

**THE UNITED NATIONS SECURITY COUNCIL AND
WALZER'S ETHICAL APPROACH TO
HUMANITARIAN INTERVENTION FROM A LEGAL
PERSPECTIVE: A COMPARATIVE STUDY OF
NORTHERN IRAQ (1991) AND KOSOVO (1999)**

Khalid Rabea Rasmi Almashhdani

**Research Report Submitted to the Faculty of Humanities, University
of Witwatersrand, Johannesburg, in fulfilment of the requirements
for the Degree of Master of Arts in International Relations.**

Johannesburg, 28 July 2008

Abstract

The debate about the United Nations Security Council and Walzer's ethical approach to humanitarian intervention from a legal perspective has been ongoing. The research upon which this study is based, centres its attention on the intervention of the United Nations (UN) in northern Iraq (1991) and Kosovo (1999). It investigates Walzer's ethical approach to humanitarian intervention against the background of the existing international law prohibition on the use of force, and the principle of non-intervention in the domestic affairs of sovereign states. The promising trend of humanitarian intervention and the current emphasis on human security are also investigated in order to determine whether the intervention in Iraq and Kosovo fits this paradigm. While acknowledging the importance of states in international relations, this study queries the possibility of an ethical international strategy to solve internal problems or conflicts. This study makes a case for sustained efforts in the area of intervention on humanitarian and ethical grounds. It further argues for the adoption of an international organisation that should have a pre-emptive right to intervene in conflicts that affect their regions of influence. The study intends to provide a standard for conducting future interventions.

I declare that: *The United Nations Security Council and Walzer's Ethical Approach to Humanitarian Intervention from a Legal Perspective: A Comparative Study of Northern Iraq (1991) and Kosovo (1999)*, is my own work and all sources that I have used or quoted have been indicated and acknowledged by means of references.

Signature

Khalid Rabea Rasmi Almashhdani

28 July 2008

*This dissertation is a
modest effort
dedicated to:*

*His Excellency Mr.
Hoshyar Zebari,*

*The Iraqi Minister of
Foreign Affairs.*

Acknowledgements

First and foremost, I would like to thank God for his help and support throughout this project. It made me work harder to complete this dissertation.

I would like to express my utmost gratitude to Dr Abdul Lamin, who was not merely a supervisor who guided and advised me throughout the progress of this dissertation, but was always ready to help and support me in every possible way during its completion. I sincerely appreciate his help and am also grateful to him for allowing me complete freedom to define and direct my research. I would also like to thank the Head of the Department of International Relations, Professor Khadiagala, who did not hesitate to assist me; special thanks are due to Hazel, Secretary of the Department of International Relations who spared no effort to help me, and to the staff at Registrations.

I would like to thank all the friends and people who provided direct assistance or moral support during the research, and while the implementation and writing of this dissertation were in progress.

Finally, I reserve the most special thanks for my family, especially my mother whom I will appreciate as long as I live. They have done more for me than I can mention here, and without their unconditional love, help and support, this work would not have been possible. The caring, encouragement, support and prayers of my precious parents, my beloved wife Farrah, who sacrificed nights for my studies, and my father in-law made it all possible.

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ACRONYMS

| | |
|---|--------|
| 1. Economic Community of West African States | ECOWAS |
| 2. International Court of Justice | ICJ |
| 3. International Criminal Court | ICC |
| 4. Military Observer Group | ECOMOG |
| 5. <i>Médecins sans Frontières</i> | MSF |
| 6. North Atlantic Treaty Organisation | NATO |
| 7. Organisation for Security and Cooperation in Europe | OSCE |
| 8. Kurdish Democratic Party | KDP |
| 9. Kurdistan National Assembly | KNA |
| 10. Kurdistan Regional Government | KRG |
| 11. Patriotic Union of Kurdistan | PUK |
| 12. Second World War | WW II |
| 13. United Nations Disaster Relief Organisation | UNDRO |
| 14. United Nations War International Crimes Tribunal | UNWICT |
| 15. United Nations | UN |
| 16. United Nations High Commissioner for Refugees | UNHCR |
| 17. United Nations Security Council | UNSC |
| 18. United Kingdom | UK |
| 19. United States of America | USA |
| 20. Universal Declaration of Human Rights | UDHR |

CHAPTER I

INTRODUCTION AND PROPOSAL

1.1 Contextualisation

Given the increase in humanitarian emergencies that have led to numerous interventions in the Post-cold War Era, many observers have considered the legalisation of humanitarian intervention as one of the most pressing issues of the 1990s. It is not a new concept; actions that are reminiscent of humanitarian intervention can be found in the *Book of Genesis* (Chapter 14).¹ *The Noble Koran* also says something about it when Muslims are instructed as follows:

... if two parties (or groups) among the believers fall to fighting, then make peace between them both, but if one of them outrages against the other, then fight you (all) against the one which outrages till it complies with the command of Allah.²

As will be noted later, this Koranic verse may accord with the second condition of Walzer's approach.

¹ Garfinkle, A. *Humanitarian Intervention and State Sovereignty: A Realist View*: pp 1-4 (2004) available at <http://www.ncuscr.org/articlesandspeeches/garfinkel%20final%203-11.pdf> Visited on July 21, 2006.

² *The Noble Koran*, the Chapter (*sura*) of Hujurat, Verse No 9, Part No 26.

In the Far East, intervention and the rules pertaining to it were important issues for Chinese leaders almost since their history was first recorded. A number of vassals of the Chou dynasty basically operated as independent entities for five centuries before the birth of Christ. In these states certain commonly accepted laws for regulating their relations were in place. Certain aspects of that system show pertinent similarities with International Law that was later to appear from the multi-state system at the end of the Middle Ages in Europe. The stipulations in connection with intervention are prime examples of this.³

Humanitarian intervention played a small part in all of the interventions mentioned below, but humanitarian considerations were by no means the main reason in these cases. For example, during the Cold War some interventions were termed humanitarian such as India's intervention into East Pakistan in 1971 in the war that created Bangladesh; the Tanzanian intervention into Uganda in 1979 and the Vietnamese intervention into Cambodia also in 1979. In recent years however, much political controversy has arisen over the question of humanitarian intervention and its supposed impact on the concept of state sovereignty. There are several dimensions to this controversy that may be political, ethical or legal.⁴

At the end of the Cold War, international relations became more amiable and non-competitive on many issues. Previously such a feat had been barred by political, moral and military rivalry. Thus, humanitarian intervention by the international community became a greater political possibility after 1989.⁵

³ Cohen, J.A. China and Intervention: Theory and Practice. *University of Pennsylvania Law Review*. Vol. 121:471, p 474 (1973). Cohen states: "In pre-imperial China it was generally accepted that each of the feudal States had a right to manage its own affairs and had a corresponding duty not to interfere in the affairs of other feudal States. Nevertheless, this general principle was frequently honoured in the breach, and there developed a variety of rationalizations for departures from the norm."

⁴ Op cit note 1

⁵ *The Political and Moral Aspects of Humanitarian Intervention*. Report of the Danish Institute of International Affairs (DUPI): p 36 (1999).

However, few concepts in the social sciences elicit greater controversy than the concept of intervention. A major reason for this has been the particularly complex problem of defining the concept of intervention since it covers several terms, including political, economic and humanitarian intervention.⁶

Walzer's definition of humanitarian intervention is used provisionally in this study. He defines it as a means that aims or intends to help oppressed people, and it is sufficient if the process is merely started: the action does not have to be completed, just started.⁷ In accordance with Walzer's conceptualisation, this means that intervention is not an arbitrary action, but is initiated in response to the suffering of any specific group of people. Walzer's principles for humanitarian intervention state furthermore, that it is not acceptable, unless internal problems occur in a state or between different nations or sects, or when there is no fit between a ruler and his people.

This dissertation examines whether the UN and foreign powers have a right to intervene in internal conflicts of sovereign states, and if this is indeed the case, what conditions justify such interventions. These matters are considered with particular reference to Iraq (1991) and Kosovo (1999).

The new context of humanitarian intervention then, consists of three factors:⁸

- * The increased regularity in the occurrence of humanitarian catastrophes in the world

⁶ *International Commission on Intervention and States Sovereignty. The Responsibility to Protect.* Published by the International Development Research Centre: pp 1-9 (2001).

⁷ Walzer, M. *Just and Unjust Wars: A Moral Argument with Historical Illustrations.* Cambridge: Penguin Books: pp 86-109 (1977).

⁸ Op cit note 1

- * A stronger international sense of responsibility to solve these crises and a greater political ability of western governments to initiate steps to avert or alleviate them
- * The central importance of the issue in the basic foreign policy of the reigning international power. Governments that invoke humanitarian claims when in fact they are acting in accordance with certain narrow-minded policies may nevertheless still be suspect.

The International Court of Justice (ICJ) in The Hague, as one of the institutions of the UN, held in 1970 that the obligations of states towards the international community as a whole include the protection of the individual against the crime of ‘genocide’ as well as the protection of “the principles and rules concerning the basic rights of human persons”.⁹

The UN has found itself in the middle of the debate about humanitarian intervention. During the period 1991-1999, it issued some of its most controversial resolutions concerning the use of force in northern Iraq and Kosovo in order to halt gross abuses of human rights, although its actions contradicted some of its Charter articles on sovereignty, non-intervention and political independence.¹⁰

A codified right of humanitarian intervention is offered as a solution that ‘resolves’ the tension between legality and legitimacy as well as the tension between HR and sovereignty principles contained in the UN Charter.¹¹

⁹ Op cit note 5.

¹⁰ For example, Resolution 746 March 17, 1992 about Somali; Resolution 912 April 21, 1994 about Rwanda; Resolution 1080 October 1996 about Eastern Zaire; Resolution 1101 March 28, 1997 about Albania and so on.

¹¹ Rethinking Humanitarian Intervention, *Magaine*: p 6 (2002). Also available at <http://WWW.law.georgetown.edu/alumni/publications/2002/magazine/stromseth.html> . Last visited August 6, 2005.

Indeed, it is the dialectic between intervention to protect human rights and non-intervention under the pretext of territorial sovereignty that is important. The focus of this study is therefore on two important humanitarian interventions in the Post-cold War Era, namely northern Iraq (1991) and Kosovo (1999). Unfortunately, the UN Charter has not resolved the tension between sovereignty and human rights. It is noted that the UN Charter prohibits the threat or use of force against any states, while the matter of human rights is in fact given limited attention.

The many humanitarian interventions of the previous decade have caused political analysts to realize that the long-held notion that sovereignty is absolute is no longer valid. Kofi Annan, the former UN Secretary-General, stated that: “National sovereignty can be set aside if it stands in the way of the United Nations Security Council’s (UNSC) overriding duty to preserve international peace and security”. He maintained that the UN’s stance of non-intervention in domestic affairs was not ever meant to be absolute. In support of this view, he said that the Charter of the UN was not issued in the name of any specific government, but in the name of the ‘people’. In connection with this, he stated that the UN’s aim was not only to maintain international peace and security but also to “reaffirm faith in fundamental HR, in the dignity and worth of the human person”.¹² The UN Charter thus respects the sovereignty of any state, but never at the expense of international peace or a respect for fundamental human rights.

In addition to this, the widening of the power of international justice in the 1990s can be demonstrated by the establishment of The Hague tribunals dealing with crimes committed during the Bosnian war and the civil conflict in Rwanda, as well as in the judgment of the House of Lords against Pinochet. These have all shown a clear will

¹² See generally, Kofi A. Annan. *The Question of Intervention: Statements by the Secretary-General*. New York: United Nations (1999).

to reduce legal weight concerning sovereignty as a pretext against external intervention in a state's domestic affairs.¹³

In fact, recent experience suggests the opposite. The United Nations War International Crimes Tribunal (UNWICT) for the former Yugoslavia is an attempt to deal with radical evil through the Nuremberg model.¹⁴

Walzer's ethical approach with regard to humanitarian intervention is used from a legal perspective in a comparative analysis of the cases of northern Iraq and Kosovo. His essential idea is that the state is the theatre; it is ruled by a government, and interference by foreign armies must be excluded from it. Walzer believes that intervention is not an option unless there is a lack of governmental legitimacy. He suggests three conditions under which sovereignty may be disregarded. These conditions are:¹⁵

- * When a particular state includes more than one political community, is an empire or multinational state and when one of its communities or nations is in active revolt, foreign powers can come to the assistance of the rebels. Walzer argues that this is the case because there is no fit between government and community.
- * In the case of a single community disrupted by civil war where a foreign power has already intervened on the side of one party, other foreign powers may rightfully intervene in support of the other party.

¹³ Chandler, D. *From Kosovo to Kabul: Human Rights and International Intervention*. London: Pluto Press: p 120 (2002).

¹⁴ Nino, C. S. *Radical Evil on Trial*. London: Yale University Press: p 120 (1996).

¹⁵ Op cit note 7

- * In cases where a government is engaged in massacre or enslavement of its own citizens intervention is supported. Again, this is based on the assumption that there is no fit between government and community.

These above-mentioned conditions, as they are adopted by Michael Walzer, constitute the cornerstone of this dissertation. In the case of northern Iraq, the Iraqi government killed and practiced ethnic cleansing and crimes against humanity of thousands of the Kurdish population. The Kurds, who were in revolt against the Iraqi government, had requested autonomy for the Kurdish people in northern Iraq. In the case of Kosovo, the former Republic of Yugoslavia also committed acts of ethnic cleansing against hundreds of thousands of the majority of the Kosovo Albanian population who were affected by the actions of the Yugoslav security forces. Forced displacements, internal and external, occurred in both cases.

Various approaches attempt to explain humanitarian intervention. The normative approach, which focuses on legal perspectives of intervention and covers “all political theorizing of a prescriptive or recommendation kind: that is to say all theory-making concerned with what ought to be”,¹⁶ is rigid. Here, consideration of the international circumstances and the actors’ policies are not priorities because the normative approach depends on legal basics.¹⁷

On the other hand, the behaviouralist approach, which emphasises interventionary conduct by studying the changes in the behaviour of states and organisational behaviour governed by social and cultural forces, regards the actors’ behaviour as an essential element. The ‘actors’ are the existing state, those who govern it, as well as those who wish to intervene. These elements are variable because of international circumstances (which are unstable) and the international actors (who are also

¹⁶ Stoker, G. & King, D. “Introduction: Normative Theories of Local Government and Democracy”. In *Rethinking Local Democracy*. London: Macmillan: pp 1-27 (1996). (The normative approach as developed by David Hume and Kant, behaviouralist approach of Pavlov, Watson and Skinner).

¹⁷ See generally, Alchourron, C. *The Normative System*. Vienna: Springer Verlag (1971).

unstable).¹⁸ Neither the normative approach nor the behaviouralist approach explains humanitarian intervention adequately.

Two other approaches should also be mentioned, namely those that can be qualified in terms of positivism or naturalism. Positivism is considered a category of jurisprudence proposed by Vattel, Zouch, Kelson and Hart, and focuses on legal basics and agreement regarding the relations between nations. Rights and obligations vis-à-vis principles are dependent on the context of agreements. The alternative approach to positivism, naturalism, is in the style of jurisprudence taken from Grotius, Pufendorf, Radbruch, and Dworkin. Its supporters hold that natural law seeks justice as the basis for law, and therefore also for International Law. A naturalist approach holds that human dignity and justice are of primary importance and should be considered above all other principles and agreements among states.¹⁹

1.2 Aims and rationale

The aim of this study is to examine the UN intervention policy and Walzer's ethical approach to humanitarian intervention from a legal perspective, specifically by comparing the cases of humanitarian intervention in northern Iraq (1991) and Kosovo (1999). Moreover, this dissertation focuses on research on the nature of the humanitarian intervention in Iraq and Kosovo. It also aims to provide a basis for new approaches to humanitarian intervention that could assist policy-makers, corporate decision-makers and activists. The study furthermore points to the need of international role-players to adopt certain measures for ethically-based interventions, and also measures against the threats inherent in the lack of doing so.

¹⁸ See generally, Florin, A. The Evolution of International Norms, *International Studies Quarterly* 40: pp 363-389 (1996).

¹⁹ Henry, F. Carey Naturalism vs Positivism: Debates over Coercive Protection of Human Rights in Haiti, Bosnia and Kosovo. *Civil War*. Vol. 5(2): pp 25-76 (Summer 2002).

1.3 Justification for this study

From the discussion thus far, it is evident that the debate on humanitarian intervention has become important within the context of International Law. Clearly therefore, there is a need for greater clarity on the ‘rules’ pertaining to humanitarian intervention.

The Resolutions of UNSC concerning the two cases discussed in this study are different. In the case of Iraq, the UNSC adopted Resolution 688, issued on April 5, 1991. It called for the Iraqi regime to halt the repression of its population and to facilitate the arrival of the international humanitarian assistance for the Kurds.²⁰ On the other hand, the UNSC Resolution 1244 was adopted after the North Atlantic Treaty Organisation’s (NATO) military attacks on Kosovo placed Kosovo under international management and requested the former Republic of Yugoslavia to respect the autonomy of the Kosovo people.

This dissertation’s relevance arises from the fact that it seeks to address the UN intervention policy and has as focus Walzer’s ethical approach to humanitarian intervention from a legal perspective. Two matters justify the study:

- * The first has already been alluded to, namely the need to examine scholarly studies focusing on Walzer’s ethical approach to humanitarian intervention from a legal perspective.
- * Second, the need to investigate the two approaches that dominated the interpretation of humanitarian intervention in the 1990s, namely, as mentioned previously, the normative and behaviouralist approaches.

The cases of northern Iraq and Kosovo were chosen for a number of reasons, including:

²⁰ The UNSC Resolutions 688 on April 5, 1991.

- * First, the aim of the UNSC Resolution 688, issued on April 5, 1991, to condemn the repression of the Iraqi civilian population, particularly the Kurds, was limited and was not issued under Chapter VII, the only chapter of the UN Charter that authorises the UNSC to use or sanction the use of force. On the other hand, the UNSC Resolution 1244 established an interim international administration for the Kosovo people under the UN auspices of effective international civil and security presences, acting as might be decided in terms of Chapter VII of the Charter, and capable of guaranteeing the achievement of common objectives.²¹
- * Second, the justification provided for intervention, tasks undertaken, means used, and outcomes of the two cases differed.
- * Third, the two cases, which on the surface appear to have little in common, share structural similarities. They both exhibit the characteristics of international intervention in which the UN played a vital role.
- * Finally, the fact that they took place in geographically diverse areas broadens the applicability of the conclusions. The Iraqi case involved Third World states, while the Kosovo case involved developed states.

These reasons are regarded as the most important for this study since it is believed that they will contribute to effectively addressing the stated research problem and also broaden the applicability of the conclusions.

The two cases are important because they were highly contested within the UN and controversial resolutions were passed concerning them. The data obtained from the literature survey and interviews are compared. This research study focuses on ethical

²¹ Ibid and The UNSC Resolutions 1244 on June 10, 1999.

and legal aspects of intervention and problems associated with this process, as well as the impacting factors as they relate to Iraq and Kosovo.

Additional justification for the study is the fact that it was the inhabitants who suffered most during the conflicts, both in northern Iraq and in Kosovo, even though it is common knowledge that during armed conflicts, civilians suffer more than fighters. The two cases also involved direct or indirect attacks on the civilian populations by those who were party to the conflicts. These attacks on the civilian population necessitated humanitarian intervention in both instances.

1.4 Research questions

The research raises four fundamental research questions:

- * Was Walzer's ethical approach applied as the norm concerning humanitarian intervention in the Post-cold War Era in Iraq (1991) and Kosovo (1999)?
- * How do the UN and the international community deal with such interventions, and how did they deal with the Iraqi and Kosovo cases respectively?
- * What was the impact of the humanitarian intervention on the sovereignty of Iraq (1991) and Kosovo (1999)?
- * What are the views of the actors involved in the cases of Iraq and Kosovo on humanitarian intervention?

1.5 Conceptual framework

This study moves away from the predominantly normative, behaviouralist, positivist and naturalist approaches to humanitarian intervention and focuses on Walzer's

ethical approach to humanitarian intervention, when and where it is employed or authorised by international organisations. There are fundamental reasons for applying Walzer's approach, but primarily because it provides a socially relevant analysis based on norms as social phenomena. Norms can be shared only if the international community accepts them and consents to their rules, even when they are not recognised by all states. Individuals who formulate foreign policy feel obliged to comply with the opinion of the majority of states on the basis of their ideas about the newly developed UN and international public opinion. With varying degrees of success, international norms introduced by the UN have reshaped the nature and intensity of both international relations and internal policies alike. Analysts of international relations have traditionally emphasised state inter-governmental organisations and legal regulations of international interaction.

Walzer explains that every government has rights. Governments should accept and respect the rule of other states without invasion or objection. He believes that sovereignty and a separate governor can co-exist in a single state. If necessary, a sovereign leader may be respected, but not necessarily obeyed.²² Thus, he sets rules for non-intervention as well as for intervention. The key concepts within the framework of this study will be determined by Walzer's approach, and the notions of humanitarian intervention and sovereignty.

Walzer's approach allows for the use of force in certain cases. This is possible when internal arrangements prohibit the enjoyment of individual rights or when a particular territory is inhabited by different communities which together comprise a nation state, but there are fundamental problems between them and government. This approach is crucial in measuring the legitimacy of interventions in Iraq and Kosovo.

In terms of Walzer's rules, foreign powers have the right to intervene in internal conflicts of sovereign states provided that consensus exists on the rules that should

²² Op cit note 7.

apply and that they be applied consistently. Interventions in states where internal conflicts were or are perpetuated may become possible targets of political, economic, legal or military interests of foreign powers. Thus, this study will contribute towards policy development that addresses human rights violations. To improve humanitarian practices, international efforts are necessary by governments to create ethical rules and to adopt appropriate policies towards human beings through specialised international organisations that positively contribute to peace, prosperity and stability. Walzer argues that the emphasis of his ideas falls not actually on the state, but on the community that justifies it.²³

The term ‘humanitarian’ is used in the contemporary world to explain a broad series of actions, either by governments or non-government organisations which aim to develop the lives and well-being of human beings.²⁴

Intervention is a concept which, for many analysts, presupposes military activity and the movement of forces from one state to others, or from certain states to other states. The UN Charter prohibits the use or threat of force other than for self-defence or the enforcements of a Chapter VII Security Council mandate. Intervention often appears to violate these prohibitions and appears negative.²⁵ “Intervention by states and the UN should be dealt with separately, since the notion of ‘intervention’ is narrower under customary law applicable to acts of states than with regard to Article 2(7) of the UN Charter applicable to acts of the UN”.²⁶

The seemingly most appropriate definition of humanitarian intervention is found in the report of the Danish Institute of International Affairs. It represents a kind of

²³ Ibid.

²⁴ Murphy, S. *Humanitarian Intervention: The UN in Evolving World Order*. Philadelphia: University of Pennsylvania Press: pp 4-9 (1996).

²⁵ Thomashausen, S. *Humanitarian Intervention in an Evolving World Order: The Cases of Iraq, Somalia, Kosovo and East Timor*. Pretoria: Africa Institute of South Africa: pp 1-2 (2002).

²⁶ Op cit note 5:46.

synthesis of the numerous definitions available in the literature dedicated to humanitarian intervention. According to this report, humanitarian intervention is:

coercive action by states involving the use of armed force in another state without the consent of its government, with or without the authorization from the United Nations Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law.²⁷

This definition must be amended slightly to include interventions that are embarked upon with the authority of the government of the targeted state. For purposes of this study, a preliminary definition of humanitarian intervention would thus include intervention to stop gross human rights violations or to provide desperately needed humanitarian aid.²⁸

It should be remembered that sovereignty in today's world is no longer a deterrent to intervention for human rights and humanitarian fundamentals. The distinguishing factor is the political will of other states based on national welfare, together with a level of humanitarian concern. Absolute sovereignty is clearly no longer a barrier. In the past, sovereignty was not a controversial subject but now it has become so. Conditions within the international community are allowed to dominate decisions as to whether a state is sovereign or not and whether the international community may come to the defense of dispossessed societies within the territories of states.²⁹

²⁷ Op cite note 5, p11.

²⁸ Gordon, R. Humanitarian Intervention by the United Nations: Iraq, Somalia and Haiti, *Texas International Law Journal*. Vol. 31(43) (1996).

²⁹ Deng, F.M. "Reconciling Sovereignty with Responsibility: A Basis for International Humanitarian Action in Africa". In *World Politics: The African State System in Flux*. Edited by Harbeson, J.W. & Rothchild, D. Colorado: Westview Press: pp 359-361 (2000).

Sovereignty is an essential institution of relations between states because it is a crucial element in the birth, maintenance and death of states.³⁰

1.6 Literature review

Researchers of international relations contribute to particular issues by adding relevant facts emerging from their research. Some such facts are included in this study in areas where they contribute meaningfully to the discussion. Studies on the subject of the UN and humanitarian intervention are included in different writings with sometimes opposing opinions. Some of these were consulted for this study and despite opposing opinions, they may in fact expand the reader's understanding and views of the issues being discussed.

This report is presented thematically to ensure a balanced approach. It must however, be stated at the outset that because issues that are discussed sometimes overlap, there might be situations where the literature reviewed for one theme is also be relevant to another one. In such cases the review of the relevant literature relates to the other theme as well. In this study, the order of presentation is as follows: first, the background of the conflicts in the two selected areas is given. Thereafter follows a review of the UN intervention in both cases. Finally the principle of non-intervention, which incorporates the doctrine of sovereignty, the emerging doctrine of humanitarian intervention as well as Walzer's ethical opinion on intervention, are discussed.

Many writers explain different ethical aspects of intervention. Writers who have maintained Walzer's opinions and have studied Walzer's moral critique of the foreign policy of the United States of America (USA) include Frost (1996), Holzgrefe (2003), and Kupfer (2003). Beitz (1999) has written about treatment of normative and ethical

³⁰ Holsti, K. *Taming the Sovereigns: Institutional Change in International Politics*. Cambridge: Cambridge University Press: p 112 (2004).

problems of humanitarian intervention in international relations and proposes a principle of state autonomy based on the justice of a state's domestic institutions. Elshstain (1998) has confirmed that ethics and politics are mutually constitutive and he suggests the continued primacy of national sovereignty, as well as the ideas contained in Walzer's books and articles. These are included as vital sources in this dissertation. Elements of Walzer's book, *Arguing about War*, are also dealt with in this dissertation. His responses to particular wars, including the first Gulf War (1991) and the wars in Kosovo and Iraq (2003), receive specific attention.

Nonetheless, these are mostly normative and behaviouralist studies and very few writers follow a comparative approach when considering Walzer's ethical approach to humanitarian intervention from a legal perspective. Some writers who have studied normative and behaviouralist approaches are Frank (2005), Davis (2004), Yamashita (2004), and Welsh (2004). The works of all the writers mentioned above constitute essential sources for this dissertation.

There is a profusion of scholarly analyses of humanitarian intervention. Relevant publications and dissertations include works such as those of Harriss (1995), Du Plessis (2000), Wheeler (2000), Chesterman (2001), Chandler (2002), Davis (2004), and Welsh (2004).

This dissertation also includes references to Schachter's study on sovereignty, Laski (1917), Deng (2000), and Keren (2002). Other sources such as Henkin (1991) and Hosti (2004) are also referred to since both writers studied the use of force in connection with intervention. Authors focusing on the topic of intervention into Iraq in particular, include Abiew (1999), Sinha (2002), and Yamashita (2004), while publications that concern Kosovo on the same theme include the studies of Stoa (1999), Minear (2000), and Morton (1999).

1.7 Methodology

Information used in this study was acquired from primary and secondary sources. Qualitative methodology was applied during the research as opposed to quantitative methods, thus the focus of this study does not involve statistical data collection and analyses, but rather qualitative data that were generated through interviews. Interviews were conducted with officials in Iraq and Kosovo, and of the UN. The content data for the respective interviews were sourced from the literature survey. Interviews that addressed the two interventions (1991 and 1999) provided information that was used for purposes of comparison and validation.

The ideas and opinions of political leaders such as Massoud Barzani of the Kurdish Democratic Party (KDP), the current President of the Iraqi Kurdistan territory, the Secretary Generals of UN in the Post-cold War Era, and the Secretary General of NATO, Javier Solana, have significance for this research. Although interviews were an important part of the primary data-generating procedure, it was not possible to conduct personal interviews with these leaders. Published interviews constitute an important component of the secondary data. An example is an interview that took place in 1993 between Massoud Barzani and the *Harvard International Review*. In this interview many issues which revolve around the central theme of this study were discussed, although the opinions of leaders recorded in other secondary sources are also important. The purpose of consulting recorded interviews and opinions is to shed light on the claims for humanitarian intervention in northern Iraq in 1991 and Kosovo in 1999.

The comparative analysis thus also relied on secondary sources. Secondary data were obtained from the existing literature on the conflicts being discussion. Besides published interviews, these includes books, journal articles, reports by investigative panels set up by groups working in the areas of conflict, and books on the subject of

third party intervention. Policy documents and official statements of agencies involved in the intervention such as the UN were also consulted.

The libraries of the University of Witwatersrand, the South African Institute of International Affairs, as well as of the University of Pretoria were the main centers from which relevant literary information was sourced. The libraries of the University of South Africa in Pretoria and the Centre for Policy Studies were also used. Inter-library loan facilities at the various libraries were helpful in acquiring materials that were not available from their collections. Internet materials were researched as well.

Critical analysis of the relevant data was the first step in interpretation. Information that was obtained from the literature and interviews was analysed and compared, and then integrated with data generated through the interviews. From this the conclusion to the study was eventually reached.

1.8 Outline of chapters

1.8.1 Chapter 1: Introduction and proposal

The first chapter provides a framework for the dissertation. Explanations for the choice of Walzer's ethical approach are given and why other approaches, namely normative and behaviouralist approaches, are regarded as less relevant.

1.8.2 Chapter 2: Michael Walzer's ethical approach to humanitarian intervention from a legal perspective

The focus is on Walzer's ethical approach from a legal perspective as applicable to the two cases selected for this study, as well as the essential reasons that rendered them interventions in terms of Walzer's views. The chapter explains the key term of

humanitarian intervention. It aims to develop a framework for the analysis of the differences between the two cases and changes that have occurred. The relation between international relations and humanitarian intervention receive attention. The role of the UN as well as the principle of sovereignty are highlighted.

1.8.3 Chapter 3: Intervention into northern Iraq

Northern Iraq experienced the first humanitarian intervention in the Post-cold War Era in a newly-emerged world dominated by a uni-polar system. Resolution 688 condemned Iraq's treatment of its civilian population, which included its Kurdish inhabitants³¹. The apparent reason was that abuses of human rights were rife in northern Iraq. This chapter explores the reasons that prompted the international community to intervene on behalf of the Iraqi Kurds in the north of the state. It suggests that the first point of Walzer's approach has been achieved, namely that when a particular state includes more than one political community, is an empire or multinational state, and when one of its communities or nations is in active revolt, foreign powers can aid the rebels (1.1 above). The essential role that the UN played both in northern Iraq and Kosovo, as well as the international resolutions taken with regard to these states are analysed. The central questions in this and the next chapter are important, and are known to make specialists in the field of international relations wonder whether these interventions fall within the three conditions which are stressed by Walzer, and what the legal perspectives for these interventions might be.

1.8.4 Chapter 4: Intervention into Kosovo

The Kosovo scenario was even more complicated than that of Iraq. The Iraqi regime committed abuses against a particular group of people, the Kurds, but the case of Kosovo was different. After the collapse of the former Republic of Yugoslavia into a number of separate states, the Kosovo people asked for separation. The former

³¹ Op cit note 29.

Republic of Yugoslavia refused to accede to the request which led to the development of civil war. The intervention of NATO and the UN resolution were intended to protect the Kosovo people from persecution by the former Republic of Yugoslavia. This matter is discussed in this fourth chapter, together with the reasons why intervention was considered. In terms of Walzer's views, the second point of his approach has been achieved.

1.8.5 Chapter 5: Conclusion

The objective of this final chapter is to assess the framework for the analysis of Walzer's ethical approach to humanitarian intervention from a legal perspective as illustrated by the comparative study of northern Iraq and Kosovo. This chapter explains the results of the actual comparison between the two cases, and also seeks to provide answers to the research questions. Finally, a summary of key issues emerging from the research and some recommendations are provided. The fundamental question in this chapter concerns whether specialists in the field of international relations would consider a possible need to establish an international organisation that would be binding on the international community, and would be positioned to take upon itself the task of intervention with due regard for ethical considerations.

CHAPTER II

MICHAEL WALZER'S ETHICAL APPROACH TO HUMANITARIAN INTERVENTION FROM A LEGAL PERSPECTIVE

2.1 Introductory remarks

This chapter sets the scene for Walzer's principles of humanitarian intervention. To contextualise his views, attention is paid first, to the concept of humanitarian intervention, its background and the problematic nature of defining it, as well as how it will be operationalised in this study. Second, the relation between International Law and humanitarian intervention receives attention.

The position of the UN is of particular importance in this chapter because from a positivist legal perspective, the approval of the UN is a requirement for intervention and most of the humanitarian interventions in the Post-cold War Era were based on UN resolutions. The role of the UN is therefore also highlighted. The principle of sovereignty as an issue in humanitarian intervention is also discussed here since an understanding of intervention in the internal affairs of a particular state is unattainable without also studying sovereignty.

Walzer's ethical approach is fundamental to this study because he provides a socially relevant analysis and suggests applications in the field that could benefit the communities involved. His approach to humanitarian intervention and his contribution to the ongoing debate on 'setting rules' for humanitarian intervention are

analysed in the final part of this chapter. This is done with due regard for the fact that there is as yet no agreement in the international community on the circumstances and conditions that would justify humanitarian intervention, or on the procedures that should be followed if intervention were to take place. Hopefully, Walzer's approach will contribute to reaching consensus and the subsequent development of applicable action plans for optimal humanitarian intervention.

2.2 The concept of humanitarian intervention

First, it should be born in mind that there is no agreement or consensus among scholars of International Law and theorists of International Relations or Political Science regarding the concept of humanitarian intervention. Thus, for the purpose of this study, attention is given to various attempts to define the concept and to actions that can be regarded as humanitarian intervention. An overview of the development of the doctrine of humanitarian intervention is also given. These issues determine how the term is used in this study.

2.2.1 Defining the concept of humanitarian intervention

Definitions are problematic by nature and the concept of humanitarian intervention is no exception. To complicate matters, the literature draws attention to the fact that the notion of intervention can be distinguished in terms of intervention *per se* and humanitarian intervention. There is both a wider and a narrower understanding of both concepts: the wider definition includes non-military forms of intervention while the narrower definition refers to military intervention only. In order to define the concepts, attention is paid first to the wider meaning of the concept of intervention.

The concept of intervention *per se* is ambiguous, and its precise description and definition are unclear, but at least an attempt should be made to clarify it.³² The root of the term is derived from the Latin verb *intervenere* which describes the general content of the concept of intervention. It can have the meaning of ‘stepping between’, ‘to disrupt’ or ‘to interfere’. Emmerich de Vattel first defined the concept of intervention in 1758 as a “breach of the sovereignty of a target state”.³³ This was the first recorded definition of intervention in International Law.

Thus, intervention was regarded as a specific action aimed at the authority structure of a state. The purpose of intervention though, is not to conquer a state, to annex it to another state, or to integrate it into an empire. Instead, intervention is political or diplomatic in nature. The party that intervenes attempts to change the actions and policies of the authority structure, that is, of the government or the state. Some would deny the political nature of intervention, like many contemporary advocates of intervention, but this is incorrect because the target of the intervention is a government, and by the very act of intervention, the intervening agent takes sides against the government or state concerned.³⁴ Intervention is thus partisan. It occurs to change the status quo.

Another element of the concept of intervention is that it is not apolitical. This view can be dangerous because an apolitical interpretation of any specific intervention might ignore the fact that the reason for human rights abuses in a particular state could be a ferocious and sectarian struggle between two member factions. Intervention may furthermore also unleash a humanitarian disaster. Before NATO’s

³² Du Plessis, L.A. (ed) *Military Intervention: Nature and Scope in Managing Africa Conflicts: The Challenge of Military Intervention*. Pretoria: HSRC Publisher: p 4 (2000).

³³ Ibid.

³⁴ Havercroft, J.J.E. *Beyond Sovereignty and Anarchy: Ontological Foundations of Political Order*. University of Minnesota: pp 224-260 (2006) (Dissertation Submitted to the Faculty of the Graduate School of the University of Minnesota).

bombing campaign against the former Republic of Yugoslavia, approximately half a million people were killed and displaced.³⁵

I don't know what the expectations of NATO commanders were last March; ordinary citizens in the United States and Europe were certainly led to expect that the bombing would solve the problem fairly quickly.³⁶

The concept of humanitarian intervention is likewise controversial and seemingly also more complex as regards International Law and international relations. As with intervention, there is no generally-accepted definition of the term humanitarian intervention. Holzgrefe for instance, describes the very perplexing situation surrounding the differences of opinion on the precise definition for humanitarian intervention, when he states aptly that:

Saying 'humanitarian intervention' in a room full of philosophers, legal scholars, and political scientists is a little bit like crying 'fire' in a crowded theatre: it can create a clear and present danger to everyone within earshot.³⁷

Be that as it may, an understanding of its real meaning is important for purposes of this study.

The issue of humanitarian intervention has been unclear since the beginning of the twentieth century and also interpreted in various ways. Then a 'right of humanitarian intervention' was acknowledged, although at the time this was an incorrect representation of the actual state affairs. Earlier too, 'humanitarian intervention' often referred to forcible interventions that aimed at stopping large-scale human rights crises as occurred in Lebanon in 1982. Currently and in the

³⁵ Ibid.

³⁶ Walzer, M. *Arguing About War*. London: Yale University Press: pp 99-103 (2004).

³⁷ Holzgrefe, J.L. & Keohane, R.O. (eds) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*. Cambridge: Cambridge University Press: p 1 (2003).

wider sense, the concept includes interventions that aim to offer humanitarian assistance to extremely deprived peoples.³⁸

Various other definitions of the term are also proposed, such as “it is an act performed for the purpose of forcing a sovereign to respect fundamental human rights in the exercise of its sovereign prerogatives”.³⁹ “Most philosophers have concluded that humanitarian intervention in cases of extreme human rights abuse is at the very least morally permissible, and some thinkers have gone so far as to say that some cases of extreme human rights abuse create a moral duty to intervene to stop the abuse”.⁴⁰ Brownlie (in Chesterman 2001) notes that the doctrine was ‘inherently vague’ and was expressed in a variety of forms. Apart from the different contents that are attributed to the ‘right’ of humanitarian intervention, further differences that are essential are evident when the normative status of human intervention is considered. The evaluation of this status is made especially difficult by the fact that engaging in itself was not condemned by International Law.⁴¹

Humanitarian intervention is also defined as “the threat of use of force by a state, group of states, or international organisations for the purpose of protecting the nationals of the target state from widespread deprivation of internationally recognised human rights”.⁴² Another definition states: “the theory of intervention on the ground of humanity recognises the right of one state to exercise international control over the acts of another in regard to its internal sovereignty

³⁸ Op cit note 28.

³⁹ Sinha, M *Humanitarian Intervention by the United Nations*. New Delhi: Nice Printing Press: p 13 (2002).

⁴⁰ Crovelli, Mark R. *Humanitarian Intervention and the State* Available at <http://www.mises.org/journals/scholar/crovelli2.pdf>. Last visited July 17, 2007.

⁴¹ Chesterman, S. *Just War or Just Peace? Humanitarian Intervention and International Law*. Oxford: Oxford University Press: p 35 (2001).

⁴² Op cite note 25. See also Op cit note 24.

when contrary to the laws of humanity”⁴³. In his account, Richard Lillich (in Sinha), on the other hand, points to the conditions of imminent danger and the occurrence or threat to substantial human values,⁴⁴ and adding a further component to the definition of humanitarian intervention, TERNANDO R TESON describes it as proportional state assistance to citizens in another nation whose basic human rights are infringed upon and who themselves are willing to rise up against their government.⁴⁵ Thus, although a generally accepted definition of humanitarian interventions is lacking, the foregoing definitions reflect upon wider understandings of the concept in comparison with narrower definitions that refer to military intervention only.

An example of a narrower definition of the concept that emphasises the armed nature of intervention is that humanitarian intervention is coercive action by states, involving the use of armed force in another state without the permission of its government, with or without sanction from the UNSC with the purpose of preventing or stopping terrible and massive violations of human rights or International Humanitarian Law.⁴⁶ The use of military force by a government against another government was traditionally included in the narrow understanding of the concept, if the aim was to protect the freedom and the life of the citizens of a state when they were unable or unwilling to do so themselves.⁴⁷ Baxter (in Sinha 2002) defines the concept of humanitarian intervention as a “short-term use of armed force by a government, in what would otherwise be a violation of the sovereignty of a foreign state, for the protection from death or grave injury of citizens of the acting state and

⁴³ Ryniker, A. *The ICRC's Position on "Humanitarian Intervention"* 83 (842): pp 527-532 (2001). Available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/57JR5Y/\\$File/527-532_Ryniker-ang.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/57JR5Y/$File/527-532_Ryniker-ang.pdf). Last visited August 28, 2007.

⁴⁴ Op cit note 39.

⁴⁵ Sinha, M *Humanitarian Intervention by the United Nations*. New Delhi: Nice Printing Press: pp 10-11 (2002)..

⁴⁶ Op cit note 43.

⁴⁷ See generally, Sinha, M *Humanitarian Intervention by the United Nations*. New Delhi: Nice Printing Press: (2002).

incidentally, perhaps, nationals of other states by their removal from the territory of the foreign state”.⁴⁸

An important aspect of the concept of humanitarian intervention is that UN humanitarian intervention usually occurs without the consent of the specific target government. In UN practice, if permission of the target state is sought, this very fact would render the particular action as not being an intervention.⁴⁹ Thus, in the UN frame of operating, intervention is only considered intervention in the true sense of the word when it occurs without the permission of the target state.

A second important aspect of the concept concerns the aims and objectives pursued with such action. The parameters of humanitarian intervention limit the actions taken to stopping the human rights violations that necessitate intervention in the first place. Pursuing other political aims and objectives thus removes an intervention from the humanitarian sphere. If the UN consequently embarks upon an intervention, and if force is used, it must focus upon the issue of human rights. A UN intervention would thus not be considered to be ‘humanitarian’ if its main goals are to pursue other political aims, even if these aims are considered to be legal and in accordance with its Charter.⁵⁰ In an interview between Massoud Barzani, of the KDP and current president of the Iraqi Kurdistan territory, and the *Harvard International Review*, Massoud Barzani said that:⁵¹

We understand humanitarian intervention to be the right of the international community to act militarily upon verified and well-documented evidence of massive human rights violations by a sovereign member of the UN against its people, especially when the level of such atrocities reaches a point of humanitarian crisis that

⁴⁸ Op cit note 45.

⁴⁹ Op cit note 28.

⁵⁰ Ibid.

⁵¹ Interview with Massoud Barzani published by the *Harvard International Review* 16(1) 07391854, (Fall 1993).

endangers peace and stability beyond the boundaries of the given nation.

Clearly, Barzani favours military intervention by the UN when serious violations of human rights occur in any member state because these events may threaten peace and security beyond that specific state's borders. Walzer shares this idea, but he does not indicate what his position is on intervention by the UN. He would invite foreign parties to assume their ethical responsibility to prevent serious violations of human rights in the state.⁵² In a critique of Walzer's views, the following is stated:

If we follow Walzer and his left-leaning critics, the solution to this problem lies in vigilant and perpetual intervention by the world's 'good' states or international organizations like the UN to stop abuses in and by other states. ... however, [that] this advocated solution is nothing more than a post hoc and superficial solution to a problem that ultimately stems from the state's monopolistic position *vis á vis* defense services and its astounding power and wealth *vis á vis* its own people in the modern world (both of which derive, of course, from its ability to tax).⁵³

A third issue pertaining to the concept of humanitarian intervention is when and under what conditions would intervention be regarded as 'humanitarian'. Humanitarian intervention assumes in itself that governments have an international duty in their relations with their own citizens to afford them certain basic or fundamental rights. These rights are viewed to be essential for the citizens' everyday lives, and for upholding amicable relations among states. It is further assumed that these rights are so important and of such benefit to people that contraventions by any government may not be slighted by other states. Acting from this premise, any government can intervene in a case of

⁵² Op cit note 7.

⁵³ Op cit note 40.

deliberate contradiction of these rights by any other government to its own people.⁵⁴ This has historically been a valid form of intervention. While Walzer admits that intervention is an 'imperfect duty', he acknowledges that gross infringements of basic human rights continue and that states that could in fact intervene find that intervention would not serve their interests.

The massacres go on, and every state that is able to stop them decides that it has more urgent tasks.⁵⁵

Difficult as it may be to indicate a precise general definition of humanitarian intervention, some commentators of International Relations nevertheless define it as relying upon armed force in the final instance with the valid aim of defending the citizens of another state from continuous and capricious exploitation that exceeds the parameters of the power within which the ruler is supposed to act with equity and justice. Another definition states that the theory of intervention based on a common humanity recognises the right of one government to exert international control over the actions of another as it relates to its domestic sovereignty when in contradiction with the laws of humankind. According to Teson's definition, when people are denied basic human rights and are themselves also willing to overthrow or resist the tyranny of their oppressive government, and are afforded transnational help that might also include the use of force by governments of other states, then one may rightfully speak of 'humanitarian intervention'.⁵⁶ Humanitarian intervention is thus basically an act executed with the aim of forcing a sovereign to adhere to basic human rights when acting as the entity of a state *vis-à-vis* the people within the jurisdiction of the state.

As regards the permissibility of humanitarian intervention, in various cases law and morality contradict each other. This emphasises the urgency of finding a way to

⁵⁴ Abiew, F.K. *The Evolution of the Doctrine and Practice of Humanitarian Intervention*. The Netherlands: Kluwer Law International: pp 30-41 (1999).

⁵⁵ Op cit note 7.

⁵⁶ Op cit note 54.

integrate these two fields into a coherent doctrine in order to find a common solution for the question on the permissibility of humanitarian intervention. Dispelling the notion that legal principles are merely technical or ethically neutral postulates, Fernando Tesón quotes HLA Hart by arguing that legal principles in fact “speak to some of our most basic moral principles, convictions and institutions”.⁵⁷

The definitions given above have many essential aspects in common and they provide a basic understanding of the use of the term by different scholars and academics. The definitions also set the scene for closer analysis of Walzer’s definition, ideas and thoughts in several sections of this dissertation. Through this research, it will be shown whether his arguments or conditions as mentioned in Chapter One, are consistent with humanitarian intervention in the cases being investigated.

2.2.2 Development of the Doctrine of Humanitarian Intervention

The origin of the doctrine of humanitarian intervention goes back to ancient times, and to the inter-religious wars that followed the Renaissance and Protestant Reformation. The norm of dignity was the greatest influence on the concept and dates back to the nineteenth century, but before that time the idea of humanitarian intervention was largely based on Christian beliefs and convictions. It was also based on the religious concept of the dignity of man who was believed to have been made in the image of God. During the Middle Ages, Thomas Aquinas held the view that, based on religious solidarity, a ruler has the right to intervene in the domestic affairs of another state when the state greatly oppresses its citizens.⁵⁸

⁵⁷ Heinze, E.A. “*In Extreme Cases Only*”: *Humanitarian Intervention in Theory, Law and Practice*, presented to the Faculty of The Graduate College at the University of Nebraska in Partial Fulfillment of Requirements for the Degree of Doctor of Philosophy , Lincoln, Nebraska: pp 8-113 (May, 2005).

⁵⁸ Op cit note 54. (Thomas Aquinas was born in or around 1225 at his father, Count Landulf’s, castle of *Roccasecca* in the Kingdom of Naples. The philosophy of Aquinas has exerted enormous influence on subsequent Christian theology, especially that of the Roman Catholic Church, extending to western

Thus, if Christian groups that lived among ‘non-civilized’ or ‘pagan’ nations were persecuted or harassed, it was considered right to intervene. Intervention in cases of human sacrifice and by European states during their imperialistic endeavours was also justified on religious grounds.

The Spanish scholar, Vitoria, believed that if any people (from Indians who live in Latin America) convert to Christianity and as a result, are persecuted by their superiors with the purpose of forcing them to return to their former religion, Spain would be justified to militarily enforce those involved to cease their mistreatment of the new converts. Furthermore, Spain would also be justified to remove the rulers, as is the case with other so-called ‘just wars’. The Pope of Rome would also have the right to remove offensive rulers and to place a sovereign with Roman Catholic persuasions over the new converts.⁵⁹

Vitoria maintained too that the struggle of the heathen rulers and the Roman Catholic missionaries against efforts to compel converted locals to revert to their previous religion would justify the Pope of Rome replacing the local rulers and to wage a just war. The latter justification and explanation formed the philosophical foundation for many interventions that were undertaken by so-called ‘civilized nations’ in the affairs of other so-called ‘non-civilized’ nations.⁶⁰

However, intervention was not always underpinned by religion. Justification for intervention became increasingly secularised after the French Revolution and more so following the First World War. Eventually it was described as “the principle of

philosophy in general, where he stands as a vehicle and modifier of *Aristotelianism*. Philosophically, his most important and enduring work is the *Summa Theologica*, in which he expounds his systematic theology.)

⁵⁹ Ibid.

⁶⁰ Ibid.

lending lawful assistance to peoples struggling against tyranny”. Many international scholars and academics subsequently supported this definition.⁶¹

Traditionally, the doctrine of humanitarian intervention acknowledged the right of a state to use military force against another state in order to protect the citizens of the intervening state from brutal or inhuman treatment, thus recognising a state’s right to interfere in another state’s internal affairs when the latter violated the laws of humanity. The doctrine of humanitarian intervention was based on fundamental human drives, such as self-preservation which in fact can be described as the most basic human drive.

Like other philosophers of the Enlightenment, Walzer maintains that human rights are of greater value than state sovereignty. Walzer does not encourage the legitimate use of military force, nor does he endorse action to be taken with strict legal paradigms. He holds that humanitarian intervention is justified when it is a response – with reasonable expectations of success – to acts “that shock the moral conscience of mankind”.⁶²

Political events during the twentieth century brought about important changes to the international humanitarian order, particularly after the Second World War (WW II). Three important stages can be identified in this regard, namely the foundational stage that followed WW II, the second stage that corresponded with the rise of the international human rights movement, and the third and current stage that commenced in the early 1980s.

⁶¹ Ibid.

⁶² Op cit note 7.

2.2.2.1 The foundational stage of change to the international humanitarian order

The first stage of change to the international humanitarian order, which can be described as ‘foundational’, corresponded with the years following WW II. An international order that was based on humanitarian views and convictions was slowly but surely being restored. It consisted of three foundation blocks:⁶³

i) International Human Rights Law (IHRL), defined as: “It codifies legal provisions governing human rights in various international human rights instruments. It is related to, but not the same as International Humanitarian Law and Refugee Law”.⁶⁴

ii) International Humanitarian Law, which is “known as the law of war, [that is] the laws and customs, or the law of armed conflict”. It is the legal corpus “comprised of the Geneva Conventions and the Hague Conventions, as well as subsequent treaties, case law, and customary International Law. It defines the conduct and responsibilities of belligerent nations, neutral nations and individuals engaged in warfare, in relation to each other and to *protected persons*, usually meaning civilians”⁶⁵. International Humanitarian Law seeks to accomplish the following:⁶⁶ namely to

- a) help with the specific needs for protection that arise in times of war
- b) minimise the effects of armed clashes and skirmishes, and

⁶³ Zalaquett, J. *The Legitimacy of Armed Humanitarian Intervention: Basic Concepts*. November 2000 Available at http://www.isn.ethz.ch/4isf/4/Papers/ISF_WS_II-2_Zalaquett.pdf: pp 1-3. Last visited on February 12, 2007.

⁶⁴ See, http://en.wikipedia.org/wiki/International_human_rights_law. Last visited on June 13, 2007.

⁶⁵ Ibid.

⁶⁶ Fitzpatrick, J. & Bayefsky, A.F. (eds) *Human Rights and Forced Displacement*. London: Martinus Nijhoff Publishers: pp 50 (2000).

c) to protect against maltreatment of people who are in the hands of the enemy. It specifically focuses on protecting people in situations that give rise to specific needs. These usually include armed conflicts and war-like situations. It can thus be said to be much more focused and specific in its scope than International Human Rights Law.

iii) The International Law of Refugees (ILR) “is the branch of International Law which deals with the rights and protection of, related to, but distinct from, International Human Rights Law and International Humanitarian Law, which deal respectively with human rights in general, and the conduct of war in particular”.⁶⁷

Clearly, the central focus of International Human Rights Law and International Humanitarian Law is the protection of people. International human rights protection is a phenomenon that came into being after WW II. Consequently, the propagation and protection of human rights has become one of the most important purposes of states worldwide. The UN Charter binds the UN and all its member states to the legal obligation of promoting and propagating respect for human rights and fundamental freedom.⁶⁸

At the centre of the international system for the promotion and protection of human rights are the human rights treaties of the UN. There are seven major human rights treaties, and every member of the UN is a signatory of one or more of them. This legal system, which promotes the protection of human rights, appears to apply to almost every child, woman or man on earth.⁶⁹

⁶⁷ Op cit note 64.

⁶⁸ Thakur, R. & Malcontent, P. (eds) *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States*. New York: United Nations University Press: pp 264-265 (2004).

⁶⁹ The UN Human Rights Treaties are:

- The *Human Rights Committee* (HRC) monitors implementation of the International Covenant on Civil and Political Rights of 1966 and its optional protocols.

It is true that broad interpretation is given to the idea of a threat to international peace and security, if one considers the recent conclusions drawn by the UNSC. It seems nevertheless unlikely that the concept of international peace and security will soon be extended cover the specific features that are proper and unique to pro-human rights intervention.⁷⁰

2.2.2.2 The International Human Rights Movement

What could be described as the second stage in the development of the international humanitarian order, began to take shape in the second half of the twentieth century with the rise of the International Human Rights Movement. It grew into an international phenomenon. Leading international actors in this movement documented and opposed oppressive regimes, combining their efforts to put an end to the abuses perpetrated in these states. This occurred when the Cold War between the Soviet Union and the west was at its fiercest, and numerous groups found themselves subjected to authoritarian regimes.⁷¹

This was also a time in which a number of states experienced strife associated with civil wars, internal military uprisings and factional conflicts. This eventually led to

-
- The *Committee on Economic, Social and Cultural Rights* (CESCR) monitors implementation of the International Covenant on Economic, Social and Cultural Rights of 1966.
 - The *Committee on the Elimination of Racial Discrimination* (CERD) monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965.
 - The *Committee on the Elimination of Discrimination against Women* (CEDAW) monitors implementation of the *Convention on the Elimination of All Forms of Discrimination against Women* of 1979.
 - The *Committee Against Torture* (CAT) monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of 1987.
 - The *Committee on the Rights of the Child* (CRC) monitors implementation of the Convention on the Rights of the Child of 1989 and its optional protocols.
 - The *Committee on Migrant Workers* (CMW) monitors implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990. Available at: <http://www.bayefsky.com/> Last visited on June 19, 2007.

⁷⁰ Fernandez-Sanchez, P.A. *The New Challenges of Humanitarian Law in Armed Conflicts*. Boston: Martinus Nijhoff Publishers: pp 84-85 (2005).

⁷¹ Op cit note 63.

the approval and enactment of new international human rights norms, and interstate means of security. Two protocols additional to the Geneva Conventions of 1949 were subsequently signed in 1977.⁷² This marked an important improvement in the sphere of International Humanitarian Law.

2.2.2.3 The current stage of change to the international humanitarian order

The early 1980s marked the development of what might be termed the third and current stage of the international humanitarian order. The ideals of the human rights movement had reached a level of extreme popularity and legitimacy all over the world.

After the fall of the Berlin wall and the subsequent collapse of the Soviet Union, the international humanitarian order that was set in place after WW II entered an important phase. Many new states came into being and many oppressive regimes began to move in the direction of making the transition to democracy and the implementation of human rights. On the other hand, ethnic, national or religious uprisings broke out in numerous states in the 1990s. In these conflicts, crimes against humanity and war crimes, which included genocide, were perpetrated. Because of the aforementioned developments, specific elements have appeared on the agenda of the international humanitarian system and movement.⁷³

It is important to remember that human rights, and peace and security are mutually inclusive. Early in the nineties, the UNSC began to spread and propagate human rights in the already existing peace and security instruments. UN peacekeeping and peace enforcement operations are examples of this. The Nuremberg Tribunal is called “the mother of all international criminal tribunals”. Based on this Tribunal the UNSC

⁷² Ibid.

⁷³ Ibid.

decided to reintroduce ad hoc tribunals of international criminal justice for the former Republic of Yugoslavia in 1993, and also for Rwanda in 1994.⁷⁴

Human right has become, along with peace, development, and democracy, a defining normative theme of Post-cold War Era international society ... making it a 'natural' subject for a volume on international ethics.⁷⁵

Three elements are important in this regard. First, a number of issues and aspects were combined together under the words: "truth, justice and reconciliation". These phrases point to the importance and need for establishing a democratic system after the collapse of a period of dictatorial or despotic rule and internal unrest in a state. During this process the enshrined ethos of human rights violations or war crimes committed were to be addressed.⁷⁶

Second, aspects relating to international criminal justice make out a further element. The UN formed new ad-hoc tribunals for the prosecution of criminals. One was termed the 'International Criminal Court (ICC) (for the former Republic of Yugoslavia)', and the other the 'International Criminal Tribunal (ICT) for Rwanda'. In the late 1990s, the Statute of the permanent International Criminal Court was eventually approved and accepted. The case against Chile's former dictator, President Pinochet, stimulated numerous other projects that resort under what might be called universal or international jurisdiction.⁷⁷

⁷⁴Thakur, R. & Malcontent, P. (eds) *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States*. New York: United Nations University Press: pp 1-2 (2004).

⁷⁵ Donnelly, J. *Ethics and International Human Rights (Human Rights Working Papers)*. 1999. Available at: <http://www.du.edu/gsis/hrhw/working/2005/23-donnelly-2005.pdf>: pp 1-2. Last visited on November 22, 2007.

⁷⁶ Op cit note 63.

⁷⁷ Ibid. Creating an international court to put national leaders and others on trial for being personally responsible for terrible violations of human rights and international crimes was first initiated in the nineteenth century. See also, Thakur, R. & Malcontent, P. (eds) *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States*. New York: United Nations University Press: p 21 (2004).

Third, aspects concerning humanitarian action became important in the agenda of the international humanitarian system and movement. These aspects include investigations relating to humanitarian aid as well as the discussion about the legitimacy and place of military intervention in foreign states for humanitarian reasons.

What the aforementioned three elements have in common is that they all developed out of a common concern by the international community to be more pro-actively involved in fighting for the realisation and implementation of human rights across the world. Obviously this also involved opposition to oppressive regimes and bringing the perpetrators of war crimes to justice. These actions were taken to prevent similar atrocities in future. The most difficult of these issues to deal with concerns the question of armed humanitarian intervention.⁷⁸

2.3 International Law pertaining to humanitarian intervention

International Law has a history that dates back over centuries. It includes an extensive range of international treaties, agreements and conventions. The norm of non-intervention in the domestic affairs of a state is one of the fundamental principles of International Law. It is therefore impossible to study intervention and issues pertaining to it without prior knowledge of what International Law stipulates in this regard, and in particular the standards set by International Humanitarian Law in terms of which it must be decided whether intervention is justified or not.

However, the issue of a state being held accountable to the international community for its conduct of domestic affairs, including the treatment of its citizens, remains controversial and is fundamental to the legal debate concerning the right and/or duty

⁷⁸ Op cit note 63.

to intervene.⁷⁹ In the *Leviathan*, Hobbes stressed the rights of a sovereign state against being held legally accountable for certain actions. With regard to the position of one sovereign to another, the Law of Nations applies which is the same as the Law of Nature: “There being no Court of Naturall Justice, but in the Conscience only where not Man, but God reigneth”.⁸⁰

The idea of protecting human rights during the scourge of war or civil war has been in existence amongst people to some or other extent since early times.⁸¹ During the nineteenth century, armed conflicts increased tremendously. A decisive event at the time was the establishment of the International Committee of the Red Cross in 1863 and the signing of an agreement "to improve the fate of the soldiers wounded in the armed forces in the field" in August 1864.⁸²

Jean Bethke Elshtain⁸³ comments on Hobbes’s war and Walzer’s hopes:

The hard fact of the matter is that many alternatives to the use of force cannot be implemented or even initiated until coercive force is deployed to stabilize a situation. You cannot use “soft power” effectively in the thick of a situation akin to Hobbes’s war of all against all. Although I do not share Walzer’s overall hopefulness where “indirection” is concerned, I join hands with him in a commitment to minimal justice for all beleaguered peoples, tormented by the brutal, that we too readily ignore or forget.

⁷⁹ Chesterman, S. *Just War or Just Peace? Humanitarian Intervention and International Law*. Oxford: Oxford University Press: p 16 (2001).

⁸⁰ Ibid.

⁸¹ Paragraph translated from Arabic Website, under title *The Historical Background of International Humanitarian Law*. Available at http://www.icrc.org/Web/ara/siteara0.nsf/htmlall/section_ihl_history. Last visited on March 30, 2007.

⁸² Ibid.

⁸³ *Jean Bethke Elshtain Responds*. Available <http://www.dissentmagazine.org/article/?article=664>. Last Visited on June 14, 2007.

The state derives legitimacy from “the fit of government and community, that is, the degree to which the government actually represents the political life of its people”.⁸⁴ Walzer lends his support to actions preventing governments from committing abuses against its own citizens.

Like other philosophers of the Enlightenment, Walzer maintains that human rights are of greater value than state sovereignty. Walzer does not encourage the legitimate use of military force, nor does he endorse action to be taken with strict legal paradigms. He holds that humanitarian intervention is justified when it is a response – with reasonable expectations of success - to acts “that shock the moral conscience of mankind”.⁸⁵

I want to begin with the second of these innovations – the product of an extraordinary speedup in both travel and communication. It may be possible to kill people on a very large scale more efficiently than ever before, but it is much harder to kill them in secret. In the contemporary world there is very little that happens far away, out of sight, or behind the scenes; the camera crews arrive faster than rigor mortis.⁸⁶

States are the most important actors in the international legal system. The latter provides the framework of rules and regulations that determines the principle actors, and regulates their conduct within the international domain.⁸⁷ International Law thus deals with the legal rights and responsibilities of international actors, and in particular states, territory, immunity, and their interactions with other actors.⁸⁸ It also includes keeping international peace and security, controlling arms, the peaceful settlement of

⁸⁴ Walzer, M. “The Moral Standing of States”. In *International Ethics: A Philosophy and Public Affairs*. Edited by Charles Beitz: p 214 (1980).

⁸⁵ Op cit note 7.

⁸⁶ Walzer, M. The Argument about Humanitarian Intervention.

Available at E:\4June2007\The Argument about.htm. Last visited June 14, 2007.

⁸⁷ Public international law From Wikipedia, the free encyclopedia.

Available at: en.wikipedia.org/wiki/Public_international_law - 69k – Last visited on March 19, 2007.

⁸⁸ Ibid.

disputes, as well as the use of force in the international domain. These include for example, the conduct of war and the treatment of prisoners of war.⁸⁹ Even though a state is an individual entity and therefore, has certain rights over its territory and people, International Law is also concerned with the treatment of people within a state's territorial boundaries, including citizens, foreigners, refugees and diplomatic personnel, as well as with issues of nationality and human rights in general.⁹⁰

Two important sources of International Law are customary International Law and the *opinion juris*.⁹¹ Customary International Law consists of an unwritten corpus of rules that is the outflow of the common practice of governments. This also includes the *opinion juris*, which can be defined as a deep-seated conviction held by states that any specific practice or custom is demanded by law or that law is at least important for its continued development. The majority of precepts of customary International Law are internationally recognised. This means that all governments play a part in establishing, monitoring or adjusting these rules. The way in which a rule is added to establish customary International Law is as follows:⁹²

- i) Governments pro-actively endorse it through their day-to-day practice and their attitude towards it as expressed in media statements and elsewhere

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ See also Article 38(1) of the 1946 Statute of the International Court of Justice is generally recognised as a definitive statement of the sources of international law. It requires the Court to apply *inter alia*, (a) international conventions "expressly recognized by the contesting states", and (b) "international custom, as evidence of a general practice accepted as law". To avoid the possibility of *non liquet*, sub-paragraph (c) added the requirement that the general principles applied by the Court were those that had been "the general principles of the law recognized by civilized nations". It states that by consent determine the content of international law, sub-paragraph (d) acknowledges that the Court is entitled to refer to "judicial decisions" and juristic writings "as subsidiary means for the determination of rules of law".

Available at http://en.wikipedia.org/wiki/Sources_of_international_law. Last visited August 2007.

⁹²Holzgreffe, J.L. & Keohane, R.O. (eds) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*. Cambridge: Cambridge University Press: p 179 (2003).

ii) Governments passively or silently support it by simply doing nothing. In this case, the specific government's silence would be interpreted as acquiescence regarding the rule concerned.

Governments in turn, also have the opportunity to actively oppose any new rule by enacting laws contrary to it. They are also free to stage certain forms of demonstrations or protests against it. A proposed new rule can only become fixed and binding when the majority of governments are in favour of it. If any governments do oppose it, the number must be very small.⁹³

Not all theorists share this opinion though, and a small but significant group of authors concur with Humphrey that a great number, if not all humanitarian interventions in the nineteenth century, were motivated by political considerations rather than by a concern for human rights. They further hold that it is doubtful whether what was then termed 'humanitarian intervention' was ever acknowledged as an institution of the law of nations in any true sense of the word.⁹⁴

Walzer would presumably insist that this conflicts with the right of individuals to live in an historic community with a way of life that sees the roles of men and women quite differently. Actual interventions challenge governments rather than whole communities, and Walzer's position is that outsiders should start with the presumption that there is a 'fit' between the community and the government. The line Walzer draws depends not only on the degree of oppression but on who the oppressor is.⁹⁵

⁹³ See generally, Holzgrefe, J.L. & Keohane, R.O. (eds) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*. Cambridge: Cambridge University Press: (2003).

⁹⁴ Verwey, W.D. "Humanitarian Intervention under International Law" in *Humanitarian Intervention and the Prohibition of Force*, Edited by Bos, M. Vol. XXXII: pp 376-377. Dordercht: Martinus Nijhoff Publishers (1985).

⁹⁵ Op cit note 7.

Treaties are another source of International Law and are comparable to written contracts agreed upon by two or more states and are recorded with a separate third party, in most cases the UN Secretary-General. They are understood on the grounds of regulations that are set out in a special treaty concerning other treaties, namely the Vienna Convention on the Law of Treaties of 1969. It has generally been viewed as a precise set of rules concerning the International Law of Treaties⁹⁶. The most crucial rule with regard to understanding treaties is explained in Article 31(1) where it is stated that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context”, as well as “in the light of its object and purpose”.

Matters are complicated by the fact that some non-treaty regulations that are dictatorial in nature and which have power over incompatible, non-dictatorial regulations exist. These regulations, which can be compared with the ‘public policy’ regulations of some state authorised structures, deal with matters such as the preventive measures on genocide and torture, as well as the violent implementation of force. Known as *jus cogens*, such regulations are seen by a large majority of intercontinental lawyers as the norm and therefore, the end result of progress comparable with that of conventional International Law. It is thus crucial that they are upheld by as many states as possible, either through active or inactive support, along with the notion of legal responsibility. Due to the publicity guidelines and peremptory nature of these regulations, the level of development for these regulations is unavoidably elevated above that of other regulations.⁹⁷

At different points in history, the strongest states in the world have come together to prevent international order from falling apart. At Westphalia in 1648, Vienna in 1814 and 1815, Versailles in 1919 and at San Francisco in 1945, strong states attempted to provide guidelines for the new order and proposed laws with which world order in the

⁹⁶ Holzgrefe, J.L. & Keohane, R.O. (eds) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*. Cambridge: Cambridge University Press: pp 179-180 (2003).

⁹⁷ Op cit note 94.

future could be maintained. One essential rule that was generally agreed upon was that fairness must prevail between states concerning sovereignty and the prevention of aggressive force, except when used to protect the state. The code of sovereignty states that there is a basis of no intervention in a state's domestic matters, regardless of whether the intervention is aggressive or not.⁹⁸

This standard of not intervening is widely accepted and is regarded as a legal duty, and not just an act of courtesy. It has a long history and has been incorporated into many international implementations that are also of a provincial and mutual kind. The 1933 Montevideo Convention on the Rights and Duties of States emphasises that no state is entitled to intrude in the affairs of any other.⁹⁹

The principle of non-intervention in the domestic affairs of another sovereign nation that is a member of the UN, including the important value of sovereign equality, constitutes the very foundation of inter-state relations and International Relations. This is one of the reasons why the generally accepted consensus in International Law holds that member states of the UN are prohibited from meddling or interfering in the internal affairs of other states. The Charter of the UN does allow the UNSC to ratify interventions though, but only in situations that threaten international peace and security.¹⁰⁰

More than once the security of a particular group of people was maintained by means of treaties, for example, the Treaty of Osnabruck in 1648 and the Treaty of Berlin in 1878. More examples include the treaties that came into effect at the end of WW1 between those who were victorious and those that had been defeated. Ensuring security by such means was seen as permissible in terms of customary law.¹⁰¹ In the Charter of the Organization of American States this same standard is articulated. The

⁹⁸ Du Plessis, L.A. (ed) *Military Intervention: Nature and Scope in Managing Africa Conflicts: The Challenge of Military Intervention*. Pretoria: HSRC Publisher: p 74 (2000).

⁹⁹ 119 UN Treaty Series (UNTS) 3, Art 8.

¹⁰⁰ Art. 2.7, Art. 2.1 and Art. 39. UN Charter.

¹⁰¹ Op cit note 94.

preceding regulation prevents any form of interference or attempt at interference in a state or its political, financial or cultural foundation.

The association of the two main sources of International Law is comparable with the association of domestic statute law and common law. A stipulation of a treaty can overrule conflicting customary International Law. One specific treaty, the UN Charter, states that it has power over all other treaties¹⁰². This treaty which was accepted in 1945, has been acceded to by 189 states, or almost all the states in the world.¹⁰³

The basic framework set by the Charter has been given substance by the UN General Assembly by means of a number of declarations. In 1965, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty (known as the Declaration on Intervention) was adopted.¹⁰⁴ The Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the UN (known as the Friendly Relations Declaration) was accepted in 1970. This Declaration has a legal character and refers to 'violations of International Law'. It states the following with regard to such violations:¹⁰⁵

No state may use or encourage the use of economic, political or any other type of measures to coerce or to secure from it the subordination of the exercise of its sovereign rights [or] and to secure from it advantages of any kind. Also, no state shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities

¹⁰² See Article 103 of the UN Charter: "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".

¹⁰³ Op cit note 93. These treaties recognise the complete independence of Romania, Serbia and Montenegro as well as the autonomy of Bulgaria. The Treaty of Osnabruck formed part of the negotiations that led to the Treaty of Westphalia.

¹⁰⁴ General Assembly Resolution 2131(xx) Dec 21, 1965.

¹⁰⁵ General Assembly Resolution 2625 (xxv) Oct 24, 1970.

directed towards the violent overthrow of the regime of another state, or interfere in civil strife in another state.

Article 38(1) (a) of the Statutes of the ICJ states that, if valid, ‘international conventions’ will at all times be an appropriate source for International Law. When the UN was established, it generally favoured the prohibition on the use of force between states. The Charter, therefore, placed many constraints on the *jus ad bellum* as a lawful right to conflict held by sovereign states.¹⁰⁶

However, forceful intrusions have occurred on the basis of ‘compassionate intervention’. Since 1945, examples of such ‘compassionate intrusions’ include the armed efforts of Belgium in the Congo in 1960 and 1964, the intrusion by the USA in the Dominican Republic in 1965, and Indonesia’s intrusion in East Timor in 1975.¹⁰⁷

While international lawyers have tried to justify such interventions in terms of International Law, scholars of International Relations have not placed the same emphasis on the legal principles involved. They focus on realist principles and the historical background of the relations between states in a particular intervention. According to experts of International Relations, planned, political, financial and societal concerns currently determine whether intervention in another state’s affairs can be allowed¹⁰⁸. Politically-warranted aims for intervention that have been looked at include bringing together separated populations and stabilising unsound communities, enabling national emancipation (self-determination), trying to fix atrocities committed in other states and encouraging the implementation of social equality. Issues of International Relations, morality in politics, and intervention now merge, and the issue thus becomes complex.

¹⁰⁶ Grimstad, K. *Humanitarian Intervention: Historical, Legal and Moral Perspectives*: pp 18-19 (2001).

¹⁰⁷ Arend, A.C. & Beck, R.J. *International Law and the Use of Force Beyond the UN Charter Paradigm*. London: Routledge: p 113 (1993).

¹⁰⁸ Scott, A.M. Non-Intervention and Condition Intervention, *Journal of International Affairs*, Vol. 22, p 208 (1968).

The perspective identified above is evident in the USA's actions, and in particular when it took it upon itself the right to intervene in states in the west and by regarding itself as an international policing force. A typical example in this regard is Theodore Roosevelt's addition of a corollary to the Monroe Doctrine in the USA's relations with Latin America from 1901 to 1909. This 'doctrine' was used in the justification of thirty-one interventions in Latin America. However, the USA officially agreed to the notion of non-intervention in 1935. The Truman Doctrine was followed in the time of the Cold War. It stated that where the ideas of a small group are forced onto the larger populace and done so by means of tyranny, the USA would aid those who oppose such tyranny by means of armed force and pressure from outside the borders of the affected state.¹⁰⁹

Again issues such as power and morality become enmeshed and this begs the question of guidelines on ethical behaviour and this is where Walzer's work can play a role (as will be discussed in the last section of this chapter).

The acceptability of the justification for an intervention is currently influenced by the distinction made between unilateral and collective intervention. Intervention by a single state has become 'socially' intolerable and borders on 'illegality'. Collective intervention on the other hand, is regarded as more legal and particularly in the Post-cold War Era where divisions have become less pronounced.¹¹⁰

The Cold War paralysis of the UNSC due to rivalry among the permanent members has also come to an end. The NATO invasion of the former Republic of Yugoslavia following the disaster in Kosovo is a good example of collective action in this regard. The UNSC, however, still looks at itself as the only true *legitimater* of persuasive

¹⁰⁹ Hinsley, F.H. *Power and the Pursuit of Peace*. Cambridge: Cambridge University Press: pp 357-360 (1967).

¹¹⁰ See generally, Chandler, D. *From Kosovo to Kabul: Human Rights and International Intervention*. London: Pluto Press: (2002).

intervention under Chapter VII of the UN Charter. In contrast, it seems that the USA's actions in Afghanistan and Iraq have caused problems.¹¹¹

Different states and different international organisations have different views on intervention, and the way in which they regard one particular intervention also shifts over time. No general viewpoint regarding the 'doctrine' of armed intervention has been proposed by the different humanitarian organisations. Over the past ten years however, some groups of organisations have made certain thoughts clear concerning when intervention is acceptable. Some organisations have done the same on an individual basis. For instance, in 1995, Oxfam created five important points for the suitable use of UN armed force under Chapter VII of the Charter to ensure the security of a state's inhabitants. The general thoughts from humanitarian organisations as a whole, however, differ from efforts by academics, politicians and the UN to determine guidelines for lawful international armed intervention.¹¹²

International Law, specifically in the way it has been changed by the UN Charter, is based on genuine or theoretical agreements between sovereign states. Accepted by the UN General Assembly in 1948, the Universal Declaration of Human Rights (UDHR), as well as linked declarations, allowed for a benchmark of human rights to be created and to which sovereign states must adhere. No details are given in either the Charter or the Declaration stating when it is acceptable for an intervention to occur and thus to go against the law of sovereignty.¹¹³

Even though there are threats of possible clashes between the two standards pertaining to international conduct, there is a general feeling that a range of human

¹¹¹ Ibid.

¹¹² Slim, Hugo. *Military Intervention to Protect Human Rights: The Humanitarian Agency Perspective*. Background Paper for the International Council on Human Rights' Meeting on Humanitarian Intervention: Responses and Dilemmas for Human Rights Organisations, Geneva March 31– April 1, 2001.

¹¹³ Binder, Leonard. *The Moral Foundation of International Intervention*. Available at: <http://igcc.ucsd.edu/pdf/policypapers/pp22.pdf>. 8. Last visited on March 18, 2007.

rights are founded on International Law, and that this law in turn, is founded on 'universally recognized principles of morality'.¹¹⁴

Moral politic, which is a foreign policy based on morals, does not have to be the end result of international agreements, or only reliant on a western legalist point of view. If there is to be any real worth to it, moral politic must be founded in the moral agreement of the political society. Not all groups of people will accept moral structures that are universal, legalistic and based on human resources. The ideological prevalence of moral dialogue based on human rights has, however, almost entirely prohibited the deliberation of different political moralities, but without making provision for a hierarchical arrangement of rival standards based on HR.¹¹⁵

The Vienna Convention does provide for the nullification of a treaty in the progression of customary International Law. A peremptory standard is important in this regard and is defined by the Convention (Article 53) as:

A norm accepted and recognized by the international community of states as 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.

Article 64 states explicitly that if a new peremptory standard of customary International Law emerges, any other conflicting treaty is terminated. This must however be read together with Article 53, which states that a treaty will be void if, at the time of its conclusion, it conflicts with a peremptory standard.¹¹⁶

Article 53 also gives the explanation that, for the functions of the Vienna Convention, a peremptory standard can be described as a standard established and accepted by the

¹¹⁴ Ibid.

¹¹⁵ Ibid

¹¹⁶ *Vienna Convention on the Law of Treaties* 1969, Art 53.

international society. Currently, there is general agreement about the notion that the prevention of the use of force is already of such a high standard.

International Law on its own does not seem to establish the legitimacy of any specific intervention; therefore it is important to consider factors that might do just that. The UNSC's influence as well as the UN's role in maintaining peace will be weakened if law is not legitimate¹¹⁷. It will also aggravate the problems faced by individual states and groups when requested to intervene. The international community needs to look at the various issues which make intervention justifiable, with the aim in mind of reaching agreement about it and making it part of International Law.¹¹⁸

Humanitarian intervention also needs to be enshrined in International Law before it will acquire what is called the 'normative credence of law'. This in turn, will increase the sense of responsibility and urgency to take practical and decisive steps against extreme human oppression and other abuses.¹¹⁹

Humanitarian intervention undoubtedly contradicts certain of aspects of International Law. The most pertinent such aspect is the law on provisions for the use of force as stipulated in the Charter of the UN. It should be stated though, that it is not beyond dispute that the UN Charter framework does indeed constitute an adequately structured legal framework that stipulates clear-cut principles for implementing military force to increase human well-being.¹²⁰

International Law, as it relates to jurisprudence, should determine a policy response to the societal needs of the international community by enacting a legal constraint. Morality touches on humanitarian intervention especially as regards helping people in

¹¹⁷ Hui, V.T. "Problematizing Sovereignty: Relative Sovereignty in the Historical Transformation of Interstate and State – Society Relations". In *International Intervention in the Post-cold War World: Moral Responsibility and Power Politics*. Edited by Michael C. Davis, Wolfgang Dietrich, Bettina Scholdan & Dieter Sepp. London: The Publisher ME Share: pp 46-47 (2004).

¹¹⁸ Ibid.

¹¹⁹ Op cit note 57.

¹²⁰ Op cit note 57.

disaster-stricken areas and how to rescue or protect them. Morality is a necessary requirement if governments and members of the international community are to act with a certain sense of regularity and stability when considering the use of military action for humanitarian purposes. It is essential for it to be accompanied by an awareness of legal responsibility.¹²¹

Morality cannot be divorced from law as a purposive human endeavour. Law would thus also imply a moral duty, which in turn also leads, or should lead, to further moral duty. Instead of arbitrarily enacting laws for its own sake, it is also important for all to be convinced that each law is just and moral. Mere adherence to the 'letter' of the law is thus not the only aim, but even more so the conviction that it is in accordance with what is morally accepted and considered to be right. Those putting moral precepts into law should therefore aim to be prescriptive since it relates to how people conduct themselves. In International Law, this would require states to adhere to these principles when determining their international policy strategies.¹²²

2.4 The United Nations

It was the large scale human suffering experienced during WW I and WW II that led to the establishment of the UN. Besides the enormous economic losses that resulted from these wars, the incidence of millions of victims and displaced persons demonstrated the complexities involved in international peace and security. In its preamble (which is also the first stated principle), the UN aims to keep international peace and security. The importance of this principle occurs more than thirty-two times in the UN Charter which contains 111 articles. Unfortunately, however, rules to resolve internal conflicts in states are lacking.

¹²¹ Ibid.

¹²² Ibid.

The responsibility of maintaining international peace and security is a crucial element in Article 39 of the UN Charter.¹²³ The establishment of the UN did not end or affect the normal tradition of humanitarian intervention. Consequently, a fresh foundation for humanitarian intervention came into being after the UN was created.

Fundamental issues such as international peace and security and equality of sovereignty between states are dealt with in the UN Charter. The important purposes and principles of the UN Charter are stipulated in Articles 1 and 2 respectively, and its purposes (as stipulated in Article 1) and can be summarised as follows: To

- i) maintain international peace and security
- ii) develop friendly relations among states based on adherence to the principles of ‘equal rights and self-determination of peoples’
- iii) facilitate international cooperation on international issues of a financial, cultural, humanitarian and societal nature, while also promoting respect for the human rights and fundamental freedoms of all people, irrespective of race, gender, language or religion, and
- iv) be a centre “for harmonizing the actions of nations in the attainment of these common goals”.

These purposes should however, be read together with the stipulations of Article 2 of the Charter which include the following:

- i) sovereign equality of all members is recognised by the organisation

¹²³ “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” (Charter of the United Nations).

- ii) every member must follow the rules set forth in the Charter with sincerity
- iii) members must settle all international disputes non-violently, ensuring that international justice, peace and security are not jeopardised
- iv) members should avoid using force or the threat of force against other states
- v) support must be provided by members to the UN in agreement with what is stated in the Charter, and no state is allowed to support a state against which the UN is taking action, and
- vi) subject to the provisions of Chapter VII of the Charter, UN intervention is not allowed in issues which essentially involve the domestic affairs of a state.

Crucial to the intentions of this study is the agreement among states that, as stipulated in the Charter, war should be banned and diplomatic resolutions that do not involve the military should be strived for by states in disagreement. The only exclusion from this rule concerns self-protection and the means of enforcement as ordered by the UNSC. The crucial nature of this framework is undisputed, even in present times, and therefore it was restored to the UN Charter. Some observers argue that joint security might be unrealistic and simply be a way of keeping anger between states hidden, which in fact, is an issue that cannot be ignored.¹²⁴

However, the adoption of the Universal Declaration of Human Rights by the General Assembly in 1948 stressed that the respect for human rights is vital for international peace and security – “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.

¹²⁴ Schachter, O. The Right of States to use Armed Force, *Use of Force*. 82: p 1620 (April/May 1984).

The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty was accepted by the General Assembly in 1965. It reaffirmed the importance of the principle of sovereignty. Only one member abstained and everyone else voted in favour of the declaration. This declaration pronounced that no state may intervene, directly or indirectly, for any reason, in the affairs of any other state. Therefore, armed intervention as well as any other type of intrusion are proscribed. Strict compliance with these stipulations was essential for securing peace, and any infringement would be seen as contravention of the letter and spirit of the UN Charter.¹²⁵ To illustrate: Article 1(2) reinforces the principles of equal rights for all as well as self-determination. Article 2(1) states that the UN is founded on the principle that the right to sovereignty applies equally to all members. Article 2(4) in particular, requires states to refrain from using force, or the threat of force, in their international dealings against the territorial integrity or political self-determination of any other state.¹²⁶

The stipulation “against the territorial integrity or political independence of any state” is a significant prerequisite for the use of force, and in the event of force being used without affecting the sovereignty of the state, it can be considered as legal. Bowett states that “the phrase [having been included], it must be given its plain meaning”. In other words, if those who drafted the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States adopted on December 21, 1965 intended to prevent the use of force or to make the threat of force non-negotiable, they would have made it completely illegal. It is possible therefore, that humanitarian intervention can be seen as legal since “it seeks neither territorial change nor a challenge to the political independence”.¹²⁷ This is an issue that cannot be ignored.¹²⁸

¹²⁵ General Assembly Resolution 2131 (xx) 1965.

¹²⁶ UN Charter.

¹²⁷ Op cit note 106. “No state has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of another state. Consequently, armed interventions against its political, economic, and cultural elements are condemned”.

¹²⁸ Op cit note 124.

Most states, and important entities that are not states, as well as scholars seem to have come to the conclusion that humanitarian intervention may occur if it is given authorisation by the UNSC. It is true that the drafters of Chapter VII of the Charter most probably anticipated an international threat to peace of some kind before Security Council action. The Chapter requires that the Security Council should be informed of any action taken (Article 51). Furthermore, it does not exclude the possibility that the international anxiety that develops when people are deprived of their human rights in a state constitutes a ‘threat to the peace’. The way in which Chapter VII has been interpreted since 1945, especially when considering the interventions into Haiti, Rwanda and Somalia, makes it obvious that the abuse of human rights can be a foundation for allowing the use of armed force under Chapter VII.¹²⁹

Interpreted both teleologically and historically, the prohibition enacted in Article 2(4) is comprehensive. The 1969 Vienna Convention on the Law of Treaties (Articles 53 and 64) which codifies contemporary International Law, sees Article 2(4) of the Charter as part of *jus cogens* which should henceforth be considered a norm from which there can be no diversion until it is modified by a subsequent norm of general International Law.

The relevant sections of the Charter are analysed to determine whether humanitarian intervention can be legalised. In defending the right for humanitarian intervention, the custom of domestic jurisdiction becomes important, starting with Article 2(4). According to some scholars, the requirement of viewing the stipulation in an open sense and in plain language must be reiterated. It is the crucial point of a group formed to “save succeeding generations from the scourge of war”. Therefore, it should not be viewed in any way that would contradict its real meaning and substance. It is also debatable whether the decision reached for complete prevention

¹²⁹ Op cit note 54.

of use of force in any way is emphasised again by a study of the *travaux preparatoires* which piloted the establishment of Article 2(4).¹³⁰

Since there are no universally defined criteria for what constitutes basic human rights, agreement on a policy of humanitarian intervention to the satisfaction of all is unattainable. This would be the case even if permanent members of the UNSC relinquished their veto powers.¹³¹

A deep-rooted principle of International Law is the impermissibility of states or intergovernmental organisations to intervene in the domestic affairs of other states. The foundation of this standard is the reverence for the territorial integrity and political independence of states. It is highlighted in the Covenant of the League of Nations, Article 10¹³² and Article 15(8)¹³³, as well as in the UN Charter in Articles 2(4)¹³⁴ and 2(7).¹³⁵

Generally, the use of military force by a member state of the UN is allowed only in cases of self-defense. It is important to remember that any campaign by a state to defend itself can only be embarked upon once the Security Council has taken the necessary measures to secure and maintain global peace, security and stability. Moreover, based on the Charter of the UN, the use of military force for purposes of a

¹³⁰ Abiew, F.K. *The Evolution of the Doctrine and Practice of Humanitarian Intervention*. The Netherlands: Kluwer Law International: p 91 (1999).

¹³¹ See generally, the debates in the course of the World Conference on Human Rights in Vienna (1993).

¹³² Article 10 stipulates that “the Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League”. See also Op cit note 39. pp 3-4

¹³³ According to Article 15(8) of the Covenant ‘If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.’ See also Op cit note 39.p 3-4.

¹³⁴ Article 2(4) of the UN Charter provides that ‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the UN. See also, Op cit note 39. pp 3-5

¹³⁵ Article 2(7) provides that ‘Nothing contained in the present Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the Present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII’. See also, Op cit note 39. pp 3-5

humanitarian nature by any member state is forbidden in terms of Article 2(4). Not only individual states, but also the UN itself is forbidden by Article 2(7) to use military force for any kind of intervention or meddling in any matters that are basically internal and within the control of a member state.¹³⁶

Two exceptions from the prohibition are detailed in Article 2(4) of the UN Charter. The first exception entailed in Article 51 of the UN Charter provides for states that are victims of aggression. The second, the so-called ‘enemy-state-clauses’ (Articles 53 and 107), are now considered obsolete¹³⁷, but these two exceptions apply if international peace and security are threatened, and not only in involvement in internal affairs.

These exceptions came about relatively recently and in particular, are related to the fact that besides an increasing defence of human rights, the international community has acknowledged the importance of maintaining international peace and security. States have come to terms with the fact that international human rights responsibilities and infringements of those rights are no longer the domestic jurisdiction of a particular state.¹³⁸

Three fundamental global changes have resulted in the appearance of ‘donor governments’ as the main players on the political scene. These major powers assume, on principle, the responsibility for both collective security and humanitarian assistance.¹³⁹

* The first changes occurred as a result of the post-Westphalian order. Situations threatening international security and which might require

¹³⁶ Article 2(4) and 2(7) of UN Charter.

¹³⁷ See UN Charter.

¹³⁸ Sinha, M *Humanitarian Intervention by the United Nations*. New Delhi: Nice Printing Press: pp 3 - 10 (2002).

¹³⁹ Randolph, Kent. *Collective Security and Humanitarian Intervention: Coping with Contending Principles*. Available at: http://www.un-globalsecurity.org/pdf/Kent_paper_hum_intervention.pdf. Last visited on August 24, 2007.

collective intervention, arise from disagreement on what underpins the state construct.

- * The second change relates to threats to global security and peace made by bodies that are not recognisable states on their own.
- * Third, threats to international peace increasingly seem to come from domestic or intra-state friction. This appears to result if governments ignore a threat.

The standards underlying collective security and humanitarian intervention are not necessarily the same, but they are often at odds with one another. Security is underpinned by political and therefore, judgmental criteria. Humanitarian intervention asks for neutrality, impartiality and independence. Collective security changes power relationships and may alter the means of governance. At its core, humanitarian intervention has the preservation of life.¹⁴⁰

The UNSC is implicitly and explicitly obligated to adhere to The Hague Convention's Laws of War as well as International Humanitarian Law. All signatories to the UN are bound by the same laws. The Security Council and a growing number of member states have extended their obligations to the protection of inhabitants in armed conflicts and to the protection of refugees.¹⁴¹

Collective Security offers a useful entry point for discussion of this issue because the debate primarily centres on the UNSC's new-found activism. According to recent study, between 1946 and 1989 the UNSC adopted 646 resolutions (on average fewer than 15 per year). Out of these resolutions, six recognised the existence of a threat to international peace and security. During the 1990-1999 periods, the UNSC adopted 638 resolutions (on average close to 64 per year). Out of these, 19 referred to threats to

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

international peace and security. The decisional context for such activism relates to early Post Cold War Era euphoria and the ‘collective response’ in the Gulf conflict in 1991.¹⁴²

The UN Charter is essentially defective due to the concealed reimplementing of some virtual *jus ad bellum*, an exceptional privilege enjoyed by some of the most developed and influential states in the ‘international community’ as a result of their status as permanent members of the Security Council.¹⁴³

In 1977, the Security Council enforced Resolution 418 under Chapter VII and a ban on weapons was placed on South Africa. This suggested that the South African government was violating the human rights of its black inhabitants, which in turn, posed a threat to international peace and security. The UNSC believed that if South Africa obtained more arms “the threat will increase”. A point to remember is that the declaration mentioned two foundations for allowing combined action, namely the policies of the government concerning the acts of violence committed and the murder of its own inhabitants, as well as the growth of its military and its continuous violent acts against bordering states.¹⁴⁴

Terry Nardin¹⁴⁵ refers to two respective traditions of thought on particular humanitarian interventions:

- i) Tradition A soundly proceeded from the UN Charter. Contemporary International Law, which in general perceives intervention as inherently problematic, granted the relative importance to the preservation of political independence and to the territorial integrity of respective states.

¹⁴² Thakur, R. & Malcontent, P. (eds) *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States*. New York: United Nations University Press: p 81 (2004).

¹⁴³ *The Voting Procedure in the United Nations Security Council*, esp. Chapter III: “The veto privilege as the major impediment to the achievement of collective security”.

¹⁴⁴ See Res 418(1977). See also, Op cit note 39: pp 3-10.

¹⁴⁵ Nardin, T. The Moral Basis of Humanitarian Intervention, *Ethics & International Affairs*. (April, 2002).

ii) Tradition B, dealing with natural law and common morality, considers intervention as some extension of the basic outlined moral imperative to grant the innocent proper protection against violence.

These two traditions create a certain tension which raises the issue of how the complex institutional duties prescribed by International Law should be reconciled, with particular reference to the more primitive and non-institutional duties of common morality.

It would seem that the end of the Cold War, as well as the ever-increasing internationalisation of the norms of human rights and economic issues that cross boundaries, make the principle of sovereignty less 'significant'. Consequently, sovereignty is no longer seen as a complete but rather as a relative concept which lends itself to limitations and exclusions. Not considering whether humanitarian intervention is seen as a regulation or an omission, Resolution 688 intends that states may not hide behind rules of sovereignty when trying to go against humanitarian norms at home. This resolution differs greatly from the idea that human rights infringements are a private matter of a state which in turn, is protected by laws of the Security Council.¹⁴⁶

The inheritance of politics in the UN Charter seems quite clear from the following statement: the ban by the Charter regarding the use of force within human rights (Art 2 [4]) with reference to unilateral actions of states, or groups of states. Article 2 (7) clearly states: this interdict "shall not prejudice the application of enforcement measures under Chapter VII". All these measures show that the UN does not have a right to intervene in the internal affairs of states. If intervention by the UN is considered in certain instances, it can be argued that the jurisprudences of the

¹⁴⁶Op cit note 138.

members of the Security Council are the deciding factor, but, perhaps, if it is not jurisprudence, it could be their own interests that dominated.

It can be argued too, that even though they are governed by Article 27(3) of the UN Charter, choices made by the Security Council regarding issues that are not procedural, “shall be made by an affirmative vote of nine members including the concurring votes of the permanent members”. It is clear that, after many years of observance, the votes of the permanent members are not necessary, and that an action can be allowed even if they do not vote. More theoretically, not many disagree that Chapter VII was initially concerned with issues of international peace threats, but after the Security Council’s approval of armed intervention in Haiti, Rwanda, and Somalia, there is little reservation that the Security Council can busy itself with issues pertaining mainly to domestic conflict¹⁴⁷. Sometimes, it considers internal conflicts as a threat to international peace and security, while at other times this is not the case as demonstrated by the events in Chechnya. Thus, it is clear that double standards apply in dealing with the internal issues of some states by the UNSC.

As Walzer suggests, there may still be situations in which autonomous unilateral intervention for humanitarian purposes is ethically justified, and, certainly from a military point of view, the formidable problems of command and control might be simplified when intervention is autonomous and unilateral.¹⁴⁸ But, in general, it seems that the old norms of sovereignty and non-intervention are still persuasive for states, at least in their official and quasi-official pronouncements.

In view of these complexities, a new approach became necessary which in turn, implied new international structures. On March 15, 2006, the UN General Assembly

¹⁴⁷ UN Charter Article 27(3). See generally, *Ibid*.

¹⁴⁸ *Op cit* note 7.

voted to form a new human rights organisation, the UN Human Rights Council. It was accepted by 170 members out of the Assembly of 191 states.¹⁴⁹

The UN Human Rights Council is an international organisation within the UN system. Its main aim concerns the prevention of human rights infringements. This Council is the descendant of the UN Commission on Human Rights which was criticised for providing important positions to member states who failed to promise that the human rights of their own inhabitants would be protected. In trying to eradicate the issues facing the previous Council, including the fact that Libya was given chairmanship in 2003, it was stated in the declaration instituting the Council that “members elected to the Council shall uphold the highest standards in the promotion and protection of human rights” and that episodic evaluations would take place.¹⁵⁰

A significant turn in international relations occurred in the 1990s, especially after the notion of human rights gained substantial support outside the UN framework and regulations. Unfortunately however, there is no specific definition of human rights agreed upon by the states or by scholars of International Humanitarian Law, and consequently and similar to other concepts in the social sciences, the concept of human rights has introduced a controversy among specialists in International Relations. The problem faced by human rights is that all international conventions and international organisations constitute an agreement between the governments of those states and not agreements between peoples.

¹⁴⁹ United Nations Human Rights Council, from Wikipedia, available at F:\United Nations Human Rights Council.htm. Last visited on Feb 27, 2007. Only the United States, the Marshall Islands, Palau, and Israel voted against the Council's creation, claiming that it would have too little power and that there were insufficient safeguards to prevent human rights-abusing nations from taking control. Belarus, Iran and Venezuela abstained from the vote, and a further seven states (Central African Republic, North Korea, Equatorial Guinea, Georgia, Kiribati, Liberia and Nauru) were absent from the session.

¹⁵⁰ Ibid.

The international community, it seems, recognises the need for intervention on humanitarian and ethical grounds, and that suitable instruments for intervention should be adopted in the Post-cold War Era. The notion of humanitarian intervention has become more important in International Relations now than was the case during the Cold War Era. Therefore, it would be beneficial to adopt ethical and humanitarian rules for intervention in the future because the UN Charter does not accommodate any intervention in internal affairs of states. For this reason, it will become essential to ensure an agreement between states in order to establish a new international organisation concerned with the subject of intervention in their internal affairs.

Walzer believes that the UN should in principle, be strengthened and supported to establish a global system which respects the rule of law. He maintains that there are several procedures of intervention outside the framework of the UN and which can be conducted without its consent. These are based on initiatives that have been successful and were able to save millions from death and displacement, for example during the Indian war against Pakistan that led to the secession of Bangladesh from Pakistan, and NATO's intervention in Kosovo before the 1999 UNSC Resolution 1244. Thus, Walzer calls for the development of a UN that conforms to the norm of human rights with due regard for the principle of sovereignty. During a recent interview, he commented as follows:

It is a good idea to strengthen the UN and to take whatever steps are possible to establish a global rule of law. It is a very bad idea to pretend that a strong UN and a global rule of law already exist. Most of the just uses of military force in the last thirty or forty years have not been authorised by the UN: the Vietnamese and Tanzanian interventions that I just mentioned; the Indian war against Pakistan that resulted in the secession of Bangladesh and the return of millions of refugees; the Israeli pre-emptive strike against Egypt in 1967, after the abject withdrawal of UN forces from the Sinai; the

Kosovo war in 1999. So far as justice, that is, moral legitimacy is concerned, if the Iraq war was unjust before the Security Council voted, it would have been unjust afterwards, however the vote went. It can't be the case that when we try to figure out whether a war is just or unjust, we are predicting how the Council will vote. Indeed, justice would be independent of UN decision-making even if the UN were a global government, though then, assuming the democratic legitimacy of this government, we would be bound to respect its decisions.¹⁵¹

2.5 The effect of humanitarian intervention on sovereignty

The concept of sovereignty as part of International Relations as a field of study, is of particular importance in International Law pertaining to intervention in general and humanitarian intervention in particular. As indicated in Chapter 2, 2.3 above, International Law is biased towards sovereignty and non-intervention. The concept is however, controversial and has both fervent advocates (eg. Machiavelli, Luther, Bodin, Hobbes) and critics (eg. Bertrand de Jouvenel and Jacques Maritain).

The word sovereignty originates from the Latin word *supra*, and is often defined as 'supreme authority within a territory'. It can thus be said that sovereignty implies ultimate power. The concept of sovereignty in International Law usually refers to external sovereignty or a state's freedom from outside interference. In this context sovereignty implies non-intervention.

The sovereign states system that came to dominate Europe after the Treaty of Westphalia in 1648, spread worldwide over the next three centuries. It culminated in

¹⁵¹ Interview with Michael Walzer. *The United States in the World – Just Wars and Just Societies*. Available at: <http://eis.bris.ac.uk/~plcdib/imprints/michaelwalzerinterview.html>. Last visited on July 10, 2008.

the decline of the European colonial empires in the mid-20th century, when the state became the only form of polity ever to cover the entire surface of the globe. Today, norms of sovereignty are enshrined in the Charter of the UN, whose article 2(4) prohibits attacks on 'political independence and territorial integrity', and whose Article 2(7) sharply restricts intervention.

Global cultural controversies and rivalry between the political and the intellectual elite have resulted in the birth of new concepts and vocabulary such as 'the new world order', 'the end of history' and 'globalisation'. These concepts have introduced new global realities and facts, thus resulting in a major revision of their traditional connotations. The concepts of 'sovereignty' and 'humanitarian intervention' are, perhaps, the two key concepts to be reassessed in light of their impact on new global realities within the field of International Relations. Hence, Article 2(1) of the UN Charter confirms that states have absolute power within their internationally recognised boundaries. This seems to imply non-involvement.

The various concerns surrounding intervention are rooted in the notion of a state's right to sovereignty. This makes the study of it important because of the link between sovereignty and the idea of non-intervention. Thus in terms of International Law and the UN Charter, the idea of sovereignty would be opposed to any kind of intervention, as is evident in the following quotation.

The discussion of the principle of non-intervention in International Law is closely related to the doctrine of sovereignty. For this reason, the two will be treated simultaneously. Extensive literature exists on this subject matter, and can be classified into two schools of thought, namely; the absolutists and the consequentiality.¹⁵²

¹⁵² Simon, Okolo, Benneth. *Legality and Legitimacy of Military Intervention in Intra state Conflicts: A Case Study of Ecowas Intervention in Sierra Leone*: p 15. (This research report was submitted to the

In this regard, absolute relates to a strict rule-based morality. In contrast, consequentiality allows for greater flexibility where the strict adherence to the ‘rule’ of rules does not dictate, but the perceived positive outcome of action is valued.

The ideas and thoughts on sovereignty changed over time. International courts and legal scholars have in time suggested a number of different interpretations. Such varying interpretations and a general vagueness of the concept in terms of International Law allows for pragmatic argumentation on the theme for very different purposes.

The passport does not confer anyone’s right to enter a country. The host can exclude anyone it wants. So we travel abroad because governments agree to let us enter. Consent is a critical fact of sovereignty. We also take for granted that states have the right to exclude or to screen the importation of certain types of commodities such as drugs, endangered species, tainted foodstuffs, and the like. Every time we show our passport to gain entry into a foreign country, exchange currency, purchase postage stamps, or accept the laws of a foreign jurisdiction, we are recognising and practicing sovereignty.¹⁵³

Sovereignty, as notion can be found at the core of customary International Law as well as in the UN Charter. It is still an important part of maintaining international peace and security, and also a means of protecting weaker states against stronger ones.¹⁵⁴ Due to its link with humanitarian intervention as well as the UN Charter, it is crucial to focus on this notion in this chapter.

Bodin (in Abiew 1999) defined the concept of sovereignty as “the most high, absolute and perpetual power over the citizens and subjects in a Commonwealth ... the

Faculty of Humanities, University of Witwatersrand, Johannesburg, in partial fulfilment of the requirements for the Degree of Masters of Arts in International Relation, 2006).

¹⁵³ Op cit note 30.

¹⁵⁴ Op cit note 6.

greatest power to command”. He saw the authority of this absolute power as being complete, not restrained by legality, and not subject to any stipulations or limitations. Even though he had a very definite idea about the notion of sovereignty, he was willing to allow for some restrictions on sovereign power. Sovereign was restricted by natural law, as well as by divine law and the law of nations¹⁵⁵. Walzer confirms that:

States claimed a right to fight whenever their rulers deemed it necessary, and the rulers took sovereignty to mean that no one could judge their decisions.¹⁵⁶

In the traditional sense, sovereignty represents the complete control over all sections of a state and all individuals and things that fall within its borders. In relations between states, sovereignty means independence, or the ability to perform the tasks of a state, both internally and externally without interference from any other state. The idea of consent is part of the doctrine of sovereignty concerning binding obligations, or the idea that “restrictions upon the sovereignty of a state cannot lightly be presumed”, as stated by the Permanent Court of International Justice.¹⁵⁷

With regard to humanitarian intervention, states that are targets for intervention on the basis of human rights abuses, usually use the word ‘sovereignty’ to assert a right of non-intervention. “States often present their sovereignty as a natural right or an inescapable logical feature of their existence”, states Donnelly (in Havercroft 2006). When sovereignty is employed as a right, the clash between sovereignty and human rights becomes a conflict of rights, with the individuals advocating human rights insisting that human rights take precedence over the rights of the state, in contrast with those who believe that the state is more important than human rights.¹⁵⁸

¹⁵⁵ Abiew, F.K. *The Evolution of the Doctrine and Practice of Humanitarian Intervention*. The Netherlands: Kluwer Law International: pp 25-26 (1999).

¹⁵⁶ Walzer, M. *Arguing About War*. London: Yale University Press: p 5 (2004).

¹⁵⁷ Harriss, J. (ed) *Sovereignty and Suffering, in the Politics of Humanitarian Intervention*. London: Pinter Publishers: pp 35-38 (1995).

¹⁵⁸ Op cit note 34.

Proponents of both sides of the issue defend their ideas by using the language of rights.

On the other hand, it is not controversial that a task agreed to by means of a treaty, custom or general principle of law, is in fact obligatory and cannot be revoked unilaterally. If a state has an international task that it must perform, the matter regulated by that task is no longer seen as necessitating the argument for exclusivity of national control. In the Nationalities Decrees case in Tunis and Morocco, for example, the milestone judgment made by the Permanent Court of International Justice in 1923 states that although they might closely affect the welfare of more than one area, they are not governed by international decree. Each state is therefore responsible solely for itself.¹⁵⁹

Some states are supporting the establishment of formal criteria that have to be met before intervention can take place, although questions remain over who would set out the criteria and who would oversee their implementation. Presumably the UN would have a major role in this process, but not all its members share the same views.

Some theorists, academics and practitioners go further. In their views states have the right to reprisal in the face of severe and continuous violations of human rights in other states¹⁶⁰. Reprisals are deeds which are illegal in theory, but which are legally justified by the target state's prior breach of International Law which the act of reprisal wishes to end. For example, reprisal may include the unilateral prevention of trading agreements. It is even more debatable whether armed force can be taken to

¹⁵⁹ Op cit note 157. Restrictions may conceptually be imposed on the freedom of a state though that had not been the case up to that point. General International Law derives from the needs and consent of the international community of states.

¹⁶⁰ Ibid.

stop human rights violations which could pose a threat to international peace and security.¹⁶¹

Walzer's defence of national sovereignty has been criticised for implying that "domestic tyrants are safe," a point Walzer is actually quick to affirm. The line must be drawn "to rule out interventions in cases of 'ordinary' oppression," and, according to Walzer, there is a significant moral difference between oppression by one's own government (however undemocratic) and oppression by a foreign occupying power.¹⁶²

In Walzer's view national sovereignty is not merely something recognised by international law, nor is it a relic of a tribal mentality or an obstacle to the achievement of international human rights. According to Walzer, any such intervention is actually a violation of human rights, the "*rights* of contemporary men and women to live as members of a *historic* community and to express their *inherited* culture through political forms worked out among themselves [my emphasis]".¹⁶³

The prohibition of the threat or use of force is subject to several restrictions stipulated in the UN Charter. Detailed exceptions from Article 2(4) and other international instruments barring the use of force do, however, exist. They are measures taken or allowed by the UN in some situations such as the use of force in individual or combined defense; armed force against earlier enemy states, as well as some measures taken according to regional measures or agencies endorsed by the UNSC. It is important to recognise that except for the cases mentioned in Chapter 1, 1.3 (northern Iraq and Kosovo), the understanding of Article 2(4) shows, according to some scholars, an absolute ban on the use of force in International Relations. Most states wanted a complete interpretation of the Charter prohibition of intervention

¹⁶¹ Ibid.

¹⁶² Op cit note 7.

¹⁶³ Ibid.

during UN talks¹⁶⁴. In their interpretation it means that interventions do infringe upon their perceived rights of sovereignty.

The predicament between sovereignty and intervention is evident in the UN Charter. In it there are “two principles that at times, and perhaps increasingly, conflict”. The Charter concurrently forbids “intervention into matters that are within the domestic jurisdiction of any state”, and “enshrines respect for human rights and for fundamental freedoms.” This misinterpretation of the Charter would be viewed as less confusing if sovereignty were viewed as relative to state-society dealings as well as to interstate relations. From this perspective, it also seems to make more sense why Emmerich de Vattel, one of the first observers to mention the idea of non-intervention, stated during the late 18th century that “if the unjust rule of a sovereign led to internal revolt, external powers would have the right to intervene on the side of the just party when disorder reached the stage of civil war”. Intervention has long been in existence, just like international politics, and sovereignty is a variable rather than a constant. It is therefore not incredibly informative to make up a list of volitions of sovereignty. Rather, a more appealing agenda is to consider how states have tried to create relative sovereignty in the west as well as in “the Rest, both then and now”.¹⁶⁵

Kofi Annan, the former UN Secretary-General, says that the Charter should be seen as ‘a living document’ and its understanding and enforcement should develop as times change. In the same train of thought, relative sovereignty is an idea which is alive and which has been altered along with the changes in interstate and state-society relations. It is important to look at this debate; introduce the idea of relative sovereignty; research the historical changes undergone by relative sovereignty

¹⁶⁴ UN Charter Article 2 (4).

¹⁶⁵ Hui, V.T. “Problematizing Sovereignty: Relative Sovereignty in the Historical Transformation of Interstate and State – Society Relations”. In *International Intervention in the Post-cold War World: Moral Responsibility and Power Politics*. Edited by Michael C. Davis, Wolfgang Dietrich, Bettina Scholdan & Dieter Sepp. London: The Publisher ME Share: pp 84-89 (2004).

besides understanding what the new definition means with regards to the phase of humanitarian involvements that occurred after the Cold War.¹⁶⁶

From the history of the doctrine of sovereignty, it is apparent that it is sovereignty, and not intervention, that is problematic. Krasner (in Hui 2004) demystifies the ‘Westphalia order’, and looks at the problems concerning the idea of sovereignty. He identifies four dimensions of the idea of sovereignty instead of the single one identified by most other analysts. The first, or usual, dimension, which is called ‘Westphalia sovereignty’, points to excluding forces from outside the borders of a state from having any power within it.¹⁶⁷ Krasner argues that the concept of sovereignty, though ‘historically inaccurate’ could be used due to the fact that “... so much [has] entered into common usage”. The second dimension is international legal self-rule, and makes reference to “the mutual recognition of states or other entities”. Domestic sovereignty, the third dimension, points to the official association of political power within the state and the means by which public powers maintain efficient control within its borders. The fourth and final dimension, namely interdependence sovereignty, is concerned with the ability of public powers “to control transformer activities”.¹⁶⁸

Sovereignty is relative to interstate relations because it concerns joint acknowledgment with other states and use of joint strategies. In general, the first point is not acknowledged as it should be in the readings on sovereignty: state does not have ‘international-legal’ or juridical independence unless it is acknowledged by other states. Moreover, the description of territorial self-rule also involves acknowledgment, either in the form of informal agreements or in formal treaties. JG Ruggie (in Hui 2004) states that “any mode of differentiation inherently entails a corresponding form of sociality”. If sovereignty makes reference to private control over set territories, then that area within which a state has complete control must be

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

distinguished. It is obvious that joint acknowledgment involves inclusion as opposed to exclusion of external factors.¹⁶⁹

Sovereignty is moreover relative to state-society dealings since it is concerned with the power and control over the people and the territorial area, and here readings tend to compare self-rule to territoriality. Due to the fact that self-rule is viewed in terms of territoriality, it is also seen as being equivalent to private property rights.¹⁷⁰

One of the most crucial outcomes of the establishment of self-rule as an introduction to dominium is that the implementation of this right can then no longer be justified by ethical issues of right and wrong. According to Roman property rights, having a specific ‘right’ merely enabled the individual who had that right to continue doing the wrong thing, as long as he did it within the territorially-restricted area. Even though ethical deliberations are not immaterial to a deliberation – of proceedings possibly targeted for intervention – the pertinence of these deliberations is clearly restricted by the institutional restraint enforced by the concept of an exclusive right.¹⁷¹ If Roman property rights are extended, this implies the following for International Relations and sovereignty:

Barzani said that “I believe that sovereignty can no longer be asserted in isolation, but rather in a context of greater international integration that guarantees national self-expression”.¹⁷²

It is evident that Barzani adopts differing ideas from those that were agreed upon at the Treaty of Westphalia. Moreover, he holds the view that sovereignty must be the expression of the national will and not any form of unilateral, oligarchic monopoly driven by decision-makers who find themselves the supreme authority of the state.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Welsh, M. Jennifer (ed) “Limiting Sovereignty”. In *Humanitarian Intervention and International Relations*. Oxford: Oxford University Press: p 12 (2004a).

¹⁷² Op cit note 51.

This form of self-rule enforces hidden limitations on its content. Some heads of states insist that sovereignty is about that government doing just what it wants to do, at least inside its own boundaries. According to them, it is acceptable for the state to sometimes take the incorrect action, and it may also choose which incorrect action it would like to take without being constrained in any way. However, not even the patron saints of this set of principles, which is obviously western in origin, put it together in such unqualified conditions, even in its 'absolutist' forms. Moreover, in the end it became apparent that creating a set of principles for sovereignty with no limitations was rather illogical. The two distinct types of grounds, namely historical and conceptual, will be focused on momentarily in order to establish that sovereignty was not originally meant to be limitless, followed by a more in-depth explanation of a startling kind of restriction that minimal ethics necessitates of it.¹⁷³

If sovereignty is a right, it is a restricted one. Sovereignty is restricted because the obligations that make up that right, and which a lack of would mean no right exists, restricts the actions of all sovereignties who are part of the international society. The more intrinsic reason why the standard of non-intervention guards the standard of sovereignty of states is that each state is protected due to the fact that all states are restricted. This is the function of rights – wherever one finds rights, one finds duty-enforcing rules.¹⁷⁴ This is not done to contradict Kratochwil's argument (Welsh 2004) concerning the idea that the right to self-rule is also a right to incorrect action, as any right to authentic freedom must be.¹⁷⁵ Walzer's ideas indicate that within liberalism there is also a more universalist conception of human rights in which sovereignty is a subsidiary and conditional value.

Even though ethical deliberations should not be overlooked in an assessment of dealings which could lead to interventions, the significance of such deliberations is

¹⁷³ Welsh, M. Jennifer (ed) "Limiting Sovereignty". In *Humanitarian Intervention and International Relations*. Oxford: Oxford University Press: pp 14-16 (2004a).

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

definitely restricted by the institutional limitations enforced by the idea of an exclusive right. While not being false, this demands very cautious examination. It is most definitely a case of something that is difficult to dispute: the action is wrong, and thus no state has a right to do it.¹⁷⁶

The possible significance of the ethical question, namely what a state could be expected to do, is prevented, and any measures taken by those from outside to stop the wrongful events from occurring, are also prevented. Nonetheless, it can be stated that when something is wrongful, no state should perform the action. It depends on what 'this' is though, and whether it is wrongful for states to be allowed to do things that are not allowed for anyone, for example genocide. To come to a decision, one must look at ethical and legal debates.¹⁷⁷

The formation of UN Disaster Relief Organisation (UNDRO) in 1972, produced hopes of a better reaction to disaster, but nothing more than that was forthcoming. Its command largely outweighed what it could handle and it did not have the political power to actually get anything done. Much negativity troubled it throughout its twenty years in existence, such as issues of an unclear mandate, insufficient staffing and financial support, a lack of in-state capability, little help from other UN organisations, a long-running disagreement concerning whether or not it should be operational, as well as poor integrity within the donor population. At the start of the 1980s, a report condemning the performance of UNDRO came from the UN Joint Inspection Unit.¹⁷⁸ Matters improved when UNDP Resident Representatives were placed in charge of assistance that was needed.

Together with the appearance of Boutros Boutros-Ghali and the 'new world order' rising from the ashes of the Cold War, it was evident that new possibilities prompted

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Harriss, J. (ed) *Sovereignty and Suffering, in the Politics of Humanitarian Intervention*. London: Pinter Publishers: pp 70-71 (1995).

the development of new tasks and responsibilities for the UN and that restructuring of its disaster relief competence was needed. The performance of the UN groups involved in giving and organising aid during the Kurdish action of 1990 and 1991 led to some western governments making an extraordinary call at the G7 Heads of Government Meeting in London in July 1991 to upgrade the system when they stated that:¹⁷⁹

We should like to see moves to strengthen the coordination, and to accelerate the effective delivery of all UN relief for major disasters ... to include ... the designation of a high level official, answerable only to the UN Secretary-General, who would be responsible for directing a prompt and well-integrated international response to emergencies, and for coordinating the relevant UN appeals.¹⁸⁰

If one considers International Law from a positivist perspective, an examination of NATO intervention would make it clear that the UN Charter disallows the use of force (Article 2(4)) without UNSC approval (under Chapters VII or VIII), or when acting in self-defense (Article 51). Even though some UNSC declarations were passed before the intervention in Kosovo, they definitely did not allow for the use of force. Also, although initially there were fears that states such as Turkey and Greece could be drawn into the conflict in Kosovo, claims followed later that Europe in its entirety was threatened by the issue. The claims seemed insubstantial at the time and are even more so now. In any event, UNSC was not told about the intervention as was required by Article 51. State practice since the Charter was passed has not changed the fundamental requirements of the Charter.¹⁸¹

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Murphy, S. *Humanitarian Intervention: The UN in Evolving World Order*. Philadelphia: University of Pennsylvania Press: ch 5 (1996).

The intervention was not condemned by the General Assembly, even though it had condemned Vietnam's intervention in Cambodia in 1978, as well as the USA's intervention in Grenada and Panama in 1983 and 1989 respectively. The General Assembly did not even create a declaration asking for the forces to be withdrawn, as it had done when India intervened in East Pakistan in 1971. While the inaction of the General Assembly should not be regarded as total support for the intervention, to the degree that positivists formerly regarded General Assembly condemnation of an intervention as probative in legal terms, the inaction definitely has some significance as well. Also, the UNSC itself, with Russia's positive vote, showed its agreement with the intervention by allowing the actions connected with the cease-fire accord forced from Serbia during the Kosovo conflict, which was negotiated with Russian participation.¹⁸²

In the Post-cold War Era, the role of sovereignty in international politics appears to be of little interest to students of international dealings in the USA. It has not been the focus of academic writing or conferences, graduate seminars or even of debates in undergraduate classes. On the contrary, many conventional scholars of International Politics believe that a focus on sovereignty is primarily the domain of specialists in International Law and Political History. At the end of last century, Stephen Krasner (quoted in Carlson 2007) stated that "sovereignty is a term that makes the eyes of most USA political scientists glaze over", appropriately talking about the frequency of this indifference.¹⁸³

In the 1990s, the evident increase in levels of economic incorporation as well as the growth of new international rules, suggested that thought was already being given to the possible flexible nature of the contemporary international system as a whole, particularly the role of sovereignty within this system. In this sense, globalisation has

¹⁸² Op cit 20. (The vote was 14-0, with China abstaining).

¹⁸³ Carlson, A. *The New Sovereignty Debate*. Cornell University Government Department: p 1. Available at: <http://www.ncuscr.org/articlesandspeeches/carlson%20final%203-11-pdf.pdf>. Last visited Nov 22, 2007.

impacted on interstate relations and on the debates on sovereignty and humanitarian intervention.

Currently there are almost fifty international clashes related to issues of sovereignty. Almost all of them have resulted in violence, with the armed forces of the states involved fighting armed rebel forces¹⁸⁴. In many cases, rebel forces have made use of ‘terrorist actions’ in the conflicts. It is known that at least a third of the Specially Designated International Terrorists programmed by the United States Treasury Department are linked to clashes related to sovereignty. Also, there are non-violent sovereignty-based clashes that cause regional instability and have a negative impact on political and economic growth.¹⁸⁵

2.6 Walzer’s ethical principles for humanitarian intervention

This dissertation adopts Michael Walzer’s ethical approach to humanitarian intervention. He places clear landmarks in his ethical approach to humanitarian intervention, as was noted in Chapter I, 1.1 and Chapter 1, 1.8.2 above. In the following section, Walzer’s ideas are examined more intensively since they constitute an important part of this dissertation.

Ethics, taken from the Ancient Greek word *ēthikos*, the adjective of *ēthos*, meaning ‘custom, habit’, is a significant component of philosophy. It is the study of principles and traditions of an individual or a group on the basis of the use of ideas such as right and wrong, good and evil, as well as matters such as responsibility. Three areas in the study of ethics can be distinguished, namely: meta-ethics, the study of the notion of

¹⁸⁴ States involved in violent sovereignty-based conflicts include for example, India, Pakistan, Sri Lanka, Russia, Spain, Macedonia, Sudan, the United Kingdom, Israel, Indonesia, Papua New Guinea, France, Turkey, Mexico, Morocco, the Philippines, and China.

¹⁸⁵ Paula R. Williams, Michael P. Scharf & James R. Hooper Resolving Sovereignty-based Conflicts: The Emerging Approach of Earned Sovereignty. Available at www.treas.gov/offices/enforcement/ofac/actions/2002cum.html. Last visited Oct. 16, 2005: p 1. States involved in non-violent, but destabilizing sovereignty-based conflicts include Montenegro, Canada, Bosnia, and Cameroon.

ethics; normative ethics, concerned with the study of establishing ethical ideals; and lastly applied ethics, which is the study of the application of ethical ideals.¹⁸⁶

Some political theories die and go to heaven; some, I hope, die and go to hell. But some have a long life in this world, a history most often of service to the powers-that-be, but also, sometimes, an oppositionist history. The theory of just war began in the service of the powers.¹⁸⁷

The ethical dilemmas surrounding decisions on whether or not humanitarian intervention should be implemented are at the core of the ethical rationalisation of any type of armed intervention. However, since the reasons are usually intricate, this validation need not be restricted to being the primary one – it only needs to be an overriding factor. The definition for ‘ethics’ can be excluded from the foundations of creed, ethnicity or regulatory rule; its importance is normative since it addresses how things should be, as opposed to what they are like.¹⁸⁸ Thus the moral or ethical aspects of civic policy should be considered critically and opposition to doing so should be investigated. Realism underplays the importance of ethics within the international system, but it does fulfil the role of cautioning against the dangers of excessive emphasis on the moral viewpoint.¹⁸⁹

In different fields such as economics, politics and political science, ethics has been reflected upon and debated, which has led to the creation of a number of different and unconnected areas of applied ethics, such as business ethics, Marxist ethics and community ethics. Recent corporate humiliations in the USA, as in the cases of Enron

¹⁸⁶ Ethics, available at C:\Documents and Settings\Administrator\My Documents\ethicals\Ethics - Wikipedia, the free encyclopedia.htm. Last visited on Feb 26, 2007.

¹⁸⁷ Op cit note 36. p 3

¹⁸⁸ Coady, C.A.J. *The Ethics of Armed Humanitarian Intervention*. August 2002. Peceworks No. 45, available <http://www.usip.org/pubs/peaceworks/pwks45.html>. Last visited on June 6, 2007.

¹⁸⁹ Ibid.

and International Crossing, show the clear relationship between ethics and business and the complexities raised by unethical actions, in these instances, in a company.¹⁹⁰

But normative consensus among observers is yet to emerge. Even sociologically, the events that may lead to humanitarian intervention are far from clear. Morally and substantively, the issues are deeply controversial. Is humanitarian intervention a rescue operation, a ‘quick in and quick out’, leaving the basic norms of sovereignty intact, or is it rather an attempt to address the underlying causes of the conflict and even to create the conditions for democracy? If the latter, the model of ‘going in and getting out’ quickly is then obviously inappropriate. Even Michael Walzer, who has often been criticised for the ‘statist’ character of his theory in *Just and Unjust Wars*, recently amended his rules for intervention. He now argues that there is an obligation to make sure that the conditions that required the intervention in the first place do not simply resume once the intervener leaves.¹⁹¹

In many cases, these actions assume a legal or political form prior to them being recognised as mechanisms of normative ethics. Two examples are the UDHR of 1948 and the International Green Charter of 2001. As warfare and the enhancement of weaponry persist however, it is obvious that there is no single non-violent way of ending disagreements that everyone might agree upon.¹⁹²

Michael Walzer argues that while there are many domineering governments, there is no case of an obvious ‘humanitarian intervention’. He states that while a deed can be viewed as humanitarian, the motivation for that deed might not be simply humanitarian, and that “states don’t send their soldiers into other states it seems, only in order to save lives. The lives of foreigners don’t weigh that heavily in the scales of

¹⁹⁰ *Ethics* available at C:\Documents and Settings\Administrator\My Documents\ethicals\Ethics - Wikipedia, the free encyclopedia.htm. Last visited on Feb 26, 2007.

¹⁹¹ Walzer, M. The Politics of Rescue. *Dissent*: p 40-42 (Winter 1995).

¹⁹² Op cit note 190.

domestic decision-making”.¹⁹³ He does say however, that the state of affairs changes when the well-being of fellow nationals are at risk. As an example he looks at the Israeli raid on Entebbe Airport in Uganda in 1976. It can be disputed that the countrywide pride of Israel was in the crossfire and that that could have been motivation for the intervention.¹⁹⁴

In the way in which he handled the concern in *Just and Unjust Wars*, Walzer wished to steer clear of the severe non- or interventionist stances. Ever since the publication of the book in 1977, individuals on either sides of the argument have wanted to take him as being on their side due to the fact that his exemplar from a legal point of view can be found between the local and international stances.¹⁹⁵

Intervention is a largely normative concept with both proponents and opponents making moral, ethical and legal arguments to address the issue. Those opposed to a right of intervention, like Michael Walzer, point to the sanctity of political communities and their right to non-interference from outside.¹⁹⁶

Humanitarian interventions to stop mass murder and ‘ethnic cleansing’ will obviously aim at regime change; since the regime’s criminal behavior is the reason for the intervention.¹⁹⁷

A closer look at these arguments reveals an exaggerated preoccupation with the custom of non-intervention, which, although undergoing dynamic change, is not being abandoned altogether. Responding to critics of *Just and Unjust Wars*, Walzer lays down the foundations for his principle of non-intervention. His argument posits that the state is constituted by the union of people and the government: the people

¹⁹³ *General Assembly Resolution 2131* (xx): p 20 (1965).

¹⁹⁴ *Ibid.*

¹⁹⁵ *Op cit* note 151.

¹⁹⁶ Walzer, M. “The Moral Standing of States”. In *International Ethics: A Philosophy and Public Affairs*. Edited by Charles Beitz: pp 109-129 (1980).

¹⁹⁷ *Op cit* note 151.

comprise a political community and the government is merely their instrument. “Communal integrity derives its moral and political force from the rights of contemporary men and women to live as members of a historic community and to express their inherited culture through political forms worked out among themselves”.¹⁹⁸

As such, intervention against such a community constitutes aggression and is a crime. States have a right to both internal and external sovereignty and may meet threats to that sovereignty with force. Aggressors may be legitimately punished, either in a war of self-defence by the victim or in a war of law enforcement by states acting on behalf of the international society.

Because of their moral foundation, states have the right to sovereignty, and non-intervention is a norm of international society. According to Walzer, intervention can only be justified by certain circumstances: when a particular state includes more than one political community; when civil war disrupts a single community and a foreign power intervenes in support of some party; and finally when the government is engaged in the massacre or enslavement of its own citizens.

In his book, *Just and Unjust Wars*¹⁹⁹, Walzer discusses three cases in which a foreign power has the right to intervene in another state where internal problems or conflicts occur. These three cases or conditions are:

* ***Self-determination and self-help***

Foreign powers can only intervene to assist rebels when there is a revolt, and therefore, there is no longer a fit between the government and community (-ies). The sovereignty of a state and its right to self-determination must be acknowledged. The

¹⁹⁸ Ibid.

¹⁹⁹ Op cit note 7.

members of a political community must seek their own freedom, even if it struggles and fails to establish free institutions; it is the right of a people to gain freedom by their own efforts. Non-intervention is the principle that guarantees that their success will not be impeded or their failure prevented by the intrusion of an alien power. Should the latter occur through the actions of an intrusive neighbour, the community's self-determination has been removed.

* *Secession*

In the case of a plurality of political communities included in a state, and one community wishes to sever itself from the state, intervention can be justified only when aid is given for independent – *not liberal or democratic* – communities to be established. Even military action is then considered 'honourable and virtuous,' although it may not be prudent. The problem with identifying a secessionist movement lies in the fact that it must have made some advance in the 'arduous struggle' for freedom. It is not enough for such a community to merely call upon the principle of self-determination; it must provide evidence that it does in fact exist, its members desire independence, and are ready and able to construct a self-determined existence.

* *Civil War*

Civil war presents severe problems because of its complexity. Various clashing parties or factions that claim to represent entire communities, draw other states into the struggle, either secretly or in unacknowledged ways. Where a foreign power is already involved with one party, another may rightfully counter-intervene. Such counter-intervention is supposed to maintain the balance and restore the degree of integrity to the local struggle. Humanitarian reasons may be cited as cause for intervention, especially where a government enslaves and/or massacres its own citizens. There would then also no longer be a fit between citizens and government.

The reality, however, is that no foreign power is as concerned with the citizens of another state so as to intervene in its affairs for humanitarian reasons, especially militarily.

However, according to Walzer, intervention, as a concept is not arbitrary but depends on ethical rules. Walzer suggests these ethical elements, regardless of whether they are unlawful or good. It is important to him that people in troubled places live peacefully, free from external or internal pressures.

In the traditional Aristotelian definition, ethics is a practical and not a theoretical discipline, according to which moral claims must be validated in historical or contingent contexts.²⁰⁰ Despite the political saliency of moral claims, intellectual discourse regarding intervention is still dominated by the norms of general International Law. These norms, admirably summarised by Michael Walzer as “the legalist paradigm,” simply proscribe intervention in the affairs of sovereign states and place a heavy burden of justification on those who claim the right or the duty to intervene.²⁰¹

Walzer’s argument could be problematic if subjugated by those that can generally be viewed as perpetrators or enablers of injustice to satisfy their own ends. His argument is extremely useful in highlighting arguments of morality in terms of how intervention may or may not be justifiable, and the protocol and procedures that should be followed in cases of intervention. He also adopts the fundamental ethical concerns pertaining to intervention against human rights violations.

Walzer’s legalist paradigm may be summed up as a proposal that the international society of independent and sovereign states be governed by a law that establishes the rights of all member states. The law defines the use of force or the threat of force against other states as a crime of aggression, thereby justifying a war of self-defence,

²⁰⁰ Op cit note 113.

²⁰¹ Op cit note 7.

a war of law enforcement by members of the international community, and punishment of the aggressor. Only aggression justifies war.²⁰²

Scholars such as Walzer have devised a clear strategy for investigating the moral and political obstacles associated with humanitarian intervention. International justice and order, the setbacks that may be suffered by the interveners and the possibility of failure, plus the negative implications it could have for those meant to be assisted by the intervention are some of the complex issues that can arise from international military intervention.²⁰³

Walzer's conditions for intervention involve three main issues. To begin with, decision-making that is concerned with international military intervention takes place among international statist regulations of non-intervention. Limitations arise from the need to respect state sovereignty as laid down in the UN Charter. On the one hand, the need to uphold individual human rights is also outlined in the Charter.²⁰⁴

The 'static' character of his theory on *Just and Unjust Wars*, which has often opened Michael Walzer to criticism, recently made him alter his rules for intervention. He now reasons that he has an obligation to ascertain that the conditions, which at first determined the intervention, do not simply resume when the intervener departs.²⁰⁵

The next issue is that of finance: intervening states must assess the cost in human life and implications to its own citizens of the monetary requirements that will be needed to facilitate the intervention.

Finally, there is the possibility of the intervention being unsuccessful. A state that is exploring the option of intervention must examine dangers to itself, but it must also

²⁰² Ibid.

²⁰³ Wheeler, N. *Saving Strangers: Humanitarian Intervention in International Society*. Oxford: Oxford University Press (2000). Chapter 1 provides a more detailed discussion of these issues.

²⁰⁴ For the principle of non-intervention and non-use of force, see especially Articles 2 and 7 of the UN Charter.

²⁰⁵ Walzer, M. *The Politics of Rescue. Dissent*: p 42 (Winter 1995).

examine the threats that its actions might have for the people it aims to benefit, and for all other people who may suffer as a result of it.²⁰⁶

The notion of humanitarian intervention envisages a regime that overcomes limitations of existing International Law and establishes a framework for preventing large-scale abuses of human rights, the ideal of justice backed by power. Once this regime is in place, International Law might be amended.²⁰⁷

Walzer's evasive argumentation could be damaging if subjugated by those that can generally be viewed as perpetrators or enablers of injustice. It is extremely useful in highlighting arguments of morality in terms of how intervention may or may not be justifiable and the protocol and procedures that need to be followed in cases of intervention. He also adopts the crucial ethical concerns pertaining to intervention against human rights violations.

Academic dialogue pertaining to intervention is still subject to the regulations of broad global decree, in spite of the political saliency of ethical obligations. The 'legalist paradigm' was clearly discussed by Walzer and he examines how these laws simply forbid intervention and require weighty validation for any such action on the part of those who assert the right or obligation to intervene. In summary, the legalist paradigm proposes that the international system be governed by the overriding right to sovereignty that all member states possess.²⁰⁸

In general, Walzer presumes that decision-makers have the ability to identify when a sovereign state is contradicting its ethics structure. In his view, they should also recognise how to utilise the same ethics structure as was the case in rationalisation of

²⁰⁶ Op cit note 7.

²⁰⁷ CSS Strategic Briefing Papers, Humanitarian Intervention: Definitions and Criteria. Vol 3: Part 1

²⁰⁸ Op cit note 7.

the intervention. Walzer also presupposes that a sector of the community in the state concerned is compliant with intervention.²⁰⁹

Walzer examines certain instances of national self-determination and the right to oppose an upcoming unjust intervention by a fellow state. The standard of national self-determination states that the intervening elements must depart after their mission has been accomplished. This is necessary in order to maintain a blameless repertoire. However, Walzer recognises no incidents of purely humanitarian intervention, only cases of mixed motive.²¹⁰

Walzer also emphasises the various principles regarding the exact cause of the intervention and the reasonable prospect of being successful. Given the importance accorded in policy debates concerning the motives of interveners, this is a controversial position. Military intervention that aims to protect citizens from deterioration of their conditions to those of a former negative situation was pursued by Walzer. He is also one of the primary authors to table an extensive (serious) evaluation regarding the effectiveness of intervention across multiple cases.²¹¹

²⁰⁹ Walzer, M. *Spheres of Justice*. Oxford (1983).

²¹⁰ Op cit note 7.

²¹¹ See generally, Op cit note 36.

CHAPTER III

INTERVENTION IN NORTHERN IRAQ

Prior to discussing the intervention and circumstances surrounding northern Iraq, it serves well to remember that the first international intervention in northern Iraq occurred in the Post-cold War Era of the 1990s. Further investigation into the Iraqi case is beneficial, but more specifically, also crucial. This chapter attempts to answer the questions of whether the intervention in northern Iraq falls within the three conditions stressed by Walzer (discussed in Chapter 1, 1.5 above), and what legal perspectives are relevant for these interventions.

The territory of present-day Iraq is approximately equivalent to that of ancient Mesopotamia, which fostered a series of early civilizations. [The] earliest of these was known as the civilization of *Sumer*, which arose probably in the 4th millennium BC and had its final thrive under the 3rd dynasty of Ur at the end of the 3rd millennium BC. Ur of the Chaldees was a great and famous Sumerian city, dating from this time.²¹²

²¹² *Iraq: The Cradle of Civilizations*, available at: <http://www.arab.net/iraq/> Last visited on July 3, 2008.

3.1 Background

The long history of the Kurds in general and of the Kurds in Iraq in particular, renders the situation in northern Iraq complicated. To facilitate an understanding of intervention in northern Iraq, and thus to achieve an objective of this research, it is necessary to delve deeper into the historical background of this area. The international and regional circumstances before Resolution 688 are discussed, but first the regional and international circumstances of the resolution before it was issued, set the scene for the discussion.

The Kurdish people compose one of the ancient nations of the Middle East. Kurdistan, the land of the Kurds, is spread among several modern states: north western Iran, northern Iraq, north eastern Syria, south eastern Turkey, and small parts of Armenia. There is no exact figure to the Kurdish population because each state has tended to downplay the number of Kurds within its own borders. Nevertheless, according to various estimates, the Kurdish population is estimated to range between 25 to 30 million. This makes the Kurds the fourth largest ethnic people of the Middle East.²¹³

The Treaty of Sevres (1920) assured the Kurds of their own state, but this was revoked under the Treaty of Lausanne in 1923. The term 'Kurdistan' is used extensively throughout Iraq and Iran for the Kurdish areas of northern Iraq and north-west Iran. For political reasons, Turkey and Syria avoid using this term, although in the 16th century under the Ottomans²¹⁴, who established one of the world's most

²¹³ See, <http://www.xs4all.nl/~tank/kurdish/htdocs/announce/KSF.html>. Last visited on July 3, 2008.

²¹⁴ See, <http://www.wsu.edu/~dee/OTTOMAN/OTTOMAN1.HTM>. Last visited on July 3, 2008

powerful Muslim civilisations stretching from the Muslim world across Europe to Spain, it was widely used.²¹⁵

When a new classification of contemporary defensive states came into being in the 20th century, the Kurds believed that they finally had the opportunity to acquire their own territory. But following and resistance from the Iraqi government, they were again disappointed, and former assurances from Iraqi about local sovereignty (Article 62) and discussions about merging a Kurdish state in future (Article 64) in the Treaty of Sevres (1925), were replaced by a decision to incorporate the Kurds into Iraq under British rule, but Britain surrendered its directive on June 3, 1930. Britain also failed to safeguard the future of marginal groups in the now autonomous Iraq.²¹⁶ However, despite their history, the Kurdish population is neither a small nation nor a nation without history. They constitute a significant group that lives dispersed between several states. They are therefore, neither autonomous nor integrated.

The Iraqi government suppressed a mass revolt that involved the Kurds, but shortly afterwards during the Iraqi-Iran War of 1980-1988, the Kurds suffered considerably, as result of their own actions, it was claimed. The Iraqi government enforced the *Anfal* (booty) operation from February to August 1988. Approximately 200,000 Kurds were killed with various types of weaponry, including chemical munitions. Thousands of Kurdish villages were attacked. Moreover, throughout the 1990s between 4 and 10 Kurds were injured or killed per month as a result of some ten million landmines that had been planted since 1975.²¹⁷

At the end of the Gulf War in 1991, smaller political parties in Iraq's Kurdish community assessed that Baghdad's political weakness at the time might finally offer

²¹⁵ O'Leary, Carole, A. The Kurds of Iraq: Recent History, Future Prospects. Volume 6(4). (December 2002). Also available at: <http://meria.idc.ac.il/journal/2002/issue4/jv6n4a5.html>. Last visited on August 12, 2007.

²¹⁶ Yamashita, H. *Humanitarian Space and International Politics: The Creation of Safe Areas*. Ashgate: pp 33-36 (2004).

²¹⁷ Ibid.

them the opportunity to achieve real autonomy. Kurdish leaders also anticipated that the Iraqi government's inability to manage the state of affairs in Iraq, in conjunction with a strategic political confrontation, would allow them to see the actualisation of their demand.²¹⁸

The adherence to the philosophy of Realism was apparent amongst those responding to the internal armed conflict and humanitarian crises during the Gulf War. Humanitarian dimensions of 'Operation Provide Comfort', as well as subsequent cases of UNSC engagement in Iraq, were not executed under the auspices of International Law, but were enacted to benefit the responders. In fact, in several cases the enormity of the unfolding humanitarian crisis seemed to reveal particular UNSC actions, which at times, had amounted to little more than tenuous references to the trans-boundary impact of key 'New World Order' indicators, such as the intrusion of refugees.²¹⁹

While war was raging in Iraq, some governments within the Coalition (the US, United Kingdom, [UK] France and other states), pushed to give, at the very least, underground or covert support to the Kurds in their rebellion. One such example was a message transmitted by means of the 'Voice of America' on February 15, 1991, during which the President of the USA, George Bush Snr, urged Saddam Hussein to relinquish his power so that the violence could be ended. Although this message was sent after the start of the rebellion, it gave the Kurds morale support.²²⁰

In an effort to distance the direct links between the Kurdish rebellion and support from certain Coalition members, Barzani stated: "came from the people themselves. We did not expect it". Kurdish leaders involved in the uprising sought approval from the destabilised central Iraqi government to allow them sovereignty as opposed to a

²¹⁸ Ibid.

²¹⁹ Thakur, R. & Malcontent, P. (eds) *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States*. New York: United Nations University Press: p 84 (2004).

²²⁰ Op cit note 216.

separate safe zone under the Iraqi regime. Clearly, the issue for the Kurds was sovereignty, and not limited separate accommodation.²²¹ This means that the people in northern Iraq rejected Saddam Hussein's regime because he refused to give them their main rights as citizens of Iraq.

The uprising spread quickly. However, the previous year the Iraqi government and its military forces had retreated from the largest area in northern Iraq in expectation of a war with Iraqi Shi'ites in the south.²²²

In spite of UNSC Resolution 686 authorisation for coalition military forces to use lethal force against fixed-wing aircraft, the Iraqi forces could use their rotary-wing battle helicopters to full advantage in assaults on the rebels. The combat force employed by Iraqi military helicopters was not only deadly to the rebels and their strongholds, but was equally lethal against innocent civilians. More importantly, based on the government's code concerning collective responsibility, which moves "blame to entire families or communities, the disobedience of one or more members of that community", the mass abandonment by Kurds from the military forces justified retribution of all Kurds.²²³

Many lives were lost as a result of the unsuccessful Kurdish uprising. Approximately 2 million people escaped to Turkey and Iran, and a massive refugee phenomenon developed. This exodus *en masse* had in fact begun in March, and coincided with the beginning of the uprising. People fled since they were afraid that there would be violent retribution from Baghdad if the uprising was unsuccessful. The memories of the *Anfal* operations of 1988 were still vivid. A senior Kurdish leader once stated that the reason so many people would rather brave hunger and cold in places such as

²²¹ Ibid.

²²² Ibid

²²³ Ibid.

Turkey or Iran, rather than remain in their own state and thereby face the wrath of Saddam Hussein, could only be as a result of the effects of the *Anfal*.²²⁴

The greatest danger that most people in the world today face comes from their own states. Many philosophers concur that it is morally permissible to intervene in the cases of extreme human rights abuses, while others insist that such abuses create a moral duty to intervene in order to stop the abuse and any further transgressions that might occur.²²⁵ Michael Walzer's view on the morality of humanitarian intervention is specifically relevant in this regard. He believes that certain cases of extreme abuse, to the point where the abuse "shocks the conscience of mankind", justify interventions that would otherwise be considered violations of a state's sovereignty.²²⁶

This draws attention to the case of Iraq. When reviewing the history of the Kurdish issue in northern Iraq, clearly the Kurds suffered greatly as a result of domestic, regional, and international circumstances. Therefore, the UN passed Resolution 688. It condemned the atrocities of Saddam Hussein's regime against the Iraqis in general, and especially against the Kurds. Resolution 688 called on the international community to shoulder its responsibility towards the Kurdish people in northern Iraq. The withdrawal of the Iraqi forces from Kuwait because of the military actions of the Coalition forces led by the USA in 1991, facilitated the Kurdish request for what they believed to be an inalienable right. The period before the passing of Resolution 688 is briefly revisited in the following section.

3.2 Iraq before International Resolution 688

It is clear from the foregoing arguments that first, large-scale transgressions against Kurdish people in the north of Iraq took place. Besides the thousands of people who

²²⁴ Ibid.

²²⁵ Op cit note 145.

²²⁶ See for example, Walzer, M. *The Argument about Humanitarian Intervention*, *Dissent* (2002).

died (including large numbers of civilians), a massive refugee problem arose. Second, the Kurdish people and their leadership felt that their inalienable rights were violently encroached upon by repressive acts by Saddam Hussein's regime. Third, there was a definite likelihood of further transgressions by the ruling regime.

This called into question the need for intervention. Walzer's argument is relevant here. In cases where massive abuses of human rights occur, a need for intervention by other states or the international community arises. Moreover, following from this, such intervention in all likelihood should come from an internationally recognised institution such as the UN.

The Iraqi troops entered Kuwait in 1990, and regarded it as part of Iraq as a result of Saddam Hussein's and his government's insistence that historical documents showed that Kuwait was legitimately part of Iraq. This was criticised by the majority of states in the international community. Soon afterwards, the UNSC condemned the action in Resolution 660 (1990), and ordered Iraq to leave Kuwait.²²⁷ New circumstances were thus imposed on Iraq which, as well as the idea that its presence represented a threat to international peace and security, prompted the decision by the international community to force Iraq to withdraw from Kuwait. This issue is significant in that it is one factor that changed the internal situation and invited direct foreign intervention.

Though the blockade required very little military enforcement, it was technically and practically an act of war. But the common perception during those months (August 1990 - January 1991) was that the Gulf peace, while the coalition tried to reverse the Iraq aggression without violence and debated, in slow motion and cold blood, whether or not to begin the war.²²⁸

²²⁷ *International Commission on Intervention and States Sovereignty. The Responsibility to Protect.* Published by the International Development Research Centre: pp 84-90 (2001).

²²⁸ Walzer, M. *Arguing About War.* London: Yale University Press: p 87 (2004).

Due to actions and thoughts in the 1990s, issues concerning international humanitarian assistance featured more than before. Directly after the end of the Cold War, many prospects arose for a new era of international collaboration termed a ‘New World Order’ of which the UN was regarded as a crucial pillar. The 1990s saw the outbreak of many deadly conflicts previously almost unseen amongst states. The UN had to cope with increasing demands since it was expected that it would preserve international harmony and security. To a large degree, the extent of these demands was impractical, and consequently responses to them or a lack thereof, led to much disillusionment.²²⁹

In less than a week, the UNSC enforced Resolution 661 (1990) which included several compulsory sanctions against Iraq. These actions incorporated a complete prohibition on trade as well as oil restrictions, deferral of international flights, weaponry restrictions, freezing Iraqi Government financial assets, and the prevention of economic dealings.²³⁰ The UNSC asked member states to enforce a sea barricade in line with Resolution 665 (1990). A month later, in Resolution 670 (1990), it was decided that all aviation relations with Iraq should be terminated. Only days afterwards, a large humanitarian emergency developed as third-state nationals, most of them Palestinians, escaped from Iraq and Kuwait mainly to Jordan.²³¹

The blockade was merely one of many alternatives, which included UN condemnation of Iraq, its diplomatic and political isolation, various degrees of economic sanction, and a negotiated settlement involving small or large concessions to the aggressor.²³²

As sanctions increased, the USA and some other states, began sending armed forces into the area. By the end of 1990, Kuwait had been ruled by Iraq for more than two

²²⁹ Op cit note 6.

²³⁰ Op cit note 227.

²³¹ Ibid.

²³² Op cit note 227.

months. This led to the decision, or at least some minimal consensus between America and the Soviet Union, that a type of enforcement action could possibly be allowed by the UNSC.²³³

During discussions, a high-ranking American State Department representative insisted that Article 51 offered adequate foundation for auxiliary acts under International Law. Thorough preparation would “provide a firmer political basis” for action. There was hardly any dispute regarding the construction of an autonomous UN force and the favored plan of action would place the alliance forces under what can be described as a UN ‘umbrella’.²³⁴

In November the American Secretary of State, James Baker, visited Moscow. Here he advocated such a decision, using the Soviet President, Mikhail Gorbachev’s Pravda Article 1987 on bettering the UN’s role, as backing for his argument. Gorbachev recommended that the UNSC enforce two resolutions: the first, which was accepted in late November, would allow force to be used after a period of six weeks of grace, while the second would give the actual sign to go ahead and use force. Baker wanted a singular decision with a period of grace before it came into action. The American government felt that when Baker and Soviet Foreign Minister, Eduard Shevardnadze, met in Paris on November 18, they had the backing for the decision to be finalised. Moscow, however, objected. As one of the objections, Shevardnadze did not want the word ‘force’ to be used. Baker had five different euphemisms, and finally, the term ‘all necessary means’ was decided upon.²³⁵ This suggests that the USA had begun to exploit international circumstances after the collapse of the former Soviet Union to achieve its goals and advance its interests in the international arena.

With 12 votes for and 2 against (Cuba and Yemen), the UNSC accepted Resolution 678 on November 29, 1990. China decided not to vote. In the operational subsection,

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Op cit note 6.

the UNSC “authorized member states co-operating with the government of Kuwait, unless Iraq on or before 15 January 1991 fully implements ... the foregoing resolutions, to use all necessary means to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area”.²³⁶

As the USA-led alliance began the air operation in January and February 1991, which marked the start of ‘Operation Desert Storm’, a few states attempted to organise an end to the clash in a non-violent manner. The Soviet Union proposed a plan under which trade restrictions enforced on Iraq would be removed once two-thirds of the Iraqi forces had left Kuwait. The remaining restrictions would be removed as soon as all the troops had left. This plan was not accepted by the USA or the UK. They insisted that they could uphold the restrictions for as long as they wished, and would continue to do so in an action allowed by the UNSC until it accepted a different resolution. As undeviating UNSC members, they kept their right to reject any agreement²³⁷. In this regard, Walzer argues a different point:

I do not believe that the bombing of Iraq in 1991 met just war standards: shielding civilians would certainly have excluded the destruction of electricity networks and water purification plants.²³⁸

But this did not happen. The operation was in full force. While the military operation in Iraq were underway in 1991, the USA President, George Bush, stated publicly that he hoped the Iraqi people would ‘take matters into their own hands’ and thereby strip Saddam Hussein of his might. The seemingly complete conquest of the Iraqi armed forces as well as foreign support re-established the need for autonomy among the Kurds residing in northern Iraq. Nonetheless, Turkey projected that by April 5, 1991 approximately one million people would go into exile.

²³⁶ Ibid.

²³⁷ UN Document S/PV.2977 (1991), p 301 (US), p 313 (UK). See also, Op cit note 227.

²³⁸ Walzer, M. *Arguing About War*. London: Yale University Press: p 10 (2004).

Apprehension was evident at an assembly of the UNSC on April 3, 1991 regarding the way in which the Kurds in northern Iraq, as well as the Shi'ites and Marsh Arabs in the south, were being treated. Resolution 687 (1991) gave the stipulations of the truce with Iraq and explained when and how the restrictions placed on the state would be removed. It did not however, mention what was to be done about the state of the civilian inhabitants of Iraq. This caused disputes concerning the validity of procedures under UNSC Resolution 688 (1991), which was decided on two days later.²³⁹

After the uprising of the Kurds in the north and the Shi'a Arabs in the south against Saddam Hussein's leadership in April 1991, Iraqi Kurdistan was separated into two different areas. According to UNSC Resolution 688, armed forces from eleven different states, including the USA and Turkey, enforced 'Operation Provide Comfort'. This was meant to provide security and charitable aid to people in camps along the border between Iraq and Turkey. It is in this context that the Kurdish area of security and a northern 'no-fly zone' was created.²⁴⁰ The 'no-fly zone' in Iraq was the first imposed in the Post-cold War Era.

A key example from the recent past was the establishment of 'no-fly zone'. The same happened later for the sake of protecting the Shias of Southern Iraq.²⁴¹

Even though there was much resistance from both in and outside of Iraq, the Kurdish area of security had been ruled for ten years by the Kurds themselves with considerable success. The voices of many Iraqi parties had appealed to the international community to intervene. However, the UN did not actively do so on

²³⁹ UN Document S/PV. 2982 (1991): p. 6 (Turkey). Op cit note 227.

²⁴⁰ Op cit note 225.

²⁴¹ Wicker, B. & Van Iersel, F. (eds) *Humanitarian Intervention and the Pursuit of Justice. The Netherlands*: Kok Pharos Publishing House: p 80 (1996).

their behalf, but only intervened in northern Iraq to protect the Kurds. Other parties were ignored.²⁴²

The Government of Iraq willingly relinquished its power of civil management in October 1991, enabling the people living in the Kurdish area of security to rule themselves. In May 1992, elections took place and the Kurdistan National Assembly (KNA) and the Kurdistan Regional Government (KRG) were formed. The KDP as well as the Patriotic Union of Kurdistan (PUK) agreed on equal power sharing. Also, five of the total of 105 KNA seats were assigned to members of the Assyrian-Chaldean Christian community. Representatives of all the racial, cultural and religious groups of people in Iraq were included in the process,²⁴³ although the Turkoman group in the state withdrew from it.

3.3 International Resolution 688

International Resolution 688 (1991) was the first in the Post-cold War Era and marked one of the most important periods in modern Iraqi history. In summary, it called on the international community to intervene to save the Kurds in northern Iraq from repression by the Iraqi leadership. Hence, the discussion of this resolution in this section is significant to indicate the vital reasons that framed it.

The old world order, based on the exercise of power, must now give way to a new order in which nations respond to the pressing needs of humankind. The UN must take a central role if that order is to be realized.²⁴⁴

²⁴² Op cit note 215.

²⁴³ Ibid.

²⁴⁴ Op cit note 51.

Charitable participation by the UN debatably developed as a consequence of the Gulf War and as an outcome of the UNSC's model decision to allow an alliance of UN member states led by the USA. These forces were to use 'all necessary means' to remove Iraqi forces from Kuwait.²⁴⁵

The Republican Guard, an elite part of Saddam Hussein's forces and which deployed approximately half of its military forces in the north of Iraq, remained capable of being operational following the war. It seems that the domestic survival of the political party (regime) in power was at least for some time, preferred as a lesser evil to the carving up of Iraq. An urgent appeal was sent forth from Kurdish leaders towards entities such as France, Saudi Arabia, the UK and the USA. They urged for immediate intervention by the UN, but by early April 1991, there had not yet been any coordinated international response.²⁴⁶ The USA asked for an emergency assembly of the UNSC. Since the Soviet Union had been dissolved, this was the first major crisis facing the UN, but with great speed and efficiency, the UNSC responded and accepted Resolution 688 on April 5, 1991.²⁴⁷

Opposition to Resolution 688 was apparent from amongst others, China, the Soviet Union and the USA, who shared the view that a response would create a precedent for the involvement of the UNSC in internal matters. The US administration offered excuses such as the unlikely success of insurgents because of their lack of a central command; the absence of a mandate from the UN extending the objective of the operation beyond the liberation of Kuwait, and the President's reluctance to put the lives of American soldiers at risk by involvement in a civil war. This precedent however, is an ethical measure designed to help people in need.

²⁴⁵ See UNSC Res.678 (1990).

²⁴⁶ *The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War*, available at E:\KK\The Kurdish Crisis 1.htm. Last visited on June 11, 2007.

²⁴⁷ Op cit 20. (Adopted ten to three, with Cuba, Yemen and Zimbabwe against and China and India abstaining). See also, Op cit note 138.

Gauged by reports in the media, these attitudes prevailed for some time, but eventually they changed because of the position assumed by other states and as a result of public pressures. Early in April 1991, states such as Turkey, France and Iran sent letters to the UNSC in support of the Kurds. Following some persistence by the French in particular, the discussion finally resulted in the adoption of Resolution 688 in 1991. Iraq rejected this resolution because it reflected growing international condemnation of Iraq's treatment of the Kurds.²⁴⁸

This resolution damned the “repression of the Iraqi population in many parts of Iraq, the consequences of which threatened international peace and security in the region”. It also ordered that “Iraq, as a contributor to involving the threat to international peace and security in the region, immediately end this repression ...” The UNSC wanted an open conversation to take place which would guarantee the human and political rights of the inhabitants of Iraq. The resolution also stated that Iraq should “allow immediate access by international humanitarian organisations to the devastated Kurdish areas”.²⁴⁹ It also requested the Secretary-General to continue his charitable assistance in Iraq.

Thus, UNSC Resolution 688 rejected and condemned the way in which Iraq handled her residents, including the Kurds. The suggestion that the outcome of Iraq's actions could be detrimental to issues concerning international peace and security seemed to be reflected in the actual state of affairs. The Iraqi government suppressed the Kurdish uprising, but the resultant refugee crisis, also in the adjoining states of Turkey and Iran, negatively affected the Kurds, not only in Iran but, in particular, those in Turkey as well.²⁵⁰ The Iraqi case illustrates a characteristic situation of internal human rights infringements which create a ‘threat to international peace’. Thus, for potential humanitarian predicaments that could have international consequences, it can be seen as a significant example.

²⁴⁸ Op cit note 246.

²⁴⁹ Op cit note 39.

²⁵⁰ Op cit note 28.

However, the extent to which UNSC Resolution 688 could be employed was restricted:²⁵¹

* First, the Resolution does not recognise internal human rights infringements as possible threats to international peace and security if no negative effects are evident outside of the borders of the state upon which it is imposed. In fact, the Resolution reads that it is the negative effects seen outside the Iraqi borders that pose a threat to international peace.

* Second, Resolution 688 makes no allowance for the UNSC to use force in order to defend human rights if necessary.

The Resolution does not mention all of Chapter VII of the UN Charter, which is the only chapter that makes allowance for the UNSC to employ or sanction the employment of force. Additionally, the Resolution does not refer to joint enforcement procedures. Since the Resolution does not cover these possibilities (actions sanctioned or invoked by Chapter VII of the Charter), it should not be interpreted as sanctioning humanitarian involvement, especially, since by their very nature, these involvements require the employment of force.²⁵²

The idea of creating UN 'safe havens', supported by military forces in northern Iraq to protect the Kurds from further attacks by the Iraqi Government, was proposed by the USA, the UK and France. This idea was quickly underscored by, among other states, Austria and Turkey, as well as certain European leaders, who on April 08, 1991 attended a conference of the European Communities in Luxembourg. The decision derived from the summit in Luxembourg was taken with reference to a British proposal that considered the inclusion of Kurdish refugees in Iraq close to its borders

²⁵¹ Ibid.

²⁵² Ibid.

with Turkey and Iran under the direct supervision and proper management of the UN itself.²⁵³

The USA had 'no position' regarding the question of Kurdish 'safe havens', and a representative from the State Department was unable to grant the proposal 'particular endorsement'. However, the President of the USA did deny reports that there was some disunity between the USA and its European counterparts regarding the issue of Kurdish refugees on April 11, 1991. The USA took a significant step in protecting the Kurds, with a plea to Iraq to cease all military activity north of the 36th parallel on April 10, 1991. This may in fact also have included certain parts of Kurdish territory, stretching approximately from the Turkish border southwards to the south of Mosul, but excluding the oil rich territory of Kirkuk. The USA furthermore warned Iraq that with the support of its allies, it would certainly use force to apply these measures should any military interference in the international relief efforts regarding the Kurds occur.²⁵⁴

'Operation Provide Comfort' followed the resolution as representatives of the French, USA and UK military were sent to create 'safe havens' in the north of Iraq. Two separate but comparable, massive efforts of humanitarian aid were introduced to assist displaced people within Iraq. The first effort resulted from decisions taken within the UN while the second came about due to the actions of the UK, France and the USA. Only the second effort can truly be regarded as an operation of compassionate intercession.²⁵⁵

The actions taken by the UN occurred with the backing of the Secretary General of the UN. First he sent Eric Suy as a personal spokesperson, and then Sadruddin Aga Khan was sent as an 'Executive Delegate' and as head of the UN Inter-Agency

²⁵³ Op cit note 246.

²⁵⁴ Ibid.

²⁵⁵ Sinha, M *Humanitarian Intervention by the United Nations*. New Delhi: Nice Printing Press: pp 76-77 (2002).

Mission for the UN Humanitarian Programme. This was done to discuss an agreement with Saddam Hussein, not only for Iraq, but also for the border regions of Kuwait, Iran and Turkey. The second important activity involved the actions of the UK, France and the USA and their effort to establish a safe area in the north of Iraq for the people, mainly Kurds, who had relocated.²⁵⁶

Iraqi officials approved of the UN effort and signed a Memorandum of Understanding on April 18, 1991. This allowed the UN 'guards' to enter Iraq and also allowed the creation of UN Humanitarian Centers. The UNSC Resolution 688 reflected a noteworthy human rights orientation with regard to the safeguarding of the Kurds.²⁵⁷

India and China were adamant that the code of non-involvement in internal affairs should be adhered to. India wished to reiterate its stance concerning high reverence for sovereignty and territorial obligations as preserved in the UN Charter. It joined forces with neutral members and requested the UNSC not to enforce sanctions on food and other necessary supplies from both states.²⁵⁸ This request was acceded to and the UNSC did not enforce sanctions on necessary supplies from either state. Chinmaya Gharekhan, the Indian delegate, said that "India has consistently held that regional initiatives or arrangements for peace and stability deserve all encouragement, provided they are arrived at by the sovereign will of the states of the region as part of a genuinely cooperative effort". Such arrangements can neither be imposed by external pressure nor can they be lasting if they are of a discriminatory nature taken in the international context. It is also not legitimate to make such arrangements under the mandatory provisions of Chapter VII of the Charter.²⁵⁹

²⁵⁶ Sinha, M *Humanitarian Intervention by the United Nations*. New Delhi: Nice Printing Press: pp 78-80 (2002).

²⁵⁷ Ibid.

²⁵⁸ UN Doc. S/PV. 2981 of April 3, 1991 p 75.

²⁵⁹ UN Doc. S/PV. 2981 of April 3, 1991 p 77.

India impressed on the UNSC the significance of the threat, or the possibility of the threat, that could jeopardise international peace and security in the area, rather than the issues that led to the creation of the emergency. The Indian representative, Gharekhan, said that “the Council should have concentrated on the aspect of peace and security, and left other aspects to other, more appropriate organizations of the UN”.²⁶⁰

While the terrible acts of violence in Iraq generated a deep sense of compassion in India, it was evident that India would not vote in favor of Resolution 688. It saw the Kurdish dilemma falling completely under the authority of Iraq itself. India’s position reflected its sense of obligation to the reverence for sovereignty and the territorial honour of states, including Iraq. This is a fundamental standard in International Relations that India felt should be re-enforced in the UNSC. Others agreed. However, the complexity of the Iraq/Kurdish question remained.

Upon acceptance of Resolution 688, the UNSC planned cautiously in order to avoid a possible unwanted or unworkable model for action in the future. Ideas that were raised during the discussions surrounding the Resolution revealed that almost all states, including those that supported the Resolution, had concerns about matching the right of the UNSC to judge the state of affairs with the standard of non-intervention into the internal matters of a state. Article 2, paragraph 7 of the UN Charter and the method in which it could be applied in these particular circumstances were argued about a great deal.

The language used in Resolution 688 mirrors these strains. Unlike Somalia, where there was no central government that functioned properly, and Haiti, where there were opposing governments, Iraq did in fact have a single, independent government. The matter of sovereignty ruled the discussions because many states doubted the right

²⁶⁰ UN Doc. S/PV. 2981 of April 3, 1991 p 63.

of the UN to become involved in a sovereign state to address human rights mistreatments.²⁶¹

The UNSC forced Iraq to allow humanitarian aid. This aid was eventually provided under UN backing, and according to a number of memoranda of understanding, it was done with Iraq's resentful permission. Nevertheless, forcing a state to allow humanitarian aid is a pioneering decision that is roughly in line with advancements made in the General Assembly. The General Assembly is slowly coming to the conclusion that in some situations, humanitarian aid can be provided without the permission of the state.²⁶²

Even though Iraq argued that the areas of security and 'no-fly zone's went against Article 2(4), western governments interpreted this as if the issues were being disputed. They claimed that they were not infringing on Iraq's right to sovereignty on a humanitarian basis. The Legal Counselor's, Anthony Aust's arguments concurred with the ideas of international lawyers who stated that humanitarian intervention is allowed under Article 2(4).²⁶³

The western armed involvement in northern Iraq followed the requirements of the Article. It was not permanent; it did not mean a government change or territorial alterations, and it was in compliance with the rules put forward in Resolution 688. However, Pierre Laberge (in Wheeler 2000) argues that despite unauthorised deployment of armed forces by western states within the borders of another state or where approval in terms of a supporting resolution was lacking, members of the

²⁶¹ Op cit note 28.

²⁶² Op cit note 28. As regards language, a recent resolution provides that the sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. Humanitarian assistance should be provided with the consent of the affected state and in principle, on the basis of an appeal by the affected state.

²⁶³ Op cit note 203.

UNSC who voted for or who abstained from voting for Resolution 688, revealed approval through their silence.²⁶⁴

Article 2(7) was an issue of concern for UN members. This resulted in the UNSC not passing Resolution 688 under Chapter VII of the Charter. As it became evident when Britain, France and the USA tried to obtain UNSC support for the areas of security, and later on for a UN police force to control the allied operation, the UNSC did not wish to approve the use of threat or force to defend human rights inside the borders of Iraq.²⁶⁵

To some extent formation of the areas of security went against the restrictions set by previous actions. It was a first for a number of states to defend the use of force concerning the obtainment of an agreement with a UNSC Resolution in public, which insisted that inherent value should be placed on human rights. By doing this, the western states defied the ruling concepts of sovereignty which prevented interventions such as ‘Operation Provide Comfort’. With the justification that the areas of security complied with the regulations laid down in Resolution 688 and that they were not violating Iraq’s right to sovereignty, the western governments stated that new meanings should be provided for the rules and laws of sovereignty concerning intervention. The rights concerning intervention were limited to providing ‘relief and redress in human rights emergencies’ and another UNSC resolution was needed to support this.²⁶⁶

This, however, did not change the fact that these areas of agreement enabled a moment of unity to occur between the states. It is an exaggeration to state that the way in which the western effort was met, supported a new means of humanitarian intervention; as International Law states that it must have the support of *opinio juris*.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ This phrase is taken from Perez de Cueller’s final report to the General Assembly in September 1999 and it captures the spirit of ‘Operation Provide Comfort’ well. Also see Op cit note 214.

Yet, by making new humanitarian declarations, the idea of areas of security became part of the discourse of the states involved. With that, as is stated by Jane Stromseth, “expectations that similar responses will be forthcoming in other conflicts” developed.²⁶⁷

Sadako Ogata (in Weiss 1999), the UN High Commissioner for Refugees (UNHCR), stated that the areas of security were a “case of successful humanitarian intervention”.²⁶⁸ This was an appropriate evaluation of the success of the effort to take the Kurds into the security areas and later of getting them back to their own homes. It was, however, less appropriate when applied to the success of allowing for a political framework that would ensure their security on an ongoing basis. Stromseth argues that by keeping this intervention in mind “humanitarian relief alone will not solve deep-seated problems”.²⁶⁹ Freedman and Boren add that “humanitarian intervention which failed to address the underlying dispute which had led to the crisis in the first place was liable to conclude without guarantees of any recurrence”.²⁷⁰ The idea that human rights abuses are always tied to political issues shows a singular idea of humanitarian intervention, but the states did not focus on or investigate these causes when they responded to the humanitarian crisis in northern Iraq.²⁷¹

The maximum effort that the UNSC considered and then suggested was to request the involved parties to have a discussion to make sure that human rights were valued. The recognition that the Kurds were in danger of future attacks by Iraq as a result of the absence of a long-term political resolution meant that the western states intended to send in armed forces to provide ongoing protection for the Kurds. This did not work since the attempt to get UNSC approval for this force to control the areas of

²⁶⁷ See generally, Stromseth, J.F. “Iraq”. In *Enforcing Restraint: Collective Intervention in Internal Conflicts*. Edited by L.F. Damrosch. New York: Council on Foreign Relations (1993).

²⁶⁸ Weiss, T.G. *Military-Civilian Interactions: Intervening in Humanitarian Crises*. Oxford: Rowman & Littlefield: p 68 (1999).

²⁶⁹ Op cit note 267.

²⁷⁰ See generally, Freedman, L. & Boren, D. “Safe Havens For Kurds”. In *To loosen the Bands of Wickedness*. London: Brassey’s (1992).

²⁷¹ Ibid.

security was resisted by pluralist laws. The UNSC was willing to order humanitarian right of entry, but it did not wish to support this by taking any actual form of action when it came to force or the threat to use force. One can therefore concur with Weiss that “the longer-term benefits of intervention remain fundamentally ambiguous”.²⁷² Further investigation is certainly justified, particularly as regards the following:

First, a link between human rights and international security arose following this case of intervention. As argued by Wheeler, “it was the first time – other than the case of South Africa– that the UNSC had collectively demanded an improvement in the human rights situation of a member state as a contribution to the promotion of international security”.²⁷³ This perhaps, amounted to one positive contribution to a complex emergency resolution.

Subsequently, it should be noted that this link was only established because assertions of self-determination were not considered. This was done by separating the ‘causes’ of the mass departure, which would involve such assertions, from its ‘consequences’ and by seeing the last-mentioned as a threat to international security²⁷⁴. In this sense, the advances made remain shrouded in ambiguity which renders future involvements problematic.

Finally, the resolution was not accepted under Chapter VII and it was not clear how it should be executed. While it signified the Council’s admittance of the humanitarian crisis in Iraq as a threat to international peace and security and therefore, allowed its involvement, measures of enforcement were not seriously considered. Since there was no clear example of previous UNSC action in a crisis of this kind, the actual

²⁷² Op cit note 268.

²⁷³ Yamashita, H. *Humanitarian Space and International Politics: The Creation of Safe Areas*. Ashgate: p 44 (2004).

²⁷⁴ Ibid.

implementation of further action needed much interpretation and imagination,²⁷⁵ and if it ever had to be repeated, it would offers major challenges.

From the foregoing is noted that states such as India and China did not support the idea to interfere in Iraqi territory because they regarded it as a violation of the Charter of the UN. The UK, France and the USA considered international intervention necessary to protect Iraqi Kurds in northern Iraq. There was however, uncertainty as to why they did not intervene to protect Iraqi citizens when Saddam Hussein's regime committed abusive actions against all Iraqi people in different areas, especially those that opposed him. The different approaches by different states because of their interpretation of Chapter VII and the UN Charter prevented action at the time – to the detriment of the Kurds.

Looking at this issue from another angle, Resolution 688 and the areas of security changed the normal limitations of lawful interventions within the international society. The implication of this resolution in creating an example for UN humanitarian interventions is that the UNSC acknowledged for the first time that the internal oppression in a state could have effects outside the borders, and that these effects could threaten 'international peace and security'.²⁷⁶ (In the case of apartheid South Africa and later on the illegal occupation of Namibia and South African incursions into Angola, the UN also addressed the issue but direct foreign intervention was not seriously contemplated. The case of Iraq seems to point to the possibility of such intervention, despite differences by member states). To illustrate: in paragraph 6, the resolution petitioned "[to] all Member States and to all humanitarian organisations to contribute" to humanitarian activities.

Arguably, the UN intervention into northern Iraq was politically rather than ethically motivated. In 1988, Saddam's regime prohibited weapons against the Kurds, but

²⁷⁵ Ibid.

²⁷⁶ Wheeler, N. *Saving Strangers: Humanitarian Intervention in International Society*. Oxford: Oxford University Press: P168 (2000).

international organisations did not lift a finger to help the Kurdish people. One might wonder why the UN has never taken any actual steps against Turkey as when Turkey failed to recognise rights for the Turkish Kurds, and attacked them repeatedly. Furthermore Turkey still regards the Kurdish fighters in its land as terrorists. Hence, it seems that international resolution 688 did not come about because of the repression of the Kurds by Saddam Hussein's regime, but because of changing international circumstances and conflicting self-interests between states inside, but especially also outside, the region. The arguments by India and China versus those of the UK, France and the USA provide an example.

3.4 Walzer and intervention into northern Iraq

As stated in Chapter 1, 2.6, Walzer places clear landmarks in his ethical approach to humanitarian intervention. He wrote about the intervention into northern Iraq, and it would seem, justified the acts of the USA and the UK against the Iraqi regime, even if these states did not have international authorisation for their actions.

After the 1991 Gulf War, George Bush said that America "went halfway around the world to do what is moral and just and right". This comment shows how Bush employed the language of just war to account for the war led by America to remove Saddam Hussein from Kuwait.²⁷⁷ But, unfortunately neither George Bush nor the previous American administrations explained why they failed to assist the Palestinian people who, since 1948 have suffered under Israeli occupation. The UN declared as long ago as 1947 that there should be a 'Jewish State' and a 'Palestinian State', with Jerusalem under a divided international institutional corpus. Yet, only one of these states exists.

²⁷⁷ See generally, David Campbell, *Politics without Principle: Sovereignty, Ethics, and the Narratives of the Gulf War*. Boulder (Colorado): Lynne Rienner Publishers (1993).

Even though Walzer is doubtful about Bush's actual objectives, he still agreed with the Republican President's statement that the just war policy legitimised the actions taken in Kuwait. In an article in *The New Republic*, he said that the emancipation of Kuwait was a war fought for a just reason.²⁷⁸

By supporting the 1991 Gulf War in principle, Walzer separated himself from many other leftist academics such as Todd Gitlin, Christopher Hitchens and Noam Chomsky, who all opposed it. Many of them did not want to support the war because they thought that there were other reasons behind it, such as oil supplies that needed to be protected.²⁷⁹

Walzer contested this leftist argument in his 1991 *New Republic* article. He mentioned that the Americans who were most worried about the protection of their economic interests in the Gulf simply asked for Saddam Hussein to be captured. Some argued that, in fact, Saddam Hussein had not been able to influence the oil price when he failed to take over oil-rich Saudi Arabia. In his article and talking to the leftist war opposition, Walzer focused on the fact that, from an ethical viewpoint, the case was very easy to understand. The failure to resist would possibly mean that America supported Saddam Hussein's acts of violence.²⁸⁰

As regards the possible results of the war, Walzer certainly did experience the same apprehension as felt by the war antagonists. In his *New Republic* article, he said that the Gulf War "might well be politically or militarily unwise [to fight]". He did, however, maintain that in the end it was the role of American military specialists to measure the hazards of fighting the war, and then to decide on appropriate action. He stated that as a just war truth-seeker, it was not his responsibility to determine whether the war should be fought or not. It was more than adequate for him to say

²⁷⁸ Ibid.

²⁷⁹ Walzer, M. "A Just War?" In *The Gulf War Reader: History, Documents, Opinions*. Edited by Micah L Sifry & Christopher Cert. New York: Times Books: pp 302-303 (1991).

²⁸⁰ Ibid.

that, in principle, removing Saddam Hussein from Kuwait would stay a just cause even if America ended up not pursuing this action.²⁸¹

The UN took numerous international resolutions against Saddam's command in 1991, including Resolution 688, with prior resolutions being dispatched. This was because the Iraqi invasion of Kuwait was seen to endanger international peace and security. As indicated previously, Resolution 688 came into being because of internal conflict in Iraq. Those who had left Iraq for other states did so because of the way in which they had been treated in Iraq. These conditions created a threat to international peace and security, and therefore, the UN issued Resolution 688.

Walzer also focused on the genuine empathetic reservations expressed by optimistic war hawks who insisted that America had an ethical duty to free the Iraqi people from the dictatorship of Saddam Hussein. Responding to them, Walzer reiterated his view that a military intervention for humanitarian reasons was only justifiable in very specific instances. This meant that although a government was not involved in genocidal actions, it should enforce ways to protest against human rights infringements in foreign states.²⁸²

Concerning Iraq, Walzer believes that by implementing the 'no-fly zone's over the north of Iraq, the international society was victorious in stopping Saddam Hussein from killing all the Kurds. To make sure that the Kurds, as well as other ethnic and religious groups, would continue to be safe, Walzer felt that the 'no-fly zone's should be extended to cover the entire state. By implementing the 'no-fly zone's, the inspection of weapons, as well as a 'smart sanctions' system, Walzer maintained that

²⁸¹ Walzer, M. "A Just War?" In *The Gulf War Reader: History, Documents, Opinions*. Edited by Micah L Sifry & Christopher Cert. New York: Times Books: p306 (1991).

²⁸² Op cit note 279.

America could have managed its security and humanitarian concerns without having to engage in a war which would inevitably cost lives and money.²⁸³

It is evident that Walzer agrees to the use of some force in Iraq. What he did oppose however, was the idea that America should go into the state with the single purpose of removing Saddam Hussein from power. Even though Walzer was aware that the implementation of ‘no-fly zone’s and inspection of weapons would cause Saddam’s power to weaken and possibly fail altogether, he did not agree with Bush’s military aim of ‘regime change’.²⁸⁴ In this sense Walzer found himself in disagreement with the rather simplistic approach of enforced-regime change.

Walzer stated that “change of regime is not commonly accepted as a justification for war”. In the article, he states that the concept of ‘regime change’ makes him think of “the bad old days of Cold War ‘spheres of influence’ and ideologically driven military or clandestine interventions”.²⁸⁵

I believe that the concept of ‘justice of war’ is applicable to not only the methods used in battle but also to the aim and rationale behind it. Should one wish to justify war beginning with a description of the reasoning behind it, one would need to question the approach as well. The management of repression, established after the first Gulf War in the early 90’s in Iraq, was a valuable arrangement. However, it would have been even more successful, had it had the complete backing of European states. Notwithstanding the prohibition of weapons, in retrospect, it is clear to see that if the no-fly zones had been imposed by the French and German planes as well as by US planes and the inspection procedure thereof been sustained by European states, it would have been almost impossible for the USA to go to battle. Saddam Hussein’s command was basically

²⁸³ Op cit note 7.

²⁸⁴ Walzer, M. No Strikes, *The New Republic* No 227: pp 19-20 (September 30, 2003).

²⁸⁵ Ibid.

ineffective after 1991 since the regime was able to deal with political rivals on home ground, but it was unable to circumvent Kurdish sovereignty, for example. The restriction on arms assisted in putting a stop to weaponry of multitude devastation.²⁸⁶

Walzer believes that just war theorists still have a very important public ‘function’. Obviously, just-war theorists continue to serve as independent critics in holding their government’s actual policies up against the just-war standards the government is claiming to observe. According to Walzer, reasonable war theorists still have a crucial public ‘function’. It is obvious that only reasonable war theorists serve as independent critics when it comes to actually examining their government’s policies against the war principles that the government apparently observes.

One can argue that a major action to help and save repression of a nation or group somewhere from non-humanitarian abuses by forceful power is important. However, at the same time it is unacceptable for such actions to apply in one state but not in another one. There should, one can argue, be consistent standards that apply equally to all nations.

3.5 The legitimacy of intervention in northern Iraq

The matter of whether the UN intervention in northern Iraq was legitimate has attracted much controversy in the area of International Relations. Intervention in Iraq represented a significant change in International Relations at the time. It followed the collapse of the Soviet Union and the beginning of the Post-cold War Era. Very different views were forthcoming around the adoption of UN resolution 688.

²⁸⁶ Interview with Michael Walzer in November 2005, in *Russia in International Affairs* Vol. 4(1) (January- March 2006).

The vote on Resolution 688 had been a close one since there were other opinions suggesting no action would lead to the weakening of Article 2(7) of the Charter. Also, a new motion that permitted protection of the Kurds would have been interpreted by numerous members as causing too much damage to the principle of non-intervention.²⁸⁷ These contrasting viewpoints in the international community influenced a complex debate with potentially divergent outcomes.

If the draft resolution put together on April 5, 1991 contained a stipulation allowing the threat or actual employment of force in order to protect humanitarian efforts or human rights, a Soviet veto would have stopped it dead in its tracks. The UNSC could not be convinced to go beyond Resolution 688 and it was this knowledge that made the western governments to withhold any new resolutions which would allow the formation of areas of security.²⁸⁸

On the other hand, China and some other states agreed to action but only within specific limitations. Within the UNSC there was much resistance to any notions that could damage the principles of sovereignty and non-intervention. Western armed intervention was only accepted because it was assumed that it would not become a permanent political condition since western forces would be cleared from the area within months.²⁸⁹

Resolution 688 is an uncertain model for two possible reasons:

First, it was the fourteenth resolution of the UNSC concerning the invasion of Kuwait. It was however, the first that did not state that the UNSC was acting according to Chapter VII of the Charter. The very first resolution which specifically recalled Article 2(7) of the UN Charter was set as *ipso facto*. This was made possible

²⁸⁷ Wheeler, N. *Saving Strangers: Humanitarian Intervention in International Society*. Oxford: Oxford University Press: P 152 (2000). See also, UN Clashes with west over Forces for northern Iraq, *The Times* (April 18, 1991).

²⁸⁸ Ibid.

²⁸⁹ Ibid.

by France's involvement after it became known that a prior outline resolution which did not refer to Chapter VII was not supported by nine members of the Council.²⁹⁰

Second, whenever the UNSC mentioned the threat to international peace and security, it was particularly limited to effects outside Iraqi borders. The introduction referred to the Council's serious apprehension concerning "the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions, which *threaten* international peace and security in the region"²⁹¹. The choice of the plural verb form 'threaten' clearly indicates that it was the two outcomes, namely the mass exit of refugees and the cross-border invasions, that were the causes for concern regarding international security.

The western governments considered how they should go about handing over the operation to the UN which would allow their forces to leave northern Iraq. The concern over whether the UN's own humanitarian aid endeavours would be negatively affected by the creation of the areas of security was one of the reasons why UN officials were wary of the west's plans.²⁹² Despite the argument that western forces would withdraw, the future was unpredictable.

Because of the collapse of John Major's, the British Prime Minister's plans concerning a UN police force, the western powers had to deal with the very situation that they had been afraid of from the start, viz being forced into a long-term obligation to protect the Kurds. However, when Iraq came to the conclusion that a UN presence in northern Iraq was the only way of eradicating the allied forces, they provided the western powers with a possible escape route by approving the plan

²⁹⁰ Chesterman, S. *Just War or Just Peace? Humanitarian Intervention and International Law*. Oxford: Oxford University Press: pp 131-132 (2001). See also Op cit 20.

²⁹¹ Ibid.

²⁹² Wheeler, N. *Saving Strangers: Humanitarian Intervention in International Society*. Oxford: Oxford University Press: P 155-160 (2000).

originally thought of by Major. The UN guards were only allowed to carry personal weapons such as handguns. Prince Sadruddin Aga Khan believed that the guards were required to defend human life as well as material belongings.²⁹³

The Iraqi Kurdish leaders, especially Barzani and Jalal Talabani, also hold a particular view about International Resolution 688. On his part, Barzani considers it a moral duty of the UN international organisation to protect the Kurdish people who supported/support its efforts in northern Iraq.

When the coalition forces started to pull out of Iraqi Kurdistan in July 1991, after they had established a security zone and left behind some security arrangements on the ground, the Kurdish people sent home the withdrawing forces with tears and flowers and demonstration of gratitude and appreciation.²⁹⁴

Furthermore, Barzani states: “I think the use of military force for humanitarian purposes is a bone solution to humanitarian crises, but it is difficult to disassociate it from morality”²⁹⁵. He added, “It is important that humanitarian intervention be conducted under UN auspices. The nature of the mission is the use of collective deployment of military force by a number of nations, which requires the authorization of the UN”.²⁹⁶

Barzani approved the use of military force in a state to resolve interior problems and according to Barzani’s views, it should be considered in the context of morality or ethics. Nevertheless, it is difficult to distinguish between what is moral and any specific military resolve when it comes to the violations of human rights.

²⁹³ Ibid.

²⁹⁴ Op cit note 51.

²⁹⁵ Ibid.

²⁹⁶ Ibid.

Barzani thus calls for humanitarian intervention under the supervision and control of the UN. To him such supervision requires authorisation by the UN. It also requires the launching of specific missions with the aim of observing and or evaluating the situation. His idea was that this could be a possible reason for additional UN action. It was obviously hoped that the mere presence of the guards would prevent attacks on the Kurds. Predictably, Kurdish leaders did not believe that the guards, who were only allowed to carry limited arms, were reliable for ensuring their security. This lack of arms allowed within the parameters of the resolution was a head-ache for some. The leader of the PUK, Jalal Talabani, was concerned about the security provided by the UN presence and feared that the Kurds might flee to the mountains again. This fear was not unfounded since 20,700 skilled troops were being substituted by 500 lightly armed UN guards whose experience was simply protection of the UN buildings in New York and Geneva.²⁹⁷

The Soviet Union, China, as well as increasing numbers of non-western states that formed part of the UNSC were worried about the example being set by the actions of the west in Iraq and its future effects. However, none of them wished to be seen as being opposed to an operation which was saving many, and they remained quiet. The situation was indeed problematic. Each choice had downsides. Compliance, as opposed to tacit legalisation, was to encapsulate the criticism of the other governments to the intervention by the west. China was also cautious concerning the setting of an example which could lead to the erosion of the non-intervention principle. Because of these political barriers, the western powers did not launch a new resolution within the UNSC.²⁹⁸

Resolution 688 of 1991 has caused the subject of compassionate involvement in domestic dealings to garner international concern and hence it became prominent in

²⁹⁷ Op cit note 292.

²⁹⁸ Wheeler, N. *Saving Strangers: Humanitarian Intervention in International Society*. Oxford: Oxford University Press: pp 153-154 (2000).

international legal dialogue. Until this stage, movement of humanitarian relief agencies had never been guarded by armed troops. Merely weeks after Resolution 688 was accepted, Javier Perez de Cuellar, then Secretary General of the UN commented that "... the perpetual conflict between sovereignty and human rights, in questioning the traditionally revered concept of sovereignty, underscored the shift in world public opinion towards the belief that support of basic human rights should prevail over boundaries arbitrarily drawn upon a map".²⁹⁹

When asked whether the existence of a western military force in the north of Iraq could be established with the influence of the UN without the permission of Iraq, Perez de Cuellar said: "No. No. No. We have to be in touch first of all with the Iraqis".³⁰⁰

The European states found themselves in disagreement with America since the only thing the US was only interested in was leaving Iraq as quickly as possible. However, any potential differences concerning the timing of allied departure was prevented by all agreeing that a group of people from all the states would remain behind to protect the Kurds. Turkey agreed to a speedy response from both air and ground on its territory, and this would be supported by American carriers in the eastern Mediterranean. By the middle of July 1991, western troops began to leave Iraq, and it was made evident to Saddam Hussein that the 'no-fly zone' in the north still applied and would be patrolled by western air forces. The remaining force was named 'Operation Poised Hammer' and was a definite sign to Iraq that any further attacks against the Kurds would create a backlash from the allies.³⁰¹

According to General Tommy Franks, the 'no-fly zone's were an important measure of control and the teams that placed their lives in jeopardy every day played an

²⁹⁹ Sinha, M *Humanitarian Intervention by the United Nations*. New Delhi: Nice Printing Press: pp 21-26 (2002).

³⁰⁰ Op cit note 298.

³⁰¹ Op cit note 292.

integral role in the US policy. The ‘no-fly zone’s provided the Iraqis, both in the north and south, some security from Saddam Hussein. They continuously served as a reminder of alliance resolution and could therefore, be regarded as a key component of America’s restriction stance. The competence of Iraq’s armed forces had been seriously hampered by the lack of adequate training. At the same time the operations provided significant intelligence regarding the Iraqi military and also allowed forewarning as regards possible coercion in Kuwait.³⁰²

Further, forewarning also meant that the west is now better equipped to face Iraqi coercion in Kuwait in comparison with 1990. The west’s willingness is supported by limitations imposed on Iraqi ground exploitation in terms of UNSC Resolution 949 in October 1994 and its capability of hastily launching military support in the area.³⁰³

In opposition to Iraqi land-based air defences in the ‘no-fly zone’s, constant actions have been the focus of tremendous interest since ‘Operation Desert Fox’ in December 1998. During this period, aircraft supporting ‘Operation Southern Watch’ reacted to approximately 650 Iraqi ‘irritants’ in more than 80 instances, while aircraft supporting ‘Operation Northern Watch’ reacted to approximately 110 ‘irritants’ on roughly 40 instances. All of these measures were reactions to antagonistic exploits by Iraqi air defences and tremendous care was taken to choose the exact weaponry in order to diminish any potential damage.³⁰⁴

It was in fact the western armed intervention that forced Iraq into agreeing to the humanitarian right of entry for the UN and other aid organisations insisted upon by Resolution 688. The western powers did not want their direct involvement to continue for an extended period of time and the Iraqis seemed to share their

³⁰² Statement of General Tommy R. Franks before the USA Senate Committee on the Army Services on Sep 19, 2000. Available at <http://www.google.co.za/search?hl=en&q=General++Tommy+R.+Franks%2C+before+the+USA+Senate+Committee+on+the+Army+Services&btnG=Google+Search&meta=>. Last visited on April 21 2007: pp 1-3.

³⁰³ Ibid.

³⁰⁴ Ibid.

sentiments, as noted by Freedman and Boren (in Wheeler 2000). They felt that if foreign attendance in their territory was needed, UN recruits rather than western forces would be preferable.³⁰⁵

In the view of western governments, Resolution 688 offered adequate authority for such a force. However, as with the questioning of the legality of the areas of security, the Secretary General's Special Envoy to Iraq doubted the validity of the idea and its lasting value. Eric Suy stated that a new resolution would be needed in order to send out UN forces "otherwise it will be an intervention and that will smell like 'Operation Desert Storm'".³⁰⁶ His observation holds value.

Sir Brian Urquhart, former under-Secretary General for Special Political Affairs, agreed with this. He aired his concerns about 'a small powerful minority' of western states that were forcing their ideas on the UN. On May 11, however, Perez de Cueller stated that he had clearly received an extremely negative reaction from the Iraqi regime which adamantly refused to have any UN police in attendance. The greatest obstruction to an accord was the persistence of the Iraqis that the UN policemen should not be allowed to carry weapons. Without Iraqi authorisation, Perez de Cueller stated that any deployment would need to be implicitly approved by the UNSC.³⁰⁷

During a conference with the USA Secretary of State, the Soviet Foreign Minister stressed his government's apprehension concerning the deployment of armed UN police to protect civilians without the approval of the Iraqi government. He believed that a fine line could be drawn between the need for compassionate assistance on the one hand, and the concerns relating to the independence of a state on the other hand.³⁰⁸

³⁰⁵ Op cit note 292.

³⁰⁶ Ibid.

³⁰⁷ Ibid.

³⁰⁸ Ibid..

It is important that international rules and laws apply equally across the world, but, unfortunately, the UN does not apply the same measures everywhere it intervenes. As stated above, the UN did not intervene in 1988 when Saddam Hussein used prohibited weapons against the Kurds and when, in accordance with Resolution 688, safe havens were established in the north, but were ignored in the south. As happened in Iraq in 1991, the international community, as represented by international powers, intervened in northern Iraq for different reasons, one of which was to save the people from Saddam Hussein's aggression. International agreements prohibit violation of sovereignty for any reason. However, dealing with transgressions inside a state's borders presents a problem. So does the break-down of security and human rights within a state that lead to a refugee crisis.

Tension exists between sovereignty and the agreed-upon measures of intervention when human rights are transgressed by a sovereign state inside its borders. There are no easy answers when it comes to resolutions, their extent, implementation and universal applications.

CHAPTER IV

INTERVENTION IN KOSOVO

4.1 Background

In an ideal and stable world, where no political problems and border quarrels exist, but only a general feeling of goodwill between people, topics such as history and political intervention would have minor importance. However, in a world where politics interfere in all spheres of life, and justify the death of children in the name of international legitimacy, a subject such history that deals with human rights abuses, retains its importance since it plays a critical part in people's interest in their homeland and the effects of intervention by other international actors.

Kosovo became an important internal division of Serbia when the region was occupied by the Turks in the fifteenth century. In the records of Serbia, it is often referred to as Old Serbia. Albanians began arriving in the seventeenth century while the Turkish were still actively occupying the area and spreading their influence. Since the second decade of the twentieth century, the international society has acknowledged Kosovo as an important part of Serbia.³⁰⁹

When the Croatian Communist dictator Tito came to power in former Republic of Yugoslavia in 1945, he refused the Serbian people

³⁰⁹ See generally, Parenti, M. *To Kill a Nation*. London: Verso (2000).

permission to go back to their homes in Kosovo. By prior arrangement with the new Communist dictator of Albania, he also agreed to allow in an additional 100,000 Albanian settlers. It seems that the Albanian majority in Kosovo can be traced right back to the time of World War II.³¹⁰

The issue of history and interventions take on a serious dimension when someone finds himself expelled from his land, and past sanctities are violated on behalf of a history that was written under different conditions.

Ibrahim Rugova was [in the meanwhile] elected as their first president, during a referendum held in Kosovo in 1992, in which the ethnic Albanians voted overwhelmingly for independence. While the international community did not recognise Kosovo's autonomy, Rugova presided over the ethnic Albanians in Kosovo, by way of a government structured along these parallel lines of thought which did not satisfy everybody.³¹¹

President Milosevic of Serbia, it is argued, laid the foundation for the disaster which followed in the 1990s by first removing the sovereignty of the province in 1989, and second, by aggravating Serb nationalism. Kosovo was filled with turmoil throughout the 1990s, but its case was not incorporated into the Dayton Agreement after the Bosnian war ended. The terrible conditions that had developed increased drastically

³¹⁰ Stoaan, Stephen K. *Why is there Civil War in Kosovo?* pp 1-3 (June 1999). Available at http://www.yustart.co.yu/cgi-bin/prikazi_eng.pl?fajl=071099. Last visited on July 13, 2006.

³¹¹ Thomashausen, S. *Humanitarian Intervention in an Evolving World Order: The Cases of Iraq, Somalia, Kosovo and East Timor*. Pretoria: Africa Institute of South Africa: pp 88-89 (2002).

at the beginning of 1998, when many alleged Albanian separatists were killed by Serbian police.³¹² Violence escalated and social tensions rose.

According to the Statistical Office of Kosovo's 2005 Population Survey, Kosovo's total population was estimated between 1.9 and 2.2 million people who are divided in the following ethnic proportions: 92% Albanians, 6.5% Serbs, 0.9% Bosniaks, 1.7% Roma, 1.1% Turks and 0.5% Gorani.³¹³

4.2 The role of international organisations

No one can deny the importance of international peace and security, especially after the world witnessed two world wars in the last century. So, the emphasis on the concept of international peace and security is clear in charters of international and territorial organisations. The UN and NATO are included in these organisations.

4.2.1 NATO's intervention in Kosovo

NATO's intervention in the Kosovo crisis is an example of organisational involvement in international peace and security. Political developments in Kosovo seem to have influenced NATO's views on conflict more than any other case. Part of this relates to geo-politics. The violent developments in Kosovo were on NATO's 'doorstep', with possible destabilising effects for neighbouring regions. One might argue that NATO consolidated a more or less consensual view on the issue – perhaps more than in any other conflict since the end of the Cold War. It remains a question though, whether NATO's response was not driven by ethical considerations or geo-politics, and attempts to secure its own interests.

³¹² Possibly, to secure the support of Russia, that would not tolerate any threat against its Serb ally. See Ryter, Marc-Andre *Motives for Humanitarian Intervention and the International*: pp 40-48. Report submitted to National Defence College, Department of Strategic and Defence Studies, Helsinki (2003).

³¹³ See also <http://news.bbc.co.uk/1/hi/business/4509781.stm>.

By the late 1990s, NATO had been transformed. It had become a tool for organising collective diplomacy for the whole of Europe. One might argue that as an international institution, NATO's involvement in security provisions was a liability, not an asset. It should also be possible to undertake a relatively dispassionate review and analysis of NATO's war over Kosovo. The post-1990 environment, the perceived growth of globalisation, and the move towards a 'multi-polar world', instead of a Cold War bi-polar world, played a role in the transformation:

As evidenced by the preamble to the 1949 Washington Treaty, the members of NATO have long committed themselves to the defense of a common set of principles, namely, "democracy, individual liberty, and the rule of law." Since the end of the Cold War, however, these principles have assumed a higher profile in NATO's mission, largely because the "new NATO" has deemed them central to security in a globalizing world.³¹⁴

The supporters of human rights-based justice often perceive the notion of sovereign equality as an essential part of the long-standing principle of state sovereignty. However, the notion of sovereign equality is of current origin.³¹⁵ For the supporters of human rights, this optimistic move in International Relations is best drawn attention to in the war over Kosovo in the spring of 1999. The Kosovo conflict is often said to have established some of the most constructive features of the new era of human rights protection and of more specific sovereignty.³¹⁶

Defenders of humanitarian intervention justify it primarily in the name of a moral imperative: "we should not let people die." This idea is grounded in

³¹⁴ Hui, V.T. "Problematizing Sovereignty: Relative Sovereignty in the Historical Transformation of Interstate and State – Society Relations". In *International Intervention in the Post-cold War World: Moral Responsibility and Power Politics*. Edited by Michael C. Davis, Wolfgang Dietrich, Bettina Scholdan & Dieter Sepp. London: The Publisher ME Share: p 201 (2004).

³¹⁵ See The Charter of the UN, Article 2.

³¹⁶ Op cit note 110.

the Universal Declaration of Human Rights, written in 1948.³¹⁷

The main western powers allegedly fought a war over the rejection of justice and the violation of the human rights of the ethnic-Albanians of Kosovo. This war was not validated through a threat to international peace and security, nor was it in self-defence of a neighbouring state. It was widely hailed as the first war for human rights, a reason adopting precedence over the sovereign rights of the former Republic of Yugoslavia. It is not insignificant that in this developing conflict, critics confirmed that ‘international justice’ and human rights have overridden sovereignty.³¹⁸

Slovenia’s representative, who voted against the resolution 1199,³¹⁹ raised the important issue that the UNSC does not control all decision-making concerning the use of force. It has “the primary, but not exclusive, responsibility for maintaining international peace and security”.³²⁰ This suggests or indicates that NATO’s action was not seen as obviously illegal, but as an unsuccessful draft resolution which is not a good foundation for arguing the legality of military action. This reality was rarely mentioned in the reports of NATO leaders.³²¹

NATO leaders did not wish to agree that they had embarked on a war. This truth may have been too uncomfortable to stomach. However, it was a war, even though it was of a strange asymmetric type. Undoubtedly, it concerned large-scale and opposed use of force against a foreign state and its military forces. Because it was defended for being mainly an action to prevent actual and possible Serb killings and removals in the Serbian province of Kosovo, the operation was at times, colloquially described as

³¹⁷ See http://en.wikipedia.org/wiki/Humanitarian_intervention . Last visited on August 1, 2007.

³¹⁸ Op cit note 316.

³¹⁹ See, S/RES/1199 of 1998, September 23, 1998.

³²⁰ UN Press Release UNSC / 6659, March 26, 1999.

³²¹ UN Press Release UNSC / 6659, March 26, 1999.

a 'humanitarian war',³²² but in retrospect there is great difficulty in perceiving the actions as 'humanitarian intervention'.

Whatever the classification of the war, 'Operation Allied Force' was a high point in the ongoing struggle for human rights and humanitarian concerns which has been very much a part of International Relations since the end of the First World War. For theorists of international associations, it showed a further interesting, if not problematic, turn of events concerning the long-running connection between the apparent hard-nosed and 'realist' factor of force, and the apparent flexible and 'idealist' factor of international humanitarian and human rights standards.³²³

Kosovo is both a fascinating and relevant case to study since it highlights the significance of the extent of human rights infringements in the arguments over whether humanitarian intervention can or should be warranted. Before NATO began the military operation named 'Allied Force', fatalities did not reach similar awful totals as in earlier cases. It could be argued that NATO's actions, human losses and destabilisation may not have reached a level that would 'shock the conscience of mankind'.³²⁴

It would appear that President Milosevic was cautiously trying to evade large-scale annihilation of Kosovo, and hopefully avoid rousing an instantaneous and strong reaction from the international community. Instead, it would seem that he had decided instead to create a climate of fear that would cause Kosovo-Albanians to flee. In 1998, tens of thousands of people escaped from Kosovo and it was obvious that some sort of ethnic purification was taking place, even without many killings. Nonetheless, Russia and China regarded the issues as domestic affairs, and they

³²² Minear, Larry, van Baarda, T. & Sommers, Marc (eds) *NATO and Humanitarian Action in Kosovo Crisis*. Thomas J. Watson Jr. Institute for International Studies: pp121-122 (2000); Available at: http://www.brown.edu/Departments/Watson_Institute/. Last visited on March 15, 2006.

³²³ Op cit note 322.

³²⁴ Op cit note 312.

demonstrated strong feelings against intervention into the internal happenings of the former Republic of Yugoslavia without its authorisation.³²⁵

The North Atlantic Council made it clear that they interpreted UNSC Resolution 1199 in a different way and amplified the demands on the former Republic of Yugoslavia by deciding that NATO would continue with air attacks if it failed to obey the decisions of the UNSC. Clarifying the motives for the intervention, Javier Solana stated:³²⁶

We took this decision after a thorough review of the situation in Kosovo. The Federal Republic of Yugoslavia has *still not complied fully* with UNSC Resolution 1199 in a way that can be verified’.

Even when the number of civilian deaths became more prominent in the autumn of 1998, Russia and China still disallowed the use of force against the former Republic of Yugoslavia. This also explains why UNSC Resolution 1199 did not include any threats of intervention. China and Russia constantly emphasised the importance of respecting the laws of sovereignty and the importance of this principle for the international structural order.³²⁷

It was obvious that to them, Resolution 1199 did not form a strong enough basis to allow for the use of force. Their doubts and diplomatic protestations however, did not stop NATO from starting its military action, debating in *contrario* that the legal foundation was given by Resolutions 1160 and 1199. The main humanitarian

³²⁵ For a detailed position of Russia and China, see UN document S/PV.3868. See also, *Ibid*.

³²⁶ Solana, Javier Press Conference at NATO Headquarters in Brussels, October 13, 1998. Available at: <www.nato.int/docu/speech/1998/s981013b.htm>, visited on May 4, 2006. See also, Beckman, O. *Armed Intervention pursuing Legitimacy and the pragmatic Use of Legal Argument*. Printed by Media Tryck, Lund University: pp 210-211 (2005).

³²⁷ Op cit note 312.

arguments of NATO states were that it was crucial to avoid an imminent humanitarian crisis and that ethnic cleansing was still occurring.³²⁸

After diplomatic failure to achieve acceptance by the former Republic of Yugoslavia for the Interim Agreement for Peace and Sovereignty on Kosovo, the North Atlantic Council allowed air strikes aimed at “disrupting the violent attacks being committed by the Serb Army and Special Police Forces and weakening their ability to cause further humanitarian catastrophe.” After about ten weeks of the air campaign, ‘Operation Allied Force,’ Slobodan Milosevic, President of the former Republic of Yugoslavia, finally accepted NATO’S demands and the bombing came to an end. While the fighting was over, arguments over the significance of it were just beginning³²⁹. Arguments also proliferated about the human losses incurred by the ceaseless bombing and its effects. At first the operation was declared as having been founded on the idea that some crimes are so severe that, despite the principle of sovereignty, the state responsible for them may be subjected to military intervention, thus going beyond the mere threat of force.³³⁰

Besides this, NATO states also insisted that European security was being endangered. It is evident that the occurrences in Bosnia leading up to and after the Dayton Agreements played a crucial part in what can be seen as fairly early actions of NATO. Western states were aware of just how far Milosevic and the Serbs were willing to go. The intervention therefore, served both as a way of saving the Kosovo-Albanian people and as a method of getting rid of the command of Milosevic.³³¹

UNSC did provide some legal reassurance to the NATO cause, but in a rather odd manner. A draft resolution which was backed by Russia and supported by two non-

³²⁸ Ibid.

³²⁹ Rizer, Kenneth, R. *Military Resistance to Humanitarian War in Kosovo and Beyond: An Ideological Explanation*. Air University Press, Maxwell Air Force Base, Alabama: p 1 (September 2000).

³³⁰ Op cit note 322.

³³¹ Op cit note 312.

Council members, namely India and Belarus, asked for “an immediate cessation of the use of force against the Federal Republic of Yugoslavia”. Only 3 states voted in favour of the draft resolution, namely Russia, China and Namibia, while 12 voted against it. During the discussions, those who spoke in favour of the resolution failed to address the problem of what was to be done with Kosovo.³³²

At this writing, the NATO bombing of Yugoslavia continues, and the Serbian destruction of Kosovar society also continues. Yes, the Serbian campaign must have been planned before the bombing began; the logistics of moving forty thousand soldiers are immensely complex.³³³

These two elements, fighting for human rights and using only airpower, feature significantly in existing discussions concerning future use of force. The core of these discussions is whether Kosovo should be viewed as an anomaly or as an example for the future. For these questions to be answered, one should consider the American military’s point of view. Contrary to many reports, the decision taken to fight for less than crucial national interests caused divisions within the US Department of Defense. Even though the Joint Chiefs of Staff had not informed people as to whether they were opposed to the intervention, some hints regarding their position are available. General Dennis Reimer, the Army Chief of Staff, stated that he had concerns about whether airpower would do it by itself. Others felt that air might do it.”³³⁴

Russia was quick to condemn the aims of America and its desire to increase US influence in the Balkans. In other words, Russia said that the US was simply acting in its own best interests. Due to the fact that the mass exodus of refugees only began after the bombs began to drop, NATO’s intervention was also denounced for apparently speeding up the Serbian killings and ethnic cleansing crusade. This view

³³² UN Press Release UNSC / 6659, March 26, 1999.

³³³ Op cit note 36.

³³⁴ Op cit note 329. See also op cit note 326.

was supported by Russia, amongst others. However, many authors seem to concur that an ethnic cleansing plan had already been in place before the NATO bombing commenced, sometimes referred to as ‘Operation Horseshoe,’³³⁵ and was aimed at forcing Kosovo-Albanians to leave the province.

In other words, ethnic cleansing was already occurring before NATO started its operation with the long-term goals in place, and the war possibly made the Serbs do as much as they could as fast as they could. It is unlikely therefore, that the Serbs would have halted ethnic cleansing and killings if NATO had not decided to invade the province. Another point of criticism concerned the effectiveness of the air campaign which was employed to overpower Milosevic. At the end of the war, the civilian infrastructures of what still stood of the former Republic of Yugoslavia were more damaged than the armed forces and their military infrastructures.³³⁶

A victory for military action by air led by the USA therefore, had apparently occurred at the cost of massive damage to infrastructure, civilian lives, and dislocation of civil society. This gains significance against the idea that protection of NATO fighters meant that ground intervention was avoided as far as possible. Attempted intervention by ground forces would have undoubtedly increased losses for USA and NATO troops, and there can be little doubt that this gave rise to the decision to use Allied Force primarily by air rather than by ground forces as a military option.³³⁷

In Kosovo, the intervention of NATO invoked many contradictory interpretations about its legality and its normative and institutional implications for the Post-cold War Era. Between the international moral imperative and the legal norms personified in Articles 2(4) and 2(7) of the UN Charter, which were strongly supported by public

³³⁵ Op cit note 312.

³³⁶ Ibid.

³³⁷ Ibid.

opinion, NATO members were faced with a legal and moral quandary on how to prevent (future) methodical human rights infringements in Europe.³³⁸

Seen from a stringently documented perspective, the NATO intervention entailed the illicit threat and use of force against a sovereign state in order to avoid human catastrophe. In terms of Articles 2(4) and 2(7) of the UN Charter, this action breached the proscription against the use of force that would destroy the honour and political autonomy of an independent state. This was the basis for previous objections in the UNSC and General Assembly. Even today, Russia and to a degree China and several non-aligned states, criticise the military intervention.³³⁹ That, in the aftermath of the war and extended bombing campaign, Russian observers also criticised the fact that mainly Serbian transgressors of human rights were hauled before the international court system, seems to confirm this.

4.2.2 The United Nations and Kosovo

No other international organisation has the same significance and influence as the UN. The UN Charter mentions the term international peace and security 32 times. Based on this, it is imperative to discuss the role of the UN Charter and the intervention into Kosovo. Since its establishment, the UN has attempted to find resolutions to conflicts in various international contexts, viz. the Suez crisis, the Israeli/Palestinian conflict, apartheid in South Africa and its illegal occupation of Namibia (from 1971 onwards), and the Lebanon conflict. Many of these were peace-keeping missions devoid of forceful interventions, for which the reasons that were supplied were - at least up to a point - clear.

Some analysts of International Relations interpret Article 2(4) of the UN Charter as *absolutely* prohibiting the use of force. But this is actually not completely accurate

³³⁸ Thomashausen, S. *Humanitarian Intervention in an Evolving World Order: The Cases of Iraq, Somalia, Kosovo and East Timor*. Pretoria: Africa Institute of South Africa: pp 106-107 (2002).

³³⁹ Ibid.

because it would seem, there are other sections in which the use of force is apparent, for example in the cases of self-defence (Article 51), collective operations (Chapter VII) and measures that are taken against enemy states (Article 53). Other situations that also appear to be exceptions to the rule are stated in Article 2(4).³⁴⁰

Kyrre Grimstad³⁴¹ comments as follows about this matter: it would seem as if the Kosovo intervention has limited precedence for humanitarian intervention because it was undertaken only “in conformity with the sense and logic of the stipulations of the UNSC”. What about Walzer’s argument about the justification of intervention? Grimstad offers another view. He suggests that most writers of International Relations believe that the Kosovo case should not be taken as a precedent at all. This does not mean though, that no lessons are to be learnt from it, for there certainly are lessons for the future, but this case is clearly not to be taken as ‘the future itself’. Concluding his argument, Grimstad states that the value of the Kosovo case as a precedent for the legality of humanitarian intervention can possibly only be ascertained when a similar case occurs. Grimstad’s argument seems to hold value and should be cause for serious reflection when future forceful interventions are considered or projected by western forces.

The UNSC responded quickly to humanitarian conditions and Resolution 1160 was issued on March 31, 1998 which appealed for a nonviolent solution to the crisis in Kosovo to be reached. Circumstances deteriorated, and on September 23, 1998, Resolution 1199 was issued by the UNSC which confirmed that there was a threat to peace and security in the area. It also stated that there was a need to improve the humanitarian situation. Further action was also discussed, but not with any particular accuracy.³⁴²

³⁴⁰ Op cit note 106.

³⁴¹ See generally, *Ibid*.

³⁴² Op cit note 312, possibly, to secure the support of Russia, which would not have tolerated any threat against its Serb ally.

Diplomatic efforts attempted to find solutions for the disaster. Since there was no improvement, measures were taken to begin air actions. Threats of the use of force ensured that President Milosevic agreed to a Verification Mission of the Organization for Security and Cooperation in Europe (OSCE) without arms. Unfortunately, matters did not improve and the carnage continued.³⁴³

In particular, Resolution 1199 of September 23, 1998 ordered Yugoslavia to “cease all action by the security forces affecting the civilian population”, and also referred to potential ‘further action’ if orders made in the resolution were not met.³⁴⁴ In addition, Resolution 1203 of October 24, 1998 ordered the Serbs to comply with numerous specific provisions of accords reached in Belgrade on October 15 and 16, including the NATO Air Verification Mission over Kosovo. The Serbs were required to accept that the Alliance had a direct position and interest in Kosovo. It can be said that, even if the UNSC could not follow these resolutions with specified authority to use force, they did provide some legal foundation for military action.³⁴⁵

In the 1990s, numerous revisions of international order outlined the decline of state sovereignty from the traditional Westphalian form of the seventeenth century, for example through the institution of the UN, to the present tendency towards a collective system of ‘international justice’, rights-regulation and ‘sophisticated’ democracy.³⁴⁶ The increasing acceptance of the moral right of various states to unilaterally or collectively employ military force to support ‘international justice’ and human rights, signify that sovereignty, or the use of state authority, is changing. While, for several states, the notion of sovereignty is restricted to others, the situation has become more open in terms of previous customary international limitations. Sovereignty as an ‘inalienable right’ is relativised by the possibility of a military

³⁴³ Ibid. Particularly relevant for the decision to attack was the massacre of Racak, where between 40 and 50 civilian were executed by Serbian police forces. See also,

³⁴⁴ Op cit note 322.

³⁴⁵ Ibid.

³⁴⁶ Op cit note 110.

humanitarian intervention. In this regard, the Kosovo intervention stands central.³⁴⁷

The Kosovo conflict draws attention to the issue of 'the noticed end' of sovereignty. With the marginalising of the UN and disagreement over its final authority concerning the use of force in international dealings, it is possible that it is considering a reorganisation of sovereign authority, or rather, the reception of sovereign disparity.³⁴⁸

Following Kosovo, future actions in relation to perceived sovereignty, protection of human rights and internal oppression/transgression of human rights will be more complex. A precedent has been set by an action that remains under debate, advocated by some and resisted by some.

In following the UN Charter, military intervention was stated as having to be performed by armed forces that would have to follow directives from the UNSC. Hypothetically, they were to be commanded by the UN Military Staff Committee. But did this really happen? Was the original idea put into practice as was projected? In the case of Kosovo for example, NATO intervened and commanded the military intervention.

Since the Kosovo conflict represented a conflict between east and west, such an international army or military force was not formed. Although the Cold War was over, it was rather unlikely that the UN would deploy its own troops anytime soon. Proposals made in the early 1990s that called for the creation of a UN Volunteer Military Force or the formation of UN peace enforcement units were very

³⁴⁷ Ibid.

³⁴⁸ Ibid.

notorious.³⁴⁹ Very little in terms of practical consequences came from these discussions.

Troops are made available to the UN when possible. At times they are placed under the command of the UN. Sometimes they are also put under national or even regional command. Africa provides several examples of peace-keeping, even peace-enforcement operations that came into being as regional initiatives. Most peace-keeping operations, which occur when local people have allowed the deployment of international help, fall under UN command.³⁵⁰

Military interventions, including UN enforcement operations, are mostly subject to national command or that of a regional association due to the high risk of casualties. In the latter case, as in most cases, there is a lead-state which runs the operation. In Europe, it is NATO, and within NATO, the US³⁵¹; in West Africa it is the Military Observer Group (ECOMOG) of the Economic Community of West African States (ECOWAS), and within ECOMOG, Nigeria is the leading state. In East Timor, Australia assumes this responsibility.

Regardless of whether a state leads or intervenes in ‘a coalition of the willing’, it poses a challenge for the international environment and the community of nations, including the legal setting, and for national interests, including military capabilities and domestic political deliberations. It has been argued that in the case of a large-scale operation, the USA should run it, even simply because it has the means to do so. Moreover, involvement, even partial involvement, of the USA will add a sense of seriousness to the effort.³⁵²

³⁴⁹ Brian Urquhart, *For a UN Volunteer Military Force*. The New York Review of Books Vol. XL (11): pp 3-4.

³⁵⁰ Op cit note 309.

³⁵¹ See generally, Chesterman, S. *Just War or Just Peace? Humanitarian Intervention and International Law*. Oxford: Oxford University Press: (2001).

³⁵² Op cit note 203.

In Somalia, America took the lead for four months, but was then removed (forced out, some would say), eventually completely. In Haiti, the USA only really acted in 1994, three years after Jean Bertrand Aristide, the President, was overthrown in a military rebellion. Some have suggested that in 1998 and 1999, the USA did not really wish to become involved in Kosovo either.³⁵³

Other states have also decided to be leaders of interventions, but such interventions only work if supported by a regional or international power. In 1997, Italy took the reins for 'Operation Alba' because it was directly affected by the disaster in Albania and it had interests in the area. Italy managed to obtain both UNSC permission and NATO support for its operations and it was successful.³⁵⁴ Part of this success rested with the support that Italy received internationally and regionally.

The at times, lack of agreement in the UNSC, has meant that regional groups offer good alternatives to states that contemplate military interventions. Such interventions (compare ECOWAS) add political authenticity to the actions. This occurred in Kosovo where the US made use of NATO. Nonetheless, as stated above, the legal reasoning for intervention by these groups was uncertain.³⁵⁵

Many scholars and policymakers state the importance of growing and maintaining domestic support for international efforts. They insist that a state will only lead if it is supported. Domestic politics and public opinion can therefore, be viewed as two individual means that influence decisions concerning intervention.³⁵⁶

³⁵³ On May 4, 1993, the US handed over command of the operation in Somalia to the UN (UNOSOM II). On October 13, 1993, the US announced that it would withdraw all of its troops from Somalia by the end of March 1994. This doomed the international intervention in Somalia to failure. The last US troops left Somalia in March 1994. They would return briefly one year later, in March 1995, to extract the remaining UN troops from Somalia. Violent conflict in Somalia has persisted.

³⁵⁴ Op cit note 203.

³⁵⁵ Op cit note 110.

³⁵⁶ Op cit note 203.

Domestic support however, depends on keeping war casualties as low as possible. The conservative approach is that the riskier the action, the weaker domestic support will be. This explains why policy-makers in America were particularly wary of intervening in Bosnia, Somalia, Rwanda, and Haiti. However, public opinion polls carried out at the University of Maryland, as well as research done by the Triangle Institute for Security Studies, show that the American public will back military interventions that are ethically and politically gripping.³⁵⁷

Another recent resource introduced in support of resolving internal conflicts has been the use of private international security companies. Studies in International Relations have shown that in certain circumstances, these private forces have helped to stop military strife. Many believe that they could be the answer to the problem of the UN's constant lack of military personnel in risky environments, and have shown that the international community should involve these companies rather than ban them or ignore their existence. Other commentators believe that the actions of these companies should be closely monitored.³⁵⁸ Nevertheless, such involvement is occurring, and increasingly, such companies complete tasks that governments are unwilling to tackle. In Africa, Afghanistan and Iraq such companies act as 'stand-ins' or proxies for those who initially interfered. Also, most of their activities are enacted without thinking about long-term effects, and occur within a domestic and international legal vacuum. Here too, an international outline is much needed.³⁵⁹

Importantly, an obvious difference exists between hiring these firms and entering into a partnership with one. The UN might wish to hire the services of such a firm, but it

³⁵⁷ The polls were carried out in 1995 by the Program on International Policy Attitudes at the University of Maryland.

³⁵⁸ However, after having spent 21 months in the state and enabled the sitting government to get the better of the Revolutionary United Front - RUF - EO's contract was terminated. This, of course, was one of the conditions of the RUF, who also refused the deployment of UN peacekeepers. The ensuing military vacuum led to continued fighting. In May 1997 a military coup took place, derailing all previous peace efforts.

³⁵⁹ See generally, Murphy, S. *Humanitarian Intervention: The UN in Evolving World Order*. Philadelphia: University of Pennsylvania Press. (1996).

should not be permitted to enter a partnership with one. The current desire for the UN to enter into business with them might be innocent, although questions pertaining to war and peace, and life and death should not be ruled by money because that would go against everything for which the UN stands.

Since the UN Charter came into being, most states that have taken forcible action abroad have rejected the idea that their actions were humanitarian interventions. Even when there seemed to be a clear humanitarian rationale, as in India's intervention in East Bengal in 1971 or the Vietnamese intervention in Cambodia in 1978, the states concerned did not refer to humanitarianism since they were still in favour of the non-interventionist regime. Numerous authors comment that now many states see humanitarian actions as legal, pointing to the fact that voting on two UNSC Resolutions can be interpreted as providing legalisation for the Kosovo operation.

4.3 The International Resolution 1244

Resolution 1244 is considered to be one of the most important events in contemporary Kosovo-Albanian history. It placed the entire province of Kosovo under international administration, which meant that Kosovo was faced with new circumstances. These led to talks inside and outside the UN around Kosovo becoming an independent state.

With UNSC Resolution 1244 from 10th of June 1999, the province of Kosovo came under the control of the UN, with a large NATO force to secure it. Most of the refugees returned home within the next two weeks and benefited from impressive international humanitarian assistance.³⁶⁰

A draft resolution drawn up by Russia two days after the start of the NATO strikes in the former Republic of Yugoslavia called for an end to the use of force against the

³⁶⁰ Op cit note 312.

former Republic of Yugoslavia, but it was defeated by twelve votes to three, the latter being those of Russia, China and Namibia³⁶¹. Furthermore, Resolution 1244 of June 10, that permitted “[M]ember states and relevant international organizations to establish the international security presence in Kosovo” was adopted although China did not vote. This can be seen as sanctioning of NATO’s presence in the Yugoslavian area.³⁶²

The terms used in UNSC Resolution 1244, as well as the military-technical arrangement between the international security force and the former Republic of Yugoslavia and Serbian government that came before it, met both NATO’S demands and Milosevic’s urge to show that the former Republic of Yugoslavia had gained some allowances during 11 weeks of bombing.³⁶³ The agreement was officially accepted by Milosevic on June 3, 1999.³⁶⁴

The UNSC Resolution and military-technical agreement met the 5 conditions needed for ending the bombings as laid down by NATO on April 6. These included a verifiable termination of combat activities and killings; the withdrawal of the former Republic of Yugoslavia and Serb military, police, and paramilitary forces from Kosovo; an agreement about the deployment of an international security force; the unconditional return of all refugees and unhindered access for humanitarian aid; and an agreement to put in place a political framework for Kosovo on the basis of the Rambouillet accords. The fifth condition has still not been met, since it requires the cooperation of the Belgrade government. NATO obviously triumphed as regards the security issues that Milosevic had fought so hard against. The UNSC ordered that *all*

³⁶¹ Portela, C. *Humanitarian Intervention, NATO and International Law: Can the Institution of Humanitarian Intervention Justify Unauthorized Action?* Research Report of Berlin Information Centre: p 12 (December 2000).

³⁶² Ibid.

³⁶³ The military-technical agreement was signed on June 9, 1999. See United Nations Security Council, letter dated June 15, 1999, from the Secretary-General addressed to the president of the Security Council. Enclosure: *Military-technical agreement between the international security force (KFOR) and the governments of the Federal Republic of Yugoslavia and the Republic of Serbia.* (June 9, 1999).

³⁶⁴ Op cit note 361.

former Republic of Yugoslavia and Serb forces be withdrawn and that an international security presence with ‘substantial’ NATO participation “be deployed under unified command and control”.

Resolution 1244 did not mention the areas of ‘competence’ that the former Republic of Yugoslavia and the Republic of Serbia would continue to have in Kosovo as had the Rambouillet terms. Amongst other, Rambouillet had accorded the former Republic of Yugoslavia ‘competence’ over maintaining a common market within the former Republic of Yugoslavia, a monetary policy, defence, foreign policy, customs services, federal taxation, and federal elections. From the all-important standpoint of the former Republic of Yugoslavia sovereignty, however, Milosevic had reason to argue that the terms personified in UNSC Resolution 1244 were an improvement over the terms contained in the Rambouillet Agreement.³⁶⁵ This is borne out by the following:

* First, the all-encompassing and embarrassing rights of ‘transit, bivouac, maneuver, billet, utilization,’ as well as infrastructural changes throughout the former Republic of Yugoslavia linked with NATO forces by the Rambouillet text were now excluded³⁶⁶. The full text was initially not made public. The June military-technical agreement gave NATO forces access to Kosovo only.

* Second, Resolution 1244 did not suggest that the final status of Kosovo might be determined by a referendum or some other ascertainment ‘of the will of the people,’ as had been implied in the article added to the Rambouillet text at the Kosovo Liberation Army’s orders.³⁶⁷

³⁶⁵ The military-technical agreement was signed on June 9, 1999. See United Nations Security Council, letter dated June 15, 1999, from the Secretary-General addressed to the president of the Security Council. Enclosure: *Military-technical agreement between the international security force and the governments of the Federal Republic of Yugoslavia and the Republic of Serbia*. (June 9, 1999).

³⁶⁶ See *Rambouillet Agreement*, Chapter 1 ‘Constitution’, Article 1(3)]

³⁶⁷ Resolution 1244 calls for “a political process towards the establishment of an interim political agreement providing for substantial sovereignty for Kosovo, taking full account of the Rambouillet

NATO's decision to actually mediate in Kosovo, was decided upon outside the framework of the UN and in violation of its own charter. More disturbing, is the question of how precise, ineffective or unjust the relevant laws and institutions must be before other states are granted permission to override the non-intervention principle or to ignore the UN Charter. It does seem helpful however, to consider this a proper question to be asked with reference to deliberation regarding humanitarian intervention.³⁶⁸

Ethical direction can neither be sustained by emphasising existing laws as if their authority were indisputable, nor by avowing elementary honourable doctrine as if, by conforming to civilised imperatives, consideration need not be given to obeying laws and that instead, it could be sustained by giving careful attention to the claims upon which the international community calls in delicate situations.³⁶⁹

Ethical issues are indulged in as separate concerns that can or should be measured, at best only after realist political analysis has been fulfilled.³⁷⁰ Hence, it is considered that Walzer's arguments on contextual realist ethics in international dealings are seldom qualified in regular security studies, or perhaps it is a matter of less consideration being given to them. But even when they are considered, the problems raised appear to remain complex.

Because it was imperative to avert an impending humanitarian catastrophe, NATO justified the use of force against the former Republic of Yugoslavia. This action was controversial because, since the founding of the UN, it was the first time that a group

accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other states of the region, and the demilitarization of UCK. Negotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions.”

³⁶⁸ Chesterman, S. *Just War or Just Peace? Humanitarian Intervention and International Law*. Oxford: Oxford University Press: pp 206-216 (2001).

³⁶⁹ Op cit note 145.

³⁷⁰ Op cit note 7.

of states, acting without explicit UNSC influence, secured a violation of the sovereignty concept, primarily and solely on humanitarian grounds.³⁷¹

The international society in Kosovo was bluntly exposed to massive infringements of human and cultural alternative rights, but not acts of genocide in the sense of the 1948 convention which called for respect to be shown for the human rights and dignity of all ethnic groups.³⁷²

The UNSC for example, did not authorise NATO to intervene in the Serbian province of Kosovo. This action caused huge disagreement over whether human rights and humanitarian concerns can ever be a legitimate cause of war.³⁷³ For this reason, the then UN Secretary-General, Kofi Annan, realised that the time had arrived to address the tension in the UN Charter directly.³⁷⁴

It remains important to focus on Article 52 of the Vienna Convention, according to which: “[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of International Law embodied in the Charter of the UN”, paramount among these principles being Article 2(4). Since the Charter referred to collective self-defence, Article 51 constitutes the legal foundation of the Washington Treaty through which NATO was established. Article 5 of the NATO Treaty bases itself expressly on Charter Article 51.³⁷⁵

Article 5 of the NATO Treaty clearly displayed the strictly defensive mission of NATO on the basis of Article 51 of the UN Charter, defining the right to individual or collective self-defence. In this Article, the NATO states formulate their collective defence doctrine in case of “an armed attack against one or more of them in Europe

³⁷¹ Humanitarian Intervention after Kosovo: Emergent Norm, Moral Duty or the Coming Anarchy? *International Affairs* Vol. 77(1): pp 113–128 (January 2001).

³⁷² Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

³⁷³ Mertus, J. Legitimizing the use of force in Kosovo, *Ethics and International Affairs*. Vol. 15(1): pp 133-135 (2001).

³⁷⁴ Annan, K. A. Two concepts of sovereignty, *The Economist* Sep 18, 1999: pp 49-50.

³⁷⁵ North Atlantic Treaty (1949), 34 UNTS 243.

or North America”.³⁷⁶ They limit any such action geographically as regards the territory covered by NATO membership, as well as legally through provisional measures within the context of a global system of collective security: “[S]uch measures shall be terminated when the UNSC has taken the measures necessary to restore and maintain international peace and security”.³⁷⁷

Article 1 of the Treaty places NATO within the framework of international legality as defined by the UN Charter. The Article confirms in particular, the principle of peaceful settlement of international disputes and commits NATO member states, in a language resembling the wording of Article 2 (4) of the UN Charter, "to refrain in their International Relations from the threat or use of force in any manner inconsistent with the purposes of the UN". No mention is made of democracy or human rights in the NATO Treaty.³⁷⁸

While the ‘sovereignty and territorial integrity’ of the former Republic of Yugoslavia was re-established in the preamble and Chapter 7, Article I, (1a) of the Rambouillet text, it was not clearly mentioned as a foundation for shaping ‘a mechanism for a final settlement for Kosovo’.³⁷⁹ The UNSC formulation would seem to rule out Rambouillet providing a path to Kosovo independence.

* Third, the UNSC resolution specified that the UN would control the execution of the international civil presence in Kosovo, while the Rambouillet accords had given this function to the OSCE, in collaboration with the European Union (EU). Milosevic had pushed hard to make the UN the controlling body of the security and civil presence in Kosovo both because he believed the conflict in Bosnia-Herzegovina had shown that UN officials were vulnerable to Serb manipulation and because he thought Russia would be better positioned to protect the former Republic of

³⁷⁶ See these Articles in the Charters of the UN and NATO.

³⁷⁷ Ibid.

³⁷⁸ See these Articles in the Charters of the UN and NATO.

³⁷⁹ Op cit note 366.

Yugoslavia's interests in a body where it enjoyed the veto. While NATO refused to agree to former Republic of Yugoslavia and Russian demands that the UN have operational control of the security presence, it did agree to UN control of the civil presence.³⁸⁰

4.4 Walzer and intervention in Kosovo

Walzer's ideas form a cornerstone of this dissertation. The main thrust of his arguments is to demonstrate to specialists of International Relations whether intervention is morally acceptable or not. Hence, a discussion of Walzer's ideas about intervention into Kosovo is relevant to the arguments in this dissertation.

So it seems best that people who have lived together in the past and will have to do so in the future should be allowed to work out their difficulties without imperial assistance among themselves. The resolution won't be stable unless it is locally grounded; there is little chance that it will be consensual unless it is locally produced.³⁸¹

To contextualise Walzer's ideas, comments on the notion of morality are first provided and particularly, the thought that common morality is a characteristic (or rather should be) of human beings as thinking, deciding beings, that is 'moral agents'. Human agents are also historical agents, not devoid of moral obligations. Morality presupposes the liberty that is innate in agency. This presupposition can never be proved: if determinism is factual, the belief that human beings are agents making

³⁸⁰ Ibid. the Security Council was to be "invited to pass a resolution under Chapter VII of the Charter endorsing and adopting the arrangements set forth" in Chapter 7, Implementation II. Otherwise, Rambouillet was mute on the subject of the United Nations. See Chapter 7, Article I (1a).

³⁸¹ Op cit note 191.

genuine choices gives a false impression. Morality also presupposes that human beings have an equal right to enjoy the liberty intrinsic in agency.³⁸²

The first principle of morality, then, is that every person should value the agency of every other. This is Kant's principle of respect. It requires us to distinguish the intrinsic capability, and therefore the right, of each person to make his or her own choices.³⁸³

In addition to what is written in the previous chapters, it can be said that Walzer has confirmed that during the Post-cold War Era, it is sometimes essential to preserve the principles of a just war *vis-à-vis* opponents of official military action abroad. Walzer has persistently challenged arguments made by members of the radical left who dismiss the principles of a just war or have taken the principle of non-combatant resistance to an extreme.³⁸⁴

Walzer therefore explains: "Just war theory is not an apology for any particular war, and it is not a renunciation of war itself. It is designed to sustain a constant scrutiny and an immanent critique".³⁸⁵ Walzer's effort to apply the principles of just war to issues of war and peace in the Post-cold War Era receives further attention below.³⁸⁶

Walzer wrote a remarkable column in *Dissent*, in which he dealt with NATO's military action in Kosovo. He commented that the allied military movement was intended to prevent Serbian ethnic cleansing in the Muslim province. Although, in principle, Walzer agreed with NATO's decision to intervene on humanitarian

³⁸² Kant, I. *Foundations of the Metaphysics of Morals* (1785), translated by Lewis White Beck. Indianapolis: Bobbs-Merrill: pp 66-67 (1959).

³⁸³ Ibid.

³⁸⁴ Walzer, M. The Triumph of Just War Theory and the Dangers of Success, *Social Research* 69: p 924 (Winter 2002).

³⁸⁵ Ibid.

³⁸⁶ Ibid.

grounds, in the *Dissent* interview however, he criticised NATO for fighting the war in unfair ways.³⁸⁷

At that time, NATO wished to attain its humanitarian goals by using high-altitude aircraft to bomb Serbian military targets. The NATO bombing operation however, not only killed Serbians, but also accelerated Serbian ethnic cleansing on the ground, a procedure that could only have been stopped by a NATO ground intervention, but did not wish to use its own ground troops for fear of putting them at risk.³⁸⁸

Walzer strongly condemned the thought of ‘risk-free war-making’. In his 1999 *Dissent* article, he asked: “Are states with armies whose soldiers cannot be put at risk morally or politically qualified to intervene?” Furthermore, he said that it was “not a possible moral position” for NATO to be “ready ... to kill Serbian soldiers” and thereby cause many civilian fatalities, while concurrently looking for ways to protect the lives of its own soldiers.³⁸⁹

Walzer therefore insisted that the lives of people in Serbia were no less valuable than those of the NATO soldiers. His influential moral statement concerning the Kosovo war shows how seriously he takes the principles of *jus in bellum*, particularly with regard to non-combatant resistance, even at the risk of having to agree to a larger number of American military casualties.³⁹⁰

In his publication, *Arguing about War*,³⁹¹ Walzer fully accepts “the obligation of democratically elected leaders to safeguard the lives” of their own people. But he adds that is not necessarily a moral position, because it is wrong to kill others if one is not prepared to die as well. Referring to NATO, he explains this statement when he

³⁸⁷ Walzer, M. Kosovo, *Dissent* 46: pp 5-7 (Summer 1999).

³⁸⁸ *Ibid.*

³⁸⁹ Walzer, M. The Triumph of Just War Theory and the Dangers of Success, *Social Research* 69: p 936 (Winter 2002).

³⁹⁰ *Ibid.*

³⁹¹ *Op cit* note 36.

says that this organisation cannot launch a campaign that aims at killing Serbian soldiers if it is not prepared to risk the lives of its own soldiers. Of course as active participants they (NATO and the USA) should try to minimise deaths, but it would be wrong for them to kill others if they are not prepared to sacrifice the lives of their own troops, which in this case, imply ground troops. Walzer then goes on to compare America's response to the Serbian case with fire fighters trying to extinguish a fire in a building that has gone up in flames. Yes, the fire fighters have a responsibility to put the fire out but, argues Walzer: "Americans can't be the world's fire fighters".

Walzer also criticises various interventions in which America took part, describing them not only as 'unilateral military acts' but also as campaigns 'authorized by regional alliances'. Arguably regional alliances act in geo-political interest, despite the fact that they became morally involved. One should keep this reality in mind when considering Walzer's arguments. One should also bear in mind that Walzer's criticism of the USA is levelled against a range of US unilateral interventions that have occurred in various parts of the world since the 1960s.

Many people who are part of the political left would like to see such interventions and campaigns conducted by the UN only. But the small size of the group of members of the UNSC would make it very difficult for such concerted action to be realised. The veto power of members in particular, is what would make it difficult.

Walzer does not agree with those of the left who want only the UN to act in such cases. He suggests that there should/could be more than "only one agent of international rescue." Furthermore, Walzer encourages people of the left to realise that although such situations usually have a very "complicated social, political, and economic background" these so-called 'fires' are nevertheless started deliberately by arsonists that aim to kill and who are 'terribly dangerous'. But more important than having a full understanding of such situations, one should still have the will to extinguish the fires.

4.5 Legitimacy of intervention in Kosovo

An important aim of this study is to indicate the extent to which such restraints were practiced or will be practiced in future interventions – especially if the self interest of the appointed agents of interventions in the past, present and in the future is to be considered. Walzer however, realistically and critically points out that future interventions should be measured against the background of such contextual interventions and the broader outlines of his arguments. Walzer is more than aware of the complexities of the theory of just war being widened to other interventions, i.e. within and against states that transgress human rights within their own borders on a large scale. Despite his criticism of the ‘left’, these complexities do not escape his reflections.

The triumph of just war theory is clear enough; it is amazing how readily military spokesmen during the Kosovo and Afghanistan wars used its categories, telling a casual story that justified the war and providing accounts of the battles that emphasized the restraint with which they were being fought.³⁹²

The issue of NATO’s intervention in Kosovo illustrates this complex situation. A resolve concerning the legal status of NATO’s intervention in the former Republic of Yugoslavia in 1999 depends on the deliberation of a number of concerns, namely:³⁹³

- i) The degree to which International Law upholds the sovereignty, rights and territorial integrity of states
- ii) The legal limitations placed on states to prevent the use of military force against other states, and

³⁹² Ibid.

³⁹³ *Concerning Legality of the Use of Force (Yugoslavia v. U.S.), Request for the Indication of Provisional Measures, 1999*, I.C.J. No. 114 (June 2). Available at <http://www.icj-cij.org>.

iii) The role of the UNSC in controlling the international use of force.

While these concerns provide a classic set of criteria upon which a resolve of the legal status of NATO's intervention in the former Republic of Yugoslavia can be based, a final judgment of NATO's action depends on the interpretation of UNSC resolutions, core Charter principles, legal principles personified in traditional (pre-Charter) International Law, and the legal obligations of states.

The notions of peace, protection and enhancement of human rights globally and within states and the right to self-determination to some extent have always been internationally recognised. To an extent, wide recognition of these three values has been achieved, the problem lies with application and implementation.³⁹⁴

Legal scholars might agree with Cassese about the three important values supporting interstate relations, but there is no agreement about which one is the most important. We can assume that when the United Nation Charter was drafted in 1945, the idea of peace among nations dominated the process.³⁹⁵

This plan is further strengthened by the Charter's restraining position as regards the right of states to use force in their international relations, the territorial integrity of nation-states, and the UNSC's rule concerning the allowance of the use of force, except in the case of self-defence. Prioritising interstate unity comes at the cost of intrastate unity, as is demonstrated by the UNSC's non-involvement in many internal conflicts during the age of the Cold War. Since the introduction of the Charter, however, there has been a move towards the codification of Human Rights Law.

The drafting process of the UDHR, seen by many as having crossed into custom, the implementation of the Genocide Convention, and the codification of many human

³⁹⁴ Ibid.

³⁹⁵ Ibid.

rights gatherings,³⁹⁶ show a jurisprudence confrontation to the idea that the peace-among-nations value is more highly rated than the human-rights-value.³⁹⁷

Seeing that the UNSC's domination of non-defensive uses of force is based on the outlook that the peace-among-nations value takes precedence over other values, it can

be argued that the appearance of international human rights erodes the centrality of the UNSC in determining the legitimacy of intrusion in support of human rights.³⁹⁸

UNHCR was widely criticised by military and humanitarian groups alike for not being able to respond to refugee requirements and, by aid groups in particular, for ceding much of the aid action to NATO, the agent that enforced and applied the threat of force. "Although heavy logistical assistance has been useful", observed *Médecins sans Frontières* (MSF), Doctors without Borders, at a Skopje press conference on April 9, NATO is first and foremost a military organization which is currently involved in the conflict and ... not a humanitarian actor".³⁹⁹ The following comment becomes relevant: frequently the enactor of force is less, if at all, interested in prioritising humanitarian aid on a large scale since it operates in terms of a different priority, namely the coercive act of humanitarian intervention.

In MSF's view, "NATO is neither responsible nor able to co-ordinate humanitarian relief activities for refugees – nor should it be. Protection and assistance for refugees is the responsibility of the UNHCR". Other non-government organisations and consortia soon agreed with MSF's concerns. Indeed, UNHCR's performance was criticised from many angles. The fact that it was not prepared to respond to the refugee problem, many held, was interpreted as making it possible for military actors to step into the gap. OSCE head of mission in Albania, Daan Evarts, said in an

³⁹⁶ Op cit note 110.

³⁹⁷ Ibid.

³⁹⁸ See further, Falk R.A. Kosovo, World Order, and the Future of International Law, *American Journal of International Law* 93(4): pp 847, 852 (1999) 847.

³⁹⁹ Op cit note 322.

interview in April that he had stated three days prior to the bombing, that there would be 150,000 refugees.⁴⁰⁰

During the same month the International Criminal Tribunal for the former Republic of Yugoslavia stated that ‘only’ 2108 bodies had been discovered. It was thus revealed that the extent of the atrocities had been far less than originally thought or rumoured in frenzied media reports. It was also believed that about 500 Kosovars, most probably fighters or supporters who were members of the Kosovo Liberation Army, lost their lives in the year prior to the bombings.⁴⁰¹

The truth of the matter however, is that another explanation for action was that without the intervention many more Albanians could have lost their lives. In April 1999, the UK government stated that a Serbian offensive had been planned, the so-called ‘Operation Horseshoe,’ that aimed to drive the Kosovars out of the province. Skeptics did not believe this and said that there was no undercover plan, and that it was a lie told to justify the method of intervention, which was a failure from a humanitarian point of view.⁴⁰²

The supporters of human rights-based justice frequently perceive the notion of sovereign equality as an essential part of the long-standing principle of state sovereignty. In fact, the notion of sovereign equality is of current origin. For the supporters of human rights, this optimistic move in International Relations is best drawn attention to in the war over Kosovo in the spring of 1999. The Kosovo conflict is often said to have established some of the most constructive features of the new era of human rights protection, and described sovereignty more reasonably.⁴⁰³

The main western powers allegedly fought a war over the rejection of justice, and over violation of the human rights of the ethnic-Albanians of Kosovo. This war was

⁴⁰⁰ Op cit note 322.

⁴⁰¹ Statement from European Council to United Nations, March 25, 1999. See also, op cit note 326..

⁴⁰² Op cit note 110.

⁴⁰³Op cit note 110.

not validated through a threat to international peace and security, nor in self-defence of a neighbouring state. It was widely welcomed as ‘the first war for human rights’, a reason that acquired adopting precedence over the sovereign rights of the former Republic of Yugoslavia. It is an insignificant revelation that in the wake of this conflict, critics has confirmed that ‘international justice’ and human rights have overridden sovereignty.⁴⁰⁴

There is no argument about the fact that signs of ethnic cleansing had been present both before and after March 23, 1999. Nonetheless, the overall idea of the cruelty in the area appears to be blown out of proportion and inflated by the media and by NATO itself. NATO leaders told the world in many statements that the main goal of the intervention was to control the unbearable situation in Kosovo.⁴⁰⁵

The events that occurred seemed to concur with what was said. This, of course, does not mean that there were no other aims. It was made very clear that the credibility of NATO was on the line. After all, the conflict in Kosovo was a threat to European security, thus NATO action confirmed the perceived indivisibility between European and US interests. Some say that intervention helped form the future shape of Europe and its geopolitical boundaries.⁴⁰⁶ Furthermore, as history demonstrated with the massacre at Srebrenica, NATO was determined to act and do so decisively before the situation deteriorated beyond control and its inactivity was condemned within the international community.

From the beginning, it is important to state that the legality of the intervention is not the crucial issue, therefore the remarks that follow only deal with intervention to the extent that it coincides with the question of skilled authority. NATO undertook the intervention without precise and unqualified UNSC permission. There was nothing in the UNSC resolution which pointed to the use of force. The jurists have agreed that

⁴⁰⁴ Ibid.

⁴⁰⁵ Op cit note 326.

⁴⁰⁶ Op cit note 309.

Resolutions 1160 and 1199 did not allow for any state to intervene in the affairs of former Republic of Yugoslavia, even though it was said that the worsening situation in Kosovo did constitute a threat to peace and security in the area.⁴⁰⁷

It is clear that the government in Belgrade did very little, or nothing, to meet the orders of the Resolution. One must however, remember the difficulty of doing so because of the stubborn stance of the Kosovo Liberation Army guerrillas. One NATO member, the Netherlands, also a supporter of America, stated at the UNSC meeting on March 24 that approval of armed force had always been desired in the case of defending human rights. Nevertheless, none of the NATO members made a motion to the UNSC for them to gather to discuss the problem of the use of force against the former Republic of Yugoslavia just before March 23. This is understandable if the very probable vetoes of large non-western powers is taken into account.⁴⁰⁸ Clearly, in the case of Kosovo, the UN was or would have been blocked by Russia in particular who did not really want to protect human rights, but was more interested in its own influence or future influence in the region. It would, however, not be outlandish to say that America tried to remove the UN from the conflict in Kosovo on purpose. This proved to be impossible because the UN had played an important role in stopping the violence and promoting peace in the former Republic of Yugoslavia.⁴⁰⁹ To a limited extent, it seems, the UN played a role in minimising previous and future transgressions of human rights, including the US led bombings in Kosovo.

UNSC Resolution 1244 finally brought an end to the fighting, and therefore, the international community along with Russia and China had indirectly legalised the intervention, while America acknowledged the important role of the UNSC.⁴¹⁰ After all, one can say that the international community concurred that the NATO intervention in Kosovo was by no means the best example for understanding

⁴⁰⁷ UNSC Res 1160 of March 31, 1998; UNSC Res of September 23, 1998.

⁴⁰⁸ Ibid.

⁴⁰⁹ The United Nations Security Council (UNSC) Resolutions 1244 on 10th June 1999.

⁴¹⁰ Ibid.

humanitarian intervention, not only because there was no proper authority, but also because the measures applied were inadequate. Considering the issue of legitimate authority, the issue of what to do when in a situation of 'overwhelming necessity' when the UNSC is unable to respond comes to mind.⁴¹¹

At the outset one must stress that the lawfulness of the intervention is not the key issue, therefore the following remarks deal with intervention only to the extent in which it overlaps with the question of competent authority. NATO undertook the intervention without explicit, or legally possible, UNSC permission. There was nothing in the UNSC resolution that enabled them to use force.

The international community, with the UN and the Contact Group at the helm, has made orderly efforts over a period of 2 years to work against the Belgrade policy in Kosovo. An apparent clear lesson from the war in Bosnia was that Milosevic negotiated only if he was placed under military strain. Therefore, the international community, especially western states, maintained an expressed link between political and military steps in the conflict over Kosovo. Acts of violence enforced by the Serbian policy, security and paramilitary forces, and by the Kosovo Liberation Army have been condemned repeatedly. Typically, no consequences followed the condemnations, or at best, they were short-lived.⁴¹²

The diplomatic efforts directed at the Contact Group, the OSCE, as well as other states such as Russia who intended to protect her influences in the Balkans, were unsuccessful. The turning point appeared to be Resolution 1199 accepted on September 23, 1998 which, in NATO'S opinion, provided a foundation for the use of force.⁴¹³

⁴¹¹ UNSC Res 1160 of March 31, 1998; UNSC Res of September 23, 1998.

⁴¹² Ibid.

⁴¹³ Op cit note 309.

Due to pressure from the Contact Group and NATO, as well as orders of activation of air strikes, Slobodan Milosevic agreed to a cessation of warfare in October. The agreement was to be supervised by an OSCE verification mission and NATO inspection flights over Kosovo. Unsuccessful implementation of the 'October Agreement', as well as a rise in violence marked, among other matters, the carnage at Racak, which led to last minute negotiations at Rambouillet.⁴¹⁴

The Rambouillet discussions were sponsored by the Contact Group, which set up an informal assembly of great powers in 1994 consisting of the USA, UK, France, Russia, and Germany, each of which was concerned with terminating the Balkan conflicts, and wanted a specific political solution for Kosovo. For the first time, the Kosovo Liberation Army was included in the reconciliation process. This angered the Serbian delegation since it could lead to legitimisation of the Kosovars' demands for sovereignty.⁴¹⁵

After a number of tough meetings,⁴¹⁶ the parties temporarily agreed that Kosovo would receive a sizeable measure of self-sufficiency, and that its future status would be determined in a referendum three years after adoption of the accord. Although the greatest problem around the discussions (which reflected a fair measure of bargaining and negotiation) was the degree of Kosovo independence that would be acceptable to Belgrade, it appears that this was not the actual reason why the negotiations turned sour. According to Appendix B of the Resolution, the status of multinational military force, NATO personnel would have enjoyed "free and unrestricted passage and unimpeded access throughout the former Republic of Yugoslavia".⁴¹⁷

⁴¹⁴ Ibid.

⁴¹⁵ Henkin, L. Kosovo and the Law of Humanitarian Intervention. *American Journal of International Law* Vol. 93 (4): pp 824 -828 (1999).

⁴¹⁶ There were no talks, only mediation because Serbian and the Kosovo delegation did not contact each other directly.

⁴¹⁷ UNSC Res 1160 of March 31, 1998; UNSC Res of September 23, 1998.

This was too much for President Milosevic and the Serbian delegation. After the collapse of the talks on March 15, the Belgrade government appeared to be resigned to the imminent intervention and began a new operation in Kosovo. In these conditions, the use of force to protect the Kosovars was essential. Diplomatic efforts seemed to have been worn out in the Kosovo case, but some doubt remains.⁴¹⁸

At Rambouillet the Alliance tried to enforce conditions but which the former Republic of Yugoslavia as sovereignty political community, could not accept. NATO's actions were apparently in contravention with the Charter of NATO itself. Proponents of this perspective argue that Article 5 of NATO's Charter restricts its use of force to situations where a NATO member has been attacked. Critics of this theory dispute that the purpose of Article 5 is to necessitate all NATO members to react when any NATO member is attacked, not to limit the circumstances under which NATO will choose to use force. NATO itself justified the actions in Kosovo under its Article 4, which states:⁴¹⁹

The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened. Because the NATO actions in Kosovo were taken after consultation with all members, were approved by a NATO vote, and were undertaken by several NATO members, NATO contends that its actions were in accordance with its charter. However, opponents of NATO's involvement contend that the situation in Serbia and Yugoslavia posed no threat to any of the NATO members.⁴²⁰

It could henceforth be argued that NATO violated international legal norms by acting without clear UNSC mandatory authorisation. From a legal perspective, one should either resort to the two exceptions to the prohibition of the use or threat of force in the

⁴¹⁸ Op cit note 415.

⁴¹⁹ Ibid.

⁴²⁰ Ibid. Also see Op cit note 227.

Charter, or to the doctrine of humanitarian intervention, as argued by Sophie Thomashausen in her account of the legitimacy of NATO's intervention.⁴²¹

According to Article 51 of the Charter, this primary exception entails an extension of a state's inherent right to collective defence in the case of an armed attack. Accordingly it could be reasoned, that as a defence alliance and collective security, NATO's intervention in the reaction to the threat to international peace and security in the Balkans region was caused by Serbia's repression of the Kosovo Albanians. In contrast, such an argument could be based on a weak rationale, since one could argue that the intervention of NATO in Kosovo took place as an act in self-defence.

A further (second) exception centres on the qualification in Article 2(7), which states that for an intervention in the internal affairs of a state to be lawful, it should clearly represent an active enforcement of Chapter 7. The intervention in Kosovo can only be considered legal when it is authorised by the UNSC supported by acknowledgement that NATO is a regional organisation. The UNSC did not explicitly authorise 'Operation Allied Force'. However, a strong case can be made for implicit UNSC authorisation.

We must build on remarkable cooperation between the UN and SFOR in Bosnia to further regime the complement of force and diplomacy that is the key to peace in the Balkans, as everywhere. The success of the NATO-led mission operation under a UN Mandate is surely a model for future endeavours.⁴²²

To summarise, the position of certain states, such as China, seems to be consistent with International Law, while such international intervention has no legitimate basis since it is in fact, a clear violation of the UN Charter, and since such mediation is conducted for the benefit of the intervening power in particular, rather than the state

⁴²¹ Op cit note 338.

⁴²² Ibid.

in consideration. The result is that the problems under consideration are usually aggravated in terms of the objectives of the intervening states.⁴²³

⁴²³ Watanabe, Koji (ed) *The Debate on Humanitarian Intervention (From Humanitarian Intervention: The Evolving Asian Debate* (2003). Available at: http://www.jcie.or.jp/thinknet/pdfs/human_murata.pdf. Last visited Nov 22, 2007.

CHAPTER V

CONCLUSION

5.1 General

This study aimed to examine the UN intervention policy, and Walzer's ethical approach to humanitarian intervention from a legal perspective, specifically by comparing the cases of humanitarian intervention in northern Iraq (1991) and Kosovo (1999). The discussions in the previous chapters revealed that humanitarian intervention remains a controversial issue among UN member states, scholars, activists and writers on international relations. Likewise, as demonstrated by the cases of northern Iraq and Kosovo, the UN's intervention policy has room for improvement. Particularly important in this regard are Articles 2(4) and 2(7) of the UN Charter and ideas of supporters of human rights. It was found that International Law pertaining to humanitarian intervention needs further development and general refinement, and that there is a particular need for the establishment of appropriate measures that would include legal/ethical principles, processes, procedures, and an appropriate organisational structure for its implementation.

One of the first issues encountered in this study on humanitarian intervention is the lack of consensus on the definition of the concept of humanitarian intervention and arguably no exact general or specific definition of the concept of humanitarian intervention exists. There is however, some general understanding of this among

researchers and those interested in the field of International Relations. Most of the definitions, if not all, confirm the existence of two or more conflicts areas within a particular state because of political, religious or ethnic factors.

The prominence of military intervention as in the cases of northern Iraq and Kosovo has resulted in humanitarian intervention becoming synonymous with military intervention. It is, however, important to distinguish between military and non-military interventions.

Walzer's definition of humanitarian intervention as a means of helping oppressed people does not embrace the concept in terms of military action. If a clear distinction is made between military and non-military humanitarian intervention, at least some concerns about humanitarian intervention could be allayed, for non-military intervention does not involve the collateral damage often associated with military action and therefore, it is not as open to criticism as military intervention.

Since humanitarian intervention is not a science but a social action, it remains open to several differing interpretations with equally diverse responses. As stated in the case of Iraq and of Kosovo, the response was military in nature. However, humanitarian intervention could be a combination of military and non-military responses, as was applied in other crises during the Cold War. Furthermore, as in other cases, for example Vietnam's intervention in Cambodia and Tanzania's intervention in Uganda in 1979, there was no unified international response.

Thus clarity is needed on what humanitarian intervention should entail, and various forms and manifestations of humanitarian intervention should be differentiated. With the development of legal principles on humanitarian intervention, it is important to pay attention to its various manifestations. Even military intervention could take on different forms and for which provision should also be made.

A second important issue involved in the practice of humanitarian intervention is that International Law is biased towards the sovereignty of the state in question. This is specifically stipulated in Articles 2(4) and 2(7) of the UN Charter, which precludes all forms of intervention in the domestic jurisdiction of other states. The UN prohibits any kind of intervention that will breach the sovereignty of a state.

To protect the sovereignty of all states, the drafters of the UN Charter prohibited the use of force and in Articles 2(4) and 2(7) supported the principle of non-intervention. Accordingly, sovereignty is sanctified under International Law. However, the Charter recognises the importance of the need for special exemptions, hence provision was made for such cases in Chapter VII.

The implication is that the international community should not intervene in a state's domestic affairs, except when there is a threat to international peace and security. When such intervention does occur the actions directly impact on the sovereignty of the state in question as originally established under the Treaty of Westphalia. Yet, as discussed and indicated in history, interventions do take place. The international community for example, intervened in the case of Iraq (1991) after the UN issued Resolution 688, which stated that members had to help the Kurdish people in the north of the state. Why they refrained from helping the people residing in the south of the state in 1991 is unclear.

The situation in Kosovo was different. Here NATO used force against the former Republic of Yugoslavia, and then the UN issued International Resolution 1244, which stated that Kosovo would be placed under international jurisdiction. The growing field of International Human Rights would probably contribute to the realisation that there is an increasing need for humanitarian intervention within the international system, in spite of the doctrine of sovereignty. It should be borne in mind that the concept of sovereignty is no longer absolute because the 1990s saw

considerable changes, especially after the collapse of the former Soviet Union and the collapse of the Berlin Wall.⁴²⁴

However, there is the real danger that humanitarian interventions could be abused to further international agendas, or that humanitarian intervention could infringe on the rights of not only the state in question, but of internal ethnic groups and also regional neighbours. Thus, it is important that rules and procedures guiding humanitarian intervention be established because, as discussed, regardless of the measures taken at the time of intervention, there are no standardised rules governing a response from the international community. A third issue that emerged from the study therefore, is the need for rules pertaining to humanitarian intervention.

Walzer formulated a set of principles in an attempt to address the issue of intervention versus sovereignty. These principles should, in his opinion, be used to determine whether intervention – and thus the violation of a particular state’s sovereignty – can be justified.

The first principle endorsed by Walzer is that if a particular state includes a variety of ethnic groups and one of them revolts against the central government, intervention is justified. This is what happened in northern Iraq when the Kurds rose against Saddam Hussein’s leadership in 1991 after the so-called liberation of Kuwait from Iraq’s invasion.

Furthermore, as pointed out in Walzer’s second principle, if a civil war occurs in a particular state, intervention is also justified. An example of this principle would be NATO’s armed intervention in 1999 to protect Kosovo’s Albanian population after they were attacked by Kosovo’s Serbs supported by the predominantly Serb-led

⁴²⁴ A contentious issue during the Cold War was the interpretation of the Universal Declaration of Human Rights. Socialist states focused more on social and communal rights and equality, while western states focused on private property, individual rights and equity (rather than equality). This led to clashing interpretations on the meaning and content of the Universal Declaration of Human Rights.

government of the former republic of Yugoslavia in response to their calls for an independent state.

Walzer's final principle addresses the use of intervention by foreign powers if a government is involved in massacring its own people. As discussed, this was the situation in both northern Iraq and Kosovo where the Iraqi and former Yugoslavia regimes horrifically massacred targeted groups within their civilian populations.

Walzer thus postulates three reasons for humanitarian intervention by a foreign power or the international community for it to be acceptable. All three reasons were complied with in the case of northern Iraq and Kosovo. While perhaps not consciously, authorisation of intervention by the UN General Assembly and the Security Council complied with at least some of Walzer's views in this regard. This dissertation argues that, despite some ambiguities in various UN Resolutions and divergent opinions within the UNSC, some elements of Walzer's approach can be recognised. Walzer's argument in favour of intervention in case of mass abuse of human rights was a discernable part of the UN intervention (though the UN may have arrived at this decision without being familiar with Walzer's work).

Walzer criticises the moral critics on the left for their strict rule-based morality that prevents intervention. Instead, he introduces a measure of consequential ethics in his views, namely that intervention under strict conditions and implicitly abiding by pre-set timelines is justified when human rights abuses, and in particular genocide, are present within a particular state's borders and are perpetrated by a *de facto* oppressive regime or partisan internal hegemonic forces. The UN opted for such humanitarian interventions in Kosovo and Iraq.

In both cases the sovereignty of the states was undermined by the international community. The decisions taken were in line with Walzer's ethical approach. In both cases intervention in order to arrest and at least minimise human rights abuses were

discussed and some action was taken after hard bargaining. However, there were conflicting opinions with regard to the interpretation of the situation in both cases. China and Russia opposed intervention in Kosovo, while France favoured minimal intervention. The USA however, pushed for aggressive and forceful intervention.

If norms are to be developed to enable intervention to proceed more amicably, far greater effort should be expended to describe and circumscribe such norms. Furthermore, guidelines should be set regarding the conditions, for how long, and for the attainment of which specified purposes (goals) interventionist actions are to take place.

Again, Walzer's ideas may be of help, but he does not provide a refined description of the exact conditions of the context that could justify interference on moral grounds. In this area, the well-known tension around a rule-based morality and consequentiality ethics enter the realm of international politics and humanitarian rights law. This tension has not yet been solved within the UN but Walzer gives some pointers. Nonetheless, he failed to prescribe the exact conditions for intervention. The debates regarding real political conditions and approaches to moral-based interventions deserve further attention, and the circumstances under which humanitarian intervention may take place remain open to debate and interpretation.

In addition, decisions on the nature, scale and intensity of interventionist actions is another controversial issue. One may ask whether the scale of the intervention is justified when compared with the threat. It is here that Walzer's laudable but less refined norms for intervention (or ethical guidelines) offer some help. Walzer's ideas are however, not without problems because they require the interpretation of conditions within a particular state prior to any form of humanitarian intervention in order to justify such action.

A further problem is that interventions may have unintended negative consequences. An unfortunate outcome could be that the intervention is seen as one-sided. Kosovo serves as such an example. The bombing campaign by NATO – led mostly by the USA in an aggressive manner – destroyed infrastructure on a large scale and brought havoc to the civilian population. A fair amount of civilian bitterness, if not hate, remains because of the bombing campaign. The intervention thus had mixed success. Not only was it seen as one-sided, outstripping the initial and precarious minimum consensus, but it is argued that it caused more harm than good. Even to this day, the Russian state and its leaders argue that the intervention's negative consequences outstripped the positive consequences. Likewise, the situation in northern Iraq was/is complex. Again minimal consensus was precarious. Arguments were/are made for and against intervention, or the need to escalate intervention.

Thus it is important that proper rules and procedures for the authorisation of humanitarian intervention should be in place and that these should be institutionalised. This begs the question of whom or what should take responsibility for the authorisation of humanitarian intervention and what the rules and procedures should be.

Currently, this is a task of the UN. The main problem with humanitarian intervention is that the UN does not make provision for intervention in the internal affairs of states in cases of internal conflict unless such conflict poses a threat to international peace and security. This led some states such as the USA to interpret the charter of the UN differently, particularly, in the Post-cold War Era. However, many specialists of international relations doubted the purposes of the USA's intervention and were concerned that the USA used the UN as a forum to achieve its own aims and further its own agenda. Allegations such as these were fuelled by the USA's quest for intervention in northern Iraq to help the Iraqi Kurds in 1991, but it disregarded the needs of those in the south of Iraq.

For these reasons, it is possible that the UN's current policy on humanitarian intervention remains arbitrary and only benefits the interests of a few member states, in particular those with a veto, for example the USA. Based on the above assessment, it would therefore be useful to modify existing provisions in the UN Charter in accordance with basic principles of ethics. Such modifications should be able to address internal conflicts and establish strict guidelines for the nature and level of the intervention (whether it should be military, non-military or a combination of them), the extent of such intervention, as well as the appropriate mechanisms for the execution and termination of such actions. In the words of Kofi Annan, the former Secretary-General of the UN, nations have in fact confirmed the need for such a shift as demonstrated by events in northern Iraq and Kosovo.

Reacting to resolutions, the UNSC struggled to obtain a minimal consensus for intervention in both the above-mentioned cases. Despite minimal consensus and the ambiguities in the UN General Assembly's resolutions as pointed out earlier, interventions did occur against the wishes of some member states and of members of the Security Council.

The international community still lacks a common vision of the concept of international peace and security. There are opposing views among the member states of the UN on the standings and ideas surrounding this concept. Not everyone agrees on these terms (international peace and security), their specific content, and/or how steps should be taken to give body to this terminology.

This lack of unified vision hampers the modus operandi to be undertaken in each conflict, where each case of conflict also reflects a different context – sometimes substantially differing from previous circumstances. The foregoing chapters revealed that even though International Law and the UN Charter do not permit any interference in the internal affairs of states, but call for the support of human rights and the protection of religious and/or ethnic minorities, wherever they are. The

situation reflects a dialogue that calls for legal and ethical treatment by specialists in International Relations and International Law, as well as focused attention from decision- and policy-makers.

A body or international organisation; a high profiled think-tank, or a council of wise men should, as a matter of urgency, be established to investigate this subject and base it on the standards of legal and ethical implications for outside parties. Therefore, it is both the duty of, and a necessity for the international society to adopt new or additional rules to further define (and refine) the concept of humanitarian intervention and frameworks related thereto. Of great importance are the following issues:

A high priority should be given to the attention and care of international jurisprudence. Internal research centers, states involved and international organisations could provide valuable insights. National and international armed conflict, or armed conflict with implications outside the state where internal war occurs, should receive attention. The 'fall-out' or trans-border consequences of conflict and the conditions for international intervention and its duration should be spelled out clearly.

The research should be placed in the hands of experts, decision-makers and stakeholders with a role in international policy-making in the framework of states or international organisations to achieve true interdependence between theoretical ideas and reality. In this way stability and prosperity of the international community, which is suffering in some parts due to internal conflicts, could be achieved. Special attention should be paid to appointing or selecting people with a non-partisan profile to work at, serve in or be associated with such institutions, at least as humanely as possible.

The world witnessed an unbearable degree of human agony in the 1990s. Some authors on international relations, including Walzer, tried to find appropriate

solutions for comprehensive humanitarian misery and also to develop useful systems for reacting to human catastrophes. Immediately after conflict erupts in an area of concern, constructive attempts should be made to alleviate the suffering of the victims. Such a body may be able to offer some recommendations for the benefit of the international community, which now suffers from the absence of legal frameworks and well-prescribed ethical obligations to determine rules of humanitarian intervention.

5.2 Recommendations concerning the work of the United Nations in internal conflicts

As previously indicated, the position of the UN regarding humanitarian intervention needs refinement, and the following are recommended:

i) The need for modification of the provisions of the UN Charter: as imperative, such modification(s) should formulate provisions that discriminate between international disputes and armed conflict that are international in character; provide distinct rules applicable to the conditions, and also suggest/propose appropriate mechanisms to deal with each of them to prevent interference or to set clear conditions for interference. This would include the timetables and conditions for withdrawal of intervening forces, but not only in the case of armed conflict.

ii) There remains a need to amend the provisions of Article 55 of the UN Charter regarding the right to self-determination to prevent foreign forces from using this right to achieve their own interests in the face of the legitimate authority. Once such amendments are in place, intervening forces should then only intervene with the full consent of the UN, and not breach the sovereignty for their own aims.

iii) There also remains a need to develop a specific definition of the concept of international peace and security, and agreement regarding the required conditions for

intervention. Once achieved, these measures should block or forestall foreign forces working to expand this concept or present their ‘widened’ approach as a pre-text for illegal interference in the internal affairs of states and subsequent violation of their sovereignty. In addition, it should be mentioned that the UN should set conditions that prevent one-sided interference, and that sanctions against one-sided interventions should be discussed and put in place.

iv) There is a need to develop rules that conclusively determine the importance of respecting the sovereignty of states by amending the provisions of Article 2 (1) of the UN Charter to prevent the violation of the sovereignty of states, especially in the case of internal armed conflicts.

v) The aim of military intervention for humanitarian purposes must be limited in order to prevent an increase in humanitarian suffering in parts or the whole of a target state. The military intervention must be focused and purposeful without causing further suffering, civil strife or civil war. In this study it is argued that unintended consequences should be considered as interventions are planned in order to safeguard human rights (humanitarian intervention), especially because such military interventions may have unexpected or unforeseen ‘fall-outs’ or domino effects detrimental to peace in a region, or may even have wider implications within the international community. The goals should be precisely honed and consensual to enable a move from violence towards civil or peaceful use and application. The international community cannot afford another Kosovo or Iraqi-type situation.

vi) Most importantly, intervening states should set a timetable in advance for the withdrawal of their forces from the territory of the targeted state. Should such a schedule not be adhered to, the structures and conditions for sanctioning continued involvement by the intervening state or states should be worked out clearly for purposeful implementation to be possible.

5.3 Recommendations concerning states with internal conflicts

States could prevent the need for intervention in their internal affairs and conflicts by other states by complying with the following recommendations:

i) States should avoid internal conflicts through the development of constitutional rules that encourage participation of all their nationals to assume responsibility and enjoy privileges on an equal footing, without discrimination on racial, religious or political grounds.

ii) The parties responsible for internal conflict in certain states should apply the provisions of International Human Rights Law to prevent problems from escalating to the extent that they could lead to humanitarian suffering that would require intervention by other states.

iii) The parties to a conflict in a particular state (or states) should cooperate with humanitarian organisations and should not be exempted from their humanitarian duties to alleviate the suffering of victims. By preventing humanitarian organisations from carrying out their legal and ethical duties, a crisis may be exacerbated and allowed to escalate.

5.4 Concluding remarks

As demonstrated with reference to the case studies of Kosovo and Northern Iraq, current practices are far from optimal. In fact, they allow for conflicting perspectives that could lead to actions that have unforeseen or unintended consequences, and moreover, could exacerbate the suffering and worsen the situation. Refinements of UN structures and policies to deal with comparable situations in future are recommended. In addition, the establishment of a body, an international think-tank or

an organisation dedicated to applied research, may assist in providing solutions by foresight, rather than leave people in misery if foresight is neglected.

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