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The legality of humanitarian  
intervention in customary international  
law

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# Summary

The aim of this study is to examine whether there exists a right of humanitarian intervention in customary international law. The point of departure is the principle of non-use of force in customary international law. The International Court of Justice established in the *Nicaragua Case* that the principle of non-use of force not only is a jus cogens norm, but that it also has the basic identity of the UN-charter article 2(4). By interpreting article 2(4) according to the provisions of interpretation in the Vienna Convention on the Law of Treaties, I thereby conclude that humanitarian intervention is not in conformity with article 2(4) and consequently not in conformity with the principle of non-use of force either. The high threshold for modification of the principle of non-use of force due to its jus cogens character is furthermore established. It is submitted that the evidence of State practice for modification of the principle of non-use of force must be overwhelming and reflect the legal conviction of the international community at large.

I then conduct a case study, where four cases, which could be perceived as evidence of State practice in favor of humanitarian intervention, are analyzed. The cases are “the three best cases” during the Cold War: the Indian invasion of East Pakistan 1971, the Vietnamese invasion of Kampuchea 1978-79, the Tanzanian invasion of Uganda 1978-1979, as well as Operation Allied Force conducted by NATO against the FRY in the spring of 1999. The invading states in “the three best cases” primarily relied on self-defense as a way of arguing the legality of the interventions, which reinforces the principle of non-use of force in customary international law. The reaction from the international community was overall negative while the few states, which approved of the invasions, did not rely on the concept of humanitarian intervention. Operation Allied Force indicated a change in the attitude towards humanitarian intervention. The majority of the NATO-states together with the international community chose to assert the morality of the operation however. It has little value in terms of establishing a right of humanitarian intervention in customary international law. I therefore conclude that the State practice analyzed can not be used as evidence for a right of humanitarian intervention in customary international law, especially since the principle of non-use of force is a jus cogens norm. Regarding the question of humanitarian intervention *de lege ferenda*, I am of the opinion that humanitarian intervention should not be part of international law, because of the risk of abuse, which is worsened by the fact that humanitarian intervention is only available to nations with the military and economic capacity. The fact that humanitarian intervention is illegal under international law must not however stop the international community from reacting when there is a desperate humanitarian need.

# Preface

I would first of all like to thank my supervisor, Ulf Linderfalk, for his skilful help during the process of writing this essay. I would also like to thank my parents, Göran and Karin, for all their support. They have helped me tremendously, not only with my study, but with other aspects of life as well. For that I am grateful.

# Abbreviations

|          |  |
|----------|--|
| A/, GA   | General Assembly   |
| EU       | European Union   |
| FRG      | Federal Republic of Germany  |
| FRY      | Federal Republic of Yugoslavia   |
| G8       | Group of Eight   |
| HRW      | Human Rights Watch   |
| ICJ      | International Court of Justice   |
| ICJ Rep. | International Court of Justice, Reports of Judgments, Advisory Opinions and Orders |
| KLA      | Kosovo Liberation Army   |
| LDK      | Democratic League of Kosovo  |
| NATO     | North Atlantic Treaty Organization   |
| OAU      | Organization of African Unity  |
| /PV.     | Verbatim Records   |
| Res      | Resolution   |
| SC, S/   | Security Council   |
| UK       | United Kingdom   |
| UN       | United Nations   |
| UNCIO    | United Nations Conference on International Organization                            |
| UNHCR    | United Nations High Commissioner for Refugees                                      |
| US, USA  | United States of America   |
| VCLT     | Vienna Convention on the law of Treaties   |

# 1 Introduction

Humanitarian intervention is a controversial subject in international law and politics. It concerns one of the most fundamental principles in international law, i.e. the prohibition on the use of force. For a right of humanitarian intervention to exist, there has to be an exception to the prohibition on the use of force for interventions on humanitarian grounds. The question is however if such an exception is desirable. The importance of protecting human rights is emphasized in the debate while the risk of abuse of the concept of humanitarian intervention is also argued. The conflict between principles such as sovereignty and non-intervention on one hand and human rights on the other hand is furthermore evident in the debate on humanitarian intervention. The evolution of human rights after the Cold War has brought with it some changes in the perception of whose rights should be protected: The nation state or the individuals inhabiting that state? This question is essential to humanitarian intervention, since it involves the use of armed force to be employed against a state to protect the lives of the citizens of that state.

The right of humanitarian intervention is of utmost importance to the victims of human rights abuses as well as the states which would face the risk of being invaded. It is however also of importance to the international community as a whole. To grant individual states a right to intervene in order to uphold human rights could, other than open up for abuse, serve as a destabilizing factor in international politics and threaten the sovereignty of states. There is also the risk of the attack to further add to the violence in the invaded state. At the same time, massive abuses of human rights or even genocide could create refugee flows that would possibly destabilize a region. There is consequently a need for international actors as well as legal scholars to examine if there exists a right of humanitarian intervention in current international law, and if so, under which circumstances it is accepted.

## 1.1 Subject and purpose

The objective of this essay is to contribute to the understanding of humanitarian intervention in international law. The question I will answer is the following: *Does it exist a right of humanitarian intervention in customary international law?* I will answer the said question by conducting a study on the legal framework regulating humanitarian intervention in customary international law. I will furthermore make a case study to see if the most relevant cases regarding

humanitarian intervention support a right of humanitarian intervention in customary international law.

## 1.2 Method and Material

I will first of all, in my study on humanitarian intervention, analyze the content of the principle of non-use of force and its legal standing in order to find out whether it prohibits humanitarian intervention. Article 38(1) of the Statute of the International Court of Justice states that:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b) international custom, as evidence of a general practice accepted as law;
- c) the general principles of law recognized by civilized nations;
- d) subject to the provisions 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.

Of the sources of law listed above, I will use treaties, judicial decisions and the legal doctrine in international law when conducting my analysis. The treaties I will use are the Vienna Convention on the law of treaties (VCLT) and the UN-charter. VCLT article 31-32, is considered to be reflective of customary law.<sup>1</sup> It will be used, together with the UN-charter, judicial decisions by the ICJ and legal doctrine, in order to interpret the UN-charter article 2(4). Judicial decisions by the ICJ and the legal doctrine will also be applied to establish whether article 2(4) is reflective of the principle of non-use of force in customary international law. They will furthermore be used, together with VCLT article 53, when I analyze the legal standing of the principle of non-use of force.

The second part of the essay is a case study, by which the conduct and opinio juris of states will be analyzed. The material I will rely upon regarding the humanitarian situation in each case as well as the conduct of the states is in general the work of legal scholars. To make my own research would be too time-consuming. My ambition is however to use the material of several legal scholars in order to get as clear picture of each case as possible. *The Kosovo Report* as well as a report by Human Rights Watch will also be used to describe Kosovo and Operation Allied Force. I will regarding Operation Allied Force also present a short background of the conflict in Kosovo, so that the case will be

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<sup>1</sup> Malcolm N. Shaw, *International Law* (Cambridge University Press, 1997), p. 633.

comprehensible. The opinio juris of states will primarily originate from statements by the individual states in the Security Council and the General Assembly. Votings in the Security Council and the General Assembly will also be used as reflective of the legal conviction of states. Statements put forward on a national level or while addressing the media or international organizations other than the UN will furthermore be taken into account. As to Operation Allied Force the opinio juris will, in addition to the sources above, be found in statements in the proceedings in the ICJ regarding the legality of the operation. These studies of the conduct of states as well as the opinio juris will amount to an assessment of the cases as evidence of State practice. I will apply judicial decisions by the ICJ and legal doctrine to the cases to make an assessment of their value as State practice. The main source of information regarding the different states' opinio juris is statements in the context of the United Nations: statements in the Security Council, the General Assembly and in the International Court of Justice. This is due to the fact that they are available in international publications. My ambition has been however to use other sources as evidence of opinio juris when available to balance the dependence of material from United Nations' institutions. Some of the material constituting opinio juris has furthermore been gathered from the work of legal scholars, since not all of the material has been available to me as a primary source.

The cases as described above will in conclusion be applied on the principle of non-use of force. It will thereby be established whether they are sufficient evidence of State practice in order to modify the principle of non-use of force. I will in my evaluation on whether the referred cases can modify the principle of non-use of force use legal doctrine.

The main focus in this essay is the practice of states and whether it can be used as evidence of customary international law. I here submit to the opinion that it is general practice that is evidence of international custom and not the other way around as stated in the Statute of the International Court of Justice article 38(1b). It is a view shared by several legal scholars.<sup>2</sup>

### **1.3 Disposition**

This essay is divided into three parts. The first part, constituting the second chapter, is an analysis of the principle of non-use of force, as emanating from UN-charter article 2(4). I will then establish the scope of application of the principle of non-use of force and whether humanitarian intervention is in conformity with the said principle. There will also be focus on the jus cogens character of the principle of non-use of force. The high threshold for modification of a jus cogens norm will furthermore be reviewed. The second part, chapter 3-6, is a description as well as an assessment of four cases that could be used as

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<sup>2</sup> See for instance, *Oppenheim's International Law*, ed. by Robert Jennings and Arthur Watts, (Harlow:Longman, 1992), p. 26.



evidence of State practice in favor of a humanitarian intervention. The third part, chapter 7, is an analysis on whether the four cases are sufficient evidence in order to establish a right of humanitarian intervention in customary international law. Chapter 7 will also deal with questions concerning the law of humanitarian intervention *de lege ferenda* and political considerations.

## 1.4 Limitations

Since the present study only covers humanitarian intervention in customary international law, the regulation on the use of force in the UN-charter is not covered. The general prohibition on the use of force in article 2(4) is however brought up indirectly while interpreting the principle of non-use of force, due to the fact that the two norms have a basic identity.<sup>3</sup> This essay furthermore focuses entirely on unauthorized humanitarian intervention, which means that humanitarian interventions undertaken with a mandate from the Security Council will not be covered. There were several possible precedents of humanitarian intervention during the Cold War era such as Congo 1960 and 1964, Dominican Republic 1965, Uganda 1976, Zaire 1978, Central African Republic 1979, Grenada 1983 and Panama 1989. Many of these interventions were however undertaken in a colonial context and aiming at rescuing the invading nations' own citizens, which makes them less relevant as examples of humanitarian intervention. For that reason, I will focus entirely on the so-called "three best cases"<sup>4</sup> during the Cold War. The historical background behind interventionism will not be covered. For the history behind humanitarian intervention, I recommend the excellent description by Simon Chesterman in *Just war or Just peace?*<sup>5</sup>

## 1.5 Terminology

I believe that primarily two formulations regarding the use of force need to be defined. The first is armed attack. The use of the word armed attack in this essay will express that there is a deliberate use of military force or threat thereof against the targeted state without that state's valid consent. The second formulation that has to be defined is humanitarian intervention. My definition of humanitarian intervention is in accordance with the established view amongst legal scholars. Thus, I require the following elements in a humanitarian intervention:<sup>6</sup>

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<sup>3</sup> Mattias Falk, *The legality of Humanitarian Intervention, A review in Light of recent UN Practice* (Stockholm:Juristförlaget, 1996), p. 46.

<sup>4</sup> Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford:Oxford University Press, 2001), p. 226.

<sup>5</sup> *Ibid*, chapter 1.

<sup>6</sup> These criteria are taken from Chesterman, p 228-229; John J. Merriam, "Kosovo and the Law of Humanitarian Intervention" (*Case Western Reserve Journal of International Law*, Vol. 33, 2001), p. 126-

1. The human rights violations must be severe and be committed on a large scale. This means that only violations of fundamental and recognized human rights such as the right to life and the right to be free from physical abuse apply.
2. All peaceful alternatives to the conflict are exhausted. Diplomacy must have been tried and failed for this criterion to be fulfilled.
3. The Security Council is unable to or does not want to authorize collective action under chapter seven in the UN- charter.
4. The amount of force must be limited to what is necessary in order to prevent further human rights violations. The action must also be proportionate. By that I mean it must do more good than harm.
5. The actors, who are involved in the humanitarian intervention, need to be able to show that the primary motivation for the action taken is humanitarian. I do not require a total lack of self – interest, as opposed to some jurists, but the humanitarian purpose should at least be paramount.

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127; Frederik Harhoff, “Unauthorised Humanitarian Interventions – Armed Violence in the Name of Humanity?” (*Nordic Journal of International Law*, Vol. 70, 2001), p. 70-72.

# 2 The legal framework

## 2.1 Introduction

The rules governing the resort to armed conflict, *jus ad bellum*, apply equally to humanitarian intervention as to other conflicts involving the use of force. This is emphasized by Olof Beckman, stating that:

Just because a deployment of force is labeled intervention and not war, or that the word intervention has been given some form of qualifying adjective making it appear a little less disagreeable, the fact that armed interventions involves the use of force has not change... Perhaps due to excessive use of the qualification 'humanitarian' to the word 'intervention', the strongest legal agreement against coercive interventions has been partly obscured. An armed intervention can have virtually any qualification attached indicating the motive (humanitarian is common) of the intervening force. For whatever reason such an adjective is chosen the intervention is still armed and therefore challenges the strong and general prohibition of force in international relations.<sup>7</sup>

The main legal obstacle regarding humanitarian intervention in customary international law is the principle of non-use of force. It will therefore be analyzed in the following section.

## 2.2 The principle of non-use of force

The principle of non-use of force emanates from the UN-charter article 2(4). It provides that:

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

The ICJ in the *Nicaragua case* came to the conclusion that: "The principle of non-use of force, for example, may thus be regarded as a *principle of customary international law*, not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under article 43 of the Charter"<sup>8</sup>. It furthermore established that the above referred principle is almost identical to article 2(4) of the UN-charter. There are only minor inconsistencies between the two sources of law.<sup>9</sup> It is a legal viewpoint shared by

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<sup>7</sup> Olof Beckman, *Armed Intervention, Pursuing Legitimacy and the Pragmatic Use of Legal Argument* (Lund:Media Tryck, 2005), p. 64.

<sup>8</sup> *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Merits, ICJ Rep., 1986, para 188 (emphasis added). It will be referred to below as *Nicaragua case*.

<sup>9</sup> Falk, p. 46.

a majority of legal scholars today.<sup>10</sup> The question is then how the customary rule reflected in article 2(4) should be interpreted. Is it possible that it leaves room for interventions on humanitarian grounds?

The rules of interpretation in the Vienna Convention on the law of treaties (VCLT) are generally considered to be evidence of customary international law.<sup>11</sup> They are applicable regarding the interpretation of article 2(4).<sup>12</sup> VCLT article 31 states that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The context consists of the text as well as the preamble, annexes and related agreements and instruments. Subsequent agreements and subsequent practice establishing agreement of the parties regarding the interpretation of the treaty should be taken into account while interpreting the treaty. Relevant rules of international law applicable in the relations between the parties should also be taken into account. If the interpretation according to article 31 leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable, then according to article 32, supplementary means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion are applicable. Supplementary means of interpretation could also, according to article 32, be used in order to confirm the meaning resulting from the application of article 31.<sup>13</sup>

### 2.2.1. “against the territorial integrity or political independence”

While reading article 2(4), it is not entirely clear how the phrase “against the territorial integrity or political independence” should be interpreted. Is it intended to qualify the scope of “threat or use of force”, so that the only use of force or threat thereof that is illegal is the one threatening the territorial integrity or political independence of a state? In that case, it would be possible to argue that interventions on humanitarian grounds not involving territorial conquest or political subjugation would be legal. Such a narrow interpretation of article 2(4) has been brought forward by legal scholars, for example Anthony D’Amato and Fernando R Téson.<sup>14</sup> Other legal scholars, proponents of a more extensive

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<sup>10</sup> See for example Peter Malanczuk, *Akehurst’s Modern Introduction to International law* (London:Routledge, 1997), p. 309 and Jens Elo Rytter, “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, (*Nordic Journal of International Law*, Vol. 70, 2001), p. 131.

<sup>11</sup> Shaw, p. 633.

<sup>12</sup> VCLT, article 4.

<sup>13</sup> For a comprehensive review of the rules of interpretation and their application on a treaty, see Ulf Linderfalk, *Om tolkningen av traktater* (Lund:Studentlitteratur, 2001).

<sup>14</sup> Chesterman, on p. 51, presents the two following books regarding D’Amato’s and Tesón’s thoughts on article 2(4): Anthony D’Amato, *International Law:Process and Prospect* (Dobbs Ferry, New

interpretation of article 2(4), have instead often referred to Oschar Schachter's comment that the idea of a war violating neither the territorial integrity nor the political independence demands an "Orwellian construction" of the terms in article 2(4).<sup>15</sup> It does seem difficult to wage war against a state without violating its territorial integrity or political independence. The argument that article 2(4) has a limited scope of application is however also contradicted by a contextual and teleological interpretation in accordance with VCLT article 31. The object and purpose of the treaty is revealed in the Preamble, paragraph 1, which states that:

[T]he Peoples of the United Nations [are] determined to save succeeding generations from the scourge of war, which twice in our life-time has brought untold sorrow to mankind.

The Preamble declares that an overriding purpose of the UN-charter is the prevention of war. It is difficult to see how this purpose would be achieved if use of force, not violating the territorial integrity or political independence, is legal. Furthermore, article 2(3) demands of the member states that they shall settle their international disputes by peaceful means, so international peace and security are not endangered. Article 2(3) does not grant an exception for armed conflicts which are not considered to violate the territorial integrity or political independence of a state. By reading article 2(4) in conjunction with article 2(3) and by considering the object and the purpose of the treaty, which the Preamble declares, it appears that the phrase "against the territorial integrity or political independence" does not qualify the prohibition on the use of force as formulated in article 2(4).

The ICJ has declared that treaty interpretation above all must be based upon the text of the treaty.<sup>16</sup> Nevertheless, the application of supplementary means of interpretation is relevant in order to confirm the meaning that was established in accordance with VCLT article 31.<sup>17</sup> The preparatory work of the treaty makes it clear that the intention to include the phrase "against the territorial integrity or political independence" was not to restrict the scope of article 2(4), but rather a desire for smaller states to emphasize the protection of their territorial integrity and political independence. The possibility that the phrase would limit the application of article 2(4) was clearly a minority position among the delegates.<sup>18</sup> There were statements made, such as the one by the US delegate, which supported a broad scope of article 2(4):

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York:Transnational, 1987); Fernando R Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (Dobbs Ferry, New York: Transnational Publishers, 1997).

<sup>15</sup> Oscar Schachter, "The legality of Pro-Democratic Invasion", (*American Journal of International law*, Vol. 78, No. 3, 1984), p. 649, quoted in Falk, p. 38.

<sup>16</sup> Shaw, p. 658.

<sup>17</sup> See section 2.2 above.

<sup>18</sup> Ian Brownlie, "Kosovo Crisis Inquiry: Memorandum on the International Law Aspects" (*International and Comparative Law Quarterly*, Vol. 49, 2000), p. 884-886 and Chesterman, p. 49.

The Delegate of the United States made it clear that the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition; the phrase 'or in any other manner' was designed to insure that there should be no loopholes.<sup>19</sup>

The ICJ furthermore considered the question of how the phrase "against the territorial integrity or political independence" should be interpreted in the *Corfu Channel case*.<sup>20</sup> The United Kingdom had previously conducted a minesweeping operation in the Albanian territory. The British government argued in defense, that a use of force not aimed at the territorial integrity or political independence of a state was legal. Although the Court did not consider the British argument, it held that the minesweeping operation violated the Albanian sovereignty, which at least is an implied rejection of the British view on article 2(4).<sup>21</sup>

In conclusion, the interpretation in accordance with VCLT article 31 establishes a broad application of article 2(4). The preparatory work of the treaty confirms the interpretation that the phrase "against the territorial integrity or political independence" does not qualify the scope of "threat or use of force". The ICJ in the *Corfu channel case* furthermore considered article 2(4) to have a broad application when it dismissed the United Kingdom's legal argument that a use of force not aimed at the territorial integrity or political independence could be legal.

## 2.2.2. The Purposes of the United Nations

Notwithstanding the outcome of the interpretation of the phrase "against the territorial integrity or political independence" above, the other part of article 2(4) remains, which is: "...or in any other manner inconsistent with the Purposes of the United Nations." If the use of force or the threat of the use of force runs contrary to the Purposes of the United Nations as stated in article 1, then it is considered illegal. It seems clear that the above quoted phrase does not mean that use of force or threat thereof "against the territorial integrity or political independence" also has to be inconsistent with the purposes listed in Article 1. The use of the words "or in any other" establishes that use of force or threat thereof "against the territorial integrity or political independence" is in itself inconsistent with the Purposes of the United Nations and therefore illegal. What the above quoted phrase makes clear is that use of force or threat of use of force not directed at the territorial integrity or political independence is also illegal if it is inconsistent with the Purposes of the United Nations.<sup>22</sup>

The first purpose of the United Nations listed in article 1(1) is "[t]o maintain international peace and security." This will be achieved by prevention and removal of threats to the peace, the suppression of breaches to the peace and

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<sup>19</sup> UNCIO, 1945, Vol. 6, ed. by United Nations Information Organization, (Buffalo, New York: William S. Hein & Co., reprinted 1998), p. 335, quoted in Chesterman, p. 49.

<sup>20</sup> *Corfu Channel case* (UK. v. Albania), ICJ Rep., 1949.

<sup>21</sup> Chesterman, p. 50.

<sup>22</sup> *Ibid*, p. 52.

peaceful settlement of disputes. The strong, unequivocal wording of the first purpose makes it very difficult, if not impossible, to argue that waging war for humanitarian purposes is legal under international law. Despite this, some proponents of humanitarian intervention focus on the third purpose of article 1 and claim that it supports intervention for humanitarian purposes.<sup>23</sup> Article 1(3) asserts the need for international co-operation in solving international problems of an economic, social, cultural or humanitarian character. It also stresses the importance of promoting and encouraging respect for human rights and fundamental freedoms for all. The purpose in article 1(3) is reflected in articles 55(c) and 56. Article 55(c) states that the United Nations shall promote universal respect for human rights and fundamental freedoms for all, while the members of the United Nations according to article 56 pledge themselves to take joint and separate action in co-operation with the United Nations in order to fulfill the purposes in article 55. The second paragraph of the Preamble declares furthermore the ambition of the United Nations to restore faith in the fundamental human rights.

It is consequently argued that interventions for humanitarian purposes are consistent with article 1(3) and therefore legal. The problem with making article 1(3) an argument in favor of humanitarian intervention is that the UN-charter does not bring forward the use of force as an appropriate method of upholding human rights. Article 1(3) only mentions peaceful means such as “international co-operation” and “promoting and encouraging respect for human rights.” Articles 55(c) and 56 as well as the Preamble are also lacking any reference to the use of force in order to uphold human rights. Furthermore, even though article 1(3) can be used as arguing the promotion of human rights, there is no indication that it is more significant than the other purposes. Article 1(3) does not override the other purposes, especially not the maintenance of international peace and security as stated in article 1(1). On the contrary, the intention of the founding states as evident from statements in the preparatory work, their preferences in the drafting process and the behavior of member states after the UN-charter came into effect as well as how the UN-charter itself is designed with its primary focus on the maintenance of international peace and security point towards a hierarchy of purposes in which the purpose of article 1(1) has the highest position. The fact that the Security Council has been given coercive authority regarding threats to international peace, but not in relation to other purposes, the lack of UN jurisdiction in matters of primarily domestic character as well as the fact that the majority of states rejected a proposal to include a Bill of Rights in the Charter support that conclusion.<sup>24</sup>

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<sup>23</sup> Ibid, p. 52.

<sup>24</sup> Falk, p. 40.

### 2.3 Jus cogens

The ICJ clarified the legal status of the principle of non-use of force in the *Nicaragua case* from 1986. It was not only a rule that was part of the customary international law<sup>25</sup>, it was also a rule having a peremptory character, i.e. a jus cogens norm. The Court stated that the prohibition on the use of force “is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that ‘the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*’.”<sup>26</sup> The prohibition on the use of force is equal to the principle of non-use of force.<sup>27</sup>

The significance of the above quoted statement by the ICJ has been questioned. It has been asserted that the ICJ used the remark by the International Law Commission merely as evidence that the prohibition on the use of force is part of customary law. The Court, according to this view, did consequently not share the International Law Commission’s view regarding the jus cogens character of the prohibition on the use of force. It is however not an accurate interpretation of the above quoted statement according to Alexander Orakhelashvili. According to Orakhelashvili, the Court wanted to put focus on the qualification by the International Law Commission of the prohibition on the use of force as peremptory in order to establish the customary character of that norm. By doing so, the Court also concurred with the view that the prohibition on the use of force is a norm of peremptory character.<sup>28</sup> It is indeed reasonable to believe that the Court did not rely on a quote by the International Law Commission without concurring with the legal view expressed in that particular quote. This is confirmed by statements of the judges in the *Nicaragua case*: Judge Nagendra Singh claimed that the principle of non-use of force is part of jus cogens while judge Sette-Camara observed that the said principle is part of “peremptory rules of customary international law which impose obligations on all States”<sup>29</sup>. There is furthermore a majority of legal scholars today that adhere to the legal view that the prohibition on the use of force has a peremptory character.<sup>30</sup>

What is then the legal significance of the peremptory character of the principle of non-use of force? Article 53 in the VCLT provides that:

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<sup>25</sup> See section 2.2 above.

<sup>26</sup> *Nicaragua case*, para 190.

<sup>27</sup> See section 2.2 above and Falk, p. 43.

<sup>28</sup> Alexander Orakhelashvili, *Peremptory Norms in International law* (Oxford:Oxford University Press, 2006), p. 42.

<sup>29</sup> *Nicaragua Case* as quoted in Orakhelashvili, p. 50.

<sup>30</sup> Beckman, p. 62. See also Malanczuk, p. 311 and Chesterman, p. 60.



A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The definition of a peremptory norm in article 53 is most likely relevant even outside the context of the VCLT, although it is stated in article 53 that the definition only applies “for the purposes of the present Convention”.<sup>31</sup> There is also general support in the legal doctrine that a jus cogens norm not only makes treaties void, as it is stated in VCLT article 53, but also means that inconsistent legal acts are void.<sup>32</sup>

Article 53 establishes that the principle of non-use of force, being a jus cogens norm, can only be modified by another jus cogens norm. The legal implications of article 53 regarding the principle of non-use of force are however not entirely clear. Orakhelashvili argues that expansion of the scope of a jus cogens norm is feasible, while it is not possible to abrogate a jus cogens norm.<sup>33</sup> He argues that State practice in order to abrogate a jus cogens norm, would not be enough, since the unilateral acts by States contradicting the jus cogens norm would be void and generate no legal consequences whatsoever. Orakhelashvili furthermore states that while abrogation of a jus cogens norm seems theoretically possible, it is not, in practice, conceivable. Since the acceptance of humanitarian intervention in customary international law would mean limiting the scope of the principle of non-use of force and thus abrogation of the principle in part, such a development in international law would not seem possible according to the view that Orakhelashvili represents. Jens Elo Rytter, on the other hand, claims that for derogation of one of the most fundamental rules in international law, like the principle of non-use of force, the evidence of State practice and opinio juris must be overwhelming.<sup>34</sup> He holds consequently the view, as opposed to Orakhelashvili, that it is possible to limit the scope of the principle of non-use of force, although he sets a very high threshold. Furthermore, Malanczuk states that a jus cogens norm must find acceptance and recognition by the international community at large, which means that it can not be imposed upon a significant minority of states.<sup>35</sup> He did not however write about the subject of modification of jus cogens norms, as he merely clarified the necessary support required for a norm to have a jus cogens character.

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<sup>31</sup> Malanczuk, p. 57.

<sup>32</sup> Orakhelashvili, p. 206, who refers to statements by several legal scholars confirming that legal acts contrary to jus cogens norms are void.

<sup>33</sup> Ibid, p. 129-130.

<sup>34</sup> Rytter, p. 137.

<sup>35</sup> Malanczuk, p. 58.

## 2.4 Conclusions

By interpreting the UN-charter article 2(4), from which the principle of non-use of force originates, it is clear that article 2(4), and thus the principle of non-use of force as well, are not compatible with the concept of humanitarian intervention. The ambition of the drafters of article 2(4), affected by the horrors of the Second-World War, was to create a prohibition on the use of force with a wide application.<sup>36</sup> The principle of non-use of force is furthermore a customary norm having the character of *jus cogens*. A customary rule will fall into desuetude and be replaced by a rule with a different content if the conditions for modification are fulfilled. As a customary norm of *jus cogens* status however, it is not entirely certain that the principle of non-use of force can be modified by limiting its scope of application and allowing humanitarian intervention. If it is however feasible, then the evidence of State practice and *opinio juris* must be overwhelming, and it must furthermore reflect the legal position of the international community at large with consensus between groups with cultural differences and opposing ideological standpoints. I will in the following chapters analyze State practice which can be perceived as contradicting the principle of non-use of force. If it is in fact possible to limit the scope of application of the principle of non-use of force, then the State practice in the following chapters can, accompanied by *opinio juris*, be used as evidence for a right of humanitarian intervention.

The ICJ reached the conclusion that the principle of non-use of force is a customary norm having a *jus cogens* character first in 1986, while “the three best cases”<sup>37</sup> analyzed below, which could indicate a modification on the principle of non-use of force, are from the 1970’s. I am of the opinion however that the prohibition on the use of force in the UN-charter article 2(4) in a relatively short period of time settled into a customary norm of *jus cogens* status, due to the widespread support for the prohibition on the use of force among states expressed inter alia in the Friendly Relations Declaration<sup>38</sup>, adopted by consensus in 1970. The fact that it was adopted by consensus is evidence of the general approval by the international community and it therefore indicates a *communis opinio juris*. The value of consensus as an expression of *communis opinio juris* is however not as great as the value of a unanimous vote, since consensus often is the result of a compromise during the preparatory phases.<sup>39</sup> The Friendly Relations Declaration establishes that:

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<sup>36</sup> For the following statements regarding the *jus cogens* character of the principle of non-use of force, see section 2.3 above.

<sup>37</sup> Chesterman, p. 226.

<sup>38</sup> GA Res. 2625, 24 October 1970.

<sup>39</sup> Mark E. Villiger, *Customary International Law and Treaties, Developments in International Law* (Dordrecht: Martinus Nijhoff, 1985), p. 9.

No State or group of States has the right to intervene, directly, or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

The above quote is a clear rejection of the concept of humanitarian intervention and an indication that the international community, at the time of the adoption of the Friendly Relations Declaration, accepted the legal obligation of the principle of non-use of force.

# 3 “The three best cases”

## 3.1 Introduction

In this chapter I will analyze three of the most promising examples of unauthorized humanitarian intervention during the Cold War era; the interventions in East Pakistan, Kampuchea and Uganda, adequately referred to as “the three best cases”.<sup>40</sup> These three conflicts all have the same prerequisites, which make them particularly interesting as case studies of humanitarian intervention: the governments were being responsible of grave breaches of human rights, the people whose rights were being violated were citizens of the nations referred to and, finally, there were foreign troops invading these nations and thereby ending the violations of human rights. They are consequently *prima facie* examples of State practice concerning humanitarian intervention and need therefore a thorough examination.

## 3.2 East Pakistan (Bangladesh), 1971

The Indian intervention in East Pakistan is considered amongst many legal writers to be the best example of humanitarian intervention during the Cold War. The background for the intervention is as follows. East and West Pakistan were geographically divided with differences in language, culture and ethnicity.<sup>41</sup> The West Pakistani part of the nation was dominating economically and politically East Pakistan, and the desire to reach autonomy grew therefore gradually stronger in East Pakistan. When the leader of the dominant party in East Pakistan, the Awami League, made a “Declaration of Emancipation”, the West Pakistani forces moved quickly into East Pakistan on 25 March 1971.<sup>42</sup> The situation deteriorated with countless atrocities committed by the West Pakistani forces. The International Commission of Jurists estimated that at least one million people died and about ten million people fled to India.<sup>43</sup> This did not improve the relationship between India and West Pakistan and the Indian Prime Minister Indira Gandhi called, without success, for help from the United Nations as the refugee crisis escalated.<sup>44</sup> Border skirmishes became frequent between the two countries and in December 1971, India declared war against Pakistan after the latter had launched an air strike against India. The war that followed lasted only

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<sup>40</sup> Chesterman, p. 226.

<sup>41</sup> Falk, p. 29.

<sup>42</sup> Chesterman, p. 72.

<sup>43</sup> International Commission of Jurists, *The Events in East Pakistan 1971: A Legal Study* (Geneva: International Commission of Jurists, 1972), pp. 24-6, 97, quoted in Chesterman, p. 72.

<sup>44</sup> Falk, p. 29.

twelve days and ended with Pakistani surrender. India recognized the former East Pakistan, now Bangladesh, as an independent state after the invasion.<sup>45</sup>

On the surface, this conflict has many of the attributes which are normally attached to a humanitarian intervention. The Indian intervention obviously stopped the atrocities committed by the West Pakistani troops – atrocities which were so great one may call it a genocide. The humanitarian tragedy was also well-documented, so there was not any real doubt about the graveness of the situation. However, one must ask: What was the actual reason for the Indian intervention? What occasioned such a drastic move by the Indian government? The fact that a country may have other motives than mere humanitarian concerns does not mean that an intervention can not be labeled as a humanitarian intervention. Governments often have many reasons for their actions. However, the humanitarian motive must be reflected in the legal position of the government – that the armed attack was considered to be legal since the pre-dominant purpose of the attack was to uphold human rights. If there is no evidence of such a legal position, then there is something very important lacking, that is, *opinio juris*. In the present case, India declared war only after being attacked by Pakistan. This points towards a less altruistic motive – that India wanted to protect itself is plausible. Even so, the attack can be perceived as a case of humanitarian intervention if only the concern for the East Pakistanis was the pre-dominant reason for the intervention and if the Indian government asserted the legality of the intervention on humanitarian grounds. India's representative in the Security Council claimed that:

[W]e have on this particular occasion absolutely nothing but the purest of motives and the purest of intentions: to rescue the people of East Bengal from what they are suffering.<sup>46</sup>

He also stated that:

[M]ilitary repressions were unleashed in a manner and in a way that would shock the conscience of mankind.<sup>47</sup>

The statement above includes the exact same formulation as the General Assembly used in its first description of Genocide in 1946.<sup>48</sup> These two statements are evidence that India had humanitarian motives for attacking Pakistan. They are however contradicted by other statements made by the Indian representative, according to which the self-defense issue seems to be the prevailing reason for going to war. India's representative said that India had taken military action against Pakistan as a response to the bombing of villages on Indian soil and that the number of refugees from East Pakistan, adding up to 10 million people, was considered by India as a civil invasion constituting

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<sup>45</sup> Chesterman, p. 72.

<sup>46</sup> S/PV.1606, 4 December 1971, para 186, quoted in Chesterman, p. 73.

<sup>47</sup> S/PV.1606, 4 December 1971, paras 158-159, quoted in Beckman, p. 131.

<sup>48</sup> Beckman, p. 132.

“economic aggression”.<sup>49</sup> India consequently justifies its action on two grounds: the humanitarian crisis of the people in East Pakistan and the right to self-defense as a response to the attacks by Pakistan. However, when the final version of the Official Records of the Security Council was published, India had chosen to delete the statements referring to the humanitarian crisis.<sup>50</sup>

India’s mixed motives make the analysis of its *opinio juris* difficult. On one hand, India initially seems extremely concerned with the humanitarian situation in East Pakistan, and on the other hand, India has a more traditional line of argument, that is, the self-defense issue. It is troublesome to bring these different motives together to create a clear picture of how India reasoned when invading East Pakistan. The fact that India did not continue to focus on the humanitarian situation in East Pakistan, and instead chose to rely entirely on self-defense is however troubling for those in favor of humanitarian intervention. It indicates that India is hesitant towards labeling the invasion as a humanitarian intervention. It also says something about the Indian point of view regarding the legality of humanitarian intervention. Even though India spontaneously regarded the invasion as a humanitarian mission, this does not seem to be enough in a legal sense for India, which ultimately justifies the invasion by labeling it as an act of self-defense. It is difficult to reconcile the Indian action, which obviously helped the people of East Pakistan, and the Indian *opinio juris*. India did not seem to believe that its action was correct in a legal sense, albeit it was legitimate inasmuch as it stopped the violations of human rights, so India, instead of making a stand for humanitarian intervention, relied on self-defense as a legal justification of its action.

The situation was debated in the UN with the Security Council initially considering the issue. A majority of the states in the Security Council called for India to withdraw its troops and a resolution by the United States demanding the withdrawal of armed forces was prevented due to a Soviet veto.<sup>51</sup> Eventually, it was clear that the Security Council was deadlocked and the issue was referred to the General Assembly. The Member States in general did not support the Indian intervention although most of the states were careful not to condemn India as an aggressor. Instead, they focused on principles such as sovereignty, territorial integrity and non-intervention, and by that disqualifying the Indian action.<sup>52</sup> The cautious approach to the situation was reflected in the resolution by the General Assembly, according to which India and Pakistan should conclude a ceasefire and withdraw their troops.<sup>53</sup> The resolution was directed mainly towards India since it had forces in the Pakistani territory. The well-being of the civilian

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<sup>49</sup> Falk, p. 29.

<sup>50</sup> *Ibid*, p. 30.

<sup>51</sup> Chesterman, p. 74.

<sup>52</sup> Falk, p. 30.

<sup>53</sup> GA Res. 2793, 7 December 1971, para. 1.

population was however also brought up, urging the parties to the conflict to safeguard the lives of the civilians in the area of conflict.<sup>54</sup>

The overall impression of how the conflict was treated throughout the debates in the Security Council and the General Assembly is that the international community had adopted a very cautious approach reflected in the guarded formulations of the Member States and the unwillingness to pass judgment. The impact of the Cold War was flagrant with the United States and China being the strongest objector against the Indian intervention. At the same time, India received some support from the Soviet Union and its Eastern allies, stating that the root of the conflict was Pakistan's repression and the inhuman acts that followed from the repression.<sup>55</sup> The support given to India by the Eastern group and its focus on the breaches of human rights conducted by Pakistan could be perceived as an indication that Soviet and its allies regarded humanitarian intervention as an appropriate method of upholding human rights. Nevertheless, the statements by the Eastern group supporting India should also be viewed in the light of the ongoing Cold War, since the United States and China were the strongest objectors against the Indian intervention. The value of the positive remarks from Soviet and its allies as evidence of *opinio juris* is therefore diminished. It is difficult to discern *opinio juris* in the remarks of the Member States, outside the context of the Cold War, since they in general assumed a neutral position, unwilling to neither condemn nor speak in favor of the action taken by India. One can however detect a negative attitude towards humanitarian intervention from the fact that Member States focused on principles such as territorial integrity, sovereignty and non-intervention, since these principles are being violated in the case of a humanitarian intervention. The fact that the resolution adopted by the General Assembly demanded a cease-fire and withdrawal of troops is furthermore an implicit rejection of the Indian action. That the resolution also expressed concern about the well-being of the civilian population is of small value, since the main purpose of the resolution was to call upon a ceasefire and withdrawal of troops. In conclusion, the cautious treatment of the conflict in the United Nations and the statements made by the Member states are not clear evidence of *opinio juris* for or against humanitarian intervention. The approach by the majority of the Member States towards the conflict can however be seen as an implicit denunciation of the right of a humanitarian intervention.

The intervention by India in East Pakistan was in a very real sense a humanitarian intervention since it stopped massive atrocities committed by the West Pakistani forces. However, the legality of the operation does not merely depend on the actual outcome of the intervention by India. In this case, as in so many others, the *opinio juris* of the invading nation was questionable. Those in favor of humanitarian intervention have the burden of proof to show that the Indian intervention is part of the State practice that establishes humanitarian

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<sup>54</sup> Chesterman, p 74.

<sup>55</sup> Falk, p. 30.

intervention in the customary international law. In order to rely on the operation by India to prove that humanitarian intervention is an accepted way of upholding human rights, they need to establish that India did not change its legal viewpoint from initially focusing on human rights issues to a more traditional self-defense argument. If this is not achievable, it is very difficult to maintain that India had the necessary *opinio juris*. The fact of the matter is that India subsequently altered its legal reasoning to rely entirely on the right of self-defense. Although the human rights concerns initially surfaced in the Indian argument for invading East Pakistan, they cannot be regarded as clear evidence of *opinio juris*, due to the fact that India did not hold on to this type of argument. Thus, the Indian operation can at best be seen as a good example of State practice lacking the necessary *opinio juris*.

The hesitant reaction from the international community and in particular the General Assembly is further proof that humanitarian intervention was, at least at the time of the Indian operation, regarded with skepticism. The majority of the Member States did not condemn the operation but on the other hand they did not approve of it either. The best to be said is that there was no outspoken rejection of the Indian intervention. But since the proponents of humanitarian intervention have the burden of proof, the fact that there can be detected no clear evidence of *opinio juris* supporting humanitarian intervention from the reaction of the international community is another setback for those who argue the legality of humanitarian intervention.

### **3.3 Kampuchea, 1978-9**

After years of civil war in Kampuchea the Khmer Rouge forces seized power in April 1975.<sup>56</sup> The new regime started an economic and social program in order to reorganize the society so it would fit the ideology of the Khmer Rouge regime. It is established that basic human rights were violated with the Khmer Rouge regime being responsible of torture, killings and deportations. The general living conditions became so harsh that 1 to 1,5 million people died during the period the Khmer Rouge regime was at power. At the same time, Kampuchea and Vietnam became engaged in fighting across the border with the result of Vietnam invading Kampuchea on 25 December 1978. The capital of Kampuchea was captured within two weeks of the Vietnamese intervention and control was established over most of the territory during the months following the invasion. The regime to take over after the Khmer Rouge in Kampuchea consisted of members in the "United Front for the National Salvation of Kampuchea"; an insurgent group formed by exile Kampuchean and with close links to Vietnam.

As the Security Council convened to consider the situation at hand, the Vietnamese representative stated the reasons for the action taken by Vietnam. At first, he claimed that there were actually two wars being fought: a border war

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<sup>56</sup> The following description is based on the work of Falk, p. 31 and Beckman p. 138-139.



between Vietnam and Kampuchea and a revolutionary war fought by the Kampuchean people.<sup>57</sup> The Vietnamese representative made consequently no assertion of a right of intervention, since Vietnam, according to the representative, never had intervened in Kampuchea. He merely concluded that Vietnam had a right to defend its territorial integrity and sovereignty, which had allegedly been endangered by the Kampuchean attacks across the border. A majority of the states in the Security Council emphasized however the principle of non-interference in the internal affairs of states and rejected the idea that the extensive record of human rights abuses by the Khmer Rogue regime made it political legitimate or legally justified for Vietnam to intervene in Kampuchea.<sup>58</sup>

France stated that:

The notion that because a regime is detestable foreign intervention is justified and forcible overthrow is legitimate is extremely dangerous. That could ultimately jeopardize the very maintenance of international law and order and make the continued existence of various regimes dependent on the judgement of their neighbors.<sup>59</sup>

United Kingdom, Norway and Portugal concurred in similar statements, as did several others. Eventually, a draft resolution emphasizing concepts such as territorial integrity, sovereignty and political independence while at the same time calling upon foreign forces to withdraw their troops was presented to the Security Council. It was supported by thirteen votes but was nevertheless rejected due to a Soviet veto.<sup>60</sup> The Soviet Union and its allies supported the Vietnamese action, focusing on its positive outcome concerning the humanitarian situation in Kampuchea. The Eastern Group also stressed that it was the Kampuchean people and not Vietnam, who had really ousted the Khmer Rogue regime.<sup>61</sup>

Later on, when the General Assembly addressed the issue of Kampuchea, several Member States questioned the right of the Vietnamese-sponsored regime to be represented in the General Assembly.<sup>62</sup> In September 1979, the General Assembly thus voted to accept the credentials of Pol Pot's delegate, instead of the newly installed regime. The arguments among the states that voted in favor of the Khmer Rogue regime differed; several states took a firm stance arguing that there was nothing that could justify the acceptance of credentials by a regime installed through external interference.<sup>63</sup> Other states explained their position by stating that they voted because of respect of the UN-charter and that it should not be interpreted as support for the Khmer Rogue regime.<sup>64</sup> A number of South-East Asian states expressed concern about the

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<sup>57</sup> Chesterman, p. 80.

<sup>58</sup> Chesterman, p. 80 and Beckman., p. 141.

<sup>59</sup> S/PV.2109, 12 January 1979, para. 36, quoted in Beckman, p. 141.

<sup>60</sup> Chesterman, p. 80.

<sup>61</sup> Harhoff, p. 86.

<sup>62</sup> The description below is based on the work of Chesterman, p. 81 and Beckman, p. 142-145.

<sup>63</sup> The states referred to were USA, Somalia, Singapore, Pakistan, Malaysia and New Zealand.

<sup>64</sup> The states referred to were Greece, FRG, Italy, Sri Lanka, Colombia and Denmark.

situation in Kampuchea during the debates in the General Assembly. The representative of Malaysia, speaking on behalf of these states, made it clear that they did not accept interventions in order to uphold human rights.<sup>65</sup>

Vietnam admitted in the General Assembly for the first time that Vietnamese troops had been present in Kampuchea in order to help the Kampuchean people to rise against the Khmer Rouge regime:

The fact that the Vietnamese armed forces responded to the appeal of the National United Front for the Salvation of Kampuchea and helped the people and the armed forces of Kampuchea to overthrow and repel the offensive of the Pol Pot-Ieng Sary clique was a just action, in keeping with morality and in keeping with international law and the aspirations for peace and national independence of the peoples of the world.<sup>66</sup>

The representative of Vietnam consequently argued in terms of self-determination for the Kampuchean people and that the action taken in order to help the Kampucheans was just; in conformity with both morality and international law. There was from the Vietnamese side also a statement that it felt a moral and humanitarian duty to act.<sup>67</sup> The argument that people in order to reach self-determination could seek foreign help was however rejected by the General Assembly. States such as Japan, the United States and Canada condemned the Vietnamese rhetoric in harsh terms. The Japanese representative stated:

The peaceful settlement of disputes between States, non-intervention in internal affairs, the non-use of force and the right of self-determination are fundamental principles contained in the Charter of the United Nations.<sup>68</sup>

A resolution was subsequently adopted, calling for an end of foreign interference in Kampuchea and the withdrawal of all foreign forces.<sup>69</sup> The Soviet Union and its allies opposed the resolution however.

The intervention in Vietnam ended the gross violations of human rights by the Khmer Rouge regime. It was a regime that was responsible of the worst human rights violations since Nazism, according to the chairman of the United Nations Human Rights Subcommission.<sup>70</sup> In general, the intervention is considered to have had a positive impact of the situation in the region.<sup>71</sup> The attack by Vietnam is interesting because of the grounds for intervention presented by Vietnam. Vietnam initially defended its action by arguing that it was a pure self-defense

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<sup>65</sup> The states referred to were Malaysia, Indonesia, Singapore, the Philippines and Thailand.

<sup>66</sup> GA 34/PV.62, 12 November 1979, para. 53, quoted in Beckman, p. 143-144.

<sup>67</sup> Harhoff, p. 86.

<sup>68</sup> GA 34/PV.63, 12 November 1979, para. 15, quoted in Beckman, p. 144.

<sup>69</sup> GA Res. 34/22, 14 November 1979, adopted 91-21-29, quoted in Beckman, p. 145.

<sup>70</sup> Falk, p. 31, who referred to V.P. Nanda, "Tragedies in Northern Iraq, Liberia, Yugoslavia and Haiti – Revisiting the Validity of Humanitarian Intervention Under International Law – Part 1" (*Denver Journal of International Law and Policy*, Vol. 20, 1992), p. 322.

<sup>71</sup> Chesterman, p. 79.

operation. Since it was obvious that Vietnam in fact had intervened in Kampuchea it also added a humanitarian motive in its reasoning. The way Vietnam presented its arguments for intervening in Kampuchea can be perceived as the other way around compared to how India motivated its intervention in Pakistan: While India finally relied on mere self-defense as justification, Vietnam, initially using self-defense as the only motive, subsequently added humanitarian concern to its arguing. What makes Vietnam's arguing interesting is that while it stressed the morality of the intervention – its moral and humanitarian duty – it also made it clear that the action was in conformity with international law. It was indeed legal, according to Vietnam, to help people in their pursuit of self-determination and for that matter intervene in another state to help the people dispose of a regime responsible of gross human rights violations. Vietnam's concept of self-determination resembles humanitarian intervention as described in the introduction in several aspects. The course of action is the same – intervention in another state with military force- while the purpose corresponds as well: removal of a regime with an extensive record of human rights violations. A crucial difference is of course that Vietnam merely stated that they were entitled to help the Kampuchean people in their struggle for self-determination and not unilaterally dispose of the Khmer Rouge regime. The fact that Vietnam did not want to confirm that it had intervened until it was obvious that the international community did not accept Vietnam's argument of two wars being fought diminishes the weight of its *opinio juris* somewhat. Furthermore, one can not overlook that it was *opinio juris* for a right to help people in their self-determination and not a right of humanitarian intervention that was the basis of Vietnam's legal position. It is however a rare incident in the post-Charter history where the State practice is an unusually clear example of an intervention that ended gross human rights violations and, furthermore, accompanied by a legal justification that at least resembles *opinio juris* for a right of humanitarian intervention.

The conflict of the Cold War was apparent during the debates in the Security Council and the General Assembly. The legal position by the Western and the Eastern group should be perceived in light of the, at the time, ongoing Cold War. The Eastern Group supported the Vietnamese intervention. The assertion from Soviet and its allies in the Security Council that it was in fact the Kampuchean people who had ousted the Khmer Rouge regime is not so valuable in terms of support for humanitarian intervention however. The international community apart from Soviet and its allies was adamant in its rejection of the intervention. The majority of the states in the Security Council supported a resolution based on legal principles such as territorial integrity, sovereignty and political independence. In the context these legal principles were put forward by the states in the Security Council they clearly contradict the concept of humanitarian intervention, and the application of these principles on the Vietnamese attack is evidence of a conviction that humanitarian intervention is not acceptable in international law. Furthermore, it was also stated by several states that the human rights violations by the Khmer Rouge regime was not a sufficient reason

for intervening in Kampuchea. It is a position firmly rejecting the legality of intervening in order to uphold human rights. The debate in the General Assembly followed a similar pattern with the Eastern Group supporting the action taken by Vietnam. As Vietnam formulated an argument resembling a right of humanitarian intervention, several states took the opportunity to reject such an idea. The South-East-Asian states were candid in their rejection, making it clear that they did not accept interventions in order to uphold human rights. The fact that the General Assembly voted in favor of accepting the credentials of the Khmer Rogue delegate instead of the newly installed regime can be perceived as further evidence that the international community did not accept a right of humanitarian intervention. It is a conclusion confirmed by several states as they took the opportunity to present their reasons for voting in favor of the Khmer Rogue delegate: the rejection of any justification for external interference in a state or the respect of the UN-charter. These two legal positions both reflect an unwillingness to accept humanitarian intervention; that nothing can justify external interference opposes the idea of intervening in a state to end gross human rights violations while the respect for the UN-charter as a reason for voting in favor of the Khmer Rogue delegate implies that the states accept the application of UN-charter article 2(4) and its rejection of humanitarian intervention. Furthermore, the number of states voting against the interference in Kampuchea and urging foreign troops to withdraw from Kampuchea, 91 in favor, 21 abstaining and 29 opposed<sup>72</sup> is evidence of a strong majority opposing humanitarian intervention in the international community.

In conclusion, the attacking state formulated in this case a legal justification resembling a right of humanitarian intervention. Such a right was however strongly rebuffed by the international community, while the Eastern group supported Vietnam but not its claim of a right to intervene in Kampuchea in order to help the Kampuchean people. As opposed to the Indian intervention, in this case there actually existed *opinio juris* that could be interpreted as resembling a right of humanitarian intervention linked to the conduct of the state. Mark E. Villiger explains however that “the *basis of the binding character* of customary law results from the general consensus of States”<sup>73</sup>. The *opinio juris* must be widespread but it does not have to be found in every state.<sup>74</sup> Since a large part of the international community so strongly rejected the intervention and the motives behind the intervention, it is submitted that the present case is not evidence of a widespread *opinio juris* reflecting that humanitarian intervention is in conformity with international law. The strong international reaction opposing the Vietnamese intervention can instead serve the opposite purpose and be used as evidence of confirming principles such as the principle of non-use of force and the principle of non-intervention.

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<sup>72</sup> GA Res. 34/22, 14 November 1979, quoted in Beckman, p. 145.

<sup>73</sup> Villiger, p. 27.

<sup>74</sup> *Ibid*, p. 26-27.

### 3.4 Uganda, 1978-9

The Tanzanian intervention in Uganda in the late 1970's is one of the few interventions in Africa which does not automatically fall into the pre-colonial context. In most of the possible humanitarian intervention cases in Africa, there is a former colonial power which is engaged in military action in Africa for dubious reasons, while this intervention was without any blatant involvement from European countries such as Belgium or France.

Uganda's dictator Idi Amin's leadership was characterized by a ruthlessness which was almost without comparison in modern African history.<sup>75</sup> During the eight years that the Amin regime was in power perhaps as many as three hundred thousand Ugandans were tortured or killed according to Amnesty International. Groups suspected of supporting the former Government were in particular subjected to torture and killings, such as the Acholi and Langi groups. In October 1978, fighting between the Ugandan army and mutineers from that army continued on Tanzanian territory, in the Kagera region. As a result, the Ugandan army took control over the region and a state of occupation was established. Idi Amin took the opportunity to claim his intention to annex the Kagera region. Tanzania's President Julius Nyerere considered the action taken by Uganda as an act of war and commanded the Tanzanian army to force the Ugandan troops to withdraw from Kagera. The occupation lasted only a couple of weeks and the Ugandan troops had withdrawn from the Kagera region by late November. The Ugandan army initiated two more attacks across the border of Tanzania after the withdrawal. On 20 January 1979, Tanzanian troops invaded Uganda together with, allegedly, Ugandan exiles. It has later on been stated that the initial purpose of the invasion was to destroy army bases from which the attacks had been carried out. President Nyerere had also declared however that Idi Amin could not be let off considering the atrocities committed in the Kagera region by the Ugandan army. The Government of Tanzania decided on a full-scale invasion of Uganda in March and the capital of Uganda, Kampala, was subsequently captured on 10-11 of April 1979. Idi Amin fled Uganda and sought refuge in Libya. A provisional government consisting of members of the Ugandan National Liberation Front was established.

Tanzania's President Julius Nyerere claimed that the military operation conducted by Tanzania was a reaction to the Ugandan aggression and therefore an act of self-defense.<sup>76</sup> He argued that there was a distinction between the military operations by Tanzania's army, which were acts of self-defense, and the overthrow of the Amin regime, which was the work of the insurgency movement in its pursuit of self-determination and democracy.<sup>77</sup> This position was

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<sup>75</sup> The following description is based on the work by Falk, p. 33, Harhoff, p. 87, Chesterman, p. 77 and Beckman, p. 148-149.

<sup>76</sup> Falk, p. 33.

<sup>77</sup> Beckman, p. 151.

maintained in a report to the OAU, where Tanzania stated that there was no other cause for the intervention than the Ugandan aggression.<sup>78</sup> President Nyerere did however make a reference to the brutal regime in Uganda in the report.<sup>79</sup> There are some comments made by President Nyerere and Tanzania's foreign minister after the Amin regime was ousted that could indicate a humanitarian purpose of the intervention. President Nyerere stated that "[i]f Africa as such is unable to take up its responsibilities, it is incumbent upon each State to do so"<sup>80</sup>. The foreign minister claimed that the fall of Idi Amin was "a tremendous victory for the people of Uganda and a singular triumph for freedom, justice and human dignity"<sup>81</sup>. These comments could contradict President Nyerere's statements that Tanzania relied merely on self-defense as a justification for its acts, since they could be interpreted as an expression for humanitarian concern and thus add another motive behind the intervention.

The United Nations did not become involved in the intervention by Tanzania to the same extent as the two previous conflicts analyzed. The intervention was not debated in the Security Council or in the General Assembly.<sup>82</sup> Only Libya, except from the states involved in the conflict, raised the issue in the General Assembly.<sup>83</sup> As the OAU considered the intervention in 1979, there was among the large majority no willingness to condemn the military operation by Tanzania. There were merely two states which reacted strongly against Tanzania, accusing it of aggression, i.e. Nigeria and Sudan. Other states such as Botswana, Angola, Zambia and Mozambique supported the intervention and considered it to be a legitimate act of self-defense.<sup>84</sup> There was little reaction from the international community, besides the debate among the member states of OAU. What is interesting is the swift recognition of the new administration in Kampala by several states as well as the ambition to resume normal diplomatic relations with Uganda after the overthrow of Idi Amin. For instance, both the United States and the United Kingdom opened their embassies in Kampala shortly after the fall of Idi Amin.<sup>85</sup> That a number of states were willing to resume normal diplomatic relations with Uganda shortly after the intervention can be seen as evidence of an acceptance of the intervention as such by these states.

The justification for the military operation by Tanzania resembles closely the grounds for intervention presented by Vietnam. The intervening states made in both cases a distinction between the conduct of their own military and the conduct of the insurgency movements in the states that were invaded. The operations conducted by the military of Tanzania and Vietnam were

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<sup>78</sup> Falk, p. 33.

<sup>79</sup> Beckman, p. 150-151.

<sup>80</sup> Natalino Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (Dordrecht: Martinus Nijhoff Publishers, 1985), p. 103, quoted in Falk, p. 33.

<sup>81</sup> Ronzitti, p. 103, quoted in Falk, p. 33.

<sup>82</sup> Chesterman, p. 78.

<sup>83</sup> Beckman, p. 149-150.

<sup>84</sup> Ibid, p. 150.

<sup>85</sup> Falk, p. 34.

characterized as acts of self-defense while the action by the insurgency movements was in pursuit of their right to self-determination. Tanzania did however not believe it was necessary to elaborate on the grounds for intervention, as opposed to Vietnam. In the Vietnamese case, there was very strong criticism and pressure from the international community, so Vietnam seemed to be under the impression that it had to present further arguments than the self-defense justification. Tanzania, on the other hand, experienced almost none of the negative reactions that faced Vietnam. The incitement for Tanzania to add further justifications to legitimize its intervention was consequently almost non-existing. Tanzania maintained therefore the distinction it initially relied upon: that the conduct of its own military was justified by mere self-defense and the action by the insurgency movements should be perceived as pursuit of self-determination and democracy. There was no ambition from the Tanzanian side to argue that its military, in conformity with international law, aided a people to oppose a ruthless regime, which Vietnam eventually stated. It is nonetheless interesting to note the reference to the brutal regime of Idi Amin in the report to OAU by Tanzania and the remarks made by president Nyerere and the foreign minister. Their value as evidence of *opinio juris* for a right of humanitarian intervention should not be overstated however. Tanzania consistently relied on self-defense as a justification for the intervention and neither the report nor the remarks referred to above explicitly state that the intervention was legal on humanitarian grounds. Furthermore, Tanzania declared in the report to OAU that there was no other cause for the war than the Ugandan aggression, which is a statement that supports the conclusion that self-defense was the only justification for the intervention by Tanzania.

The international community was strangely uninterested in the war between Tanzania and Uganda. It was never debated in the United Nations and there was very little reaction even outside the UN-context. Only two African states condemned the intervention while the majority was silent on the issue or considered it to be a legitimate act of self-defense. Under some circumstances, the failure to protest by a State can amount to State practice in the form of acquiescence. It requires however that the State has not protested against an emerging rule over a long period of time in situations where other States, in good faith, could have expected the State to do so.<sup>86</sup> The absence of protest in the Tanzanian case can consequently, not by itself, be evidence of acquiescence of an emerging customary rule – there has to be other incidents similar to the intervention by Tanzania where the international community failed to protest. The fierce rejection by the international community of the intervention by Vietnam opposes the idea that there would have developed State practice in the form of passive conduct supporting humanitarian intervention during the Cold War. One instance of silent acceptance can not amount to acquiescence and indicate a change in the law; there must be constant waiver of illegality over a period of time.<sup>87</sup>

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<sup>86</sup> Villiger, p. 19.

<sup>87</sup> Chesterman, p. 86.

In conclusion, the conduct of Tanzania could be perceived as an example of humanitarian intervention. The only clear expression of *opinio juris* by the attacking state was however the reliance on self-defense. The fact that the international community accepted the intervention, albeit in silence, has been emphasized by the proponents of humanitarian intervention. It seems that the intervention by Tanzania is opposite to the one conducted by Vietnam: While Vietnam expressed a view resembling *opinio juris* for humanitarian intervention there was little evidence of *opinio juris* from the Tanzanian side. The intervention by Vietnam was strongly opposed by the majority of states, while these states accepted the military operation by Tanzania. The silent acceptance from the international community can however not be regarded as acquiescence of an emerging customary rule, since it requires consistent failure to protest over a long period of time. The Tanzanian intervention can, just as the Indian intervention, at best be regarded as an example of State practice lacking *opinio juris*.

### **3.5 Conclusions**

The reason why the three interventions I have analyzed above are referred to as “the three best cases” is most likely the evidence of gross human rights abuses and the outcome of the interventions. The human rights abuses were well documented in each case by independent organs and were on a very large scale. By intervening the attacking states put an end to massive atrocities which otherwise probably would have continued just as before. The interventions are therefore acts which could be evidence of State practice if they are accompanied by a legal conviction, that is, *opinio juris*.

The only intervening state who declared a purpose of the attack resembling a right of humanitarian intervention was Vietnam. India did eventually not consider the humanitarian issue to be a sufficient legal justification while Tanzania’s only explicit argument in favor of the attack on Uganda was self-defense. The intervening states seemed to be faced with the problem of wanting to use the human rights abuses as an argument for invading but afraid of the consequences of making the human rights issue a part of their justification for invading. When they were in fact bringing up the human rights situation in the states which were invaded, they did so hesitantly, careful so they did not make it their main reason for the intervention. India initially argued that it wanted to help the people in East Pakistan. Subsequently this changed into a traditional self-defense argument: India merely reacted on the attack from West Pakistan. Vietnam on the other hand declared a humanitarian purpose of the intervention, but first after its initial self-defense argument had been soundly rejected by the international community. Tanzania’s references to the humanitarian situation were not in connection with a legal justification. This unwillingness of declaring the human rights situation the reason for the invasion conveys a belief that humanitarian



intervention was not in conformity with international law. It seems that the intervening states, with the possible exception of Vietnam, believed that the human rights situation could not be used as a strong argument legally, although it could receive the intervening states some moral support. This belief – or opinio juris – that humanitarian intervention was not a part of international law makes it impossible to perceive the cases above as evidence that humanitarian intervention became established in the customary international law during the Cold War era. Furthermore, ICJ stated the following in the *Nicaragua case*:

If a state acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.<sup>88</sup>

The above statement makes it clear that the reliance on self-defense, which is an exception in conformity with international law, by India, Uganda and, initially, Vietnam rather makes the principle of non-use of force more established.

The reaction of the international community also conveys a skeptical opinion regarding humanitarian intervention. The differences in attitude among States towards the Indian and Vietnamese interventions must be viewed in the light of the, at the time, ongoing Cold War. The support given by the Eastern group to the intervening States can therefore not be perceived as clear evidence that Soviet and its allies believed that humanitarian intervention was in conformity with international law. At the same time should the outright rejection, especially in the Vietnamese case, by the States in the Western hemisphere not be interpreted as an indication that the Western group disregarded the possibility of intervention no matter the humanitarian emergency. It is however abundantly clear that the international community regarded humanitarian intervention with skepticism at the time of the interventions. A majority of the States in the Security Council and the General Assembly either condemned the Indian and Vietnamese interventions or criticized them indirectly when bringing up principles which are being violated in the case of a humanitarian intervention: principles such as the principle of non-intervention, territorial integrity and sovereignty. In the Tanzanian case, it was not established the reason behind the silent acceptance. It could be just as much an expression of the antipathy against Idi Amin as an expression of approval of the actual intervention. It is however established that silent acceptance in one case can not by itself amount to acquiescence. By evaluating the opinio juris of the international community in all three cases, it is submitted that any general belief that humanitarian intervention was part of international law at the time of the interventions cannot be found.

The attitude of the international community in the three cases referred to above was to a large extent dependent upon the context of the Cold War. The international relations were dominated by the conflict between USA-Soviet and

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<sup>88</sup> *Nicaragua case*, para 186.

their allies. The decision-making in foreign politics among the Eastern and Western group was based upon pragmatism, where the purpose was to undermine and weaken each other. There was simply no room for ideals and engage in war in order to uphold human rights if it did not, at the same time, serve the purpose of fighting the other group. At the same time, both superpowers were reluctant when it came to take action, since it could provoke the other side to attack on a large scale. The obvious risk of abuse of humanitarian intervention made it almost impossible for the Eastern and Western group to unanimously support an intervention when an ally to one of the groups had invaded and put an end to human rights violations. There will consequently not emerge a right of humanitarian intervention under such circumstances. The question is however if the end of the Cold War has altered the legal position of the majority of States in the international community. I have above described three examples of State practice lacking the *opinio juris*. I will now analyze a possible example of humanitarian intervention after the Cold War era and see if it was based on the legal conviction that an armed attack is an accepted method in international law to uphold human rights.

# 4 Kosovo

## 4.1 Introduction

Operation Allied Force is the name of the military operation against the FRY conducted by the NATO organization in the spring of 1999. It has the prerequisites of an unauthorized humanitarian intervention: gross human rights abuses were carried out against an ethnic group in a state, the government of the state was responsible of these abuses and unwillingness of the Security Council to pass a resolution authorizing military force is followed by an armed attack which ends the persecution of the ethnic group. I will in this chapter present a short background to the conflict in Kosovo as well as a review of the persecution of ethnic Albanians prior to NATO initiated Operation Allied Force. I will also, in brief, describe the military operation conducted by NATO.

## 4.2 The ethnic conflict

The conflict between Serb nationalists and ethnic Albanians striving for an independent Kosovo has existed throughout the twentieth century.<sup>89</sup> The ethnic Albanians regarded the incorporation of Kosovo into Serbia in 1912 as a tragic moment while the Serbs considered Kosovo as a place with an enormous historic value; it was in Kosovo where the Serbian army defeated the Turks in the Battle of Fushe in June 1839 and it is also a region where many of Serbia's historic churches are situated. The wave of nationalism in 1970 and 1980 made use of these events and historic symbols to create tension between the two ethnic groups. Kosovo had been declared an autonomous province in Serbia 1974. This was however challenged by Slobodan Milosevic, who largely due to his extreme nationalistic agenda seized power in the FRY. He made it clear that Kosovo was an indispensable part of Serbia and consequently removed Kosovo's autonomy in 1989. As a result, ethnic Albanian politicians declared the independence of Kosovo in 1990, creating parallel institutions that Serbia did not recognize.<sup>90</sup> The revocation of Kosovo's autonomy was followed by an increase in human rights abuses and discrimination motivated by a desire of the FRY regime to "Serbianize" the province.

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<sup>89</sup> This description is based, unless there is a reference to another source, on the work by The Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford University Press, 2000), pp. 33-34, 41-42, 48, 50 and 53.. It will be referred to below as *Kosovo Report*.

<sup>90</sup> Chesterman, p. 207.

The resistance movement in Kosovo had until the mid-1990s consisted mainly of the LDK. It was a political movement that strived for independence of Kosovo, which would be achieved through non-violent methods such as influencing the international community and deny legitimacy to the Milosevic regime by establishing parallel institutions and boycotting elections. Many ethnic Albanians grew weary of the methods advocated by the LDK after the Dayton agreement, which excluded Kosovo. The signal from the international community was, according to a lot of people in Kosovo, that attention from the international community could only be obtained by war. As a result, a new political group surfaced in Kosovo, striving for independence: the KLA. This group sought confrontation with the FRY forces, which in turn escalated the harassment of the ethnic Albanians by the FRY police forces.

A turning point in the Kosovo crisis was, according to Human Rights Watch, the events in the Drenica region in 1998.<sup>91</sup> Drenica was populated by a large majority of ethnic Albanians. The KLA movement had in the region established a strong resistance force against the Yugoslav regime, which for that reason considered Drenica the focal point of "Albanian terrorism".<sup>92</sup> The Yugoslav forces were particularly interested in the KLA leader Adem Jashari and his clan. In January, special police forces had tried to arrest Adem Jashari, but were fought back. The Jashari clan was however once again attacked in March in the village of Donji Prekaz and this time the attack was successful. Police forces with artillery and sharpshooters, who killed the people who fled, managed to annihilate the entire Jashari clan except an eleven-year-old girl. 58 people were killed and of these eighteen were women and ten children (sixteen years or younger).<sup>93</sup>

The Yugoslav forces also mounted major attacks on the villages of Likosane and Cirez. The majority of the people who were killed in the village did not offer any resistance at the time of their death. There is strong evidence which indicates that at least fourteen people were summarily executed by Yugoslav forces in the attack on Likosane.<sup>94</sup> *The HRW Report* describes the attacks on the two villages as an arbitrary and excessive use of force against the inhabitants long after resistance had ceased. In sum, 83 people were killed by FRY forces in the Drenica region.<sup>95</sup> After the events in the Drenica region, several village militias emerged to defend their villages, calling themselves the KLA. The conflict in Kosovo had by then turned into a situation resembling war<sup>96</sup>.

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<sup>91</sup> Human Rights Watch, *Humanitarian law violations in Kosovo* (Human Rights Watch, October 1998.) The report *Humanitarian law violations in Kosovo* will be referred to below as the *HRW Report*.

<sup>92</sup> HRW Report.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> Kosovo Report, p. 55

### 4.3 Ethnic cleansing

The events in the Drenica region led to an increase in the attacks on the FRY police installations by the KLA, although the attacks often were small and non-coordinated. The KLA claimed that it had seized control over the countryside with the FRY forces controlling the towns and main roads. The increased activity by the KLA resulted in a massive reaction from the Yugoslav army, entering Kosovo and initiating military operations together with police and paramilitary units.<sup>97</sup> The Yugoslav army and the FRY police forces conducted an, until then, unprecedented attack on the ethnic Albanians in Kosovo around mid-May 1998 with the purpose of depopulating the area bordering Albania.<sup>98</sup> This was carried out by shelling the villages and towns. There were frequently civilians present when the Yugoslav forces initiated the attacks. The HRW conducted interviews with the refugees, who had crossed the border into Albania, and they had heard of shelling of more than twenty villages and towns in Kosovo. Since the purpose of the operation was to remove the ethnic Albanians populating the area bordering Albania, the FRY forces destroyed most of the villages and killed the livestock. Houses were also set on fire even though there had been no combat taking place. A yet undetermined number of people were detained and people were regularly shot at while fleeing from the villages. The FRY forces achieved their goal – approximately 15000 people escaped into Albania, 30000 people crossed the border into Montenegro and an unknown number fled east towards Drenica, where KLA at that time had control over the territory. HRW concludes in the report that by interviewing refugees: “A clear pattern emerged of detentions, beatings, indiscriminate shelling, excessive force, and the systematic destruction of villages”<sup>99</sup>.

The fighting between the FRY forces and the KLA continued during the summer with FRY forces shelling villages and cities in Kosovo and attacking fleeing civilians.<sup>100</sup> The humanitarian crisis resulting from the Yugoslav offensive was extensive. According to the UNHCR displacement figures for August 1998, 260000 people had been displaced in Kosovo and 200000 refugees were outside of Kosovo.<sup>101</sup> Many of these refugees could however return after the Holbrooke-Milosevic agreement in October 1998.<sup>102</sup> Another 150000 to over 200000 ethnic Albanians were forced from their homes in the period of January to mid-March 1999.<sup>103</sup>

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<sup>97</sup> Kosovo Report, p. 70-71.

<sup>98</sup> The following description is based on the HRW Report.

<sup>99</sup> Ibid.

<sup>100</sup> Kosovo Report, p. 73-74.

<sup>101</sup> Ibid, p. 74.

<sup>102</sup> Ibid, p 150.

<sup>103</sup> Ibid, p 82.

#### 4.4 The military operation

NATO openly considered a military attack against the FRY to end the crisis in June 1998.<sup>104</sup> A NATO official emphasized then the urgency of the situation and said that the focus was on air-strikes. The British Prime Minister Tony Blair stated that military action was needed unless the diplomatic work led to a result. This was followed by an activation order by NATO on October 13, which authorized air strikes if the FRY forces were not withdrawn within 96 hours. Milosevic was under this threat willing to conclude an agreement with the US Special Envoy, Ricard Holbrooke, that the essential parts of Security Council resolution 1199 would be implemented. Resolution 1199 demanded a reduction of FRY forces in Kosovo and the deployment of monitors.<sup>105</sup> The FRY initially complied with the agreement and consequently reduced the number of soldiers in Kosovo and allowed 2000 civilian monitors to be present in Kosovo. The KLA took however advantage of the withdrawal of FRY forces and renewed their military activity. This led to increased violence in December and January, which the discovery of 45 ethnic Albanians in the village Racak on January 15 1999 is illustrative of.<sup>106</sup> On 30 January 1999, the NATO organization declared, in response to the increasing violence, that it would initiate an air-strike, unless the FRY complied with Security Council resolutions. NATO also completed its preparations for air-strikes, making itself ready to attack the FRY.<sup>107</sup>

Peace Negotiations were once again initiated, this time by the Contact Group, consisting of the key members of the NATO alliance, i.e. U.S.A., U.K., Germany, France and Italy. Russian representatives were also involved in the Contact Group. The negotiations were held at Rambouillet in France from 6-23 February 1999 and later on in Paris from 15-18 of March the same year. The negotiating parties consisted of three groups: the Contact Group, the Kosovar resistance movement and the FRY. The threat to resort to violence was probably the reason why the FRY engaged in negotiations at all. Most likely Milosevic was, according to many observers, just trying to buy some time to prepare for the next step in the Kosovo conflict. At the same time, one can question the willingness of the NATO side to negotiate. NATO needed to demonstrate that it also had a function after the Cold War, which air attacks seemingly carried out in order to defend the ethnic Albanians in Kosovo would confirm. In addition to this, the threat diplomacy conducted by NATO left the organization with little option to negotiate. It would be difficult for NATO to back down from its demands without losing credibility.

The negotiations were, in the end, fruitless. The main reason for this was a document called Annex B. It consisted of military provisions and stipulated that

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<sup>104</sup> The following description is based on the Kosovo Report, pp. 72-82, 92-96, 137, 151-158 and 181 unless there is a reference to another source.

<sup>105</sup> SC Res. 1199, 23 September 1998.

<sup>106</sup> Beckman, p. 213.

<sup>107</sup> Ibid, p. 214-215.

NATO, not the UN, would maintain troops in the FRY and would have free access to all parts of the FRY territory. It was an unacceptable condition to the FRY and Milosevic. As for the NATO side, there was no will to negotiate the stipulations in Annex B.<sup>108</sup> Since the negotiations were unsuccessful, NATO initiated Operation Allied Force on 24 March 1999.

NATO's Operation Allied Force was restrained by two factors. Firstly, the NATO leaders were very sensitive towards their own casualties, which meant that ground troops would not take part in the attack on Yugoslavia. The operation would rely entirely upon bombing by the NATO aircraft. Secondly, since NATO would carry out what at least seemed to be a humanitarian mission, it did not want too many casualties on the Yugoslav side – especially not civilian casualties. This resulted in a military operation which was limited to specific military targets. Furthermore, the aircraft which conducted the bombing of the military targets had to fly at a very high altitude, more than 15000 feet, to avoid the Yugoslav air defense systems.

The NATO campaign was without any result after four weeks of bombing. This lack of response from the Yugoslav side bewildered NATO, since NATO thought that Yugoslavia would yield swiftly once the air strikes were initiated. The NATO leaders decided consequently to expand the attacks to include not only military targets but targets such as infrastructure, media and other targets. The initial strategy to bomb only military objects was thus abandoned for a more pragmatic approach which involved civilian targets as well as military ones.

Operation Allied Force lasted for 78 days, longer than any NATO leader would have expected. In April, Germany put forward a solution to end the conflict. The German plan stated that the UN would be involved in the administration of Kosovo. At a G8 meeting the member states agreed that Russia would bring a peace plan very similar to the German proposal to Milosevic as a basis for negotiations. The peace plan called for immediate and verifiable end to the violence in Kosovo, withdrawal of FRY forces, deployment of international civil and security presences and the return of all refugees. FRY accepted the peace plan by the G8 states on June 1, 1999 and Operation Allied Force ended on June 10. On the same day, the Security Council adopted resolution 1244 and thereby established the framework for UN civil administration and an international security presence.<sup>109</sup>

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<sup>108</sup> See the reasons behind this attitude in the above paragraph.

<sup>109</sup> SC Res. 1244, 10 June 1999.

# 5 Operation Allied Force: Justifications and international response

## 5.1 Introduction

In order to change the established norm of non-use of force, the conduct of NATO as described above must be accompanied by *opinio juris*. In this chapter I will describe the justifications for Operation Allied Force by NATO and the most dominant NATO-states. Furthermore, I will describe the international reaction towards the NATO attack. Since the customary law in this case is general, the prevailing view among states must be that the NATO attack was legal; it will otherwise not serve as evidence of State practice for a right of humanitarian intervention.

## 5.2 NATO

NATO as an organization expressed its opinion on the operation in Kosovo in a press statement by the Secretary General Javier Solana.<sup>110</sup> In this statement, issued on March 23 1999, Solana declared that NATO was involved with a humanitarian operation to end repression and violence against civilians. The statement referred to a “moral duty” which the NATO member states had to carry out. Furthermore, in a letter from Solana on October 9 1998 to the NATO council, he stated that there is “legitimate grounds” for NATO’s threat to use force and that it was based on Security Council resolutions 1160 and 1199.<sup>111</sup> The member states added several justifications individually, which will be discussed below.

### 5.2.1. USA

USA motivated the air campaign during an emergency session of the Security Council on 24 March 1999, by pointing out that the FRY violated the legal obligations in resolutions 1199 and 1203.<sup>112</sup> In the proceedings against ten NATO members in the ICJ, which was a request from the FRY for provisional measures, USA once again relied upon Security Council resolutions as a justification for Operation Allied Force. USA stated that the resolutions, which

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<sup>110</sup> Rytter, p. 153-154.

<sup>111</sup> Ibid, p 153.

<sup>112</sup> Chesterman, p. 211.



were adopted under Chapter VII of the Charter, demanded a halt to such actions by the FRY that threatened peace and security. The American representative also justified the intervention by marking the situation in Kosovo a “humanitarian catastrophe” and by claiming that the FRY forces were responsible for serious violations of international humanitarian law and human rights obligations.<sup>113</sup> Later on, after Operation Allied Force was completed, US Secretary of State, Madeleine Albright spoke of the campaign in Kosovo as “a unique situation *sui generis* in the region of the Balkans”<sup>114</sup>. She also stressed the importance “not to overdraw the various lessons that came out of it”<sup>115</sup>.

### 5.2.2. The United Kingdom

The Government of the United Kingdom made several statements in which Operation Allied Force was explained in different ways.<sup>116</sup> On a domestic level, the Foreign Secretary made a statement in the House of Commons on 1 February 1999. This statement asserted that the UK had the legal authority for action to prevent a humanitarian catastrophe. The Prime Minister made a similar declaration on 23 March 1999 as did the Defense Secretary on 25 March 1999. On the other hand, the Minister of State merely referred to a “moral obligation” on 25 March 1999. Another argument for Operation Allied Force that was put forward in the House of Commons in the spring of 1999, 23-25 March, derived from the Prime Minister together with the Deputy Prime Minister and the Defense Secretary. These statements in the House of Commons made it clear that the UK relied upon Security Council resolutions 1199 and 1203. Operation Allied Force was also justified in the same period of time, 23-25 of March 1999, by the unwillingness of the FRY to comply with the Rambouillet proposals. It was declared by the Prime Minister as well as the Foreign Secretary.

In the House of Lords, Baroness Symons, the leader of the House, stated the following on 16 November 1998, and later on clarified on 6 May 1999:

There is no general doctrine of humanitarian necessity in international law. Cases have nevertheless arisen (as in Northern Iraq in 1991) when, in the light of all the circumstances, a limited use of force was justifiable in support of purposes laid down by the Security Council but without the council’s express authorisation when that was the only means to avert an immediate and overwhelming humanitarian catastrophe. Such cases would in the nature of things be exceptional and would depend on an objective assessment of the factual circumstances at the time and on the terms of relevant decisions of the Security Council bearing on the situation in question.<sup>117</sup>

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<sup>113</sup> *Legality of Use of Force Case*, Provisional Measures, ICJ 1999, pleadings of the United States, 11 May 1999, CR 99/24, para 1.7.

<sup>114</sup> Chesterman, p. 216.

<sup>115</sup> *Ibid*, p 216.

<sup>116</sup> About the following statements, see Brownlie, p 879.

<sup>117</sup> Brownlie, p 879-880.

On an international level, the UK presented its view on Operation Allied Force in the Security Council and during the proceedings in the ICJ. In the emergency session of the Security Council, 24 March 1999, the UK delegate, Sir Jeremy Greenstock, asserted that Operation Allied Force was legal. He argued as follows:

The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. - - - Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable. The force now proposed is directed exclusively to averting a humanitarian catastrophe, and is the minimum judged necessary for that purpose.<sup>118</sup>

Part of Sir Jeremy Greenstock's argument above was later on quoted during the proceedings in the ICJ, as a way of presenting the UK's view of the matter. The assertion that Operation Allied Force was legal was however deleted.<sup>119</sup> A speech from the Prime Minister Tony Blair in the House of Commons on 23 March 1999 when he labeled the situation in Kosovo a humanitarian catastrophe was also presented for the Court. He said the following: "We must act to save thousands of innocent men, women and children from humanitarian catastrophe – from death, barbarism and ethnic cleansing by a brutal dictatorship..."<sup>120</sup>

The Prime Minister indicated during a speech in Chicago on 22 April 1999, that interventions similar to Operation Allied Force may become more common. The problem, according to the Prime Minister, would be to identify the circumstances in which action would be taken. He did not however maintain this position. On 26 April 1999, the Prime Minister made it clear during the Parliamentary Debates that Operation Allied Force was of an exceptional nature.<sup>121</sup>

### 5.2.3. Belgium

Belgium was the only nation that perceived Operation Allied Force as an instance of humanitarian intervention during the proceedings in the ICJ. It justified the intervention in other ways as well, referring to Security Council resolutions and invoking the state of necessity.<sup>122</sup> The focus in this presentation will however be on Belgium's argument in favor of humanitarian intervention.

Belgium argued that the intervention had been carried out in order to protect fundamental values which belong to *jus cogens*, such as the right to life and the

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<sup>118</sup> Chesterman, p 212.

<sup>119</sup> *Legality of Use of Force Case*, Provisional Measures, ICJ 1999, pleadings of the United Kingdom, 11 May 1999, CR 99/23, para 17.

<sup>120</sup> *Ibid*, para 18.

<sup>121</sup> Chesterman, p 216.

<sup>122</sup> Brownlie, p 881.

prohibition of torture. The intervention had also taken place “to prevent an impending catastrophe, recognized as such by the Security Council”<sup>123</sup>.

Belgium made the following statement during the proceedings in the ICJ:

The purpose of NATO’s intervention is to rescue a people in peril, in deep distress. For this reason, the Kingdom of Belgium takes the view that this is an armed humanitarian intervention, compatible with Article 2, paragraph 4, of the Charter, which covers only intervention against the territorial integrity or political independence of a State.

There is no shortage of precedents. India’s intervention in Eastern Pakistan; Tanzania’s intervention in Uganda; Vietnam in Cambodia; the West African countries’ interventions first in Liberia and then in Sierra Leone. While there may have been certain doubts expressed in the doctrine, and among some members of the international community, these interventions have not been expressly condemned by the relevant United Nations bodies. These precedents, combined with Security Council resolutions and the rejection of the draft Russian resolution on 26 March, which I have already referred to, undoubtedly support and substantiate our contention that the NATO intervention is entirely legal.<sup>124</sup>

Despite the assertion above that Operation Allied Force was legal, the Belgian Foreign Minister said during a debate in the General Assembly on 26 September 1999 that the Security Council Resolution 1244 meant a “*return to legality*” (emphasis added)<sup>125</sup>.

#### 5.2.4. Other NATO states

During the emergency session described above,<sup>126</sup> Germany asserted that the members of the EU were under a “moral obligation” to stop a humanitarian catastrophe in Europe. Germany was at the time speaking as the Presidency of the EU.<sup>127</sup> In the proceedings in the ICJ, Germany explained that Operation Allied Force was undertaken in order to stop the massive human rights violations committed by the FRY and to protect the people in Kosovo from an unfolding humanitarian catastrophe.<sup>128</sup> The German government used another formulation than humanitarian catastrophe during a debate in *Bundestag*, by arguing that the campaign in Kosovo was in fact a humanitarian intervention. It did however very carefully point out the uniqueness of the situation. The German Foreign Minister Kinkel said in *Bundestag*:

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<sup>123</sup> *Legality of Use of Force Case*, Provisional Measures, ICJ 1999, pleadings of Belgium, 10 May 1999, CR 99/15 (uncorrected translation).

<sup>124</sup> *Ibid.*

<sup>125</sup> Ian Brownlie, “Kosovo Crisis Inquiry: Further Memorandum on the International Law Aspects”, (*International and Comparative Law Quarterly*, Vol. 49, 2000), p 908. See also section 4.4 for a description of resolution 1244.

<sup>126</sup> See above, section 5.2.1.

<sup>127</sup> Chesterman, p 211-212.

<sup>128</sup> *Legality of Use of Force Case*, Provisional Measures, ICJ 1999, pleadings of Germany, 11 May 1999, CR 99/18, para 1.3.1.

The decision of NATO [on air strikes against the FRY] must not become a precedent. As far as the Security Council monopoly on force [*Gewaltmonopol*] is concerned, we must avoid getting on a slippery slope.<sup>129</sup>

France justified Operation Allied Force the same way as USA during the emergency session, relying upon resolutions 1199 and 1203.<sup>130</sup> It did not however articulate any clear legal justification in the proceedings in the ICJ.<sup>131</sup> On 26 March 1999, a draft resolution which called for an end to the air strikes was rejected by the Security Council by twelve votes to three. Again, France relied upon previous resolutions, stating that they were adopted under chapter VII of the UN Charter. By bringing up chapter VII, France indicated that it considered that the coercive powers of the Security Council had been invoked.<sup>132</sup>

Italy, just as France, did not offer any legal justification for Operation Allied Force in the ICJ.<sup>133</sup> The Italian opinion about the operation was instead brought forward in an interview in the newspaper *International Herald Tribune*. The Foreign Minister of Italy said in the interview that although the war had been fought for a just cause it raised questions about how to maintain the international legal order in the future. He was also curious about how NATO's extended responsibility would be reconciled with the legitimacy of the United Nations.<sup>134</sup>

The Netherlands was the only nation except the UK that asserted the legality of Operation Allied Force during the emergency session of the Security Council on 24 March 1999. The delegate from Netherlands put forward the following position on the debate upon Operation Allied Force:

The Secretary-General is right when he observes in his press statement that the Council should be involved in any decision to resort to the use of force. If, however, due to one or two permanent members' rigid interpretation of the concept of domestic jurisdiction, such a resolution is not attainable, we cannot sit back and simply let the humanitarian catastrophe occur. In such a situation we will act on the *legal basis* (emphasis added) we have available, and what we have available in this case is more than adequate.<sup>135</sup>

...As stated by the Secretary-General, diplomacy has failed, but there are times when the use of force may be *legitimate* (emphasis added) in the pursuit of peace. The Netherlands feels that this is such a time.<sup>136</sup>

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<sup>129</sup> *Deutscher Bundestag, Plenarprotokoll* 13/248, 16 October 1998, quoted in Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects", (*European Journal of International Law*, Vol. 10, No.1, 1999), p 12-13.

<sup>130</sup> See USA:s argument above, section 5.2.1.

<sup>131</sup> *Legality of Use of Force Case*, Provisional Measures, ICJ 1999, pleadings of France, 10 May 1999, CR 99/17, (uncorrected translation).

<sup>132</sup> Chesterman, p 213.

<sup>133</sup> *Legality of Use of Force Case*, Provisional Measures, ICJ 1999, pleadings of Italy, 11 May 1999, CR 99/19, (uncorrected translation).

<sup>134</sup> Brownlie, p 882.

<sup>135</sup> Chesterman, p 212.

<sup>136</sup> *Ibid.*

During the debate regarding the draft resolution on 26 March 1999 that demanded an end to the air strikes, the Netherlands and France made similar statements.<sup>137</sup>

The Netherlands referred to the existence of a humanitarian catastrophe as a way of justifying the intervention during the proceedings in the ICJ. It also noted that the FRY had not complied with certain Security Council resolutions, such as resolution 1199.<sup>138</sup>

Canada argued the same way as USA and France during the emergency session of the Security Council on 24 March 1999.<sup>139</sup> The Canadian representative stated during the proceedings in the ICJ that the Security Council in a resolution had demanded that the FRY must take immediate steps to avert a humanitarian catastrophe.<sup>140</sup>

Spain belonged to the group of NATO-states that referred to the existence of a humanitarian catastrophe in the proceedings in the ICJ. In addition to this, Spain claimed that certain resolutions had been adopted under chapter VII of the UN Charter.<sup>141</sup>

Portugal emphasized the exceptional nature of Operation Allied Force during the proceedings in the ICJ. It stated:

... NATO's operation was an *exceptional intervention* (emphasis added) with the aim to put an end and minimize a gross violation of human rights – caused by the Federal Republic of Yugoslavia.<sup>142</sup>

Portugal also marked the situation in Kosovo a humanitarian catastrophe during the proceedings in the ICJ.<sup>143</sup>

### 5.3 The international reaction

The international reaction to Operation Allied Force was conveyed during the sessions of the Security Council when the air campaign was debated. On 24 March 1999, when the Security Council was engaged in the emergency session

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<sup>137</sup> See the reasoning of France above.

<sup>138</sup> *Legality of Use of Force Case*, Provisional Measures, ICJ 1999, pleadings of Netherlands, 11 May 1999, CR 99/20, paras 38 and 40.

<sup>139</sup> See the reasoning of USA, section 5.2.1.

<sup>140</sup> *Legality of Use of Force Case*, Provisional Measures, ICJ 1999, pleadings of Canada, 10 May 1999, CR 99/16, para. 43.

<sup>141</sup> *Legality of Use of Force Case*, Provisional Measures, ICJ 1999, pleadings of Spain, 11 May 1999, CR 99/22, (uncorrected translation), para. 1.

<sup>142</sup> *Legality of Use of Force Case*, Provisional Measures, ICJ 1999, pleadings of Portugal, 11 May 1999, CR 99/21, para 3.1.4.

<sup>143</sup> *Ibid*, para 4.1.2.2.

as described above, Russia, China, India and Belarus declared that Operation Allied Force was a violation of the UN-charter since there was no mandate from the Security Council.<sup>144</sup> Two permanent members of the Security Council, that is Russia and China, were accordingly opposed to Operation Allied Force. Those states that supported Operation Allied Force were very hesitant regarding the legal basis for the action.<sup>145</sup> The majority of the non-NATO members of the Security Council asserted the moral legitimacy of the air campaign while simultaneously regretting the resort to unauthorized use of force.<sup>146</sup>

The draft resolution on 26 March 1999 that demanded a halt to the air campaign was rejected by twelve votes to three.<sup>147</sup> The states that voted in favor of the draft resolution were Russia, China and Namibia. Those voting against it were, except the NATO-states, Argentina, Gabon, Gambia, Bahrain, Brazil, Malaysia and Slovenia. The majority of the Security Council thus held the opinion that the draft resolution was the wrong response to the situation. States such as Slovenia, Argentina, Malaysia and Bahrain argued that the draft resolution was very one-sided in the legal issues raised by the situation in Kosovo. Few states opposing the draft resolution voiced any legal reasoning at all.

On 14 April 1999, a draft resolution intended to condemn Operation Allied Force as a violation of article 2(4) was rejected by the Security Council. The draft resolution was again supported only by Russia, China and Namibia.<sup>148</sup> Apparently, there was no willingness to condemn the air campaign among the majority in the Security Council, although many non-NATO members held the view during the emergency session on 24 March 1999 that it was unfortunate that Operation Allied Force was not authorized by the Security Council.

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<sup>144</sup> Brownlie, p 908 and Rytter, p 155.

<sup>145</sup> Chesterman, p 211.

<sup>146</sup> Rytter, p 155.

<sup>147</sup> About this paragraph, see Chesterman, p 213.

<sup>148</sup> Rytter, p 155.

# 6 Evaluation of opinio juris

## 6.1 Introduction

In this chapter, I will establish whether the legal position of the NATO states together with the international reaction towards Operation Allied Force is evidence of opinio juris for a right of humanitarian intervention. There were certain explanations to Operation Allied Force that were maintained by several NATO states in different circumstances. These are particularly interesting since they indicate that the NATO states had decided upon a common ground to stand on regarding the justifications for the intervention. I will consequently analyze these common features that exist among the statements by the NATO states to see what legal position they reflect. There will also be an analysis of the characteristics of some of the individual justifications by the NATO states in order to establish if they reaffirm or oppose the motives that were shared by several NATO states. I will, in conclusion, analyze the response of the international community to see if there was a general acceptance of Operation Allied Force.

## 6.2 Shared arguments and individual characteristics

The debate on Operation Allied Force was heated, and as a consequence many different arguments in favor and against the intervention were brought forward. It makes it difficult to create a clear picture of the legal conviction expressed by NATO and the individual states. My ambition is however to present an assessment of the arguments by NATO and its member states below regarding their significance as evidence of opinio juris for a right of humanitarian intervention.

### 6.2.1. "Humanitarian catastrophe"

Almost all NATO-states, except Italy and France, referred to a humanitarian catastrophe when they described the situation in Kosovo during the proceedings in the ICJ. It was either used as a justification for the intervention or a mere statement of facts. The reference to a humanitarian catastrophe could be interpreted as an argument in favor of humanitarian intervention. It is however not a clear legal argument due to the unwillingness of the NATO-states to put the phrase in a legal context. Did the NATO-states consider the intervention to be legal because of the humanitarian catastrophe, or was it an argument brought forward in the pursuit of legitimacy? It is therefore difficult to establish some

opinio juris from the use of the phrase humanitarian catastrophe, although it could indicate a growing acceptance of the concept of humanitarian intervention.

The UK together with the Netherlands asserted however that the intervention was a legal response to the alleged humanitarian catastrophe. The UK argued the legality of Operation Allied Force on the domestic level in the House of Commons and on the international level during the emergency session of the Security Council.<sup>149</sup> The UK thus expressed the conviction that there exists a right to intervene in a state in order to avert a humanitarian catastrophe. Although there is no specific international law source invoked, one may interpret the statements as assertions of a right of humanitarian intervention. It is however confused by other statements by the UK representatives. Operation Allied Force was explained in the House of Commons by members of the Cabinet that it was a moral obligation which the UK had undertaken, that it was a direct result of the FRY:s unwillingness to accept the Rambouillet proposals and that the UK relied upon Security Council resolutions as described above. There are consequently several different explanations to Operation Allied Force. Since the UK did not consistently assert the legality of the intervention due to the humanitarian catastrophe, but rather chose to put forward several non-legal explanations as well, it raises the question whether the UK in fact perceived the intervention to be legal because of the humanitarian catastrophe. The fact that the UK did not argue the legality of Operation Allied Force in the proceedings in the ICJ, when the representative of the UK decided to delete the part of Sir Jeremy Greenstock's quote which describes the intervention as legal, adds to the perception of the UK:s attitude as ambiguous. It is therefore impossible to conclude that the UK had a distinct conviction that Operation Allied Force was legal due to the alleged humanitarian catastrophe.

The Netherlands also asserted the legality of Operation Allied Force by referring to a humanitarian catastrophe during the emergency session of the Security Council.<sup>150</sup> The Netherlands observed that it was impossible to have a Security Council resolution, allowing military force to be applied by NATO, adopted. In spite of this, it stressed the importance not to let a humanitarian catastrophe occur and that there was a sufficient legal basis to act. Since the Netherlands recognized that the Security Council had not authorized the use of force, its statement may be interpreted as arguing for military force outside the framework of the UN-charter in order to avert a humanitarian catastrophe. The Netherlands claim of legality is however contradicted by the fact that it did not continue to assert the legality of the intervention in the proceedings in the ICJ. It stated that it existed a humanitarian catastrophe, but the Netherlands did not put the phrase in a legal context. The Netherlands also implied during the discussion in the Security Council on the draft resolution which was subsequently rejected, that the coercive powers of chapter VII had been invoked. This is contrary to the Netherlands' statement during the emergency session, when it claimed that the

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<sup>149</sup> See 5.2.2 above.

<sup>150</sup> See 5.2.4 above.



intervention was legal even though Chapter VII was not applied. Although the Netherlands asserted on an initial basis that the intervention was legal even without a resolution authorizing military force, the overall impression is that the Netherlands did not have a firm belief that Operation Allied Force was legal outside the framework of the UN-charter. The initial assertion of legality outside the UN framework is thus contradicted by the absence of a legal claim in the proceedings in the ICJ and the emphasis of the coercive powers of chapter VII, when the draft resolution was rejected.

### 6.2.2. Security Council resolutions

During the emergency session referred to in the previous chapter, three states, that is USA, France and Canada, argued that the FRY violated legal obligations in certain Security Council resolutions.<sup>151</sup> France and Netherlands also relied upon Security Council resolutions when the draft resolution on 26 March 1999 was rejected, implying that the coercive powers of the Security Council had been invoked.<sup>152</sup> In the proceedings in the ICJ, several states - Belgium, Canada, Netherlands, Spain and USA - stressed the importance of Security Council resolutions.<sup>153</sup> In the House of Commons, the Prime Minister together with the Deputy Prime Minister and the Defense Secretary made it clear that the UK relied upon Security Council resolutions.<sup>154</sup>

The emphasis on Security Council resolutions is certainly an argument in favor of the intervention. There was however, among the majority of states, no claim made that the resolutions constituted a legal basis for Operation Allied Force. It is not surprising, since the resolutions did not contain any language referring to the use of force.<sup>155</sup> The reference to the resolutions was likely an attempt to argue the legitimacy of the intervention rather than the legality. Even if the NATO states would consider the intervention to be legal due to the resolutions, this does not however constitute the necessary *opinio juris* for a right of humanitarian intervention outside the context of the UN-charter.

### 6.2.3. “Exceptional intervention”

Some NATO-states emphasized the exceptional nature of Operation Allied Force. USA marked the operation a “unique situation *sui generis*” and stated that one should not overdraw the lessons that came out of the air campaign.<sup>156</sup> Furthermore, Germany claimed that Operation Allied Force was in fact a

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<sup>151</sup> See 5.2.1 and 5.2.4 above.

<sup>152</sup> See 5.2.4 above.

<sup>153</sup> See 5.2.1, 5.2.3 and 5.2.4 above.

<sup>154</sup> See 5.2.2 above.

<sup>155</sup> Brownlie, p. 895.

<sup>156</sup> See 5.2.1 above.

humanitarian intervention, although it very carefully pointed out in *Bundestag* that the intervention should not become a precedent.<sup>157</sup> Portugal stated that Operation Allied Force was an “exceptional intervention” in the proceedings in the ICJ.<sup>158</sup>

<sup>159</sup> The Prime Minister of the UK Tony Blair also emphasized the exceptional nature of the air campaign in the Parliamentary Debates on 26 April 1999. Baroness Symons spoke in the House of Lords of cases when a limited use of force had been justifiable in order to avert a humanitarian catastrophe, although the Security Council had not authorized the use of military force. She noted that such cases would in the nature of things be exceptional.

Both USA and Germany argue that Operation Allied Force has no value, or very small value, as a precedent for future interventions on humanitarian grounds. They seem to have the ambition to establish for the rest of the world that although Operation Allied Force was carried out for humanitarian purposes, it should not be seen as evidence for a right of humanitarian intervention. It is difficult, if not impossible, to reconcile this position with a conviction that humanitarian intervention is legal, or is in the process of being legal, in customary international law. Therefore, the *opinio juris* of those two states is clearly lacking. Regarding Portugal and the UK, the reference to the exceptional nature of the intervention does not have to be contradictory to a right of humanitarian intervention. It can be interpreted as merely explaining with what frequency they believe such interventions will occur in the future. Therefore, one can not draw any definite legal conclusion from Portugal’s or the UK’s statements.

#### 6.2.4. Humanitarian intervention”

Belgium argued the legality of Operation Allied Force in the proceedings in the ICJ.<sup>160</sup> There was from the Belgian side an assertion that Operation Allied Force was a humanitarian intervention compatible with article 2(4) of the UN-charter. Belgium also explained that certain precedents (including ‘the three best cases’) supported its conclusion that the intervention was legal. The significance of the precedents was however not clarified. Despite this, the fact remains – Belgium claimed that Operation Allied Force was a humanitarian intervention which was legal, compatible with article 2(4) of the UN-charter and that the NATO action was supported by precedents from the Cold War. It is the most explicit assertion that Operation Allied Force was a humanitarian intervention in conformity with international law by the NATO-states.

The statement that Operation Allied Force was compatible with article 2(4) is an expression of a legal conviction that the referred article should be interpreted

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<sup>157</sup> See 5.2.4 above.

<sup>158</sup> Ibid.

<sup>159</sup> For the following review, see 5.2.2 above.

<sup>160</sup> See 5.2.3 above.

narrowly, allowing humanitarian intervention. It has however been established above that a broad interpretation of article 2(4) is correct.<sup>161</sup> The second argument, that certain precedents in the Cold War support Belgium's opinion that humanitarian intervention is legal, has more relevance in terms of establishing a right of humanitarian intervention in customary international law. Belgium seemed to have the conviction that the precedents of the Cold War are evidence of State practice for a right of humanitarian intervention. This State practice, in combination with certain Security Council resolutions, indicated according to Belgium that Operation Allied Force was legal.

There are however some doubts about the significance of the Belgian claim of legality as evidence of *opinio juris* for a right of humanitarian intervention. Belgium indicated on 26 September 1999 that it was not so sure about the legality of the intervention. The Belgian representative in the General Assembly then said during a debate that the Security Council resolution 1244 meant a "return to legality".<sup>162</sup> Since resolution 1244 dealt with matters in Kosovo after Operation Allied Force was finished, the statement referred to above gives the impression that Belgium perceived Operation Allied Force as illegal and that the said resolution created a legal framework for Kosovo. The Belgian conviction of the legality of Operation Allied Force is therefore highly questionable.

### **6.3 The legal opinion outside NATO**

<sup>163</sup>The states outside the NATO-alliance that participated in the debates of the Security Council regarding Operation Allied Force conveyed an ambiguous attitude towards the operation. Although most states regretted that there was no Security Council resolution authorizing the operation, on the other hand there was, in general, no flat condemnation of the operation. The majority of the states outside NATO acknowledged the moral legitimacy of the operation instead during the debates of the Security Council. This ambiguous attitude was especially reflected during the emergency session. Russia, China, India and Belarus stated however that Operation Allied Force was a violation of the UN-charter because of the absence of a Security Council resolution sanctioning the action.

The fact that only a minority condemned Operation Allied Force during the debates of the Security Council could be perceived as an acceptance by the majority of the use of force without Security Council approval. That is however to overstate the case. One can not conclude from the lack of condemnation among the states outside NATO that there was *opinio juris* for a right of unauthorized humanitarian intervention. The behavior of NATO was not met with silence. Although there was no formal condemnation, the states outside NATO expressed their opinion about the intervention when they regretted that there was no

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<sup>161</sup> See 2.2 above.

<sup>162</sup> See 5.2.3 above .

<sup>163</sup> For the following discussion, see 5.3.

resolution authorizing Operation Allied Force. The focus on the moral legitimacy in combination with the regret expressed due to the absence of a Security Council resolution indicates a legal opinion that runs contrary to an acceptance of humanitarian intervention in customary international law. The States outside NATO seemed to have the conviction that in order for Operation Allied Force to be in conformity with international law, there needed to be a Security Council resolution authorizing the operation.

## **6.4 Conclusions**

There was some expectation after the end of the Cold War that the new era would bring with it a new international legal order. The Security Council, often dead-locked between the Western and Eastern Group, would be more potent and there would also be a more active prevention of gross human rights abuses around the world. Humanitarian intervention would in such a legal order become an effective tool to prevent abuses of human rights and punish those responsible of them. Operation Allied Force could be seen as evidence of this new era with focus on human rights rather than principles such as sovereignty and non-intervention.

The operation by NATO had the necessary attributes of a humanitarian intervention, with gross human rights abuses and, in this case, an intervening military organization. It does not however automatically follow that the Cold War skepticism towards humanitarian intervention had been replaced by a more positive attitude. The justifications by the NATO states could be divided into two major groups: reference to a humanitarian catastrophe and reliance on Security Council resolutions. There were several other justifications as well; the two referred to above were however used by a majority of NATO states in different situations. Humanitarian catastrophe is a phrase with no legal significance and there was, in general, no ambition from the NATO states to put it in a legal context. It seems that the NATO states wanted to use a formulation that reminded of the concept of humanitarian intervention, to render the operation a sense of legitimacy, but without the legal implications that follows with the phrase humanitarian intervention. The Security Council resolutions that were brought forward did not authorize the use of force. The majority of the NATO states did consequently not argue that the intervention was legal due to the resolutions. Again, it is not unlikely that the NATO states merely brought forward the resolutions in order to make the intervention more legitimate, rather than presenting an actual legal justification.

The claim by Belgium that the operation was a humanitarian intervention could be seen as evidence of *opinio juris*. The statement from Belgium was however not backed up by the other NATO states. Furthermore, Belgium contradicted itself later on during a discussion in the General Assembly by stating that

resolution 1244 meant a “return to legality”, and thereby implying that Operation Allied Force was illegal.

Several NATO states focused on the exceptional nature of Operation Allied Force. This does not necessarily have any legal significance, although it could mean that the states who made such a claim did not want to set a precedent for the future. Two states, the USA and Germany, made it clear however that the operation had little value or no value at all in terms of precedent for future operations. Their eagerness to declare the uniqueness of Operation Allied Force could be seen as part of a pattern in the argumentation by the NATO states. There was no ambition, as the previous analysis demonstrates, to argue the legality of the operation so that it would set a precedent for the future. The NATO states seemed to have a desire to reserve the right to intervene under extreme circumstances when it from their perspective was politically and morally motivated. They did not want to give that right to other states or organizations by establishing a precedent for the future.

Even though the NATO states did not wish to establish a right of humanitarian intervention in international law, the international community could have seen Operation Allied Force as a way of making the principle of non-use of force more flexible. The fear of setting a precedent was however seemingly shared by the international community as well. The majority of the states outside NATO did not wish to formally condemn the operation, nor did they want to state the legality of Operation Allied Force. As a consequence, they chose the middle-way by giving the moral approval of the operation. Although a moral argument could be used politically, it has little value in terms of *opinio juris*.

The expectation that the new political order would also bring a new legal order was, as the analysis demonstrates, put down. Although Operation Allied Force can be perceived as evidence of a more confrontational approach towards states that abuse human rights, the unwillingness to make unauthorized humanitarian intervention legal was clear. The risk of abuse of the concept of humanitarian intervention is probably a reason behind the negative attitude of the international community towards humanitarian intervention. A state or a military organization could claim that an armed attack is a humanitarian intervention when it is in fact undertaken for other more dubious reasons. If unauthorized humanitarian intervention would become legal, it would furthermore put pressure on military organizations and strong military powers to react with armed forces against abuses of human rights when the legal prerequisites are fulfilled. It is not a desirable situation for states or military organizations, which the unwillingness to act in the civil war of Yugoslavia and the genocide in Rwanda, shows.

# 7 Assessment and Conclusions

Humanitarian intervention and its legal standing in customary international law is a controversial topic, which has given birth to a heated debate amongst international lawyers. The point of departure of the discussion on humanitarian intervention is the principle of non-use of force, which has the basic identity of the UN-charter article 2(4).<sup>164</sup> The present study establishes that a broad interpretation of article 2(4) is correct, which means that article 2(4) as well as the principle of non-use of force disqualify humanitarian intervention as a method of upholding human rights. The principle of non-use of force could however change and be replaced by a different norm if there is sufficient evidence of State practice supporting such a development. There is consequently a burden of proof on the proponents of humanitarian intervention to display evidence of State practice that indicates a modification of the principle of non-use of force. The question is then how difficult it is to satisfy the burden of proof: How many instances of State practice must be put forward for a right of humanitarian intervention to emerge? And how strong and unequivocal must the evidence be? It is clear that the jus cogens character of the principle of non-use of force puts the threshold for modification very high. Although it has been submitted that it is in fact not possible to limit the scope of application of the principle of non-use of force, the better view seems to be the one represented by Jens Elo Rytter and Peter Malanczuk: Modification of the principle of non-use of force is feasible, although the evidence of State practice must be overwhelming and reflect the legal conviction of the international community at large.<sup>165</sup> That it would not be possible to limit the scope of the principle of non-use of force, no matter the amount of State practice supporting a modification, and no matter if the *opinio juris* for a modification is shared by almost the entire international community, seems unreasonable.

The human rights abuses in “the three best cases” were both extensive and well-documented. The armed attacks by the intervening states ended these abuses of human rights. Although the State practice is consequently sound insofar as the interventions ended gross human rights violations, the conduct of the states must be accompanied by *opinio juris* in order to modify the principle of non-use of force. If there is no *opinio juris*, the conduct of the states is reduced to mere violations of a legal obligation. In none of “the three best cases” invoked the attacking states a right of humanitarian intervention. Uganda, India and initially Vietnam chose to rely on self-defense instead in order to justify their interventions. The reliance on self-defense is rather a confirmation of the principle of non-use of force.<sup>166</sup> Vietnam’s claim of helping the people in

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<sup>164</sup> See section 2.2 above.

<sup>165</sup> See section 2.3 above.

<sup>166</sup> See section 3.5 above.

Cambodia in their pursuit of self-determination is the closest to an expression of a right of humanitarian intervention. The reaction of the international community was also absent a legal conviction in favor of humanitarian intervention. The silent acceptance in the Ugandan case can not amount to acquiescence by itself, while the focus on principles such as non-intervention, sovereignty and territorial integrity in the Indian case opposes the concept of humanitarian intervention. The Vietnamese intervention was furthermore sharply criticized by the international community.

Operation Allied Force indicated however a change in the attitude towards humanitarian intervention. While the primary justification for intervention during the Cold War had been self-defense, the NATO states instead relied on motivations referring to the humanitarian situation in Kosovo. The often mentioned phrase “humanitarian catastrophe” was however not used in a legal context. It seems to have been formulated to resemble humanitarian intervention but without the legal significance of the phrase humanitarian intervention attached to it. Belgium in fact, as the only NATO state, asserted a right of humanitarian intervention, even though the legal significance of it was subsequently diminished since it maintained that resolution 1244 meant a “return to legality”.<sup>167</sup> The moral approval that was in part conveyed by the international community is also an indication of a different attitude towards humanitarian intervention after the Cold War. Moral approval is however not the same as stating the legality of the operation.

Since the material practice supporting humanitarian intervention is scarce, the clearer must the evidence of *opinio juris* be.<sup>168</sup> It is here submitted that the best to be said about the *opinio juris* regarding the “three best cases” is that it does not unequivocally reject the concept of humanitarian intervention. Operation Allied Force indicated a move towards accepting the morality of humanitarian intervention but not the legality however. It seems to me that the *opinio juris* of the four cases above is not sufficiently clear in order to use the interventions as evidence of State practice to establish that the principle of non-use of force has been modified. Even if the cases analyzed could be used as evidence of State practice, it might not suffice. The proponents of humanitarian intervention have a very heavy burden of proof due to the fact that the principle of non-use of force is a *jus cogens* norm. That the four cases analyzed would be sufficient to satisfy the burden of proof is not reasonable, since the State practice modifying the principle of non-use of force has to be overwhelming and the *opinio juris* must be shared by all important ideological and cultural groups.

It has been argued in the Kosovo Report<sup>169</sup>, regarding the question of humanitarian intervention *de lege ferenda*, that the international community must overwork the gap between legality and legitimacy. It is stated that the end of the

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<sup>167</sup> See section 5.2.3 above.

<sup>168</sup> Villiger, p. 28.

<sup>169</sup> Kosovo Report, p. 185-195.

Cold War has created some dramatic changes in circumstances with evolution of international standards governing human rights and a growing trend towards insisting on accountability of leaders for crimes of states. The extradition case against General Augusto Pinochet is mentioned as one example of the ambition to make leaders face responsibility for human rights crimes. The threat that interventions for humanitarian purposes would provoke a strategic warfare between leading states has furthermore declined after the Cold War, according to the Commission behind the Kosovo Report. The Commission presents, in light of the recent developments described above, a principled framework for humanitarian intervention.

The development in international law and politics after the Cold War as presented in the Kosovo Report could be a correct analysis. I do not however consider it a ground for changing the current legal status of humanitarian intervention. There are several reasons behind my skeptic attitude towards humanitarian intervention. The practice of humanitarian intervention is only available to strong nations, or nations which are supported by strong nations. An intervening state must have the military and economic capacity to engage in such a project. There is an apparent inequality worsened by the fact that the intentions behind the intervening states often have little to do with humanitarian aspects. The interventions not seldom serve a strategic purpose or has an ideological background.<sup>170</sup> It furthermore puts focus on another argument against humanitarian intervention: the risk of abuse. There have been several examples of states both during and after the Cold War, which have had an ambition to mask strategic or ideological purposes for an intervention by claiming that it was undertaken for humanitarian purposes.<sup>171</sup> There is a great risk of abuse of the term humanitarian intervention, since it can serve as both a political and a moral justification for an attack. To give states a right of humanitarian intervention will likely increase the number of humanitarian interventions undertaken in bad faith. It is of course even more tempting for a state to argue that the intervention is carried out for humanitarian purposes when it is not only a moral or political justification but a legal justification as well.

There is a moral and political dilemma regarding humanitarian interventions. It is questionable if it can be seen as morally and politically acceptable to reduce human rights violations by a method which is creating further violations of human rights. The many civilians who were killed during Operation Allied Force for instance as well as the damaged infrastructure and environment made it difficult for the NATO states to argue that the operation was in accordance with humanity and morality.<sup>172</sup> The suffering caused by a humanitarian intervention could easily backlash in a negative reaction both in the state which is attacked and on a domestic plane.

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<sup>170</sup> Brownlie, p. 909.

<sup>171</sup> See Chesterman, chapter 2 and Kosovo Report, p. 159-160.

<sup>172</sup> Kosovo Report, pp. 92-94 and 179-183.



There is also a problem of carrying out an intervention in an ethnic context, as Operation Allied Force was. The intervention was conducted in order to aid the ethnic Albanians, and many of the ethnic Albanians took advantage of the situation after Operation Allied Force by persecuting the Serbs in Kosovo and forcing them from their homes.<sup>173</sup> Operation Allied Force illuminates the problem of intervening in an ethnic context blatantly supporting one group. An intervention on those terms, as Operation Allied Force is evidence of, will likely aggravate the situation and make the ethnic conflict even bitterer.<sup>174</sup> The lesson of Operation Allied Force is an important one for the international community to learn, since the conflicts after the Cold War have been increasingly of an ethnic nature. Although this essay does not provide an answer to how an ethnic conflict should be resolved, it is nevertheless important to note the difficulties with imposing external force on an ethnic conflict.

Leaving the difficulties with ethnic conflicts aside, humanitarian interventions often provide only a temporary relief. The violations of human rights are likely to continue if the root causes of the crisis are not treated. It is therefore important to look at humanitarian intervention as an extremely short-term solution, which has to be followed up by a political solution immediately after the operation has ended. The origins of the crisis must be considered in the political solution as well as reforming the political and legal institutions in the country so that the human rights abuses are less likely to happen again.<sup>175</sup>

It is my opinion that humanitarian intervention can be a necessary and effective tool on a short-term basis when there is a desperate need that has to be dealt with immediately. The ideal solution in such a case is an authorization to use force by the Security Council under chapter VII of the UN-charter. The absence of a Security Council resolution can however not prevent the international community from reacting. There are situations when the humanitarian urgency is so great that one has to dispense with the legality of the situation.

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<sup>173</sup> Ibid, p. 108-110.

<sup>174</sup> Brownlie, p. 909.

<sup>175</sup> Falk, p. 100.

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