

NATO’S INTERVENTION IN KOSOVO: HISTORICAL, POLITICAL AND LEGAL ASPECTS*

TARİHİ, SİYASİ VE HUKUKİ YÖNLERİYLE KOSOVO’YA YAPILAN NATO MÜDAHALESİ

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Abstract: On 24 March 1999 the North Atlantic Treaty Organization (NATO) commenced air strikes against the Federal Republic of Yugoslavia (FRY) due to the ongoing crisis and human rights violations in Kosovo. Although this intervention in Kosovo had no legal basis, the so-called “right of humanitarian intervention” was surprisingly revoked by some scholars. Debates on the intervention divided international community and an old conflict aroused again; which do have the priority in the UN charter? Protecting Human rights or keeping the international peace and security. This article explores the historical reasons of the NATO’s action, the conflicting views of the scholars on the issue, arguments and counter arguments in the United Nations Security Council before and after the attacks, the precise ban on the use of force under UN Charter and whether a right to humanitarian intervention exists under contemporary international law or not.

ANAHTAR KELİMELEER: İnsani Müdahale, Kuvvet Kullanma, NATO, BM, 1999 Kosova Müdahalesi

Özet: 24 Mart 1999 tarihinde NATO, Kosovo’da süregiden siyasi krizi ve insan hakkı ihlallerini sona erdirmek üzere Yugoslavya Federal Cumhuriyeti’ni hedef alan hava saldırılarına başladı. Söz konusu müdahalenin yasal bir dayanağı olmamakla birlikte birtakım hukukçular “insani müdahale hakkı” na dayanarak NATO saldırılarını meşrulaştırmaya çalıştılar. Müdahale üzerine yapılan tartışmalar uluslararası toplumu ikiye böldü ve eski bir ihtilaf yeniden gündeme geldi; BM

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Anlaşması çerçevesinde öncelikli olarak korunan değer nedir? Uluslararası barış ve güvenlik mi yoksa insan hakları mı? Bu makalede NATO müdahalesinin tarihsel nedenleri, müdahale meselesine ilişkin olarak uluslararası hukukçuların birbiriyle çatışan görüşleri, NATO hareketinden sonra Birleşmiş Milletler Güvenlik Konseyinde cereyan eden tartışmalar açıklandıktan sonra BM Anlaşması çerçevesinde kuvvet kullanma yasağı ve insani müdahale hakkının uluslararası hukuktaki varlığı sorunu incelenecektir.

KEYWORDS: Humanitarian Intervention, Use of Force, NATO, UN, Intervention in Kosovo in 1999.

INTRODUCTION

On 24 March 1999 the North Atlantic Treaty Organization (NATO) commenced air strikes against the Federal Republic of Yugoslavia (FRY) due to the ongoing crisis and human rights violations in Kosovo. There were many justifications and debates about this armed intervention.¹

Tony Blair, Prime Minister of UK at the time, stated that the choice was to do something or do nothing.²

The choice to do something or nothing is a very striking argument with respect to the matter of to use force. It is the fact that the constitutional aim of the UN charter is to protect peace amongst nations. This is the core aim of the international community which always suffered from the cruelty of wars. As Judge Lauterpacht suggested in his book *The Function of Law in the International Community* the world's legal system must be built on a precise rule: "There shall be no violence" by states.³ The insufficiency of the League of Nations Covenant with respect of protecting peace led the states to constitute the United Nations and the UN Charter after the World War II. The very core part of the UN Charter is the prohibition of the threat or use of force under Article 2(4). There are two exceptions to this rule; self-defence and the actions authorized by the UN Security Council.

However the rising concerns on Human Rights issues in the world public opinion, led states to justify their use of force on the grounds of humanity as happened in Kosovo incident. Yet article 2(4) of the United Nations Charter provides a broad prohibition on the use of force and even the humanitarian concerns do not have enough bases to justify the arbitrary use of force.

The aim of this paper is to assess the legality issue of the NATO's Humanitarian Intervention in Kosovo. To be able to evaluate the issue, firstly, the origins of the conflict in Kosovo, the United Nations' and NATO's responses to this conflict and

¹ Javier Solana, NATO Secretary General at the time, stated that: "The Allies believe that in particular circumstances with respect to the present crisis in Kosovo as described in United Nations Security Council (UNSC) Resolution 1199, there are legitimate grounds for the Alliance to threaten, and if necessary, to use force."¹ NATO Secretary- General Dr Javier Solana, Press Conference at NATO Head Quarters in Brussels, 13 October 1998 see <http://www.nato.int/docu/speech/1998/s981013b.htm> (last visited 15 February 2009)

² Rachel Sylvester, 'War In Europe: The Blair Doctrine: This is an Ethical Fight; But How Will the Public React When the First British Serviceman Dies?', *Independent on Sunday*, 28 March 1999., at 18.

³ Hersch Lauterpacht, *The Function of Law in the International Community*, (Oxford: Clarendon Press) (1933) at 64.

the justifications of NATO's action will be handled. Secondly, intervention under contemporary international law, by stating the common rules on the use of force and the intervention, the decisions of the International Court of Justice and the state practice before and after the cold war will be examined. The developments in the United Nations in the Cold War Era will also be discussed in this part. Finally, a detailed evaluation on the legality of the Humanitarian Intervention in Kosovo will be analysed. In this part first of all, the arguments and counter-arguments in the Security Council about the NATO air strikes will be stated. Then, the justifications of the intervening states will be discussed. These discussions will be a kind of response to the justifications for the NATO action and search the answer of the question if a right to humanitarian intervention exists under contemporary international law and the existing Security Council Resolutions justifies the armed intervention of NATO.

The conclusion part will briefly assess the whole issues and answer the above mentioned questions in a negative way; that is, the intervention in Kosovo neither legal nor justifiable under contemporary international law.

1. THE BACKGROUND OF NATO'S INTERVENTION

In this part of the paper first a brief history about Kosovo which led to NATO's intervention, the responses of the UN to the escalating Human Rights violations and the justifications before the world public opinion and International Court of Justice (ICJ) will be analysed.

1. 1. The Historical Background; what Happened in Kosovo?

The conflicts in Kosovo go back to the defeat of Serbians by Ottoman Turks in 1389. Ottomans ruled the region until 1912 when Serbia and other Balkan States united to compel Turks to leave Balkan region. During the World War I, Serbs were expelled from Kosovo. In 1918, the Kingdom of Serbs, Croats and Slovenes were established and Kosovo returned to Serbia. It became Yugoslavia, as a Slav state, in 1929 and was divided again during the World War II. General Tito reconstituted the state as the 'People's Federal Republic of Yugoslavia' consisted of Serbia, Montenegro, Croatia, Slovenia, Bosnia and Herzegovina and Kosovo and Kosovo was granted an autonomous position in 1974.⁴

The tension increased in Kosovo when Serbian president Milosevic had rescinded the province's autonomous status in 1989.⁵ In the following years Milosevic dismissed

⁴ Simon Chesterman, *Just war or just peace? Humanitarian Intervention and International Law* (Oxford: Oxford University Press) (2001), at 207.

⁵ Nicholas J. Wheeler, *Saving strangers: humanitarian intervention in international society* (Oxford: Oxford University Press) (2000), at 257.

the Albanians by revoking the official status of Albanian language, excluding them from state school system and as a reaction under the leadership of Ibrahim Rugova the Democratic League of Kosovo had been established and Albanian Kosovars created unofficial parallel system of schools, laws, judiciary and taxation.⁶ By 1997 the non-violent responses began to change because Kosovo was left out the Dayton Peace Agreement and Ushtria Clirimate e Kosoves/ Kosovo Liberation Army (UCK/ KLA) had been established and began to bombings against Serb targets.⁷ As a response, Belgrade deployed troops and attacked villages by helicopters.⁸ According to Independent international Commission on Kosovo, from February 1998 to March 1999 the casualties were around 1000 civilians and more than 400.000 people were driven from their homes.⁹ The Events escalated in February and March 1998. Fifty Kosovars were killed in the Drenica area, including 25 woman and children, on 5 March 1998.¹⁰

1.2. The Responses of the United Nations and NATO to the Kosovo Crisis

The first resolution adopted by United Nations Security Council on Kosovo crisis was Resolution 1160.¹¹ In its operative paragraphs the resolution condemned the use of excessive force by Serbian Police and terrorist action by the UCK and called upon Albanian Leadership “to condemn all terrorist actions” and solve the problems “by peaceful means only”.¹² To this end UN preferred the “meaningful dialogue on political status issues”, imposed an arms embargo, and expressed support for a solution, based on the territorial integrity of the FRY with a greater degree of autonomy and meaningful self-administration for the Kosovar Albanians and the people who live in Kosovo.¹³ The resolution was not only supporting the enhanced status of Kosovo by making references to 1975 Helsinki Final Act and UN Charter but also inviting the parties to political dialogue.¹⁴ By doing so

⁶ Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press) (2002), at 164.

⁷ Wheeler, *op cit. supra n. 5*, at. 258.

⁸ Independent International Commission on Kosovo: The Kosovo Report see <http://www.reliefweb.int/library/documents/thekosovoreport.htm> (last visited 15 February 2009)

⁹ *ibid.*

¹⁰ Franck, *op.cit., supra n. 6*, at 164.

¹¹ SC Res 1160 (31 March 1998). <http://daccess-ods.un.org/TMP/8240586.html> (last visited 15 February 2009)

¹² *ibid.*, para 2 and para 4.

¹³ *ibid.*, para 5.

¹⁴ *ibid.*

the Council appeared as a facilitator of dialogues which was operating within the principals of humanitarian law and human rights law between the parties.¹⁵ For this reason, support was expressed for The Organization for Security and Co-Operation in Europe (OSCE) and International Criminal Tribunal for Yugoslavia.¹⁶ Although the resolution was expressing above mentioned, in the preambular it was stated that the “commitment of all member states to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia.”¹⁷ Thus, UN indicated its sensitiveness on the concepts of state sovereignty and territorial integrity. Although it was stated that there had been ongoing human rights violation in Kosovo and resolution was adopted under Chapter VII, the situation was not explicitly determined as a threat to international peace and security.¹⁸ No member states vetoed the resolution but Russia and China abstained since they viewed the matter within the domestic jurisdiction of Yugoslavia.¹⁹ Russia stated that the recent events in Kosovo were the internal affairs of Yugoslavia and China supported this view by adding that the intervention of the Security Council in the ethnic issues within states without a request from the country concerned might set a bad precedent and might have broader implications.²⁰ It is also important to cite that no state in the Security Council supported the secessionist claims on the territorial integrity of Yugoslavia and sovereignty of FRY was approved in Resolution 1160.²¹ These international pressures on Belgrade government did not stop Serbian attacks. The attacks in the Decani caused many civilian killings as well as the vast amount of refugee fleeing.²² Because of the large scale Serbian attacks against Albanian villages, William Cohen, US Defence Secretary a the time, stated at a NATO meeting of defence ministers in September if Serbs did not stop NATO would act.²³ However three NATO members Greece, Italy and Germany did not support this idea because of the lacking Security Council authorization.²⁴

¹⁵ Dino Kritsiotis, ‘The Kosovo Crisis and NATO’s Application of Armed Force Against the Federal Republic of Yugoslavia’ (2000) 49 *International and Comparative Law Quarterly*, at 333.

¹⁶ *ibid.*

¹⁷ SC Res 1160, *op cit. supra n.11*, preamble.

¹⁸ *ibid.*

¹⁹ S/PV. 3868, 53th year , (31 March 1998), 10-12. <http://daccess-ods.un.org/TMP/9240571.html> (last visited 15 February 2009)

²⁰ *ibid.*

²¹ SC Res 1160, *op cit. supra n.11*, preamble.

²² More than 100.000 refugees left Decani and this scene shocked Blair government and led them to argue that use of force is necessary force to stop Serbian ethnic cleansing. Jonathan Steele, ‘Learning to Live with Milosevic’, *Transitions*, 20 cited in Wheeler, *op. cit., supra n. 5*, at 259.

²³ *ibid* at 259.

²⁴ *ibid.*, at 260.

The second resolution on the issue could not meet the expectations on the explicit authorization of the use of force either. On 23 September 1998 Resolution 1199 was adopted by fourteen votes with the abstention of China.²⁵ This resolution was recalling the Resolution 1160 and considering Kofi Annan's, UN Secretary-General at the time, report pursuant to that resolution. This report indicated the "increased heavy fighting between the security forces of the FRY and UCK" and that the numbers of civilian and military casualties were "at their highest point since the outbreak of the conflict" in paragraph 11 and the dramatic increase in internally displaced persons because of the cruel violence in paragraph 12.²⁶ This Resolution determined that "the deterioration of the situation in Kosovo constitutes a threat to peace and security in the region"²⁷. It also demanded that immediate steps must be taken by both Kosovars and FRY "to avert the impending humanitarian catastrophe".²⁸ Although the resolution expressed the deep concern of the Council on the human rights and humanitarian law, there was not any authorisation on the use of forcible measures against FRY.²⁹ While the Council expressed that it was acting under chapter VII there were no 'all necessary measures' clause which had become an ordinary characteristic of such actions.³⁰ In this respect resolution 1199 indicates similarities to resolution 688³¹ adopted by the Council at the end of the Gulf Conflict in 1991.³² The resolution further demanded from FRY the implementation of following measures: to cease all action condemning by security forces which affects the civilians; to permit effective monitoring for the EC Monitoring mission; to make possible the return of refugees and displaced persons and to allow free and unhindered access for humanitarian organizations and supplies; and to achieve a rapid progress towards a political solution.³³ Finally the Council decided that if these concrete measures were not taken the additional measures would be taken to maintain or restore peace and stability in the region.³⁴ Although UK and the USA wanted a more effective resolution, the informal debates indicate that Russia and

²⁵ SC Res 1199 (23 September 1998). <http://daccess-ods.un.org/TMP/5247176.html> (last visited 15 February 2009)

²⁶ Report of the Secretary General of the UN Pursuant to Security Council Resolution 1160, UN Doc. S/1998/712 (5 August 1998), <http://www.un.org/Docs/sc/reports/1998/sgrep98.htm> (last visited 15 February 2009)

²⁷ SC Res 1199, preamble, paras 1-2.

²⁸ *ibid.*, paras 1-4.

²⁹ Kritsiotis, *op. cit.*, *supra n.* 15, at 335.

³⁰ *ibid.*

³¹ SC Res 688 (5 April 1991). <http://daccess-ods.un.org/TMP/4457809.html> (last visited 15 february 2009)

³² Kritsiotis, *op. cit.*, *supra n.* 15, at 335.

³³ SC Res 1199, *op. cit. supra n.* 25, para. 4.

³⁴ *ibid.*, para 16.

China would veto such a resolution.³⁵ While Russia supported the draft resolution the Russian Ambassador stated that “no use of force and no sanctions are being imposed by the Council at the present stage...the use of unilateral measures of force in order to settle the conflict is fraught with the risk of destabilizing the Balkan region and of all Europe and would have long-term adverse consequences”.³⁶ Chinese Ambassador argued that the draft resolution had “invoked the Chapter VII of the UN Charter all too indiscreetly in order to threaten the Federal Republic of Yugoslavia” and that the efforts on the peaceful solution of the conflict would not be affected in a positive way.³⁷

After the adoption of the Council resolution 1199 UN Secretary General presented a report which indicated the mass killings of civilians in Kosovo.³⁸ This led UK to propose a draft resolution which was authorizing use of force to halt the killings in Kosovo but Russia refused to adopt this kind of a resolution and expressed that any military intervention against a sovereign state without an explicit Security Council authorization, would undermine the contemporary international legal order.³⁹ Because of the opposing views of Russia and China, Council could not create such a resolution and the Alliance warranted its threat to recourse to force on the grounds of the existing Security Council resolutions.⁴⁰ However Germany was concerning about the legality of such a claim because of the lack of Security Council resolution.⁴¹ After the debates in German Bundestag (Parliament of Federal Republic of Germany) the approval was given to Germany to join the action of NATO.⁴² The striking point of these debates was generated from the UN Charter law; that is, whether or not the action of NATO would be legal in terms of the UN Charter.⁴³ Then the Bundestag decided that the situation in Kosovo was a state of humanitarian necessity and had to be justified even without any UN authorization. Thus, the Bundestag regarded the threat of NATO as an example of humanitarian intervention.⁴⁴ However in Bundestag

³⁵ Wheeler, *op. cit.*, *supra* n. 5, at 261.

³⁶ S/PV. 3930 (23 September 1999), at 3. <http://daccess-ods.un.org/TMP/4457809.html> (last visited 15 February 2009)

³⁷ *ibid.*, at 4.

³⁸ S / 1998 / 912 (3 October 1998) Report of the Secretary- General Prepared Pursuant to Resolutions 1160 (1998) and 1199 (1998) of the Security Council see <http://www.un.org./Docs/sc/reports/1998/sgrp98.htm> (last visited 15 February 2009)

³⁹ Wheeler, *op. cit.*, *supra* n. 5, at 261.

⁴⁰ *ibid.*

⁴¹ *ibid.*, at 262.

⁴² Bruno Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’, (1999) 10 *European Journal of International Law*, at 13.

⁴³ *ibid.*, at 12.

⁴⁴ *ibid.*, at 13.

it was emphasized that the NATO's intervention was not a precedent or a green light for other NATO actions.⁴⁵ German Foreign Minister stated before the Bundestag that "The Decision of NATO, about the air strikes against the FRY, must not become a precedent. As far as the Security Council monopoly on force is concerned, we must avoid getting on a slippery slope."⁴⁶

On 13 October 1998 NATO issued an activation order for air strikes against Serbian targets and warranted it in terms of the existing Council resolutions 1160 and 1199 though the reservations of Germany and other states on the legality of resolutions in order to commence such an attack.⁴⁷ The concept of humanitarian intervention was also other legal basis of the NATO in order to enhance the degree of the legitimacy for the action.⁴⁸ Before this activation order, NATO Secretary General had summarized the NATO's position by a letter.⁴⁹

After this statement by NATO, Richard Holbrooke, US special envoy at the time, went to Belgrade so as to prevent an armed intervention in the FRY.⁵⁰ Holbrooke and Slobodan Milosevic, President of FRY at the time, reached an agreement based on the demands in Resolution 1160 and 1199 and the major points of the agreement addressed the reduction of forces and the deployment of the monitoring facilities.⁵¹

⁴⁵ *ibid.*

⁴⁶ Deutscher Bundestag, Plenarprotokoll 13/248, 16 October 1998 at 23129 cited in *ibid.*, at 13.

⁴⁷ Wheeler, *op. cit.*, *supra* n. 5, at 262.

⁴⁸ Simma, *op. cit.*, *supra* n. 42, at 7.

⁴⁹ Letter from Secretary-General Solana, addressed to the Permanent Representatives to the North Atlantic Council, dated 9 October 1998, cited in *ibid* at 7. In the letter it was stated that "- The FRY has not yet complied with the urgent demands of the international Community, despite UNSC Resolution 1160 of 31 March 1998 followed by UNSC Resolution 1199 of 23 September 1998, both acting under Chapter VII of the UN Charter.

- The very stringent report of the Secretary-General of the United Nations pursuant to both resolutions warned *inter alia* of the danger of a humanitarian disaster in Kosovo.

- The continuation of a humanitarian catastrophe, because no concrete measures towards a peaceful solution of the crisis have been taken by the FRY.

- The fact that another UNSC Resolution containing a clear enforcement action with regard to Kosovo cannot be expected in the foreseeable future.

- The deterioration of the situation in Kosovo and its magnitude constitute a serious threat to peace and security in the region as explicitly referred to in UNSC Resolution 1199. On the basis of the discussion, I conclude that the Allies believe that in particular circumstances with respect to the present crisis in Kosovo as described in UNSC Resolution 1199, there are legitimate grounds for the Alliance to threaten, and if necessary, to use force."

⁵⁰ Wheeler, *op. cit.*, *supra* n. 5, at 262.

⁵¹ S/1998/978, Agreement between the organization for security and cooperation in Europe and the Federal Republic of Yugoslavia on the Kosovo Verification Mission (16 October 1998) see http://www.un.org/peace/kosovo/sc_kosovo.htm (last visited 15 February 2009)

By this agreement Milosevic accepted the Organization on Security and Cooperation in Europe Kosovo Verification Mission (OSCE-KVM), a team of 2000 civilian observers who would monitor the enforcement of the agreement.⁵² On 15 October 1998 another agreement had been signed between FRY and NATO and Milosevic accepted the NATO's verification mission in Kosovo which would be situated there to provide compliance by all parties with the previous Security Council resolutions.⁵³

The Security Council was adopted two more resolutions in 1998. On 24 October 1998, Security Council accepted Resolution 1203, which affirmed the agreement between Halbrooke and the government of Yugoslavia, providing for OSCE-KVM deployment and Yugoslav troop withdrawals and also welcomed the NATO- FRY agreement.⁵⁴ Security Council resolution 1203 was also expressing 'deep alarm' on the gross human rights violations in Kosovo and affirming the situation in the region as a "threat to international peace and security."⁵⁵

By the end of October, large numbers of Yugoslavian forces withdrew and KVM monitors had been organized.

The statements of Russia, USA and China during the adoption process of the resolution made it clear that the permanent members of the Security Council were deeply divided. US Ambassador stated "that a credible threat of force was key to achieving the OSCE and NATO agreements and remains key to ensuring their full implementation. The NATO Allies, by agreeing on the 13th of October on the use of force, made it clear that they had the authority, the will and the means to resolve the issue."⁵⁶ The counter-argument for the statements of US came from Russia. Russian ambassador stressed that "enforcement elements have been excluded from the draft resolution, and there are no provisions in it that would directly sanction the automatic use of force which would be the detriment of the prerogatives of the Security Council under the Charter."⁵⁷ The Russian Ambassador also argued that the draft resolution did not exactly consider the positive steps taken by Belgrade

⁵² *ibid* at 8.

⁵³ S / 1998 / 991 (23 October 1998), Kosovo Verification Mission Agreement between the North Atlantic Treaty Organization and the Federal republic of Yugoslavia, at 3, see http://www.un.org/peace/kosovo/sc_kosovo.htm (last visited 15 February 2009)

⁵⁴ SC Res 1203 (24 October 1998), preamble, see <http://daccess-ods.un.org/TMP/2804129.html> (last visited 15 February 2009)

⁵⁵ *ibid*.

⁵⁶ S/PV 3937, 53th year (24 October 1998) at 15 see <http://daccess-ods.un.org/TMP/5295496.html> (last visited 15 February 2009)

⁵⁷ *ibid*.

to resolve the matter and that Russia could not agree with one-sided assertion in the preambular part of the text that the unresolved situation in Kosovo constitutes a continuing threat to peace and security in the region.⁵⁸ The argument of Russia was supported by China. Chinese ambassador stated that NATO's activation order was a very worrying development since the "decision was made unilaterally without consulting the Security Council and or seeking its authorization.....Furthermore it has violated the purposes, principles and relevant provisions of the UN Charter, as international law..."⁵⁹ China stated that Resolution 1203 did not "entail any authorization to use force or threaten to use force against FRY."⁶⁰ Other members of the Council such as Costa Rica and Brazil while supporting the resolution stated their concerns on the legality of a regional organization's use of force without Security Council authority.⁶¹ The Brazilian ambassador stated that "non-universal organisms may resort to force only on the basis either of the right to legitimate self-defenceor through the procedures of chapter VIII, in particular Article 53, which imposes on them the obligation of seeking Council authorization beforehand and abiding by the Council's decision....There is no third way."⁶²

On November 17, Security Council adopted Resolution 1207, demanded by Yugoslavian authorities to fulfil the requests of the ICTY including the arrest of certain individuals.⁶³ At the beginning of October, the recognition of ICTY's jurisdiction in Kosovo was rejected by the Yugoslav Foreign Ministry, based on a claim that it was a violation of national sovereignty.⁶⁴ Accordingly visas to ICTY investigators were denied by Yugoslavian authorities and also they threatened to terminate co-operation with the ICTY Liaison Office in Belgrade.⁶⁵ The Chief Prosecutor announced the actions of Yugoslavia had to be "totally unacceptable."⁶⁶ By means of Resolution 1207, Security Council rejected the Yugoslavia's sovereignty argument and firmly established ICTY's investigative authority.⁶⁷

⁵⁸ *ibid.*, at 11.

⁵⁹ *ibid.*, at 12.

⁶⁰ *ibid.*, at 14.

⁶¹ *ibid.*

⁶² *ibid.*, at 6-7, 10-11.

⁶³ *ibid.*, at 15.

⁶⁴ SC Res 1207 (17 November 1998), preamble, see <http://daccess-ods.un.org/TMP/1543987.html> (last visited 15 February 2009)

⁶⁵ Independent international Commission on Kosovo, *op. cit. supra n.8*, under the chapter of "Internal Armed Conflict".

⁶⁶ *ibid.*

⁶⁷ *ibid.*

Albanians rejection of 16 October Agreement -because of its proposal on the autonomy in which they were entitled less autonomy when compared to 1974 constitution, UCK continued its attacks.⁶⁸ The Serb forces responded these attacks by destroying Albanian villages and killing civilians.⁶⁹ On 15 January 1999 forty-five civilians were killed in the village of Racak.⁷⁰ In the meantime there were ongoing negotiations for a political solution between Serbs and Kosovar Albanians at the French chateau at Rambouillet.⁷¹ The negotiations commenced on February and concluded with the “Interim Agreement for Peace and Self-Government in Kosovo” at 23 February 1999.⁷² The sovereignty of Yugoslavia was emphasized in the preambular part of this agreement. The framework part of the agreement stipulated the self-government issue in Kosovo region. In this part the right to democratic self-government of the citizens of Kosovo through “legislative, executive, judicial, and other institutions” would be established in accordance with this agreement.⁷³ The agreement also stipulated the legal equality of the national communities and also emphasized the respect for human rights and democracy. The disarmament of FRY and KLA was also included.⁷⁴ However the negotiations broke down because of Milosevic’s opposition to the requirements proposing free movement of NATO in the territory of the FRY and a referendum on Kosovo’s independence in three years.⁷⁵ After the breakdown of these negotiations a new ethnic cleansing campaign was commenced by Serbian Forces. 22 March 1999 was the last meeting of Halbrooke and Milosevic.⁷⁶ The attempts of Halbrooke could not persuade Milosevic to accept Rambouillet Interim Agreement and NATO commenced its air strikes against FRY on 24 March 1999.⁷⁷

⁶⁸ SC Res 1207, *op. cit. supra* n.63, at 2.

⁶⁹ Wheeler, *op. cit., supra* n. 5, at 264.

⁷⁰ *ibid.*

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ Rambouillet Accords: Interim Agreement for Peace and Self Government in Kosovo, see <http://www.reliefweb.int/rw/rwb.nsf/db900SID/MHII-6599VZ?OpenDocument> (last visited 15 February 2009)

⁷⁴ *ibid.*

⁷⁵ *ibid.*

⁷⁶ Wheeler, *op. cit., supra* n. 5, at 264 and Chesterman, *op. cit., supra* n.4, at 211.

⁷⁷ When Holbrooke asked Milosevic “you understand what will happen when I leave here today if you don’t change your position, if you don’t agree to negotiate and accept Rambouillet?” Milosevic’s answer was simple that is; “Yes, you will bomb us”, Tim Judah, *Kosovo: War and Revenge* (New Haven: Yale University Press) (2000), at 277.

1.3. The Justifications of the NATO's Intervention by the Allies

The intervening states had different grounds for justification however these were generally intersected on the humanitarian concerns. States did not generally use the term humanitarian intervention which is defined as the use of force by a state, states or regional organisations in order to prevent gross human rights violations.⁷⁸ However the justifications show that they were intending to use this doctrine. The reason of intervening states to recourse to the doctrine of humanitarian intervention was the result of the Council resolutions which did not allow use of force against FRY.⁷⁹ Tony Blair, The Prime Minister of UK at the time, stated the aim of NATO's use of force as to protect the innocent civilians from the cruelty of Milosevic⁸⁰ UK Secretary of State for Defence, declared that "Our legal justification rests upon the accepted principle that force may be used in extreme circumstances to avert a humanitarian catastrophe. These circumstances clearly existed in Kosovo. The use of force in such circumstances can be justified as an exceptional measure in support of purposes lay down by the Security Council, but without the Council's express authorisation, when that is the only means to avert an immediate and overwhelming humanitarian catastrophe."⁸¹ United States justified the intervention on multiple legal grounds. On 23 March 1999 Clinton and his advisers argued that there is a moral responsibility of West to stop the bed atrocities taking place in Kosovo. There is also another justification of this action that is the jeopardizing effect of the deterioration of Europe security on the national interests of American people.⁸² There is not any argument that national interests were not involved in the intervention. Blair in his Chicago speech stated that there was not any clash between supporting humanitarian values and defending national interests.⁸³

These opinions were repeated in the proceedings before the ICJ by NATO members.⁸⁴ In the hearings the most detailed legal justifications for the air strikes were presented by Belgium.⁸⁵ Belgium first rejected the jurisdiction of the Court, and

⁷⁸ Wheeler, *op. cit.*, *supra* n. 5, at 265.

⁷⁹ Ian Brownlie, 'Humanitarian Intervention' in John N. Moore (eds.), *Law and Civil War in the Modern World*, (Baltimore, Maryland: John Hopkins University Press), (1974), 217.

⁸⁰ Kristiotis, *op. cit.*, *supra* n. 15, at 340.

⁸¹ Bird, Black, Walker and Ellison, "NATO unleashes Massive Air and Missile Strikes Across Defiant Yugoslavia: The Onslaught begins", *The Guardian* (London) 25 March 1999, p.1.

⁸² HC Hansard, Vol.328, cols.616-617, 25 March 1999 cited in Kritsiotis, *op. cit.*, *supra* n. 15, at 341-342.

⁸⁴ President Clinton's remarks to the American Federation of State, County and Municipal Employees (AFSCME) Convention, 23 March 1999. see <http://clinton3.nara.gov/WH/New/html/19990323-1110.html>. (last visited 15 February 2009)

⁸⁵ Speech by the British Prime Minister, Tony Blair, to the Economic Club of Chicago, 22 April 1999 cited in Wheeler, *op. cit.*, *supra* n. 5, at 267.

then drew up its justifications. Belgium stated that the Security Council resolutions had a legitimate basis for the air strikes because they were adapted under chapter VII.⁸⁶ Belgium went further by making reference to humanitarian intervention. Belgium stated that: ‘...This is an armed humanitarian intervention, compatible with Article 2, paragraph 4, of the Charter...’ and concluded by stating the incidents of intervention justified under the doctrine of humanitarian intervention such as India’s intervention in East Pakistan or Tanzanian intervention in Uganda.⁸⁷ Belgium also claimed that there was a state of necessity since there was a grave and imminent peril which was endangering some humanitarian values.⁸⁸

US introduced its justifications under four categories as follows, the ethnic cleansing campaign against the people of Kosovo; the security of neighbouring states due to the high refugee flows, the serious violations of international human rights and humanitarian law by forces of the FRY and the existing Security Council resolutions describing the actions of FRY as a threat to peace and security in the region under Chapter VII of UN Charter.⁸⁹

2. CAN STATES INTERVENE UNDER CONTEMPORARY INTERNATIONAL LAW?

In this part of the paper the provisions relating to the Human Rights and use of force issues in the UN Charter, other related resolutions and related verdicts of the ICJ will be stated briefly. After these brief statements incidents of intervention during the cold war will be examined. Following to this review, the developments on the Human Rights and non-intervention issues and the expanded definition of “threat to peace” clause during the Cold War era will be discussed. Finally the interventions after the Cold War according to this new threat to peace approach will be analysed in order to evaluate the Kosovo incident properly.

2.1. Developments on Human Rights in the United Nations World

In the preambular part of the UN Charter “Faith in fundamental human rights in the dignity and worth of the human person, in the equal rights of men and women

⁸⁶ FRY applied to ICJ on the grounds of the illegality of air strikes against ten NATO members on 29 April 1999, USA, Canada, Belgium, France, Germany, Italy, Netherlands, Portugal, Spain UK, which were named as Legality of Use of Force cases.

⁸⁷ *Legality of use of Force Case*, Oral Pleadings, (Serbia and Montenegro v Belgium) (ICJ Reports 1999) CR 99/15 (10 May 1999) uncorrected translation, see <http://www.icj-cij.org/docket/files/105/4515.pdf> (last visited 15 February 2009)

⁸⁸ *ibid.* at 1-2, 4.

⁸⁹ *ibid.* at 6.

and of nations large and small” is reaffirmed. Paragraphs 2 and 3 of Article 1 also states the development of friendly relations among nations by respecting the principle of equal rights and self-determination of peoples and the achievement of international cooperation in “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” Under Article 13 paragraph 1, the General Assembly “shall initiate studies and make recommendations for the purpose of ...b)...assisting the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” Under Chapter IX Article 55 (c), “The UN shall promote... c)...universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” According to Article 56 all members guarantee to take joint and separate action with the UN for this aim. Under Chapter X the Economic and Social Council is authorized to make recommendations for the promotion of human rights and fundamental freedoms and is called upon to found a commission for the development of human rights (Articles 62 and 68) and under chapter XII in order to encourage this kind of rights UN Trusteeship is established. (Art 76).

However UN Charter did not mention some issues on human rights. For instance the definition of human rights and fundamental freedoms did not exist in the charter. Also there is not any explicit provision which gives authorization for the use of force either by states or by the UN for the promotion of human rights. As Tom J. farer concluded “...the promotion of human rights ranked far below the protection of national sovereignty and the maintenance of peace as organizational goals.”⁹⁰

2. 2. Prohibition on the Use of Force by States

Article 2(4) of the UN Charter prohibits “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.” In the context of the Charter term use of force refers armed conflicts generally not only formal states of war.⁹¹ The interpretation of Article 2(4) varies according to different schools but the arguments basically lay

⁹⁰ *ibid.* at 7.

⁹¹ ICJ (1999) *Legality of use of Force Case*, Oral pleadings, (Yugoslavia v United States of America) CR 99/24 (11 May 1999) see <http://www.icj-cij.org/docket/files/114/4577.pdf>. (last visited 15 February 2009); For the discussions of other parties before the Court see <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=yus&case=114&k=25>. (last visited 15 February 2009)

down the clauses of “against the territorial integrity or political independence of any state” and “in any other manner inconsistent with the purposes of the United Nations”. The first argument based on the idea that interventions are permissible unless the actions by a state directed against the territorial integrity of a state such as occupying the territory or political independence of any state, for instance the overthrow of a foreign government.⁹² However the *travaux preparatoires* of the Charter makes it clear that the words “territorial integrity and political independence” do not constrain the scope of prohibition but rather to strengthen the comprehensive nature of it.⁹³

The second argument puts forth the view that interventions are permissible when they are consistent with the purposes of the UN. According to this argument use of force is permissible in order to protect certain rights which are stipulated in the UN Charter-such as Article 1-if there is no other way to protect them.⁹⁴ One of the purposes of the UN is to promote and protect human rights and fundamental freedoms. Therefore humanitarian intervention would be consistent with the purposes of the Charter.⁹⁵ It is, however, highly questionable whether the drafters of the Charter considered human rights as important as keeping the international peace and security.⁹⁶ Negotiating history indicates that this phrase did not intend to constrain the scope of the prohibition in Article 2(4). States are strictly forbidden from threatening and using force against the political independence and territorial integrity of any state and are further prohibited to use or threat to use of force in any other manner inconsistent with the purposes of UN.⁹⁷

There are two exceptions in the charter to the prohibition on the use of force; Article 51 which preserves ‘the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the UN, until the Security Council has taken measures necessary to maintain international peace and security’, and the authorization of the UN Security Council to do so under chapter VII. The latter exception will be considered in the following section. When the scope of article 2(4)

⁹² Tom J Farer, An inquiry into the legitimacy of Humanitarian Intervention in L. Damrosch and D. Scheffer (eds.) *Law and Force in the New International Order*, at 190 (Boulder: Westview Press) (1991).

⁹³ Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia: University of Pennsylvania Press) (1996), at 70.

⁹⁴ *ibid.*, at 71.

⁹⁵ Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press) (1963),at 264-68

⁹⁶ Julius Stone, ‘*Aggression and World Order: A Critique of United Nations Theories of Aggression* (1958), at 43, 95-96, cited in, Murphy, *op. cit.*, *supra* n. 91, at 72.

⁹⁷ Murphy, *op. cit.*, *supra* n. 91, at 72.

is considered the Charter does not prevent the states to apply their inherent right of self-defence which has already existed under customary international law.⁹⁸ From this point of view it is accepted that the Charter permits to use of force when a state's territorial integrity, political independence, the lives and property of its nationals and its economic independence are violated.⁹⁹ The discussion about the scope of Article 2 bases on two arguments. One argument suggests that, in a restrictive way, any use of force other than the responses to an armed attack does not grant the right to resort to the principle of self-defence.¹⁰⁰ The other argument however supports an expanded view which indicates that under the situations of anticipatory self-defence or the protection of nationals abroad, the use of force might be permitted as an expanded right of self-defence.¹⁰¹ Therefore one can argue that humanitarian intervention may be permissible under this view. Nevertheless there is no explicit statement which supports a right of humanitarian intervention either in the present text of the UN Charter or its *travaux preparatoires*.¹⁰²

The prohibition on the use of force by states was also considered by the International Court of justice in the *Corfu Channel Case*. UK was carrying out a mine sweeping operation in Albanian territorial waters and trying to justify her action; "as a new and special application of the theory of intervention, by means of which the state intervening would secure possession of evidence in the territory of another State, in order to facilitate its task."¹⁰³ The Court rejected this argument by stating that:

"The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past given rise to most serious abuses and such cannot, whatever be the present defects in international organisation, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself."¹⁰⁴

⁹⁸ Chesterman, *op. cit.*, *supra* n. 4, at 52.

⁹⁹ Murphy, *op. cit.*, *supra* n. 91, at 73.

¹⁰⁰ *ibid.*, at 74.

¹⁰¹ Murphy, *op. cit.*, *supra* n. 91, at 71.

¹⁰² *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua Case)* (Nicaragua v United States of America), ICJ Reports 1986, at, paras. 194-95, 210-11 see <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=nus&case=70&k=66> (last visited 15 February 2009); Brownlie, *op. cit.*, *supra* n. 93, at 273-76.

¹⁰³ Murphy *op. cit.*, *supra* n. 91, at 74.

¹⁰⁴ *ibid.*, at 75.

In the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* the Court found that states do not have a right of collective armed response to acts that do not represent an armed attack under customary international law.¹⁰⁵

It is also appropriate to state the General Assembly Resolutions on the principle of non-intervention. The UN General Assembly Resolution 2131 created a comprehensive formulation on the non-intervention principle. The first paragraph of this resolution reads that:

“No State 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 condemned.”¹⁰⁶

The UN General Assembly Resolution 2625 states that:

“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.”¹⁰⁷

The resolution further states that the intervention proscribed is not only military intervention but also the political or economical measures which prejudice its sovereignty.¹⁰⁸

2.3. Provisions on the Use of Force in United Nations Charter:

It is appropriate to start the discussion by stating the Article 2(7) of the UN Charter. Article 2(7) reads that “Nothing contained in the present charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

¹⁰⁵ *Corfu Channel Case* (U.K. v Albania) ICJ Reports 1949, at 34, see <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=cc&case=1&k=cd> (last visited 15 February 2009)

¹⁰⁶ *Ibid.* at 35.

¹⁰⁷ *Nicaragua Case, op. cit. supra n. 100*, para. 249.

¹⁰⁸ The General Assembly Resolution 2131(XX) (1965), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States para 1 [Reprinted in (1966) 60 *American Journal Of International Law* at 662].

The prohibition to intervene in Article 2(7) is broader than the prohibition in Article 2(4). The negotiating history indicates that article 2(7) meant to prohibit not only uses of armed force against a territory but also the other types of interference such as interference related to economic and social matters.¹⁰⁹ There is an important exception in Article 2(7) which precludes the UN's right to intervene under chapter VII powers.¹¹⁰ According to Chapter VII economic or military measures against a state may be taken in order to maintain and restore international peace and security by UN Security Council. Article 39 of the UN Charter states that Security Council "determines the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." According to the *travaux preparatoires*, the clause 'threat to the peace, breach of the peace, or act of aggression' is not defined in the Charter.¹¹¹ Other important articles of Chapter VII are Articles 41 and 42. Under Article 41 Security Council can decide on measures not involving the use of armed force which are essential to maintain or restore international peace and security. If Article 41 measures would not be sufficient the Security Council may decide to take military measures according to Article 42. Article 43 of the UN Charter pledges all members 'to make available to the Security Council on its call and in accordance with a special agreement or agreements armed forces assistance and facilities including rights of passages necessary for the purpose of maintaining international peace and security.' In fact no Article 43 agreements have been made. However The Security Council's contemporary practice indicates that armed actions taken by the authorization of the Security Council under chapter VII, forms enforcement action.¹¹²

The regional arrangements or agencies are also recognized by the UN Charter.¹¹³ However the Charter proscribes use of force under such arrangements without the authorization of the Security Council.¹¹⁴

¹⁰⁹ General Assembly Resolution 2625(XXV) (24 October 1970) Principles of International Law Concerning Friendly Relations and Co-operation among states in Accordance with the Charter of the United Nations. [reprinted in D. J. Harris, *Cases and Materials on International Law* (5th edition 1998), at 1082, quoted paragraph at 1084].

¹¹⁰ *ibid.*

¹¹¹ Murphy, *op. cit., supra n.* 91, at 75.

¹¹² UN Charter, Articles 39-51.

¹¹³ Murphy, *op. cit., supra n.* 91, at 77.

¹¹⁴ Murphy, *op. cit., supra n.* 91, at 81.

As Thomas Franck has stated the Charter established a ‘two tiered system.’¹¹⁵ On the one hand, in the idealized world of the charter no state would use of force against another and if this occurs the forces of the UN would response to it, on the other in a position when UN can not take action against the state which attacks, the victim state can apply self-defence principle envisaged in article 51.¹¹⁶ Human rights are also addressed in the UN Charter but they have a secondary role when compared to the provisions addressing peace and security.¹¹⁷

2. 4. Incidents of Intervention during the Cold War:

As referred in the earlier sections the UN Charter’s core articles mention the strict prohibitions on the use of force and the preference of collective measures over unilateral ones. However UN Charter is a “living instrument” because it has been interpreted by the organs and the members of the UN for several years.¹¹⁸ For this reason the practice of the UN and its members is very crucial with respect to the interpretation. During the Cold War era there was a huge law making process through UN and its members and these tasks were directed to maintain human rights with state sovereignty.¹¹⁹ Yet in this era there was not any intervention which was authorized on the humanitarian grounds by UN and this led states to justify their interventions under the UN Charter.¹²⁰ In this section the interventions which were justified with some humanitarian concerns will be assessed. However any of these interventions were warranted merely on the basis of Humanitarian Intervention. These practices were also not characterized as consistent.¹²¹ This list is not exhaustive, and covers only more significant armed interventions warranted on humanitarian grounds.

a) Belgian Intervention in Congo (Leopoldville), 1960

Belgian Congo proclaimed its independence under the name of the Republic of Congo on 1 July 1960.¹²² On 5 July rebellions broke out and commenced an action against Belgian and other European residents.¹²³ Counter to this action of Congo, Belgium intervened in Congo and UN reacted to this intervention with Security

¹¹⁵ UN Charter Articles 52,53.

¹¹⁶ UN Charter Article 53 para. 1.

¹¹⁷ Franck, *op. cit.*, *supra* n. 6, at 3.

¹¹⁸ *ibid.*

¹¹⁹ Murphy, *op. cit.*, *supra* n. 91, at 82.

¹²⁰ *Ibid.*, at 83.

¹²¹ Murphy, *op. cit.*, *supra* n. 91, at 84.

¹²² *ibid.*

¹²³ *ibid.*

Council Resolution 143 demanding Belgian troops' withdrawal in its first paragraph.¹²⁴ French claimed that this intervention was on the humanitarian grounds.¹²⁵ It was argued by the international community that Belgian's core concern was not to protect human rights but to reach to the copper-rich regions.¹²⁶

b) Belgian and US Intervention in the Congo (the Stanleyville Operation), 1964

In September 1964 the rebellions (National de Liberation) took foreign hostages from the regions of Stanleyville and Paulis and threatened to kill them.¹²⁷ Consequently Belgian troops again intervened in Congo but this time with the help of the United States and British military facilities.¹²⁸ Although it was characterized as a true humanitarian intervention this view is arguable.¹²⁹ At least in the first phase of the intervention there was a clear consent of the Congolese government.¹³⁰

c) US Intervention in the Dominican Republic, 1965

On 24 April 1965 Cabral Government of the Dominican Republic was staged a coup d'état by the members and the military officers of the Dominican Revolutionary Party and the junta warned the US Embassy that they could not assure the safety of US nationals.¹³¹ On 28 April 1965 US marines landed in Santa Domingo with the purpose of securing US and other nationals.¹³² After the landing of the marines US president Johnson justified the intervention by stating that the intervention aimed to preserve "law and order" and help "the people of that country...freely choose the path of political democracy, social justice, and economic progress."¹³³ However these humanitarian objectives lost their credit when the US marines did not withdraw after the immigration of the foreigners.¹³⁴ The Security Council responded

¹²⁴ Chesterman, *op. cit.*, *supra* n. 4, at 65.

¹²⁵ *ibid.*

¹²⁶ SC Res 143 (14 July 1960). See <http://daccess-ods.un.org/TMP/7552192.html>. (last visited 15 February 2009)

¹²⁷ Chesterman, *op. cit.*, *supra* n. 4, at 66.

¹²⁸ *ibid.*

¹²⁹ *ibid.*, at 67.

¹³⁰ *ibid.* 67.

¹³¹ *ibid.*

¹³² *ibid.*, at 66-67.

¹³³ *ibid.* at 69.

¹³⁴ *ibid.*, at 70.

to this intervention by accepting Resolutions 203 and 205 demanding a ceasefire and requesting to send a representative to the Dominican Republic.¹³⁵

d) Indian Intervention in East Pakistan / Bangladesh, 1971

The Western governments' support of East Pakistan for an autonomous status was interpreted as a threat to the territorial integrity of Pakistan and the National Assembly was postponed indefinitely by President Yahya Khan.¹³⁶ Then the demands of autonomous regime of East Pakistani turned into demands for independence and the Pakistani Army moved into Dacca.¹³⁷ During the following nine months an estimated ten million people fled to India and at least one million people were killed.¹³⁸ As a result of the crisis the relations between Pakistan and India deteriorated and in December 1971 India's armed forces intervened in East Pakistan.¹³⁹ India's intervention in East Pakistan is generally accepted as one of the best examples of humanitarian intervention.¹⁴⁰ However India had other motives such as the support of the new government of Bangladesh and right to self-defence.¹⁴¹ Because the Security Council could not create a resolution General Assembly adopted a resolution and called upon India and Pakistan to conclude a ceasefire and withdrawal of their troops.¹⁴²

e) Tanzanian Intervention in Uganda, 1978-79

The conflict between Tanzania and Uganda began in October 1978 because of series of border incursions by Ugandan (Field Marshall Idi Amin's) forces into territory of Tanzania and as a response Tanzanian forces entered into Uganda and overthrew Amin's regime.¹⁴³ The military action of Tanzania was regarded as defensive due to the previous attacks of the Uganda.¹⁴⁴ Also Tanzanian President Julius Nyerere had seriously considered Amin's human rights violations.¹⁴⁵ Thus it

¹³⁵ *Johnson Papers* in 30 April-1 May 1965, 465 and 467, cited in *ibid.* at 70.

¹³⁶ *ibid.*

¹³⁷ SC Res 203 (14 May 1965) see <http://daccess-ods.un.org/TMP/7552192.html> and SC Res 205 (22 May 1965) see <http://daccess-ods.un.org/TMP/7552192.html> (last visited 15 February 2009)

¹³⁸ Chesterman, *op. cit.*, *supra* n. 4, at 72.

¹³⁹ Chesterman, *op. cit.*, *supra* n. 4, at 72.

¹⁴⁰ Murphy, *op. cit.*, *supra* n. 94, at 98.

¹⁴¹ *ibid.*

¹⁴² Fernando R. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (NY: Transnational) (2nd edition 1997), 207; Jean-Pierre L Fonteyne, ' The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the UN Charter' (1974) 4 *California Western International Law Journal* at 203, 204.

¹⁴³ Chesterman, *op. cit.*, *supra* n. 4, at 73.

¹⁴⁴ GA Res 2793 (XXVI) (1971) para 4. see <http://daccess-ods.un.org/TMP/8266297.html> (last visited 15 February 2009)

¹⁴⁵ Chesterman, *op. cit.*, *supra* n. 4, at 77.

could be argued that there were mixed motives before the intervention in Uganda. The issue neither discussed in the Security Council nor in the General Assembly.

f) Vietnamese Intervention in Kampuchea (Cambodia), 1978-79

The motives were similar to the Tanzanian intervention in Uganda. Because of the irregular fighting along the Vietnamese Kampuchean Border, Kampuchea was invaded by Vietnamese troops in 1978 and Pol Pot regime was overthrown.¹⁴⁶ Vietnam justified the intervention by applying primarily to self-defence principle.¹⁴⁷ There debates on the issue in the UN however no resolution was adopted until 1990.¹⁴⁸

g) French Intervention in Central African Empire/Republic, 1979

France intervened in Central Africa because of the human rights violations committed in the region.¹⁴⁹ This intervention was not justified under the principle of self-defence but on the grounds of humanitarian concerns.¹⁵⁰ In fact France had genuine human rights concerns and many scholars accepted this intervention lawful.¹⁵¹

h) US Intervention in Grenada (1983) and Panama (1989-90)

Both in the interventions in Panama and Grenada, the humanitarian concerns were in fact beyond the installation of a democratic regime. US never justified these interventions on the grounds of humanity but rather under the inherent right of self-defence. United Nations did not support the interventions and General Assembly adopted two resolutions condemning interventions.¹⁵²

2. 5. Incidents of Intervention after the Cold War

Before stating the incidents of interventions after the Cold War it would be useful to explain UN practice under chapter VII prior to 1990, and the transformed definition of the phrase ‘threats to peace’.

Recourse to Chapter VII powers was only used two times by the Security Council during the Cold War Era. The Council with its resolutions 82, 83 and 84 determined that the situation in South Korea was a breach of peace.¹⁵³ Because of the

¹⁴⁶ *ibid.*

¹⁴⁷ Murphy, *op. cit.*, *supra* n. 91, at 107.

¹⁴⁸ Chesterman, *op. cit.*, *supra* n. 4, at 79.

¹⁴⁹ Murphy, *op. cit.*, *supra* n. 91, at 104.

¹⁵⁰ Chesterman, *op. cit.*, *supra* n. 4, at 80.

¹⁵¹ Murphy, *op. cit.*, *supra* n. 91, at 108.

¹⁵² *ibid.*

¹⁵³ *ibid.*; Teson, *op. cit.*, *supra* n. 140, at 199.

absence of article 43 agreements United States was authorized by Security Council to command the operation against North Korea under the UN flag as a response to invasion of South Korea by North Korea.¹⁵⁴ In 1966 the Council ‘called upon’ the United Kingdom to use of force to prevent ships carrying oil to Southern Rhodesia in contravention of Resolution 217.¹⁵⁵ It was argued that UN Peacekeeping Force in Congo between 1961-1964 was an enforcement action. This view is groundless though. Peacekeeping forces moved into Kongo only after the consent of the Congolose government.¹⁵⁶

The creation of “Uniting for Peace” Resolution and the invention of chapter VI ½ -peacekeeping forces were placed under this chapter- were striking developments during the Cold War Era. In 1950 the General Assembly adopted Uniting for Peace Resolution¹⁵⁷ because of the lack of unanimity in the Security Council. By this resolution the Assembly would meet to recommend collective measures in situations where the veto prevented the Council to fulfil its main responsibility for the maintenance of international peace and security. The resolution also stated that in the case of the act of aggression the armed force could be used.¹⁵⁸ Although this authority was used in some occasions such as in the Korean Crisis, Suez Crisis or in the Middle East it was not exactly developed.¹⁵⁹

As mentioned earlier there is no definition of the phrase ‘threats to peace’ in the text of the UN Charter or in the *travaux preparatoires*. During the first forty-four years of the UN, the Council only determined three incidents as a breach of peace under article 39; Korea (1950);¹⁶⁰ the Falkland Islands (1982)¹⁶¹ and Iran-Iraq (1987)¹⁶².

¹⁵⁴ GA Res 38/ 7 (1983) see <http://daccess-ods.un.org/TMP/6757005.html>; GA Res 44/ 240 (1989) see <http://daccess-ods.un.org/TMP/6757005.html> (last visited 15 February 2009)

¹⁵⁵ SC Res 82 (25 June 1950) see <http://daccess-ods.un.org/TMP/1969184.html>; SC Res 83 (27 June 1950) see <http://daccess-ods.un.org/TMP/6319580.html>; SC Res 84 (7 July 1950) see <http://daccess-ods.un.org/TMP/1402209.html> (last visited 15 February 2009)

¹⁵⁶ SC Res 84, *ibid.* para. 4.

¹⁵⁷ SC Res 221 (9 April 1966) para. 5, see <http://daccess-ods.un.org/TMP/5178080.html> (last visited 15 February 2009)

¹⁵⁸ Chesterman, *op. cit.*, *supra* n.4, at 117.

¹⁵⁹ GA Res 377(V) A, (3 November 1950) see <http://daccess-ods.un.org/TMP/2060285.html> (last visited 15 February 2009)

¹⁶⁰ *ibid.*

¹⁶¹ Murphy, *op. cit.*, *supra* n. 91, at 120.

¹⁶² SC Res 82, *op cit. supra* n. 153.

In a meeting on 31 January 1992 the commitment to the UN Charter system was affirmed by the Security Council and it was stated that 'new favourable international circumstances' that allowed the Council to make effective decisions for the maintenance of international peace and security.¹⁶³ In this meeting economic, social, humanitarian and ecological instabilities stated as *threats to peace and security*.¹⁶⁴ It is not clear if this statement was an indication that UN was expanding the nature of threat to peace concept. However after 1992 Chapter VII powers applied in internal armed conflicts, humanitarian crises and in the situations of disruption of democracy.¹⁶⁵ Thus these developments especially after 1992 indicate that the clause "threats to peace" has been interpreted by the UN in a more expanded way. In the following part not all but some significant interventions by UN until the occurrence of Kosovo incident will be analysed.

2. 5. 1. Incidents of Intervention in Internal Armed Conflicts:

a) Iraq, 1991: To view internal strives as a threat to peace goes back to Resolution 688. Because of the Iraq repression on the civilian population there were huge amounts of refugee flows in the region. Security Council, by adopting Resolution 688, found the situation as a threat to peace and demanded the accession of International Humanitarian Organizations to the region.¹⁶⁶ After the adoption of resolution 688 US troops entered into Northern Iraq to guarantee the safety of Kurdish refugees and allied powers established no-fly zones both in Northern and Southern Iraq.¹⁶⁷ Nevertheless there was neither explicit authority on the use of force nor any statement that the Council was acting under chapter VII in resolution 688. Therefore the legality of the measures taken under Resolution 688 sets a dubious precedent.¹⁶⁸ The debates on the establishment of safe havens in Northern Iraq and no-fly zones in Northern and Southern Iraq will be discussed in Chapter III.

b) Yugoslavia, 1991: The dissolution of Yugoslavia started in 1991 with the 'declaration of independence' of four of the six republics. First Slovenia and

¹⁶³ SC Res 502 (3 April 1982) see <http://daccess-ods.un.org/TMP/9906746.html> (last visited 15 February 2009)

¹⁶⁴ SC Res 598 (20 July 1987) see <http://daccess-ods.un.org/TMP/354853.5.html> (last visited 15 February 2009)

¹⁶⁵ Chesterman, *op. cit.*, *supra* n. 4, at 128.

¹⁶⁶ Security Council Summit Statement Concerning the Council's Responsibility in the Maintenance of International peace and Security, 47 UN SCOR (3046th meeting) UN Doc S/ 23500(1992), [1992] *UNYB* 33.

¹⁶⁷ Chesterman, *op. cit.*, *supra* n. 4, at 128.

¹⁶⁸ SC Res 688 (5 April 1991) see <http://daccess-ods.un.org/TMP/7372156.html> (last visited 15 February 2009)

Croatia then Bosnia- Herzegovina declared their independence.¹⁶⁹ Because of these dissolutions war broke out in the region and Security Council found the situation as a threat to international peace and security and put an arms embargo.¹⁷⁰ Resolution 713 was also stating the concerns caused by the loss of human life.¹⁷¹

c) Liberia, 1990-2: The civil war began in 1989 between National Patriotic Front of Liberia and Armed Forces of Liberia.¹⁷² Since UN and OAU (Organization of African Unity) did not take necessary precautions, Economic Community of West African States (ECOWAS) established ECOWAS Cease-fire Monitoring Group (ECOMOG) and commenced aerial bombardments against Liberia in 1990.¹⁷³ In 1992 Security Council adopted Resolution 788 and determined the situation as a threat to international peace and security.¹⁷⁴ The Resolution was obviously adopted *ex post facto*. Therefore the legality of this intervention is debatable.

2. 5. 2. Incidents of Intervention in Humanitarian Emergencies

a) Somalia, 1992-3: Because of the civil strife in Somalia thousands of refugees were starving in the camps.¹⁷⁵ Therefore the Council adopted Resolution 733 (1992) which was accepting heavy loss of human life in the region as a threat to international peace and security.¹⁷⁶ The deteriorating situations led to the adoption of Resolution 794 (1992) authorizing the enforcement actions under chapter VII.¹⁷⁷ This decision of the UN was a precedent because it was the first time that the Council decided to act militarily for strictly humanitarian aims.¹⁷⁸

b) Rwanda, 1994: The tribal conflict between Hutus and Tutsis caused many killings in Rwanda in 1994.¹⁷⁹ The situation in Rwanda was reported as genocide

¹⁶⁹ Chesterman, *op. cit.*, *supra* n. 4, at 131.

¹⁷⁰ *ibid.*

¹⁷¹ *ibid.*, at 133, 134.

¹⁷² SC Res 713 (25 September 1991) preamble and para. 6 see <http://daccess-ods.un.org/TMP/8779199.html> ; SC Res 724 (15 December 1991) para. 5 see <http://daccess-ods.un.org/TMP/8781714.html> (last visited 15 February 2009)

¹⁷³ SC Res 713, *ibid.*, preamble.

¹⁷⁴ Chesterman, *op. cit.*, *supra* n. 4, at 135.

¹⁷⁵ *ibid.*

¹⁷⁶ SC Res 733 (23 January 1992), preamble see <http://daccess-ods.un.org/TMP/5229213.html> (last visited 15 February 2009)

¹⁷⁷ Chesterman, *op. cit.* *supra* n. 4, at 140.

¹⁷⁸ SC Res 733 (23 January 1992), preamble see <http://daccess-ods.un.org/TMP/9646736.html> (last visited 15 February 2009)

¹⁷⁹ SC Res 794 (3 December 1992), preamble, para 8 see <http://daccess-ods.un.org/TMP/2905897.html> (last visited 15 February 2009)

by Secretary General of UN.¹⁸⁰ Because of the deteriorating situation in the region France decided to intervene and sought the authority of UN.¹⁸¹ Thus Security Council Resolution 929 was adopted authorizing use of force by France.¹⁸²

c) Eastern Zaire, 1996: The political and ethnic friction in the region led to huge refugee flows from Rwanda to eastern Zaire.¹⁸³ Security Council considered that the humanitarian crisis in the region was a threat to peace and adopted the Resolutions 1078 and 1080.¹⁸⁴

d) Albania, 1997: Due to the collapse of many officially sanctioned investments in 1997 a chaos emerged in the country.¹⁸⁵ Therefore council passed Resolution 1101 which determined that the situation constitutes a threat to international peace and security and authorized Italy to lead a multinational force 'to facilitate the delivery of humanitarian assistance.¹⁸⁶

3. 5. 3. Incidents of Intervention for the Installation of Democracy:

a) Haiti, 1991-4: The removal of a democratically elected government by a coup d'etat in Haiti was determined as a threat to international peace and security and a mandatory economic embargo was imposed under Chapter VII in June 1993.¹⁸⁷ There were also other reasons, such as humanitarian crisis in the region, which led the Council to adopt this resolution.¹⁸⁸ Three years after the coup d'etat, on July 1994, Security Council adopted resolution 940 which authorized a multinational force to use all necessary means to restore democracy in the region.¹⁸⁹

b) Sierra Leone, 1997-98: The overthrow of recently elected government of Sierra Leone by the military forces caused a hostile reaction in the region and led

¹⁸⁰ Chesterman, *op. cit. supra* n. 4, at 142.

¹⁸¹ *ibid.*, at 144.

¹⁸² S/ 1994/640, at 10, see <http://www.un.org/documents/repsec.htm> (last visited 15 February 2009)

¹⁸³ Chesterman, *op. cit. supra* n. 4, at 146.

¹⁸⁴ SC Res 929 (22 June 1994), preamble paras 2,3 see <http://daccess-ods.un.org/TMP/4405936.html> (last visited 15 February 2009)

¹⁸⁵ Chesterman, *op. cit. supra* n. 4, at 147.

¹⁸⁶ SC Res 1078 (9 November 1996) preamble see <http://daccess-ods.un.org/TMP/8820335.html>; SC Res 1080 (15 November 1996) para 5 see <http://daccess-ods.un.org/TMP/5129181.html> (last visited 15 February 2009)

¹⁸⁷ Chesterman, *op. cit. supra* n. 4, at 148.

¹⁸⁸ SC Res 1101(1997) paras. 2,4 see <http://daccess-ods.un.org/TMP/4584161.html> (last visited 15 February 2009)

¹⁸⁹ SC Res 841 (16 June 1993), preamble see <http://daccess-ods.un.org/TMP/6689113.html> (last visited 15 February 2009)

to high casualties.¹⁹⁰ Due to this coup d'état OAU implicitly authorized ECOWAS to use force to restore the removed government.¹⁹¹ On 8 October 1997 The Council adopted Resolution 1132 and determined the situation as a threat to international peace and security and authorized ECOWAS to use force under Chapter VIII.¹⁹² However this resolution was adopted after the acts taken place and the legality of intervention is debatable under contemporary international law.

The progressive decisions of Security Council were not unexpected.¹⁹³ However the Council should not leave the legal path when authorizing the interventions. The legality of many interventions, such as Iraq, Liberia or Sierra Leone is debatable. Also the frequent references to the uniqueness of the situations as in the Haiti, or Rwanda created an arbitrary international system and weakened the credit of UN.¹⁹⁴ Thus while expanding the nature of the Chapter VII, the Council must not undermine the importance of the rule of law principle.

3. EVALUATION ON THE LEGALITY MATTER OF THE NATO'S INTERVENTION IN KOSOVO

Generally intervention under contemporary international law and the basic Charter articles and state practice until Kosovo incident is dealt with in the second chapter. In this part the legal debates about Kosovo incident will be analysed and evaluated in a slightly detailed way. First the debates in the Security Council after the bombings started, then the justification grounds of the operation will be discussed.

3. 1. The Debates in the Security Council

As NATO acts were in progress Russian required the convening of the Security Council.¹⁹⁵ In the meeting it was understood that there were three camps in the Council.

The first camp which was claiming that NATO actions were essential in order

¹⁹⁰ *ibid.*

¹⁹¹ SC Res 940 (31 July 1994) para. 4, see <http://daccess-ods.un.org/TMP/9645603.html>. (last visited 15 February 2009)

¹⁹² Chesterman, *op. cit., supra* n. 4, at 155; Franck, *op. cit., supra* n. 2, at 159.

¹⁹³ *ibid.*

¹⁹⁴ SC Res 1132 (20 October 1997) paras 1 and 8. Paragraph 8 reads as "Acting also under Chapter VIII of the Charter of the United Nations, authorizes ECOWAS, cooperating with the democratically-elected Government of Sierra Leone, to ensure strict implementation of the provisions of this resolution relating to the supply of petroleum and petroleum products, and arms and related matériel of all types, including, where necessary and in conformity with applicable international standards..." see <http://daccess-ods.un.org/TMP/3144781.html> (last visited 15 February 2009)

¹⁹⁵ Chesterman, *op. cit., supra* n. 4, at 160.

to stop the humanitarian catastrophe in Kosovo, consisted mainly of NATO states together with Islamic and Arab nations.¹⁹⁶ It is striking that the defenders of NATO's action were unwilling to use the legal traditional literature such as self-defence to stop that which had provoked the flow of refugees flooding into Albania and Macedonia.¹⁹⁷ However it was justified generally on the grounds of human rights by the defenders of the NATO action in the Security Council.

The second camp in which Russia, China, Namibia and India -was not the member of the Council- considered that NATO was violating the UN Charter.¹⁹⁸

A few states such as Malaysia and Gabonese were accepting that the action was illegal but they also found the attacks necessary.¹⁹⁹

After the debates Russia offered a draft resolution announcing that NATO's action was violating the UN Charter however the resolution could not be adopted.²⁰⁰

The resolutions adopted after the operation did not condemn the NATO's air strikes. Resolution 1239 considered the activities of international humanitarian aid organizations and Resolution 1244 required the withdrawal of the FRY forces from Kosovo and the deployment of an international peace keeping force in the region

¹⁹⁶ Resolutions on Haiti and Rwanda described the situation as unique and exceptional. *ibid.*, at 161.

¹⁹⁷ S/1999/320, (24 March 1999), cited in Franck *op.cit. supra* n. 6, at 166.

¹⁹⁸ US Ambassador stated that: "We and our allies have begun military action only with the greatest reluctance. But we believe that such action is necessary to respond to Belgrade's brutal persecution of Kosovar Albanians, violations of international law, excessive and indiscriminate use of force refusal to negotiate to resolve the issue peacefully and recent military build up in Kosovo- all which foreshadows a human catastrophe of immense proportions." In essence he argued that NATO's intervention was justified and necessary to stop the violence and prevent an even greater humanitarian disaster." Canada's ambassador added that they could not stand idly by while the innocents were murdered, people were displaced and a population was denied its basic rights. The ambassador of Slovenia mentioned that all diplomatic means had been exhausted. Netherlands stated that "due to one or two permanent members' rigid interpretation of the concept of domestic jurisdiction, such a resolution is not attainable, we can not sit back and simply let the humanitarian catastrophe occur. See S/PV. 3988, 54th year, 24 March 1999, at 4,5,6,9, <http://daccess-ods.un.org/TMP/6658864.html> (last visited 15 February 2009)

¹⁹⁹ Franck, *op. cit., supra* n.6, at 167.

²⁰⁰ Russian Ambassador put his country's view as follows:

"Attempts to justify the NATO strikes with arguments about preventing humanitarian catastrophe in Kosovo are completely untenable. Not only are these attempts in no way based on the Charter or other generally recognized rules of international law, but the unilateral use of force will lead precisely to a situation with truly devastating humanitarian consequences." He continued that the things which were occurring in FRY would create "a dangerous precedent that could cause acute destabilization and chaos on the regional and global level". China argued that the position in Kosovo was an internal matter of FRY and the problem had to be resolved by the parties. See S/PV. 3988, *op. cit. supra* n.196, at 2, 3, 12.

as has been demanded in the Agreement between NATO and Belgrade in 9 June 1999.²⁰¹

The debates in the Security Council during the attacks and the justifications which were stated in Chapter I clearly indicate that NATO attacks were justified on multiple grounds but especially on the controversial right of humanitarian intervention and the existing Security Council resolutions. In the following parts these justification will be discussed.

3. 2. Discussion of the Justifications on the So-called Right of “Humanitarian Intervention”

As stated earlier, according to the *travaux préparatoires* and teleological interpretations, Article 2(4) has a comprehensive nature in respect of the prohibition on the use of force.²⁰² Article 2(4) of the UN charter is accepted as *jus cogens*; that is “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”²⁰³ and this rule is binding on states and regional organizations.²⁰⁴ Therefore, threat of armed force must be regarded as a violation of UN Charter unless it is justified under the authority of the Security Council or under Article 51 of the Charter. It is also accepted that states have an obligation to take necessary precautions against the acts of genocide under international law.²⁰⁵ In Kosovo, however, the international community faced with massive violations of human rights of ethnic minorities, but not acts of genocide in the sense of the 1948 Genocide Convention.²⁰⁶

Akehurst argues that “any humanitarian intervention, however limited, constitutes a temporary violation of the target State’s political independence and territorial integrity if it is carried out against that State’s wishes”.²⁰⁷ Similarly Higgins states that “even temporary incursions without permission into another state’s air space constitute a violation of its territorial integrity.”²⁰⁸ On the contrary one could argue

²⁰¹ *ibid.*, at 10.

²⁰² S/1999/ 328, 26 March 1999 cited in Franck, *op. cit.*, *supra* n. 6, at 169.

²⁰³ SC Res 1239 (14 may 1999) see <http://daccess-ods.un.org/TMP/6600390.html>; SC Res 1244 (10 June 1999) the agreement appears in the Annex 2, see <http://daccess-ods.un.org/TMP/1629045.html> (last visited 15 February 2009)

²⁰⁴ Simma, *op. cit.*, *supra* n. 42, at 2.

²⁰⁵ 1969 Vienna Convention on the Law of Treaties, Article 53.

²⁰⁶ According to the Article 103 of the UN Charter, UN Charter has a priority to other agreements.

²⁰⁷ Simma, *op. cit.*, *supra* n. 42, at 2.

²⁰⁸ *ibid.*

that article 2(4) does not provide an absolute ban on the use of force if it does not threaten the territorial integrity or political independence of a state and intervention for human rights purposes meet these conditions. According to Teson after a genuine humanitarian intervention there would not be any territorial annihilation or political vanquish.²⁰⁹ Michael Reisman and Myres Mcdougal argue that humanitarian intervention is permissible because it does not violate a state's territorial integrity or political features but enhance them.²¹⁰

Although the doctrine of humanitarian intervention has been resorted by states and regional organisations in order to justify several interventions, there is no explicit right of Humanitarian Intervention in UN Charter. The matter is that whether this situation has been altered by state practice and *opinio juris* in other words, if a customary rule has emerged.

A rule can only be recognized as customary when comply with the state practice and *opinio juris* conditions. These two conditions, which were essential for the creation of a customary international rule, also reaffirmed by ICJ in *Nicaragua Case*. The Court held that "Either the States taking such action or other states in a position to react to it must have behaved so that their conducts is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."²¹¹ Although some writers assert that there is enough state practice as evident to a right of humanitarian intervention they are exaggerating their judgements.²¹² There were generally mixed concerns which led the states to intervene as stated in Chapter II. For instance French intervention in Central African Republic (1979) can not be perceived exactly without considering its colonial history in the region.²¹³ Similarly Belgian (1960), Belgian and US (1964) interventions in Congo and Belgian and French intervention in Zaire (1978) had different motives such as to secure the access to mineral resources in the new decolonized independent states.²¹⁴ India's intervention in Pakistan in 1971, which led to the creation of Bangladesh, has been

²⁰⁹ Michael Akehurst, "Humanitarian Intervention" in Hedley Bull (eds), *Intervention in World Politics* (Oxford: Clarendon) (1986), at 105.

²¹⁰ Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (London: Oxford University Press) (1963), at 183.

²¹¹ Teson, *op. cit.*, *supra* n. 140, at 131.

²¹² Michael Reisman and Myres Mcdougal "Humanitarian Intervention to Protect the Ibos" in Richard B. Lillich (eds), *Humanitarian Intervention and the United Nations* (University Press of Virginia: Charlottesville) (1973), 167, at 177.

²¹³ *Nicaragua Case*, *op. cit. supra* n.100, para. 207.

²¹⁴ Chesterman, *op. cit.*, *supra* n. 4, at 84.

regarded as a typical example of humanitarian intervention by many scholars.²¹⁵ However India's justification of use of force was based on the principle of self-defence. Although India justified the attacks on the humanitarian grounds as has been understood from the provisional verbatim records of Security Council, she changed her view by realizing that humanitarian intervention was not sufficient to justify any armed intervention.²¹⁶ The intervention in Uganda by Tanzania (1978) and in Kampuchea by Vietnam, which were regarded as the examples of humanitarian intervention as well, have also been justified on the self-defence principle.²¹⁷ The existence of *opinio juris* of the right of humanitarian intervention is also dubious. Although there are not many cases in which states did not justify their interventions on the grounds of humanity, some argue that what states do is more important than what they say in the emergence process of the custom.²¹⁸ Even some humanitarian interventions may be approved tacitly in some circumstances it does not mean that this is sufficient basis for the existence of *opinio juris* but weak assertions against the legality of humanitarian intervention may be defied by applying to these approvals in the international community.²¹⁹ The best summary of this view may be found in 1984 UK Foreign and Commonwealth Office documents. According to this text state practice seems does not provide a precise basis on the right of a humanitarian intervention and humanitarian aims are nearly in every incident accompanied by other motives.²²⁰

The above part argued that there is no right of Humanitarian intervention either under customary international law or UN Charter. However defenders of Humanitarian Intervention put some proposals in order to evaluate legal or moral scale of such a right. I feel that it would be appropriate to state a summary of these proposals in order to evaluate the issue accurately. According to these proposals the following conditions should be met so as to determine whether a humanitarian intervention legally or morally justifiable.²²¹

1) Human rights violations in the target state must be severe and immediate. 2) There must be no peaceful alternatives in order to prevent the intervention. 3) The

²¹⁵ *ibid.*

²¹⁶ *ibid.*

²¹⁷ Akehurst, *op. cit.*, *supra* n. 207, at 96.

²¹⁸ *ibid.*

²¹⁹ Chesterman, *op. cit. supra* n. 4, at 84.

²²⁰ Anthony D' Amato, Reply to letter of Michael Akehurst, (1986) 80 *American Journal of International Law*, at 149.

²²¹ Chesterman, *op. cit. supra* n. 4, at 86.

collective action must have been unsuccessful and Security Council must be unable to act. 4) Armed force must be used to prevent further violations and requirements of international humanitarian law such as principle of necessity or proportionality should be observed. 5) There is also another requirement for the 'disinterestedness' of the state which is intervening on the grounds of humanitarian intervention.

In fact in Kosovo case there were grave human rights violations in the region as it was stated in resolution 1199, the attempts in order to halt the conflict in peaceful means were not successful and the council could not create a resolution which was explicitly authorized armed intervention in the FRY. However after the NATO air strikes had began the Serbian violations initiated in the region.²²² Accordingly armed force could not prevent further Serbian violations. The means of NATO was also criticized during and after the strikes. The reason of the Allies' relying on the air powers was their reluctance to risk lives of their soldiers.²²³ However NATO during its bombing campaign did not act carefully enough and targeted civilian objects, such as the attack on a Civilian Passenger train or Chinese Embassy and caused civilian killings.²²⁴ Thus it is questionable whether the intervention complies with the International Humanitarian Law. It is also impossible to say that the targeting states were in a 'disinterestedness' position. US and UK claimed that their national interests tied in this intervention as stated in the first chapter. Accordingly even a even a right of humanitarian intervention would be accepted the intervention against FRY could not meet these conditions.

3. 3. Discussion of the Justifications on the Existing Security Council Resolutions:

The Council resolutions before the UN attacks were not explicitly permitting use of force either under chapter VII or chapter VIII of the Charter. As mentioned in the first chapter, resolutions 1199 and 1203 were adopted under chapter VII and defining

²²² Planning Staff of the Foreign Commonwealth Office, 'Is Intervention ever justified?'(internal document 1984), released as Foreign Policy document No 148, excerpted in (1986) 57, *British Yearbook of International Law*, 618-619.

²²³ These views are based on the articles of; Fonteyne, *op. cit.*, *supra* n. 140, at 258-68; Wil D Verwey, 'Humanitarian Intervention under International Law' (1985) 32 *Netherlands International Law Review*, at 413-18; David J. Scheffer, 'Toward a Modern Doctrine of Humanitarian Intervention' (1992) 23 *University of Toledo Law Review*, at 290-91; Murphy, *op. cit. supra* n. 91, at 382-7; Jonathan Charney, 'Anticipatory Humanitarian Intervention in Kosovo' (1999) 93 *American Journal of International Law*, at 838-40; Antonio Cassese, 'Ex Injuria Ius Oritur: Are We moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 *European Journal of International Law*, at 27.

²²⁴ Charney, *ibid.*, at 840.

the situation in Kosovo as a threat to international peace and security but never clearly authorized an armed intervention. One could argue that Security Council responses to NATO actions and their results were an implicit authorization granted *ex post* and especially the Holbrooke agreements and their endorsement by Resolution 1203 were perceived as the results of NATO's threat of looming air strikes.²²⁵ However Russia stated that it was not ready to give permission to an armed intervention on the grounds of Resolutions 1160 and 1199.²²⁶ Therefore to view the Council's welcome to the results of the NATO threats as an approval of an armed intervention is not defensible.²²⁷ The endorsement of agreements between NATO/OSCE and FRY may lead to think that the 'synergy' between NATO and UN caused the unapproved threat or use of force by NATO.²²⁸ However Article 33 and 42 of the UN Charter supports the view that the Charter requires an explicit authorization by Security Council for the use of force.²²⁹ Use of force under Article 42 will be possible only if non-military measures taken under Article 41 are inadequate. Therefore armed intervention should be applied as a last resort. In 1961 Goa was seized by India and India argued that it was enforcing UN resolutions against colonialism.²³⁰ Professor Quincy Wright however did not agree this view by considering that the claim based on an implied authorization.²³¹ A majority of the Security Council also opposed the India's claim.²³² In 1962 US claimed that there was an implied authorization in order to interdict Soviet Ships going to Cuba.²³³ The Council did neither adopt the Soviet resolution which was disapproving the US action nor vote on a draft resolution supporting US' action.²³⁴ The Council's *ex post facto* authorizations in relation to the ECOWAS' interventions in Liberia, Resolution 788 of 1992, and Sierra Leone, Resolution 1132 of 1997, appear to be the only cases that the Council's implicit affirmations were unchallenged however these incidents presents the danger which can encourage

²²⁵ Adam Roberts, NATO's Humanitarian War over Kosovo 41/3 (1999) *Survival*, at 110.

²²⁶ The Attack on a Civilian Passenger Train at the Grdelica Gorge on 12. 04. 1999; The Attack on the Chinese Embassy in Belgrade on 07. 05. 1999, see <http://www.un.org/icty/pressreal/nato061300.htm> (last visited 15 February 2009)

²²⁷ Simma, *op. cit.*, *supra* n. 42, at 10 -11.

²²⁸ *ibid.*, at 11.

²²⁹ *ibid.*

²³⁰ *ibid.*

²³¹ Jules Lobel and Michael Ratner, 'Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime (1999) 93 *American Journal of International Law*, at 128.

²³² *ibid.*, at 131.

²³³ Quincy Wright, The Goa Incident, (1962) 56 *American Journal of International Law*, at 629

²³⁴ *ibid.*, at 628.

states or regional organizations to apply to use of force with expect of after the fact approval by council.²³⁵

The efforts of United States, United Kingdom and France to provide safe havens to Kurdish refugees in Northern Iraq and no-fly zones in northern and Southern Iraq were justified on the grounds of Resolution 688 (1991) but there were not any explicit permission on armed intervention in this resolution.²³⁶ One could argue that Resolution 678 and 688 are sufficient to justify these operations. Resolution 678 was adopted during the Iraq-Kuwait crisis and authorized the use of all necessary means to support resolution 660 -demanding the Iraq's withdrawal from Kuwait- and all other subsequent resolutions.²³⁷ After the suspension of the conflicts a provisional ceasefire resolution; resolution 686 was adopted and this resolution stated that Resolution 678 remained compelling for the time required by Iraq to fulfil its conditions.²³⁸ However the text of resolution 687 which introduced a formal ceasefire is a problem for the defenders' of the view that Resolution 688 gives permission to use force, because resolution 687 approved the previous resolutions 'except as expressly changed below to achieve the goals of this resolution, including a formal ceasefire.'²³⁹

Javier Perez de Cuellar, UN secretary General at the time, did not accept the views arguing that existing Council resolutions implicitly gave permission to the establishment of no-fly zones and safe havens in Iraq and stated that a foreign military presence in Iraq either required Iraqi consent or the express authorization of the SC.²⁴⁰ Although some UN members contested the safe haven operation, some stated their concerns about the lacking explicit Council authorization and also Soviet and Chinese officials opposed the deployment of the UN forces in Iraq without the consent of the Iraqi government.²⁴¹ These incidents and arguments indicate that attempts to justify armed interventions on the grounds of implied authorizations do not provide a systematic and continuous practice and the claims on the implied authorizations have generally been contested.²⁴²

²³⁵ Lobel and Ratner, *loc. cit.*, *supra n.* 229, at 131.

²³⁶ *ibid.*

²³⁷ *ibid.*, at 132.

²³⁸ *ibid.*

²³⁹ SC Res 678 (29 November 1990) para 1 see <http://daccess-ods.un.org/TMP/3785868.html> (last visited 15 February 2009)

²⁴⁰ SC Res 686 (2 March 1991) para 4, see <http://daccess-ods.un.org/TMP/5984433.html> (last visited 15 February 2009)

²⁴¹ SC Res 687 (3 April 1991) para 1, see <http://daccess-ods.un.org/TMP/4316724.html> (last visited 15 February 2009)

²⁴² Lobel and Ratner, *op. cit.*, *supra n.*, 229, at 132.

The paralyzing of Security Council as perhaps occurred during the cold war might strengthen the claims on the implied resolutions.²⁴³ However since 1990, the idea on the necessity for a flexible reinterpretation of the Council decisions has not been supported by the Council practice because the Council in several instances adopted resolutions clearly authorizing recourse to force.²⁴⁴

The above mentioned discussions indicate that justifications on the Kosovo intervention on the existing Security Council resolutions are not reliable. The justifications of armed interventions on the implicit Council Resolutions were not generally welcomed by United Nations and led to debates in the international community.

CONCLUSION

In contemporary world the public consciousness about the human rights is developing and the UN's role in order to protect and develop these rights is very important. However as has been understood from the *travaux préparatoires* of the UN Charter and the subsequent practice of UN, the peace in other words the prohibition on the use of force is still the core principle of the Charter and the Organization. The aim of the UN as an institution is to protect the "succeeding generations from the scourge of war". Therefore the arbitrary use of force even on the human rights concerns unacceptable.

One could argue that NATO's intervention was illegal but it was necessary and should remain exceptional.²⁴⁵ However as Cassese states this unique instance of violation of international law may turn into a rule, recourse to force to halt gross human rights violations.²⁴⁶ Such a possibility is dangerous when the international legal order is considered. It is useful to put the India's argument in the Security Council after the NATO attacks had started. India stated that:

"...Among the barrage of justifications we have heard, we have been told that the attacks are meant to prevent violations of human rights. Even if that were to be so, it does not

²⁴³ *ibid.*, at 133.

²⁴⁴ *ibid.*

²⁴⁵ *ibid.*, at 134.

²⁴⁶ *Ibid.*, For a detailed overview see SC Resolutions for; Iraq-Kuwait 678 *op. cit. supra n.237*; Somalia 794 *op. cit. supra n. 172*; Haiti 940 *op. cit. supra n 189*; Rwanda 929 *op. cit. supra n.182*; Bosnia and Herzegovina 770 (1992) see <http://daccess-ods.un.org/TMP/4457925.html>. and 816 (1993) see <http://daccess-ods.un.org/TMP/2342560.html> (last visited 15 February 2009)

justify unprovoked military aggression. Two wrongs do not make a right.”²⁴⁷

Another argument could be that the intervention is illegal but morally justifiable.²⁴⁸ This argument however raises a question; if an act is moral then is not the law recognize it legal? ²⁴⁹

Although in the last fifty years self-determination and human rights issues have attached great importance, they have never been allowed to put peace at risk.²⁵⁰ This does not mean, however, watching by the gross human rights violations is the appropriate way. The solution for prevention and protection is not illegal resort to force but to amend the United Nations Charter and put clear rules which allow using force in grave human rights violations. It is also necessary to revise the mechanism of the Security Council. The International Community needs a more powerful Security Council which is able to take actions against the human rights violation. Recourse to force should be the last option.²⁵¹ It is true that there were severe human rights violations prior to the NATO attacks in Kosovo and the fear of veto of Russia prevented the Council to adopt a resolution which was authorizing use of force. However, under the articles of the present UN Charter, even the situations that a Security Council approval difficult to obtain do not justify bypassing the Security Council.²⁵²

To conclude justifications on the intervention in Kosovo are not persuasive and can not veil the illegality of NATO's action. The Kosovo Incident was an unambiguous breach of the law of the UN Charter and a deviation from the international rule of law. Because the obligation of “keeping the peace” has a priority in the UN Charter and it is the goal of the UN, NATO's intervention in Kosovo can not be regarded as legal and justifiable.

²⁴⁷ Simma, *loc. cit.*, *supra* n. 42, at 22.

²⁴⁸ Cassese, *loc. cit.*, *supra* n. 221, at 29

²⁴⁹ S/PV. 3988, S/PV. 3988, *op. cit. supra* n.196, at 16.

²⁵⁰ Independent international Commission on Kosovo, *op cit supra* n. 8, ‘Conclusions’ part

²⁵¹ Chesterman, *op. cit. supra* n. 4, at 75.

²⁵² Cassase, *loc. cit. supra* n. 221, at 25.

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