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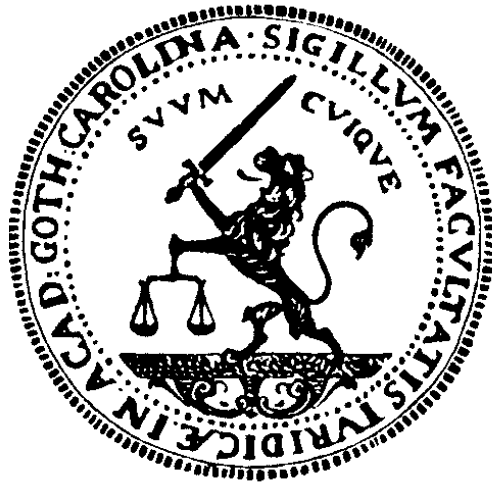

The concept of Humanitarian Intervention at the beginning of the 21st century

The History, Tradition, Evolution and an Outlook

A graduate thesis in partial fulfilment of the masters degree in Public International Law

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„Armed intervention for humanitarian purposes may be necessary at times, [but] it is not the right answer and will never be more than the lesser of two evils in extreme circumstances.“[1]

[1] Yves Sandoz, Director for Principles, Law and Relations with the Movement, ICRC; Brussels 25 January 1994

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A) Foreword

It is not long ago or still on the way, that governmental and non-governmental officials probing the killing-fields of Bosnia-Herzegovina, Rwanda and Kosovo are resurrecting memories that, in the least years, have shocked Europe and the whole world conscience as has nothing since the Holocaust: tens and hundreds of thousands of desperate men, women and children fleeing from their homes and across borders to escape „ethnic cleansing“ and other premeditated abuse; huddled refugees and déplacés crammed into squalor and further victimised by starvation and malnutrition, not unusually owing to deliberate policy; emaciated young men, some old, clutching barbed wire prison fences, eyeballs sunken, ribs protruding, the victims often of torture and comparable atrocities; gaunt, terror-struck women haunted by systematic rapes and assaults, concerned pornography, and their forced witness to the sadistic murders of their children, families, and friends; bloodied and dismembered bodies, some the consequence of indiscriminate warfare others of savage massacres, scattered on city streets and country hillsides, or heaped one upon the other in open charnel pits swarming with flies; and more.

The enormity of the horror is only partially revealed by the statistics: in Bosnia-Herzegovina more than 200.000 killed and an estimated 2.5 million driven from their homes since the outbreak of hostilities in 1990, the vast majority of them of Muslim faith; in Rwanda, between 500.000 and one million Tutsis exterminated during three months of fighting and 3.5 million external refugees and internal displaced persons since fighting began in 1994, an astounding three-fourth of the country's total population; in Kosovo the amount of killings is still not known and the world remembers still the wave of refugees during the air-campaign against Yugoslavia. In towns and villages with unfamiliar names, nearly every building damaged or destroyed, little or no running water, little or no electricity, little or no government infrastructure. And always the threat that the same might happen again[2].

There was a great hope after the end of the cold war and the overthrowing of the communist regimes to enter in a time of peace and freedom, with understanding, wide spreading development and collective efforts to solve the big problems of mankind. Especially with regard to the Iraqi invasion in Kuwait and the reaction of

nearly the whole state community it seemed that the world may under the UN-Charter create and enforce peace all over. However, after a few weeks or months of happiness and enthusiastic hopes another „new world“ started to show up.

There are a lot of examples showing another, unexpected future and the problems for the states, the International Organisations and the people of the world itself to deal with them; Somalia, Iraq, West-Africa, Bosnian-Herzegovina, Indonesia, Sri Lanka, Congo, Angola and now the region around the Kosovo and the events after the voting for independence in East-Timor are only a very few but widely well-known examples.

Besides, the effectiveness of the UN-system, on which a lot of hopes are put on, loses gradually its capability, i.e. not only because of growing disagreements between the vetoing powers, but also because of failures and the loss of confidence in the last ten years.

In consequence, an old and in the time after the UN-Charter heavily criticised but still practised or at least claimed concept, starts its revival; the

“HUMANITARIAN INTERVENTION“.

In my thesis I will thus try to give an overview of the history of this concept, its practice and evolution, a definition to deal with in a legal debate, an examination of the last developments and an outlook over the future possible interpretations of this concept.

B) General legal aspects of Humanitarian Intervention in the past

To understand today’s problems dealing with the so-called “Humanitarian Intervention“, it is necessary to look back in the history and outline briefly the evolution of the principles of war (or in modern terms: the threat or use of force[3]).

I. Humanitarian Intervention before WW I

Although the term “Humanitarian Intervention” is rather new, debates on “a right to intervene” have a long and distinguished history. However, a complete historical

[2] Murphy, Editor´s Foreword

[3] according to the Geneva Conventions and the Additional Protocols

overview would not be our concern and I will thus only focus on the main issues of the right to intervene[4].

As long as mankind, society and war exist, the following question arises: "In which circumstances is war or the use of force justified and which limitations or criteria are to be recognised?" Although there are many old, better ancient, and - here not mentioned - ideas and point of views, I want to draw a brief line and start with a short review of this evolution beginning at the end of the Roman empire.

Aurelius Augustinus (354-430) was one of the first persons who tried to find an answer to the question in which circumstances war might be justified. He established three criteria: War is a legitimate mean (a) if the reason for the war is to compensate injustice (which the opponent is not willing to take back or to compensate), (b) if a legitimate authority conducts the war and (c) if all this happens with the right intention.

The next fundamental step was taken by *Thomas of Aquin* (1224-1274). He established a modified list of criteria: (a) the legitimate power of the leader (princeps) who starts the war, (b) the justice reason (causa iusta) and (c) the right intention.

Francisco de Vitoria (1483-1546) added to these criteria the modern role of the state as the institution to grant peace and security for the inhabitants (pax et securitas). This lead to the new focus on a rational system in the discussion of a just war. In such a system, the principle of the law applicable in an armed conflict ("jus in bello") and the principle of the law dealing with the question when and how to go to war ("jus ad bellum") are separated and the question of war is pressed in a scheme with a rational (or maybe from today's point of view irrational) weighing up aspects like usefulness and efficiency.[5] But it was an enormous step forward and the separation between the jus ad bellum and the jus in bello is still important in the discussions and in today's applicable law.

With the Peace of Westphalia in 1648 and the ending of the long religious wars in Europe, the "international state system" finally turned into the so-called "nation state"-system. At that time the principle of sovereignty was being manifested in favour of an absolute theory of absolute power of a monarch. But this was not only meant for the internal affairs of a state and over its people. Furthermore, Monarchs

[4] for more details see: Hans-Peter Gasser, Einführung in das humanitäre Völkerrecht, Stuttgart 1995 or Jean Pictet, Development and principles of International Humanitarian Law, Geneva 1985

were well within their rights to wage war on behalf of their state. *Hugo Grotius*, as the main theorist of international relations at this time wrote the following, although he was more a "non-interventionist" than a "interventionist":

"The fact must also be recognised that kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any person whatsoever. For liberty to serve the interests with individuals, now after the organisation of states and courts of law is in the hands of the highest authorities, not, properly speaking, in so far as they rule over others, but in so far as they are themselves subject to no one. For subjection has taken this right away from others".[6]

This was the starting point of a long practice of wars and interventions all over the world by the absolute powers of Europe. But it also turned into a kind of respect and non-interference regarding the pure internal affairs of the states.

The manifestation of a principle of non-intervention acquired general recognition with the writings of *Christian Wolff* and *Emmerich de Vattel* in the 18th century[7]. Traditional international law constituted a serious obstacle to Humanitarian Intervention, for the doctrine of state sovereignty and non-intervention in the internal affairs of other states had deep roots in customary international practice. However, the international legal order of the 19th century was characterised by certain exceptions to the rule, and some theorists argued that customary international law recognised two grounds on which states could intervene in another state. First, a state could intervene "to protect the lives and property and material interests of its nationals abroad" and second, a state could "intervene in situations where another state mistreated its own citizens in a way falling so far bellow the general standards recognised by civilised peoples as to shock the conscience of mankind". In the course of the 19th century, the great powers[8] threatened or carried out interventions in a number of cases on the stated grounds of protecting nationals or Christians facing massacre or brutal repression in Turkey. Many of these cases concerned the conduct of the Ottoman Turks, in Greece (1827-30), Crete (1866), Bosnia-Herzegovina and Bulgaria (1876). In 1860, after the massacre of thousands of Christians in Syria,

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[5] Schmitz, Humanitäre Intervention – ethische Aspekte eines Problemfeldes, FIZBw BD 9581, 49f

[6] Grotius, De Jure Belli Ac Pacis Libri Tres; bk.1, chapter 3, p.8.11

[7] J.H. Drake, Carnegie Classics of International Law, NY 1964; C.G.Fenwick, Carnegie Classics of International Law, Washington DC 1916

[8] England, France, Germany, Russia, Austria-Hungary

France was expressly authorised by a protocol between the great powers to intervene and halt the bloodshed and 6000 French troops landed in Syria for this purpose[9].

However, all these cases were mainly rescue missions of foreign nationals, or based on self-interest, or mere diplomatic protest. They failed to satisfy the basic principles of Humanitarian Interventions which involved e.g. severe human rights violations, exhaustion of all other remedies, disinterest, proportionality and co-operation with relevant international organisations. A study of the so-called Humanitarian Interventions in the period before the first World War (WW I) reveals that most those Interventions occurred in situations where the humanitarian motive was outweighed by a desire to protect property or to enforce socio-political and economic instruments of the status quo[10].

Despite the state practice of the 19th century, it is debatable whether Humanitarian Intervention was clearly established under customary international law. Many scholars opposed to this doctrine, mostly because they feared the political and practical abuse, rather than they took the very principle into considerations.

II. ***Between the World Wars***

Beginning of the 20th century, there was still a strong support for the principle of non-intervention. The League of Nations did not provide a right to intervene for the Member States. Among the conventions during the inter-war period, the 1928 Convention on the "Duties and Rights in the Event of Civil Strife" prohibited intervention even by nationals of one state in the affairs of another. Similarly, the 1933 Montevideo Convention on the "Rights and Duties of States" maintained that no state had the right to intervene in the internal or external affairs of any other.[11]

However Italy and Japan did intervene in Manchuria (Japan in 1931) and Ethiopia (Italy in 1935), based on humanitarian aspects. Japan explain that:

"It was Japan's clear duty to render her steps of self-defence as little disturbing as possible to the peaceable inhabitants of the region. It would have been a breach of that duty to have left the population a prey to anarchy – deprived of all the apparatus of civilised life. Therefore, the Japanese military have, at considerable sacrifice, expended much time and energy in securing the safety of persons and property in the districts where the native authorities had become ineffective. This is a responsibility

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[9] C. Ero and S. Long; International Peacekeeping Vol.2 1995, 142

[10] J.-P. Fonteyne, in R. Lillich Humanitarian Intervention and the UN, UniPress of Verginia 1973, 199

[11] C. Ero and S. Long; International Peacekeeping Vol.2 1995, 142f

which was thrust upon them by events, and one which they had as little desire to assume as to evade".[12]

With regard to the invasion of Ethiopia Italy argued to the League of Nations:

"The Italian government has abolished slavery in the occupied territories, giving to 16.000 slaves that liberty from which they would have awaited in vain from the government of Addis Abeba, despite the clauses of the Covenant and the undertakings assumed at the moment of its admission as a member of the League of Nations. The liberated population see in Italy, not the aggressor state, but the power which has the right and the capacity of extending that high protection which the very Covenant of the League of Nations, in its Article 22, recognises as the civilising mission incumbent upon the more advanced nations."[13]

According to the above mentioned practices and theories, it is thus possible to perceive these explanations under the principle of Humanitarian Intervention. In the sense of a legal discussion about the existence of a right to a Humanitarian Intervention, it is also not very relevant if the statements are true. Furthermore the fact that the Japanese and the Italian government tried to justify their actions by arguing with the principle of Humanitarian Intervention led to the conclusion that such a right was accepted in the international relations at this time.

III. Humanitarian Intervention during the cold war

After the second World War, the principle of non-intervention continued to play a major role in contemporary international law. This concept holds that states are obligated to respect each other's sovereignty. Non-intervention, as it had developed over the last several centuries, positively protected the powers of a state and its sphere of jurisdiction without foreign intervention. The prohibition of state-sponsored interference directed against an established government was based on various grounds, e.g. one might see it as inherent in the general principles which define the international system, such as the doctrines of sovereignty, the sovereign equality of states and of self-determination of peoples.

The fundamental source for international relations after the Second World War, the United Nations Charter, does not mention Humanitarian Intervention[14]. Article 2 (4) UN-Charter forbids the use of force by states and may only be overridden in cases of individual or collective self-defence (Article 51 UN-Charter). Article 2 (7) UN-

[12] Statement by the Japanese Government (27 December 1931), Murphy, p.60f
[13] Note from the Italian Government (11.November 1935), Murphy, p.61
[14] Simma-Randelzhofer, Art.2(4) No.35

Charter prohibits intervention by the UN in "matters which are essentially within the domestic jurisdiction of any state". However, Article 2 (7) UN-Charter does allow therefore the possibility of "enforcement measures under Chapter VII", thereby declaring the situation one of threat to international peace and security.

Legal scholars had debated the legitimacy of using force against tyrants engaged in gross violations of domestic human rights, one fear being that a dangerous precedent would be set. Opponents of Humanitarian Intervention had argued that human rights may be seen as being permanently subordinated to the UN's primary responsibility of maintaining international peace and security. These opponents claimed that Article 2 (4) UN-Charter cannot be interpreted as allowing for a right of Humanitarian Intervention, either because that norm bans virtually all uses of force, or because allowing the exception would open the door to unacceptable abuse.

Furthermore, Article 2 (7) UN-Charter had been referred to by opponents to refute the possibility of Humanitarian Intervention. *Ian Brownlie* represented the views of many opponents of Humanitarian Intervention stating that:

"In the lengthy discussions over the years in United Nation bodies of the definition of aggression and the principles of international law concerning international relations and co-operation among states, the variety of opinions canvassed has not revealed even a substantial minority in favour of the legality of Humanitarian Intervention."[15]

Some support for this was provided by declarations passed in the resolutions of the UN General Assembly[16].

However, it should be noted that while the declarations appear to support those who oppose Humanitarian Intervention, they do not have any legally-binding effect. Supporters of Humanitarian Intervention argued that this kind of intervention does not contravene Article 2 (4) UN-Charter, since "such an act would not constitute an assault on the territorial integrity or political independence of the affected state".[17] Their position was further enhanced by the fact that the Security Council so determines, while it was authorised to use force against a recalcitrant state. Some interventions may fall under Chapter VII provisions, since it is highly possible that a grave violation of human rights could constitute a threat to peace.

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[15] I. Brownlie, Humanitarian Intervention, in J.N.Moore, Law and Civil War in the Modern World, John Hopkins UniPress 1974, 218f

[16] E.g. GA/RES/2625(XXV), 24/10/1970; GA/RES/3314 (XXIX), 14/12/1974

[17] C. Ero and S. Long; International Peacekeeping Vol.2 1995, 142; see also Annex No.2

In this regard, Article 39 of the UN-Charter is of special importance since it gives the Security Council the right to determine "any threat to peace, breach of peace or act of aggression".

IV. Humanitarian Intervention in the 90´s

In the last ten years of the 20th century, a significant development in the practice of Humanitarian Intervention was the use of UN forces to protect humanitarian operations where widespread human suffering occurred. This led to a new kind of operation, especially in Bosnia-Herzegovina and in Somalia, but also in Rwanda and East Timor.

The increasing number of UN operations mandated to meet emergency humanitarian needs, trying to ensure safe delivery of aid and seeking to deter attacks on civilians, with action culminating in the collective use of force, were the most controversial developments, which began with the UN Security Council resolution on April 5th 1991[18] and the international community's military intervention in northern Iraq in the immediate aftermath of the second Gulf War, meant to establish "safe havens" to protect the Kurdish minority from the Iraq army.

Other actions taken by the UN, other international organisations or states (e.g. Somalia, Rwanda, Haiti, Ex-Yugoslavia and East-Timor) also show the strong and militant involvement of the world community in the broader field of human rights after the Cold War.

However, at the end of 1998 and in 1999 the old but also new questions arose whether a single state or a group of states have the right to a Humanitarian Intervention NOT mandated by the Security Council.

Because of a blockade of the Security Council, the NATO states started an air campaign against the Federal Republic of Yugoslavia (a full member of the UN and an independent state) to end the massive Human Rights violations in Kosovo, claiming a right to Humanitarian Intervention. Russia, on the other hand, started a "new" Chechnya war against "Moslem terrorists" providing the same reasons as the NATO did, but not claiming yet any right for a Humanitarian Intervention.

[18] SC/RES/688

V. Summing

In all times, in all regions of the world and in any kind of political system it is possible to find situations and engagements of states or of groups of states described or justified with the term “Humanitarian Intervention”. At the beginning of the new millennium it might now be the right time to collect and discuss the different aspects, arguments and interpretations of the past and compare these with the evolution, the necessities and the interests of the states and the world today to find the meanings of the tool “Humanitarian Intervention” in the 21st century.

C) The term “Humanitarian Intervention“ today

Dealing with the subject “Humanitarian Intervention“ necessarily requires a definition of this term. Regarding terms in international law in general, this always faces big difficulties but nevertheless it is essential to give a definition, at least for a legal discussion.

The term “Humanitarian Intervention“ is not defined in the praxis and theory. Exaggerated speaking and according to *Talleyrand*, it seems that the word “intervention“ means nearly the same as the word “non-intervention“[19]. *Anthony Clark Arend* and *Robert Beck* e.g. state that Humanitarian Intervention may be considered as “the use of armed force by a state (or states) to protect citizens of the target state from large-scale human rights violation there”. *Ian Brownlie* defines Humanitarian Intervention as “the threat or use of armed forces by a state, a belligerent community, or an international organisation, with the object of protecting human rights” and according to *Nick Lewer* and *Oliver Ramsbotham*, to count as humanitarian, “the intervention must be (a) a response to actual or threatened denial or violation of basic or fundamental human rights”, along with innocent civilians who have been deliberately starved by actions or inactions of belligerents, (b) “undertaken with the view to remedying the situation, and (c) carried out in the name of the international community.”[20]

Because of this diversity it is necessary to find a definition:

[19] Isensee, Weltpolizei für Menschenrechte, JZ 1995, 423
[20] C. Ero and S. Long; International Peacekeeping Vol.2 1995, 141f

I. Common interpretation

For the traditional ("classical") meaning of "intervention" (at least including the use of force) any physical exertion of influence is necessary, i.e. interference of one state into the matters of another by the use or the threat of (physical) force ("dictatorial interference"). In this regard the prohibition of intervention is covered by the general prohibition of the use of force expressed in Art.2 (4) UN-Charter and regarded as binding customary international law[21].

However, there have recently been repeated attempts in order to place other actions under the expression "intervention", e.g. political and economical boycotts, diplomatic pressure, economic limitations and restrictions, support for rebels and early recognition of secessions.

Respectively, the socialistic states regarded also radio and television transmissions as interventions in their domestic affairs by violating the governmental information monopoly.

Apart from that, the question of the subjects of intervention is difficult. In the traditional sense only states can intervene and the traditional prohibition of intervention is addressed to them. Today this prohibition is also directed to (governmental) international organisations and the question then left to be answered is whether this prohibition should also be extended to private actors.

Individuals, but especially organisations, parties, churches, trade unions, international enterprises have sometimes had great influence in different states and special matters.

II. Legal interpretation

With the regard to the above mentioned variety of interpretations and meanings of the term "intervention", it is thus necessary for the legal discussion to establish a legal definition or at least some useful criteria. Many scientists, lawyers, authors and politicians have tried to create a clear definition of the term but until now this effort has not been successful. Consequently, I do not try to find a new/other definition but I want to work out some criteria which might be helpful in solving most of the arising questions. Besides, it needs to be examined under which circumstances a intervention can be seen as "humanitarian".

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[21] Simma-Randelzhofer, Art.2(4) No.58

1.) What does the term “Intervention“ mean?

a) Actors / Subjects

Only states and governmental international organisations can intervene in the sense of the above mentioned term “intervention“. The actions of private actors such as authors, parties, trade unions, churches or enterprises are not covered; in other words they cannot intervene. Any interference into the matters of a foreign state from this side are not on the level of interstate international relations and the limitations, prohibitions or contra actions must be defined in the domestic legal system. Only if state powers directly act through private instruments like the former Soviet Union through to the “Cominform“ and the “Communist Internationale“ an intervention is given as well.

b) Elements

The definition of “intervention“ also consists of actions/elements which can be separated into an objective and a subjective part, i.e. violation of the territorial sovereignty and unauthorised behaviour of the intervening state.

Whereas the objective part is regularly very difficult in defining since it is a matter of contention whether as not a territorial sovereignty is violated, it seems, in principal, easier to define the subjective part, i.e. unauthorised behaviours, under public international law:

Normally, the elected or empowered government acts for an independent state and as long as a government is capable of acting, an intervening state cannot deal or negotiate with another group, even if it claims to “represent the people“ or acting in “exercising the right of self-determination“.

However, according to public international law the effectiveness and not the legitimacy of a government is important.

c) The case of a “failed state“

In the case of a state in anarchy, because of a non existing or not acting government, the question is to which extent an intervention is legal and which requirements must be observed.[22]

There are some steps in the international praxis that such a country is to be regarded as a *res nullius* and that any state, regional organisation or the UN has the right to act trustily. This could be seen as a drawback in the time of colonialism. But according

to the modern view of international law a country does not lose its protection of its inviolable territory just because of a failure of an effective government[23].

Still, in the case of a failed state, it might be easier to justify a "Humanitarian Intervention", but from the objective point of view any action must be considered as intervention without the consent of the affected country.

d) **Interference below the level of intervention**

Interference into another state's domestic matters which is explicitly allowed in public international law - e.g.: diplomatic intercessions - cannot be regarded as an intervention. So too, critical and - furthermore - propaganda radio and television transmissions cannot be seen as a violation of the sovereignty of a state in terms of an intervention[24].

It is another question if any interference within the territory of another state is allowed or not, but actions of this kind and intensity cannot be subsumed under the term intervention.

e) **Question of boycotts**

Another difficult issue arises in connection with boycott-measures against foreign states, e.g. during the apartheid regime against South Africa. As a general rule, every single state can decide in which field and to which extent it is willing to get in contact and build up relations with another state. This includes the fields of political, economical and cultural relations. Nevertheless, a potential difficulty is, which actions or non-actions/relations can still be seen as non-interfering in the sovereignty of another state and which must be regarded as unlawful methods of isolating or embargoing that might lead to the violation of the political independence of a state (e.g. especially if the boycott hits a fundamental basis of the state).

In general, all boycott-measures which implement severe harm and are destined and suitable to force the affected state must be regarded as intervention.

2.) What does "humanitarian" mean?

The above mentioned criteria describe an action which might be called "intervention". However, to describe an intervention as humanitarian, additional criteria must be fulfilled. To put it bluntly, humanitarian grounds must be achieved.

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[22] see also C. Ero and S. Long; International Peacekeeping Vol.2 1995, 141f
[23] Isensee, Weltpolizei für Menschenrechte, JZ 1995, 424
[24] Isensee, Weltpolizei für Menschenrechte, JZ 1995, 424

The acting/intervening state is not led mainly by its own national interests but it must act due to “higher“ motives such as protecting minorities or peoples against serious human rights violations, protecting aid and food supply for starving people, restoring order and safety in collapsed societies.
In most of the cases it is very difficult to work out (sometimes only to express) the real reasons for the intervening state, but nevertheless this requirement is fundamental for the term “Humanitarian Intervention“.

III. Summing

“Humanitarian Intervention“ is the use of armed forces for the prevention or discontinuation of massive violations of Human Rights in a foreign country[25]. Two main elements have to be considered and we will see at the end of this thesis the arguments, details and procedures that must encompass these elements[26].

a) **The objective element**

The Intervention is carried out by the use of armed forces which are NOT under the command or/and control of the affected state and the intervening state(s) is/are not acting in self-defence.
Massive violations of Human Rights have been committed and are going on and there is no foreseeable change.
All possibilities for a political solution are undertaken and fruitless.

b) **The subjective element**

The task of the intervening state(s) is/are only the ending of the massive violations of Human Rights and to restore “law and order”. Other interests, such as economic interests or actions against the long-term territorial integrity and political independence of the affected state may not be allowed. Thus, for the concept of Humanitarian Intervention it is essential to prevent abuses by states claiming this concept for pure national interests and actions against the principles laid down in the UN-Charter.

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[25] Simma-Randelzhofer, Art.2(4) No.51; Knut Ipsen (Horst Fischer), Völkerrecht, 3rd edition 1990, 885, No.26; K.Ach, Humanitäre Intervention, Wörterbuch zur Sicherheitspolitik mit Stichworten zur Bundeswehr, Hamburg, Berlin, Bonn 2000

IV. Conclusion

It is necessary to have this definition of the term Humanitarian Intervention in mind for my ongoing paper and not start arguing about aside definitions connecting or similar situations and cases.

D) The Development of the Concept of Humanitarian Intervention

The interesting evolution and development of today's view on the concept of Humanitarian Intervention started shortly after the Second World War (WW II).

I. The UN-Charter and its interpretation

At the end of the Second World War in 1945 the UN Charter was discussed and signed at the San Francisco Conference. Today, almost all states are Member States of the UN and thus have accepted the rules laid down in the Charter.
With regard to Humanitarian Intervention there are different provisions and organs dealing with those matters and I will give a short overview.

1.) Organs of the UN

The central UN organs are the General Assembly and the Security Council, the Economic and Social Council (ECOSOC), the International Court of Justice (ICJ), and the Secretary-General plays a role in the international relations and in the field of Humanitarian Interventions as well. But not all of these organs can play the same important role or have the same power to enforce resolutions, so in the discussion it is always important to mention which organ is dealing this at the moment.

a) **The Security Council**

The Security Council is the primary organ for addressing matters related to the maintenance of international peace and security, pursuant to powers granted by Chapter VII of the UN Charter. But since it is a political and not a legal organ it was almost impossible to pass resolutions during the Cold War because of the veto power of the "big five"[27]. Around 1990 there was a time of good co-operation which lead to the actions against Iraq and the Second Golf-War. However, today's relations are more tense and pure national or economic interests are gaining more importance again.

b) **General Assembly, ECOSOC**

Although matters relating to the protection of human rights and freedoms were assigned to the General Assembly, ECOSOC and the Commission on Human Rights, there is no express linkage in the Charter between the maintenance of international peace and security and the protection of human rights. The important point is that all these organs of the UN cannot pass binding resolutions or decisions and, implicitly, cannot be as effective as the Security Council.

c) **ICJ**

The International Court of Justice may deal with problems regarding Humanitarian Intervention (e.g. the air campaign of NATO states against Yugoslavia[28]) but it is very unlikely for an organ to maintain international peace and security or the protection of Human Rights in a direct and effective way. Only Member States can be a party in the ICJ and they must accept the authority of the court to deal with the special case. This is a long procedure and not very effective in terms of acute massive Human Rights violations[29].

d) **Secretary-General**

The Secretary-General and his office can offer many possibilities to solve problems, starting from consultations, negotiations or “good-office”-tasks. However, he is actually the less powerful organ of the UN, although the engagement of the Secretary-General will always come together with a world wide recognition by mass media.

2.) Provisions in the Charter

The main provisions of the UN Charter regarding Humanitarian Intervention can be found in the first two Articles and in Chapter VII. Other provisions of the Charter may be applicable too, but I will focus on them later in this thesis. The above mentioned provisions are the most important ones.

a) **Article 1 UN-Charter**

The purposes of the United Nations are listed in Article 1 of the UN Charter, which are:

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[27] China, France, Russia/Sovjetunion, United Kingdom, USA

[28] see below in Part „VI. The question in regard of the Kosovo-war 1999”

[29] In the cases of Yugoslavia against several NATO Member States before the ICJ, Yugoslavia was forced to accuse these states to commit a crime of genocide against the Serbia people to give reason for the juristdiction of the ICJ.

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. ...
3. To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. ...

The problem of working in the field of massive human rights is already laid down in Article 1 of the UN Charter: on one hand, the United Nations should grant for peace and international security, on the other hand the UN is responsible for solving international humanitarian problems and promoting and encouraging respect for human rights. In the case of massive Human Rights violations this might turn into a conflict.

b) Article 2 UN-Charter

There are two different provisions within Article 2 UN-Charter relevant for the discussion of the concept of Humanitarian Intervention.

Article 2 (4) UN-Charter

This provision weighs heavily against the use of force in the international relations. With respect to the Member States, Article 2 (4) of the Charter provides:

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations".

The broad term "use of force" - as opposed to the term "war", as used in the Briand-Kellogg-Pact - reflected a desire to prohibit armed conflicts on a general scale, not only conflicts arising from a formal state of war. As such, an initial reading of Article 2 (4) UN-Charter suggests that the various doctrines of forcible self-help, reprisal, protection of nationals and Humanitarian Intervention that had developed in the pre-Charter era were now unlawful[30].

But there has always been a big discussion whether this prohibition should be understood so strictly. A first argument is that the phrase "against the territorial integrity and political independence" is meant to be read as a limitation of the

[30] Murphy, p.70

prohibition of the use of force. In consequence, only actions by a state annexing territory or seeking to depose a foreign government are prohibited, while other actions may involve military action of a different type. This is a very strong argument in the case of a Humanitarian Intervention, since the intervenors do not seek to deprive the state of its territorial or political attributes.

The counter of this argument is that, according to the negotiating history of the Charter, the phrase "territorial integrity or political independence" reflects an effort to clarify, not curtail, the comprehensive nature of the prohibition[31].

Another argument is that, even if the phrase is regarded as prohibiting only the use of force on a special level, a Humanitarian Intervention violates the territorial integrity as well as the political independence of a state. Deployment from military personal and equipment is likely to "violate the territorial integrity" of a state and its political independence[32].

Another argument for pre-Charter doctrines which survived the passage of Article 2 (4) UN-Charter is the presence of the phrase "or in any other manner inconsistent with the purposes of the United Nations". It is argued that this phrase allows the protection of certain fundamental rights explicitly mentioned in the UN-Charter in situations where there are no other means to protect them. However this phrase (especially the "or") may also indicate a supplement, not a qualification, of the initial text, i.e. states are always prohibited from threatening or using force against the territorial integrity and the political independence of any state and are further prohibited from threatening or using force in any other manner inconsistent with the purposes of the United Nations. In the discussion at the end of the 1970s this argument was countered with reference to the genesis of Article 2 (4) UN-Charter. The specification of the prohibition of the use of force with the words "against the territorial integrity or political independence of any state" was added later to reach a special kind of protection for smaller states. But the stronger argument would be the pure interpretation by the meanings of the words. With regard to the concept of Humanitarian Intervention one cannot argue without dealing with the question of using Article 2 (4) UN-Charter. First, the Humanitarian Intervention is necessarily and by definition connected to Human Rights violations within the borders of a

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[31] Simma-Randelzhofer, Art.2(4) No.35

[32] Ulrich Beyerlin, Humanitarian Intervention, EPIL Vol.3 1982, p.212

sovereign state by the authorities of this state. Second, there is a third alternative of Article 2 (4) UN-Charter in the term “or in any other manner inconsistent with the purposes of the UN”. A Humanitarian Intervention respecting the borders of a sovereign state is hard to imagine.

Article 2 (7) UN-Charter

Another important provision of the UN Charter is Article 2 (7), stating the following:

“Nothing contained in the present Charter shall authorise the UN to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

The scope of the term “intervention” used in this provision is broader than the prohibition against the “threat or use of force” that applies to actions undertaken by a single state or a group of states. Article 2 (7) UN-Charter is/was meant to include all interference in the domestic affairs of states.

On the other hand, Article 2 (7) of the Charter states that “the present” Charter does not authorise any action of this kind, leaving open the possibility that authorisation might emanate from some other sources, such as inherent rights of states or subsequent state practice[33].

This is also a very controversial issue and the most common interpretation, at least at the beginning of the UN system, was that out of the principles of sovereignty and equality of states, no other state may intervene in the domestic affairs of a state and neither should the UN itself[34].

In conclusion: Article 2 (7) UN-Charter and the prohibition of intervention are not the issue in dispute. Any intervention which refers to matters essentially within the domestic jurisdiction of any state (the so-called domaine réserve) excludes actions taken by the UN. However, one may not argue that massive Human Right violations belong essentially within the domestic jurisdiction[35]. The real problem within the UN system is rather that there is no foundation for any UN organ to react with military means against any state. There is only a justification by Chapter VII of the UN-

[33] Murphy, p.75

[34] Simma-Ermacora, Article 2 (7) No.19

[35] John P. Humphrey, Foreword for Richard B. Lillich, Humanitarian Intervention and the United Nations, 1973, p. VIII

Charter for interventions because of a threat or a breach of the peace or the international security.

c) **Article 51 UN-Charter**

Another fundamental provisions in regard of the use of force is Article 51 UN-Charter, which provides:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member State of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such actions as it deems necessary in order to maintain or restore international peace and security."

It is to be emphasised that Article 51 and Article 2 (4) UN-Charter do not exactly correspond to one another in scope, i.e. not every use of force contrary to Article 2 (4) UN-Charter[36] may be responded to with armed self-defence. However, the development of the right of self-defence has to be viewed against the background of the general development of public international law towards the prohibition of war, and, eventually, of the use of force[37].

In the discussion about the concept of Humanitarian Intervention, some authors are using Article 51 UN-Charter not in the "traditional" sense that the right of self-defence is only applicable in the relations between states. As already seen above, there is an attempt to subsume massive Human Rights violations as a breach of international peace and security and, responding to that, the United Nations Member States must have a right to "self"-defence in the field of Human Rights too. Thus, it would open a justification for military actions undertaken by single states or a group of states outside the UN system. This argumentation is quite interesting to follow in the discussion about some cases of Humanitarian Interventions, mainly when there was no clear mandate of the Security Council[38].

d) **Chapter VII UN-Charter**

Chapter VII describes the special powers of the Security Council to maintain international peace and security. Article 39 UN-Charter provides:

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[36] see above p.16f
[37] Simma-Randelzhofer, Article 51 No.1 and 4
[38] so e.g. in the Kosovo Case, 1998/1999

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

While Article 41 refers to "measures not involving the use of armed forces" like "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communications and the severance of diplomatic relations", Article 42 of this Charter provides the widest possibilities for any action:

"Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

Since the UN-Charter does not define "international peace and security" or and does not clarify which violation does make the matter a "breach of the peace", these terms have to be explored in the light of the United Nations and state practice:

The ability of the Security Council to take military actions against a state was a radical advance over the collective security regime of the League of Nations Covenant, which only provided for recommendations of such action by the unanimous vote of the League Council. While a "plain and natural" reading of the Charter suggest that all military actions by the Security Council would arise under Article 42, in fact, since early in the Charter years, most UN military actions have occurred under Article 39 or as "peacekeeping operations" conducted with the consent of the host state[39].

3.) The procedure to maintain international peace and security

According to the UN Charter the Security Council is the primary UN organ to deal with any situation which is likely to violate the international peace and security[40]. It has to decide if the qualifications of the Charter are met[41] and if the situation in question is "any threat to the peace, breach of the peace, or act of aggression"[42] which would finally open special measures under Chapter VII.

[39] Murphy, p.80
[40] Article 24 (1) UN Charter
[41] e.g. Article 2 (7) UN Charter
[42] Article 39 UN Charter

Afterwards, the Security Council decides on the means it wants to use in order to solve the crisis. It shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42 of the UN-Charter, to maintain or restore international peace and security.

This opens a variety of actions starting from recommendations over economic sanctions to the massive use of military force. In contrast to actions of the other UN organs, the Security Council actions are binding the whole world community and all member states[43].

Of course, this is a very short and formal description of the UN security and peace system, but it is, however, necessary to keep in mind this basic procedures for the following discussion about the evolution of the principle of Humanitarian Intervention.

II. Missions of the UN in regard of the concept of Humanitarian Interventions

There were many actions, involvement and missions by the UN, their organs or under its authorisation, but not all of them had a direct impact on the evolution of the concept of Humanitarian Intervention. Most of the UN "blue helmet actions" before 1990 and most of the others were set down to solve international conflicts and not mainly because of Human Rights violations. However, with the end of the east-west conflict, an evolution with regard to the implementation of and concern on Human Rights started. In a world of less international armed conflicts and an increasing number of internal conflicts, this evolution was necessary, but also very surprising.

1.) Examples of UN missions until the 90´s

To understand the development of the last ten years, it is necessary to give an overview on the UN missions of the first 40 years of the United Nations. As already mentioned, the UN Charter vests in the Security Council the authority to make a finding that there is a threat to the peace, breach of the peace, or an act of aggression in any "special" situation. The Security Council can recommend ways to resolve the underlying problems. Under Chapter VII of the UN Charter it also has the power to

[43] Article 25 UN Charter

decide to use sanctions, e.g. embargoes, the break of diplomatic relations, and use of military force, called enforcement actions as well.

Apart from the countless involvement in conflicts from offering good-offices until the dispatching blue helmet troops between the fighting parties, the Security Council sanctioned the use of force in three instances: Korea, the Second Gulf War, and the Somalia Civil War.

Korea, 1950: Since the Soviet Union was boycotting sessions of the Security Council over the seating of Nationalist China, a series of three resolutions[44] found a breach of peace by North Korea in crossing the 38th Parallel. The resolutions recommended that states assist in repelling the attack and requested the United States to provide a commander for military forces. The authorisation to use force was not binding on states. However, this was not a true enforcement but it rather occurred because of the Soviet non participation. The Soviet Union's return to the Security Council resulted in no future resolution on Korea. The authorities to pursue the Korean war were in place.

The Second Gulf War, 1990: In the summer of 1990, the Security Council passed a number of resolutions condemning the Iraqi invasion of Kuwait and its attempted annexation, as well as explicitly invoking Chapter VII powers to sanction Iraq. Resolution 678 of November 1990 authorised all necessary means to accomplish the required withdrawal of Iraq from Kuwait. After the UN military alliance attacked and Iraq withdrew, Resolution 687 of April 2nd 1991 required destruction of chemical, biological and nuclear weapon facilities and ballistic missiles, subject to international inspections. It is important to notice with regard to the whole conflict that these first Security Council resolutions were not based on Chapter VII of the UN-Charter. Only the resolutions concerning embargo measures were based on Chapter VII UN-Charter. The actions generally known as the "Desert Shield" and "Desert Storm" operation were based on the collective right of self-defence, written down in Article 51 UN-Charter[45].

Nevertheless, Iraqi forces still committed - in reaction of rebellions - atrocities against Kurdish people in the northern part and Shiites in the south of Iraq including

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[44] SC-Resolutions 82, 83, 84 from June 25th to 27th 1950

[45] UN secretary-general Perez de Cuéllar at the European Parliament: "It was no UN war. General Schwarzkopf didn't carry a blue-helmet. This is result of a multilateral action, approved and justified by the UN" (gisted).

the use of chemical weapons. Thousands of people were killed and many had no access to any kind of food or humanitarian aid. In this circumstances, the Security Council Resolution 688 of April 5th 1991 required Iraq to give access to humanitarian aid organisations to give aid and to facilitate their work. A memorandum of understanding developed procedures which include no-fly zones and no Iraqi troops in the northern part of the country.

One may see Resolution 688 as a major opening wedge in the development of collective Humanitarian Intervention. It should be recalled that the resolution was passed in the context of a Chapter VII undertaking. However, it is not a self evident precedent for collective Humanitarian Intervention nor does it provide legitimacy to the concept for its use by individual countries[46]. Still, the Security Council will declare massive Human Rights violations a threat to peace and order forceful action against the offending state in the future.

In April 1992, the Security Council ordered sanctions against Libya because of its support for terrorist groups and its refusal to extradite two persons accused in the PanAm 103 bombing until 1999. Subsequently, in May 1992, the Council ordered economic sanctions against Serbia for its actions in Bosnia.

The Somalia Civil War, 1992: On December 3rd 1992, the Security Council Resolution 794 authorised the use of force to secure a safe environment to deliver humanitarian aid. The situation in Somalia was found to be a threat to *international* peace and security, even though no external aggression had occurred. The Security Council explicitly referred to its Chapter VII powers in making the finding and authorisation means necessary to distribute aid.

"Recognising the unique character of the present situation in Somalia and mindful of its deteriorating, complex and extraordinary nature, requiring an immediate and exceptional response,

Determining that the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution on humanitarian assistance, constitutes a threat to international peace and security,

...

Acting under Chapters VII and VIII of the Charter, calls upon States, nationally or through regional agencies or arrangements, to use such measures as may be necessary to ensure strict implementation of paragraph 5 of resolution 733 (1992);"[47]

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[46] see below

[47] SC-Resolution 794; December 3rd 1992

In one sense, a use of Chapter VII power is not a Humanitarian Intervention. The UN-Charter authorises the Security Council to make its findings and does not limit its judgements. However, the motivation of the Security Council in Resolution 688 and in the Somalia Civil War to deliver humanitarian aid are not without some importance to understanding the extent of the weight given by humanitarian motives in justification for interventions. Just as motivation of states is important in evaluating the standing of rules of law, so the motivations of states acting collectively is instructive.

2.) Human rights as a threat to peace and international security or a breach of peace

The main legal evolution in the field of Humanitarian Intervention after 1990 connected to Human Rights and forceful international response in situations of cross violations of Human Rights. Immediately after the Second Gulf War, the Security Council[48] argued - as shown above – for the first time with "humanitarian reasons" and, saw the cross Human Rights violations as a breach of international peace and security within Article 39 of the UN Charter.

Thus involvement[49] in the Somalia Case was the logical result and the UN has shown that Human Rights violations and the need of civilians for help could open the measures of Chapter VII UN-Charter because they have to be seen as breaches of international peace and security. In consequence, one may see, at least with regard to the United Nations, that the general opinion and interpretation of the legality of Humanitarian Interventions has changed and that actions under Chapter VII (and Chapter VIII) of the UN-Charter will be accepted in the future.

It is of special interest and thus worth pointing out in detail the requirements, the UN uses and need for the authorisation for their Humanitarian Interventions and how the conditions for accepting massive Human Right violations or other humanitarian catastrophes played a role with regard to the definition of Article 39 UN-Charter[50].

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[48] SC-Resolution 688; April 5th, 1991

[49] starting with SC-Resolution 733; January 1992

[50] Article 39 UN-Charter has in its third alternative the "act of aggression". According to the interpretation of this alternative and with regard on UN-GA Resolution 3314 (Definition of Aggression) from December 14th 1974 it is impossible to subsume the Humanitarian Intervention below the criteria settled down in that definition.

The first question was whether any resolution can be taken into the discussion about the justification of the Humanitarian Intervention. *Otto Kimminich*[51] wrote that this is by definition impossible. He argued that not every resolution of the Security Council incorporating actions under Chapter VII UN-Charter but not including military actions is useful in the discussion about a "new way" of the Security Council with regard to Humanitarian Intervention. However, the Security Council is per se free to take actions under Chapter VII if it decides that the situation is falling under the qualification of Article 39 UN-Charter.

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[52]

Consequently, the Security Council may react with all measures listed in Chapter VII, if the prerequisites of Article 39 UN-Charter are fulfilled[53]; in the 1990s it was likely to subsume cross Human Right violations or other kinds of humanitarian catastrophes under these prerequisites.

In Resolution 713 from September 25th 1991 the Security Council decided on the bases of Chapter VII that "all states shall, for the purpose of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Council decides otherwise following consultations between the Secretary-General and the Government of Yugoslavia".[54]

So too, the Resolution 735 from January 23rd 1992 which was decided on the basis of Chapter VII UN-Charter was meant to implement a embargo for weapons against Somalia because of the humanitarian catastrophe and to give a justification for the call to all states and international organisations for humanitarian aid and food supply for the people of Somalia.

The first case in which the Security Council permitted the concrete use of military forces under the "new interpretation" of Chapter VII competencies was the Resolution 940 of July 31st 1994 regarding the situation in Haiti. Here, the Security

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[51] Otto Kiminich, Der Mythos der humanitären Intervention, p.447
[52] Article 39 UN-Charter
[53] Simma-Frowein, Art.39 No.31
[54] SC-Resolution 713 lit.6; September 25th, 1991

Council did not, however, refer to a violation of Human Rights but the "unique situation on Haiti":

"Condemning the continuing disregard of those[55] agreements by the illegal de facto regime, and the regime's refusal to cooperate with efforts by the United Nations and the Organisation of American States (OAS) to bring about their implementation.
Gravely concerned by the significant further deterioration of the humanitarian situation in Haiti, in particular the continuing escalation by the illegal de facto regime of systematic violations of civil liberties, the desperate plight of Haitian refugees and the recent expulsion of the staff of the International Civilian Mission (MICIVIH), which was condemned in its Presidential statement of 12 July 1994,
...
Reaffirming the goal of the international community remains the restoration of democracy in Haiti and the prompt return of the legitimately elected President, Jean-Bertrand Aristid, within the framework of the Governors Island Agreement,
...
Determining that the situation in Haiti continues to constitute a threat to peace and security in the region,
...
4. Acting under Chapter VII of the Charter of the United Nations, authorises Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement, on the understanding that the cost of implementing this temporary operation will be borne by the particular Member States;"[56]

The more clear and detailed expression towards the implication of a humanitarian catastrophe was in the resolution concerning the situation in Rwanda in 1994:

"Noting the offer by Member States to cooperate with the Secretary-General towards the fulfilment of the objectives of the United Nations in Rwanda (S/1994/734), and stressing the strictly humanitarian character of this operation which shall be conducted in an impartial and neutral fashion, and shall not constitute an interposition force between the parties,
...
Deeply concerned by continuation of systematic and widespread killings of the civilian population in Rwanda,
Recognising that the current situation in Rwanda constitutes a unique case which demands an urgent response by the international community,
Determining that the magnitude of the humanitarian crises in Rwanda constitutes a threat to peace and security in the region,
...
3. Acting under Chapter VII of the Charter of the United Nations, authorises the Member States co-operating with the Secretary-General to conduct the operation

[55] different SC-Resolutions concerning the situation in Haiti
[56] SC-Resolution 940; July 31st 1994

referred to in paragraph 2 above using all necessary means to achieve the humanitarian objectives set out in subparagraph 4 (a) and (b) of resolution 925 (1994);"[57]

In comparison to the former Security Council policy as set down in other resolutions, Resolution 929 is going far beyond the interpretations used by the Security Council with regard to the situation in Iraq after the Second Gulf War and in Somalia[58]. These resolutions were the starting point for maybe the greatest change of interpreting competencies of the UN in general and the Security Council in particular under Chapter VII. Today, cross Human Rights violations can be seen as a threat to peace and international security or a breach of peace within the meaning of Article 39 UN-Charter, opening the measures of Chapter VII UN-Charter for the Security Council and the UN .

3.) Summing

These few given examples of UN Humanitarian Interventions and the legal discussion show the obvious political problems regarding the use of force under the authority or with the authorisation of the UN Security Council and its evolution. It is self-evident that dozens of conflicts after 1945 objectively demanding international help in the form of military forces but because of geopolitical issues and the confrontation between "East" and "West", the means to solve these problems laid down in the UN Charter where blocked by the system of the UN Charter itself.
Korea (1953) was one single exception and only happened due to the "unluckily" behaviour of the Soviet Union[59]. After passing the highpoint of the east-west conflict at the end of the 80´s, there was an optimistic enthusiasms among many people of the world to start into a new area of co-operation and collective-security sponsored by the UN and this international system. This was manifested in the collective actions taken or approved by an overwhelming majority of states, including the permanent Members of the Security Council, against the unlawful invasion in Kuwait and the following incidents. But already during this operation the shortcomings of this new world order came in sight.

[57] SC-Resolution 929 (June 22nd, 1994)
[58] SC-Resolution 668 (April 5th, 1991) and SC-Resolution 794 (Dezember 3rd, 1994)
[59] The case that while the Soviet Union was boycotting the meetings of the Security council, the majority of the Security Council and without a veto, deciding a series of resolutions concerning the situation in Korea (1953).

A last attempt of collective actions under the authority of the UN can be seen in Somalia (1992) but with the increasing intensity of the conflict in former Yugoslavia the limits of this new world order and the UN system in the situation of armed conflicts became obvious.

III. Interventions during the cold war

Apart from the UN-Charter, public international law also has other sources of law such as customary law, which is mainly based on the will and the behaviour of the states. During the whole period after the Second World War, there has never been an overwhelming agreement between the states mentioned expressive verbis anything like a "Concept of Humanitarian Intervention" or a "Right to intervene". However, several states had taken actions named as interventions and many of them were justified by humanitarian reasons. It is therefore necessary to enumerate whether customary law knows the "Concept of Humanitarian Intervention".

1.) Examples of Interventions during the Cold War period

Arend and Beck[60] review eleven cases since World War II that contain an element of Humanitarian Intervention. Each will be briefly described, noting the use and success of the Humanitarian Intervention argument to justify the forceful intervention.

The Palestine Conflict, 1948: Both, Arab and Israeli representatives justified their extraterritorial use of armed forces before the Security Council in humanitarian terms. The Security Council basically rejected these arguments. In addition, the objectives of the belligerents makes recourse to humanitarian justification suspect.

Belgium in the Congo, 1960: Shortly after independence, Belgium dispatched troops to protect its citizens and other Europeans from harm given the chaos of a coup. The troops stayed for months and assisted the Katangese rebels who seemed most supportive of Belgian commercial interests. The involvement of protection of nationals and the additional objectives indicated by troops remaining lead to questioning the Humanitarian Intervention label.

Belgium and the United States in the Congo, 1964: The United States and Belgium undertook a three-day operation to save some 2000 hostages under rebel control. Because the fact that nationals were being rescued (but not exclusively) the

[60] Arend, Anthony Clark and Beck, Robert J, International Law and the Use of Force, New York: Routledge, 1993

government gave its permission; and since the operation also materially weakened the rebels and reduced its control of key assets led to questioning whether a true Humanitarian Intervention had taken place.

The United States in the Dominican Republic, 1965: In the midst of a violent civil war without an effective government, the United States justified its action as an attempt to protect its nationals and other foreign nationals. The United States obtained authorisation from the Organisation of American States (OAS) and introduced a force of 20,000 soldiers to restore order. Both sides to the civil conflict consented to the military activities to restore order and U.S. President Johnson also stated that another communist regime in the hemisphere was intolerable, thereby introducing a geopolitical dimension. Thus, a Humanitarian Intervention justification is difficult to accept.

India in East Pakistan, 1971: Pakistan's President, Yahya Khan, did not summon Parliament after elections in which the autonomy party of East Pakistan gained the majority. Protests were followed by material law. The military operation included terrible human rights violations, as reported by an International Commission of Jurists report. Some ten million refugees went to India. India intervened, recognised an independent Bangladesh, and prevailed militarily in short order.

India first justified its actions on humanitarian grounds before the Security Council but deleted such references in the final version of the official record. While *Akehurst* Held that this change of mind indicates that India realised the Humanitarian Intervention was not a sufficient justification, *Teson* dismissed India's change of heart as immaterial by stating: "What really mattered were not Indian objectives, but rather that the whole picture of the situation was one that warranted foreign intervention on the ground of humanity".

The colloquy among publicists was of some importance in this respect. *Akehurst* focused on state behaviour and mentioned India's need of the Humanitarian Intervention justification. *Teson*[61] argued that India cannot have done so because the justification was sound. However, state actions and motives are germane. India's objectives were not solely to preserve human rights. The final result of its action, the succession of Bangladesh, materially increased India's position as a regional power,

especially vis-à-vis its major rival, Pakistan. The burden of refugees was also important. India's action had a humanitarian dimension and the human rights violations that took place during the Pakistani military operation were inexcusable, weakened Pakistan's moral standing, and provided some latitude to India's given scale of the rights violations.

In consequence, the discussion on the right to Humanitarian Intervention did not come to an end. Remarkable is especially the work of the Commission for Public International Law with its chairman Richard B. Lillich under the authority of the International Law Association. The task was to evaluate India's argumentation and to find a conclusion also with regard to the failure of the UN system. The outcome of the animated discussion and the results of the studies opened the way to many basic questions of the Human Rights discussion today. *Thomas M. Franck* and *Nigel S. Rodley* came in their summary to the conclusion that the development of the Human Rights reached "the stadium of a rudimentary international implementation by means like reports, investigations, debates, condemnations and, in very special cases, by resolutions and with means like diplomatic and or economical sanctions[62]". They continued with regret that (in 1973) "there is no justification in public international law for the use of military forces by a state or a group of states to enforce Human Rights or to prevent the atrocities, other inhuman treatments or to assist the right of self-determination in other states outside the UN system". On the other hand, they started a discussion and implemented in their work the founding of a new evolution in this field.

Indonesia in East Timor, 1975: Indonesia claimed humanitarian motives for intervention in the political turmoil preceding and anticipating of East Timor from Portugal. Indonesia's support for a pro-Indonesian faction, its repulsion of other intervention to protect human rights, and its annexation of East Timor (followed by massive deaths) provides little support for a humanitarian motive, much less a humanitarian justification for armed intervention.

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[61] Amandine Fulchiron, For a better World Order Based on the Respect for Human Rights - A call for Collective Intervention; Thesis for the European Master's Degree in Human Rights and Democratisation; Lund 1999

[62] Thomas M. Franck and Nigel S. Rodley, After Bangladesh: The Law of Humanitarian Intervention by Military Force, AJIL Vol.67, 1973, p.302

South Africa and Cuba in Angola, 1975: South African's intervention against the Soviet supported MPLA group on behalf of the FNLA and UNITA has been questioned. The concern for black Angolans by a South African government was suspect. Hydroelectric assets were at stake. The geopolitical ramifications of Soviet influence with Cuban help on its door-step played a part. While the Security Council condemned South Africa's intervention as aggression against Angola, five states abstained, including the United States, which also wanted Cuban intervention condemned.

Vietnam in Kampuchea, 1978-1979: Vietnam invaded Kampuchea at the end of 1978 and included in the force members of the United Front for the Salvation of Kampuchea. Vietnam prevailed and established members of the Front as the government, ousting the Khmer Rouge regime. Vietnam did not use a Humanitarian Intervention argument. Two wars were going on, it insisted. Reaction to Kampuchean aggression against Vietnam and a civil war in which it insisted that the United Front ousted the murderous Pol Pot regime. The horrible human rights atrocities of the Khmer Rouge make the humanitarian issue almost cry out for analysis in this case.

The Security Council did not seem disposed to brand Vietnam the aggressor and a milder resolution calling for all parties to depart had 13 votes, but the Soviet Union vetoed it. The General Assembly subsequently seated the Khmer delegation. *Akehurst* concluded that the episode lent support to the conclusion that a consensus exited that Humanitarian Intervention was illegal. *Teason*, who supports the Humanitarian Intervention concept, did not include the incident in his analysis.

The Kampuchea incident is full of Cold War geopolitics, involving Sino-Soviet tensions, Sino-Vietnamese tensions about regional hegemony, and U.S. policy regarding Vietnam and Southeast Asia generally. The reign of terror under the Khmer Rouge was horrifying and the attempt of the Khmer Rouge to withdraw from the international community and the extremity of its ideology practice were general threats to the system of states. Vietnam was generally rebuffed about its intervention and it was clearly acting for hegemonic reasons. More importantly, it did not use Humanitarian Intervention as a justification.

Perhaps what makes the Kampuchean case haunting is the enormity of the Khmer Rouge atrocities. The appeal of the Humanitarian Intervention argument includes its capacity to permit reaction against such activities which so repulse most people. It is

almost too much to believe that a system of states and laws could allow such an event to be ignored. If nothing can be done in the face of such atrocity, then for many people the very system is fundamentally flawed, if not inherently rotten. It is such visceral reaction and arguments that challenge states and international law to react.

Tanzania in Uganda, 1979: The Ugandan Case showed many parallels to the Kampuchean Case. Uganda's Idi Amin committed outrageous Human Rights violations. Tanzania, like Vietnam, claimed that two wars were going on. Tanzania was repelling Ugandan aggression, and there were Ugandan incursion into Tanzania and prior military reaction by Tanzania only months before the 1979 action. But Tanzania troops helped topple Amin and stayed on to help install the new government.

Unlike the Kampuchean case, the UN Security Council did not take up this case and criticism was muted. Some mild criticism was voiced in Organisation of African Unity (OAU) meetings. There was palpable relief that Amin was gone, just as similar relief was expressed at the ouster of the Khmer Rouge. But Big Power politics was mainly absent in the Tanzania/Uganda case. The action was not approved as a Humanitarian Intervention, but other factors did not result in explicit condemnations a part of power plays among the global or regional rivals.

France in Central Africa, 1979: France supported a coup while Emperor Bokassa was in Libya. Again, ruthless human rights violations had taken place, the scale of which is debated, but not the horror. French actions seem to have an element of forestalling several planned coups that had Soviet backing. A succession of coups would have hurt French interests in Central Africa. The action went uncondemned in UN Bodies.

United States in Grenada, 1983: The U.S. invasion was roundly condemned. The U.S. itself justified the action as a protection of nationals, a response to a legitimate government's request, that is the Governor Gerneral's request, and a collective action under Art.52 if the UN-Charter. The regional issue of Cuban influence was also clear. The Humanitarian Intervention motive is thin indeed[63].

[63] quoted from Keely, Charles B, Humanitarian Intervention and Souvereignty, Arbeitspapier Konrad-Adenauer-Stiftung, Sankt Augustin, 1995

2.) Legal aspects

This brief overview of a number of cases in which the Humanitarian Intervention motive has been alleged or claimed shows a diverse picture. What does emerge is a clear acceptance of the existing of a principle of Humanitarian Intervention not answering the question if this principle is lawful or not. A clear rule is missing, guiding the moral and legal debate in terms of when a state may undertake a Humanitarian Intervention or claim it as a justification for its actions. On the other hand, the treatment of interventions has not been even-handed. Geopolitics clearly has coloured reactions to interventions. Furthermore, these examples show that the states as primary subjects of public international law are not accepting the justification of interventions in general by claiming it an Humanitarian Intervention.

To be regarded as a rule of customary law, a general and wide - at least regional - acceptance by the states is necessary. This must be laid down in the behaviour of the states and the will to act in regard/support of this "right". Although many states from all parts of the world, from any political system and in connection with many international lawyers argued at some time on the principle of Humanitarian Intervention, there is no such right in customary public international law accepted. The existence of horrible cases of human rights violations impacted reactions, but only to allow a sigh of relief and a tendency to ignore the means to the desirable end of stopping horrible torture and other violations of fundamental Human Rights and never generally accepted as a Humanitarian Intervention.

3.) Summing

It is obvious that most of the above mentioned examples have occurred because of pure national interests but it is also worth mentioning that - although the written public international law does not show any rule for Humanitarian Intervention, furthermore trying to establish a system denying the right to intervene by a single state or a group of states - many states still use the term Humanitarian Intervention or at least put humanitarian reasons in front of actions taken by their armed forces. This leads to the question whether there is no concept of Humanitarian Intervention besides the written law, the UN Charter or as result of an interpretation in the last years.

4.) The Humanitarian Intervention in the legal discussion

As shown above the legal discussion received new initial after India's activities in East Pakistan in 1971. Beside of the above mentioned summary from *Thomas M. Franck* and *Nigel S. Rodley*[64] there were several other articles about the work of lawyers with the concept of Humanitarian Intervention. In the 1980s and at the beginning of the last highpoint of the Cold War, the legal discussion came to the conclusion that a right for a Humanitarian Intervention does not exist in public international law. However, it is interesting to see that in this period a lot of aspects from today's discussion for the justification of an Humanitarian Intervention were already evaluated and discussed. Besides, several other possibilities were brought on sight, e.g. the question about a practice of acting under regional organisations, the expansion of the legal argumentation in regard of the right to intervene to protect nationals abroad[65] and the case of a situation of the UN unable to help.

All these arguments will be taken into account in the argumentation below about the justification today. But one of the most interesting steps was the list of eight criteria by *J.N. Moore*[66], later specified by *Felix Ermacora*[67]. The list of *Moore* contained at the beginning that it must be a situation of genocide or any other extended, arbitrary threat to human lives against the basic rules of public international law. It ended with a detailed obligation to report all facts to the Security Council or the responsible regional organisation. He added that this list is motivated by his conviction that a Humanitarian Intervention must be possible in cases of cross Human Rights violations, but only in a very detailed fixed circumstances. He admitted that the possible justification of such an Intervention contains a high danger for abuses. But a denial for a justification for these actions at all would be the higher danger for mankind.

Emacora pointed out in his essay that this list was heavily criticised. However, he accepted the principle of this list and modified it. He recognised the cross and systematic Human Rights violations but then added that the community of states must be responsible for these special rights and there must be a failure or inability on

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[64] Thomas M. Franck and Nigel S. Rodley, After Bangladesh: The Law of Humanitarian Intervention by Military Force, AJIL Vol.67, 1973

[65] like Germany in Mogadischu 1977 or Isreal in Entebbe 1975

[66] J.N. Moore, Law and Civil War in the Modern World", 1974, p.24

[67] Felix Ermacora, Geiselbefreiung als Humanitäre Intervention im Lichte der UN-Charta, Festschrift für August Frhr. v.d. Heydte, 1977, p.169

the global or regional level to grant these fundamental Human Rights to the people. *Emacora* added general principles such as necessity and proportionality. The most important difference to *Moore* is the demand that the intervening state, group of states or regional organisation must agree automatically with the jurisdiction of the ICJ over this Humanitarian Intervention. This should guarantee the responsibility for damages with regard to this action of any material and immaterial kind.

There is a very strong connection and primary responsibility for the UN or other regional international organisations (or regional arrangements like expressed in Chapter VIII of the UN-Charter) determined in these concepts. In every case of a justification of an Humanitarian Intervention, its subsidiary character is easily pointed out and it is directly named as an "back-up" for the system laid down in the provisions of the UN-Charter. It is common to both authors and expressed by *Wolfgang G Friedmann*[68] that a Humanitarian Intervention is forcing back the basic principle of state sovereignty in favour to a higher principle. To reach this higher principle, the international system and especially the UN must be strengthened and the state community must establish a supreme institution with the right to intervene.

In conclusion, a great and not ending discussion about the right for an Humanitarian Intervention arose at the end of the Cold War period and the overwhelming majority of lawyers and the objective state practice did not accept this right. On the other hand, there can be seen the evolution to find possibilities for a justification de lege feranda. But lege lata was only the call for strengthening the poser of the international organisations.

IV. The evolution in the 1990´s

In the aftermath of the Second Gulf War, the states - as well as the Security Council - turned more and more to an acceptance of the right for Humanitarian Interventions. This was mentioned in the realisation among the people of the world and the states that the "new" problems after the Cold War are not the main question about the "great war". There were many conflicts coming up and it was a lack of the international instruments dealing with them correctly explained as follows:

"The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the

[68] Wolfgang G. Friedmann, closing word to J.N. Moore, Law and Civil War in the Modern World, 1974, p. 581

economic, social, humanitarian and ecological fields have become threats to peace and security. The United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters".[69]

The UN Secretary-General pointed out, trying to give some explanation and guidelines, that:

"poverty, diseases, famine, oppression, and despair abound, joining to produce 17 million refugees, 20 million displaced persons and massive migrations of peoples within and beyond national borders. These are both sources and consequences of conflict that require the ceaseless attention and the highest priority in the efforts of the United Nations. A porous ozone shield could pose a greater threat to an exposed population than a hostile army. Drought and disease can decimate no less mercilessly than the weapons of war. So at this moment of renewed opportunity, the efforts of the Organisation to build peace, stability and security must encompass matters beyond military threats in order to break the fetters of strife and warfare that have characterised the past".[70]

The unsolved problem in the 1990s was that the international organisations and especially the UN had not the means for these new tasks. This was obvious in different incidents (e.g. Somalia, Bosnia, Haiti, Rwanda, ...) and closer to the end of the 1990s the international community and the public opinion did not trust the international systems anymore. Thus, many state actors reduced their engagement in solving the humanitarian problems by the means of the UN or merely tried to receive the mandate for their operations.

This evolution consequently leads to the point where a single state or group of states act without the mandate of the UN or a recognised regional arrangement. The most discussed and important issue is the situation around the Kosovo crisis.

It is worth mentioning that the states again started to act in the international bodies with pure national interest. The task for the legal discussion is how this new behaviour of the states and the evolution in (or - maybe better - the new interpretation of) the provisions of the Charter, the increasing influence of Human Rights, other fundamental treaty obligations and public international law in general in the last years influence the concept of Humanitarian Intervention.

[69] UN Doc. - SC/PV.3046 (1992)
[70] An Agenda for Peace, Item 10, para.13 - UN Doc. - A/47/277,S/24111 (1992)

V. *Problem: Sovereignty and Humanitarian Intervention*

After the Cold War and after realising that the need of armed and forceful interventions may help in many situations all over the world, the question of the quality of sovereignty in this new world order arose.

1.) The possibility of a "changing" sovereignty

A frequent mistake is to assume that sovereignty has a given meaning and is unchangeable: In the case of sovereignty, this idealism is demonstrably false because sovereignty is also changing with the circumstances of a changing world. As already shown, the meaning of sovereignty dramatically changed between the middle ages, the 17th and 18th century, and again in the 19th century with the upcoming of the nation(al) states. For example, in the mechantilist era, sovereigns were concerned not so much to control immigration as to regulate and prohibit emigration - to populate was to rule. The United States and Great Britain fought the war of 1812 partially due to the right of Britain citizens to expatriate themselves. It was only in the 19th century that western industrial countries systematically began to regulate immigration. Eventually, in the Declaration of Human Rights of 1948, the right of a person to leave his or her country and to return thereto was recognised as a basic Human Right. What had been essential to sovereignty in the past - control of immigration - became a Human Right. The essence of sovereignty changed from the right to prohibit expatriation to regulation of entry and conditions on the entrant into the territory[71]. Thus, it is not surprising, especially with regard to the history, that the content of sovereignty can change.

The UN Charter itself, in its articulation of the norms of jus ad bellum, constrained the scope of self help as previously understood and agreed to. This attempt to redefine the rules for going to war constrained sovereignty in one sense. However, it increased sovereignty in the sense that states would be freer to act without fear of forceful intervention ... if the Charter were followed.

2.) Is sovereignty absolute today?

The idea that a state may do whatever it wants in its own territory is an illusion. The nature of the state system itself requires co-operation on many matters. Intercourse

[71] Keely, Charles B, Humanitarian Intervention and Souvereignty, Arbeitspapier Konrad-Adenauer-Stiftung, Sankt Augustin, 1995

among states from mail delivery, to rules on the high seas, to the more complicated and esoteric issue spawned by today's communications, transportation and technology mean that no land is an island unto itself. Even basic tenets of state relations affecting sovereignty are in tension. The competence to wage war and the right of non-intervention are of necessity in tension. In practice, one or the other is violated at various times. The very existence of public international law and the difficulty of conceiving of a state system without some functional equivalent of public international law means that states must enter into agreements. An absolutist vision of the sovereign state is a chimera.

The growth of social networks and technology make co-operation in economic and other spheres almost mandatory for states. In this atmosphere, the growth of economic unions and other forms of multilateralism are, practically speaking, no longer matters of choice for most states.

Finally, the sorts of non-forceful interventions by multilateral lenders and other sources of external pressure indicate that sovereignty is contingent.

3.) Has sovereignty changed?

The force of the UN Charter paradigm for jus ad bellum has and will continue to be questioned. Reisman[72] proposes that the Charter paradigm does not need to be questioned if sovereignty was understood to reside in the people and not in the government. In essence, Human Rights violations against citizens by a government would fall outside Article 2 (4) UN-Charter because intervenors would be helping the sovereign power - the people. The practical difficulties make this approach questionable. In addition, it fundamentally handles the tension between peace and justice by tilting in favour of justice, contrary to general interpretations of the UN-Charter.

Obviously, this interpretation is going too far and all commentators would agree that the UN Charter is not providing this kind of interpretation. However, since the Somalia Case, a Humanitarian Intervention can based, on Chapter VII of the UN Charter and rest on a threat to peace and international security because of uncontrolled refugee flows.

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[72] Reisman M., „War owers: The operational code of competence“, American Journal of International law. 83,777

Consequently, the content of the term sovereignty is changing continuously. Concerning a Humanitarian Intervention by an individual state or a group of states undertook outside Chapter VII of the UN Charter, but because of cross Human Rights violations and with the danger of refugee problems threaten the refugee-receiving countries and this region, the scope of sovereignty could be in question. Thus, if state sovereignty is changeable and contingent, then its scope and content can change in general, including the conditions under which a state's sovereignty must be respected and the conditions under which a state may lose sovereignty in a special field.

The Danish Institute of International Affairs in Copenhagen analysed the legal implications of the growing need to intervene across borders over Human Rights violations and where diplomacy fails. "Since 1945, the principle of international protection of human rights has progressively gained weight at the cost of the classical, highly prohibitive interpretation of state sovereignty. The tendency is towards increasingly considering the individual, and not only the state, as a fundamental subject of international relations." The authors of that analyse observe that the Security Council is increasingly setting precedents for intervention based on internal civil wars and repression. They frame four ways that Humanitarian Intervention can be consistent system within international law:

1. Reliance on the UN Sec. Council in its current procedures;
2. Intervention as Emergency "Exit" from Intl Law;
3. Subsidiary Right to Humanitarian Intervention, outside the Security Council's auspices, but through treaty or practice; and
4. Establishment of a general right of Humanitarian Intervention.

The authors compare these options at length and then conclude that the first two ways are to be preferred. The long-term hazards of humanitarian intervention are explored: e.g. in undermining the international legal order, dividing the Security Council, and inviting abuse by strong nations over weak. This exceptionally balanced and intelligent book suggests trigger criteria for interventions and the proportionate (minimum necessary) use of force that should be established prior to intervening.[73]

[73] Danish Institute of International Affairs, "Humanitarian Intervention: Legal and political aspects", Copenhagen 1999

VI. The question with regard to the Kosovo-war 1999

1.) Historical background

The conflict between Yugoslavia and the NATO-States between the 24th of March till the 10th of July 1999 was the result of a long process which began in 1989. In the last months of 1998 and the first months of 1999, it became, however, evident that the bitter war between the Kosovo Liberation Army (KLA) and the Yugoslav army was at risk to develop into a wholesale "ethnic cleansing" of the Kosovar Albanians, who constituted over 80% of the province's population[74], of whom already 290.000 where displaced.

Continued with massive Human Rights violations in October 1997 and March 1998, the Security Council dealt several times with the Kosovo question[75]. Already in Resolution 1160 of March 1998 the Security Council acted in the field of Chapter VII:

Acting under Chapter VII of the Charter of the United Nations,
1. Calls upon the Federal Republic of Yugoslavia immediately to take the further necessary steps to achieve a political solution to the issue of Kosovo through dialogue and to implement the actions indicated in the Contact Group statements of 9 and 25 March 1998;
2. Calls also upon the Kosovar Albanian leadership to condemn all terrorist action, and emphasizes that all elements in the Kosovar Albanian community should pursue their goals by peaceful means only;
...
5. Agrees, without prejudging the outcome of that dialogue, with the proposal in the Contact Group statements of 9 and 25 March 1998 that the principles for a solution of the Kosovo problem should be based on the territorial integrity of the Federal Republic of Yugoslavia and should be in accordance with OSCE standards, including those set out in the Helsinki Final Act of the Conference on Security and Cooperation in Europe of 1975, and the Charter of the United Nations, and that such a solution must also take into account the rights of the Kosovar Albanians and all who live in Kosovo, and expresses its support for an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration;
...
8. Decides that all States shall, for the purposes of fostering peace and stability in Kosovo, prevent the sale or supply to the Federal Republic of Yugoslavia, including Kosovo, by their nationals or from their territories or using their flag vessels and aircrafts, of arms and related matériel of all types, such as weapons and ammunition, military vehicles and equipment and spare parts for the aforementioned, and shall prevent arming and training for terrorist activities there;

[74] Stefan Troebst, „Conflict in Kosovo: Failure of Prevention? An Analytical Documentation", 1992-1998, ECMI Working Paper No.1, 1998, 1n
[75] SC-Resolution 1160 (23-03-98), SC-Resolution 1199 (23-09-98), SC-Resolution 1203 (24-1098)

...
10. Calls upon all States and all international and regional organizations to act strictly in conformity with this resolution, notwithstanding the existence of any rights granted or obligations conferred or imposed by any international agreement or of any contract entered into or any license or permit granted prior to the entry into force of the prohibitions imposed by this resolution, and stresses in this context the importance of continuing implementation of the Agreement on Subregional Arms Control signed in Florence on 14 June 1996;
...
13. Invites the OSCE to keep the Secretary-General informed on the situation in Kosovo and on measures taken by that organization in this regard;
14. Requests the Secretary-General to keep the Council regularly informed and to report on the situation in Kosovo and the implementation of this resolution no later than 30 days following the adoption of this resolution and every 30 days thereafter;
15. Further requests that the Secretary-General, in consultation with appropriate regional organizations, include in his first report recommendations for the establishment of a comprehensive regime to monitor the implementation of the prohibitions imposed by this resolution, and calls upon all States, in particular neighbouring States, to extend full cooperation in this regard;
16. Decides to review the situation on the basis of the reports of the Secretary-General, which will take into account the assessments of, inter alia, the Contact Group, the OSCE and the European Union, and decides also to reconsider the prohibitions imposed by this resolution, including action to terminate them, following receipt of the assessment of the Secretary-General that the Government of the Federal Republic of Yugoslavia, cooperating in a constructive manner with the Contact Group, have:
(a) begun a substantive dialogue in accordance with paragraph 4 above, including the participation of an outside representative or representatives, unless any failure to do so is not because of the position of the Federal Republic of Yugoslavia or Serbian authorities;
(b) withdrawn the special police units and ceased action by the security forces affecting the civilian population;
(c) allowed access to Kosovo by humanitarian organizations as well as representatives of Contact Group and other embassies;
(d) accepted a mission by the Personal Representative of the OSCE Chairman-in-Office for the Federal Republic of Yugoslavia that would include a new and specific mandate for addressing the problems in Kosovo, as well as the return of the OSCE long-term missions;
(e) facilitated a mission to Kosovo by the United Nations High Commissioner for Human Rights;
17. Urges the Office of the Prosecutor of the International Tribunal established pursuant to resolution 827 (1993) of 25 May 1993 to begin gathering information related to the violence in Kosovo that may fall within its jurisdiction, and notes that the authorities of the Federal Republic of Yugoslavia have an obligation to cooperate with the Tribunal and that the Contact Group countries will make available to the Tribunal substantiated relevant information in their possession;
...[76]

[76] SC-Resolutions 1160 from March 31st,1998

Apart from that the Security Council required the ICTY to collect information about the atrocities in Kosovo.

The Resolution 1199 of 23rd September 1998, in particular, demanded that Yugoslavia *inter alia* "cease all action by the security forces affecting the civilian population", and had referred to possible "further action" if measures demanded in the resolution were not taken. In addition, Resolution 1203 of 24th October 1998, by demanding Serb compliance with a number of key provisions of accords concluded in Belgrade on 15.-16. October 1998, accepted that the Alliance had a direct standing and interest in the Kosovo issue.

Already on the 24th of September 1998 the NATO warned the Yugoslav government to keep to the Security Council resolutions and to obey their international obligations. On the 13th of October 1998 the Council of NATO approved the military operation plans for different periods of air strikes against Yugoslavia. One day later, the Secretary-General of NATO announced the decision:

"A few hours ago we were briefed by Ambassador Holbrooke on his efforts to resolve the crisis in Kosovo, Ambassador Holbrooke reported that there has been progress. He stressed that the process was largely due to the pressure of the Alliance in the last few days and that we have to maintain this pressure in order to ensure that the process continues.
In response, just a few moments ago, the North Atlantic Council decided to issue activation order - ACTORDs – for both limited air strikes and the phased air campaign in Yugoslavia, execution of which will begin in approximately 96 hours.
We took this decision after a thorough review of the situation in Kosovo. The Federal Republic of Yugoslavia has still not complied fully with UNSCR 1199 and time is running out.
Even at this final hour, I still believe diplomacy can succeed and the use of military force can be avoided.
The responsibility is on President Milosevic´s shoulders. He knows what he has to do."[77]

After this threat the Yugoslavian president Milosevic decided to sign an agreement to solve the crises and to accept an unarmed OSCE verification mission and unarmed verification flights by NATO air planes. As already mentioned, the Security Council confirmed this agreement by Resolution 1203. But the Yugoslav government did not

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[77] NATO Statement to the Press by the Secretary General, October 13th 1998, in *www.nato.int/docu/speech/1998/s981013a.htm*

keep this agreement, ignored the Resolution 1199 and massive Human Rights violations and atrocities happened again[78].

The next -and last- political step was the attempt at the peace conference in Rambouillet and Paris in spring 1999, but the Yugoslavian side prevented all agreements and more and more Yugoslavian troops were sent near or into Kosovo at the same time.

A new Security Council resolution was not approved because Russia prevented a session on 12th January 1999 and another session ended with no results.

2.) Legal review

a) The try of a solution according to the UN System

The Security Council started the solution of the Kosovo crisis as according to the UN-Charter with the three above mentioned resolutions but Yugoslavia, however, ignored them. The UN System, the situation of violations of fundamental human rights and the commitment of atrocities by armed forces and police units of Yugoslavia was a breach of the principles laid down in the UN-Charter and not compatible with the aims of the world community.

Yugoslavia is like all other UN Member States bound to the principles and rules of the UN Charter and "shall refrain in [its] international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the UN."[79] The massive violations of Human Rights in Kosovo by Yugoslavia were clearly against the purposes of the UN.

Pursuant to Article 2 (7) UN-Charter it is impossible to intervene in a State because "nothing ... shall authorise the UN to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter"; but "this principle shall not prejudice the application of enforcement measures under Chapter VII", which directly leads to the Article 39 in Chapter VII. The Security Council "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance

[78] The statement of an Yugoslavian officer was in the World News, that „the Western powers will not undertake any military measures as long as [the Serbs] only clean one Kosovo-Albanian village per day.

with Articles 41 and 42, to maintain or restore international peace and security" and it repeatedly stated in the three above mentioned resolutions that the situation in Kosovo was a threat to peace and security in the sense of Chapter VII. Since the Yugoslavian government ignored these resolutions it was necessary to "take the next step" by starting with enforcement measures according to Articles 41 and 42 UN-Charter because it was obvious that Yugoslavia acted against Article 24 (1) and especially Article 25 of the UN-Charter[80] and continued with more intensive Human Rights violations. On the other hand, it was also obvious, that the Security Council was not capable of taking further measures to "restore peace and international security" and avert this humanitarian catastrophe. The reason for this was the behaviour of China and mainly Russia: This political behaviour was against the obligation of the UN-Charter, mentioned in Article 2 (2), that "all Members, ..., shall fulfil in good faith the obligations assumed by them in accordance with the present Charter". These duties -expressed in Article 2 UN-Charter- must therefore be seen in the light of the purposes, concretely in the implementation and enforcement of fundamental Human Rights ("any other manner inconsistent with the purposes of the UN") and also as a binding obligation for the Member States out of their membership status to fulfil these.

This obligation of the Members of the UN is fundamental and it should not be possible for them to act against their objective duties only because of subjective political interests. Acting against the spirit of the UN Charter is to be qualified as a breach of the Charter mainly according to its Article 2 ("... in order to ensure to all [members] the rights and benefits resulting from membership ...")[81].

That was the situation before the air strikes of the NATO-States. The "next steps" according to the procedure of the UN Charter, especially Chapter VII, were impossible because of the expected and announced veto of Russia and China. Related to this and under recalling the other resolutions passed with the consensus of Russia and China, the Security Council was blocked (which was against the purposes and

[79] Article 2 (7) UN-Charter

[80] The Members of the UN agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

[81] Adam Roberts, Nato's 'Humanitarian War' over Kosovo, Survival - IISS Quarterly, Autumn 1999, p.119, 120

fundamental bases of the UN System) and it was not able to deal with the situation anymore and fulfil its task.

However, it is important to emphasise that it was not only a question of capability or power of the Security Council and the UN System to deal with the Kosovo crisis. Furthermore, it was the abuse of the UN Charter and the procedure as set down in the Articles 2 (2), 24 (2). There can be no doubt that the NATO-States would vote for a resolution having a chance to solve the problem and the humanitarian disaster and carrying out the necessary actions to end the endangerment of the maintenance of peace and security in the region. In conclusion Russia and China blocked the UN-system in confirming a solution and, by that, forced the NATO States to act "outside" the UN Charter procedures.[82]

b) The solution "outside" the UN system

On the 24th of March 1999, air planes from almost all NATO Member-States started flying air strikes against Yugoslavia without a clear direct mandate by the Security Council. The Resolution 1199 had already demanded that Yugoslavia *inter alia* "cease all actions by the security forces affecting the civilian population" and had referred to possible "further actions" if measures demanded in the resolution were not taken. In addition, Resolution 1203 accepted that the NATO has a direct standing interest in the Kosovo issue. It may be argued that even if the Security Council was not able to follow these Resolutions on Kosovo with a specific authority to use force, they provided some legal basis for military action.

Another argument might be that already two days after the beginning of the air campaign, the Security Council gave at least a crumb of legal comfort to the NATO cause. A draft resolution sponsored by Russia and supported by the two non-Council Members India and Belarus called for "an immediately cessation of the use of force against the Federal Republic of Yugoslavia". However, only the three States, namely Russia, China and Namibia voted in favour, while twelve states[83] where against and in this debate the speeches in support of the resolution did not address in any detail the question of what to do about the Kosovo. The representative of Slovenia made the key point that the Security Council does not have a monopoly on decision-making regarding the use of force. It has "the primary, but not exclusive, responsibility for

[82] Armin A. Steinkamm, Zur humanitären Intervention, Wehrrecht und Friedenssicherung S.269ff

maintaining international peace and security"[84]. While this debate confirmed that the NATO action was not considered manifestly illegal, a failed draft resolution is not a strong basis for arguing the legality of a military action.

Several NATO governments put forward an argument that their actions are justified as a necessary "Humanitarian Intervention" to stop the humanitarian catastrophe.

The Federal Republic of Yugoslavia instituted proceedings before the ICJ against several NATO Member-States involved in the air campaign against Yugoslavia[85]. The cases concerning several accusations, namely that Yugoslavia claim that every accused state:

"has violated its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons, the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group",[86]

are not conclude yet but some points in the argumentation of the court with regard to the request for the indication of provisional measures may be interesting.

Judge *Koroma* argued in his declaration[87] that the situation should be seen in the light of the Draft Article 25 on State Responsibility of the Report of the International Law Commission, reflecting that:

"the breach of an international obligation, by an act of the State composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and as long as such action or omissions are repeated."[88]

He came to the conclusion that there was a legal dispute existing for a specific dispute. Under Article 33 UN-Charter, he asked together with other Members for a peaceful solution, stressing out the obligation for the parties "not to aggravate or

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[83] Argentina, Bahrain, Brazil, Canada, France, Gabon, Gambia, Malaysia, the Netherlands, Slovenia, the United States and the United Kingdom

[84] UN Press Release SC/6659, 26 March 1999

[85] against Belgium, Canada, Germany, The Netherlands, United Kingdom, United States (e.g. Canada ICJ 1999, June 30th, General List No.106)

[86] ICJ 1999, June 2nd, General List No.108

[87] http://www.icj-cij.org/icjwww/idocket/iyge/iygeorde.../iyge_iorder_19990602_Koroma.htm

extend the dispute and to respect international law, including humanitarian law and the Human Rights of ALL the citizens of Yugoslavia".

Judge *Vereshchetin*[89] criticised the ICJ by stating that "the Court should have promptly expressed its profound concern over the unfolding human misery, loss of life and serious violations of international law which by the time of the request were already a matter of public knowledge". He continued by stressing out "it is unbecoming for the principle judicial organ of the United Nations, whose very *raison d´être* is the peaceful resolution of international disputes, to maintain silence in such a situation".

The most clear statement was in the dissenting opinion of Judge *Kreca*[90]. After evaluating the whole situation and procedure he came to the summing that "... the qualification that 'human tragedy and the enormous suffering in Kosovo ... from the background of the present dispute' not only is political, by its nature, but has, or may have, an overtone of justification of the armed attack on Yugoslavia. Suffice it to recall that fact that the respondent State refers to its armed action as Humanitarian Intervention."

Already in the order of the ICJ about provisional measures in the cases concerning the legality of the use of force, the judges of the ICJ had different point of views. The final decision in this case is very interesting and perhaps one of the most important decisions for the future development of the concept of Humanitarian Intervention. The main aspects for today's discussion are the recognition by the ICJ that Human Right violations are concerning international peace and security, that there may be an exception or justification for the "legal" use of force and that - at least one judge – already argued with the term Humanitarian Intervention.

Besides, other additional arguments, overlapping with the main arguments indicated above, were occasionally used in support of the legitimacy of military action. One is the fact that there was a massive multilateral support within the NATO (an organisation in which all 19 Member States have in theory the power of veto) which confirms that this military action did represent an international community interest, and not the interest of one single state. A further element was sometimes woven into the argumentation, namely the claim that democratic states have a greater claim to

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[88] YILC, 1978, Vol. II Part 2, Art.25, p.89

[89] http://www.icj-cij.org/icjwww/idocket/iyge/iygeorde.../iyge_iorder_19990602_Vereshchetin.htm

international support when they do so. The fact that 19 states with a multi-party democratic systems did act collectively is impressive and the democratic nature of their systems may have helped to place certain restrains on the means used and on the goals of the military operation.[91]

UK Prime Minister Tony Blair said in a speech in Chicago on 22nd April 1999 with regard to the often raised question whether a general doctrine justifying Humanitarian Intervention could be developed:

"The most pressing foreign policy problem we face is to identify the circumstances in which we should get involved in other people's conflicts. Non-interference has long been considered an important principle of international order. And it is not one we would want to jettison too readily ... But the principle of non-interference must be qualified in important respects. Acts of genocide can never be a purely internal matter. When oppression produces massive flows of refugees which unsettle neighbouring countries they can properly be described as 'threats to international peace and security'."[92]

Blair went on to list five major considerations which might help in decisions on 'when and whether to intervene':

"First, are we sure of our case? War is an imperfect instrument of righting humanitarian distress; but armed force is sometimes the only means of dealing with dictators. Second, have we exhausted all diplomatic options? We should always give peace every chance, as we have in the case of Kosovo. Third, on the basis of a practical assessment of the situation, are there military operations we can sensibly and prudently undertake? Fourth, are we prepared for the long term? In the past we talked too much of exit strategies. But having made a commitment we cannot simply walk away once the fight is over; better to stay with moderate numbers of troops than return for repeat performances with large numbers. And finally, do we have national interests involved? The mass expulsion of ethnic Albanians from Kosovo demanded the notice of the rest of the world. But it does make a difference that this is taking place in such a combustible part of Europe."[93]

VII. ***Conclusion***

The outcoming for the legal discussion as regards of the Kosovo crisis was that for the first time in the last years a group of states acted mainly/only on behalf of Human Rights and without a mandate of an international body. The most important point is that the overwhelming majority of third states accepted the operation. These issues

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[90] http://www.icj-cij.org/icjwww/idocket/iyge/iygeorde.../iyge_iorder_19990602_Kreca.htm
[91] Adam Roberts, NATO´s ‚Humanitarian War' over Kosovo, Survival - IISS Quarterly Autumn 1999, p.107
[92] Tony Blair, Doctrine of the International Community
[93] Tony Blair, Doctrine of the International Community

and the fact that no international organ criticised (yet) the operations as illegal, may be the next important passing point for the ongoing process to enforce fundamental Human Rights all over the world.

E) Humanitarian Intervention in the 21st century

Although the evolution of the concept of Humanitarian Intervention, the examples in the years before 1998 and the discussion about the meaning of the term Humanitarian Intervention was staidly going on, a lot of issues remained unclear and controversial. The prediction of some U.S. experts that the use of the term Humanitarian Intervention would reopen Pandora's box seemed to come true[94]. It is at all remarkable that the debate in public international law covered many aspects and arguments in advance to the political and medial debate after the experiences of Iraq, Somalia and Rwanda at the beginning of the 1990s. *Tom Farer*, for example, expressed 20 years before these events the general arguments against the permission to use the concept of Humanitarian Intervention outside the system of the United Nations for justification of the use of armed forces[95]: First, because always when the "good Samaritan" has to fight for his right to help, he might be the cause for more damages at the end. Second, because the right to a (forceful) Humanitarian Intervention is likely to be abuse for pure national interests and thirdly, because also the use of uni- or multilateral military forces for pure humanitarian reasons but without a mandate of the UN will weaken the whole concept and system of the general prohibition of the use of force by phasing out the psychological barrier to use the force for other reasons[96].

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[94] H.S. Fairley, State Actors, Humanitarian Intervention and International Law: Reopening Pandora´s box, Georgian Journal of International and Comparative Law, Vol.10, 1980, p.29

[95] Tom J. Farer, Humanitarian Intervention - The view from Charlottesville, in Richard B. Lillich, Humanitarian Intervention and the United Nations, 1973, p.152

[96] see to this aspects: *E/CN.4/Sub.2/1999/L.12/Rev.1*

Commission on Human Rights – Sub-Commission on the Promotion and Protection of Human Rights; Question of the violation of Human Rights and fundamental freedoms, including policies of racial discrimination and segregation, in all countries, with particular reference to colonial and other dependant countries and territories: report of the sub commission under commission resolution 8 (XXIII)

Mr. Alfonso Martinez: Draft resolution

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Deeply concerned at the intensified efforts to develop the concept of an alleged "duty" or "right" of certain States to carry out "humanitarian Interventions", including through armed forces, in situations unilaterally identified by themselves, as well as at the military operations undertaken using such

On the first view these three arguments do not seem very juridical because they contain psychological based prognoses for the consequences of the use of a "classical" mean of power. However, there is a deeper concern behind this argumentation about a central problem of the whole public international law order in the second half of the 20th century: The general meaning of the prohibition of the use of force.

It is important to see the whole discussion on the concept of Humanitarian Intervention not only with regard to the prohibition of intervention and the concept of state sovereignty. Of course, these two aspects must also be covered in a discussion about a right for Humanitarian Intervention and play a major role but, nevertheless, the general rule about the use of military force must be evaluated and taken into account. Recalling the above stated definition of Humanitarian Intervention necessarily contain the involvement of armed forces and the use of military power. Therefore, the analyse of the relation between the general prohibition of the use of force (stated in Article 2 (4) UN-Charter and been recognised as part of the customary public international law[97]) and the concept of Humanitarian Intervention must come at first. After ascertaining the situations and under determining which circumstances a Humanitarian Intervention is not contrary to the prohibition of the use of force, it is possible to evaluate other limits because of other rules or concepts.

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justification, which have caused heavy loss of life among the civilian population and immense damage to civilian facilities,

Bearing in mind the provisions of the various Articles of the Charter which establish the respective functions, powers of and limitations to the actions of the Security Council, the General Assembly, and the Economic and Social Council in matters relating to the solution of international humanitarian problems, the use of armed forces and other enforcement measures, as well as possible actions to be taken to maintain or restore international peace and security, in particular Articles 3 (1b), 12, 24 (2), 39, 41, 51, 52 (1), 53, 60, 62 (2), 83,

...

1. Expresses its firmest conviction that the so-called "duty" and "right" to carry out "humanitarian interventions", in particular by means of the threat or use of force, is juridically totally unfounded under current international law and consequently cannot be considered as a justification for violations of the principles enshrined in Article 2 of the Charter of the United Nations;

2. Calls upon all States to step up their efforts to achieve international cooperation in the search for peaceful solutions to international humanitarian problems and to comply strictly, in their actions towards that purposes, with the basic principles and norms of current general international law and other pertinent norms and standards of international human rights law and international humanitarian law, in particular those governing the functioning of the main United Nation bodies, accountability for war crimes, the realisation and protection of the rights of national or ethnic minorities, and the protection of the civilian population and civilian installations in cases of military operations.

[97] Simma-Randelzhofer, Art.2(4) No.58; ICJ Report (1986), Nicaragua Case

I. The limits by the prohibition of the use of force

As already shown above the prohibition of the use of force codified in Article 2 (4) of the UN-Charter can be seen as customary international law. The only question which is still under discussion is, if this prohibition is also part of jus cogens. Neither customary public international law nor the UN-Charter or any other treaty knows an exception from this prohibition. The generally accepted right of self-defence which is also recognised in Article 51 UN-Charter is not an exception from the prohibition of the use of force, it is a mere justification. Furthermore, this justification supports the general rule. As codified in the most national penal codes there are justifications for normally unlawful actions in the field of self-defence. But instead of regarding them as an exception, they are always seen as justification for the acting against the rules and laws. So too, on the national level these justifications are supporting the general rules.

Other possibilities laid down the UN-Charter for the use of military forces against a state - collective actions on a global or regional level in regard of Chapter VII or Chapter VIII of the UN-Charter - are justified because of massive violations of the public international law: threat to peace or the breach of peace as well.

In conclusion: With regard to the prohibition of the use of force it is not possible in the situation of the Humanitarian Intervention to act within the system and the rules laid down in Chapter VII and Chapter VIII of the UN-Charter or under the justification of self-defence codified in Article 51 UN-Charter, like it is seen in history between states. This right of self-defence is only applicable “in case of an armed attack against a (member-) state”.

However, the discussion whether it is possible to use the right of collective self-defence as well in the case of primary internal affairs, e.g. in situations of rebellions, in the circumstances of peoples claiming their right of self-determination and in the case of massive and cross Human Rights violations is going on.

II. DIGRESSION: The concept of “Intercession”

It is interesting that the question of the compatibility between the prohibition of the use of force and the Humanitarian Intervention has a side-effect on another area, the concept of “Intercession”. If a forceful Humanitarian Intervention is possible, it

might be argued *a maiore ad minus*, that an action without using military means in the field of “Intercession” must be possible, too.
However, this is not necessary. It is not against legal procedures and logical argumentation to accept an justification only in special circumstances and only for a special situation, here called Humanitarian Intervention[98]. The discussion about the concept of Humanitarian Intervention is only a part of the general problem of the implementation of Human Rights and measures to prevent massive Human Rights violations. The issue in dispute is rather if the normally forbidden use of force might be justified by humanitarian reasons.

III. DIGRESSION: Economical sanctions

Another very potential difficulty is the relation between pure economic actions and the use of force against another state. Alben C. Pierce argued that in some circumstances quick military actions can be more sufficient and then long-term economical sanctions[99]. I will just stress out the main cornerstones of his argumentation, because it can be also interesting to keep this in mind while arguing about Humanitarian Intervention.
Before involving military forces, it is likely to use other sanctions, especially in the economic field, so as not to risk or even lose people’s lives, mainly those of own soldiers and innocent civilians. Economic sanctions are thus the more “human” or maybe “humanitarian” method to reach political interests. If economic sanctions are in force, the discussion is dominated by the argument to give more time to let them work. However, it is necessary to ask if economic sanctions are always preferable in relation to military actions and what the limitations for economic sanctions with regard to the principal of humanity are.
It is self-evident that economic sanctions can also be inhuman and cause massive human suffering. On the other hand, there were a lot of examples for economic sanctions in history and today’s policy: To besiege the enemy was a mean of warfare in history and also in the 20th century. The sea battles around England and in the North Sea in the first and Second World War, the embargo policy of the United Nations and other state actors (e.g. Cuba, South Africa, ...) were interventions by

[98] Philip Kunig, Das völkerrechtliche Nichteinmischungsprinzip, 1981, p.351

economic sanctions. Especially in the last years the international community tried to solve international problems mainly with regard to Human Rights or terrorism with the economic sanctions. Some of the countless examples are the well known cases of Iraq (hindrance of the UN inspections)[100], Libya (PanAm 103 bombing)[101], and Ex-Yugoslavia (Human Right and other violations). It is very discussed what the results of these sanctions were and if they were not aggravating the situations.

To discuss this problem objectively it is necessary to point out that human suffering and human catastrophes cannot be accepted and are to avoid. But it would be an illusion to think that situations of massive Human Right violations can be solved without any loss of human lives and any kind of destruction. However, from the moral point of view, it must not be taken into account on which bases this happens. There can be no difference in an ethnical review between starving to death and being killed by a bomb, in the military language called "collateral damages". Everyone has in mind the damages and dead caused by the NATO air campaign in Yugoslavia in 1999 but how is this comparable to the thousands of ill and dying children in Iraq caused by the sanctions and the refusal to take "final" military actions.

Reaching this fundamental point there must be always a discussion about the proportionality and the efficiency of the different means. In the above mentioned cases of Cuba and Libya, economic sanctions are maybe[102] appropriate but the use of military means would be not proportional. On the other hand, the economic sanctions against Haiti and Ex-Yugoslavia were ineffective at all. In these special situations it would be more proportional to act with massive military power (of course in danger to cause the lose of human lives) instead of implementing always "new" economic sanctions (but the situation is getting worse and worse and at the end a military operation becomes necessary).

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[99] Albert C. Pierce, Just War Principles and Economic Sanctions, Ethnics and International Affairs, 10 (1996) 1, p.99-113

[100] for more details, see: „Permanent Mission of Iraq to the United Nations, New York"; http://www.iraqi-mission.org/ and, for the humanitarian influences on the peoples: "Iraq and the West", http://fourier.dur.ac.uk:8000/~dma3md/index.html

[101] for more details, see: Hugh Stephens, Coordinator of the International Commission of Inquiry on Economic Sanctions, „Libya, Lockerbie, Sanctions and International Law - Libya, Lockerbie and the sanctions issue: their implications for international law", http://www.geocities.com/Athens/8744/hugh.htm

[102] I don't want to discuss the special cases in detail in this thesis. I just assume that sanctions in force are also necessary and legal.

As shown above, people arguing against the Humanitarian Intervention are trying to put the possibilities of other kind of sanctions in front. But as history all over the centuries shows, political, diplomatic and economical means are the bases to influence a situation but, however, there are situations which are not solvable by these kind of means. Vice versa, the economic sanctions may increase the situation and make it worse from the point of human suffering[103].

IV. Justifications for Humanitarian Interventions

The prohibition of the use of force is - *inter alia* but still - the main argument against the Humanitarian Intervention but there are several possibilities to justify a violation of this prohibition. I want to point out in this last part of my thesis the different possibilities for its justification and come to a final conclusion about the concept of Humanitarian Intervention at the end. Of course, this includes a summary of the development already explained in the chapters above, but I think it is important to have a complete overview at the end.

1.) The Right for Humanitarian Intervention within the UN-Charter

There are some different starting-points for an argumentation about an interpretation within the UN-Charter.

a) **UN mandated Humanitarian Interventions**

As already explained in detail there is the possibility for the Security Council in a special situation to determine the existence of any threat to peace, breach of peace, or act of aggression according to Article 39 UN-Charter. Today, it is world wide accepted that massive Human Rights violations may be seen as a threat to international peace and security. According to Chapter VII of the UN-Charter the Security Council can decide what measures shall be taken to maintain or restore international peace and security. This may include the use of military means (which is by definition an Humanitarian Intervention) in the field of actions under Article 42 UN-Charter. The UN may act in this field by “own” troops or mandate a national or multinational intervenor[104].

[103] For more details see: Albert C. Pierce, Just War Principles and Economic Sanctions, Ethnics and International Affairs, 10 (1996) 1, p.99-113

[104] see Articles 45, 46 and 47 UN-Charter. Although there is no “UN-army” existing at the moment there might be one in the future (maybe on regional level in accordance to Chapter VIII of the UN-Charter).

Based on the provisions in Chapter VII UN-Charter, one cannot seriously deny the authority of the United Nations (including the discussion on Article 2 (7) UN-Charter) or argue with the prohibition of the use of force in Article 2 (4) of the UN-Charter.

A Humanitarian Intervention carried out or directly mandated by the Security Council is, of course, in accordance to public international law. But other actors may be also acting in accordance with public international law. The same is valid for actions taken by a regional arrangement in accordance to Chapter VIII of the UN-Charter.

b) **Interpretation of Article 2 (4) UN-Charter**

The provision of Article 2 (4) UN-Charter prohibits any "threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations"[105]. The main aspect of the interpretation in favour of Humanitarian Intervention is that the threat or use of force for a "good" reason like the prevention of massive Human Rights violations is not directed against the territorial integrity and the political independence of a state and not inconsistent with the purposes of the UN. Thus, the Humanitarian Intervention is not covered by general prohibition of the use of force. This argumentation is obviously contra the word and historical interpretation of Article 2 (4) UN-Charter. But the question is if this meaning is also against a teleological interpretation and if a "positive" teleological interpretation can overrule the resentments against such an interpretation. Following these arguments, Article 2 (4) UN-Charter would shorten its application in a sense of only a prohibition of annexation. But it is not convincing that the invasion by foreign armies or air fleets is not a violation of the territorial integrity. The historical interpretation must also come to the conclusion that no exception was planned and it would go much too far to implement one nowadays[106].

c) **Humanitarian Intervention justified because of a blocking of the UN system**

Another explanation is in the field of Chapter VII of the UN-Charter and the interpretation of the term "peace" and the right to act in self-defence. This opinion has its starting-point at the established and widely accepted praxis of the Security

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[105] Article 2 (4) UN-Charter

[106] Simma-Randelzhofer, Art.2(4) No.11, 12

Council to assess massive Human Rights violations or the violation of the fundamental rights of minorities as a breach of international peace and security. This is the bases to create and establish the responsibility of the Security Council for this concrete situation and opens the powers to react with the means set down in Articles 41 and 42 UN-Charter. If the Security Council is in such a situation unable or unwilling to react there is a cap in the international system.

The argumentation continues with the comparison to the “old cases” of the Security Council. In the situation of a “classical” armed attack, the Security Council has a monopoly to deal with that situation under the powers of Chapter VII UN-Charter if it declares the situation as a breach of the peace in the sense of Article 39 UN-Charter[107]. If the Security Council is not reacting after declaring the situation for a breach of the peace, the state would be justified to take all necessary steps in self-defence.[108]

In comparison to a case where the Security Council valued a specific Human Rights situation as a breach of peace and lunched a resolution on the base of Article 39 UN-Charter, the victims would remain without any help. Thus, there must also be a possibility to act “outside” the UN if the world does not accept a one side act of breach of peace. Declaring something as a breach of peace and not opening the field of international (collective) self-defence would be against a modern interpretation of the UN-Charter.

Of course, this is a new interpretation of the right of self-defence written down in Article 51 UN-Charter and it is not like the old interpretation of a codifying customary international law. Furthermore, it is an own content of that provision but a thoroughly conclusive evolution in regard of the changing value of Human Rights and the new interpretation with regard to Chapter VII UN-Charter. In the future, Article 51 UN-Charter is to be understood as “... if an armed attack or any other breach of the peace occurs ...”[109]

The counter arguments against this interpretation are obvious. Because of the history and systematic of the UN-Charter it is not necessary to come to this wide

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[107] see Article 24 (1) UN-Charter

[108] According to Article 51 UN-Charter. But it is important to not that the provision of Article 51 is just codified customary law (Simma-Randelzhofer, Art.51 No.38)

[109] Michael Bothe, Kosovo - Anlässe zum völkerrechtlichen Nachdenken, Wehrrecht und Friedenssicherung S.17

interpretation. The term “attack” is within the UN-Charter in Article 39 UN-Charter (act of aggression, acte d´agression) as well as in Article 51 UN-Charter (armed attack). But the annex of “threat or breach of the peace” is only added in Article 39 UN-Charter. This shows the intention of the UN-Charter’s editor to give a further field for actions taken under Chapter VII UN-Charter. This different range of applicability was desired and there is no place for other interpretations[110].

The argument that a regional alliance may have a general right or even a duty to act as vigilante for Security Council resolutions, while it may have the considerable merit of ensuring that such resolutions are taken seriously, could also create a risk of undermining international inhibitions against the use of force.

d) **The concept of the “Uniting for Peace”- resolution**

Even before the Kosovo crisis the veto power of the five permanent members of the Security Council has been questioned in its present form. During the Korean War (1950-53), the Western majority of the United Nations did not accept that the Security Council could be blocked out of action and influenced by the use of the veto by the Soviet Union, at a time when peace was being threatened or broken. The so-called "Uniting for Peace" resolution[111], adopted by the UN General Assembly in November 1950, allowed a qualified majority of the Assembly to assume responsibility for the maintenance of international peace and security, whenever the Security Council was unable or unwilling to do so.

On this bases it may be possible to appeal to the General Assembly under the "Uniting for Peace" mechanism for approval of an Humanitarian Intervention. Law is often referred to as "a process", and international law as "a world social process" that encompasses concrete state practice, other governmental positions, group expectations, and value demands from different participants in the world community, including intergovernmental (IGOs) and non-governmental (NGOs) organisations. The outcome of this process is influenced by the authority and persuasive arguments of the participants.

[110] Simma-Randelzhofer, Art.51 No.4
[111] GA-Res, November 1950

The General Assembly "Friendly Relations Declaration"[112] reaffirmed "a duty to cooperate" as part of the Charter system. A modern interpretation of this principle should oblige states to do their utmost - including armed action, as a last resort - to avert a humanitarian crisis.

A "duty" to intervene with armed force in such crises is hardly conceivable. But a "duty to act", even in situations when the Security Council is veto-blocked, should make itself felt in the international community. An option for regional organisations to intervene if there is the political will and military capacity to do so, should be part of modern international law. Whenever necessary, the "Uniting for Peace" precedent should be used to bring the matter before the General Assembly to mobilise UN approval outside the Security Council framework.

Upcoming sessions of the UN General Assembly and other international fora will provide states with the opportunity to either accept or reject attempts to legitimise or criticise Humanitarian Interventions[113].

e) **Summing**

The are several arguments against both ways of opening the provisions of the UN-Charter for a right of Humanitarian Intervention. Especially the fading of the definition in Article 2 (4) UN-Charter might be open for massive abuse, since

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[112] Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter Of the United Nations (Friendly Relations Declaration); GA-Res 2625 (XXV), October 24th, 1970

...

(c) The duty of States to co-operate with one another in accordance with the Charter;

States have the duty to co-operate with one another, irrespective of the differences in their political, economical and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.

To this end:

(a) States shall co-operate with other States in the maintenance of international peace and security;

(b) States shall co-operate in the promotion of universal respect for and observance of human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance;

(c) States shall conduct their international relations in the economic, social, cultural, technical, and trade fields in accordance with the principles of sovereign equality and non-intervention;

(d) States Members of the United Nations have the duty to take joint and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter.

States should co-operate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress. States should co-operate in the promotion of economic growth throughout the world especially that of the developing countries.

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[113] Ove Bring, Should NATO take the lead in formulating a doctrine on humanitarian intervention?, Nato Brief - Autumn 1999

different states have different points of view with regard to Human Rights in general and to the intensity and consequences in detail.

The - in public international law - relative clear definition of Article 51 UN-Charter would also fade the different prerequisite of the right for self-defence. On the other hand, there must be a resolution on the basis of Article 39 UN-Charter declaring massive Human Rights violations a breach of the peace.

The last argument against a development in this field within the UN system is that public international law is still based on the consent of the states, i.e. the interpretation of rules and provisions are also limited by the consent of the states. There was no such consent in the Kosovo war in 1999[114] and it is more than questionable if there is one today.

With regard to the above mentioned arguments the conclusion has to be taken that in a case of a failed UN system the Member States must have the possibility and right to act. Though there are strict limitations to obey: The Security Council must pass a resolution where the special situation is considered as a "threat or breach to peace or international security" combined with other conditions mentioned bellow.

2.) The argumentation of the European Union

As regards to the situation in Bosnia at the beginning of the 1990s, the European Union also focused its interest on the concept of Humanitarian Intervention. Although no new arguments or reasons for a justification were mentioned, it is important to take the expressed point of view of such a large and powerful international organisation into account.

Apart from several other organs and sub-commissions, the European Parliament lunched a resolution on the "right of Intervention on humanitarian grounds"[115]

In this resolution from 4th April 1994, the European Parliament accepted the concept of Humanitarian Intervention, considered that current international law does not necessarily represent an obstacle recognition of the right of Humanitarian Intervention but also, that, where all else has failed, the protection of Human Rights may justify Humanitarian Intervention:

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[114] see UN-Security Council draft resolution from 26th March 1999; Russia, China and Namibia voting against the NATO air campaign

[115] Deutscher Bundestag - Drucksache 12/7513 - 10th Mai 1994; EPOQUE A3-0227/94 – 20th April 1994

A. whereas the situation in the world after the Cold War is characterised by a degree of uncertainty which may represent a greater danger to stability and a greater risk or armed conflicts than the situation prior to 1989,
B. having regard to the risk, both within and outside Europe, of interethnic conflicts spreading and taking on international dimensions, thus constituting a threat to international peace and security,
C. whereas old and new conflicts, fuelled by ethnic differences, resurgent nationalism and historically conditioned distrust, can no longer kept in check by the involvement of the superpowers,
D. whereas the repercussions of armed conflicts on innocent civilian populations are a constantly increasing cause for concern,
E. noting with concern that the number of armed conflicts taking place at any one time in the world has grown from approximately 35 during the Cold War to approximately 60 at present, and that, as a result the need for humanitarian aid and intervention has greatly increased and public opinion in democratic countries is calling for a major commitment to solidarity,
F. whereas one of the most serious consequences of the numerous conflicts is the large number of refugees and all associated problems,
G. whereas the 'usefulness' of the United Nations for resolving conflicts and keeping or restoring international peace and security has grown and altered with the disappearance of the East-West conflict,
H. whereas, demands are being made with increasing frequency on the United Nations Organisation, which is in danger of being overburdened; recalling its [aforementioned][116] resolution of 8th February 1994, which stressed the need to reform and strengthen the UN and to achieve greater specialisation and decentralisation of its interventions through UN regional organisations,
I. whereas international law has traditionally followed the principle of non-interference in the internal affairs of a sovereign state; whereas, however, the traditional justification of national sovereignty for giving carte blanche to all internal abuses is no longer acceptable,
J. whereas it is generally accepted that human rights, as defined in the Universal Declaration of human rights and the UN International Conventions on civil and political rights and economic an and cultural rights, are universal, and whereas important international documents such as the Helsinki Final Act and the Fourth Lorné Convention include provisions according to which the human rights situation in a country does not form part of its internal affairs,
K. aware of the valuable role played by non-governmental organisations in the protection of human rights and in providing assistance in emergency situations,
L. having regard to the need for a political stance to be taken as regards the admissibility of humanitarian Intervention,

This European resolution promotes the recognition of Human Rights and the enforcement by the state community by not qualifying Human Rights as a part of the internal affairs. After stressing the main responsibility of the UN, the European Community also accepted the involvement of a regional organisation, without an UN

[116] Resolution on the role Union within the UN and the problems of reforming the UN of 8 February 1994

mandate as well as "outside its territory". Beside of this general possibility, the European Parliament expanded special requirements[117].

3.) Other justifications

Of course, there are also other kinds of solutions and argumentation in the discussion on Humanitarian Intervention. In the following lines I will try to give an overview on today's mainly discussed ways.

a) **Justification because of the principle of emergency situations**

Another possible argument to justify the Humanitarian Intervention is drawn out the principle of an emergency situation. All modern law systems know the basic system of special reasons for justification or excuse in a situation of emergency. This means that something enjoying legal protection can only be saved from violations or its destroying only by violating other rules of law. With regard to public international law this can be seen as a "general principle of law recognised by civilised nations" within the sense of Article 38 Para.1 lit.c) of the Statute of the International Court of Justice.[118] Thus, this principle is also part of public international law.

Health and life of persons, the protection against ethnic cleansing and genocide are, without doubt, very high ranking rules in public international law. In the situation of massive Human Right violation and with regard to these rules and the above mentioned principle the use of military power against the violating state could be justified in term of acting in an emergency situation. The question is, again, how to prevent abuses of this justification. On the other hand, it seems to be very difficult to evaluate the situation with regard to the principle of proportionality. Using the argument of an emergency situation is only possible in a restrictive and detailed verification procedure.

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[117] Annex No.4

[118] Article 38 of the Statue of the International Court of Justice:

1. The court, whose function is to decide in accordance with international law such dispute as are submitted to it, shall apply:
(a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognised by civilised nations;
(d) subject to the provision of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

b) **Justification because of other treaty obligations**

The argument that general public international law provides a basis for Humanitarian Interventions can also be reinforced by reference to bodies of law which have considerably developed since the UN Charter was drawn up in 1945. In particular, crimes against humanity, violations of the 1948 Genocide Convention, and violations of the 1949 Geneva Conventions may all constitute grounds for intervention, even though these and related agreements do not provide explicitly for military preventive measures against states violating their provisions. In this respective, it cannot be right to tolerate acts which violate widely supported legal norms only because the Charter does not explicitly provide for military actions in such circumstances or because a veto on the Security Council makes the UN-authorised action impossible.[119]

Without a recognised justification for the right to an Humanitarian Intervention in some special circumstances, an area outside the system of law would thus be created and a state would be able to act against the above mentioned international obligations without the fear of any interference by the international community. Calling the right of territorial integrity, the prohibition of intervention into internal affairs and the state sovereignty, a violating state could commit acts of genocide, ethnic cleansing or other massive Human Rights violations and no other party would be able to prevent that. This result is acceptable neither under legal nor under ethnic-moral grounds[120].

c) **"Democratic" Humanitarian Intervention**

One justification for the NATO involvement in Kosovo 1999 was that this military action did represent an international community interest, and not the mere interest of one single state. The argument was that democratic states have a greater claim to international support when they do so. The fact that states with their multi-party democratic systems did act collectively would be impressive, and the democratic nature may help to place certain restrains on the means used and on the goals of the military operation. However, existing international law relating to the legitimacy of resort to force does not depend to any significant degree on the fundamental distinction between democratic and autocratic states. In UN-based as well as European institutions, democracy may be emerging as an important criterion whereby

[119] Adam Roberts, Nato's ‚Humanitarian War' over Kosovo, Survival - IISS Quarterly, Autumn 1999, p.106, 107

[120] BMVg, Internal Paper concerning the legal situation in Kosovo, R II Az 39-05-05A/87a - 3 SH 9 of 12th May 1999

a state's claim to be legitimate member of international society are judged, but this has yet to be reflected in the body of international law relating to intervention.[121]

Because of the these argumentation a Humanitarian Intervention is not justified *per se* only because "democratic" states are acting. However, the political system of the intervenior might help for a justification within the world community, and, with regard to the world media, get the necessary support for the operation.

4.) Legal requirements for a Humanitarian Intervention

After stressing out the different possibilities to come to a positive legal conclusion about the question of the possibility for a right of Humanitarian Intervention in general, it is necessary to work out some specifications.

a) **Situations open for a Humanitarian Intervention**

In most cases, the discussions about Humanitarian Interventions are based on actual and special situations anywhere in the world, mostly along with an immense recognition in the mass media. However, it is important for a general discussion about the right for Humanitarian Intervention to figure out some scenarios to open the discussion about the forceful measures at all.

B. Sutor[122] accepted in 1995 a list of special circumstances. If such a situation reaches an "unacceptable" level, a Humanitarian Intervention may be justified but he denied every justification in any other situations[123]. His list contains any kind of military aggression, a policy of genocide and mass expulsion, emergency situations for civilians in the case of riots, civil wars or wars, imminent ecological catastrophes or the building of an arsenal of mass extermination weapons.

Although this list is very universal and goes beyond the definition of Humanitarian Intervention as made at the beginning of my thesis[124], it may, as well, give some cornerstones for today's question. However, there must be a situation of massive Human Rights violations which is *per se* unacceptable for the international community. This "*justa et gravis causa*" must be ascertained by a competent international organ like the United Nations or any regional arrangement.

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[121] Adam Roberts, Nato's ‚Humanitarian War' over Kosovo, Survival - IISS Quarterly, Autumn 1999, p.105

[122] Bernhard Sutor; Vom Recht auf Verteidigung zum Recht auf Intervention? Neue Fragen zur Friedensethik; Stimmen der Zeit 1995 (2), p.213

[123] Part 2. of the Rome Statute (for the *new* International Criminal Court) on JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW might be a unseful tool for the argumantation if a situtaion can justify an Humanitarian Intervention; see Annex No.5

b) **General requirements for Humanitarian Interventions**

Beside of the existence of a situation which requires a Humanitarian Intervention other requirements have to be fulfilled in order to use military means.

Most of these requirements are already written down in the report of *Thomas M. Franck* and *Nigel S. Rodley*[125] and the resolution of the European Union.

It is my opinion that different levels of requirements have to be fulfilled, depending on the acting organ: The situation where the United Nations, the Security Council or a regional arrangement act in the field of the UN-Charter differs from the situation where a single state or a group of states acts because it must take into account the danger of an abuse.

But there are still some other "checkpoints" for the legality of an Humanitarian Intervention mandated by or under command of an international (UN-)organ in accordance with the UN-Charter.

Firstly (regardless of the discussion if economic sanctions are more disproportional in special circumstances), the use of military means - the Humanitarian Intervention - must be the *ultima ratio* of measures the international community can use to solve problems or react on human catastrophes.

Secondly, the concept of proportionality must be taken into deep consideration. The justification to violate the general prohibition of the use of force and because of the danger of massive losses of lives and irreparable damages to civilian property (collateral damages) is only possible if the negative consequences are fewer than the positive ones. So too, the use of force must be temporary and may not be disproportionate.

Finally, the operations have to be limited to the absolute necessary operative aims to fulfil the requirements the mandating organ agreed on. It must not represent a threat to international peace and security to the extent that it causes a greater loss of life and greater suffering than that which it aims to prevent.

Having in mind the general principles of public international law codified in the provisions of Article 2 (4) and Article 2 (7) UN-Charter, these operations should be limited as far as possible in the sense of violating the territorial integrity, affecting the political independence or other matters, essentially within the domestic

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[124] see above Part C

jurisdiction. On the other hand, it must be a sufficient and final solution. A Humanitarian Intervention must intend[126] to end the humanitarian catastrophe and to keep the creditability of the international community for the future – non-military or military - involvement.

c) Special Requirements of Humanitarian Interventions not mandated by the UN[127]

If a Humanitarian Intervention is not carried out under the command or mandate of the United Nations or a regional arrangement, there are several other requirements that need to be fulfilled. These additional requirements are necessary to "keep Pandora's Box closed", in other words to prevent single states or a group of states to use the justification for a Humanitarian Intervention because of mere national or other improper reasons.

These additional requirements are on the first step that the intervening state(s) has/have to accept the primary responsibility of the Organs of the United Nations, especially the Security Council, and other organs of regional arrangements due to Chapter VIII UN-Charter. If one of these organs decides to act itself, the intervenor has to get the mandate or step back. The justification for the breach of the prohibition of the use of force is also impossible, if the Security Council determines the "humanitarian" operation as a threat to peace, breach of peace, or act of aggression. It must be apparent that the UN apparatus is unable to take effective actions. However, the Humanitarian Intervention must also be reported immediately to the United Nations and not be subject to UN condemnation.

Another additional requirement is that no state can be enabled to justify any military operation as a Humanitarian Intervention if it obviously has its own fundamental national interests in that state. The intervenor must be relatively disinterested in the situation in so far as the protection of Human Rights should be the primary objective and no other motives of a political or economic nature play a role; the stress in this connection is on the importance of full implementation of the agreements barring the presence of armed forces which might generate further instability.

[125] Thomas M. Franck and Nigel S. Rodley, After Bangladesh: The Law of Humanitarian Intervention by Military Force, AJIL Vol.67, 1973, p.302
[126] Not like e.g. the case of Somalia.
[127] see Annex No.1

However, this last mentioned requirement is very difficult to fulfil, since all states have some kind of special interest in the situation of the affected state[128].

The Humanitarian Intervention should also only occur in a situation where there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief.

This also led to the requirement that a Humanitarian Intervention should never be carried out - without the mandate of any UN organ - by one single state. The direct involvement of more than one state gives at least a minimum protection against pure national abuses.

The last requirement is that the intervenor must accept the judicial power of the ICJ over the whole Humanitarian Intervention operation and recognise as compulsory *ipso facto* the jurisdiction of the ICJ.

5.) DIGRESSION: Other possibilities to act in these situations

Beside of the argumentation and a final conclusion about the development of the concept of Humanitarian Intervention, it is also a question of other possibilities and consequences.

If the world community is not able to react or if the international law does not provide sufficient means to solve crisis of tremendous humanitarian catastrophes and for the case of massive Human Rights violations, the way for “other solutions” will be open - outside any mechanism of public international law.

a) **Secret state action solutions**

At all times, states were likely to intervene in any kind of situations in other states. Not only the directly and obviously use of military means but also the secret use of political, diplomatic, economical or military power had and has a huge influence on the international relations. However, this is much more difficult to monitor and if states or other state-actors were “forced” to use these means because the international law is not clear enough, the result will be a more difficult and confused international situation. Examples for these actions are secret military operations, the support with

[128] e.g. as a former colonial power, because of own nationals involved. The problem is, that nearly NO state will be willing to send own troops in such operations with all its risks and costs. But the interests must be mainly immaterial and not focused on economic, political or strategic influence.

military equipment and weapons, logistical or technical support, ... the list will never come to the end.

b) **Religious, ideological or national solutions**

Another risk is the strengthening of fundamental religious, ideological or national movements. The problem is, that there is normally no peaceful solution when these movements are too strong and have too much influence. The extreme situation in Kosovo (or better the whole former Yugoslavia), the problems in East Timor, Northern Ireland, and in several Arabic countries show the danger and consequences if a situation turns into a situation of religious, ideological or national matters, especially if those are too strong.

c) **Terrorism**

One last aspect what could happen if the world community is not reacting at humanitarian problems and Human Rights violations is the question of terrorism. There are a lot of reasons for terrorism but one is to get the world's attention, to "set a signal" and to make people aware of a special situation in a state. Especially, in the time of mass media it will become more and more fact that only the "highpoints" of human tragedies, Human Right violations and other kinds of conflicts will rule political decisions. The attention of the world is easily focused on some (critical) media interesting points and helping campaigns for other regions are not on the topic anymore. This is the starting point for people to set also "highpoints" to get attention[129].

6.) Conclusion

All attempts to develop a general doctrine regarding the circumstances in which Humanitarian Intervention may be justified seem to run into predictable difficulties. There are two enduring and inescapable problems: Firstly, the majority of the states of the international community are nervous about justifying in advance a type of operation which might further increase the power of major powers, and might be used against them; and secondly, the intervening states of the last years are uneasy

[129] The world is moving towards a critical point where it will be necessary to commit medial interesting actions (acts of terrorism, brutal war scenarios, ...) to get significant observance for the problems.

about creating a doctrine which might oblige them to intervene in a situation where they were not keen to do so.[130]

Nevertheless, there are several legal possibilities to justify Humanitarian Intervention either by the UN or at least mandated by the UN system or by a group of states including the obligation to pass additional circumstances. From my point of view it is not possible to argue at the beginning of the 21st century that the concept of Humanitarian Intervention is illegal as such. If a special situation which fulfils the above mentioned circumstances and requirements is given, of course, the question of the rules and standards to be applied in case of a Humanitarian Intervention will remain (but this is the substance for another thesis).

F) Final Statement

The concept of Humanitarian Intervention has been used ever since it was created to implement or support different ideologies. Religious and confessional principles in the 16th and 17th century, the confirmation of monarchy, ideas of the Jacobeans, the principle of humanity and the idea of the socialist world revolution. At the moment, it is the time of the principles of Human Rights and democracy[131]. But it would be irresponsible to open "Pandora's box" and break the general prohibition without exception of the use of force only due to a fashion or because it is the time for it nowadays. However, the last ten years were full of horrible atrocities and situations where the world could not just stand aside and watch CNN. It would be as

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[130] Adam Roberts, Nato's ‚Humanitarian War' over Kosovo, Survival - IISS Quarterly, Autumn 1999, p.120

[131] Isensee, JZ 1995, 429

irresponsible as the other alternative not to find solutions to solve these problems. If the Humanitarian Intervention as the *ultima ratio* of the world community against massive Human Right violations, genocide, mass expulsions or other humanitarian catastrophes is missing or implausible, inhuman violators might be invited to keep their "policy" going. In case of a dictatorship or any other tyranny, all other means of solving the problem or at least helping the suffering people are intended to break down.

The measures and solutions must contain, of course, political, diplomatic and economical means, on a first level and long before the crises turns into massive Human Rights violations. However, it must also be clear, how to solve situations where the classical means of politics and diplomacy are not able to give sufficient answers.

This leads to the question of military actions as the final possibility to stop genocide, massive Human Rights violations or other humanitarian catastrophes. On this level, the concept of Humanitarian Intervention is the umbrella-term. As a conclusion for this thesis it is thus my opinion that a right for Humanitarian Intervention (within the UN system and outside of it carried out by a group of states) is developed and the future will need answers to the question of the prerequisites, the applicable law for these interventions and the role the international organisation, to have a justification for a Humanitarian Intervention will not be enough.

But the main problem in the legal discussion on public international law will be still unsolved: Lawyers tend to like a world of clarity, where an action can be distinctly categorised as legal or illegal. Politicians and members of the public around the world look at law as a provide of a clear guidance, or at least a verbal bludgeon with which to assault their opponents. In reality, because contradictory principles were inescapably at the heart of the concept of Humanitarian Intervention, there is, so far, no definitive legal answer that may satisfy a convincing majority of the world's people, governments or even international lawyers. Law can provide principles, guidelines, procedures, but not always absolute answers.[132]

[132] Adam Roberts, Nato's ‚Humanitarian War' over Kosovo, Survival - IISS Quarterly, Autumn 1999, p.105

Annex:

Memorandums on elements for the justification of Humanitarian Interventions in the legal discussion.

No.1:

A UK Foreign and Commonwealth Office note of October 1998, circulated to NATO allies, suggests elements of for a justification:

Security Council authorisation to use force for humanitarian purposes is now widely accepted (Bosnia and Somalia provided firm legal precedents). A UNSCR would give a clear legal bases for NATO action, as well as being politically desirable.
But force can also be justified on the grounds of overwhelming humanitarian necessity without a UNSCR. The following criteria would need to be applied.

(a) that there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
(b) that it is objectively clear that there is no practicable alternative to the use of force if lives are to be saved;
(c) that the proposed use of force is necessary and proportionate to the aim (the relief of humanitarian need) and is strictly limited in time and scope to this aim - i.e. it is the minimum necessary to achieve that end. It would also be necessary at the appropriate stage to assess the targets against this criterion.

There is convincing evidence of an impending humanitarian catastrophe (SCR 1199 and the UNSG´s and UNHCR´s reports). We judge on the evidence of FRY (Federal Republic of Yugoslavia) handling of Kosovo throughout this year that a humanitarian catastrophe cannot be averted unless Milosevic is dissuaded from further repressive acts, and that only the proposed threat of force will achieve this objective. Th UK's view is therefore that, as matters now stand and if action through the Security Council is not possible, military intervention by NATO is lawful on grounds of overwhelming humanitarian necessity.[133]

No.2:

Comfort Ero and Suzanne Long published in their Article in 1995 also a list of possible criteria, to reduce the selective nature of UN Humanitarian Intervention actions and to avoid the perception that decisions are largely dictated by the political interests of the Permanent Five members of the Security Council. The Article is only focusing on UN mandated Humanitarian Intervention:

1. Military Humanitarian Intervention should be undertaken by a competent authority, in this case the UN, or by other recognised, international bodies, authorised by, and acting on behalf of the UN.

[133] http://www.parliament.the-stationery-office.co.uk/pa/cm/cmhansrd.htm

2. Humanitarian Intervention should take place only when violations of Human Rights are extremely serious, involving the systematic violations of the most basic rights. This criterion, however, needs much more detailed consideration as it remains the fundamental area of disagreement.
3. Military Humanitarian Intervention should proceed only when all other appropriate measures outlined in Article 41 of the Charter have been implemented and have failed to bring about the cessation of Human Rights violations.
4. The intervention should be proportionate to direct and urgent needs, and should not be enlarged further and extended longer than these needs warrant.
5. The intervening forces should begin their withdrawal as soon as reasonable possible. The intervention should be seen as a short-term measure which responds to the immediate needs of those in need or danger until such time as a political accommodation may be arranged through international arrangements.
6. There should be a minimal impact on the authority structure within the target state except where the cessation of Human Rights violation is dependent upon the removal of those holding power. Humanitarian Intervention is based on the preservation of life. It is not the purpose of the interventionary forces to do anything more than enforce the stipulations of international treaties pertaining to Human Rights. Of course, in practice interventionary forces have other objectives which may or may not coincide with the protection of Human Rights.

These are important factors which must be taken into consideration when discussing the principles and forms of Humanitarian Intervention.[134]

No.3:

Ove Bring is setting strict conditions for intervention:

As a number of legal scholars have made clear, strict conditions for any forcible intervention in the absence of Security Council authorisation need to be set out in an emerging doctrine on the subject. The following requirements should be included:

- it has to be a case of gross human rights violations amounting to crimes against humanity;
- all available peaceful settlement procedures must have been exhausted; u the Security Council must be unable or unwilling to stop the crimes against humanity;
- the government of the state where the atrocities take place must be unable or unwilling to rectify the situation;
- the decision to take military action could be made by a regional organisation covered by Chapter VIII of the UN Charter, using the "Uniting for Peace" precedent to seek approval by the General Assembly as soon as possible; or the decision could be taken directly by a two-thirds majority in the General Assembly in accordance with the "Uniting for Peace" procedure;
- the use of force must be proportional to the humanitarian issue at hand and in accordance with international humanitarian law of armed conflict;
- the purpose of the humanitarian intervention must be strictly limited to ending the atrocities and building a new order of security for people in the country in question.[135]

[134] C. Ero and S. Long; International Peacekeeping Vol.2 1995, 152

No.4:

The European Parliament in its “Resolution on the rights of Humanitarian Intervention”, A 3 / 0227 /94 from 20th April 1994:

1. Defines the concept of Humanitarian Intervention as the protection, including the threat or use of force, by a state or group of states of the basic Human Rights of persons who are subject of and/or resident in another state;
2. Considers that current international law does not necessarily represent an obstacle to the recognition of the right of Humanitarian Intervention:
3. Notes that international law is significantly shaped by what individual Member States actually do;
4. Considered that, where all else has failed, the protection of Human Rights may justify Humanitarian Intervention, whether military force is used or not;
5. Considers, moreover, that intervention should preferable taken place on the initiative of the UN Security Council or with the agreement of a legitimate government, but considers that the option of Humanitarian Intervention must be left open if there is no reasonable alternative;
6. Considers that a wide range of instruments for Humanitarian Intervention must be devised and implemented, from the use of political, diplomatic and economic pressure to the sending of observers or arbitration missions and, possibly, the threat or use of force under the UN authority, the level of intervention being determined by criteria justice and effectiveness;
7. Considers that the concept of Humanitarian Intervention must not undermine the ten principles of the Helsinki Final Act including the territorial integrity of a state and its political independence and unity;
8. Notes that all decisions on Humanitarian Intervention must take full account of the wishes of the populations directly affected and aim to restore without delay the necessary conditions for self-sufficiency and democratic self-government;
9. Considers it necessary, partly in order to meet the existing objections against Humanitarian Intervention, to draw up criteria which must be satisfied when a state or group of states intervene in this manner;
10. Considers that Humanitarian Intervention should take account of the following criteria:

(a) there must be an extraordinary and extremely serious situation of humanitarian need in a country where those in power be made to see reason other than through military means;
(b) it must be apparent that the UN apparatus is unable to take effective [and timely] action;
(c) all other means must, in so far as possible or reasonable, have been exhausted and must have failed;
(d) the intervenor must be relatively disinterested in the situation in so far as the protection of Human Rights should be the primary objective and no other motives of a political or economic nature play a role; stresses in this connection the importance of full implementation of the agreements barring the presence of armed forces which might generate further instability;

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[135] Ove Bring, Should NATO take the lead in formulating a doctrine on humanitarian intervention?, Nato Brief - Autumn 1999

(e) states which have been formally condemned by the international community for unlawful intervention in a region must not be allowed to take part in Humanitarian Intervention in other regions until they have put an end to all their unlawful operations;
(f) intervention must be limited to specific objectives and must not only have minimal political consequences for the authority of the state concerned;
(g) the use of force must be temporary and not be disproportionate;
(h) the intervention must be reported immediately to the UN and not be subject to UN condemnation;
(i) the intervention must not represent a threat to international peace and security to the extent that it causes greater loss of life and greater suffering than that which it aims to prevent.

...

12. Considers that strict and objective standards must be set, in agreement with the United Nations, with regard to the conduct of military troops engaged in Humanitarian Intervention and that any illegal actions or other deviation from international law and legal principles much be penalised as appropriate so as to avoid illegal intervention involving violations of Human Rights and undermining peace;[136]

No.5:

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5 - Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes;
(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6 - Genocide

For the purpose of this Statute, "genocide" means 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;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

[136] EPOQUE A3-0227/94 – 20th April 1994

Article 7 - Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.[137]

[137] Rome Statute - http://www.un.org/law/icc/statute/romefra.htm

List of Abbreviations:

BMVg	Bundesministerium der Verteidigung (German defence ministry)
ECOSOC	Economic and Social Council
FIZBw	Fachinformationszentrumm der Bundeswehr (Informationcenter of the German Armed Forces)
NATO	North Atlantic Treaty Organisation
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for Yugoslavia
JZ	Juristen Zeitung (German law journal)
Res	Resolution
RWI	Raoul Wallenberg Institute
SC	Security Council
UN	United Nations
ZaöRVR	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (German law journal)

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