

Unilateral humanitarian intervention
and
article 2 (4) of the United Nations Charter

- the dilemma of reconciling positive with negative peace

A tutte le splendide persone con cui ho avuto il grande privilegio e piacere di *VIVERE* a Pisa quest'ultimo anno dei miei studi. Brindo a voi!

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1 Introduction

1.1 Introducing the problem in question

From the 24th of March to the 10th of June 1999¹ NATO conducted a military operation in The Federal Republic of Yugoslavia with the alleged purpose of putting an end to the gross violations of human rights carried out in the Kosovo province by the Serbian regime. Contemporary international law prohibits such violations of human rights committed by a state against individuals under its sovereignty. These duties are state obligations owed *erga omnes* to the world community as a whole and all states may be said to have legal interest in their protection and the right to resort to countermeasures to respond to those violations.² Countermeasures are acts of retaliation, traditionally known as ‘reprisals’.³ This may imply suspension of treaty obligations by the injured state towards the responsible state, economical and political sanctions and under certain conditions unilateral coercive actions.⁴ The scope of reactions third states are allowed to resort to in the face of violations of such obligations is however not clear under current international law. The Court remarked in the *Barcelona Traction case* that “the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespectively of their nationality.”⁵ And, as expressed in the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts⁶ art. 50 I. A), the right to resort to countermeasures, “shall not

¹ Rytter, J.E. “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001) p. 65

² *Barcelona Traction Case* (Second Phase) (1970) ICJ Reports 3 p. 32, International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts art. 48 I b), GA Res. 56/83

³ Akehurst’s *Modern Introduction to International Law*, 7th edition, Routledge London and New York (1997) p. 271

⁴ *Ibid.*

⁵ *Barcelona Traction Case* (Second Phase) (1970) ICJ Reports 3, p. 47

⁶ GA Res. 56/83

affect...[t]he obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations.”⁷

The question is whether the use of force to protect the compliance with human rights obligations is prohibited under international law, thus posing a limit to the countermeasures to which states may resort.

Lassa Francis Lawrence Oppenheim has expressed the problem in these words:

“when a state commits cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, the matter ceases to be of sole concern to that state and even intervention in the interest of humanity might be legally permissible”.⁸

However, the United Nations Charter proscribes in art 2 (4) a broad prohibition on the use of force between states, the only two exceptions set in the Charter itself being the use of force in self-defence (art. 51) and the collective use of force authorised by the Security Council (Chapter 7).⁹ None of the exceptions were applicable to the NATO-action. Shortly after the conflict, United Nations Secretary-General Kofi Annan encapsulated the questions brought to the fore by the conflict:

“This year’s conflict in Kosovo raised equally important questions about the legal consequences of action without international consensus and clear legal authority: on the one hand, is it legitimate for a regional organization to use force without a UN mandate? On the other, is it permissible that gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked?”

⁷ The Draft is generally considered to reflect customary international law on the matter, Brownlie, I. (ed), “Basic documents in international law”, 5th ed, Oxford University press (2002) p. 300

⁸ Oppenheim, “International Law” (Robert Jennings and Arthur Watts (eds) 9th edn; London: Longman, 1996), p. 44

⁹ It is debated in international legal doctrine whether customary law subsisting next to the treaty provides further exceptions. The debate mainly focuses on an “inherent right to self-defense”, which is broader and different from the one regulated in art. 51. This question will not be discussed here.

In the Report of the Secretary General, the Kosovo-conflict was specified to demonstrate the general “dilemma of...[unilateral] humanitarian intervention: The questionable legitimacy of an action taken without U.N. authorization, on the one hand, and the imperative of ”halting gross violations of human rights”, on the other.”¹⁰ It had been the inability of the international community to reconcile these two competing interests that resulted in the “tragedy” in Kosovo.¹¹

In all events, the Kosovo-conflict has revived the debate on an international legal doctrine of unilateral humanitarian intervention. This topic has been the object of a longstanding controversy in international law and remains so today. It concerns not only the application of the relevant legal norms, but also the method used to identify them. The tension between two fundamental principles of international law underpins the problem: on the one hand, the cardinal principle of sovereign equality of states, which in its traditional form dictates non-intervention and non-use of force. On the other hand, respect for human rights as a universal obligation. Humanitarian intervention clashes with these principles as the use of force becomes necessary to ensure the respect of human rights within a sovereign state. It thus also conflicts the desire of “positive peace”, i.e. the realization of justice, with “negative peace”, i.e. the absence of armed conflict?

The task of this study is to analyse the possible legality under international law of such operations undertaken in apparent violation of the legal regime on the use of force established in the Charter of the United Nations, notably the prohibition of force in art. 2 (4). The central and principal question is whether art. 2 (4) should be understood to ban all use of force not explicitly allowed for in the Charter and thus prohibit unilateral humanitarian intervention, or whether it contains a qualification that does not encompass a forceful intervention on humanitarian grounds. Section 1.5

¹⁰ “Report of the Secretary-General on the work of the Organization, U.N. GAOR, 54th Sess, 4th plan. Mtg., UN Doc. A/54/PV.4 (1999)

¹¹ Zacklin, R. “The United Nations and Humanitarian Intervention”, Virginia Journal of International law, Vol. 41:4 p. 929

gives a more detailed plan for the legal discussion. Initially, section 1.2 attempts to define the concept of unilateral humanitarian intervention.

1.2 “Unilateral humanitarian intervention”

“Unilateral humanitarian intervention” is not an exact legal concept. No codified or universally accepted definition of what humanitarian intervention is exists. The notion has in legal doctrine been given multiple meanings and the legal implications of the concept are by no means universally accepted, thus hindering the formation of a normative definition in customary international law.

There are essentially three recurring situations that in international legal doctrine have been categorized under the heading “humanitarian intervention.”¹² The first is “humanitarian emergency help”, which is provided in cases of disasters without the approval of the state where the disaster takes place.¹³ The second is enforcement actions for humanitarian purposes that are carried out under the umbrella of Chapter 7 of the UN Charter. The third is the threat or use of force by a state or group of states against a third state in reaction to gross human rights violations, in the absence of an authorization from the Security Council acting under Chapter 7 of the UN Charter.

This study limits the concept of unilateral humanitarian intervention to the third situation and suggests the following definition: “unilateral humanitarian intervention” is the coercive military intervention by one or more states within the domestic sphere of another state with the purpose of preventing or putting an end to gross violations of human rights, without a Security Council mandate to do so. This is how unilateral humanitarian intervention is understood in its classical sense and

¹² Beyerlin, U. “Humanitarian Intervention”, in Bernhardt R. (Ed.), “Encyclopedia of Public International Law”, Vol. 3 at 212 (1992).

¹³ Blockmans, S. “Moving Into Uncharted Waters: An Emerging Right of Unilateral Humanitarian Intervention?”, 12 *Leiden Journal of International Law* 759-786 (1999) p. 763

corresponds to the conception of humanitarian intervention the legality of which is heatedly debated under contemporary international law.¹⁴

By opting for this definition, we exclude some less controversial issues that have been and very well be subsumed under the concept's broad wording. The following paragraphs clarify the reasons for such exclusion and justify the definition outlined in more detail.

The term "intervention" can literally mean any kind of interference within the affairs of another state ranging from bare verbal statements or claims about domestic policies, to economic or diplomatic actions and in the gravest sense, the application or threat of armed force.

To fall within the scope of the above definition, the interference must be *coercive* and involve the use of *armed force*. These two qualifications rule out that any interference of a non – violent character and any interference that is requested from or accepted by the target state answer the definition.¹⁵ Thus, economic or diplomatic interventions in a state, hereunder "humanitarian emergency assistance"¹⁶, fall outside the scope of humanitarian interventions, independently of consent from the

¹⁴ See eg. Definition by Ian Brownlie in "Humanitarian intervention" in John Moore (ed) *Law and Civil War in the Modern world* (Baltimore, Maryland: John Hopkins University press, 1974) p. 217: "the threat or use of armed force by a state, a belligerent community, or an international organization, with the object of protecting human rights"; Farer, T.J., "An inquiry into the legitimacy of Humanitarian intervention", in L. Damrosch and D. Scheffer (eds), *Law and Force in the New International order* (1991) p. 15: "is the threat or use of force against another state for the purpose of terminating the latter's abuse of its own nationals legal in international law?"

¹⁵ For a more detailed account on the actions that we thereby exclude, see Harhoff, F. "Unauthorised Humanitarian Interventions – Armed Violence in the Name of Humanity?", *Nordic Journal of International Law* 70:65-119 (2001) p.71, Rytter, J.E. "Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond", *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001) p. 122 with further references.

¹⁶ Such operations include the provision of humanitarian aid to civilians in a state. According to ICJ's ruling in the *Nicaragua* case, they do not amount to intervention and are legal as long as they are limited to their purpose, *Military and Paramilitary Activities Case*, ICJ Reports 1986, para 242 et seq. See also Rytter, J.E. "Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond", *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001) p. 122. and Ryniker, A. "The ICRC's position on "humanitarian intervention", *IRRC* June 2001, vol. 83 No 842 at 529

third state. The same applies to forcible intervention on the request from the third state. An example of the latter is the Belgo-American operation in Stanleyville in 1964.¹⁷

Furthermore, the intervention must have “the purpose of preventing or putting an end to gross violations of human rights.” This gives rise to two questions: What is “gross violations of human rights” and to what extent does the presence of other motives, additional to the pure humanitarian ones, disqualify the action from being labelled “humanitarian intervention”?

Regarding the latter question, the reality of world politics and international relations makes it effectively impossible to demand 100 % purity of humanitarian motives. Legal theory therefore puts forward that the predominant or the primary purpose of the operation must be humanitarian.¹⁸ Consequently, political or economical aims will *disqualify* an operation as “humanitarian intervention” unless they are less relevant than the humanitarian objectives.¹⁹ The way in which this criterion is to be tested is discussed in section 5.4.3.2.

The requirement of dominance of humanitarian motives is necessary for three reasons: firstly, it is a logic corollary of the very nature of the concept; for an action to be conceptualised and analysed as a *humanitarian* intervention, it has to be aimed at remedying the *humanitarian* catastrophe which motivated the action from the outset. If not, it must be regarded as an act of aggression clearly violating the prohibition of force in the UN Charter art. 2 (4), unless it is justified on other grounds. Secondly, the means of armed force demands us to show constraint and

¹⁷ Blockmans, S. “Moving Into Uncharted Waters: An Emerging Right of Unilateral Humanitarian Intervention?”, 12 *Leiden Journal of International Law* 759-786 (1999) p. 764

¹⁸ See Murphy, S.D. “Humanitarian intervention – The United Nations in an Evolving World Order” (1996) p. 15, Brenfors M., Petersen M. “The Legality of Humanitarian Intervention – A defence”, *Nordic Journal of International Law* 69: 449-499 (2000) p. 479

¹⁹ *Ibid.*

caution when outlining the situations in which an intervention can be accepted.²⁰ Thirdly, allowing the intervention to be based on utterly mixed motives would represent a great risk of abuse of the doctrine where states with the power do so intervene for their own political or economical motives.²¹

According to the definition, only “gross violation of human rights” can constitute grounds for an intervention. What human rights violations that are above and below this threshold is not at all clear. In 1905, Oppenheim argued that violations must take place “in such a way as to...shock the conscience of mankind.”²² Wheeler similarly argues for the existence of a “supreme humanitarian emergency.”²³ However, there is no consensus upon an objective definition of this category.

The content of this category of human rights violations cannot depend upon a moral judgment as to which human rights are worthy of protection and which are not. Nor is it a pure moral question as to which human rights that are considered grave or serious enough to justify that the sovereignty of the state that perpetrates the atrocities is violated. Few contest that all violations of human rights deserve protection regardless of their gravity and that all human rights are of main concern to the world community as a whole.²⁴ Likewise, most people would agree that the protection of human rights has stronger moral foundations than the territorial integrity of the state where the intervention takes place. The question in our context is: what human rights violations are considered *qua* international law sufficiently grave to require humanitarian intervention?

²⁰ See example Harhoff, F. “Unauthorised Humanitarian Interventions – Armed Violence in the Name of Humanity?”, *Nordic Journal of International Law* 70:65-119 (2001) p. 73.

²¹ See Brenfors M. Petersen M. “The Legality of Humanitarian Intervention – A defence”, *Nordic Journal of International Law* 69: 449-499 (2000) p. 479 note 151. See section 3.2.3 about the risk of abuse as an argument against the legality of unilateral humanitarian intervention.

²² Oppenheim, *International law*, vol. 1, Longmans & Co., 1905, p. 101

²³ Wheeler, N. J. “Saving Strangers”, Oxford University Press (2002) p. 34

²⁴ See section 3.2.2.

However, as there is no authoritative definition of “humanitarian intervention” and no agreement upon its legality, there is no doctrinal statement as to which human rights violations that can be forcefully prevented or halted. A fundamental consideration is: since humanitarian intervention consists, effectively, in the legal use of force, by the universal community as a whole (though, arguably and subsidiarily, also by one or more states), against domestic violations of human rights, legal coherence commands that such use of force should be limited to repress only violations of legal obligations due to mankind as a whole. In determining this qualifying threshold, the concept of *erga omnes*, introduced by the ICJ in the *obiter dictum* in the *Barcelona Traction Case*²⁵, is a natural starting-point. In its ruling, the Court referred to obligations *erga omnes*, which translated literally, means “as against all”²⁶.

“[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In the view of the importance of the rights involved, all States can be held to have legal interest in their protection; they are obligations *erga omnes*.

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination...”²⁷

Based on the Court’s ruling, two elements can be deduced from the concept: universality, i.e. their binding character on all states, and solidarity, i.e. the legal interest of every state in their protection. However, the Court adopted no authoritative list or precise definition of what meaning that is attached to the definition. There are immediately strong developments in current international law

²⁵ *Barcelona Traction Case* (Second Phase) (1970) ICJ Reports 3 para. 33.

²⁶ Byers, M. “Custom, Power and the Power of Rules”, Cambridge University Press (1999) p. 195

²⁷ *Barcelona Traction Case* (Second Phase) (1970) ICJ Reports 3 para 34.

towards establishing a customary law code of what represents the gravest violations of human rights with equal concern to all states and individuals.

With reference to the *Barcelona Traction* case, the International Law Commission in its Draft on State Responsibility (1980) introduced “international crimes” as a category of international wrongful acts.²⁸ The category included, *inter alia*, acts of genocide, aggression, apartheid and slavery. The purpose was to categorize the most serious violations of international law, those which, in the line of the *Barcelona Traction* case, are of the interest to the international community as a whole.²⁹ The draft article 19 and the term “crime”, however, were subject to vast criticism for penalizing the state responsibility. In the International Law Commission 2001 Draft articles on Responsibility of States for internationally wrongful acts³⁰ art. 19 was abandoned. Instead the new art. 40 reads, under the Chapter heading “Serious breaches of obligations under peremptory norms of general international law”:

1. This Chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

The term “peremptory norm” of international law refers to the concept of *jus cogens*, defined in art. 53 of the Vienna Convention of the Law of the Treaties as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” *Jus cogens* is thus “compelling” law and holds the highest hierarchical position among all other norms and principles.

²⁸ International Law Commission Draft Articles on State Responsibility 1980 art. 19, (1980) ILC Yearbook, vol. 2, part. 2, p. 26

²⁹ Dixon & McCorquodale, “Cases and materials in international law”, Blackstone press limited, 1991 (3rd.ed) p. 436

³⁰ GA Res. 56/83

The international legal doctrine is not clear as to which rules that fall under this category. However, there seems to be general agreement upon the prohibition of force, genocide, slavery, crimes against humanity, and gross violations of the right of people to self-determination and of racial discrimination.³¹ Thus, there is reason to hold that the abandonment of “international crimes” in favour of “breaches of obligations under peremptory norms of general international law” did not in reality alter the nature or classification of the most serious violations of international law or the regime of state responsibility.³²

The concept and category of *erga omnes* obligations and *jus cogens* norms are often presented as two sides of the same coin, and obligations deriving from *jus cogens* are presumably *erga omnes*.³³ *Erga omnes*, it is argued, is a consequence of a given international crime having risen to the level of *jus cogens*.³⁴ Accordingly, the content of the concepts are largely overlapping. In this context, it is also worth noting the crimes that according to the statute of the International Criminal Court (ICC) are subject to the Court’s jurisdiction. Art. 5 of the ICC statute reads:

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

- a) The crime of genocide;
- b) Crimes against humanity;
- c) War crimes;

³¹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Rep. 1951, p. 15 at p. 23, Akehurst’s *Modern Introduction to International Law*, 7th edition, Routledge London and New York (1997) p. 58, Brownlie, I. “Principles of Public International Law”, Clarendon Press, Oxford (1998) 5th edition p. 515, see especially his notes 28, 29, 30 with numerous references to legal writing and practice from the International Court of Justice.

³² Wylter, E. “From State Crime” to Responsibility for “Serious breaches of Obligations under Peremptory Norms of General International Law”, *EJIL*, Vol. 13, no. 5 (2002) p. 1147 et seq. argues for this.

³³ Ragazzi, M. “The concept of international obligations *erga omnes*”, Clarendon Press, Oxford (1997) p. 72.

³⁴ Bassiouni C.M. “International crimes, Jus cogens and Obligatio Erga omnes”, http://www.sos-attentats.org/juridique/etudes_articles/27.pdf. This is however not undisputed in the legal doctrine, see *ibid* note 34 p. 271

d) The crime of aggression.”³⁵

As explicitly enshrined in the article, the jurisdiction is limited to the most serious crimes of *concern to the international community as a whole*. The nature of the acts under the court’s jurisdiction thus resembles the nature of the concepts of *jus cogens* and *erga omnes* outlined above. Indeed, the crimes in a), b) and d) are all *jus cogens* norms and *erga omnes* obligations. Similarly, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (1993)³⁶ subjects, *inter alia*, war crimes (art.3), genocide (art. 3) and crimes against humanity (art.5) to its jurisdiction.

When *jus cogens*, *erga omnes* and international crimes are viewed together, they reflect what acts the world community considers the gravest of crimes, acts that by their nature are against mankind as a whole, from which no one should go unpunished and to the protection of which all states must have legal standing. The development of these concepts thus provides evidence of an emerging customary law code on what human rights violations that, as specified in the definition above, are due to mankind as a whole, and thus potentially *could* justify a unilateral humanitarian intervention. Current international law must be held to include at least genocide, slavery and crimes against humanity in this category, but the further scope is yet unclear.

Furthermore, the definition used in this work implies that any use of force would not be added to or interfere with an international conflict. Humanitarian purpose would otherwise clearly interact with political motives; the idea that involvement in a

³⁵ Rome Statute of The International Criminal Court 1998, <http://www.un.org/law/icc/statute/romefra.htm> art. 5, emphasize added

³⁶ SC Res. 827 (1993)

border-transcending conflict could take place without losing the neutrality a humanitarian intervention is supposed to assume is an illusion.³⁷

However, not all armed coercive interventions with humanitarian purposes that fall within the scope outlined above are embraced by our definition. “Rescue operations”, i.e. interventions to rescue nationals of the intervening state abroad, are generally considered to fall outside the scope of humanitarian intervention³⁸ as they pose less problems from the sovereignty point of view and use of force. An example is the Israeli operation on the airport of Entebbe in 1976.³⁹ The legality of such operations should be examined in the context of self-defence or self-help and must be held distinct from our discussion.⁴⁰

The definition furthermore expressly limits its scope to humanitarian interventions undertaken on the independent initiative of one state or a group of states absent of Security Council authorisation. This is what makes the action a *unilateral* humanitarian intervention.

Actions carried out upon authorisation from the UN Security Council, often referred to as *collective* humanitarian intervention⁴¹, are not encompassed. The two categories are substantially similar as both are forceful actions to prevent or put an end to gross human rights violations. However, to distinguish between them is crucial in legal terms.

³⁷ Harhoff, F. “Unauthorised Humanitarian Interventions – Armed Violence in the Name of Humanity?”, *Nordic Journal of International Law* 70:65-119 (2001) p. 73

³⁸ see *inter alia* Rytter, J.E. “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001), p. 122 with further references. See the explanation *Ibid.* in note 4. See section 5

³⁹ Blockmans, S. “Moving Into Unchartered Waters: An Emerging Right of Unilateral Humanitarian Intervention?”, *12 Leiden Journal of International Law* 759-786 (1999) p. 764, see further section 5.4

⁴⁰ Charney, J. “Commentary: Anticipatory Humanitarian Intervention in Kosovo”, *Vanderbilt Journal of Transnational Law*, Vol. 32, Nov. 1999, no. 5 p. 1235 with further references in note 19, Schachter, O. “International Law in Theory and Practice”, Martinus Nijhoff Publishers (1991) p. 143-149.

⁴¹ See Rytter, J.E. “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001) p. 122 in note 4 and p. 123

There is no doubt that interventions which take the form of international actions aiming to cope with humanitarian emergencies of this kind are legal under current international law if carried out pursuant to a mandate from the UN Security Council acting under Chapter 7 of the Charter.⁴² One example is the UN intervention in Somalia pursuant to Security Council resolution 794 (1992). The on-going clan-based civil war threatened almost 4.5 million of the country's 6 million population with severe malnutrition and related diseases by October 1992.⁴³ A massive flow of refugees was on the brink of starvation and the internal conflict made the provision of humanitarian assistance difficult. On the 29 November the Secretary General advised the Security Council that the only way in which relief operations could continue was through resort to enforcement provisions under Chapter 7 of the Charter.⁴⁴ On the 3 December the Security Council unanimously adopted resolution 794, stating that the Council,

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

10. Acting under Chapter 7...authorizes the Secretary-General and Member States cooperating to implement the offer [by the United States to organize and lead an operation] to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.”⁴⁵

⁴² See *inter alia*, Malanchuk (Akehurst's Modern Introduction to International Law, 7th edition, Routledge London and New York (1997). P. 221), Tesón, F. “Humanitarian Intervention: An Inquiry into Law and Morality”, Transnational Publishers, Inc. Irvington-on-Hudson, New York (1997) p. 225, Simma, B. “NATO, the UN and the Use of Force: Legal aspects, 10 EJIL (1999) no. 1, p. 1, p. 4 4, Brenfors M. Petersen M. “The Legality of Humanitarian Intervention – A defence”, Nordic Journal of International Law 69: 449-499 (2000) p. 450 with further references and Rytter, J.E. “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, Nordic Journal of International Law, Vol. 70 Nos. 1-2 (2001) p. 123 with further references.

⁴³ Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 141

⁴⁴ Keating's (1992) p. 39218.

⁴⁵ SC Res 794 (1992)

The operation in Somalia is later characterised by the Secretary-General as a “precedent in the history of the United Nations: it [the Security Council] decided for the first time to intervene military for strictly humanitarian purposes.”⁴⁶

The Charter has not, however, established any explicit mechanisms for unilateral action involving the use of force. We must draw the distinctions between the two categories of humanitarian intervention.

An intervention can only be considered authorised if the Council *explicitly* mandates the use of force *prior* to the beginning of an action. A clear example is the Security Council Resolution 794 (1992) authorising the action in Somalia in 1992. A determination by the Council that a Chapter 7 situation (“a threat to international peace and security”) exists cannot substitute a formal authorisation to the use of force.⁴⁷ Accordingly, the Security Council *determination of a threat to peace and security in the Kosovo region* in resolution 1199 (1998)⁴⁸ did not authorize NATO to use force to remedy this threat.⁴⁹ Neither can a subsequent *de facto* acceptance by the Council.

Three incidents of interventions in the post war period are commonly referred to as examples of interventions that are best compatible with the scope of this definition. These are the Indian action in Bangladesh (1971), which helped the people to secure independence from Pakistan and to end repression, the Tanzanian action in Uganda

⁴⁶ [1993] UNYB 51, referred in Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) note 250 p. 142

⁴⁷ The system of Chapter 7 of the Charter show that an art. 39 determination of threat to peace cannot legally justify an armed intervention. The legal ground for this must be an explicit authorization, cf. art. 42, after which the Security Council is given monopoly on the decision of the use of force outside situations of self-defense. See Rytter, J.E. “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, Nordic Journal of International Law, Vol. 70 Nos. 1-2 (2001) p. 123. See further section 5.4

⁴⁸ SC Res 119 (1998) preamble, paras 1-2

⁴⁹ Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 206 and 214. Indeed, as Chesterman notes: “this was evident in the manner in which the resolutions were said to support the action: no state argued that the resolutions actually authorized an enforcement action, or that the resolutions on their own constituted a legal basis for the intervention; they were relied on instead to provide a political justification for military action, *ibid* p. 214. See further *infra* section 5.

(1979), which led to the overthrow of Idi Amin and the Vietnamese invasion of Cambodia (1978), which lead to the overthrow of Pol Pot.⁵⁰ The clearest post cold war case of unilateral humanitarian intervention is the NATO intervention in Kosovo to overthrow the repressive Serbian regime. These interventions are discussed under section 5.

1.3 A brief account of the legal position of humanitarian intervention prior to the enactment of the United Nations Charter

“I approve...decidedly of the opinion of those who say that the cause of the Spaniards is just when they make war upon the Indians, who practised abominable lewdness even with beasts, and who ate human flesh, slaying men for that purpose. For such sins are contrary to human nature.”⁵¹

- A. Gentili

The purpose of this section is to put the issue of unilateral humanitarian intervention into a historical setting and thereby attempt to clarify the legal position of this concept prior to the UN Charter. The latter is necessary because some of the proponents of unilateral humanitarian intervention base their arguments partly on a pre-Charter doctrine.⁵²

The doctrine of humanitarian intervention can be traced back to the 16th and 17th century classical legal writers on international law, like Grotius, Suarez, Vattel and Gentili.⁵³ They supported the notion of sovereignty, but as natural law theorists they

⁵⁰ Gray, C. “International Law and the Use of Force”, Oxford University Press (2000) p. 26

⁵¹ A. Gentili, *De iure belli libri tres* (J.C. Rolfe trans., 1933) p. 122

⁵² See especially section 4

⁵³ Rytter, J.E. “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001) p. 125, Harhoff, F. “Unauthorised Humanitarian Interventions – Armed Violence in the Name of Humanity?”, *Nordic Journal of International Law* 70:65-119 (2001) p. 80.

held the view that fundamental principles of humanity restrain the law⁵⁴, thereby legitimating forcible interventions to protect a people from maltreatment by their sovereign. As Grotius put forward in his “just war” theory: “Certainly it is undoubted that ever since civil societies were formed, the ruler of each claimed some special right over his own subjects...But...if a tyrant...practises atrocities towards his subjects, which no just man can approve, the right of a human social connexion is not cut off in such case.”⁵⁵

The contemporary doctrine of humanitarian intervention is usually traced back to the 19th century.⁵⁶ International law did not then contain any general provision on the use of force, but, as noted by Rytter, “there was among states a sense of necessity to justify the use of force on moral or political grounds.”⁵⁷ Thus, in accordance with the “just war” theory, forcible interventions were considered lawful when carried out towards a government that “...violates the rights of humanity...”⁵⁸, or as put by Sir H Lauterpacht, “in cases in which a State maltreats its subjects in a manner which shocks the conscience of mankind.”⁵⁹ This doctrine gained broad recognition in legal theory. A substantial minority, however, rejected such a doctrine by referring to the principle of non-intervention.

⁵⁴ Harhoff, F. “Unauthorised Humanitarian Interventions – Armed Violence in the Name of Humanity?”, *Nordic Journal of International Law* 70:65-119 (2001), p. 80

⁵⁵ De Groot, *De Jure Belli ac Pacis Libri Tres*, Kelsey transl., 1925, Chap. 25, quoted in Brenfors M., Petersen M. “The Legality of Humanitarian Intervention – A defence”, *Nordic Journal of International Law* 69: 449-499 (2000) p. 463.

⁵⁶ Rytter, J.E. “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001), p. 126, Brenfors M., Petersen M. “The Legality of Humanitarian Intervention – A defence”, *Nordic Journal of International Law* 69: 449-499 (2000) p. 463, Harhoff, F. “Unauthorised Humanitarian Interventions – Armed Violence in the Name of Humanity?”, *Nordic Journal of International Law* 70:65-119 (2001) p. 80

⁵⁷ Rytter, J.E. “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001), p. 126

⁵⁸ Arntz, M. in Rolin-Jacquemyns, quoted in Brenfors M., Petersen M. “The Legality of Humanitarian Intervention – A defence”, *Nordic Journal of International Law* 69: 449-499 (2000) p. 463-464.

⁵⁹ Lauterpacht, H., “International law and Human rights”, Clarendon press, Oxford (1950), p. 32, quoted in Rytter, J.E., “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001) p. 126.

Contemporary international legal writing do not agree upon the question whether state practice in the 19th and 20th century up to the UN Charter manifested a rule of international customary law.⁶⁰ The instances of alleged humanitarian interventions virtually disappeared during these centuries, and when the doctrine was invoked, the genuine humanitarian motives were in most cases questionable.⁶¹ Humphrey has said that “partly because most if not all of them – i.e. humanitarian interventions in the 19th century – were motivated by political considerations that had nothing to do with human rights, it is questionable whether so-called humanitarian intervention was ever recognized as an institution of the law of nations.”⁶² This development might also be related to the attempts in the international community to outlaw war as an instrument in international relations, notably through the Kellogg –Briand Pact, where states stated their conviction that "all changes in their relations" should be sought only by pacific means, condemned the resort to war for the "solution of international controversies", and renounced it as an instrument of national policy.⁶³ The presumption now was no longer in favour of the alleged right to self-help and the right to resort to war.⁶⁴ As Chesterman remarks, "humanitarian intervention appears to occupy a lacuna in the primitive international legal regime of the time."⁶⁵ It is thus debatable whether the doctrine of humanitarian intervention was established under the customary law of that time. Far less controversial is the contention that the introduction of the prohibition of the use of force in the UN Charter art. 2 (4) outlawed whatever was left of a doctrine of humanitarian intervention.⁶⁶

⁶⁰ Cassese, A. “The current legal regulation of the use of force”, Martinus Nijhoff Publishers (1986) p. 60

⁶¹ Rytter, J.E. “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001) p. 128, Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 42

⁶² Humphrey, J., in foreword p. 7 in Lillich, L. (ed.) “Humanitarian Intervention and the United Nations” (Charlottesville: Universitypress of Virginia (1973)

⁶³ Treaty providing for the denunciation of Wars as an Instrument of National Policy, 27 Aug 1928, signed at Paris, in force 1929, 94 LNTS 57, preamble, referred in Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 43

⁶⁴ Brownlie, I. “Thoughts on Kind-Hearted Gunmen” in “Humanitarian intervention and the United Nations”, Lillich, R. (ed.), University press of Virginia Charlottesville (1973) p. 142

⁶⁵ Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 43-44

⁶⁶ *Inter alia* Brenfors M., Petersen M. “The Legality of Humanitarian Intervention – A defence”, *Nordic Journal of International Law* 69: 449-499 (2000) p. 464 and 498, Brownlie, I. “Thoughts on Kind-hearted Gunmen” in Lillich, R. (ed.), “Humanitarian Intervention and the United Nations”,

1.4 Re-actualising Humanitarian intervention

There are essentially three post- Second World War developments in international relations that have called for a new investigation of the doctrine of unilateral humanitarian intervention. The first one concerns the nature of armed conflicts, which is increasingly changing from inter-state to intra-state conflicts. Former United Nations Secretary-General, Boutros Boutros-Ghali described this development as a “new breed” of civil war.⁶⁷ The rise of internal conflicts is often connected to the thawing of the bipolar cold war, which has bred threats among peoples of long-suppressed ethnic, religious and cultural differences.⁶⁸ Boutros Boutros-Ghali commented on this development in a 1995 supplement to his *Agenda for Peace*:

“The end of the cold war removed constraints that had inhibited conflict in the former Soviet Union and elsewhere. As a result there has been a rash of wars within newly independent states, often of a religious or ethnic character and often involving unusual violence and cruelty. The end of the cold war seems also to have contributed to an outbreak of such wars in Africa. In addition, many of the proxy wars fuelled by the cold war within states remain unresolved. Inter-state wars, by contrast, have become infrequent.”⁶⁹

As Blockmans notes, “most striking about these post-cold war crises has been the wanton disregard for basic human rights.”⁷⁰ In this type of war civilians end up as the main direct or indirect target of armed operations. It is estimated that civilian victims now constitute ninety per cent of casualties of armed conflicts.⁷¹

Charlottesville: University press of Virginia (1973) p. 139, Dinstein, Y. “War, aggression and self-defence”, Cambridge University Press (2001) (3rd.ed) p. 91

⁶⁷ Simons, P.C. “Humanitarian Intervention: A Review of the Literature” p. 1, <http://www.ploughshares.ca/content/Working%20PAPERS/wp012.html>

⁶⁸ Blockmans, S. “Moving Into Unchartered Waters: An Emerging Right of Unilateral Humanitarian Intervention?”, 12 Leiden Journal of International Law 759-786 (1999), United Nations Secretary General Boutros Boutros Ghali in supplement to Agenda for peace, UN GaOR, 50th Sess., UN Doc. A/50/60 (1995)

⁶⁹ *Ibid.*

⁷⁰ Blockmans, S. “Moving Into Unchartered Waters: An Emerging Right of Unilateral Humanitarian Intervention?”, 12 Leiden Journal of International Law 759-786 (1999) p.760

⁷¹ Simons, P.C “Humanitarian Intervention: A Review of the Literature” p. 1, <http://www.ploughshares.ca/content/Working%20PAPERS/wp012.html>, see also Mary Kaldor in “New and old wars”: Organized violence in a global era (1999), referred in Zacklin, R. “The United Nations and Humanitarian Intervention”, Virginia Journal of International law, Vol. 41:4 at 924 where

On occasions, the doctrine of humanitarian intervention has been invoked or subsequently served to legitimate interventions by the international community in these domestic conflicts. Such actions are justified when this is done pursuant to Security Council authorisation.⁷²

Questions of legality arise instead when the Security Council, due to the current political reality and decision-making procedure of the Council, fails to authorise the action necessary to prevent such disasters. In this situation, can individual states or a group of states carry out a *unilateral* humanitarian intervention on their own initiative like in the case of the interventions by India in Bangladesh in 1971, by Tanzania in Idi Uganda in 1979, by Vietnam in the Cambodia of Pol Pot (Kampuchea) in 1978 and by NATO in Kosovo in 1991, or must the prohibition on the use of force take precedence?

The second evolving tenet relevant to our investigation is the dramatic changes in the international legal protection of human rights. The emergence of both universal and regional instruments has helped in crystallising legal norms guaranteeing human rights, which have had a significant effect on the status of individuals in international law, and in their position in relation to states. Obligations to respect the rights of the individuals now represent limits to the States' supremacy in deciding how to treat their citizens. This development indicates a gradual shift in thinking about absolute notions of state sovereignty and its corollary principle of non-intervention, as laid down in art. 2 (7) of the Charter and has fed the arguments of those scholars who claim that the concept of sovereignty is being progressively eroded.⁷³ It is held that this alleged erosion in the concept of sovereignty must have decisive consequences

she points out that the ratio of military to civilian casualties at the beginning of the twentieth century was eight to one; by the 1990's, the ratio had been almost exactly reversed.

⁷² See section 1.2

⁷³ Blockmans, S. "Moving Into Uncharted Waters: An Emerging Right of Unilateral Humanitarian Intervention?", 12 *Leiden Journal of International Law* 759-786 (1999) p. 769, Reisman, M., "Sovereignty and Human Rights In Contemporary International law", *AJIL* vol. 84 (1990) p. 866. Brenfors M., Petersen M. "The Legality of Humanitarian Intervention – A defence", *Nordic Journal of International Law* 69: 449-499 (2000) p. 459. See section 3.2.2.

for the interpretation of the rules protecting the sovereignty of states, notably the prohibition of force between states in the UN Charter art. 2 (4).⁷⁴ This argument is a subject matter in the interpretation of art. 2 (4) in the light of subsequent development in international law, as we shall see section 4.

Likely difficulties in reaching consensus upon a collective humanitarian intervention among the Members of the Security Council represent a third factor worth mentioning in this context. The current real-political situation has led to what has been termed “the return to deadlock”⁷⁵ in the Security Council. This refers to the situation during the cold war, in which the Security Council was crippled by the antagonisms between USA and USSR, and was thus unable to come to consensus between the five veto powers. After the end of the cold war and the collapse of the USSR, the Security Council experienced a short *renaissance*, most notably the Security Council measures taken following the Iraqi invasion of Kuwait in 1990. The latest development however, with the humanitarian crisis in Kosovo as the main incident, indicates a renewed deadlock of the Security Council.

These developments pose a challenge to current international law in reconciling existing constraints on the use of armed force in cases where the Security Council fails to act, with the increasing desire and need to protect civilians and combatants from widespread and severe infringements of human rights that arise from internal conflicts due to civil war or to the persecution of groups by autocratic governments.⁷⁶ The quandary is whether the central juxtaposition of the prohibition of inter-state use of force poses a limit to this respect.

⁷⁴ *Ibid.*

⁷⁵ Blockmans, S. “Moving Into Uncharted Waters: An Emerging Right of Unilateral Humanitarian Intervention?”, 12 *Leiden Journal of International Law* 759-786 (1999) p. 774

⁷⁶ *Ibid.* p. 761-762

1.5 The plan for the legal discussion

The legal discussion falls in two parts. The first part analyses “unilateral humanitarian intervention” against an ordinary interpretation of art. 2 (4) of the UN Charter.⁷⁷ The second part discusses whether subsequent developments in international relations render a re-interpretation or a modification of art. 2 (4). Three arguments are analysed under this section: First, how is art. 2 (4) to be *interpreted* in the light of developments in international law after 1945⁷⁸; second, can the ineffectiveness or inactivity of the Security Council weaken prohibition in art. 2 (4) out of force?⁷⁹; three, has art. 2 (4) been *modified* by subsequent state practice?⁸⁰

⁷⁷ See section 2

⁷⁸ See section 3

⁷⁹ See section 4

⁸⁰ See section 5.

2 Article 2 (4) of the UN Charter

2.1 The Charter regime on the use of force

The Charter does not explicitly mention unilateral humanitarian intervention. Neither does it specifically prohibit it. The central rule on the use of force from which we must proceed is the prohibition of the use of force in art. 2(4), according to which

“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.”

The broad prohibition of the use of force in art 2(4) of the UN Charter was introduced to protect the sovereign equality of Member states as a means of waging war and ensuring peace.⁸¹ It is described as the “cardinal rule” of international law and “cornerstone” of peaceful relations among states⁸², and generally held not only to be treaty law and customary law but also *jus cogens*.⁸³ The prohibition of inter-state use of force should be read in parallel with the principle of peaceful resolution of international disputes.⁸⁴ The Charter allows for the use of force on only two explicit circumstances: as an act of self-defence⁸⁵; or pursuant to an authorisation from the Security Council acting under Chapter 7. Cassese describes the Charter regime on the use of force well when he notes that “the Charter enforces a collective security system that hinges on a rule, collective action, and an exception, self defence.⁸⁶ The subordinate status of self–defence to collective enforcement is seen in the last part of art. 51, after which, self-defence must yield to “necessary measures” taken by the Security Council.

⁸¹ Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 222, Cassese, A. “The current legal regulation of the use of force”, Martinus Nijhoff Publishers (1986) p. 4

⁸² See eg. Dixon & McCorquodale, “Cases and materials in international law”, Blackstone press limited, 1991 (3rd.ed) p. 553

⁸³ See section supra section 1.2 and infra section 5.3.2

⁸⁴ Art. 2 (3)

⁸⁵ Art. 51

⁸⁶ Cassese A. “Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?”, EJIL 10 (1999) 23-30, p. 24

Force carried out collectively under Chapter 7 is not the subject matter of this thesis.⁸⁷ The only exception that explicitly allows for the unilateral use of force is thus art. 51 on self-defence. Art. 51 reads:

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

This article embodies a right to use force for states that are victims of an “armed attack”. Humanitarian intervention is per definition a) not a defensive use of force by one state in response to another state; and b) let alone, not in response to an “armed attack”. To the extent that there is an attack, that attack is occurring by a state against its own nationals, who themselves are not “member of the United Nations.”⁸⁸ Art. 51 can therefore not justify a unilateral humanitarian intervention.

The question then remains whether unilateral humanitarian intervention is compatible with the prohibition of the threat or use of force in art. 2 (4). To answer this we must establish whether an interpretation of the prohibition on the use of force as proscribed in the provision’s text rules out the use of force to protect human rights.

⁸⁷ see section 1.2

⁸⁸ Blockmans S. “Moving Into Unchartered Waters: An Emerging Right of Unilateral Humanitarian Intervention?”, 12 *Leiden Journal of International Law* 759-786 (1999) p. 770

2.2 Preliminary questions on the interpretation of article 2 (4)

2.2.1 Defining the interpretative questions

Art. 2 (4) has a complex structure and raises question of interpretation on nearly all terms. There is no agreement as to the exact scope of the provision.

The most debated elements are probably the scope of the notion of “force” and the significance of the phrase “against the territorial integrity and political independence” which was added during the second drafting session of the International Law Commission. Unilateral humanitarian intervention is defined to involve the use of inter state armed force⁸⁹ thus excluding any discussion of the notion of “force” in our context.

The central question for our discourse is whether the prohibition is comprehensive or not. The relevant terms to be interpreted are the last 23 words of the article;

“...against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.”

The question is whether this passage is to be interpreted as a qualification of the illegal force, i.e. that force is only illegal when it is directed against or in effect violates the territorial integrity or political independence of any State or if it in any *other* manner is inconsistent with the purposes of the United Nations. Those who argue in favour of unilateral humanitarian intervention support this restrictive interpretation. Accordingly they claim that unilateral humanitarian intervention does not fall within the scope of the prohibition because it neither violates the “territorial integrity or political independence” of the target state, nor is it inconsistent with the purposes of the UN Charter. Opponents to this line of argument, on the other hand, hold that art. 2 (4) is all-inclusive and therefore outlaws any use of force not

⁸⁹ See definition in section 1.2

explicitly provided for in the Charter. This is the interpretative question to be analysed below.

2.2.2 The method of interpretation – treaty interpretation

The disagreement between the proponents and the opponents of the legality of humanitarian intervention relates not only to the substantial question of whether art. 2 (4) allows for the action, but also to the rules that govern the interpretative process. Disagreement of the latter is naturally determining for the outcome of the analysis of the substantive rules. The doctrinal approach must thus be commented.

Basically, there are two contrasting interpretative approaches on the issue of humanitarian intervention. In Farer's words, they can be described as the classical approach and the realist approach. The classical view presumes that the parties to a treaty "had an original intention which can be discovered primarily through textual analysis and which, in the absence of some unforeseen change in circumstances, must be respected until the agreement has expired according to its terms or been replaced by mutual consent."⁹⁰ This is thus a "traditional" interpretative approach. In contrast, according to the realist approach, the "[t]exts themselves are but one among a large number of means of ascertaining original intention". Moreover, to the realists, original intention has no intrinsic authority. "The past is relevant only to the extent that it helps us to identify currently prevailing attitudes about the property of a government's acts and omissions."⁹¹

What matters is the interpretative approach that has the strongest foundations in international legal doctrine. This clearly suggests the classical approach. The

⁹⁰ Farer, T. "An inquiry into the legitimacy of Humanitarian intervention", in L. Damrosch and D. Scheffer (eds), *Law and Force in the New International order* (1991), p. 185, 186.

⁹¹ *Ibid.*

International Court of Justice favours in general also this method.⁹² Fitzmaurice sums the court's position in these words:

“the intention of the framers of a treaty, as they emerged from the discussions or negotiations preceding its conclusion, must be presumed to have been expressed in the treaty itself, and are therefore to be sought for primarily in the actual text, and not in any extraneous source.”⁹³

This position is adopted in substance in the relevant provisions of the Vienna Convention on the Law of the Treaties.⁹⁴ ICJ practice⁹⁵ and international legal doctrine supports the view that the Convention's rules on treaty interpretation constitute a general expression of the principles of customary law relating to treaty interpretation.⁹⁶ The interpretation of UN Charter art. 2 (4) must thus be determined according to the principles of interpretation laid down in the Vienna Convention of the Law of the Treaties.⁹⁷

The “general rule” is enshrined in art 31 para. 1, which reads:

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

⁹² Fitzmaurice, G.G. “The law and procedure of the International Court of Justice: Treaty interpretation and certain other points, *British Yearbook of International Law*, 28 (1951) p. 7

⁹³ *Ibid* p. 7

⁹⁴ see the “main rule” enshrined in art. 31 para.1 and discussion related to it below in section 2.2.2 and Brownlie, I. “Principles of Public International law”, Clarendon Press, Oxford (1998) 5th edition p. 632

⁹⁵ *Namibia*, ICJ reports (1971), p. 47, *Fisheries Jurisdiction*, ICJ reports (1973), p. 18.

⁹⁶ Sinclair, I. “The Vienna Convention of the Law of Treaties”, Manchester University Press (1984) p. 153. See also Brownlie, I. “Principles of Public International law”, Clarendon Press, Oxford (1998) 5th edition p. 630. The fact that strictly speaking, the Convention only applies to treaties concluded after the entry into force of the Convention (art. 4) and the fact that the treaty is not ratified by all members of the UN are therefore not relevant.

⁹⁷ Hereafter VCLT

The initial task is to interpret art 2(4) using this general rule. This rule combines three different methods of interpretation into one integrated rule.⁹⁸ We must seek to find the ordinary meaning of the terms (literal interpretation) as they are to be understood in their context (contextual interpretation) and in the light of the objects and purposes of the UN Charter as a whole (teleological interpretation). The starting – point is thus the text itself, as a systematic whole.

The contextual, or systematic, interpretation requires a reading of the article in the light of the whole treaty structure.⁹⁹ Art. 31 para. 2 reads:

The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

If the textual analysis leaves the meaning “ambiguous or obscure” or “leads to a result which is manifestly absurd or reasonable”, recourse to supplementary means of interpretation, hereunder preparatory works, is provided for in art 32. The preparatory works can also throw light on the teleological interpretation.¹⁰⁰ According to the predominant practice of the International Court of Justice, art. 32 should be interpreted literally on this point; resort to preparatory work can only happen when the textual analysis fails to yield a clear result or leads to a unreasonable result.

⁹⁸ Sevastvik, P. “Informell modifikation av traktater till följd av ny sedvanerätt och praxis”, Nordstedts Juridik (2002) p. 249, n. 34

⁹⁹ *Competence of the ILO*, 1922, PCIJ, Series B, No.2 p. 33

¹⁰⁰ VCLT art 31 para.1

In addition to the context, art 2(4) must be examined in the light of any “subsequent agreement” or state practice that establishes such agreement, regarding the *interpretation* of the treaty, and any other “relevant rules of international law.”¹⁰¹ It flows naturally from the contractual character of treaties and from the proposition that the parties to a treaty are legally entitled to modify a treaty, that they are entitled to interpret it in an authoritative way.¹⁰² Two elements of this provision need a comment: how can subsequent state practice and subsequent developments in international law be relevant in the interpretation of art. 2 (4)?

I will deal with “relevant rules of international law” first. VCLT art. 31 proscribed in its original design the element of contemporaneity in the interpretation of treaties. The provisionally adopted text stated, *inter alia*, that the ordinary meaning to be given to the terms of a treaty was to be determined “in the light of the general rules of international law *in force at the time of its conclusion*.”¹⁰³ With these words, the provision was intended to reflect the general principle that “a judicial fact must be appreciated in the light of the law contemporary with it and not of the law in force at the time when the dispute in regard to it arises or falls to be settled.”¹⁰⁴ This element was not included straightforwardly in the final draft. Instead the element of “relevant rules of international law” is now extrinsic both to the text and “context” as defined in art. 31 para. 2. The wording thus seems to conflict with the above defined principle of contemporaneity. The question arises whether the UN Charter is to be interpreted in the light of the rules of international law in force at the time of the conclusion of the treaty or those in force at the time of the interpretation.

¹⁰¹ VCLT art 31

¹⁰² Sinclair, I. “The Vienna Convention of the Law of Treaties”, Manchester University Press (1984) p. 136

¹⁰³ Sinclair, I. “The Vienna Convention of the Law of Treaties”, Manchester University Press (1984)136, Sevastvik, P. “Informell modifikation av traktater till följd av ny sedvanerätt och praxis”, Nordstedts Juridik (2002) p. 250

¹⁰⁴ *Island of Palmas* arbitration, Permanent Court of Arbitration, 1928, Reports of International Arbitral Awards. vol. 2 p. 845, ref. Sevastvik, P. “Informell modifikation av traktater till följd av ny sedvanerätt och praxis”, Nordstedts Juridik (2002) p. 250, Sinclair, I. “The Vienna Convention of the Law of Treaties”, Manchester University Press (1984) p. 139

The principle of contemporaneity as expressed by Judge Huber in the *Island of Palmas arbitration*¹⁰⁵ was undisputed in the past.¹⁰⁶ However, the ICJ has gradually, under the influence of the development of the law of the treaties, opened for an evolutionary interpretative approach, based on the nature of the provision or the treaty. As to the nature of the provision, Sinclair sums it up in these words:

“...there is scope for the narrow and limited proposition that the evolution and development of the law can be taken into account in interpreting certain terms in a treaty which are by their very nature expressed in such general terms as to lend themselves to an evolutionary interpretation.”¹⁰⁷

Sinclair gives as examples of this category words like “domestic jurisdiction” and “public policy”.

More importantly is the Court’s willingness to allow evolutionary elements in the interpretation of law-making treaties, and most notably, the UN Charter. The Court stated in the *Namibia Advisory opinion* that the “interpretation cannot remain unaffected by the subsequent development of law...Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”¹⁰⁸

The unique character and status of the UN Charter leaves it in a particular position. It was apparent already from the beginning that the element of evolution is inherent to the nature of the Charter as a dynamic treaty-regime.¹⁰⁹ In view of the Charter’s

¹⁰⁵ *Island of Palmas arbitration*, Permanent Court of Arbitration, 1928, Reports of International Arbitral Awards, Vol. 2, p. 845

¹⁰⁶ See *US Nationals in Morocco*, ICJ Reports 1952 p. 189; *South West Africa Case*, ICJ Reports 1966 p. 23, Sevastvik, P. “Informell modifikation av traktater till följd av ny sedvanerätt och praxis”, Nordstedts Juridik (2002) p. 250, Simma, B. “The Charter of the United Nations – a commentary”, vol. 1, Oxford University Press (2nd. Ed) (2002) p. 24

¹⁰⁷ Sinclair, I. “The Vienna Convention of the Law of Treaties”, Manchester University Press (1984) p. 140

¹⁰⁸ *Namibia Advisory opinion*, ICJ Rep. (1971) p. 31

¹⁰⁹ Sevastvik, P. “Informell modifikation av traktater till följd av ny sedvanerätt och praxis”, Nordstedts Juridik (2002) p. 288

character as a “World-constitution”¹¹⁰, with the overarching purpose of maintaining international security and peace, it would be absurd to see the Charter as a static instrument. Rather, an evolutionary approach seems appropriate so that subsequent developments in law and facts can be considered to achieve the original purposes. Accordingly, Edvard Hambro wrote in 1946:

“The Charter, like every written constitution, will be a living instrument. It will be applied daily: and every application of the Charter, every use of an Article, implies interpretation: on each occasion a decision is involved which may change the existing law and start a new constitutional development. A constitutional customary law will grow up and the Charter itself will merely form the framework of the Organisation which will be filled in by the practice of the different organs.”¹¹¹

Confirming this prediction, the Court commented in the *Nicaragua* case that [t]he UN Charter...by no means covers the whole area of the regulation of the use of force in international relations” and that international law has developed under the influence of the UN Charter to such an extent that “a number of rules contained in the Charter have acquired a status independent of it.”¹¹²

In principle, all factors, including legal acts, declarations and other circumstances, must be taken into consideration in the evolutionary treaty interpretation, but it is uncertain as to which “phenomena, circumstances, and expressions are necessary to determine such an evolution.”¹¹³ Clearly, legal practice of the UN organs and State practice can be decisive elements. The relevance and impact in changing values is less certain.

¹¹⁰ The UN Charter art. 103 also formally puts the Charter in a lex-superior position. The article reads: In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

¹¹¹ Pollux, *The interpretation of the Charter of the United Nations*, 23 BYBIL, 1946, p. 54

¹¹² *Nicaragua* (Merits) (1986) ICJ Rep. 14 para 181

¹¹³ Simma, B. “The Charter of the United Nations – a commentary”, vol. 1, Oxford University Press (2nd. Ed) (2002) p. 25

In any case, the interpretation is confined by the “radius” of the provision. Thus, if an interpretative result contradicts the underlying reasoning or purpose of the provision, it is no longer an interpretation, but a question of modification.¹¹⁴ Accordingly, custom serves as a supplementary function in the interpretation; it can fill gaps and help specifying ambiguous rules, but not contradict – exceed the interpretative scope of the article.¹¹⁵ Then it becomes a question of modification.

The second factor of development that has to be considered is “subsequent [state] practice in the application of the treaty which establishes the agreement of the parties regarding its *interpretation*.”¹¹⁶ Hence, state practice is a relevant factor to the interpretation of art. 2 (4). This process, however, must be distinguished from practice that amounts to a modification of the provision. The latter concept is discussed in detail in section 5.2. In the present context, only the major distinctions have to be drawn.

As noted by the International Law Commission in the drafting process of the VCLT, the distinction between treaty *interpretation* based on subsequent practice and treaty *modification* based on subsequent practice is often blurred, but legally the processes are distinct.¹¹⁷ A guide-line seems to be that if the interpretation is clearly at variance with the text, it is no longer an interpretation, but modification.¹¹⁸ Zacklin describes the distinction as a question of whether the subsequent practice develops *sub lege* or *contra legem*.¹¹⁹ Sevastvik clarifies the issue in these words:

¹¹⁴ Kontou, N. “The Termination and Revision of Treaties in the Light of New Customary International Law”, Oxford (1994) p. 19, Sevastvik, P. “Informell modifikation av traktater till följd av ny sedvanerätt och praxis”, Nordstedts Juridik (2002) p. 251

¹¹⁵ Sevastvik, P. “Informell modifikation av traktater till följd av ny sedvanerätt och praxis”, Nordstedts Juridik (2002) p. 253

¹¹⁶ VCLT art. 31 nr. 3 emphasis added

¹¹⁷ [1966] 2 YILC p. 236

¹¹⁸ Wolfke, K. “Treaties and custom: Aspects of interrelation in Essays on the law of the treaties”, Jan Klabbers and Rene Lefeber (eds), Martinus Nijhoff Publishers (1998), Sevastvik, P. “Informell modifikation av traktater till följd av ny sedvanerätt och praxis”, Nordstedts Juridik (2002) in note 68, p. 303

¹¹⁹ See Sevastvik, P. “Informell modifikation av traktater till följd av ny sedvanerätt och praxis”, Nordstedts Juridik (2002) p. 296

“If the subsequent practice develops *sub lege* i.e. within the interpretative radius of the treaty provision (or treaty) it is a question of interpretation of the provision in accordance with the provisions set forth in article 31 (3) b of the Vienna Convention on the Law of Treaties. If the subsequent practice develops *contra legem* and falls outside of the interpretative radius of the provision (or treaty) the provision is modified. The modification procedure is described as a *de facto* modification. A *de facto* modification of a provision has the same legal status as a formally undertaken amendment provided for in a treaty.”¹²⁰

2.2.3 Conclusion

This account serves as the background against which art 2 (4) must be interpreted. The Charter can be seen as a hybrid between a multilateral treaty and a multilateral treaty with constitutional elements.¹²¹ In addition to the rules laid down in the VCLT, the principles of dynamic /evolutionary interpretation as outlined above, must apply. The question now is what legal consequences that can be drawn from an analysis of art. 2(4) conducted with the help of the interpretative principles we have highlighted.

2.3 Unilateral humanitarian intervention as compatible with the ordinary meaning of the terms in article 2(4) read in their context and in the light of the objects and purposes of the UN Charter.

2.3.1 A reminder

It is appropriate here to repeat the principal interpretative question: Does art 2 (4) prohibit the threat or use of force in general or only when directed against the “territorial integrity or political independence” of a state “or in any other manner inconsistent” with the UN Charter?

¹²⁰ *Ibid.* p. 384

¹²¹ *Ibid.* p. 292

2.3.2 Literal interpretation

2.3.2.1 “ territorial integrity and political independence”

The expression “against the territorial integrity or political independence” appears on its face to limit the prohibition of force. It defines in negative terms the targets against which the threat or use of force is illegal. Thus, Schachter observes that “if these words are not redundant, they must qualify the all-inclusive prohibition against force”.¹²² Reading the passage together with the article’s last words confirms this understanding, that is, the wording “*or in any other manner inconsistent with the purposes of the Charter.*”¹²³ If the first passage were intended to indicate an all-embracing prohibition on the use of force, the addition *in fine* would seem to serve no purpose.

This interpretation finds support also in the interpretative principle *inclusion unius est exclusio alterius*¹²⁴, which suggests the idea that the inclusion of the phrase in art. 2 (4) does restrict the prohibition by banning *only* the type of force that would violate the territorial integrity or political independence of states.

If the drafters wanted to create a blanket-provision, they would have done so. Nothing in the text allows a reading that excludes the qualifications. A literal interpretation thus suggests that the phrase “territorial integrity and political independence” should be read to limit the prohibition to uses of force that are above a threshold where the territorial integrity or political independence of a state is attacked¹²⁵: force directed against other targets falls outside the limits of the prohibition. According to this narrow textual understanding, a unilateral humanitarian intervention is only a violation of art 2 (4) if it is considered to be an

¹²² Schachter, O. “The Right of States to Use force”, (1984) 82 Michigan Law Review p. 1620, p.1625

¹²³ Art 2(4) *in fine*, emphasis added

¹²⁴ The inclusion of one is the exclusion of the other

¹²⁵ Murphy, S.D, “Humanitarian intervention – The United Nations in an Evolving World Order” (1996) p. 71

application of force “against the territorial integrity or political independence of any state.”

The next task is to determine what is an infringement of the “territorial integrity and political independence” of the target state.

The wording in art 2 (4) does not give any indications as to what is below or above this threshold. Proponents and opponents of a right to unilateral humanitarian intervention argue respectively for a restrictive and broad understanding of the terms.

One reading is that only force that alters or abolishes the political independence or the territorial integrity is an infringement of the article. According to this view, coercive action with only short-term effect would fall outside the scope of the qualification and be legal as long as the end sought by the use of force is consistent with the purposes of the Charter, cf. art. 2 (4) *in fine*. Accordingly, they argue that humanitarian intervention would be legal because it is a short-term action that does not seek to deprive the target state of its territory or its political independence, but only aims at protecting human rights. This is the statement submitted by Anthony D’Amato as a justification for the legality of the American invasion of Panama in 1989: “the United States did not intend to, and has not colonized, annexed or incorporated Panama. Before and after the intervention, Panama was and remains an independent nation.”¹²⁶ Fernandò Tesón similarly argues that “[a] genuine humanitarian intervention does not result in territorial conquest or political subjugation”, and does therefore not violate the territorial integrity of political independence of the state.¹²⁷

In contrast, for those who favour the broad view, “territorial integrity and political independence” merely stand for territorial “inviolability”, so that any non-consensual

¹²⁶ D’Amato, A. “The Invasion of Panama was a Lawful Response to Tyranny” (1990), 84 AJIL, p. 520

¹²⁷ Tesón, F. “Humanitarian Intervention: An Inquiry into Law and Morality”, Transnational Publishers, Inc. Irvington-on-Hudson, New York (2nd. Ed) (1997) p.151

use of force that is directed against a state's territory or that aims at forcing a state to take a decision it would not otherwise take, is a violation of art. 2 (4), even if the violation is merely temporary.¹²⁸ The provision is thus violated the moment the political will or the territorial integrity of the target state is forcibly coerced. A humanitarian intervention, then, however limited, constitutes a temporary violation of the target State's political independence and territorial integrity because it is carried out against that State's wishes. Schachter similarly argues that a humanitarian intervention runs counter to the prohibition because it suppresses the political will of the government in the target state and because it represents a violation of its territorial rights.¹²⁹

The wording of art.2 (4) itself does not clarify this controversy. Legal clarity and predictability, however, suggest that the legal use of force is not subject to discretion and thus supports the broad ("inviolability") view; if not, "a legion of loopholes will inevitably be left open", which could give rise to unwanted abuse of force.¹³⁰ However, both readings are compatible with the wording of art. 2 (4) thus yielding a textual analysis insufficient to provide any clear answer to the question of the legality of unilateral humanitarian intervention.

2.3.2.2 "or in any other manner inconsistent with the purposes of the UN Charter"

This passage also has been subject to controversial readings. The most radical argument put forward is that the addition of this phrase makes even the use of force *against* the territorial integrity or political independence of another state legal *as long as the motives are not inconsistent with the purposes of the Charter*. This view is not supported *prima facie* by the text. The expression, "or" in any "other" suggests an

¹²⁸ Schachter, O. "International Law in Theory and Practice", Martinus Nijhoff Publishers (1991)p. 113, Helgesen, V. "Kosovo og folkeretten", Institutt for forsvarsstudier, Info 4/99p. 25, Brownlie, I. "International Law and the Use of Force Between States", Oxford at the Clarendon press (1963) p. 267-8

¹²⁹ Schachter, O. "International Law in Theory and Practice", Martinus Nijhoff Publishers (1991) p.118

¹³⁰ Dinstein, Y. "War, aggression and self-defence", Cambridge University Press (2001) (3rd.ed) p. 82

inclusive meaning.¹³¹ As Schachter points out, it is “strange, if not absurd” and “very definitely invalid” to argue that the added reason for the illegality of force (namely, inconsistency with a Charter purpose) results in an exception to the general prohibition of force against political independence and territorial integrity. Indeed, as argued by Dinstein, these words *in fine* “form the centre of gravity of art. 2(4) because they create a residual “catch all” provision that closes up the gaps not covered by the first part.¹³² Then, the two passages read together, clearly indicates that also force against the “territorial integrity or political independence” is inconsistent with the purposes of the Charter. The assumption is accordingly that “territorial integrity and political independence” was added only to emphasis the gravest violation of the purposes of the Charter.¹³³

Summing up, the correct reading should be that the article establishes two categories of illegal force; the first one, force directed “against the territorial integrity or political independence of any state”; and the second, force inconsistent with the purposes of the Charter, the latter including the first: force that does not infringe the territorial integrity or the political independence is nevertheless illegal if inconsistent with the purposes of the Charter.

Presuming here that humanitarian intervention is not infringing the territorial integrity or political independence of the target state, the question remains whether the action is “inconsistent” with the purposes of the Charter: is the use of force directed at protecting human rights consistent with the purposes of the UN Charter? Teson argues that this clause “at first blush...provides a rather strong literal argument in favor of accepting a right of humanitarian intervention in appropriate cases. It need hardly be emphasized that the promotion of human rights is a main

¹³¹ Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 52

¹³² Dinstein, Y. “War, aggression and self-defence”, Cambridge University Press (2001) (3rd.ed) p. 82

¹³³ A similar argument put forward by Dinstein Y. “War, aggression and self-defence”, Cambridge University Press (2001) (3rd.ed) p. 83

purpose of the United Nations.”¹³⁴ However, the analysis cannot end here. The term, “inconsistent” requires a holistic evaluation that presupposes a distinct hierarchy of purposes in the Charter as originally conceived. It is therefore not sufficient that the promotion of human rights is one of the important purposes of the Charter if this would challenge the protection of other purposes carrying greater status.

Most scholars argue that peace, in the sense of the absence of inter state conflicts, is privileged over the protection of human rights in the text of the Charter: the primary purpose of the Charter is the maintenance of *international* peace and security between states and not the protection of justice and human rights within states.¹³⁵ Art. 1 para. 1 lists the first and paramount purpose of the UN:

“To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;”

Art. 1 (2) furthermore speaks of the strengthening of peace through the development of friendly relations.

The term “International peace and security” is traditionally narrowly limited to inter-state relations. Nothing in the preparatory works suggests that the parties envisioned a government’s treatment of its own nationals as a situation to be considered as a

¹³⁴ Tesón, F. “Humanitarian Intervention: An Inquiry into Law and Morality”, Transnational Publishers, Inc. Irvington-on-Hudson, New York (2nd. Ed) (1997) p. 151

¹³⁵ Schachter, O. “International Law in Theory and Practice”, Martinus Nijhoff Publishers (1991) p. 118, Simon C. “Just War or Just Peace”, Oxford University Press (2001) p. 92, Simma, B. “The Charter of the United Nations – a commentary”, vol. 1, Oxford University Press (2nd. Ed) (2002) p. 40, Akehurst’s Modern Introduction to International Law, 7th edition, Routledge London and New York (1997) p. 220

threat to or a breach of peace.¹³⁶ The internal relations within state were furthermore to be considered solely a domestic concern, according to art. 2 (7).

Indeed, any unilateral use of force would be inconsistent with the Charter's principal emphasis on the purpose of maintaining peace.

There is, however, no doubt that the Charter affirms the importance of human rights. The Preambular paragraph 1 declares "...faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women...". Art. 1 moreover states the purposes of "promoting and encouraging respect for human rights and fundamental freedoms for all without distinction to sex, language or religion" and the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". Human rights provisions are also found in arts. 55, 56, 62, 68 and 76.

But nothing in the Charter's text indicates that resort to force is a legitimate means to protect them. On the contrary, art. 1 speaks of the purpose of *co-operation* in solving international problems of an economic, social, cultural, or humanitarian character, and in *promoting and encouraging* respect for human rights and for fundamental freedoms for all. Arts. 55 and 56 provide this purpose with some substance, but the advancement of human rights is also here restricted to co-operation and promotion. The means to achieve this purpose is furthermore connected to the conditions for realizing peaceful relations among nations, the most central purpose of the Charter. Art. 55 reads:

With a view to the creation of conditions of stability and well-being *which are necessary for peaceful and friendly relations among nations*¹³⁷ based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

¹³⁶ Farer, T. "An inquiry into the legitimacy of Humanitarian intervention", in "Law and force in the new international order", Damrosch and Scheffer (eds), Westview press (1991), p. 190. However, see discussion later about the post 1945 development in this concept

¹³⁷ emphasis added

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Art. 56 encourages member states to “pledge themselves to take joint and separate action in *co-operation*” for the promotion of the human rights purposes set out in art. 55.¹³⁸

In fact, the logic of the Charter itself suggests that further questions of human rights were postponed or left aside to be taken up by a separate body in more detail. Under Chapter 4, the General Assembly “shall initiate studies and make recommendations for the purpose of... (b)... assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹³⁹ The Charter furthermore leaves ECOSOC with the responsibility for the future development in human rights and empowers this body to make recommendations in this realm. ECOSOC is also called upon to establish a commission for the promotion of human rights.¹⁴⁰ It is therefore logic that no enforcement procedures were laid down in the Charter.

The letter of the Charter thus gives the objective of human rights protection a lower position to that of promoting peace. This is also the common view among legal scholars.¹⁴¹ *Unilateral non-consensual use of force to ensure justice within a state* is certainly not consistent with the purposes of the Charter.

¹³⁸ emphasis added

¹³⁹ UN Charter art. 13 (1)

¹⁴⁰ UN Charter art. 62 and 68

¹⁴¹ Cassese A. “Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?”, EJIL 10 (1999) 23-30, p. 23, Murphy,

2.3.2.3 Conclusion on literal interpretation

The literal analysis suggest that art 2 (4) does not prohibit unilateral use of force in general, but only uses of force against “the territorial integrity or political independence of any state” and uses of force that “in any other manner” is inconsistent with the purposes of the Charter. Whether a unilateral humanitarian intervention is an illegal infringement of the first category could not be determined by a textual analysis alone. However, a unilateral humanitarian intervention anyway violates the prohibition because it is inconsistent with the UN Charter’s paramount purpose of maintaining peace and thus infringes the “catch-all” provision laid down in the article *in fine*.

2.3.3 Contextual and teleological interpretation

2.3.3.1 Introduction

The wording of art. 2 (4) analysed against the Charter system as a whole and its objects and purposes confirms the contention that a unilateral humanitarian intervention is incompatible with the prohibition of the use of force. The teleological and systematic interpretation suggest that the phrase “against the territorial integrity or political independence of any state” should not be interpreted restrictively, but rather to make the prohibition on the use of force water-tight. Key-words here are the Charter’s normative logic, the allocation of coercive jurisdiction, and its omissions.¹⁴²

2.3.3.2 Interpretation

Art. 2 (4) must first of all be read in conjunction with the purposes enshrined in art. 1 (1) of the Charter and the mechanisms established to achieve these ends.

S.D, Humanitarian intervention – The United Nations in an Evolving World Order (1996) p. 130, Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) pp. 53, 70

¹⁴² Farer, T. in Damrosch Scheffer, “Law and Force in the New International Order”, Westview Press (1991) pp. 185, 190

It has been recognized in section 2.3.2.2. how, given the hierarchy of purposes set out in the Charter, maintenance of peace has been assigned a higher priority than protection of human rights. Surely, the respect of human rights is established as a legal obligation¹⁴³, but the Charter does not allow for the enforcement of this obligation to be obtained at the cost of destabilizing peace. A reading of the phrase “against the territorial integrity and political independence” which results in a restrictive view of the prohibition of the use of force thus runs against the purposes of the Charter.

This position is confirmed by the principle and standard of conduct laid down in the preceding art 2 (3):

All members shall settle their international disputes by *peaceful means* in such a manner that international peace and security, and justice, are not endangered.

The status of the purpose of peace as a paramount principle is also reflected in the regime on the use of force established in the Charter. Its overall architecture and the way it allocates coercive jurisdiction, provide three arguments in support of viewing art 2 (4) as a comprehensive prohibition of the use of force.

First: the Charter sets out both the purpose of promoting human rights and the purpose of promoting peace. However, while a standard of conduct is set out in order to achieve the purpose of promoting peace in art. 2 (3) and art. 2 (4), no such principle is established to promote human rights, but for art. 55 and 56 mentioned before. Furthermore, there are two exceptions to the broad prohibition of the use of force, none of which explicitly refers to unilateral humanitarian intervention or says anything about the use of force to protect human rights.

¹⁴³ *Namibia*, ICJ Rep. (1971) pp. 16, 57

Second: the Charter provides explicitly only for one *discretionary* exception that allows the use of force. This, however, is the system of collective action pursuant a Security Council mandate under Chapter 7 and safeguarded by decision-making procedures that ensure a broad support in the world-community. The decision-making competence is thus allocated in a Community body, which guarantees that when an action of force is authorised, it is assumed to find support in the “common interest”, as set out in the preamble.¹⁴⁴ In other words, the Charter rests upon the notion that policy-making in matter of use of force should be centralised and not left to the discretion of individual states. Instead of which, these would have to settle their disputes by peaceful means. The use of force under this mandate is furthermore related to an existing threat to peace, a breach of peace, or an act of aggression, thus related to maintenance of the primary purpose of international peace.

Third: the only explicit exception to the prohibition of the use of force that allows for *unilateral* action is the right to self-defence enshrined in art. 51 of the Charter. The omission of explicit reference to humanitarian intervention must be assumed intentional.¹⁴⁵ We have also made it clear that this article cannot serve as a legal ground for humanitarian intervention.¹⁴⁶

The absence of a rule permitting unilateral military measures to enforce the respect of human rights is also coherent with the enforcement mechanisms established in the various human rights treaties that have come into being subsequently to the adoption of the UN Charter. None of these contains provisions that allow for international enforcement with military means.¹⁴⁷ On the contrary, they contain advisory, judicial or semi-judicial procedures of various kinds that are far more intrusive on the defendant’s sovereignty than the obligations under UN Charter under art. 55 and 56,

¹⁴⁴ UN Charter preambular paragraph 7

¹⁴⁵ See Brenfors M., Petersen M. “The Legality of Humanitarian Intervention – A defence”, *Nordic Journal of International Law* 69: 449-499 (2000) p. 469

¹⁴⁶ *Supra* section 2.1. Note also that even here there is an obligation of immediately reporting to the Security Council which should then endorse further action, cf. art. 51

¹⁴⁷ Helgesen, V. ”Kosovo og folkeretten”, *Institutt for forsvarsstudier, Info 4/99* p. 26

which demand the Member States nothing more than to “pledge themselves to take joint and separate action in *co-operation* ...” for the promotion of human rights. As the Court stated in *Nicaragua*, where human rights are protected by international conventions, that protection takes the form provided for in those conventions.¹⁴⁸

2.3.3.3 Conclusion

To read into art 2(4) that individual states or a group of states unilaterally may seize to armed force to protect human rights is not coherent with the Charter’s regime on the use of force. The normative logic of the Charter clearly suggests that the only situations in which the use of force was supposed to be authorised, were in self-defence or pursuant to Chapter 7. If Member States had wanted so, they could have established coercive authority in connection with all the principles and purposes of the Charter, inclusive of the protection of human rights. As a preliminary conclusion we thus agree with Farer when he holds that “if one deems the original intention of the founding states to be controlling with respect to the legitimate occasions for the use of force, then humanitarian intervention is illegal.”¹⁴⁹

2.4 The Travaux Préparatoires

Resort to preparatory works, as a “subsidiary means” of interpretation, serves in general to throw light on ambiguities in the text.¹⁵⁰ However, based on the clear arguments against unilateral humanitarian intervention, both deriving from the textual analysis and the contextual interpretation¹⁵¹, it is difficult to see how the preparatory works can make a difference in the interpretative discourse.

¹⁴⁸ *Nicaragua* (Merits) (1986) ICJ Rep. 14, para. 267

¹⁴⁹ Farer, T. in Damrosch Scheffer, “Law and Force in the New International Order”, Westview Press (1991) p. 191

¹⁵⁰ See supra section 2.2.2.

¹⁵¹ *Ibid.*

The majority of writers hold that the preparatory works of the UN Charter confirm the view that unilateral humanitarian intervention is incompatible with art. 2 (4) of the Charter.¹⁵² As in the textual analysis, the question is whether the phrases “territorial integrity or political independence” or “in any other manner inconsistent with the Charter of the United Nations” were meant to limit the prohibition of the use of force.

The Dumbarton Oaks Proposals to art. 2 (4) read:

All Members of the Organization shall refrain in their international relations from the threat or use of force in a way inconsistent with the purposes of the Organization.¹⁵³

No reference was made to the “territorial integrity and political independence” of any state. This supports the textual conclusion above; all actions inconsistent with the purposes of the UN are incompatible with art. 2 (4). This obviously includes actions against “territorial integrity or political independence” as the core of state sovereignty, which the prohibition was set out to protect in order to wage inter-state force.¹⁵⁴

The reason why the phrase was included in the final draft is also clear from the preparatory works. A number of states, notably smaller ones, put forward the necessity to emphasise the protection of territorial sovereignty and political independence as the main means to achieve the purpose of international peace. An Australian amendment inserting the phrase “territorial integrity and political independence” was adopted at the San Francisco Conference in response to this desire. During the San Francisco Conference, delegates from Brazil and Norway raised the possibility of the passage being interpreted restrictively as opposed to the

¹⁵² *Inter alia* Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 49, Brownlie, I. “International Law and the Use of Force Between States”, Oxford at the Clarendon press (1963) p. 267

¹⁵³ Referred in Brownlie, I. “International Law and the Use of Force Between States”, Oxford at the Clarendon press (1963) p. 266

¹⁵⁴ see supra section 2

extensive prohibition from the Dumbarton Oaks Proposals. Norway suggested that the phrase should be omitted in order to make clear that the article “did not contemplate any use of force, outside of action by the Organization, going beyond individual or collective self-defence.”¹⁵⁵ The majority of states however, did not consider the wording inadequate and the US delegate emphasised

“that the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition; the phrase “or in any any other manner” was designed to insure that there should be no loopholes.”¹⁵⁶

The Rapporteur of Committee 1 to Commission I subsequently emphasised that

“unilateral use of force or any other coercive measures of that kind is neither authorized nor admitted.”¹⁵⁷

There is no indication in the records that the phrase was intended to have a restrictive effect.¹⁵⁸

Some scholars still claim that the preparatory works are not clear. Tesón holds out the fact that the Norwegian suggestion to omit the qualifying clause was not adopted and the fact that there is no indication in the preparatory works that the drafters expressly contemplated and rejected the hypothesis of armed intervention for humanitarian purposes.¹⁵⁹ The account in the paragraphs above clearly contradicts the first argument. And, since the preparatory works clearly disclose that the

¹⁵⁵ Statement from the Norwegian delegate referred in Brownlie, I. “International Law and the Use of Force Between States”, Oxford at the Clarendon press (1963) p. 267

¹⁵⁶ See Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 49, Sevastvik, P. “Informell modifikation av traktater till följd av ny sedvanerätt och praxis”, Nordstedts Juridik (2002) p. 341

¹⁵⁷ See Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 49

¹⁵⁸ Brownlie, I. “International law and the use of force by states”, Oxford:Clarendon Press (1963) p. 267

¹⁵⁹ Tesón, F. “Humanitarian Intervention: An Inquiry into Law and Morality”, Transnational Publishers, Inc. Irvington-on-Hudson, New York (2nd. Ed) (1997) p. 154

intention was to write a comprehensive prohibition, absence of *rejections of a doctrine permitting* the use of force is not surprising.

The preparatory works thus warrant the conclusion that the phrase “territorial integrity and political independence” was not meant to have a qualifying effect and amplifies the textual conclusion above.

2.5 Conclusion

Unilateral humanitarian intervention is not compatible with art. 2 (4) read in the light of its context and the purposes of the UN Charter.

3 Article 2 (4) in the light of subsequent developments in international law

3.1 Introduction

This section undertakes an evolutionary interpretation of art. 2 (4) of the UN Charter. Some scholars have put forward that art 2 (4) read in the light of the shifting foundations of international law does not outlaw the use of force to protect human rights. It has been argued that the restraints of the Charter on the use of force, resting upon the desire to protect the sovereignty of the state, have been superseded by a new consensus concerning the use of force to protect human rights and that a humanitarian intervention must be lawful insofar as it purports these values.¹⁶⁰ Theoretically, this argument would have to prove that a) current international law sets the protection of human rights ahead of the protection of the sovereignty of the state and that b) this must lead to a re-interpretation of art. 2 (4) of the Charter. This is the thesis discussed in the following sections.

3.2 Sovereignty and the prohibition of the use of force

3.2.1 Introduction

The sovereign equality of states is the key legitimating feature and basic norm of the international legal system.¹⁶¹ It was fundamental to the development of the modern system of states as laid down in the Westphalia-treaty in 1648. As the ICJ put it in the *Nicaragua case*, it is the principle “on which the whole of international law rests.”¹⁶² Then, in the words of Bennoune, there would be no international law without the nation-state and no nation-state would have developed and prevailed but

¹⁶⁰ *Inter alia* Brenfors M., Petersen M. “The Legality of Humanitarian Intervention – A defence”, *Nordic Journal of International Law* 69: 449-499 (2000) p. 471

¹⁶¹ Brownlie, I. “Principles of Public International law”, Clarendon Press, Oxford (1998) 5th edition p. 289, Wheeler, N.J “Saving Strangers”, Oxford University Press (2002) p. 46, Abiew, F. “The evolution of the doctrine and practice of humanitarian intervention, *Kluwer law international* (1999) p. 23.

¹⁶² *Nicaragua* (Merits) (1986) ICJ Rep. 14, para 263

for the idea of sovereignty.”¹⁶³

“Sovereignty” is traditionally held to connote supreme authority of the state within its territorial borders and over citizens abroad¹⁶⁴, and the equality of status between states. The principle was enshrined explicitly in the UN Charter art. 2(1), which reads:

The organization is based on the principle of the sovereign equality of all its members.

The Drafters of the UN Charter considered the independence of states, especially with respect to matters of domestic concern, of foremost importance.¹⁶⁵ Art. 2 (7) therefore prohibits the UN from interfering within the internal matters of a state. The protection of the sovereignty of the state was furthermore seen as a means of ensuring peace, that is, the absence of armed conflicts between states. Accordingly, art. 2 (4) outlaws any unilateral use of force against the sovereignty of another state. The protection of human rights was given a subordinate status to these values.¹⁶⁶

Through history the notion of “sovereignty” has been given multiple meanings and its content has never been generally agreed upon.¹⁶⁷ Critics of the concept have put forward that it might as well be eliminated from the constitutive characteristics in the legal system. Oppenheim put it this way in 1905: “The term is used without any well-recognised meaning except that of supreme authority.”¹⁶⁸

¹⁶³ Bennoune, K. “Sovereignty vs. Suffering? Re-examining Sovereignty and Human Rights through the Lens of Iraq”, EJIL 13 (2002) p. 243-262 p. 244. According to the ICJ Statute art. 38 (1) (c), sovereignty, as a principle of international law, it is also a source of international law.

¹⁶⁴ *Island of Palmas case*, Permanent Court of Arbitration, 1928, Reports of International Arbitral Awards. Vol. 2, p. 839, Brenfors M., Petersen M. “The Legality of Humanitarian Intervention – A defence”, Nordic Journal of International Law 69: 449-499 (2000) p. 459, Abiew, F.K. “The Evolution of the Doctrine and Practice of Humanitarian Intervention”, Kluwer Law International (1999) p. 25

¹⁶⁵ Charney, J., “Commentary: Anticipatory Humanitarian Intervention in Kosovo”, Vanderbilt Journal of Transnational law, Vol. 32, Nov. 1999, no. 5, p 1240

¹⁶⁶ See supra section 2.3.2.2., Murphy, S.D., “Humanitarian intervention – The United Nations in an Evolving World Order” (1996) p. 70 and Farer, T.J., “An inquiry into the legitimacy of Humanitarian intervention”, in L. Damrosch and D. Scheffer (eds), Law and Force in the New International order (1991) p. 190

¹⁶⁷ Abiew, F. “The evolution of the doctrine and practice of humanitarian intervention”, Kluwer law international (1999) p. 30.

¹⁶⁸ Oppenheim, “International law”, vol. 1, Longmans & Co. (1905) p. 108.

More recently, Louis Henkin argues that “Sovereignty, strictly, is the locus of ultimate legitimate authority in a political society, once the prince or “the crown”, later the parliament or the people. It is an internal concept and does not have, need not have, any implications for relations between one state or another”, and suggested to avoid the term.¹⁶⁹ Likewise Akehurst purports that sovereignty hardly denotes anything else than the independence of states and suggests to substitute the term with “independence”. This debate on the principle itself will not be furthered here. However, the arbitrator Max Huber’s holding in the *Island of Palmas case* (1928) that “the concept of sovereignty remains of necessity the point of departure in settling most questions that concern international relations”¹⁷⁰, might not be as accurate today as it was 70 years ago.

There is no doubt that the notion of sovereignty by nature is a term that, according to the theories of evolutionary interpretative approach described above in section 2.2.2, is shaped by the changing foundations of its context, i.e. the developments in international law and international relations. It cannot be seen as “a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used.”¹⁷¹ As the Permanent Court of International Justice put it in 1923 in its advisory opinion the *Nationality Decrees case* in relation to the League of Nations’ predecessor to UN art. 2(7), “the question whether a certain matter is or is not solely within the jurisdiction of a state is essentially a relative question; it depends on the development of international relations...”¹⁷²

¹⁶⁹ Henkin, L., “International law: Politics and values (1995) p.. 9-10, quoted in Kingsbury, B. “Sovereignty and inequality, EJIL 9 (1998), 599-625.

¹⁷⁰ *Island of Palmas case*, (1928), Permanent Court of Arbitration, 1928, Reports of International Arbitral Awards. Vol. 2, p. 829 and p. 839

¹⁷¹ Judge Holmes’s dictum in *Towner vs. Eisner*, 245 U.S. 372, 376 (1918), quoted in “Sovereignty and Human rights in contemporary international law”, Reisman, M. AJIL, vol. 84, 1990 p. 867 ff. The statement does not relate to the concept of sovereignty but the nature of any legal term. See also Brenfors M., Petersen M. “The Legality of Humanitarian Intervention – A defence”, Nordic Journal of International Law 69: 449-499 (2000) p. 460, note 54. “Sovereignty is not a unit, which a state either has or does not have; it is a relative norm”, Openheim, International law (5th ed. By Lauterpacht, 1935) p. 117. See also the *South West Africa opinion* where the International court noted on the absurdity of mechanically applying an old norm without reference to fundamental constitutive changes

¹⁷² *Nationality Decrees in Tunis and Morocco* (1923) PCIJ, Series B no. 4, p. 24

It is also a fact that the traditional concept of state sovereignty is losing ground in many areas of international law. The UN Secretary General said in 1999 that

“[s]tate sovereignty, which for all of the twentieth century had been regarded as the very foundation of organized international society as enshrined in the UN Charter, was being redefined by the forces of globalization and international cooperation, that “[t]he state is now widely understood to be servant of its people, and not vice versa.”¹⁷³

3.2.2 Erosion of sovereignty – growth of human rights

Subsequent development in the international community has penetrated the traditional supremacy of the sovereign in a myriad of ways,¹⁷⁴ and international law increasingly values and protects the rights of the people and individuals on account of the sovereignty of the state.

The conception of the states’ political legitimacy as deriving from popular support, also called popular sovereignty, won positive ground through the French and American Revolution. As Reisman puts it, “With the words ‘We the people’, the American Revolution inaugurated the concept of the popular will as the theoretical and operational source of political authority.”¹⁷⁵ According to Peaslee, 85% of the nations (by 1965) have by their constitution established the people as the sovereign

¹⁷³ UN Secretary General in “Report of the Secretary-General on the work of the Organization, U.N. GAOR, 54th Sess, 4th plan. Mtg., , UN Doc. A/54/PV.4 (1999) at 1-2: (1) ref. Zacklin, R. “The United Nations and Humanitarian Intervention, Virginia Journal of International Law, Vol. 41:4 (2001) p. 923 at 928.

¹⁷⁴ Similarly Rosenau says: “For the first time since the period that culminated in the settlement of the Westphalia in 1648, turbulence has overwhelmed world politics and altered its parameters so extensively that the underpinnings of a new world order have been laid (...) All the indicators suggest that the legal status of sovereignty rights is bound to be subverted by the transformative dynamics currently at work in international politics”, Rosenau, *Sovereignty in a turbulent world*, 1995, p. 203, 221. Also, as a result of globalisation, notably the liberalization of markets, the walls of sovereignty are no protection against movements of capital, labour, information and ideas. “Free markets” now prevail in the vast part of the world and global and regional arrangements with supranational elements challenge the normative priority of the state, note e.g. the institutional structure of the European Union.

¹⁷⁵ Reisman, M. “Sovereignty and Human rights in contemporary international law” *AJIL*, vol. 84, 1990 p. 867

source of power.¹⁷⁶ The formal international legal system has codified the principle in art. 1 of the UN Charter, which reads, *inter alia*, that international relations should be “based on the respect for the principles of equal rights and self-determination of peoples.” Subsequently it was expressed in the Universal Declaration of Human Rights, now accepted as expression of customary international law¹⁷⁷, in art. 21 (3), which reads, *inter alia*, “the will of the people shall be the basis of the authority of government...”

Traditional sovereignty has also lost ground due to the philosophy of human rights. The emergence of international human rights law since the enactment of the Charter indicates an increasing interest in the international community for the promotion of justice in international relations and international law.¹⁷⁸ In Reisman’s words, the human rights program has shifted “the fulcrum of the international legal system from the protection of sovereigns to the protection of people.”¹⁷⁹ In the aftermath of the holocaust and the atrocities of The Second World War, human rights have been established as a matter of international concern. The Preamble of the UN Charter declared, *inter alia*, that the world community “reaffirm(ing) faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of man and woman...” The network of constitutive rules and institutions, both at the universal and regional level, that have come into being in order to protect human rights since the enactment of the charter represents, in Abiew’s words a “theoretical shift in the conception of human rights”¹⁸⁰ and an erosion in the states sovereignty. And it is indeed from this extraordinary development in the protection of human rights that all those who support unilateral humanitarian intervention draw their

¹⁷⁶ Whiteman, M.M. “Digest of International Law”, Vol.1, Department of State Publication (1963). p. 233-4

¹⁷⁷ Reisman, M. “Sovereignty and Human rights in contemporary international law” AJIL, vol. 84, 1990 p. 867

¹⁷⁸ Murphy, S.D., “Humanitarian intervention – The United Nations in an Evolving World Order” (1996) p. 2

¹⁷⁹ Reisman, M. “Sovereignty and Human rights in contemporary international law” AJIL, vol. 84, 1990, p. 872

¹⁸⁰ Abiew, F.K. “ The Evolution of the Doctrine and Practice of Humanitarian Intervention”, Kluwer Law International (1999) p. 83

arguments. Thus, Teson argues that “ anyone who in the face of the impressive rise of human rights concerns simply asserts that post-1945 international law must be seen as one containing a rigid prohibition of war, even to remedy serious human rights deprivations, carries a considerable burden of proof. One simply cannot select article 2 (4) as the only norm that had a revolutionary impact on international law.”¹⁸¹

The sovereignty of the state is eroded because norms that protect human rights impose duties on the state vis-à-vis the nationals. The arbitrator in the *Island of Palmas Case* stressed this duty as early as 1928¹⁸², and the UN General Assembly reaffirmed in 1970 that sovereignty includes for each state “a duty to comply fully and in good faith with its international obligations.”¹⁸³ The negative denotation of this duty was expressed by the ICJ in relation to human rights and the UN Charter in the *Namibia opinion* in 1971 in these words: “to establish...and to enforce distinctions...restrictions...which constitute a denial of fundamental human rights is a flagrant violation of the purpose and principles of the Charter.”¹⁸⁴ State-actions contrary to human rights obligations are violations of international law and infer upon the states an international responsibility.¹⁸⁵ This could lead to claims against the perpetrating state under some regional arrangements established in human rights conventions, such as the European Court of Human Rights.¹⁸⁶

The introduction of the concept of *erga omnes* obligations in the dictum of the *Barcelona Traction Case*,¹⁸⁷ and the customary doctrine on *jus cogens* human rights

¹⁸¹ Tesón, F. “Humanitarian Intervention: An Inquiry into Law and Morality”, Transnational Publishers, Inc. Irvington-on-Hudson, New York (2nd. Ed) (1997) p. 157

¹⁸² *Island of Palmas case*, Permanent Court of Arbitration, 1928, Reports of International Arbitral Awards. Vol. 2,p referred in Reisman, M. “Sovereignty and Human Rights in Contemporary International Law“, AJIL, vol. 84 (1990) p. 867

¹⁸³ See General Assembly Resolution 2625, 24. Oct. 1970

¹⁸⁴ *Namibia case*, ICJ Rep. (1971) pp. 15, 57

¹⁸⁵ International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83 art. 1

¹⁸⁶ The European Convention for the Protection of Human Rights as Amended By Protocol no. 11, section 2.

¹⁸⁷ *Barcelona Traction case* (Second Phase) (1970) ICJ Reports 3, para. 33.

that is developing in the aftermath of this judgement and the work of the International Law Commission¹⁸⁸, mark another important step in strengthening the status and universal protection of human rights. The same does the establishment of the tribunals of the former Yugoslavia, Rwanda and most importantly the newly entered into force International Criminal Court, which show that sovereignty is not any longer an absolute legal shield for the individuals acting on the behalf of the state.

The protection of human rights has become an issue of universal concern also through the practice of the Security Council. Art. 39, as one of the main provisions of Chapter 7 of the UN Charter, was meant to be a collective rule of safeguard against acts of aggressions and other threatening *international* conflicts, and art 2(7) were to prevent interventions in internal matters of States. Art. 39 reads:

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

However, the Security Council has expressed that “the absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.”¹⁸⁹ The Council has furthermore moved towards classifying national human rights violations as threats to the international peace and security¹⁹⁰, and the Council and other international bodies are increasingly intervening in internal conflicts where human rights are in serious

¹⁸⁸ See section 1.2 and Blockmans, S. “Moving Into Uncharted Waters: An Emerging Right of Unilateral Humanitarian Intervention?”, 12 *Leiden Journal of International Law* 759-786 (1999) p. 773

¹⁸⁹ The President of the Security Council, SC doc., S/23500, p. 3.

¹⁹⁰ See Brenfors M. , Petersen M. “The Legality of Humanitarian Intervention – A defense”, *Nordic Journal of International Law* 69: 449-499 (2000), p. 458 note 45

jeopardy.¹⁹¹ A precedent which confirms this is Security Council Resolution 688¹⁹² issued in relation to the situation of the Kurdish population in northern Iraq. The Security Council stated, *inter alia*, that it

“1. [c]ondemns the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region; 2. Demands that Iraq, as a contribution to removing the threat to international peace and security in the region, immediately end this repression and expresses the hope in the same context that an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens are respected.”

By this resolution, the Security Council for the first time recognized the indirect relationship between repression – mass and gross violations of human rights – and the maintenance of international peace and security.¹⁹³ Similarly, the Security Council Resolution 794 (1992) on the collective humanitarian intervention in Somalia stressed the “magnitude of the human tragedy” as warranting the intervention. This proves that the UN bodies do not consider human rights violations as a matter solely of domestic concern, but rather linked to the maintenance of international peace. Accordingly, it is now commonly agreed upon that art. 2 (7) no longer represents an obstacle to humanitarian interventions and few, if any, legal scholars contest that humanitarian interventions conducted under a UN Chapter 7 mandate is incompatible with the Charter.¹⁹⁴

The holding that the promotion of human rights clearly ranked far below the practice of national sovereignty and peace at the enactment of the Charter is therefore not a decisive argument today. While, as we have seen, the Charter it self does not appear

¹⁹¹ See Cassese, A. “Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?”, EJIL 10 (1999) 23-30 p. 4 for an overview

¹⁹² UN Doc. S/RES/688 (1991)

¹⁹³ Blockmans, S. “Moving Into Uncharted Waters: An Emerging Right of Unilateral Humanitarian Intervention?”, 12 Leiden Journal of International Law 759-786 (1999) p.777

¹⁹⁴ Akehurst’s Modern Introduction to International Law, 7th edition, Routledge London and New York (1997) p. 220

to emphasise the importance of human rights, there is clear evidence now that international law and UN practice increasingly sets aside the necessity of state sovereignty in order to ensure the protection of fundamental human rights thus linking the protection of human rights to peace.

Then, what implications do these developments have for the prohibition of force?

Brenfors and Peterson hold that "...if a state violates human rights, its right to sovereignty is of a derogatory nature to the rights of its individuals."¹⁹⁵ The protection of the sovereignty of the state provided for by art. 2 (4) should accordingly be conditioned on the respect for human rights.¹⁹⁶ Reisman concludes with the negative remark that sovereignty can never be used to "shield the actual suppression of *popular sovereignty* from external rebuke and remedy."¹⁹⁷ Proponents of a re-interpretation of art. 2 (4) thus adopt the social contract philosophy: the state only exists because its individuals have consented to give up part of their autonomy in order to obtain collective goods.¹⁹⁸ It is a mistake, they claim, to uphold the original sixteenth century theories of sovereignty as legitimating the unlimited supremacy of the monarchs of that time today.¹⁹⁹ This feudal view is described as the "Hegelian myth" – "the illusion that a state is an ethical being capable of holding rights

¹⁹⁵ Schrijver, N. "NATO in Kosovo: Humanitarian Intervention Turns into Von Clausewitz", International Law FORUM du droit international 1:155-59 (1999) p. 156, Brenfors M., Petersen M. "The Legality of Humanitarian Intervention – A defence", Nordic Journal of International Law 69: 449-499 (2000) p.462 with further references in note 69

¹⁹⁶ Brenfors M., Petersen M. "The Legality of Humanitarian Intervention – A defence", Nordic Journal of International Law 69: 449-499 (2000) p. 471. Similarly, Reisman and D'Amato argue that "popular sovereignty" has displaced the traditional state centered concept of sovereignty. In this view, a humanitarian intervention to restore the democratic and human rights of a people would be to uphold or vindicate, and not violate, the sovereignty and therefore be lawful, Reisman, M. "Sovereignty and Human Rights in Contemporary International Law", AJIL, vol. 84 (1990) p. 866

¹⁹⁷ Reisman, M. "Sovereignty and Human Rights in Contemporary International Law", AJIL, vol. 84 (1990) p. 872.

¹⁹⁸ Brenfors M., Petersen M. "The Legality of Humanitarian Intervention – A defence", Nordic Journal of International Law 69: 449-499 (2000) p. 462

¹⁹⁹ Akehurst's Modern Introduction to International Law, 7th edition, Routledge London and New York (1997) p. 17, Whiteman, M.M. "Digest of International Law", Vol.1, Department of State Publication (1963) p. 237 Reisman, M. "Sovereignty and Human Rights in Contemporary International Law", AJIL, vol. 84 (1990) p. 866. Most prominent were Niccolo Machiavelli, Jean Bodin and Thomas Hobbes

independently of the rights of its individuals.”²⁰⁰ Instead, the state’s authority and the political right to sovereignty must be seen to rest upon a “social contract” through which it is obliged to protect the right of the individuals.²⁰¹ When these rights are violated, the state’s claim to sovereignty falls and so does the shield against intervention.²⁰² In this view, sovereignty and human rights are not countering poles; an intervention for the protection of human rights supports sovereignty, the sovereignty of the people. In this vein, Reisman concluded that it was “anachronistic” to say that the United States violated Panama’s sovereignty in 1989 by launching an invasion to capture its (allegedly) illegitimate head of state.²⁰³

These contentions are morally unproblematic. In legal terms however, the problem is more complex.

Firstly, this philosophical view of popular sovereignty, which in the past was largely supported in international law along with Grotius’ “just war” theory, and which could serve to justify “humanitarian interventions”, finds little substantial support in the material rules of current international law. By the emergence of the principle of non-intervention and shift in the 20th century to a policy of non-interference and attempts to outlaw war²⁰⁴, culminating with the introduction of the prohibition of force and the proclamation of state sovereignty in the UN Charter, these theories were left behind.²⁰⁵ The inclination in the traditional concept of sovereignty and the strengthening of the popular sovereignty since the adoption of the Charter do not mean that democracy has displaced peace as the main concern of the UN Charter. As Chesterman holds in his critic of Teson, D’Amato and Reisman:

²⁰⁰ Brenfors M., Petersen M. “The Legality of Humanitarian Intervention – A defense”, *Nordic Journal of International Law* 69: 449-499 (2000) p. 461, Abiew, F.K “ The Evolution of the Doctrine and Practice of Humanitarian Intervention”, *Kluwer Law International* (1999) p. 73, 74

²⁰¹ Tsagourias, N. “Humanitarian Intervention After Kosovo and Legal Discourse: Self-deception or Self-Consciousness?” *13 Leiden Journal of International Law* 11-32 (2000) p. 20

²⁰² See other statements by Vattel, Rawls, Mills and Teson in Tsagourias, *Ibid.*

²⁰³ Reisman, M. “Sovereignty and Human Rights in Contemporary International Law“, *AJIL*, vol. 84 (1990) p. 867, p. 874

²⁰⁴ *Supra* section 1.3, Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 90

²⁰⁵ *Supra* section 1.3. At least temporarily, we might add.

“No matter what role the concept of popular sovereignty plays in modern international law, it simply does not follow that the illegitimacy of one regime entitles a foreign state – any foreign state (though one can guess which *foreign* state) – to use force to install a new and more “legitimate” regime.”²⁰⁶

This holding finds support also in the *Nicaragua* judgement. The Court held that, whatever the United States thought of the regime in Nicaragua,

“adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State. Consequently, Nicaragua’s domestic policy options, even assuming that they correspond to the description given of them by the Congress finding, cannot justify on the legal plane the various actions of the Respondent complained of.”²⁰⁷

Secondly, even if there is no doubt that the protection of human rights is of universal concern and that fundamental human rights are also *erga omnes* obligations deriving from *jus cogens*; even if the mechanisms established to protect these rights and the practice of UN bodies show that a state cannot hide behind their sovereignty to escape responsibility - or interference from the world community in terms of collective humanitarian intervention or countermeasures by individual states, it does not flow from this that art. 2 (4) now must be understood to allow the use of force to protect these rights. The question of permitting unilateral humanitarian intervention is far more complex than a problem of human rights vs. sovereignty.

To opt for an interpretation of art. 2 (4) according to which unilateral use of force could be allowed to destabilise the peace would contradict and undermine the very spine of the UN Charter’s collective enforcement system and the principles upon

²⁰⁶ Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 91-92

²⁰⁷ *Nicaragua* (Merits) (1986) ICJ Rep. 14 para 263

which it is built. It is therefore questionable whether we are re-interpreting the Charter-provisions at all, or if it is a question of treaty modification.

Moreover, the regulation of the use of force did not stagnate after 1945. Rather, the prohibition of force has strengthened its position as the cardinal rule of international relations. Parallel to the development of human rights, the inviolability and comprehensiveness of the Charter prohibition has been significantly reinforced and amplified through numerous General Assembly resolutions²⁰⁸ and, as stated in the *Nicaragua case*, now is a customary norm and maybe the clearest example of a norm of *jus cogens* character.²⁰⁹

The horizontal order of international law means that the establishment of mechanisms to enforce existing rights depend on the will of the states to do so. The protection of human rights is therefore limited to the remedies provided for in international law. The Court stated in the *Nicaragua case* that “where human rights are protected by international conventions, that protection takes the form provided for in those conventions.”²¹⁰ But neither the Charter nor other instruments have established a legal regime that allows the unilateral use force to protect violations of human rights. Notably, the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts (2000)²¹¹ art. 50 I. A), states that the universal right to resort to countermeasures in the face of violations of obligations *erga omnes*, “shall not affect...[t]he obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations.”²¹²

²⁰⁸ See *infra* section 5.3.2. Support for the authoritative status of these declarations can be found in art. 31 (2) and (3) of the VCLT regarding subsequent agreements by the parties to a treaty and the effect thereof upon treaty interpretation.

²⁰⁹ See discussion *infra* in section 5.3.2

²¹⁰ *Nicaragua (Merits)* (1986) ICJ Rep. 14 para. 267

²¹¹ GA Res. 56/83

²¹² The Drafts is generally predicted to reflect customary international law on the matter, Brownlie, I. (ed), *Basic documents in international law*, 5th ed, Oxford University press (2002), p. 300.

3.2.3 The shield of sovereignty and the risk of abuse

Recently, some scholars have emphasised the danger of dismantling the polarity between sovereignty and human rights and advocated caution when arguing for intervention to protect human rights. One argument is that a concept of sovereignty is a double-edged sword that cuts both ways in the field of human rights.²¹³ Intervening to protect the popular sovereignty, the rights of the civilians of a state, does not necessarily enhance the conditions for the people. This is often formulated as the risk of abuse when the decision to use force is left to the discretion of unilateral action.

Bennoune highlights this by referring to the intervention carried out by an international coalition lead by USA, in Iraq in 1991.²¹⁴ In terms of exercise of sovereignty, “[t]he Iraqi state offers [offered...] a Westphalian nightmare of absolutist ideas of sovereignty in their ugliest guise; an unaccountable state apparatus exercising absolute power over its terrified citizenry.”²¹⁵ This included gross violations of human rights, whose cruelty defies the imagination.

However, the regime of economic, social and military sanctions implemented in and against Iraq, partly pursuant to UN resolutions acting under Chapter 7 of the Charter, partly unilaterally by states or groups of states acting outside the scope of the UN resolutions²¹⁶, to a large extent worked against their intentions, resulting in a worsening of the humanitarian situation. That action is held to be responsible for “one of the great human atrocities of our times — more deaths than caused by all the weapons of mass destruction throughout the twentieth century, in violation of the laws of war requirements of proportionality and of discrimination between combatants and civilians.”²¹⁷ Bennoune says that “...the sanctions have devoured the most central of all human rights, the right to life, by impeding provision of essential

²¹³ Bennoune, K. “Sovereignty vs. Suffering? Re-examining Sovereignty and Human Rights through the Lens of Iraq”, EJIL 13 (2002) p. 243-262 p. 254

²¹⁴ *Ibid.* p. 244 flg.

²¹⁵ *Ibid.* p. 249

²¹⁶ See section 5

²¹⁷ Ramesh T. “Global norms and international humanitarian law: an Asian perspective”, International review of the Red Cross No, 841, p. 19-44.

medical care or drugs, clean water and adequate nutrition. They have undermined the enjoyment of the full panoply of economic, social and cultural rights...They have also infringed upon the right to work, the right to earn a decent living, as well as other rights specifically pertaining to women and to children.”²¹⁸

This example discloses that in setting aside the shield of sovereignty there is the risk that ambiguous forms of humanitarian intervention are followed by a worsening of the human rights situation; it also shows that international peace and respect of the State’s sovereignty might be of even greater importance for the individuals than intervention to protect their human rights. As Chinkin notes, “human rights give rise to responsibilities in states...These must encompass a duty not to make conditions worse for a threatened population and the obligation to respect the civil, political, economic, social and cultural rights of all civilians.”²¹⁹ Recent incidents show the risk of non-compliance to this duty when action is carried out unilaterally, and send a warning against allowing the unilateral enforcement of human rights in violation of state sovereignty.

Furthermore, allowing for unauthorised unilateral action poses the general risk that states forcibly intervene in the domestic affairs of another state claiming that the target state is engaged in violations of human rights when in fact the intervening states are simply seeking to advance their own interests by altering the political or economic structure of the target state.²²⁰ Thus, in the words of Schachter, allowing for unilateral humanitarian interventions “would introduce a new normative basis for recourse to war that would give powerful states an almost unlimited right to overthrow governments alleged to be unresponsive to the popular will.”²²¹ Needless to say, history has proven this risk to be a genuine one, and the contention that “[t]he

²¹⁸ Bennoune, K. “Sovereignty vs. Suffering? Re-examining Sovereignty and Human Rights through the Lens of Iraq”, *EJIL* 13 (2002) p. 253-254 with further references

²¹⁹ Chinkin, C. “Kosovo: A “Good” or “bad” war, 93 *AJIL* (1999) p. 841-847

²²⁰ Blockmans, S. “Moving Into Unchartered Waters: An Emerging Right of Unilateral Humanitarian Intervention?”, 12 *Leiden Journal of International Law* 759-786 (1999) p. 781

²²¹ Schachter, O. “The legality of Pro-democratic Invasion”, *AJIL*, Vol. 78, (1984) p. 649

most powerful explanation for intervention in the international system continues to be state power²²² can hardly be contested in our year 2003. Without doubt, all modern states prefer to have an international legal basis for their actions on the international level, but not all considers this necessary. This statement from the former United States Deputy Secretary of State, Strobe Talbott, about the position of NATO in the world community is illuminating:

“We will try to act in concert with other organizations, and with respect for their principles and purposes. But the Alliance must reserve the right and freedom to act when its members, by consensus, deem it necessary.”²²³

Sovereignty thus becomes a privilege of force, which is exactly what the UN Charter’s collective security system intends to avoid. Indeed, since gross human rights violations are considered a matter of universal concern, operations to ensure their protection should be carried out by the international community through the UN organs. This provides the strongest safeguard against abuse of a doctrine of humanitarian intervention. In other words, action against a global threat requires a global decision.

The abuse-argument was also put forward by the ICJ in its very first case, the *Corfu Channel case*. Mines in Albanian territorial waters in the North Corfu Channel had damaged British warships. The British responded by carrying out a minesweeping operation against the clearly expressed will of the Albanian government. The Court noted on the British interventions:

"[t]his 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 as cannot, whatever the present defects of international organisation, find a place in international law. Intervention is still less admissible in the particular form it would take here; for, from the

²²² Krasner, “Sovereignty and Intervention”, 1995 p. 249,

²²³ Simma, B. “NATO, the UN and the Use of Force: Legal aspects, 10 EJIL (1999) no. 1, p. 15

nature of things, it would be reserved for the most powerful states and might easily lead to perverting the administration of international justice itself."²²⁴

Henkin sums it well in these words:

“The principles of law, and the interpretations of the Charter, that prohibit unilateral humanitarian intervention do not reflect the conclusion that the sovereignty of the target state stands higher in the scale of values of contemporary international society than the human rights of its inhabitants to be protected from genocide and massive crimes against humanity...but reflect above all the moral political conclusion that no individual state can be trusted with authority to judge and determine wisely.”²²⁵

3.3 Conclusion

Subsequent developments in international law do not yield a re-interpretation of art. 2 (4) of the UN Charter.

²²⁴ *Corfu Channel* case [1949] ICJ Rep. 4, 15

²²⁵ Henkin, L. in “Editorial Comments: Nato’s Kosovo Intervention, *AJIL*, v. 93, no. 4 1999 p. 824

4 Article 2 (4) and the effectiveness of the collective security system

The contemporary political reality makes it difficult for the Security Council to reach a decision, and thus to give effectiveness to the Charter's "collective use of force" mechanism for restoring international peace. The paralysis of the Security Council, usually connected to the cold war era and the antagonisms between USSR and USA, is again a likely reality. An example here is Kosovo, where the probable veto of Russia and China refrained the NATO members from seeking a resolution from the Security Council. In other words, the possibility exists that the collective security system may prove unable to address and prevent "threats to peace", such as imminent humanitarian catastrophes, that might occur in the world-community in the future. Some scholars have argued that this inability of the Security Council to act effectively in the face of widespread human rights violations warrants an interpretation of art. 2 (4) according to which unilateral humanitarian intervention is permissible.²²⁶ Their theory is that should the Security Council be unable to act, a right of self-help, based on *pre-Charter customary law*, would then arise for individual states. As established above, however, it is arguable whether a customary doctrine of humanitarian intervention existed in the years before the Charter's enactment. The existence of such must is presumed in the following analysis.

Teson presents this line of argument in his recent study of humanitarian intervention. He finds support for the right of self-help in the doctrine *rebus sic stantibus* (fundamental change of circumstances).²²⁷ The prohibition on the use of force, he argues, only makes sense provided that the collective security arrangements contemplated in the Charter are effective.²²⁸ Art. 2 (4) should thus be read as

²²⁶ Lillich, R. "Forcible self-help by States to protect human rights" (1967), Iowa Law Review p. 326, Reisman and McDougal, "Humanitarian Intervention to Protect the Ibos", in R. Lillich (ed.), "Humanitarian Intervention and the United Nations" (Charlottesville: University press of Virginia, 1973), p. 167ff.

²²⁷ Tesón, F. "Humanitarian Intervention: An Inquiry into Law and Morality", Transnational Publishers, Inc. Irvington-on-Hudson, New York (2nd. Ed) (1997) p. 157

²²⁸ Tesón, F. "Humanitarian Intervention: An Inquiry into Law and Morality", Transnational Publishers, Inc. Irvington-on-Hudson, New York (2nd. Ed) (1997) p. 158

inclusive of an implicit condition, that the collective security system is able to function effectively. Failure of those security arrangements would then represent a fundamental change of circumstances that would allow to set aside the prohibition in art. 2 (4).

In contemporary international law, the doctrine of *rebus sic stantibus* is enshrined in the Vienna Convention of the Law of the Treaties art. 61 para.1, which reads:

“1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

The application of the doctrine as enshrined in the VCLT art. 61 (1) is problematic on at least two points.

First of all, it is doubtful whether one can say that it was not foreseen that the reality of world politics could make it difficult for the Security Council to act. The Security Council is a political organ constituted by five great world powers. By implementing a voting procedure that gives veto to these states, the possibility of inaction due to conflicting political interests must have been foreseen. As Brownlie remarks, the veto was part of the Charter and cannot be considered as a subsequent fault in performance.²²⁹ That this possibility was indeed in the thoughts of the drafters finds support in the preparatory works.²³⁰

²²⁹ Brownlie, I, “Thought on Kind-Hearted Gunmen”, Lillich (ed), “Humanitarian Intervention and the United Nations”, University of Virginia Press (1973) p. 141

²³⁰ Constantine A. “The unilateral use of force by states in international law”, Ant.N.Sakkoulas Publishers Athens – Komotini 1997 p. 418

Secondly, can the Security Council's intervention within the domestic sphere of another state have been an "essential basis" for the Member states to enter the Charter? The overarching construction of the Charter runs counter to this assumption. One of the main principles upon which the security system was built was indeed the principle of non-intervention in internal affairs of another state, independently of the circumstances within that state.²³¹ As noted repeatedly above, it was fundamental for the UN Charter to protect the sovereignty of the states as a means of waging armed conflicts. The fact that art. 2 (7) in today's interpretation is considered to be no obstacle to intervention on humanitarian grounds, or that "threats to peace" have come to include also internal human right affairs, is not relevant in this context, as the real question is what circumstances the Member states had in mind at the time of the enactment of the Charter. There is no support for the contention that the majority of Member states of the UN have accepted this conditional validity of Charter obligations. We need only to recall the "Uniting for Peace" General Assembly resolution (1950), in which the General Assembly declares, *inter alia*:

"Conscious that failure of the Security Council to discharge its responsibilities on behalf of all the Member States...does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security."²³²

²³¹ UN Charter art. 2 (7)

²³² GA Res. 377(5), 302nd Plen.Meeting, 3 Nov. 1950. Despite its wording "uniting for peace", which suggests that it is only through the General Assembly that actions potentially could be taken according to the Resolution, some scholars and states have argued that it allows for action by individual states when the collective security system fails. This argument is commonly presented together with an alleged subsidiary responsibility for the member states to maintain peace and security when the primary organ, the Security Council, is unable to do so, with reference to the UN art. 24, see e.g. the Norwegian Minister of Foreign affairs Vollebæk in "Interpellasjonsdebatt", Stortinget 5, 27. april 1999. This line of argument finds little support in legal doctrine. First of all, when art. 24 confers "primary responsibility" upon the Security Council for the maintenance of peace and security, it implies a secondary responsibility of other UN organs, notably the General Assembly, but not of the member States, see Rytter, J.E. "Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond", *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001) p. 121, p. 130 and Simma, B. "The Charter of the United Nations – a commentary", vol. 1, Oxford University Press (2nd. Ed) (2002) p. 445ff. The "Uniting for Peace" Res., moreover, is commonly understood to regard the relationship between the UN organs, i.e. the SC and GA, and not between

Art. 2 (4) can therefore not be held to be conditioned on the effective functioning of the security mechanisms of the Charter and the doctrine of *rebus sic stantibus* is not applicable.

Practice of the ICJ also rejects an application of such a doctrine. In its first case, the *Corfu Channel case*²³³, the ICJ was confronted with the question of what were to happen if the institutional mechanisms for conflict failed.²³⁴ The court, although without referring specifically to art. 2 (4), refused to consider “defects in the present organization” as justifying the British violation of Albanian sovereignty. The Court wrote²³⁵:

“The court can only regard the alleged right of intervention as a policy of force, such as has, in the past, given rise to the most serious abuses and such as cannot, *whatever be the present defects in the international organization*, find a place in international law.”²³⁶

A further rejection of the doctrine *rebus sic stantibus* follows from the *Nicaragua case*. Amplifying the *Corfu Channel case*, the Court said that the customary prohibition of the use²³⁷ of force is not “conditioned by provisions relating to collective security...[The principle of non-use of force should therefore] be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter.”²³⁸

Thus, even if the provision in art. 2 (4) were conditioned upon the effectiveness of the collective enforcement system, the customary principle of non-use of force would

the UN organs external organisations or individual states, Simma *ibid.* p. 450. And, the secondary responsibility that the resolution confer upon the General Assembly is generally held not to include the competence to authorise humanitarian intervention or recommend any use of force, which would otherwise be unlawful, see Rytter, J.E. “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001) p. 121, p. 131.

²³³ *Corfu Channel case* [1949] ICJ Rep. 4, p. 15

²³⁴ See facts in section 3.2.3.

²³⁵ Quoted also in section 3.2.3.

²³⁶ *Corfu Channel case* [1949] ICJ Rep. 4, p. 35, emphasis added

²³⁷ See *infra* section 5.3.2 for a discussion of the customary principle of the prohibition of force

²³⁸ *Nicaragua (Merits)* (1986) ICJ Rep. 14 para. 188

be in the way for unilateral use of force because the doctrine *rebus sic stantibus* does not apply to the customary rules.

The ineffective functioning of the Security Council must thus be abandoned as an argument of a customary right of unilateral humanitarian intervention.

5 Is article 2 (4) modified by subsequent state practice?

5.1 Introduction

The task of this section is to see whether the prohibition of the use of force in art. 2 (4) is modified through state practice subsequent to the enactment of the UN Charter and must now be considered to permit unilateral use of force to protect fundamental human rights.

A treaty can be subject to modification. This flows from the contractual aspect and horizontal structure of international law. A modification can take place through the formal mechanisms of modifications or amendments as provided for in a treaty²³⁹, or it can be informal as a consequence of development in state practice subsequent to the treaty has entered into force. The relevant issue in thesis is informal modification.²⁴⁰

Section 2.2.2 drew the line between subsequent practice as a factor in the interpretation of the treaty and as a means of modifying a provision. The distinction was drawn between practice that develops *sub lege*, which becomes a factor in the interpretation, and practice that develops *contra legem*, which might lead to an informal modification of the treaty. The interpretative discourse ruled out any unilateral use of force as compatible with the scope of art. 2 (4). The incidents of “humanitarian interventions” in apparent violation of art 2 (4) occurred since the enactment of the Charter are thus practice that develops *contra legem*.

Informal modification as a result of subsequent practice can potentially take two forms. The first possibility is that a customary norm emerges and according to the principle of *lex posterior* or *lex specialis* changes or takes the place of an existing

²³⁹ As for the Charter, see arts. 108 and 109

²⁴⁰ Formal modification of the UN Charter has never taken place.

treaty-rule.²⁴¹ The modified rule will in this case be a new norm of customary status retaining validity outside the treaty regime and thus bind also third states that are not parties to the treaty. The practice constituting the modification would have to satisfy the requirements of a customary process.²⁴²

Secondly, it may be possible that state practice develops within a treaty regime. This is characterized by a practice between the parties to the treaty that reflects a new common will among the parties and thus suggests a modification to the existing treaty rule. This new modified rule, however, will not acquire validity outside the treaty context.

Consequently, insofar as the original treaty rule is expressing customary law, a modification of the norm would require a subsequent practice that fulfils the requirements to customary law.

5.2 Informal modification

There is no explicit regulation of informal modification of treaties in international legal doctrine. The only situation in which the Vienna Convention of the Law of the Treaties deals with the impact of subsequent state practice is with respect to the interpretation of treaties²⁴³ and with respect to the emergence of a *jus cogens* norm.²⁴⁴ Art. 64 reads

“If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates”.

²⁴¹ International customary law and treaties are as legal sources equal, the prevailing source in case of conflict depends on other factors, notably the character of the individual norms. A consequence of the normative equality between customary law and treaty law, subsequent customary law can modify treaty based on the principles of *lex posterior* or *specialis*. A customary rule may also exist before or parallel to a treaty rule and prevail over the latter based on *lex specialis*.

²⁴² See *infra* in section 5.4

²⁴³ VCLT art. 31.3 b) and *supra* in section 2.2.2

²⁴⁴ art. 64

This article indicates that at least one potential category of subsequent state practice may have significant effects on pre-existing treaties.²⁴⁵

However, the ILC, in its 1966 Draft articles, seem to have anticipated that treaty rules could be modified through subsequent state practice also outside the scope of art. 64. In the 1966 Draft Articles on the Law of the Treaties, art. 38 provided:

A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provision.²⁴⁶

The article prescribed the manner in which a modification can take place within a treaty-regime. However, this clause did not receive the necessary support to be included in the in the VCLT.²⁴⁷ This did not mean that a principle of informal modification of treaties by subsequent practice was rejected, but that the VCLT was not considered appropriate to deal with this issue. One main reason for this was that the drafters did not want to touch upon the complex relationship between custom and treaties.²⁴⁸ Accordingly, most scholars hold that the drafting process did not affect pre-existing norms on treaty modification. As Karl puts it, “at least, there was no adverse *opinio juris* against...[informal] modification of treaties²⁴⁹. Similarly, Akehurst holds that it is “difficult to interpret the deletion of Article 38 as a clear rejection of the view that existing law allowed a treaty to be amended by subsequent practice.”²⁵⁰

²⁴⁵ Byers, M. “Custom, Power and the Power of Rules”, Cambridge University Press (1999) p. 175

²⁴⁶ YBILC 1966-“, s. 236,

²⁴⁷ Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 58

²⁴⁸ Bowett, R. “Treaty revision in the light of the evolution of the customary international law”, 5 AJCIL, 1993, p. 88

²⁴⁹ Karl, Vertrag und Spätere Praxis im Völkerrecht, Berlin, 1983, s. 389, referred in Sevastvik, P. “Informell modifikation av traktater till följd av ny sedvanerätt och praxis”, Nordstedts Juridik (2002) p. 273

²⁵⁰ Akehurst, M. “The subjective element in the formation of customary international law”, 47 BUBIL 1974/1975, s. 277

The issue of informal modification of treaties should therefore be dealt with under the rules of customary law. The preamble of the VCLT reads, *inter alia*, that "the rules of customary international law will continue to govern questions not regulated by the provision of the present Convention."

In legal doctrine it is widely agreed that modification of treaty rules through the process of customary law or subsequent practice is possible. However, uncertainty and disagreement exist as to the mode in which such changes could occur.²⁵¹

In its commentary to its 1966 draft articles, the ILC refers to two cases in which international tribunals have recognised a process of modification based on state practice or customary international law.²⁵² In the *Temple Case*²⁵³ the ICJ wrote:

"The Court considers that the acceptance of the Annex 1 map by the Parties caused the map to enter the treaty settlement and to become an integral part of it...In other words, the Parties at that time adopted an interpretation of the treaty settlement which caused the map line, in so far as it may have departed from the line of the watershed, to prevail over the relevant clause of the treaty."²⁵⁴

Similarly, in its interpretation of the Air Service Agreement of 27 March 1946 between France and the United States, the arbiters held that the relevant treaty had been modified "by virtue of an agreement that implicitly came into force."²⁵⁵

Numerous examples of multilateral treaties being modified by subsequent practice may be found in the Law of the sea²⁵⁶, where concepts such as the 12 mile territorial

²⁵¹ Byers, M. "Custom, Power and the Power of Rules", Cambridge University Press (1999) p. 175, Chesterman, Simon, "Just War or Just Peace", Oxford University Press (2001) p. 60

²⁵² [1964] 2 YILC 198; [1966] 2 YILC 236, referred in Chesterman, S. "Just War or Just Peace", Oxford University Press (2001) note 83 at p. 58

²⁵³ *Temple Case* (1962) ICJ Rep. 6

²⁵⁴ *Ibid.* at p. 33-34

²⁵⁵ *Air Transport Services Agreement Arbitration* (1963), reprinted in 38 ILR 182, 253, referred in Chesterman, S. "Just War or Just Peace", Oxford University Press (2001) in note 85 at p. 58.

sea and the 200 mile exclusive economic zone both emerged from subsequent state practice, significantly modifying provisions of the 1958 Geneva Convention on the High seas and the 1958 Geneva Convention on the Territorial sea and the Contiguous zone.²⁵⁷

The *Namibia Advisory opinion*²⁵⁸ dealt with the impact of subsequent practice for the understanding of the UN Charter art. 27 (3). Art. 27 (3) provides that decisions of the Security Council on non-procedural matters “shall be made by an affirmative vote of nine members including the concurring votes of the permanent members”. The question before the Court was whether Security Council Resolution 284 lacked the concurring votes of the permanent members as required by art. 27 (3) as a result of abstentions by the Soviet Union and the United Kingdom, and thus would have to be considered invalid. The Court held:

“the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by permanent member as not constituting a bar to the adoption of resolutions...This procedure...has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.”²⁵⁹

Legal doctrine is split upon the question whether this “general practice” amounted to an authoritative interpretation of the Charter, or a modification as a result of practice within the treaty regime or the emergence of a new customary law.²⁶⁰

²⁵⁶ Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 58, Byers, M. “Custom, Power and the Power of Rules”, Cambridge University Press (1999) p. 173-174, Sevastvik, P. “Informell modifikation av traktater till följd av ny sedvanerätt och praxis”, Nordstedts Juridik (2002) p. 384

²⁵⁷ Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 58 and Byers, M. “Custom, Power and the Power of Rules”, Cambridge University Press (1999) p. 173-4

²⁵⁸ *Namibia Advisory opinion* (1971) ICJ Rep 16

²⁵⁹ *Namibia Advisory opinion* (1971) ICJ Rep 16, para 22

²⁶⁰ See Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 59 with further references in note 97 and 98.

Wolke holds that the subsequent practice in question in the *Namibia Opinion*, "being clearly at variance with the text of Article 27 (3), cannot be considered merely as its interpretation, but also as its amendment by accepted practice, that is custom...One must conclude, then, that precisely law-making by custom still constitutes an invaluable means for the development of international law in the present multiplied and divided society of States."²⁶¹

The same view is held by Byers and Eek.²⁶² Kontou, on the other hand, claims that it is "a case of treaty modification by subsequent practice between the parties...The treaty is, as a result, modified by means of tacit agreement between the parties [and not] by the emergence of a new rule of general customary law..."²⁶³ He refers to the second mode of informal modification of treaties sketched above in section 5.1, that is, modification by practice within a treaty regime by means of tacit agreement or common consent.²⁶⁴

It is not necessary to resolve this debate in this context. As Byers maintains, most of the cases mentioned in this paragraph could "concern either the interpretation of treaties or the modification of the internal procedures of an international organization by its member States, rather than recognition of the possibility of the customary process modifying treaty rules through subsequent State practice."²⁶⁵ With regard to the *Namibia Opinion*, Chesterman rightfully points out that the ruling itself is ambiguous, referring both to "interpretation" and "practice."²⁶⁶

²⁶¹ Sevastvik, P. "Informell modifikation av traktater till följd av ny sedvanerätt och praxis", Nordstedts Juridik (2002) in note 68, p. 303

²⁶² Byers, M. "Custom, Power and the Power of Rules", Cambridge University Press (1999) p. 177-180, Eek, "Folkretten", 4th edition, Nordstedts 1987, referred in Sevastvik, P. "Informell modifikation av traktater till följd av ny sedvanerätt och praxis", Nordstedts Juridik (2002) p. 303

²⁶³ Kontou, N. "The Termination and Revision of Treaties in the Light of New Customary International Law", Oxford, 1994, p. 125

²⁶⁴ See Sevastvik, P. "Informell modifikation av traktater till följd av ny sedvanerätt och praxis", Nordstedts Juridik (2002) p. 384 for an account of this criterion to practice

²⁶⁵ Byers, M. "Custom, Power and the Power of Rules", Cambridge University Press (1999) p. 173

²⁶⁶ Chesterman, S. "Just War or Just Peace", Oxford University Press (2001) p. 60-1 and *Namibia Advisory opinion* (1971) ICJ Rep 16 para 22., Dinstein, Y. "War, aggression and self-defence", Cambridge University Press (2001) (3rd.ed) p. 88

We can conclude that informal modification of treaties based on subsequent state practice is possible, although the mode of modification is not at all as clear as sketched in the introductory paragraph to this section. In relation to the UN Charter, the threshold of requisite practice would be high.²⁶⁷

5.3 The question of modification of article 2 (4) of the UN Charter

5.3.1 Initial comments on the possible modification of the rule in art. 2 (4)

Because the provision in art. 2 (4) is generally held to express a *jus cogens* customary norm²⁶⁸, it is not sufficient for a modification of the principle it enshrines that the practice by the parties to the UN Charter (despite the fact that this includes virtually all states) reflects a “common consent”. To modify also the customary norm, the subsequent practice would have to reflect a “general practice accepted as law”, in the sense of the Statute of the International Court of Justice art. 38.²⁶⁹ Furthermore, the question arises whether and how a norm of *jus cogens* character can be modified. The next section discusses the status of the prohibition of force as customary law and *jus cogens*.

5.3.2 Article 2 (4) as customary law and *jus cogens*. The *Nicaragua case*

The Court held in the *Nicaragua case* that “[t]he principle of non-use of force...may...be regarded as a principle of customary law.”²⁷⁰ This is also the predominant view in international legal doctrine. As held by the International Law Commission in 1966:

²⁶⁷ Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 60, note 101

²⁶⁸ *Ibid.* See also section 2.1

²⁶⁹ www.icj-cij.org/icjwww/icj002.htm. See infra section 5.4

²⁷⁰ *Nicaragua (Merits)* (1986) ICJ Rep. 14 para. 188

“the great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force.”²⁷¹

The norm in art. 2 (4) and the customary principle are not just coexisting, but also independent of each other.²⁷² The Court said in the *Nicaragua case* that ” [t]he existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the North Sea Continental Shelf cases...”²⁷³ Such rules “retain a separate existence.”²⁷⁴ Indeed, “[b]oth the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations”²⁷⁵, but the customary law has developed under influence of the Charter “to such an extent that a number of rules contained in the Charter have acquired a status independent of it.”²⁷⁶ Thus, the Court noted, “customary international law continues to exist and apply, separately from international treaty law, even where the two categories of law have an identical content.”²⁷⁷

These passages provide an authoritative statement on the customary status of the prohibition of force. The Court noted on the degree of overlapping between the customary and treaty norm:

“The Court does not consider that, in the areas of law relevant to the present dispute, it can be claimed that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in the treaties which cannot be applied by virtue of the United States reservation. On a number of points, the areas governed by the two sources of

²⁷¹ ILC Yearbook, 1966, Vol. 2, p. 247

²⁷² See supra section 4 about the significance of this for the application of the doctrine of *rebus sic stantibus*

²⁷³ *Nicaragua* (Merits) (1986) ICJ Rep. 14 para 177

²⁷⁴ *Nicaragua* (Merits) (1986) ICJ Rep. 14 para 178

²⁷⁵ *Nicaragua* (Merits) (1986) ICJ Rep. 14 para 181

²⁷⁶ *Nicaragua* (Merits) (1986) ICJ Rep. 14 para 181

²⁷⁷ *Nicaragua* (Merits) (1986) ICJ Rep. 14 para 179

law do not exactly overlap, and the substantive rules in which they are framed are not identical in content.”²⁷⁸

Charter and customary norms are thus not completely identical. But in essence, there is no marked divergence between them, for customary international law has solidified under the influence of the Charter.²⁷⁹

As a confirmation of the validity as customary law of the principle of the prohibition of the use of force in art. 2 (4), the Court declared in the *Nicaragua case* that

“it [the prohibition of the use of force] is frequently referred to in statements by State representatives as being not only a principle of customary law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that “the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having character of *jus cogens*.”²⁸⁰

In determining the tenor of customary international law, the Court furthermore relied on the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, unanimously adopted in 1970 by the UN General Assembly.²⁸¹ The Declaration reiterates the language of art. 2 (4) and refers to “[e]very state” and not just “[a]ll Members”²⁸², and therefore, in the words of the Court, “the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question.”²⁸³

²⁷⁸ *Nicaragua* (Merits) (1986) ICJ Rep. 14 para 175

²⁷⁹ *Nicaragua* (Merits) (1986) ICJ Rep. 14 para 181, Dinstein, Y. “War, aggression and self-defence”, Cambridge University Press (2001) (3rd.ed) p 91

²⁸⁰ *Nicaragua* (Merits) (1986) ICJ Rep. 14 para. 190

²⁸¹ GA Res. 2625 (25), 25 R.G.A. 121 (1970), see *Nicaragua* (Merits) (1986) ICJ Rep. 14 para 191

²⁸² The Declaration, *Ibid.*, p. 122, *Nicaragua* (Merits) (1986) ICJ Rep. 14 para 191

²⁸³ *Nicaragua* (Merits) (1986) ICJ Rep. 14 para 191

Since 1945 the UN General Assembly has issued numerous resolutions that amplify the prohibition in art. 2 (4) and shed light on the *opinio juris* as to its customary existence.²⁸⁴ In addition to the *Declaration on Friendly Relations* these include, *inter alia*, GA Res. 375 (1949) on the *Rights and Duties of States*, which states, that every state has the duty to refrain from intervention in the internal or external affairs of any other state; GA Res. 2131 (1965) on the *Inadmissibility of Intervention*, which says that “[n]o state has the right to intervene, directly or indirectly, for any reason whatsoever, 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, economical and cultural elements, are condemned”; GA Res 3314 (1974), the *definition of aggression*, stating that “no consideration of whatever nature, whether political, economic, military or otherwise, may serve as justification for aggression”. The two latter Resolutions were also held to evidence the customary principle of non-use of force in the *Nicaragua case*.²⁸⁵ Worth mentioning is also statement by the G77 group, constituted nowadays by 133 non-industrialised states, which after the Kosovo incident declared that unilateral humanitarian intervention is illegal under international law.²⁸⁶

Dinstein rightfully points out that the Court only stressed the *opinio juris* of states, and not their actual behaviour. The widespread inter-state force contrary to the prohibition of the use of force has lead some scholars to deny the existence of a customary status of art. 2 (4). T.M. Frank contended in 1970 that the prohibition of the use of force is “eroded beyond recognition”²⁸⁷ in world affairs. Other scholars considered exaggerate this contention indeed. The fact that the prohibition is violated does not suggest the disappearance of the norm itself.²⁸⁸ As Schachter notes, “no

²⁸⁴ *Nicaragua (Merits)* (1986) ICJ Rep. 14 para 193, Villiger, M.E. “Customary International Law and Treaties”, Kluwer Law International (1997) (2nd.ed) p. 21.

²⁸⁵ *Nicaragua case*, *ibid.* para 195 and para 203

²⁸⁶ www.g77.org/docs/declaration_g77summit.htm

²⁸⁷ Frank, T.M. “Who killed article 2 (4)? Or: Changing norms governing the use of force by states”, 64 AJIL (1970) p. 835

²⁸⁸ Henkin, L. “The reports of the death of art. 2 (4) are greatly exaggerated”, 65 AJIL (1971) p. 544

state has ever suggested that violations of art. 2 (4) have opened the door to the free use of force.”²⁸⁹

The Court held in *Nicaragua* that

“[i]t is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force...The Court does not consider that, for a rule to be established as customary law, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as an indication of the recognition of a new rule.”²⁹⁰

There is therefore every reason to contend that the norm in UN art. 2 (4), or at least major parts of it, express a customary rule.

The next question is whether the norm in art. 2 (4) and customary law prohibiting the use of inter-state force is a norm of *jus cogens* character.

According to VCLT art. 53, a norm of *jus cogens* is

“a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

The article makes it clear that a norm of *jus cogens* character can only be altered by a norm carrying the same status. This raises the threshold for evidence of an emerging

²⁸⁹ Schachter, O. “In defence of international rules on the use of force”, UCLR 131 (1986), referred in Dinstein, Y. “War, aggression and self-defence”, Cambridge University Press (2001) (3rd.ed) p. 89 . See also Henkin, L. *Ibid.* p. 547 in note 160

²⁹⁰ *Nicaragua* (Merits) (1986) ICJ Rep. 14 para 186

customary norm still higher. VCLT art. 64 states that “[i]f a peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.” This wording would seem to indicate that should a new customary *jus cogens* norm emerge, it would terminate the UN Charter. This would be an absurd result of the dynamic of international law, and could not sensibly apply to the UN Charter.²⁹¹

The VCLT does not give any indications as to whether art. 2 (4) of the UN Charter is a *jus cogens* norm. But the International Commission identified in its commentary on the draft of the VCLT the prohibition on the use of force as “a conspicuous example” of *jus cogens*.²⁹² The commission’s position was quoted by the ICJ in the *Nicaragua case*.²⁹³ See also separate opinion of President Singh: “the principle of non-use of force belongs to the realm of *jus cogens*.”²⁹⁴ The same view was confirmed in the separate opinion of Judge Sette Camara²⁹⁵. This holding appears to be generally accepted in international legal doctrine.²⁹⁶ However, it is not certain whether the peremptory content of the ban coincides perfectly with the rule in art. 2 (4).²⁹⁷

We can thus conclude that the principle enshrined in art 2 (4) is customary law and *jus cogens*. A modifying norm would therefore have to satisfy the requirements to the formation of customary law and also carry *jus cogens* status.

²⁹¹ Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 60

²⁹² Report of the International Law Commission, 18th Session (1996) 2 YILC 172, pp. 248-9

²⁹³ *Nicaragua* (Merits) (1986) ICJ Rep. 14 para 190

²⁹⁴ *Nicaragua* (Merits) (1986) ICJ Rep. 14 at p. 153

²⁹⁵ *Nicaragua* (Merits) (1986) ICJ Rep. 14 at p. 199

²⁹⁶ “Restatement of the law, The foreign relations law of the United States”, The American Law Institute, Vol. 1 at 28, Cassese, A. “The current legal regulation of the use of force”, Martinus Nijhoff Publishers (1986) p. 150, Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 60, Gray, C. “International Law and the Use of Force”, Oxford University Press (2000) p. 24

²⁹⁷ Cassese, A. “The current legal regulation of the use of force”, Martinus Nijhoff Publishers (1986) p. 150

5.3.3 The *Nicaragua case* and the rejection of the use of force to protect human rights

The possible emergence of a customary legal right of intervention was examined in the *Nicaragua case*.

The case concerned Nicaraguan allegations against the United States concerning certain US military actions (including laying of mines in Nicaraguan territorial waters), and the American support given to the *contras*. The USA did not actually invoke the doctrine of humanitarian intervention to justify its support for the *contras*, but the court nevertheless considered whether the protection of human rights might provide a legal justification for the US use of force. The part of the judgement which deals with this question provides an authoritative statement of the law on this area; it has proved relatively uncontroversial among commentators.²⁹⁸ As the Charter of the United Nations was ruled inapplicable due to an American reservation to its acceptance of the jurisdiction of the Court,²⁹⁹ the dispute was resolved on the basis of the corresponding obligations in international customary law.³⁰⁰ The Court found, by twelve votes to three, that by its acts in support of the *contras*, the US had acted contrary to customary law, notably, the principle of non-intervention, and that it by the attacks on the Nicaraguan territory they had violated the customary principle of the prohibition of the use of force.³⁰¹

On the question of modification of the customary principle of non-intervention, the Court initially held that

“The significance for the Court of cases of State conduct *prima facie* inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance

²⁹⁸ Gray, C. “International Law and the Use of Force”, Oxford University Press (2000) p. 54

²⁹⁹ *Nicaragua (Merits)* (1986) ICJ Rep. 14 para 42-43

³⁰⁰ See *supra* section 5.3.2.

³⁰¹ *Nicaragua (Merits)* (1986) ICJ Rep. 14 para 292

by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law.”³⁰²

In the view of the court, no such reliance could be proved. The Court asserted that states do not have a right of collective armed response to acts that do not constitute an armed attack³⁰³, thus excluding any other exceptions to the prohibition of the use of force than the right to individual or collective self-defence.³⁰⁴ As to the allegations that Nicaragua had violated human rights, the Court noted that “where human rights are protected by international conventions, that protection takes the form...provided for in the conventions themselves.”³⁰⁵ And in any event, while the United States were free to form their own opinion about the Nicaraguan respect for human rights,

"the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot in any event be reconciled with the legal strategy of the respondent State, which is based on the right to self-defence.”³⁰⁶

This passage of the ruling appears to be the Court’s first (implicit) reference to humanitarian intervention. In its broad terms, most notably the first phrase in para 268 “the use of force could not be the appropriate method...”, the ruling narrowly construed the ability of states to resort to armed force³⁰⁷ thus rejecting any right to use force to protect human rights. The Courts conclusion based on the customary norm of non-intervention and non-use of force thereby supports the conclusion

³⁰² *Nicaragua* (Merits) (1986) ICJ Rep. 14 para 207

³⁰³ *Nicaragua* (Merits) (1986) ICJ Rep. 14 para 249

³⁰⁴ Falk, M. “The Legality of Humanitarian Intervention – A review in Light of Recent UN Practice”, Jurisförlaget, (1996), p. 46

³⁰⁵ *Nicaragua* (Merits) (1986) ICJ Rep. 14 para 267

³⁰⁶ *Nicaragua* (Merits) (1986) ICJ Rep. 14 para 268

³⁰⁷ Murphy, S.D., “Humanitarian intervention – The United Nations in an Evolving World Order” (1996) p. 129

derived in section 2 from a textual interpretation of the conventional rule in art. 2 (4). The general view among legal writers is also that the position of the Court is inconsistent with a customary international law right of humanitarian intervention.³⁰⁸

However, some scholars have argued for a narrow interpretation of the judgment.³⁰⁹ If read isolated from the rest of the judgement, the second part of para 268, starting with the words “[w]ith regard to the steps actually taken...”, could be read to indicate that the Court did not on a general basis rule out the use of force to protect human rights, but rather rejected that the use of force was adequate *in this case* based on the *specific facts* in question. One of the proponents of this view is Teson. He submits that the courts holding “should be interpreted as declaring only the illegality of *disproportionate forcible intervention to restore democracy*”³¹⁰ and that the holding on the use of force to protect human rights can only claim authority for that specific case: i.e. that the forcible methods applied by the US were not justified upon the facts present in this case because a) the human rights violations were not grave enough and b) the methods applied were not adequate.³¹¹ This view is to some extent also supported by the Court’s holding concerning the provision of humanitarian aid. To this respect the Court observed that there could be

“no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or in any other way contrary to international law.”³¹²

Chesterman opposes these narrow readings of the case. He admits on the basis of the Court’s holding on the lawfulness of humanitarian aid that “the judgement can (at

³⁰⁸ Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 62, Rodley, N.S. “Human rights and Humanitarian intervention: The Case Law of the World Court”, (1989) 38 ICLQ 332, Gray, C. “International Law and the Use of Force”, Oxford University Press (2000) p. 28

³⁰⁹ Murphy, S.D., “Humanitarian intervention – The United Nations in an Evolving World Order” (1996) p. 129, Tesón, F. “Humanitarian Intervention: An Inquiry into Law and Morality”, Transnational Publishers, Inc. Irvington-on-Hudson, New York (2nd. Ed) (1997) p. 270

³¹⁰ Tesón, F. “Humanitarian Intervention: An Inquiry into Law and Morality”, Transnational Publishers, Inc. Irvington-on-Hudson, New York (2nd. Ed) (1997) p. 207

³¹¹ *Ibid.*

³¹² *Nicaragua* (Merits) (1986) ICJ Rep. 14 para 242

best) be said to be not incompatible with a narrow right of humanitarian intervention”, but adds that “such an analysis is merely directed at importing common-law principles to narrow the ratio of the case, however, and in no way provides support for the contrary position.”³¹³ Legal theory is generally sceptic to the narrow view of the Court’s holding. Teson’s interpretation is, in Simma’s words, “clearly too narrow”, if not subtle. The Court’s holding on the specific measures applied in this case must be read against the background of the whole judgment, after which the Courts standing should be understood to proscribe the use of force for humanitarian motives as a matter of principle, rather than as one of “scale and effects.”³¹⁴

Thus, the *Nicaragua case* provides a strong argument against the holding that the norm enshrined in art. 2 (4) is modified by new customary law. It confirms the conclusion derived from the textual interpretation, that unilateral use of force to protect human rights is not permissible under international law.

³¹³ Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 62

³¹⁴ Simma, B. “The Charter of the United Nations – a commentary”, vol. 1, Oxford University Press (2nd. Ed) (2002) p. 131 n. 156. See also Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 62 who rejects the view that the judgment can be confined to its statements on the disproportionate use of force.

5.4 The formation of customary law and unilateral humanitarian intervention

5.4.1 Introduction

The purpose of this section is to analyse the alleged “humanitarian interventions” conducted after the enactment of the Charter and to examine whether they have developed a customary norm modifying art. 2 (4) of the UN Charter. A full-scale survey of state practice, however, is not within the scope of this thesis. Numerous studies have been conducted during the last years, most of which are already mentioned in this work. This section is based on the main observations in these studies. The most prominent and interesting studies conducted recently are probably that of Chesterman, who rejects the emergence of such a doctrine, and that of Teson, who supports it. They seem to stand out for the two main contrasting views, although Teson’s view is one of a small minority among legal scholars.³¹⁵

5.4.2 The starting point: “General practice accepted as law”

Art. 38 of the ICJ Statutes defines international customary law as a “general practice accepted as law”. “[G]eneral practice” refers to the objective element and “accepted as law” to the subjective element of international custom. The objective element is constituted by what the States actually do – the convergence of state actions, while the subjective element consists of the States conviction that they follow the practice

³¹⁵ Rejecting the emergence of a doctrine of unilateral humanitarian intervention, see, *inter alia*, Rytter, J.L. “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001) p. 121, Sevastvik, P. “Informell modifikation av traktater till följd av ny sedvanerätt och praxis”, *Nordstedts Juridik* (2002), Cassese A. “Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?”, *EJIL* 10 (1999) 23-30, Simons, Penelope C, “Humanitarian Intervention: A Review of the Literature”, <http://www.ploughshares.ca/content/Working%20PAPERS/wp012.html>, Cassese, A. “A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*”, *EJIL* Vol. 10 (1999) p. 791, Murphy, S.D., “Humanitarian intervention – The United Nations in an Evolving World Order” (1996), Harhoff, F. “Unauthorized Humanitarian Interventions – Armed Violence in the Name of Humanity?” *Nordic Journal of International Law* 70:65-119 (2001), Gray, C. “International Law and the Use of Force”, Oxford University Press (2000), Farer, T.J., “An inquiry into the legitimacy of Humanitarian intervention”, in L. Damrosch and D. Scheffer (eds), *Law and Force in the New International order* (1991), Falk, M. “The Legality of Humanitarian Intervention – A review in Light of Recent UN Practice”, *Jurisforlaget*, (1996)

as a matter of law.³¹⁶ The objective and subjective criteria are cumulative: the raw material of customary law – the state practice or *diuturnitas* – can only transform into customary law if it is accompanied by an *opinio juris* – a convinced legal obligation. This was first held in the *North Sea Continental Shelf* case and reaffirmed in the *Nicaragua case*:

“[f]or a new customary rule to be formed, not only must the acts concerned ‘amount to a settled practice’, but they must be accompanied by the *opinio juris sive necessitates*.”³¹⁷

The minimum requirement to the emergence of a customary norm that could lead to a modification of art. 2 (4) making unilateral humanitarian intervention permissible would thus be that incidents of interventions must amount to a “general practice” and be conducted upon the conviction that the conduct is according to the law. As it regards a custom in derogation of maybe the most fundamental rule of international law, the prohibition of force, the evidence of practice and *opinio juris* would have to be overwhelming.³¹⁸ The practice and *opinio* must also be evidence that the new rule carries a *jus cogens* status, according to VCLT art. 53, which raises the threshold for evidence of the countervailing norm still higher.³¹⁹

5.4.3 “General practice” – the objective element

5.4.3.1 Introduction

There are two main issues that need to be addressed regarding the objective element in the formation of customary law. First, it is necessary to determine what constitute “state practice”. Second, the requirements to this practice must be determined. Three

³¹⁶ Villiger, M.E. “Customary International Law and Treaties”, Kluwer Law International (1997) (2nd.ed) p. 48

³¹⁷ *Nicaragua* (Merits) (1986) ICJ Rep. 14, para 207

³¹⁸ Rytter, J.E. “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001) p. 121, p. 137

³¹⁹ Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 60

factors are generally discussed in relation to the latter question; generality; uniformity or consistency of practice; duration.³²⁰

5.4.3.2 “State practice”

The Court stated in the *Continental Shelf case* (Libya vs. Malta) that the substance of customary law must “be looked for primarily in the actual practice...of States.”³²¹ We must therefore look for evidence of state practice in the alleged precedents of “unilateral humanitarian intervention”. These state conducts can only be considered “state practice”, and thus potentially evolve in to a customary norm, if they answer to the definition outlined in section 1.2.

The majority of legal commentators hold that few, if any of the alleged incidents of humanitarian intervention can be considered genuine state practice as such. Simma sums it up with these words: “State practice in the past two centuries, and especially since 1945, at best provides only a handful of genuine cases of humanitarian intervention, and, on most assessments, none at all.”³²²

Most cases of interventions are questionable as precedents because they have been conducted upon utterly mixed motives and very often other than humanitarian. Section 1.2 specified that for a state conduct to be regarded as a genuine unilateral humanitarian intervention, one criterion is that it must be based on predominant humanitarian motives.

There are three cases of post-war interventions commonly held out as the best examples of unilateral humanitarian intervention.³²³ However, most surveys regard

³²⁰ Brownlie, I. “Principles of Public International law”, Clarendon Press, Oxford (1998) 5th edition p. 5-6

³²¹ *Continental shelf* (Libya vs. Malta) case, ICJ Rep. 1985 para. 27

³²² Simma, B. “NATO, the UN and the Use of Force: Legal Aspects”, EJIL 10 (1999), p. 1-22, p. 4

³²³ *Inter alia* Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 84, Gray, C. “International Law and the Use of Force”, Oxford University Press (2000) p. 26, Farer, T.J., “An

even these cases as rather dubious evidence of state practice. These are the Indian intervention in Pakistan in 1971, The Tanzanian intervention in Uganda in 1979 and the Vietnam intervention in Cambodia in 1978-1979.

India intervened in East Pakistan after Pakistani forces had committed large-scale human rights violations and had forced some 10 million people to flee to India, following East Pakistan calls for autonomy and notably their “Declaration of Emancipation”. India defeated Pakistan in the ensuing war, resulting in the independence of Bangladesh. This incident is commonly described as the clearest case of unilateral humanitarian intervention in this century; “an almost perfect example”, according to Teson.³²⁴ The presence of humanitarian interests was clear. However, the Indian initial claims of humanitarian intervention was later withdrawn, or at least blurred by other decisive motives.³²⁵ India ultimately relied on a more traditional ground of self-defence³²⁶ on the ground of a Pakistani “pre-emptive” air strike against Indian airfield on the 3 December the same year. India’s concern for the regional balance of power vis-à-vis Pakistan is said to have been equally apparent.³²⁷ The majority of the delegates to the UN General Assembly were of the opinion that India had interfered within the internal affairs of Pakistan and asserted that India had to respect the sovereignty of Pakistan, calling upon India to withdraw its forces.³²⁸

In 1979, Tanzania intervened in Uganda, overthrew the terror-regime of Idi Amin (which had resulted in the estimated loss of 300.000 lives), and installed a new

inquiry into the legitimacy of Humanitarian intervention”, in L. Damrosch and D. Scheffer (eds), *Law and Force in the New International order* (1991)

³²⁴ Tesón, F. “Humanitarian Intervention: An Inquiry into Law and Morality”, Transnational Publishers, Inc. Irvington-on-Hudson, New York (2nd. Ed) (1997) p. 207

³²⁵ Cassese, A. “The current legal regulation of the use of force”, Martinus Nijhoff Publishers (1986) p. 63

³²⁶ Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 72

³²⁷ Rytter, J.E. “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001) p. 139

³²⁸ Brenfors M., Petersen M. “The Legality of Humanitarian Intervention – A defence”, *Nordic Journal of International Law* 69: 449-499 (2000) p. 489, Schachter, O. “International Law in Theory and Practice”, Martinus Nijhoff Publishers (1991) p. 124

government. The outcome is generally considered as being a welcome result. Apart from the humanitarian motives, a territorial conflict concerning Kagera, a region of Tanzania annexed by Amin, served as a background for the conflict. The military action by Tanzania is therefore held to be, at least partly, precipitated by Uganda's violation of Tanzanian sovereignty. The element of self-defence is thus present. Few states criticised the intervention.

In 1978 Vietnam invaded Cambodia, expelled the Khmer Rouge regime and installed a new government. Also this intervention is commonly regarded as having had a positive impact on the region. Apart from the humanitarian elements constituted by the genocide committed by Khmer Rouge with the result of close to 2 million deaths among Cambodians, the intervention seems to have been motivated also by the numerous violations of the Vietnamese boarder by Khmer Rouge forces. The intervention was then partly one of self-defence, and partly a revolutionary war in support of the Cambodian people. Indeed, no right of humanitarian intervention was asserted by Vietnam. The adoption of a Security Council resolution condemning the action was blocked by Soviet veto, but most western states protested against the intervention. As Chesterman notes, nearly all states making speeches during meetings in the Security Council regarding the conflict (January 1979) referred to the principle on non-interference in internal affairs. The Norwegian delegate stated that Norway had "strong objections to the serious violations of human rights committed by the Pol Pot Government. However, the domestic policies of that government cannot, we repeat, cannot, justify the actions of Vietnam over the last days and weeks"³²⁹ Several General Assembly resolutions condemned the intervention.³³⁰

From post cold war practice we need to mention the US/UK/French intervention to protect the Kurds and Shiites in Iraq in 1991-1999 after the Iraq-Iran conflict and the NATO operation in Kosovo 1999 carried out to put an end to the escalating oppression by the Serbian regime against the ethnic Albanians in the region.

³²⁹ Referred in Chesterman, S. "Just War or Just Peace", Oxford University Press (2001) p.80

³³⁰ As for example GA Res. 34/22

In response to the Iraqi repression of the Kurds and Shiites following the end of the Iraq-Iran conflict, the Security Council eventually passed Resolution 688 (1991). The Council called on Iraq to end the repression of its civilian population and to allow access to international humanitarian organisations. The resolution was not passed under Chapter 7 of the Charter and did not authorise the use of force to help the Kurds and the Shiites. Despite this, British, US and French troops proclaimed safe havens and forced Iraqi troops to leave these areas. Later no-fly zones over the north and the south were established and forcibly controlled, which included air-strikes against Iraqi missile sites following confrontations between Iraq and the coalition planes controlling the no-fly zones.

Prior to the NATO action in Kosovo, the Security Council had determined that the humanitarian situation in Kosovo constituted a threat to international peace and stressed the need to prevent a humanitarian catastrophe.³³¹ Stated intentions to use veto by China and Russia, however, hindered a Security Council authorisation for military intervention. There seems to have been widespread recognition in the international community that NATO's campaign was carried by legitimate humanitarian motives.³³²

Most other incidents are generally held not even to be arguable as "state practice" of unilateral humanitarian intervention. Several interventions are at best discussed under the heading "protection of nationals abroad" and thus fall outside the concept of humanitarian intervention as defined in section 1.2. These include the Entebbe operation (1976: Israel conducted a rescue operation of the remaining 104 passengers taken hostage by Palestinian terrorists at Entebbe, Uganda) and the three Belgian/US/French interventions in Congo/Zaire ("at worst they were post-colonial

³³¹ Sec. Res. 1199 (1998)

³³² Rytter, J.E. "Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond", *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001) p. 121, p. 153

adventures to secure access to mineral resources in the newly independent state.”³³³). Others are excluded because the humanitarian elements were rather dubious. Often mentioned here are the US interventions in the Dominican Republic (1965; on that occasion President Johnson revealed the real objectives of the intervention in the famous words: The American nation cannot, must not and will not permit the establishment of another communist government in the Western hemisphere), Grenada (1983) and Panama (1989-90).³³⁴

This traditional analysis is by some scholars held to be mistaken. Brenfors Peterson says that “[i]t is clear that additional motives do not pose an obstacle, as long as humanitarian considerations are present.”³³⁵ The problem with this argument is that the action then loses its character and nature of a *humanitarian* intervention. Because of the risk of abuse of such a doctrine, these actions must be excluded from the concept.³³⁶

Another critical argument is that the traditional process of evidencing state practice emphasises too much what states claim to be doing in favour of what they really do. In ascertaining actions by states, some scholars claim that only real-acts, and not verbal statements, constitute state practice.³³⁷ D’Amato explained: “given the simplicity of verbal invention, and the infinite variety of sentences that can be used to

³³³ Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 84, Brenfors M., Petersen M. “The Legality of Humanitarian Intervention – A defence”, *Nordic Journal of International Law* 69: 449-499 (2000) p. 496

³³⁴ See e.g. Chesterman *Ibid.* p. 69-71 and p. 83. The two latter incidents are sometimes discussed under the heading “pro-democratic intervention”, as an exception to UN Charter art. 2 (4). Chesterman rejects this argument. See *Ibid.* p. 88-109. This study does not analyse this as a separate argument. It follows, however, from the discussion in section 3 about the impact of development in international law that such actions would be contrary to art. 2 (4) of the UN Charter. A common approach is also to discuss these two cases under the heading protection of nationals abroad, see e.g. Gray, C. “International Law and the Use of Force”, Oxford University Press (2000) p. 7 and 27

³³⁵ Brenfors M., Petersen M. “The Legality of Humanitarian Intervention – A defence”, *Nordic Journal of International Law* 69: 449-499 (2000) p. 488

³³⁶ See section 1.2 and 3.2.3.

³³⁷ Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 63

explain or mis-explain events, I find it unpersuasive to base a theory of customary law upon what states say.”³³⁸

Teson, drawing on the work of D’Amato, holds that whether the verbal conduct of states indicate that an intervention is carried out upon motives other than humanitarian, is not relevant.³³⁹ He wants to disregard verbal acts completely.³⁴⁰ Instead, he emphasises the importance of giving the best possible interpretation of the situation regarded as a whole. Referring to the Indian intervention in East-Pakistan he contends that “the important point here is not so much whether the Indian leaders harboured selfish purposes along with humanitarian ones, or in what proportion those purposes blended as an efficient cause of the intervention...but rather that the whole picture of the situation was one that warranted foreign intervention on grounds of humanity.”³⁴¹ The reasoning seems to be that verbal acts are disregarded because the state in fact *could have* conducted the interventions upon humanitarian motives. And whether or not they *could have*, is to be interpreted by courts, writers, governments and historians.³⁴²

This view has been met with vast critic and finds little support in legal doctrine.³⁴³ Notably, Teson’s *logic of the situation* or contextual judgment, to be interpreted by observers of the law, runs counter to the traditional view that “customary law is created by states, not by academics.”³⁴⁴ According to this view, what counts are the reasons states choose to lay down, not what reasons commentators can infer.

³³⁸ D’Amato, A. “Response”, 80 AJIL (1986) p. 148-150

³³⁹ Tesón, F. “Humanitarian Intervention: An Inquiry into Law and Morality”, Transnational Publishers, Inc. Irvington-on-Hudson, New York (2nd. Ed) (1997) p. 192-193

³⁴⁰ But he does not disregard verbal in-actions, i.e., passive conduct (!), see infra section 5.4.4

³⁴¹ Tesón, F. “Humanitarian Intervention: An Inquiry into Law and Morality”, Transnational Publishers, Inc. Irvington-on-Hudson, New York (2nd. Ed) (1997) p. 208

³⁴² Tesón, F. “Humanitarian Intervention: An Inquiry into Law and Morality”, Transnational Publishers, Inc. Irvington-on-Hudson, New York (2nd. Ed) (1997) p.193

³⁴³ see e.g Akehurst, M. “Custom as a source of international law”, BYIL (1974-75) p. 7-8, Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 63, Murphy, S.D., “Humanitarian intervention – The United Nations in an Evolving World Order” (1996) p. 83-281, Villiger, Mark E. “Customary International Law and Treaties”, Kluwer Law International (1997) (2nd.ed) p. 20

³⁴⁴ Akehurst, M. “Letter”, 80 AJIL p. 147 (1986)

By limiting the relevant state practice to what states actually do would also seem to require actual violations of customary law. In short, acts contrary to existing rules represent violations of those rules, while statements do not; it would accord great weight to acts of intervention contrary to the customary rules of non-use of force and no weight to protests, resolutions and declarations condemning them.³⁴⁵ It would thus be contrary to the paramount principle of peaceful persuasion and settlement of disputes. It would also marginalize less powerful states within the international legal system because the restrictive view disregards state expressions in the form of General Assembly resolutions, in which every state (read: virtually the whole world-community) has one vote, thus ensuring the equal possibility of states to influence the outcome. This restrictive view of state practice is furthermore inconsistent with the evolution of international relations and the flexibility of customary law. As Villiger remarks, “a restricted view of State practice has not yet accommodated sufficiently the immense changes of the past 50 years in the State community, regarding its international organization and the multilateral treaty making process.”³⁴⁶ This means taking into consideration the importance UN and similar bodies have attained for states as a fora in which to express them selves collectively or individually and thus influence the development of international law.

A restrictive view of state practice is furthermore inconsistent with the term “practice”, as *per* art. 38 of the ICJ-Statute, which does not distinguish between various state conduct. It is general enough to cover any act or behaviour of a State.³⁴⁷ This broad understanding of state practice is also supported in ICJ practice.

The court relied in the *Nicaragua case* explicitly on statements from politicians, General Assembly resolutions, constitutions of international organisations, and treaties, when establishing the customary nature of the prohibition of the use of

³⁴⁵ Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 63

³⁴⁶ Villiger, M.E. ”Customary International Law and Treaties”, Kluwer Law International (1997) (2nd.ed) p. 21

³⁴⁷ Villiger, Mark E. ”Customary International Law and Treaties”, Kluwer Law International (1997) (2nd.ed) p. 21

force.³⁴⁸ See also the *Asylum* case, where the Court relied on “official views” and treaty ratifications in determining that a “constant and uniform usage” did not exist.”³⁴⁹ In the *Rights of Nationals of the United States of America in Morocco* case, diplomatic correspondence was reviewed to determine a right to exercise consular jurisdiction.³⁵⁰ Similarly, The International Law Commission listed in 1950 the following forms of “Evidence of Customary International Law”: treaties, decisions of national and international courts, national legislation, opinions of national legal advisers, diplomatic correspondence, practice from international organisations.³⁵¹

Thus, when analysing state practice of “unilateral humanitarian interventions”, evidence must be sought for in “any act or statement by a State from which views can be inferred about international law.”³⁵²

It is on this base that most surveys of practice have been conducted and which reveals few if any genuine cases of unilateral humanitarian intervention that potentially could develop a norm of customary international law.³⁵³ Most of the interventions have been conducted upon grounds of self-defence or protection of nationals abroad, and in the few cases where humanitarian ends were sought, the allegations and behaviour of the states disclose that humanitarian ends were almost always mixed with other underlying less laudable motives for intervening.³⁵⁴ The

³⁴⁸ See *Nicaragua (Merits)* (1986) ICJ Rep. 14 para 196f, para 203, para 212 and the account supra in section 5.3.2.

³⁴⁹ ICJ Rep. 1950 p. 277

³⁵⁰ ICJ Reports 1952, p. 176, p. 200

³⁵¹ Referred in Villiger, M.E. “Customary International Law and Treaties”, Kluwer Law International (1997) (2nd.ed) p. 17

³⁵² Akehurst, M. “Custom as a source of international law”, BYIL (1974-75) p. 1f., p.10

³⁵³ See supra in this section and *inter alia* Gray, C. “International Law and the Use of Force”, Oxford University Press (2000) p. 27, Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 84, Rytter, J.E. “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001) p. 121, p. 143, Farer, T.J., “An inquiry into the legitimacy of Humanitarian intervention”, in L. Damrosch and D. Scheffer (eds), *Law and Force in the New International order* (1991), Helgesen, V. “Kosovo og folkeretten”, Institutt for forsvarsstudier, Info 4/99

³⁵⁴ Gray, C. “International Law and the Use of Force”, Oxford University Press (2000) p. 27

NATO operation in Kosovo stands out as the clearest example of an intervention based on predominant humanitarian motives.³⁵⁵

5.4.3.3 “General” Practice.

The term “general” attached to practice refers to the number of states that have to contribute towards the customary rule and, hence, introduces a quantitative dimension into the ascertainment of customary law.³⁵⁶ “General practice” is a relative concept and cannot be defined abstractly.³⁵⁷ It should not be understood in absolute, universal terms. As expressed in the Restatements, “a practice can be general even if it is not universally accepted; there is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity.”³⁵⁸ Similarly, the Court held in the *North Sea Continental Shelf case* that:

“an indispensable requirement would be that within the period in question..., State practice, including that of States whose interest are especially affected, should have been both extensive and virtually uniform.”³⁵⁹

Thus, practice does not have to be universal, but representative.³⁶⁰ A practice can be recognised as “general” when concurrence is reached among the states that are most affected or interested in a particular issue and the overwhelming majority of remaining states do not raise objections.

³⁵⁵ Specific to this intervention was also its regional character, thus indicating implicit concern for the stability within Europe. Its nature as a “collective” action, though not in the sense of a UN authorized action, is according to some scholars supportive to its legality. However, even if one might agree that the legitimacy of an action is stronger when carried out upon a broad regional decision, legally, it is still a unilateral humanitarian intervention.

³⁵⁶ Villiger, M.E. “Customary International Law and Treaties”, Kluwer Law International (1997) (2nd.ed) p. 29

³⁵⁷ Akehurst’s Modern Introduction to International Law, 7th edition, Routledge London and New York (1997 p.)42

³⁵⁸ The Restatements (Third) Vol.1 para. 102, 25

³⁵⁹ *North Sea Continental Shelf Case* ICJ Report, 1969. para. 74

³⁶⁰ Villiger, M.E. “Customary International Law and Treaties”, Kluwer Law International (1997) (2nd.ed) p. 298

It is not always easy to determine which states that are specially affected by a practice. However, practice related to the prohibition of the use of force in the UN Charter art. 2 (4) is clearly of equal concern for every state. This would imply a high threshold of generality in order for a customary rule to emerge.

Then, interventions carried out in violation of the prohibition of force would have to be accepted by virtually the whole world community. This does not mean, though, that the doctrine must be positively accepted by nearly every state. It is clear that the absence of protests under certain circumstances can be part of a general practice, thus allowing for a rule to emerge. The interpretation of state's passive conduct in relation to the alleged "humanitarian interventions" is a highly debated issue and a matter of controversy in the international legal doctrine. The significance of passive conduct is discussed hereafter, in relation to the element *opinio juris* in section 5.4.4

5.4.3.4 Uniformity and consistency of practice

In the *Asylum* case, the ICJ suggested that a customary rule must be based on a "constant and uniform usage."³⁶¹ Later, the Court held in *Nicaragua*:

"It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule."³⁶²

³⁶¹ ICJ Rep. 1950 p. 277

³⁶² *Nicaragua* (Merits) (1986) ICJ Rep. 14 para 186. Also referred above in section 5.3.

Accordingly it is clear that complete uniformity to the rule is not required, but major inconsistencies will prevent the creation of a customary rule.³⁶³ Minor inconsistencies, however, as also noted in the Fisheries case (UK vs. Norway)³⁶⁴, do not prevent the emergence of a customary rule. The relativity of the requirement implies that the greater the inconsistencies, the larger the amount of practice supporting the rule is required. Vice versa, it is possible that a small amount of practice that has lasted a short period of time may amount to customary law if there is no practice that conflict with that rule.

5.4.3.5 Duration

There is no standard length of time and the ICJ does not (anymore) emphasis the importance of duration as such. As held by the Court in the *North Sea Continental Shelf Case* on the question whether art. 6 (2) in the Continental Shelf Convention had developed into customary law 11 years after the adoption of the convention:

“even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself.. Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary law...within the period in question, short though it might be, State practice...should have been both extensive and virtually uniform.”³⁶⁵

The time element is hence a relative requirement³⁶⁶, and customary law may evolve out of a short period of time. One example is the rapid development of the continental shelf doctrine. The required duration depends on the circumstances, notably the two other objective criteria, the consistency of the practice and the generality the practice. Hence, the lesser the generality and the greater the

³⁶³ Akehurst's Modern Introduction to International Law, 7th edition, Routledge London and New York (1997)p 42

³⁶⁴ ICJ Rep. 1951 p. 138

³⁶⁵ ICJ Rep. 1969 para 73.

³⁶⁶ Sevastvik, P. “Informell modifikation av traktater till följd av ny sedvanerätt och praxis”, Nordstedts Juridik (2002) p. 193, Villiger, M.E. “Customary International Law and Treaties”, Kluwer Law International (1997) (2nd.ed) p. 45

inconsistency of a practice, the longer duration in time is necessary for a practice to develop into customary law.³⁶⁷ It might be that the sensitive and controversial nature of an issue is also a factor likely to influence the length of the period of time required.³⁶⁸ Accordingly, considering the controversy in legal doctrine and among states as to the legality of unilateral humanitarian intervention, and the large body of customary law and treaty law supporting the prohibition of the use of force, a customary right of humanitarian intervention is ineligible for any theoretical development of instant custom. A considerable period of time is likely to be required.³⁶⁹

5.4.4 “Accepted as law” – the subjective criterion

The second element necessary to the formation of customary law is a psychological element. The state practice must be “accepted as law”. As held in the North Sea Continental Shelf case and reaffirmed in *Nicaragua*, this criterion implies that the states in their practice must have behaved so that their conduct is

“evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.”³⁷⁰

The participants in the state practice must thus be convinced that their acts reflect a legal obligation. Moral or political motivations are not sufficient.

The presence of *opinio juris* is what transforms *diuturnitas* into customary law. This requirement thus carries the aptitude to evolve inherent to the nature of customary law, thereby allowing a new norm, such as a right to unilateral humanitarian

³⁶⁷ Sevastvik, P. “Informell modifikation av traktater till följd av ny sedvanerätt och praxis”, Nordstedts Juridik (2002) p. 194

³⁶⁸ See Cassese, A. “A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*”, EJIL Vol. 10 (1999) p. 791 at p. 797

³⁶⁹ *Ibid.*

³⁷⁰ *Nicaragua* (Merits) (1986) ICJ Rep. 14 para 207

intervention, to emerge out of the practice of states. In this process, *opinio juris* serves to distinguish violations of the customary rule from subsequent modification of the rule. Hence, state practice that answer to the definition of unilateral humanitarian intervention outlined in section 1.2, cannot develop a customary modification of the principle of non-use of interstate force unless it is accompanied by *opinio juris*. Without *opinio*, the practice must be interpreted as breaches of the existing customary rules outlawing such actions.

However, the *opinio juris* does not have to be universal. The Court held in the Lotus case that “[t]he rules of law binding upon states...emanate from their own *free will* as expressed in conventions or by usages *generally* accepted as expressing principles of law.”³⁷¹ The reference to the “free will” of the states indicates the consent based decision-making procedure in international relations and the expression “generally accepted” indicates that it is consensus based.

The relativity of the formation process is seen also in this criterion. The ascertaining of *opinio juris* requires a balancing of state actions and state reactions, of claims and protests and the abstentions from protests.³⁷² An utterly widespread *opinio juris* accompanied with lack of opposing views can allow a state practice to develop into customary law quickly. On the other hand, if supporting and opposite attitudes to the practice are fairly balanced, a formation process is difficult and slow.³⁷³ This assessment of *opinio juris* was adopted in the *Nicaragua case* regarding the possible modification of the principle of non-intervention. The Court held that “[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of a customary law.”³⁷⁴

³⁷¹ PICJ Serie A, No. 10 (1927) p.4, emphasis added

³⁷² Akehurst's Modern Introduction to International Law, 7th edition, Routledge London and New York (1997)p. 44

³⁷³ Akehurst's Modern Introduction to International Law, 7th edition, Routledge London and New York (1997) p. 45

³⁷⁴ *Nicaragua* (Merits) (1986) ICJ Rep. 14 para.207

How is *opinio juris* to be ascertained further is a debated issue and a cause of disagreement on a customary doctrine of unilateral humanitarian intervention. From the traditional point of view, seeing customary rules as rules of international law deriving from the own free will of the states³⁷⁵, as express statements of states – “the articulation of a rule of international law”³⁷⁶ – should represent the clearest evidence of *opinio juris*.³⁷⁷ The lack of such express statements in relation to alleged humanitarian interventions is commonly put forward as the main and decisive argument against the existence of *opinio juris* with respect to a customary rule allowing for the doctrine.³⁷⁸ As Joyner notes, “[t]he lack [in state practice] of clear reliance on a legal right of humanitarian intervention to legitimise the use of force against another state manifests a fatal deficiency of relevant *opinio juris* by the intervening states involved.”³⁷⁹

In none of the cases during the cold war era was the doctrine invoked as the primary justification for the interventions and most of the interventions were met with vast

³⁷⁵ *Lotus Case* (1927) PCIJ Rep., Ser. A, No. 9, p. 4, see supra in this section

³⁷⁶ D’ Amato, A. “The Concept of Custom in International Law”, Ithaca/New York (1971) p. 75

³⁷⁷ Rytter, J.E. “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001) p. 121, at p. 150: “The doctrine of customary international law is based on the premise that it is what states say they do that counts. . . The character of the external justification is decisive when assessing whether the conduct expresses also *opinio juris*”. See also Cassese, A. “Ex iniuria ius oritur: Are we moving towards international legitimation of forcible humanitarian countermeasures in the world community?”, *EJIL* 10 (1999), p. 23-30, p. 25 where he says in relation to the Kosovo action that “what primarily counts, however, are the official grounds adduced by NATO countries to justify their resort to force.”

³⁷⁸ See e.g. Rytter, J.E. “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001) p. 121, p. 144, Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 87, Schachter, O. “International Law in Theory and Practice”, Martinus Nijhoff Publishers (1991) p. 124, Gray, C. “International Law and the Use of Force”, Oxford University Press (2000) p. 26 ff., Charney, J., “Commentary: Anticipatory Humanitarian Intervention in Kosovo”, *Vanderbilt Journal of Transnational Law*, Vol. 32, Nov. 1999, no. 5 p. 1238, Joyner, D.H. “The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm”, *EJIL* 13 (2002), p. 597-619 p. 603, “Editorial Comments: Nato’s Kosovo Intervention”, *AJIL*, v. 93, no. 4 1999

³⁷⁹ Joyner, D.H. “The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm”, *EJIL* 13 (2002), p. 597-619 p. 603

critic in the world community.³⁸⁰ The grounds upon which the intervening states ultimately relied was instead self-defence or protection of nationals abroad.³⁸¹

The UK, US and France did neither offer any consistent legal justification for their actions in Iraq in the period 1991-1991. No doctrine of humanitarian intervention was put forward in the Security Council. Outside the Security Council, however, the UK formulated maybe the first openly support by a state of a doctrine of unilateral humanitarian intervention. The UK Foreign and Commonwealth Office said that “we believe that international intervention without the invitation of the country concerned can be justified in cases of extreme humanitarian need. This is why we were prepared to commit British forces to *Operation Haven*, mounted by the coalition in response to the refugee crisis involving the Iraqi Kurds. The deployment of these forces was entirely consistent with the objective of SC Res. 688.”³⁸² This was immediately the only clear open disposal of the doctrine among the intervening states. The operations were generally claimed to be “in support of” or “consistent with” Security Council resolution 688, notwithstanding that this resolution from the strictly legal point of view could not justify the use of force, or as “necessary means” to limit the capacity of Iraq to oppress its own people.³⁸³ Self-defence was also invoked as a justification for some of the actions. Clear legal arguments, however, remained absent. The actions were not condemned by the Security Council or the General Assembly.

Neither does the NATO action in Kosovo, the clearest case of unilateral humanitarian intervention in the post-cold war era, indicate any radical change in the *opinio juris*. NATO did not as an organisation present a principled legal justification of humanitarian intervention. Indeed, the action was not openly based on any specific

³⁸⁰ In relation to the Grenada case, the legal advisor to the US Department of State said explicitly that the United States “did not assert a broad doctrine of humanitarian intervention”, thereby disclaiming any right of such a doctrine, see AJIL (1984) p. 664

³⁸¹ See section 5.4.3.2

³⁸² “UK Materials on International Law”, 63 BYIL (1992) p. 824

³⁸³ “Contemporary Practice of the United States Relating to International Law”, 93 AJIL (1999) p. 470 at p. 478, Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 199-206, Gray, C. “International Law and the Use of Force”, Oxford University Press (2000) p. 30

rule of law at all.³⁸⁴ Rather, NATO put forward that the action was legitimate on humanitarian considerations and alleged implicit Security Council mandate in SC Res. 1199 and 1203.³⁸⁵ The German Foreign Minister Kinkel said that NATO, because of the state of humanitarian necessity in which the international community found itself in the Kosovo case, acted in conformity with the “sense and logic” of the resolutions that the Security Council had managed to pass.³⁸⁶ This resembles the Iraq situation. Rather than operating as an explicit source of legal authority, Security Council resolutions are seen as one policy justification among others.³⁸⁷ The UK seems to have been the only NATO Member to invoke a doctrine of humanitarian intervention, but also here motives are mixed up with alleged support found in Security Council resolutions. In the *Legality of Use of Force* brought to the ICJ following the hostilities in Kosovo, and raised by Yugoslavia against ten of the nineteen NATO members, Belgium was alone among the respondent states to allege a doctrine of unilateral humanitarian intervention, and, notably, as a secondary argument³⁸⁸ and mixed up with alleged support in SC Resolutions and arguments of necessity.³⁸⁹ This reluctance to formulate a clear legal justification for the action

³⁸⁴ Rytter, J.E. “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001) p. 121, p. 154 and Charney, J. in Editorial Comments: *Nato’s Kosovo Intervention*, “Editorial Comments: *Nato’s Kosovo Intervention*, *AJIL*, v. 93, no. 4 (1999), p. 452-482

Gray, C. “*International Law and the Use of Force*”, Oxford University Press (2000) p. 32

³⁸⁵ Gray, C. “*International Law and the Use of Force*”, Oxford University Press (2000) p. 32 and 41, Chesterman, S. “*Just War or Just Peace*”, Oxford University Press (2001) p. 206, Cassese, A. “*Ex iniuria ius oritur: Are we moving towards international legitimation of forcible humanitarian countermeasures in the world community?*”, *EJIL* 10 (1999), p. 23-30, p. 24, Rytter, J.E.

“*Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond*”, *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001) p. 121, p. 153. , Cassese, A. “*A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis*”, *EJIL* Vol. 10 (1999) pp. 791, p. 792

³⁸⁶ See Simma, B. “*NATO, the UN and the Use of Force: Legal aspects*, 10 *EJIL* (1999) no. 1, p. 12

³⁸⁷ Chesterman, S. “*Just War or Just Peace*”, Oxford University Press (2001) p. 218

³⁸⁸ ICJ Rep. (1999), 38 ILM (1999) p.950. Belgium’s primary argument was that the armed intervention was based on Security Council resolutions. Other justifications that were put forward by other states were that the action was necessary to avert humanitarian catastrophe, threats to the security of neighbouring states, human rights violations of Yugoslavia, and implied authorisation of the Security Council resolutions which had identified the situation as a threat to international peace and security

³⁸⁹ It has also before been argued that a humanitarian intervention could be legally justified in the customary doctrine of necessity, now expressed in the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83 art. 25. This draft article is generally considered to express customary law, see. *Case concerning Gabčíkovo-Nagymaros project*, ICJ rep.

discloses the desire to avoid setting a precedent that could lead to an erosion in the prohibition of force and abuse by other states in the future.³⁹⁰ As the German Foreign Minister Kinkel said before the Bundestag: “the decision of NATO [on 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.”³⁹¹ The Deputy Prime Minister of Belgium similarly said in a statement of 25 September 1999 at the UN General Assembly that “[w]e hope that resorting to force without the approval of the Security Council will not constitute a precedent.”³⁹² Following the end of the hostilities, the majority of states and legal scholars have made it expressly apparent that they regard NATO action in Kosovo as illegal.³⁹³

However, some scholars argue that evidence of *opinio* cannot depend only on such statements and reject the traditional analysis conducted above.³⁹⁴ Villiger says that in

(1997), para 51. The article sets out two requirements. The act, read: the humanitarian intervention, must a) be the only way for the state to safeguard an essential interest against a grave and imminent peril; and b) the act cannot seriously impair an essential interest of the state or states towards which the obligations exist, or of the international community as a whole. Even if a humanitarian intervention could be said to satisfy the first requirement, it would clearly impair essential interest of the state in which it is intervened, notably its sovereignty. The doctrine of necessity is therefore not applicable. What is more, according to the Draft article 26, an act of necessity is not justified if it conflicts an obligation arising under a peremptory norm of general international law. The use of force is therefore ruled out in any act of necessity because the prohibition of force is a *jus cogens* norm. This position is shared by the ILC and its Special Rapporteur, see ILC, “Second Report on State Responsibility by James Crawford, Special Rapporteur” (1999), A/CN.4/498/Add.2. paras 286-287; “ILC rep. On the work of Its 51st. session” (1999), A/54/10, paras. 384, 387 and 389

³⁹⁰ Rytter, J.E. “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001) p. 121, p. 154, Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 216.

³⁹¹ Deutscher Bundestag, Plenarprotokoll 13/248, 16 October 1998, p. 23129

³⁹² reported in Cassese, A. “A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*”, *EJIL* Vol. 10 (1999) p. 791 at p. 798, note 32

³⁹³ See *inter alia* Frank, T.M. “Sidelined in Kosovo? – Break it, don’t fake it”, *Foreign Affairs* July/August 1999 p. 118, Gray, C. “International Law and the Use of Force”, Oxford University Press (2000) p. 38, Kritsiotis, D. “The Kosovo Crisis and Nato’s Application of Armed Force Against the Federal Republic of Yugoslavia”, *International and Comparative Law Quarterly*, vol. 49, april (2000) p. 330, p. 359, Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001), Rytter, J.E. “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001) p. 121, p. 156. See opposite, Cassese, A. “A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*”, *EJIL* Vol. 10 (1999) p. 791 p. 792

³⁹⁴ Villiger, M.E. “Customary International Law and Treaties”, Kluwer Law International (1997) (2nd.ed) p.50, Brenfors M., Petersen M. “The Legality of Humanitarian Intervention – A defence”, *Nordic Journal of International Law* 69: 449-499 (2000) p. 488

some cases the ascertainment of the *opinio* could be a result of the evaluation of the context surrounding the individual instances of practice, and of other conditions required for a customary rule.³⁹⁵ Some support for this can be found also in ICJ practice. The Court noted in the *North Sea Cases* in this regard that the *opinio* may also be sought among the instances of practice themselves, which “must..be carried out in such a way, as to be evidence” of the legal conviction.³⁹⁶

However, according to Brownlie and Chesterman, ICJ practice shows that the required evidence of an *opinio* depends upon the nature of the issue and the generality of the practice.³⁹⁷ In case of a widespread state practice or a consensus in the literature, whose character as law is uncertain, positive statements of *opinio* might not be required.³⁹⁸ But this is not the situation with unilateral humanitarian intervention. Considering the few instances of state practice (or the lack of such) that can be considered genuine unilateral humanitarian interventions and the controversy of the doctrine, the clearest expression of *opinio* must be required.

An authoritative statement as to this requisite is implied by the Nicaragua case, where the Court commented on the possible modification of the principle of non-intervention:

“[The Court has no] authority to ascribe to states legal views which they do not themselves advance. The significance for the Court of cases of State conduct *prima facie* inconsistent with the principle of non-intervention lies in the nature of the ground *offered* as a *justification*.”³⁹⁹

³⁹⁵ Villiger, M.E. "Customary International Law and Treaties", Kluwer Law International (1997) (2nd.ed) p. 51

³⁹⁶ ICJ Reports 1969 para. 77

³⁹⁷ Brownlie, I. "Principles of Public International law", Clarendon Press, Oxford (1998) 5th edition p. 7-8. See also Chesterman, S. "Just War or Just Peace", Oxford University Press (2001) p. 85

³⁹⁸ *Gulf of Maine* case ICJ Rep (1084) para 91-93

³⁹⁹ *Nicaragua* (Merits) (1986) ICJ Rep. 14 para 207, emphasis added

However, the Court found that the grounds offered by USA for their intervention in Nicaragua were partly “statements of international policy” and thus “not an assertion of rules of existing international law”, and partly based on “classical” self-defense.⁴⁰⁰ The USA had not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition.”⁴⁰¹ A customary right of intervention was therefore rejected.⁴⁰²

It can therefore not be correct, as some scholars put forward, to neglect statements completely and leave in its place the *logic of the situation* (Teson) or “circumstances” (Brenfors Peterson) from which the *opinio* must be derived or assumed, as if commentators were best seat seeing what the states really meant or should have meant.⁴⁰³ Teson, illustrating his argument with the Uganda case, says: “[i]t matters little that the Tanzanians (wrongly) thought that they were acting in self-defence or said that they were so acting. The *logic of the situation*, revealed by world reactions, tells a different story: that the observance of a minimum of human rights is a precondition of the protection afforded governments by article 2 (4) of the United Nations Charter.”⁴⁰⁴ Similarly, regarding the Indian intervention in East-Pakistan in 1971, Teson holds that whether India did or did not “articulate humanitarian reasons as justification for her military action...or whether...India amended her initial pro-interventionist statements in the U.N., are matters of little importance. The important point here is not so much whether the Indian leaders harboured selfish purposes along with humanitarian ones, or in what proportion those purposes blended as an efficient cause of the intervention...but rather that the whole picture of the situation

⁴⁰⁰ *Ibid.* para 208

⁴⁰¹ *Ibid.* para 207

⁴⁰² *Ibid.* para 209

⁴⁰³ See also D’Amato, A., “International Law: Process and Prospects”, Transitional, New York (1987) p. 230-231, Tesón, F. “Humanitarian Intervention: An Inquiry into Law and Morality”, Transnational Publishers, Inc. Irvington-on-Hudson, New York (2nd. Ed) (1997) p. 193, Brenfors M. Petersen M. “The Legality of Humanitarian Intervention – A defence”, Nordic Journal of International Law 69: 449-499 (2000) p. 488

⁴⁰⁴ Tesón, F. “Humanitarian Intervention: An Inquiry into Law and Morality”, Transnational Publishers, Inc. Irvington-on-Hudson, New York (2nd. Ed) (1997) p. 193

was one that warranted foreign intervention on grounds of humanity.”⁴⁰⁵ Or, in the words of Brenfors Peterson: “the explicit invocation of the doctrine of humanitarian intervention is not decisive, as long as the actual circumstances warrant such action.”⁴⁰⁶

This view is not compatible with the holdings based on ICJ practice outlined above. It is furthermore questionable as it seems to do away with the notion of *opinio juris* (the *state's* conviction that it is adhering to a legal norm) completely.⁴⁰⁷ Under section 5.4.3.2 it was explained why such a view of state practice and *opinio juris* cannot be upheld. The restrictive view furthermore ignores widespread protests put forward by individual states⁴⁰⁸ and important General Assembly resolutions confirming the illegality of inter-state use of force.⁴⁰⁹ Resolutions from the General Assembly are, in virtue of the “one state one vote” voting procedure and accessibility, a “source” that can be used to shed light on the *opinio juris* of states.⁴¹⁰ Indeed, General Assembly Resolutions were important as evidence of a customary principle of the prohibition of the use of force in the *Nicaragua case*.⁴¹¹ Taking such statements into consideration furthermore accommodates that states need not break the law to influence or change it, which appears especially important in matter of use of force.⁴¹²

⁴⁰⁵ Tesón, F. “Humanitarian Intervention: An Inquiry into Law and Morality”, Transnational Publishers, Inc. Irvington-on-Hudson, New York (2nd. Ed) (1997) p. 208

⁴⁰⁶ Brenfors M., Petersen M. “The Legality of Humanitarian Intervention – A defence”, Nordic Journal of International Law 69: 449-499 (2000) p. 488

⁴⁰⁷ Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 85, Gray, C. “International Law and the Use of Force”, Oxford University Press (2000) p. 27, Akehurst, M. “Letter”. AJIL (1986) p. 148, Gray, C. “International Law and the Use of Force”, Oxford University Press (2000) p. 27

⁴⁰⁸ See supra section 5.4.3.2

⁴⁰⁹ See supra section 5.3.2

⁴¹⁰ Villiger, M.E. “Customary International Law and Treaties”, Kluwer Law International (1997) (2nd.ed) p. 21, , Gray, C. “International Law and the Use of Force”, Oxford University Press (2000)18. See

⁴¹¹ See supra section 5.3.2

⁴¹² Akehurst, M. “Custom as a source of international law”, BYIL (1974-75) p. 47, Villiger, M.E. “Customary International Law and Treaties”, Kluwer Law International (1997) (2nd.ed) p. 21.

It is surprising that the proponents of the restrictive view of state practice and *opinio juris* still makes so much out of what states do not say. Teson, for example, argues that because of the lack of protests and critical debates in the Security Council, in the General Assembly and in the world community at large, “the Tanzanian action was legitimised by the international community”⁴¹³, which “virtually approved the Tanzanian intervention.”⁴¹⁴ This is held to be an exaggeration.⁴¹⁵ One thing is to say that states, for moral or political reasons, acknowledged Tanzania’s right to defend themselves; another is to hold that the use of force on that occasion was considered legal.

Generally speaking, silence may, over a period of time and provided that other states could reasonably have expected the state to react, be regarded as tacit acceptance of the *practice* in question.⁴¹⁶ However, tacit approval of the practice does not necessarily evidence *opinio juris*.⁴¹⁷ Thus, the fact that certain actions appear to be tolerated by the international community is an insufficient basis on which to ground a right of humanitarian intervention.⁴¹⁸ As touched upon before, this would be especially questionable considering the controversy of the doctrine and the nature of specific actions as unilateral use of force.

⁴¹³ Tesón, F. “Humanitarian Intervention: An Inquiry into Law and Morality”, Transnational Publishers, Inc. Irvington-on-Hudson, New York (2nd. Ed) (1997) p. 187

⁴¹⁴ *Ibid* p. 191 See also Brenfors M., Petersen M. “The Legality of Humanitarian Intervention – A defence”, Nordic Journal of International Law 69: 449-499 (2000) p. 490-491

⁴¹⁵ Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 78

⁴¹⁶ Villiger, M.E. “Customary International Law and Treaties”, Kluwer Law International (1997) (2nd.ed) p. p. 37-42, Rytter, J.E. “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, Nordic Journal of International Law, Vol. 70 Nos. 1-2 (2001) p. 121 p. 156. Considering the divided nature of the current international community, identifying silence with acquiescence is also problematic as it implies favouring the powerful states. The opposite, active conduct, is in many cases easier for these states. They generally have large well-financed diplomatic corps which enables them to follow the international development and to object to developments that they perceive as contrary to their interest or international law, see Byers, M. “Custom, Power and the Power of Rules”, Cambridge University Press (1999) p. 37

⁴¹⁷ *Ibid* and Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 86. See also Akehurst, M. “Custom as a source of international law”, BYIL (1974-75) p. 1f. at p. 10: “Thus, to prove a custom then passive conduct must be accompanied by *opinio*.”

⁴¹⁸ *Ibid*.

The same applies to the argument that failure of the General Assembly and the Security Council to condemn interventions (of the three “best cases” only Vietnam was condemned explicitly) is evidencing *opinio juris*.⁴¹⁹ As Gray remarks, there is a distinct reluctance in the Security Council and the General Assembly to express explicit condemnations that might be read as findings on responsibility. If the failure to condemn by the SC can be attributed to one state using its right to veto, evidence of legality is even less convincing and would privilege powerful states in an unacceptable way. As regards the failure in the General assembly to condemn interventions, the argument could be turned: Why did none of the actions receive General Assembly approval?⁴²⁰

We can then conclude that what counts when evidencing *opinio juris* in relation to an emerging doctrine of unilateral humanitarian intervention must be the descriptions and justifications which a state invokes for its actions, not the descriptions and justifications which academics invent. As regards the passive conduct by states, it must be agreed with Rytter when he says that “[e]ven if a large number of states remain silent over a period of time in the face of conduct of relatively few states, new customary law is unlikely to be established, unless the practice of the few is consistent and supported by clear evidence of *opinio juris*.”⁴²¹

Judged by these standards, a customary doctrine of unilateral humanitarian intervention must be rejected because of the lack of clear legal justifications upon such a doctrine in the cases of alleged humanitarian interventions after 1945. The incidents of intervention should therefore be interpreted as violations of the prohibition of force rather than as evidence of the formation of a new rule.

⁴¹⁹ See e.g. Brenfors M., Petersen M. “The Legality of Humanitarian Intervention – A defence”, *Nordic Journal of International Law* 69: 449-499 (2000) p. 489, Abiew, F.K. “ The Evolution of the Doctrine and Practice of Humanitarian Intervention”, *Kluwer Law International* (1999) p. 120

⁴²⁰ Schachter, O. “International Law in Theory and Practice”, *Martinus Nijhoff Publishers* (1991) p. 124

⁴²¹ Rytter, J. E. “Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond”, *Nordic Journal of International Law*, Vol. 70 Nos. 1-2 (2001) p. 121, p. 156

6 Conclusions and assessments

The problem under consideration in this thesis has been the legality of unilateral humanitarian intervention under art. 2 (4) of the United Nations Charter. Four alternative lines of argument have been examined and all rejected as legal justifications for the doctrine.

First, unilateral humanitarian intervention was ruled incompatible with the textual understanding of art. 2 (4) of the UN Charter. *Prima facie*, the prohibition is limited to force against “the territorial integrity or political independence of any state” or force that in “any other manner is inconsistent with the purposes of the UN Charter.” However, the addition *in fine* must be understood to be a “catch-all” provision that includes the phrase “territorial integrity or political independence” and renders any unilateral use of force that is inconsistent with the Charter’s main purpose of preserving peace *illegal* use of force. Any doubt as to whether this was the original intent of the founding states was removed by an analysis of the Charter’s system and its normative logic. The preparatory works of the Charter confirmed this view. Then, from a static interpretative approach, in which the original intention of the drafters is deemed supremely authoritative in matter of legality of the use of force, unilateral humanitarian intervention is not permissible.

Secondly, it was proven that subsequent developments in international law do not warrant a re-interpretation of art. 2 (4). This discussion took as a starting-point the evolution of two cardinal principles of international law that are confronted by a humanitarian intervention: the principle of state sovereignty, which underpins the prohibition of inter state force, and the universal protection of human rights. There is wide support in international legal doctrine for the holding that fundamental human rights are *erga omnes* obligations deriving from *jus cogens* and that their protection is a matter of concern to the whole world community. It is also clear that the normative revolution in human rights and the mechanisms established to their

protection are eroding the sovereignty of the state. However, this does not affect the continued validity of the comprehensiveness of art. 2 (4) because it could not be shown that states have accepted the right to use force to protect these rights, in the absence of an authorisation under Chapter 7 by the Security Council or a situation of self-defence.⁴²² Rather, ICJ practice and state practice *qua* General Assembly resolutions confirm the comprehensiveness of the prohibition of force and its status as *jus cogens* and are evidence of widespread *opinio juris* for its parallel existence under customary law. Thus, notwithstanding the decline in the traditional concept of state sovereignty flowing from the growing concern and protection of human rights, the use of force as a means towards their protection remains illegal. Under this section it was also argued that discretionary unilateral use of force is not a preferred mechanism to resolve or remedy human rights problems and secure justice within a sovereign state. Such a rule would be bound to be abused, especially by the big and strong, and to pose a threat, especially to the small and weak.⁴²³

Thirdly, it was shown that the deadlock of the Security Council did not represent a fundamental change of circumstances that according to the doctrine of *rebus sic stantibus* potentially could set the prohibition in art. 2 (4) out of force and thus permit unilateral humanitarian intervention based on a presumed pre-Charter doctrine. Apart from the fact that problems of efficiency in the collective security mechanisms were reasonably foreseeable and that intervention to protect human rights within a sovereign state was clearly not an essential basis for the Member states to enter the Charter, this argument is inconsistent with practice from the ICJ in the *Corfu Channel* and the *Nicaragua cases*. Most notably, the Court stated in *Nicaragua* that the customary principle of non-use of force is not conditioned by provisions relating to collective security in the UN Charter, but retains a separate life in customary law.

⁴²² Charney, J., "Commentary: Anticipatory Humanitarian Intervention in Kosovo", *Vanderbilt Journal of Transnational Law*, Vol. 32, Nov. 1999, no. 5 at 1235, p. 1247

⁴²³ Swedish delegate in the Security Council 1940th meeting, para 121

Fourth and finally, the modification of art. 2 (4) by a customary doctrine of unilateral humanitarian intervention was rejected because the instances of state conduct alleged to be compatible with such a doctrine did not suffice to establish a customary rule. The objective requirement of a “general practice” was not fulfilled since the interventions by and large were not carried out for predominant humanitarian motives. The state conduct also failed to satisfy the subjective criterion *opinio juris* because, despite the existences of widespread and well- documented violations of human rights in many of the cases, the states *did not* invoke a legal doctrine of unilateral humanitarian intervention as a legal justification of their actions. Even in the “best cases” of East-Pakistan, Uganda and Camodia, where the brutality of humanitarian atrocities represented a ground upon which a humanitarian intervention could have been invoked, the doctrine was ignored, and the states chose instead to rely on self-defense from an armed attack or the protection of nationals abroad. Neither the Iraq, nor the Kosovo interventions did indicate any radical change in the *opinio juris*. At best, these two incidents can be said to show an emerging *opinio necessitatis* among the intervening states⁴²⁴ thus disclosing a moral imperative to remedy humanitarian crisis with the use of force on a unilateral basis. Both operations were asserted by the intervening states to be necessary and legitimate out of political or moral reasons. The Netherlands government stated that “the terrible, unceasing human tragedy in Kosovo” left it “no other choice.”⁴²⁵ The Italian government similarly noted, in relation to Kosovo, that the use of force had been “inevitable”.⁴²⁶ This impelling moral and humanitarian necessity was shared also by other states.⁴²⁷ However, the magnitude of protests and legal criticisms; the emphasis among intervening states such as Belgium and Germany that the Kosovo episode

⁴²⁴ Cassese, A. “A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*”, EJIL Vol. 10 (1999) p. 791 at p. 797

⁴²⁵ reported in Zappala, “Nuovi sviluppi in relazione alle vicende del Kosovo”, Rivista di diritto internazionale (1999) p. 975-1004, at p. 987, note 46

⁴²⁶ reported in Zappalà, “Nuovi sviluppi in relazione alle vicende del Kosovo”, Rivista di diritto internazionale (1999) p. 975-1004, at p. 986, note 42

⁴²⁷ Cassese, A. “A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*”, EJIL Vol. 10 (1999) p. 791, at p. 798

should not set a precedent⁴²⁸, and the unwillingness to explicitly formulate legal justifications for the action, indicate that the legal controversy of such a doctrine still exists and that the *opinio juris* for a legal right to intervene is lacking.

The main conclusion is therefore that unilateral humanitarian intervention is not permissible under current international law.

Then, returning to the quandary presented in section 1.4: is international law able to reconcile the restraints on the use of force in cases when the Security Council fails to act, with the increasing desire and need to protect civilians and combatants from widespread and severe infringements of human rights that arise from internal conflicts? The answer is, as this thesis has shown, no. Such a gap between what morality and justice demand and what is legally permissible might seem disturbing and leads us to ask: are there no situations where humanitarian atrocities are so grave that points of law become secondary to moral considerations; or, as formulated by Cassese, “should respect for the Rule of Law be sacrificed on the altar of human compassion?”⁴²⁹ The Kosovo case has shown that at least some states would give a positive answer to this question. This study does not share this position. One problem keeps emerging: the risk of abuse and possible ambiguous negative consequences when the decision of the use of force is left up to the discretion of unilateral action. This view is also reflected in the reluctance among states to explicitly invoke a legal doctrine of humanitarian intervention as justification for their action, thus avoiding setting precedents that may seed the ground for a doctrine permitting unilateral action to protect human rights.

This inability to realise justice represents a legal deficiency in international law and poses a serious challenge for the international community in the future. One possible

⁴²⁸ See supra section 5.4.4

⁴²⁹ Cassese A. “Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?”, EJIL 10 (1999) 23-30, p. 25

solution could be to recognise the moral imperative of protecting human rights and formalise criteria in a UN Charter amendment after which a unilateral forceful action to their protection could be carried about. Many attempts have been suggested to this respect. In addition to the pre-requisites of “predominant humanitarian purposes” and the existence of grave violations of fundamental human rights outlined in the definition in section 1.2, three criteria are commonly put forward: the exhaustion of peaceful remedies, the failure of collective action by the Security Council and proportionality.⁴³⁰ Amending the Charter’s regime on the use of force might, however, not be a sufficient lever to alter the principle enshrined in art. 2 (4) because the prohibition of force derives its peremptory nature not only from the conventional rule in art. 2(4), but also from the independently valid customary norm. But even if such an amendment legally would be sufficient, codifying a legal framework for unilateral action may, as Chesterman notes, not solve the problem. State practice to date show that normative restraints do not prevent states from intervening on other grounds than pure humanitarian ones.⁴³¹ And as we have seen, there is a great risk that the ends achieved by unilateral action to protect human rights do not coincide with the ends that ideally should be sought. This suggests the conclusion that the only feasible way in which the use of force can be used to secure justice is when carried out by the international community through the UN organs. But because of the decision-making process and the geo-political reality, the current structure of this security system makes it unable to cope with this. In order to reconcile the desire to provide “positive peace”, i.e. the realization of justice, with the necessity to limit the use of force and thus preserve the “negative peace”, it thus seems necessary to reform the procedures under which the UN decisions on the use of force are taken.⁴³² The feasibility of this, however, depends on the ability to come to a political

⁴³⁰ See Chesterman, S. “Just War or Just Peace”, Oxford University Press (2001) p. 228-229, note 35 with references

⁴³¹ Ibid. p. 231 and 236

⁴³² Charney lists some possible reforms that the UN might adopt:”a UNSC vote by a three-fifths majority but without the right to a veto by the permanent members; a restructured UNSC with more states added with or without veto rights; a UNGA vote by two-thirds majority (the Uniting for Peace Resolution); a rapid ICJ advisory opinion requested by the UNGA or a special organ of the UNGA or UNSC that would find that the specific situation makes a humanitarian intervention lawful...”

consensus, which, ironically, is the very problem why the existing mechanisms do not work.

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8 Abbreviations

AJIL	American Journal of International Law
BYIL	British Yearbook of International Law
EJIL	European Journal of International Law
HJIL	Harvard Journal of International Law
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ILC	International Law Commission
ILR	International Law Reports
Kessing's	Kessing's Contemporary archives
LJIL	Leiden Journal of International Law
Mjil	Michigan Journal of International Law
NATO	North Atlantic Treaty Organisation
VJTL	Vanderbilt Journal of Transnational Law
VJIL	Virginia Journal of International Law