷

A further conspicuousness is the fact that the Security Council did not authorise the use of force when addressing a 'threat to international peace and security' in every case, although other measures turned out to be insufficient.¹⁹⁸ It is easy to

¹⁹² See: [www.OSCE.org](http://www.osce.org/albania/overview/), <<http://www.osce.org/albania/overview/>>, (last accessed 10 November 2003).

¹⁹³ [www.OSCEBIH.org](http://www.oscebih.org), <<http://www.oscebih.org/mission/themission.asp>>, (last accessed 10 November 2003).

¹⁹⁴ SC Res 1199, UN Doc S/RES/1199 (1998).

¹⁹⁵ See: SC Res 688, UN Doc S/RES/687 (1991).

¹⁹⁶ Richard B Lillich "The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post Cold War World" (1995) 3 *Tulane J Int' & Comp L* 1, 6-7.

¹⁹⁷ SC Res 940, UN Doc S/RES/940 (1994).

¹⁹⁸ Compare for example Kosovo, Iraq, and Somalia, Congo.

recognize that this difference is not caused by the kind or severity of human rights abuses. Compared with the atrocities against Kurds in Iraq the violations of human rights in Haiti were minor, nevertheless only in the case of Haiti was the use of force explicitly authorised. It is obvious that the stronger and more stable a government is, the more reluctant the Security Council is to authorise the use of force.

C Conclusion

The Security Council shifted from rejecting intervention on humanitarian grounds through tacit approval towards explicit authorisation. The protection of basic human rights came into focus of the Council. However, the Council has only one means to take action. It has to determine a threat to international peace and security. However, the analysis above proved that the determination of a 'threat to international peace and security' was dependant on the humanitarian crisis within a state, rather than on the effect on surrounding countries. It is said that the Security Council has some flexibility in determining what constitutes a threat to international peace and security and that history taught that violation of human rights can cause instability of a region.¹⁹⁹ Certainly it is true that the Security Council has a wide discretionary power and that in some cases surely instability occurred as determined above. On the other hand these threats did not seem to be the cause for intervention. In fact the Council increasingly involved itself in internal conflicts.²⁰⁰ The Council risks breaching Article 2 (7) and therefore losing its authority. Further more it puts its ability to react to humanitarian crisis at risk: If the Security Council has to follow its self set guidelines it is not able to authorise intervention when there cannot be made even the slightest argument, that the situation has an international impact.

Further on the Security Council is obviously in a dilemma regarding state sovereignty. This led in the past to an unequal treatment of humanitarian disasters,

¹⁹⁹ Tania Voon "Closing the Gap Between Legitimacy and Legality of Humanitarian Intervention: Lessons from East Timor and Kosovo" (2002) 7 *UCLA J Int' L Foreign Aff* 31, 38.

²⁰⁰ See also: David M Malone "The Security Council in the Post-Cold War Era: A Study in the Creative Interpretation of the UN Charter" (2003) 35 *NYUJ Int' L & Pol* 487, 490 – 492.

disadvantageous for maltreated people in a strong and stable country. Nevertheless it seemed in recent decades willing to limit this doctrine in favour of human rights. Within the whole United Nations this willingness increases. In 1991 the Secretary General commented on that:²⁰¹

“It is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity”

The Security Council followed that thread in 1992 when noting that not only military conflicts between states but also instability in humanitarian fields constitute a threat to international peace and security²⁰² and in a Report from the Secretary General in 1992 the threat by refugees and displaced persons was pointed out.²⁰³ Recent developments prove that such limitation of state sovereignty is already coming into force under international law. The Secretary General stated in 1999: “State sovereignty, in its most basic sense, is being redefined. ...States are now widely understood to be instruments at the service of their people, and not vice versa.”²⁰⁴

Even if the Security Council explicitly authorised the use of force in the past, some disadvantages and shortcomings occurred. In the case of Rwanda the reaction was far too hesitant. Intervention in Somalia took its time as well and was eventually characterised by lack of planning, chaotic enforcement, and lack of understanding of the regional situation. Also of negative impact was the growing difference between the United Nations and the leading power of the Somalia intervention, the United States.²⁰⁵ Unclear distribution of authority led to the development of different aims, counterproductive to carrying out the main targets of

²⁰¹ *Report of the Secretary General on the Work of the Organisation* (13 September 1991), UN Doc A/46/1 (1991).

²⁰² SCOR 47th Session, 3046 meeting, UN Doc S/PV.3046 (1992).

²⁰³ *Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, UN Doc S/24111 (1992).

²⁰⁴ Kofi Annan “Two Concepts of Sovereignty” (18 September 1999) *The Economist* United States.

²⁰⁵ See in detail: Chester A Crocker “The Lessons of Somalia; Not Everything Went Wrong” (May / June 1995) *Foreign Aff*, Comments 1.

the operation.²⁰⁶ This was similar in the Iraq case in 1991 although the conflict between the intervening parties was more obvious, as the Security Council even did not authorise the use of force.

Even regarding Haiti, several months elapsed until intervention was authorised. Several ineffective embargos were imposed and false promises made by the militia rulers.²⁰⁷ The UN Charters demands in Article 40, 41 to take other measures than the use of force beforehand. This is definitely not to be criticised as the use of force is, and should be, under all circumstances the absolute. On the other hand lives are at stake, therefore a more comprehensive framework, which would enable faster decision-making, is necessary. Another reason for the slowness of reaction is the lack of the United Nations own military means. The system depends on the willingness of states to send troops and to provide a military command staff.²⁰⁸ This proves the shortcomings of a system originally not created for humanitarian intervention. The lack of such a system also eventually leads to a neglect of preventive measures in the preliminary stages of a rising crisis. The scrutinized cases all show this neglect and are characterised by inconsistent reaction in the early stages.²⁰⁹ The efforts often appear like a patchwork: general Security Council Resolutions; involvement of regional organisations, expressly supported by the United Nations or tacitly tolerated; establishment of observer missions; establishment of special missions.

For sure authorisation by the Security Council is the most legitimate and desirable one. Meanwhile we have to face the fact that state sovereignty is no more

²⁰⁶ See: Chester A Crocker "The Lessons of Somalia; Not Everything Went Wrong" (May / June 1995) *Foreign Aff*, Comments 1.

²⁰⁷ D J Lecce "International Law Regarding Pro-Democratic Intervention: A Study of the Dominican Republic and Haiti" (1998) 45 *Naval L Rev* 247, 255.

²⁰⁸ See: Michael Reisman "Peacemaking" (1993) 18 *Yale J Int' L* 415, 422.

²⁰⁹ See: Kofi Annan "Two Concepts of Sovereignty" (18 September 1999) *The Economist* United States.

an absolute doctrine.²¹⁰ Human rights increasingly gain importance. They even gave reason for intervention. Nevertheless the Security Council has to address a threat to international peace and security, rather than the abuses within the country. This seemed to be driven more by the necessity to fall back to this tool, because no other exists, then by the fit, and this creates the already mentioned disadvantages.

IV HUMANITARIAN INTERVENTION UNDER CUSTOMARY LAW

Definite justification for humanitarian intervention can be gained by Security Council authorisation. However, in the last decades interventions took place without or at least unclear authorisation. Obviously there also is no general principle of humanitarian intervention under international law, as proved by the controversies after unauthorised interventions. This questions how far humanitarian intervention might be already legal under customary international law. Especially after the Kosovo intervention by NATO a widespread discussion about that issue started.

A State of Necessity

One link for humanitarian intervention could be the rules of 'state of necessity' under the 'Draft articles on the Responsibility of States for Internationally Wrongful Acts' adopted by the International Law Commission (ILC) at its fifty-third session 2001.²¹¹ State of necessity is a defence to otherwise injurious and illegal acts.²¹² Article 25 states:²¹³

Necessity may not be invoked by a State...unless the act: (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) Does not seriously impair an essential interest of a State...or the international community as a whole."

²¹⁰ See also: Thomas Frank "The Emerging Right to Democratic Governance" (1992) 86 Am J Int' L 46, 85.

²¹¹ UN Doc A/CN.4/L.602/Rev.1 (26 July 2001).

²¹² George E Walker "Principles for Collective Humanitarian Intervention to Succor other Countries' Imperiled Indigenous Nationals" (2002) 18 A U Int' L Rev 35, 49.

²¹³ UN Doc A/CN.4/L.602/Rev.1 (26 July 2001).

Some considered this to legitimize intervention on an international level.²¹⁴ Essential interests must be at stake and there must be a grave and imminent peril, which, however, does not mean, that the very existence of a state need be threatened.²¹⁵ According to the ILC it is not even necessary that interests of a certain state be at stake. It is sufficient if essential interest of the international community as a whole a threatened.²¹⁶ However, it is not generally acknowledged, that a doctrine of necessity exists under international law.²¹⁷ Nevertheless, recent decisions of the International Court of Justice (ICJ) acknowledge the existence of 'state of necessity' under international law and refer to commentaries of the ILC.²¹⁸ But even if we recognize a doctrine of necessity we face some problems: On the one hand we need a wrongful act under Article 1, which can be a breach of an obligation, regarding to Article 12.²¹⁹ These can be seen in breaches of human rights treaties. The ILC states: "Thus State Responsibility extends, for example, to human rights violations".²²⁰

Another question however is whether breaches can be answered by use of force. The ILC states:²²¹

²¹⁴ George E Walker "Principles for Collective Humanitarian Intervention to Succor other Countries' Imperiled Indigenous Nationals" (2002) 18 A U Int' L Rev 35, 160.

²¹⁵ See detailed: Roman Boed "State of Necessity as a Justification for Internationally Wrongful Conduct" (2000) 3 Yale H R & Dev L J 1, 15 – 20.

²¹⁶ "Commentaries on the draft articles on Responsibility of States for internationally wrongful acts" adopted by the International Law Commission at its 53d session, 195, UN Doc A/56/10.

²¹⁷ Ian Brownlie *International Law and the Use of Force by States* (Oxford University Press, Oxford, 1963) 247.

²¹⁸ *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia)* ICJ Rep 1997, 7, 39 – 44.

²¹⁹ UN Doc A/CN.4/L.602/Rev.1 (26 July 2001).

²²⁰ "Commentaries on the draft articles on Responsibility of States for internationally wrongful acts" adopted by the International Law Commission at its 53d session, 214, UN Doc A/56/10.

²²¹ "Commentaries on the draft articles on Responsibility of States for internationally wrongful acts" adopted by the International Law Commission at its 53d session, 204, UN Doc A/56/10.

This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of Military necessity. It is true that in a few cases, the plea of necessity has been invoked to excuse military action abroad, in particular in the context of claims to humanitarian intervention. The question whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law is not covered by article 25.

To bring into play the 'Draft articles on the Responsibility of States' to justify humanitarian intervention means also to consider the comments of the ILC concerning the relevant articles. The ILC stated clearly, that humanitarian intervention is not within the scope of Article 25. To conclude, that a custom of state of necessity based on the draft articles immanently includes justification for the use of force to bring human rights abuses to an end is therefore contradictory.

Interference could be than just based on 'emergency help' for the effected people.²²² As this is not enshrined in the UN Charter, it has to be derived from an analogous application of Article 51.²²³ This however is against the purpose of Article 51 to provide a narrow and strict framework for the legality of self-defence. Therefore a strict interpretation of Article 51 does not allow such a conclusion.²²⁴ Further argument against such an analogous application can be found in the roots of Article 51: It codified the already existing right of self-defence under customary international law. 'Emergency help' for individuals however has no roots in customary law. To derive it from Article 51 would contradict the aim of this Article to narrow down the legality of use of force instead of widening it.

²²² Peter Hilpold "Humanitarian Intervention: Is There a Need For a Legal Reappraisal?" (2001) 12 *European J Int' L* 437, 445.

²²³ Peter Hilpold "Humanitarian Intervention: Is There a Need For a Legal Reappraisal?" (2001) 12 *European J Int' L* 437, 445.

²²⁴ See: Peter Hilpold "Humanitarian Intervention: Is There a Need For a Legal Reappraisal?" (2001) 12 *European J Int' L* 437, 445

Another possible root can be found in domestic law, where such a right is common.²²⁵ But this faces counterarguments as well. Firstly, such a right does not exist in every domestic legal system,²²⁶ therefore it cannot be concluded that such a right is a general principle. Secondly it is problematic to transfer domestic law into international law. Both have different origins and purposes. International law originally dealt solely with the relationship between states.²²⁷ The relevant part of domestic law in contrast deals with the relationship between individuals within the domestic jurisdiction. As the recognition of rights of individuals under international law is only recently on the rise, it is improper to transfer domestic law, grown over decades and centuries, without further justification one to one into international law. Some argue, however, that humanitarian intervention dates back to the 19th century.²²⁸ Admittedly interventions already took place in pre-Charter times. Nevertheless there is strong evidence that these interventions were not solely carried out to protect foreign human beings. Instead strategic-political motivations and the rescue of nationals abroad were driving factors.²²⁹ Lastly, domestic law of emergency help is mostly not only a right; it is often also a duty.²³⁰ As there are lives at stake, no state can be forced to sacrifice human lives without expressing its explicit willingness to do so.

B State Practice

Under international law a right or duty can emerge from state practise over a certain time, if widely recognised and tolerated.²³¹ Such a practise must be carried

²²⁵ George E Walker "Principles for Collective Humanitarian Intervention to Succor other Countries' Imperiled Indigenous Nationals" (2002) 18 A U Int' L Rev 35, 53.

²²⁶ George E Walker "Principles for Collective Humanitarian Intervention to Succor other Countries' Imperiled Indigenous Nationals" (2002) 18 A U Int' L Rev 35, 53.

²²⁷ See in general: Antonio Cassese *International Law* (Oxford University Press, Oxford, 2001).

²²⁸ See: Thomas E Behuniak "The Law of Unilateral Intervention by Armed Force: A Legal Survey" (1978) 79 Mil L Rev 157, 159 – 163.

²²⁹ Yogesh K Tyagi "The Concept of Humanitarian Intervention Revisited" (1995) 16 Mich J Int' L 883, 885.

²³⁰ See for example: Paragraph 323a StGB (German Criminal Code).

²³¹ Ralph Zacklin "The United Nations and Humanitarian Intervention" (2001) 41 Va J Int' L 923, 935.

out in a constant manner, the acting states have to act in *opinio juris*, and other states have to refrain from protest.²³² The true character of interventions in pre-Charter times is, as already stated, in question. Anyhow, when the UN Charter came into effect Article 2 (4) and Article 51 did not allow conclusions to be drawn about the legality of unilateral humanitarian intervention due to former state practise. One argument for legality of humanitarian intervention is the reference to the existence of a doctrine of self-defence under customary law.²³³ Beside the fact that even its existence is in dispute,²³⁴ this argument has a lack of persuasive power. Self-defence is already enshrined in Article 51 of UN Charter and an inherent right of self-defence can be derived from that.²³⁵ Humanitarian Intervention on the other hand is not mentioned in the Charter, therefore it is not sufficient to refer to the right of self-defence because the roots and derivations differ.

Taking the very principle of 'state practise' as a basis, it is necessary to scrutinize post-Charter cases of unauthorised intervention. The intervention in Cambodia met strong objections and the Vietnamese government did not try to justify the intervention on humanitarian grounds.²³⁶ Tanzanian intervention in Uganda in contrast was tacitly approved and President Nyerere claimed it to be based in part on humanitarian concerns.²³⁷ The intervention in Iraq in 1991 as well

²³² Malcolm N Shaw *International Law* (4th Ed, Cambridge University Press, Cambridge, 1997) 64 – 73.

²³³ See more detailed: Wil D Verwey "Humanitarian Intervention" in Antonio Cassese (Ed) *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff Publishers, Dordrecht, 1986) 67 – 75.

²³⁴ Compare the diverse opinions regarding use of force of Bowett and Brownlie: D W Bowett *Self-Defence in International Law* (Manchester University Press, Manchester, 1958); Ian Brownlie *International Law and the Use of Force by States* (Oxford University Press, Oxford, 1963).

²³⁵ Derek W Bowett "The Use of Force for the Protection of Nationals Abroad" in Antonio Cassese (Ed) *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff Publishers, Dordrecht, 1986) 49.

²³⁶ Compare Chapter II A 1.

²³⁷ Compare Chapter II A 2.

as the one in Kosovo, evoked ambivalent reactions.²³⁸ Approval balanced objection, but a general and absolute recognition by other states can till now not be concluded. Further more the intervening nations viewed their action as just, but they also emphasised the uniqueness of the cases and the unwillingness to set precedent. In 1999 United States Secretary of States Madeleine Albright stated regarding the Kosovo intervention as model for future incidents: "I would caution against such sweeping conclusions."²³⁹ Humanitarian Intervention as norm under customary law faces therefore mainly three problems: First, the chain of comparable state practise is quite short to extract an already established custom. Second, recent interventions met objections by key players like Russia and China. Finally, even the acting states express their will not to set a standard. Although the action provides background to contradict that statement, it at least weakens *opinio juris*.

Antonio D'Amato takes the point of view that humanitarian intervention does not even contradict the principles of Article 2 (4), as long as it is not directed against the territorial integrity or the political independence of a state or it is not otherwise inconsistent with the purpose of the Charter.²⁴⁰ He refers to the Preamble, which points out the importance of human rights to stress that humanitarian intervention is not inconsistent with the Charter.²⁴¹ This argument might be in so far a bit simplistic, that 'state sovereignty' is also one of the basic principles of the Charter like already mentioned above. The thereupon-derived principle of non-intervention has gained *jus cogens* character under international law. This was emphasised in two decisions of the ICJ, the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* and the *Corfu Channel Case*.²⁴² Furthermore the General Assembly declared in 1965: "[N]o state has the right to intervent directly or

²³⁸ Compare Chapter II A 6 and 7.

²³⁹ Madeleine Albright, United States Secretary of States, "Remarks at the Council on Foreign Relations", (Council on Foreign Relations, New York, 28 June 1999), can be found at: <http://www.foreignpolicy2000.org/transcripts/t_albright.html> (last accessed 23 November 2003).

²⁴⁰ Anthony D'Amato "International Law and Kosovo" (1999) 33 UN L Rep 112, 113.

²⁴¹ Anthony D'Amato "International Law and Kosovo" (1999) 33 UN L Rep 112, 113

²⁴² *Case Concerning Military and Paramilitary Activities in and against Nicaragua* ICJ Rep 1986, 14, 205; *The Corfu Channel Case* 1994 ICJ Rep 4, 35.

indirectly for any reason whatsoever in the internal or external affairs of other states."²⁴³ Afterwards several Resolutions referred to this Declaration, which was also reaffirmed in 1981.²⁴⁴ The statement 'for any reason whatsoever' makes clear how strong the non-intervention principle is enshrined in international law. So even if it is recognised, that humanitarian intervention by itself is not inconsistent with the Charter, it nevertheless comes into serious conflict with another fundamental principle of international law and the United Nations Charter. How this should be balanced seems still to be in question.

In the light of Kosovo another approach was taken: Under the precondition, that the cause to intervene was just, the United Nations failed to take appropriate action, although it determined a 'threat to international peace and security', unilateral intervention should be permissible.²⁴⁵ Antonio Cassese sees an emerging customary law. Nevertheless it cannot be approved that such a right is already in existence, as Kosovo is the only precedent. In the case of Iraq in 1991 the inaction was caused more by a different approach the United Nations wanted to follow than by an inability to react.²⁴⁶

C Conclusion

Some scholars regard humanitarian intervention as legal under international customary law, while others have a contrary opinion. This reflects the struggle humanitarian intervention has to face. On the one hand growing recognition of human rights, on the other hand the still strong doctrine of state sovereignty and the principle of non-intervention. The rules of necessity seem not to fit for justifying the use of force, while state practice is till now not sufficient enough to provide a profound legal basis for intervention. Anyway has such a state practise the

²⁴³ *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of other States* (1965), UN Doc GA/RES/2131(XX).

²⁴⁴ See: A/RES/36/103 (1981).

²⁴⁵ Antonio Cassese "A Follow Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*" (1999) *European J Int' L* 10, 791, 794.

²⁴⁶ Compare Chapter II A 7.

disadvantages, that it is blurred and that it is open to misuse. This would endanger the goal to keep the legality of the use of force narrow, tight, and clear defined. Further on to leave humanitarian intervention in the hands of unilateral or regional collective action without an international responsible body would mean to weaken coordination of preventive and forceful measures. However, it is not deniable, that a custom starts to take shape. The condemnation of unauthorised intervention decreased since intervention in Cambodia. The need to intervene was acknowledged several times in recent years. It became common to address severe human rights abuses in the Security Council and to determine a 'threat to international peace and security'. Humanitarian intervention as legal means under customary international law is on the rise.

V *LEGAL DUTY TO INTERVENE*

Minimum precondition for a legal duty is the legality of the measures. However, the willingness to address those situations within Resolutions of the Security Council became stronger, but there is still disagreement about which measures to take. Eventually this was followed by action by single states or other international bodies without consent of the international community. These interventions were all highly disputed. Although a couple of interventions took place in the past it seems impossible to bring out enough common grounds for intervention. As a *duty* to do something is always based on an unquestioned and clear legitimacy to do something, the legitimacy has to be well defined. However, there is no clear standard of what is legitimate as we saw in the different reaction of states towards humanitarian intervention. States cannot be forced to threaten their troops on the basis of such ambiguity. Therefore we can rule out the existence of a legal duty to intervene. The need and a possible framework of such a duty will be addressed below.

VI *CONCLUSION*

With the increasing recognition of human rights under international law in the last decades a need to address severe human rights abuses arose. As a last resort forceful intervention became common, although in all cases the unique character was pointed out. Therefore how to react remains unclear. Strongest legitimisation is

provided by Security Council authorisation, but decision-making within the Security Council is still inconsistent and aggravated by the struggle with the doctrine of state sovereignty. Nevertheless the general will to sanction such violations and the past interventions already carried out support the rising of a moral duty to intervene.

A legal right, however, is hard to see till now. Nevertheless it is a desirable aim as it enables the international community to put pressure on criminal regimes or groups. A way to circumvent the inconsistency of Security Council decisions would be to recognize humanitarian intervention under customary international law, but this is disadvantageous, too. The increasing use of force in recent times jeopardises the strict and narrow rules of use of force, implemented with the United Nations Charter. To recognize use of force, that is carried out by different states under different excuses may lead unintentionally to new customary international law by state practice. Also, involvement by single states or regional organisations was often driven by other motivations besides the desire to eliminate human rights abuses. Humanitarian intervention as means and excuse to achieve such political goals undermines the moral authority of such intervention, which is the basis for the legal authority. Further more the existence and allowance of such a resource should not compromise attempts to find non-violent solutions. To leave humanitarian intervention under the rule of customary international law would support this. Therefore it is necessary to create a framework under which that kind of intervention can be carried out.

For a legitimisation as strong as possible this should happen under the umbrella of the United Nations. However, Security Council authorisation showed in the past serious shortcomings: The slowness and tenaciousness of implementing such measures, the lack of coordination with preventive measures, and often the inability to find adequate solutions. Another problem is the unsuitableness: The Security Council is legitimised to authorise the use of force under the condition of danger for international peace and security. As already pointed out above, the Security Council had to fall back upon such a determination even if the international peace was not really endangered. This also undermines the strict exemptions of the prohibition of the use of force. If even the Security Council tends towards a broad interpretation of

the rules of use of force it is hard to argue against a general erosion of these rules, which already takes place nowadays.

This supports the necessity to create a tool, which is faster, more effective and more fitted. Humanitarian intervention should be addressed under an explicit legal terminology. To leave that with the Security Council ignores another weakness though: the composition of the Security Council supports, on the one hand, the slowness and on the other it deals with the problem to reach a decision about highly regional issues. Therefore it would be helpful to create a new body, just in existence to react to severe violations of human rights and finally as last resort to legalise humanitarian intervention. It should consist of just a few members to be quick in decision-making, in rotating composition, but beneath every member should exist a regional body, which is familiar with regional characteristics. This enshrined interaction of regional and supra-regional involvement would minimize both disadvantages: predomination of self-interest driven intervention, and lack of knowledge or ignorance of regional distinctions. To establish a military force under the umbrella of the United Nations would be desirable, although the main problem might be the lack of political will which can only be overcome politically.²⁴⁷ However, a command staff and an allocation of troops by different countries in advance would help the system to work effectively.

However, forceful humanitarian intervention shall be the only means of absolute last resort. It has already been mentioned, that some humanitarian catastrophes would have been prevented by more effective preventive measures. Such preventive measures and an effective early warning system must therefore be included in an international framework of humanitarian intervention and are an essential precondition for the use of force. Further on are the capabilities of the use of force limited. It can only stop the acute abuse, not the causes or roots. Other, non-forceful, measures have to accompany intervention. To unite all this under one umbrella and authority is necessary to eliminate further inconsistency and

²⁴⁷ See: Michael Reisman "Peacemaking" (1993) 18 Yale J Int' L 415, 422.

ineffectiveness. It also ensures to balance fast and effective reaction with the doctrine to manage the situation preferably without the use of force.

This questions which abuses of human rights should be addressed and should justify the use of force. As forceful intervention is a means of last resort and is the severest possible interference in states affairs, the terms of its application should be strict and narrow. The most intense form of human rights violation is Genocide. Even if a state is no party to the Genocide Convention it is now considered to be part of customary international law and "has attained the status of jus cogens".²⁴⁸ It is obvious that a predomination of state sovereignty over human rights is unjustified, if it bears extensive lethal consequences. According to the Rome Statute of the International Criminal Court genocide is also within the jurisdiction of the Court, which supports the view that it should be addressed in an international framework.²⁴⁹ The *finalized draft text of the Elements of Crimes of the Preparatory Commission for the International Court* provides useful, profound and therefore adaptable definitions.²⁵⁰ Severe crimes against humanity should also legitimise intervention. These are also within the jurisdiction of the International Criminal Court.²⁵¹ Reference to the *finalized draft text of the Elements of Crimes* can also be made.²⁵²

The basic legal framework should be set in the UN Charter to highlight the exceptional character of humanitarian intervention concerning the general prohibition of the use of force under the Charter. Legally this would balance the need for intervention on humanitarian grounds to satisfy the increasing recognition of human rights under international law and the undesirable widening of the rules of

²⁴⁸ *Preliminary Report of the Independent Commission of Experts established in accordance with Security Council resolution 935* (4 October 1994), UN Doc S/1994/1125.

²⁴⁹ Article 6, *Rome Statute of the International Criminal Court* (1998), UN Doc A/CONF.183/9.

²⁵⁰ *Report of the Preparatory Commission for the International Court – Addendum: Part II – finalized draft text of the Elements of Crimes*, UN Doc PCNICC/200/1/Add.2 (2000).

²⁵¹ See: Article 7, *Rome Statute of the International Criminal Court* (1998), UN Doc A/CONF.183/9.

²⁵² *Report of the Preparatory Commission for the International Court – Addendum: Part II – finalized draft text of the Elements of Crimes*, UN Doc PCNICC/200/1/Add.2 (2000).

use of force. Politically, however, there are admittedly strong obstacles. Nevertheless it is worthwhile to work on such a framework instead of leaving it to a growing customary law of humanitarian intervention. Such a custom can hardly gain the same undisputed authority. It has barely the same accuracy and precision of intensively negotiated and codified legislation. Further more it supports the erosion of the strict rules of the use of force. It is obvious that such a custom is on its way, but it is up to now insufficient enough to justify forceful intervention on its own. Therefore customary international law of humanitarian intervention has some obstacles as well and needs also some time to develop into a sufficient enough legitimisation to intervene.

This questions whether humanitarian intervention is prohibited without explicit authorisation by the Security Council until such a legal framework is in force. This would mean, that human rights would have to take second place to state sovereignty till then. To circumvent this problem the determination of a 'threat to international peace and security' in context with severe human rights abuses like genocide and crimes against humanity by the Security Council should be authorisation enough, if other preliminary measures failed. Although the 'exceptional character' of the situation was emphasized in nearly every case there is some commonness: When the Security Council determined such a threat, some states considered that as justification enough to intervene, like in Kosovo or Iraq. State practise consolidates such a custom. This point of view has two advantages: Firstly suffering of humans imposed by a criminal regime cannot step back behind the protective shield of state sovereignty. Secondly, if the Security Council is aware of such consequences when calling a situation a 'threat to international peace and security', it will not use this phrase in a rash and over-extensive manner, which would otherwise eventually undermine the credibility of the appliance of Chapter VII by the Security Council.

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