

**Research Report 00.4
December 2000**

Clara Portela

Humanitarian Intervention, NATO and International Law

**Can the Institution of Humanitarian Intervention
Justify Unauthorised Action?**

Berlin Information-center for Transatlantic Security (BITS)

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Acronyms

CSCE	Conference on Security and Co-operation in Europe
ECOWAS	Economic Community of West African States
EU	European Union
(S)FRY	(Socialist) Federal Republic of Yugoslavia
IFOR	Implementation Force
NATO	North Atlantic Treaty Organisation
NSC	New Strategic Concept
ONU	Organisation des Nations Unies
OSCE	Organisation for Security and Co-operation in Europe
OTAN	Organisation du Traité de l'Atlantique Nord
SFOR	Stabilisation Force
UN	United Nations
UNSC	United Nations Security Council
WEU	Western European Union

Preface

Some issues in international affairs are simply matters of principle. Thus they are far more important than the subject under dispute. This is certainly true for the subject of this study: the question whether unauthorized military action can be justified as humanitarian intervention. Are humanitarian interventions legal under international law? Were NATO's military actions justifiable under international law? Will international law be changed in order to justify operations such as the NATO air-strikes over Kosovo?

This study about the legitimacy of NATO's military action presents a clear answer. NATO's military operations during the Kosovo war were illegal under international law. They were neither mandated by the UN Security Council, nor justifiable for reasons of gross violation of humanitarian law. While it might be possible to declare NATO's military action a precedent on the way towards an emerging, new understanding of international law, there are strong arguments to believe that the latter is neither the case nor would it be prudent.

However, NATO decided to retain the right to resort to military force again without the presence of a UN mandate. The Alliance's "New Strategic Concept", which was adopted during the Washington NATO-Summit in April 1999, as well as the Alliance's follow-up documents do not rule out that NATO will take military action again without the authorization of the international community.

This has a significant impact on the future of NATO and on the Alliance's relations with others - nations as well as international organizations. NATO- Russian relations are a good case in point.

The Kosovo conflict has had a serious impact on the relationship between NATO and Russia. Based on the 1997 "NATO-Russia Founding Act", Russia expected NATO to give Moscow some say over whether or not a military intervention should take place. Russia's veto-power in the United Nations Security Council provided Moscow with another reason to believe that it could influence the events in the Balkan region. However, NATO finally decided instead to make Kosovo a precedence for undertaking unilateral military action without a UN mandate and without Russian cooperation. Russian President, Boris Yeltsin, decided to make the conflict a symbol of his political will-power in resisting the West. Russia halted cooperation with NATO.

Most Western politicians and analysts were quick to point out that Russia is a declining power in search of ways to retain influence beyond regional affairs. They pointed out that Russia has overriding financial and economic reasons to cooperate with Western countries and that it does not have realistic chances of building strategic alliances with China, India, and others that could substitute broken links with the West.

While these analysts were correct in predicting that Russia would finally renew her cooperation with the Alliance, they tended to overlook or underestimate the fact that Russia perceived NATO's decision as a matter of principle and as a matter of long-term impact.

Russia must be most interested not to be bypassed in international organizations, such as the UN or the OSCE. International organizations whose work is based on the principle of "one nation, one vote" provide a country like Russia some security against violations of their own national interest. Within such organizations Russia cannot be bypassed and by virtue of being a veto-power at least block developments that are directed against her interests. However, the efficiency of these international organizations is also a necessary prerequisite for an international system that is based on the rule of law. Many nations might feel the need to resort to the law of the strongest, should these bodies not function properly or should they continue to be sidelined by unilateral action.

As a result, Russia's new strategy documents, which were adopted in 2000, emphasize the need to strengthen these international organizations. They form part of Russia's policy to promote a multi-polar international system and to build restraints against unilateralism. They also reflect the fact that other countries might have similar interests.

Some Russian analysts fear that NATO might prepare to use "humanitarian intervention" as a reason for intervening in Russia's internal affairs. These analysts are likely to err, at least as far as the foreseeable future is concerned. NATO and its member states will continue to respect the territorial integrity of the Russian Federation, simply because - if for no other and better reasons - Russia will continue to be a nuclear power in the foreseeable future.

However, while there might not be a direct risk to Russia herself, Western interventions that are legitimized as humanitarian interventions might occur outside of Russia's borders and in its vicinity. A number of plausible scenarios exist in which such an intervention might run contrary to Russian interests. Thus Russia fears that she might again have to face the choice of having to join the West (even if this option is not in Russia's best interests) or being bypassed in the NATO-Russia framework and in the UN system. The realization that such a situation could occur already cautions Russia against cooperating too closely and trustfully with NATO. This situation has the same effect on NATO-Russian relations as NATO's policy of enlargement.

On the other hand, NATO under US leadership signaled a strong interest to retain as much flexibility and as little restriction as possible. "With the UN, whenever possible, without it when necessary" was the title of an internal memorandum presented by the US Embassy at NATO to its Allies in Brussels as early as during the summer of 1993. Months before the well-reported Mogadishu events in Somalia, which are often quoted as the origins of the US' critical attitude towards UN peace enforcement missions, this food-for-thought paper already made the case that became the line of argument during the Kosovo operations: NATO should not limit itself to UN-mandated military action. The Alliance should be prepared to act without authorization by the UN Security Council, if necessary. Unanimity in the Security Council could be prohibited by China, Russia, or both. Why should countries that are not real democracies be able to legitimately block sixteen of the most democratic nations from pursuing whatever they perceive to be legitimate? NATO decided to create a precedence for being able to bypass anyone, who might decide to limit the Alliance's options, and to take military action whenever the Alliance felt such action was necessary.

NATO-Russian relations and the authority of the UN Security Council suffered from this decision. The negative impact of this decision was later limited by offering Russia a face-saving chance to participate in the negotiations to end military action and by involving the UN and Russia in the UN-mandated KFOR peace enforcement operation. However, these initiatives did not come from NATO or the United States. They were formulated within the European Union and conducted within the context of the G-8 and UN.

There is no reason to relax. While there might have been moral motivations for supporting NATO's course of action, there was no legal basis to do so. Even worse the ethical arguments that were provided were based on questionable facts. This opened the door for arguments that Western nations (under the leadership of NATO) might finally resort to a policy of ethical imperialism as another form of promoting the law of the strongest.

This makes it clear that the negative, long-term impact on NATO-Russian relations as well as on the future role of the UN and the OSCE (not the short-term one) causes the most serious concern for the future. If NATO's decisions are not revisited and revised, this will have a strong, long-term impact on the system of international relations.

Given the importance of the Kosovo war for NATO-Russian relations and the future role of international organizations, the present study provides a number of basic arguments to be considered when looking at the future of Russia's policy towards the West. Since the subject is a matter of principle and of interest to many nations, Russia's reaction will be important, but not the only one of importance.

Otfried Nassauer, Co-Director, BITS

Executive Summary

NATO's unauthorized action in Kosovo prompted a number of observers to argue that either the notion of humanitarian intervention existed or it should be established in order to allow for enforcement operations in situations of extreme humanitarian necessity. This report analyses whether the institution of humanitarian intervention exists and whether the establishment of such an institution is legally feasible and politically convenient.

Part I argues that the institution of humanitarian intervention does not exist:

- A legal analysis shows that, in principle, the notion of Humanitarian Intervention is incompatible with the ban on the use force enshrined in the UN Charter.
- An examination of recent developments shows that Humanitarian Intervention has not been established under customary law.

Part II argues that it is extremely difficult to accommodate such an institution within the current system of international law due to the following difficulties:

- Since the ban on force has the status of 'peremptory law', it can only be substituted by a norm of the same character. This means, the formation of a norm that establishes the notion of Humanitarian Intervention requires the consent of the whole (or nearly the whole) community of states. There is currently no prospect of reaching such an agreement.

Part III finally argues that the West should not promote the establishment of such an institution because:

- The promotion of unauthorized action implies the willingness to ignore the Russian veto in the UN Security Council, therefore seriously undermines co-operation with Russia.
- It could also negatively impact NATO's relations with the rest of the international community. The right to undertake humanitarian intervention leaves room for a wide range of abuse, thus undermining inhibitions about the use of force.

Introduction

There can be no doubt that NATO's decision to intervene in Kosovo has been the event with the most disruptive impact on the relations between the West and Russia over the past few years. It was no coincidence that the Alliance adopted crisis management as one of its core tasks in the new Strategic Concept¹ in the middle of this operation - the first one carried out by the organisation against a sovereign state and outside the framework provided by the UN. The most striking feature of the document is that it seems to suggest that this function can be undertaken directly by NATO and not on behalf of other entities, such as the UN or OSCE. It states that one of the fundamental security tasks the Alliance performs is "to stand ready, case-by-case and by consensus, in conformity with Article 7 of the Washington Treaty, to contribute to effective conflict prevention and to engage actively in crisis management, including crisis response operations."² This leaves the option open that non-UN-authorized action could actually be adopted as a general policy.

The possibility of NATO operating a policy that, in principle, allows for unauthorised use of force on a permanent basis raises some questions which will be the object of this study. It will explore three main questions:

- **How does the Kosovo intervention relate to Public International Law?**

First, this paper will analyse how non-authorized action relates to International Law. It will specifically look at the question whether NATO can lawfully invoke a right of humanitarian intervention to justify the Kosovo operation. The fact that the unauthorised Kosovo operation was widely justified by officials on humanitarian needs has led a number of experts to claim that the operation bears exemplary character as a precedent for the establishment of humanitarian intervention as a legal institution.³ International interventions in the 1990s have produced not only controversy, but even some confusion among certain observers.

- **Can unauthorised action be brought into consonance with Public International law through the establishment of the institution of Humanitarian Intervention?**

It has even been suggested that NATO should promote the establishment of such legal institution since this would provide the Alliance with a lawful basis for future operations. Is this feasible?

- **How would this move affect NATO-Russia relations?**

Beyond the legal question, the consequences of legitimising humanitarian interventions should be assessed. Particular attention will be paid to NATO – Russia relations. This discussion should take into account the need to conduct NATO policies in accordance with its goals.

Some conclusions will follow.

¹ The NSC can be defined as the "statement of the Alliance's objectives", setting out NATO's political and military strategy". The predecessors to the documents approved in 1991 and in 1999 were classified documents providing guidelines for military planning activities. See Cragg, Anthony: A new strategic concept for a new era, *NATO Review*, 47(2), Summer 1999, p. 1.

² NATO: The Alliance's Strategic Concept, Washington D. C., April 24 1999, Title 10. The rest of the article completes the new function with a commitment to co-operation with non-NATO countries, reading "Partnership: To promote wide-ranging partnership, co-operation, and dialogue with other countries in the Euro-Atlantic area, with the aim of increasing transparency, mutual confidence and the capacity for joint action with the Alliance".

³ Bring, Ove: Should NATO take the lead in formulating a doctrine on humanitarian intervention?, *NATO review*, Vol.47, No.3, Autumn 1999; Cassese, Antonio: *Ex iniuria ius oritur*: Are We Moving towards International Legitimization of Forcible Humanitarian Countermeasures in the World Community?, *European Journal of International Law*, Vol. 10, No.1, 1999; Guicherd, Catherine: International Law and the War in Kosovo, *Survival*, Vol.41, No.2, Summer 1999; Ronzitti, Natalino: Lessons of international law from NATO's armed intervention against the Federal Republic of Yugoslavia, *The International Spectator*, 24(3), July-September 1999.

1. Kosovo and Public International Law

1.1. Legal Difficulties on NATO's way

The main difficulty is that if NATO uses force without an authorisation of the UN Security Council, it breaches International Law as codified in the UN Charter. NATO actions in similar (i.e. intrastate) conflicts can place the organisation outside legality. This question was given extensive discussion on the occasion of NATO's war against the FRY, which denounced the attack before the International Court of Justice.

The threat or use of force is governed under international law by the UN Charter. Article 2 (4) reads:

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

The UN Charter provides only for two exceptions from this prohibition, embodied in Art. 51 and Art.39⁴. Art. 51 reads:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

This Article constitutes the legal foundation of the Washington Treaty by which NATO was founded, and serves as a basis for its Art. 5.

The second exception that allows for the use of force can be found under Article 42. It reads:

"Should the Security Council consider that measures provided for in Article 41⁵ would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."

The sole competence of the Security Council for the maintenance of international peace and security is laid down in Article 39:

"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."

Consequently, any threat or use of force that is neither justified as self-defence against an armed attack nor authorised by the Security Council constitutes undeniably a breach of the UN Charter.⁶

Those paragraphs of the UN Charter referring to regional arrangements should be mentioned as well. Although NATO has never applied for recognition as a "regional agency dealing with security issues" in accordance with in Chapter VIII of the Charter⁷, these provisions would be

⁴ The so-called "enemy-state-clauses" (Articles 53 and 107) are now considered obsolete.

⁵ Art. 41 refers to "measures not involving the use of armed force." These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

⁶ So far, Article 48 of the UN Charter constituted the legal foundation which enabled the Security Council to entrust NATO with the enforcement of its mandates. It reads as follows: "(1) The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine. (2) Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members."

⁷ This was expressly clarified in a letter addressed by NATO's former Secretary General Claes to the UN Secretary General. See Simma, Bruno: NATO, the UN and the use of force: Legal aspects, *European Journal of International Law*, 10(1), chapter 2.

applicable by way of analogy.

While Art. 52⁸ allows for the existence of regional arrangements, Article 53 explicitly forbids military intervention by regional agencies without a Security Council mandate:

“The Security Council shall, where appropriate, utilise such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council”.

It should be noted that Charter regulations prevail over any other treaty or agreement, as stated in Article 103 of the Charter itself:

“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.”

In addition, the pre-eminence of Article 2(4) of the Charter over any other source of international law is enshrined in Art. 30.1 of the 1969 Vienna Convention on the Law of the Treaties, according to which the ban of force of Article 2(4) is part of *ius cogens*, i.e., it is accepted and recognised by the international community as an unalterable norm.⁹ It is binding on states both individually and as members of international organisations, as well as on international organisations.

Moreover, one should note that all NATO members reiterated the obligations acquired under the UN Charter at a regional level in the 1975 Helsinki Act of the Conference on Security and Co-operation in Europe.¹⁰ Even though it does not have legal consistence and is geographically restricted to Europe, it includes some provisions repeating the above-mentioned principles:

Title II calls for refraining from the threat or use of force:

“The participating States will refrain in their mutual relations, as well as in their international relations in general, from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations and with the present Declaration.”

Title IV sets forth the principle of non-intervention in internal affairs:

“The participating States will refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations.”

Finally, NATO members once again confirmed their commitment when they signed the organisation's founding act, the Washington Treaty. Article 7 explicitly binds NATO countries to act within the UN Charter:

“This Treaty does not affect, and shall not be interpreted as affecting in any way the rights and obligations under the Charter of the Parties which are members of the United Nations.”

Despite statements by US officials¹¹, the conduct of operations such as the Kosovo intervention

⁸ Art.52 of the UN Charter reads: “Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations”.

⁹ The term *ius cogens* refers to a peremptory norm of general international law. It is defined as a norm “accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. See Art. 53 of the 1969 Vienna Convention on the Law of the Treaties.

¹⁰ Predecessor of OSCE.

¹¹US Deputy Secretary of State Talbott said: “Some commentators contend that such adaptations require a revision of the North Atlantic Treaty, or believe that we are proposing one. This is untrue. The framers of the Washington Treaty were careful not to impose arbitrary functional or geographical limits on what the Alliance could do to protect its security.” However, as Simma recalls, “no unanimity of NATO member states can do away with the limits to which these states are subject under peremptory international law (*ius cogens*) outside the organization, in particular

are inconsistent with the text of the Washington Treaty. It runs counter to the Alliance's commitment to refrain from the use of force set forth in Art. 1 as well as to the responsibility of the Security Council for the maintenance of peace recognised in Art. 7.

Moreover, the new task can be considered to contravene Art. 5 of the Washington Treaty. Since Art. 5 endorses the use of force only to repel an armed attack against a NATO member, a negative reading of this paragraph excludes any use of force other than one aimed at self-defence.¹²

The question raised is: can interventions such as the one over Kosovo be possibly justified under international law?

One should look at the justifications adduced by the organisation and the states concerned. NATO governments, left with the responsibility of presenting the war's objectives to its respective constituencies individually¹³, gave three legally relevant justifications for the recourse to armed force:

First, they argued that the operation took place within the framework of UN Security Council Resolutions. When Secretary-General Solana explained why NATO had issued the activation order, he made explicit reference to UN Security Council Resolutions stating that the FRY had not yet complied with the urgent demands of the International Community, "despite UNSC Resolution 1160 of 31 March 1998 followed by UNSC Resolution 1199 of 23 September 1998, both acting under Chapter VII of the UN Charter". He further said that "the deterioration of the situation in Kosovo and its magnitude constitute a serious threat to peace and security in the region as explicitly referred to in the UNSC Resolution 1199".¹⁴

It was argued that a number of Security Council resolutions on Kosovo repeatedly defied by the Yugoslav government had largely determined that the crisis in this region constituted a threat to international peace and security and therefore provided some legal basis for military action. The intervention was aimed at enforcing FRY's compliance with the demands issued by the Security Council in previous resolutions. According to US Secretary of State Albright:

"Acting under Chapter 7, the Security Council adopted three resolutions -- 1160, 1199 and 1203 -- imposing mandatory obligations on the FRY; and these obligations the FRY has flagrantly ignored. So NATO actions are being taken within this framework, and we continue to believe that NATO's actions are justified and necessary to stop the violence."¹⁵

Resolution 1160 called upon the Federal Republic of Yugoslavia "*to immediately take the further necessary steps to achieve a political solution to the issue of Kosovo through dialogue*".¹⁶

Resolution 1199 adopted an increasingly assertive tone and demanded "*that all parties, groups and*

the higher law (cf. Article 103) of the UN Charter on the threat or use of armed force. NATO is allowed to do everything that is legally permissible, but no more. Legally, the Alliance has no greater freedom than its member states". For both statements see: Simma 1999, Chapter 3, p. 2 and p. 6 respectively.

¹² Some critics have also referred to the question of its democratic legitimacy, pointing out that the substantial changes introduced by the new Strategic Concept requires formal ratification by national parliaments. This was the claim of the Political Committee of the Assembly of WEU: "[E]ven though neither the Washington Communiqué nor the new Strategic Concept are international treaties, their aims are nonetheless to lay the foundations for redefining the tasks of the Alliance by introducing fundamental changes for which no justification can be found in the Washington Treaty. In fact, this boils down to amending the Treaty without going through the appropriate procedures, and in particular without bothering to obtain the necessary approval and ratification from parliaments." See "WEU after the Washington and Cologne Summits-Reply to the annual report of the Council", Report submitted on behalf of the Political Committee to the Assembly of the WEU by Mr Baumel, Paris, 10 June 1999, pp. 8-9.

¹³ Some analysts have observed how the stated objectives narrowed in the course of the campaign. See Woodward, Susan L.: Should we think before we leap?, *Security Dialogue*, 30(3), September 1999, p. 278. Some criticised that certain objectives, particularly the refrain from targeting civilian objectives were not entirely honoured. See Rogers, Paul: Lessons to learn, *The World Today*, 55(8/9), August/September 1999, p. 5.

¹⁴ Letter from Secretary-General Javier Solana, addressed to the permanent representatives to the North Atlantic Council, dated 9 October 1998.

¹⁵ Secretary of State Madeleine K. Albright, press conference on Kosovo in Washington, DC, March 25, 1999.

¹⁶ UNSC Res 1160 of March 31 1998, operative paragraph 1.

*individuals immediately cease hostilities and maintain a cease-fire in Kosovo*¹⁷ and *“that the Federal Republic of Yugoslavia...cease all action by the security forces affecting the civilian population and order the withdrawal of security units used for civilian repression”*¹⁸. Furthermore, in the same paragraph Yugoslavia was demanded *”to enable...international monitoring in Kosovo”*.

Finally, Resolution 1203 of October 24, 1998 demanded the implementation of the agreements Yugoslavia had signed with both NATO and OSCE concerning a Verification Mission and the public commitment of Yugoslavia to negotiate a political settlement.¹⁹

While all these resolutions were the premise for authorisation of the use of force, the act needed to actually resort to force never materialised within the Security Council. However, it is only the competence of the Security Council to authorise the enforcement of its resolutions, not of the individual states or groups of states; thus, legally speaking, enforcing a resolution without enforcement provisions is unlawful. In the words of White, “where there is no authorisation, there is no legal basis”.²⁰ At best, the strict adherence to UN Security Council resolutions offers political advantages as opposed to other unilateral actions.²¹

US Secretary of State Albright also argued that the behaviour of Serb forces in Kosovo was a breach of the Geneva Conventions, the Charter on Human Rights and, if the ethnic cleansing continued, of the Genocide Convention of 1948. She contended that these treaties provided an alternative source of legitimisation of NATO action.²²

Most jurists agree that the Genocide Convention was not affected.²³ In any case, these treaties do not provide for enforcement; therefore, they do not offer a legal basis for the use of force. The reference to the breaches could at best be seen as a means to justify the situation in Kosovo was amenable to an intervention on humanitarian grounds.

In view of these prohibitions, it is clear that the Kosovo intervention could not possibly be legitimised by UN Security Council Resolutions. There seems to be no way for NATO to circumvent the unlawfulness of crisis management operations without a UN mandate.

1.2. ‘Reviving’ the notion of Humanitarian Intervention

Some within NATO claimed that military intervention in another state can be justified in cases of overwhelming necessity. While all leaders clearly put the emphasis on the humanitarian distress, reference to the theory of humanitarian intervention was sometimes made more explicitly than others. NATO Secretary-General Solana repeatedly stressed that the campaign’s objective was to “avoid a humanitarian disaster”. In the above-mentioned letter explaining the Allies’ approval of the activation order, he mentioned “the very stringent report of the Secretary-General of the United Nations pursuant to both resolutions, (which) warned inter alia of the danger of a humanitarian disaster in Kosovo”. He further referred to “the continuation of a humanitarian

¹⁷ UNSC Res 1199 of September 23 1998, operative paragraph 1.

¹⁸ *ibid*, operative paragraph 4.

¹⁹ UNSC Res 1203 of October 24 1998. It should be noted that at the time when the activation order was given, Resolution 1203 had not been adopted yet. Therefore, it was Resolution 1199 that served as basis for the opening of the military option within the Alliance. See the statement by Secretary of State Madeleine K. Albright Press Conference in London, October 8, 1998.

²⁰ White, Nigel D.: The Legality of the threat of force against Iraq, *Security Dialogue*, 30(1), March 1999, p. 80

²¹ As Simma puts it, “a reading of the relevant Council resolutions together with the respective pronouncements of NATO (members) might lead an observer to conclude that the two sides are acting in concert.[...] NATO tries to convince the outside world that it is acting alone only to the least degree possible, while in essence it is implementing the policy formulated by the international community. Simma 1999, p. 14

²² The pertinent articles were not specified. See for instance: Transcript of the Secretary of State’s press conference on Kosovo in Brussels, 8 October 1998, on website <http://secretary.state.gov/www/statements/1998>

²³ Simma 1999, p. 1. Ambos is one of the few to dissent, arguing that the *dolus specialis*, a special intent aimed at the destruction of a protected group existed in the case of Kosovo. However, an intent is generally difficult to determine. See Ambos, Kai: Comment on: Bruno Simma, NATO, the UN and the use of force: Legal aspects, *European Journal of International Law*, 10(1), 1999, p. 1.

catastrophe, because no concrete measures towards a peaceful solution of the crisis have been taken by the FRY.”²⁴ The risk of the conflict spilling-over the Yugoslav borders took a secondary place:

“Our objective is to prevent more human suffering and more repression and violence against the civilian population of Kosovo. We must also act to prevent instability spreading in the region. ...We must stop violence and bring an end to the humanitarian catastrophe now taking place in Kosovo. We have a moral duty to do so. The responsibility is on our shoulders and we have to fulfil it.”²⁵

Among NATO leaders, British Prime Minister Tony Blair most vigorously intended to conceptualise the moral rationale of the intervention, even formulating a ‘doctrine of the international community’:

“I believe that a real sense of moral purpose is also motivating NATO. We either allow ethnic cleansing to succeed, or we say that the world community has an obligation to stop this most violent form of nationalism. Our job is to go in there and reverse it and defeat it.”²⁶

While the validity of the two first mentioned justifications - UN Security Council resolutions and international treaties - was easily dismissed, the question of the humanitarian intervention is more complicated. Could the doctrine of humanitarian intervention confer some legitimacy to the Kosovo operation?

In order to give an answer to this question, the first issue to be clarified is whether the humanitarian intervention actually exists as an institution.

Humanitarian intervention “encompasses any use of armed force by a State against another State for the purpose of protecting the life and liberty of the citizens of the latter State unwilling or unable to do so itself.”²⁷ Although a majority of writers supported the idea of a lawful humanitarian intervention during the era previous to the signing of the UN Charter, it is debatable whether it was clearly established under the customary international law of that time. In any case, it is clear that even if that right had existed prior to 1945, it had not survived the adoption of the Charter; although no explicit reference is made in the Charter to humanitarian intervention, it is in conflict with the prohibition of the threat or used of force in Art. 2 (4).

Only a minority of jurists maintained in the period after 1945 that the institution of humanitarian intervention is permitted under customary international law, a recognised source of international law. They argued that the principles of non-violence and the protection of human rights must be balanced against each other in any particular case, with the result that in extreme situations involving seriously inhumane treatment, the latter principle should override the former. It was often adduced that humanitarian interventions were not precluded by Art. 2 (4) of the UN Charter since it only banned the use of force when directed “against the territorial integrity or political independence” of the target state, and not at the protection of its population.²⁸ This argument is based on a wrong understanding of the terms in question, which were not added to the text in order to restrict its scope, but in the spirit of specifying the prohibition. Furthermore, it has been generally rejected as incompatible with the system of the Charter, since its framers had attributed a predominant role to individual non-violence. The recognition of humanitarian intervention as an exemption from this prohibition of Art. 2(4) was deliberately abnegated in order to prevent a confrontation of the two power blocks.²⁹

²⁴ Letter from Secretary-General Javier Solana, addressed to the permanent representatives to the North Atlantic Council, dated 9 October 1998.

²⁵ Press statement by Javier Solana on 23 March 1999 at 23h00.

²⁶ Hoagland, Jim: Blair on NATO: We must defend human values, *The Washington Post*, 19 April 1999

²⁷ Beyerlin, Ulrich: Humanitarian intervention, in: R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. I (1992), p. 926. The use of armed force for the protection of its own nationals will not be considered here.

²⁸ This claim was voiced once again with regard to the war against Yugoslavia. See Guicherd 1999, p. 23.

²⁹ Beyond the teleological explanation, Deiseroth has drawn attention to the unacceptability of the notion that military intervention does not affect the territorial integrity of a state: “Die Anwendung von militärischer Waffengewalt.gegen das Territorium und die Bevölkerung eines Staates...stellt durch die Beeinträchtigung und die

Some of these specialists have voiced the need for reappraisal of this question in view of a number of events taking place after the end of the Cold War. They contend that notions of legitimacy are changing, with humanitarian reasons emerging as a third option for justified military intervention in a sovereign state.³⁰

Two constitutive elements define the existence of an international custom: *diuturnitas*, i.e. a consistent international practice and *opinio juris*, i.e. acceptance of this custom by states.³¹ In order to determine the existence of the institution of humanitarian intervention, it should be demonstrated that both elements are present. Advocates of this notion point to recent UN and state practice and codified and non-codified signs of growing acceptance of this institution. In the following, these arguments will be examined.

1.2.1. Assessing the Practice

1.2.1.1. The argument based on state practice

Greenwood defends that states' practice allows for the consideration of this institution as established under customary international law. He contends that enough precedents of humanitarian interventions justify the claim that most states accept them as legal.³² For him, the emergence of "at least a limited right of intervention" is best exemplified by the allied intervention in northern Iraq in 1991 on behalf of the Kurds and the imposition of a no-fly zone in southern Iraq on behalf of the Shiites some months later. As further examples, he cites the cases of India's invasion of Bangladesh (1971), Tanzania's invasion of Uganda (1979) and ECOWAS' intervention in Liberia (1990). In Greenwood's words,

"It seems that the law on humanitarian intervention has changed both for the UN and for individual states. It is no longer tenable to assert that whenever a government massacres its own people or a state collapses into anarchy international law forbids military intervention altogether."³³

Greenwood cites cases in which there was no state authority to request or allow outside intervention, or when in civil strife, foreign help met with the consent of all parties to the conflict. These examples cannot bear precedential character for cases when a state authority existed.³⁴ This leaves the enforcement of a no-fly zone in Iraq as the only case of non-UN authorised state intervention that would qualify as a humanitarian intervention.³⁵

The UK justified its participation on this basis, stating that it intervened "in exercise of the

Zerstörung der angegriffenen Ziele einen massiven Übergriff auf das Staatsgebiet dar, und zwar unabhängig davon, ob die Gewaltanwendung subjektiv auf die Eroberung des Gebietes abzielt oder nicht." Deiseroth, Dieter: 'Humanitäre Intervention' und Völkerrecht, *Neue Juristische Wochenschrift*, Heft 42, 1999, p. 3086.

³⁰ See for instance Greenwood, C.: "Legal Limitations of the Prohibitions of Use of Force" in: Souchon, Lennard (Hrsg.): *Völkerrecht und Sicherheit*, Herford 1994.

³¹ This is defined in Art. 38(1) b of the Statute of the International Court of Justice. See for instance: Fernández Flores, J.L.: "Fuentes del derecho internacional público", in: Fundación Tomás Moro: *Diccionario Jurídico Espasa*, Madrid 1991, p. 443, Shaw, M.: *International Law*, Cambridge 1997, pp. 58-59, Simma, B.: "Das Völkergewohnheitsrecht", p. 39 in Neuhold, H.: *Österreichisches Handbuch des Völkerrechts*, Wien 1997, Hillier, T.: *Principles of Public International Law*, Cambridge 1999, p. 19.

³² Quoted in "War with Milosevic", *The Economist*, 3rd April 1999, p. 18.

³³ Greenwood, Christopher: Is there a right of humanitarian intervention?, *The World Today*, 49(2), February 1993, p. 40.

³⁴ As were respectively the cases of Somalia and Liberia. The intervention of ECOWAS in Liberia in 1990 was carried out without a mandate, but was given post-facto legitimacy by Security Council Resolution 788. In contrast to the above-mentioned interventions of the seventies (India in East Bengal in 1971, Tanzania in Uganda and Vietnam into Kampuchea in 1979), a declaration issued by the ECOWAS Heads of State and Government made clear that the peacekeeping force was sent with a humanitarian rationale, see UN Doc. S/ 21485, 9 August 1990. The Liberian case is a doubtful example since ECOWAS encountered the consent of all factions.

³⁵ The US and British governments justify their unilateral campaign on the basis of the determination of a threat to international peace and security by the Security Council in a resolution. They indicated that they do not consider a UN mandate indispensable for the international military action, claiming that they still comply with international law.

customary international principle of humanitarian intervention”³⁶, thus invoking this institution by name. Former British Foreign Secretary Douglas Hurd declared:

“[W]e operate under international law. Not every action that a British government or an American government or a French government takes has to be underwritten by a specific provision of a UN resolution provided we comply with international law. International law recognises extreme humanitarian need...We are on strong legal as well as humanitarian ground on setting up this “no fly” zone.”³⁷

Nevertheless, non-compliance with UN-imposed requirements does not authorise states to use force. An enforcement provision is still required. One should not be misled by official statements: Interventions conducted outside the UN umbrella are illegal. The enforcement of a no-fly zone in Iraq falls within this category.

Very few interventions both in the pre-Charter period and after 1945 often cited as precedents can be described as humanitarian without serious difficulties.³⁸ Greenwood himself acknowledges that the circumstances under which the intervention in Iraq took place are rather unique and unlikely to be repeated.³⁹ One author has written that “the first respectful piece of practice supporting the doctrine of humanitarian intervention is represented by the NATO air campaign against the FRY.”⁴⁰

In this particular instance, trends from UN authorised and non-authorised practice seem to converge: NATO, which had acted previously as a “UN subcontractor”, emancipated itself from UN Security Council’s authorisation to take action and placed itself outside legality, while claiming to aim at achieving compliance with UNSC Resolutions.

1.2.1.2. *The argument based on UN practice*

Some commentators contend that the UN Security Council has established a practice legitimising humanitarian grounded interventions so that they can now be considered part of customary law. This argument suggests that increased UN involvement in civil war situations can be regarded as evidence that international obligations and problems of humanitarianism may rank alongside the defence of national interests.⁴¹ As precedents, reference is made to Resolution 699 of 5 April 1991 on Iraq, Resolution 770 of 13 August 1992 on Bosnia-Herzegovina, Resolution 794 of 3 December 1992 on Somalia, Resolution 929 of 22 June 1994 on Zaire and Rwanda, Resolution 940 of 31 July 1994 on Haiti and resolution 1101 of 28 March 1997 on Albania. According to this analysis, NATO’s strikes on FRY would be legal.

Indeed, cited developments evidence a notable shift underway in terms of the principle and practice of humanitarian intervention over the past ten years, suggesting that the protection of human rights in situations of extreme deprivation and suffering is sometimes given pre-eminence over the sovereignty principle.⁴² In order to correctly assess the existence of an international custom, though, Security Council and non-authorised practice require a separate analysis. This is

³⁶ See British Year Book of International Law, vol. 63, 1992, p. 827.

³⁷ Interview on BBC Radio 4, 19 August 1991.

³⁸The interventions in Belgian Congo (1964) and in the Dominican Republic (1965) can either be more appropriately classified as interventions to protect nationals abroad, while the incursions of Vietnam into Kampuchea and Tanzania into Uganda (1979) were aimed primarily at other political ends. See Beyerlin in: Bernhardt (ed.) 1992, p. 926.

³⁹ The scale of Iraq’s violations of human rights had been extensively documented, the scope and purpose of the intervention were limited and the situation had been internationalised by the war to liberate Kuwait. See Greenwood 1993, p. 40. See also Beyerlin in: Bernhardt (ed.) 1992, p. 931: “The circumstances under which the intervention took place were rather unique; thus, this isolated relief action cannot furnish evidence that humanitarian intervention may henceforth be considered as allowed under customary international law”.

⁴⁰ Ronzitti 1999, p. 52.

⁴¹ Guicherd 1999. For other adepts of this view, see Mayall, James: *The New interventionism 1991-1994: United Nations experience in Cambodia, Former Yugoslavia and Somalia*, Cambridge 1996, p. 1; Ipsen Knut: *Der Kosovo-Einsatz- Illegal? Gerechtfertigt? Entschuldbar?*, *Die Friedens-Warte*, 74(1999) 1-2, p. 22 and Tomuschat, Christian: *Völkerrechtliche Aspekte des Kosovo-Konflikts*, *Die Friedens-Warte*, 74 (1999) 1-2, p. 34.

⁴² For a comprehensive survey see: Abiew, Francis K.: *Assessing humanitarian intervention in the post-Cold War period*, *International Relations*, XIV(2), August 1998.

so because, as explained above, military action taken by the Security Council is one of the legal exceptions provided for in the Charter, while state practice without authorisation is not.

In recent years, the UN Security Council has clearly become more active and more assertive in the field of security. This quantitative evolution was accompanied by a qualitative one in two senses:

First, in the early nineties, the UN Security Council conducted a considerable number of forcible interventions, or “peacekeeping of third generation”.

During the Cold War, peacekeeping interventions were governed by the strict principles of consent of the parties on the deployment of the forces, impartiality and non-use of force, with the peacekeeping tasks being restricted to the interposition between the contending parties and the monitoring of the cease-fires. Towards the end of the 1980's, peacekeeping began to turn multifunctional, including new tasks such as election monitoring, national reconciliation or demining. Namibia, El Salvador and Cambodia are examples of the so-called peacekeeping operations of second generation. In this period it became the practice of the Security Council to allow for military action to conduct humanitarian relief or rescue operations; most examples mentioned by Guicherd correspond to this tendency. Nevertheless, the basic principles mentioned above continued to be respected.

At a third stage, the UN increasingly authorised operations conducted by regional organisations such as OSCE's Kosovo Verification Mission, NATO-led IFOR and SFOR in Bosnia-Herzegovina, CIS' in the Trans-Caucasian area and international coalitions such as the Italian-led coalition in Operation Alba. The UN also authorised an individual state, the US, to act in Haiti, as permitted under Art.52 of the UN Charter. Some of these operations, notably Somalia, Rwanda, and IFOR/SFOR in Bosnia have been characterised differently from previous peacekeeping operations. They present characteristics such as the emergence of a coercive dimension beyond the right to self-defence⁴³ and the delegation of the use of force to national (or coalition) forces.

While some observers have denominated these interventions “peacekeeping of third generation”, others prefer to call them ‘peace-enforcement operations’, as a type separated from peacekeeping. This type has been subject to more acute criticism than the peacekeeping of first and second generation.⁴⁴

Second, the UN Security Council has shown an increasing willingness to conduct this kind of forcible interventions in cases of purely domestic humanitarian distress.

Beyond its more active role in humanitarian aid operations,⁴⁵ the Security Council is increasingly willing to characterise the plight of the people of a state as a threat to international peace and security, and to authorise interventions resting merely on humanitarian grounds.⁴⁶ This constitutes a substantial restriction of the scope of Art. 2(7) of the Charter, which reads:

“Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such

⁴³ In the case of operations under UN command, the use of force is often not stipulated in original resolutions, but authorised later by supplementary mandates for the protection of humanitarian convoys and the civil population (rules of engagement).

⁴⁴ Bouchet-Saulnier writes: “Cette troisième génération du maintien de la paix a jeté un lourd discrédit sur l'ONU, et marqué un coup d'arrêt au lancement d'interventions en faveur de la paix.” Bouchet-Saulnier, Françoise: *Maintien de la paix*, in: *Dictionnaire pratique du droit humanitaire*, Paris 1998, p. 242.

⁴⁵ Examples abound: Bettati lists 65 resolutions of the Security Council between April 1991 and December 1995 insisting that warring states should allow access to humanitarian organisations, urging parties to a conflict to refrain from obstructing humanitarian relief and demanding at times that they facilitate such relief. See Bettati Mario: *Le droit d'ingérence*, Paris 1996, p. 329-340.

⁴⁶ As Damrosch has noted, recent resolutions ‘evidence a newly emerging consensus that the Security Council's enforcement powers may be invoked...in...purely domestic situation[s]’. in Damrosch: *Changing conceptions of intervention in international law*, in: Reed and Kaysen (eds.): *Emerging norms of justified intervention*, Cambridge, 1993, p. 105.

matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

This trend suggests that the rationale of non-intervention in internal affairs enshrined here is being replaced by the principle that massive or widespread violations of human rights or humanitarian law arising from governmental acts or internal conflicts and the magnitude of human suffering that they engender can constitute a threat to international peace and security. In those circumstances, the Security Council can take appropriate measures, including the use of force for the protection of humanitarian relief operations. This was especially evident in the case of Somalia, where the threat to neighbouring states was relatively small and arguably receding by the time Resolution 794 was adopted.

In this light, it becomes clear that important difficulties remain with the argument that the Security Council has been authorising a number of “humanitarian interventions”.

First, there seems to be confusion in the understanding of the term 'humanitarian intervention'. Guicherd's analysis overlooks an important fact: with the sole exception of Resolution 940, all cited Security Council Resolutions authorised the use of force to protect humanitarian relief and rescue operations, but not to conduct operations effectively intervening in the conflict and aimed at influencing its outcome. NATO's intervention in Kosovo would not fall into this category. 'Humanitarian' operations are designed to provide food, shelter, and medicine directly to victims of conflicts, or to protect relief workers who furnish these goods and services, and are not meant to influence the political incentives of the actors in a conflict. They should be distinguished from 'peace enforcement' operations, which can imply the use of force against one of the parties to enforce an end to hostilities.

The above-mentioned analysis also fails to recognise that when resolutions provided for forcible implementation without the consent of the government of the target country, they did so in situations when there was effectively no government that could authorise such an operation.⁴⁷

Finally, a further problem remains. While the practice shows a lesser degree of respect towards the sovereignty principle than in the Cold-War era, it is debatable whether developments taking place within a codified legal system such as the UN Charter can serve as a basis for justifying actions outside the UN umbrella.⁴⁸

⁴⁷ According to declarations of UN Secretary-General Boutros Ghali at the time when Resolution 794 was adopted, “no government exists in Somalia that could request and allow such use of force”. (See UN Doc S/24868). For its part, Resolution 770 was adopted several months after the Arbitration Commission established by the Peace Conference on Yugoslavia had determined that the Socialist Federal Republic of Yugoslavia (SFRY) was in the process of dissolution (Opinion n.1 of the Badinter Commission, *International Law Reports* 162). See also Greenwood 1993, p. 38: “Although the conflict in what was the SFRY was originally perceived as a conflict within a state, the break-up of the SFRY meant that the conflict later became an international one. From that moment at least, the legal basis for outside intervention, whether by individual states or by the United Nations, no longer needed to rest on any theory of humanitarian intervention.”

⁴⁸ In principle, this argument tries once again to extract a norm from a non-codified practice, and if put to the test, it would hardly qualify as such. Further, it overlooks the fact that the codification of international concern for situations of extreme humanitarian distress either in the form of either the Declaration of Human Rights, the Geneva Conventions or the Convention on Genocide or other international treaties, did not include any enforcement provisions. Simma indicates that international concern for these situations is not contrary to the respect for the Charter because the international community can make use of countermeasures allowed for in the Charter in such cases. See Simma 1999, p. 1.

1.2.2. Assessing the Acceptance by States

What about the *opinio juris*? Legal doctrine attaches more importance to the psychological element than to the material one, noting that practice needs to be accompanied by a manifestation by states bringing it home that they view their behaviour as legal. In fact, it is the conviction that the act is legal what differentiates law from mere courtesy.

Since the entry into force of the UN Charter, most states taking forcible action abroad have tended to reject the notion that their actions were humanitarian interventions. Even in cases where there appeared to be a clear humanitarian rationale such as in India's intervention in East Bengal in 1971 or the Vietnamese intervention in Cambodia in 1978, states did not make any reference to humanitarianism, what is still interpreted as an indication that they were willing to uphold the non-interventionist regime.⁴⁹

Do developments following the Kosovo events add something new to this state of affairs? Several authors contend that now a majority of states regard humanitarian interventions as legal, pointing out that the voting on two UN Security Council resolutions can be seen as granting post-facto legitimisation to the Kosovo operation:

A draft resolution tabled by Russia two days after the commencement of the NATO strikes against FRY calling for the cessation of the use of force against the FRY was defeated by twelve votes to three- those of Russia, China and Namibia.⁵⁰ Further, resolution 1244 of 10 June 1999 authorising "Member States and relevant international organisations to establish the international security presence in Kosovo", adopted with the abstention of China, can be regarded as sanctioning NATO's presence in Yugoslav territory.⁵¹

It is actually striking that most Third World countries, which have traditionally displayed firm opposition to humanitarian interventions, were supportive of the resolution. However, it should be kept in mind that opposition by states is enough to prevent the formation of a custom. A "majority of states" would not be enough. With the consistent expressions of disapproval by a number of states, in particular coming from countries such as Russia and China, no international custom binding upon them could be set up.

As a further sign of a growing international acceptance of humanitarian-grounded interventions, some commentators adduce that a principle recognising that populations in danger of starvation, massacre or other forms of massive suffering have the right to receive assistance was set out by General Assembly Resolution 43/131 of 8 December 1988.⁵²

However, it is important to make clear that the resolution merely invites countries to contribute and to facilitate the provision of humanitarian assistance 'in natural disasters and similar situations'. GA resolutions fall short of furnishing a legal basis, since they are not legally binding. At best, they can be considered to reflect a change in general attitudes of the international community. Only a wide interpretation of the resolutions allows for a recognition of the right of endangered populations to humanitarian assistance.

Furthermore, the wording 'right to humanitarian assistance' can be found nowhere in the text of Resolution 43/131.⁵³

The existence of this principle could not be claimed without later Security Council availing itself of a right of humanitarian intervention in a number of Resolutions, still necessary to legitimise

⁴⁹ This argument is even used to support the idea that the non-interventions principle is based on customary law. See Ipsen, Knut: *Völkerrecht*, München 1999, p. 956.

⁵⁰ See "War with Milosevic", *The Economist*, 3rd April 1999, p. 18. Nevertheless, the rejection of the Resolution does not mean that the air raids received an 'implicit authorisation', as has been argued, since Russia and China explicitly opposed the war.

⁵¹ Ronzitti insinuates that a parallel could be drawn with the Tanzanian invasion of Uganda, which was condoned by the international community. See Ronzitti 1999, p. 51.

⁵² This resolution was later reaffirmed by another General Assembly Resolution 45/100 of 14 December 1990.

⁵³ In contrast, the "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty", GA Res. 2131 of 21 December 1965, although much older, displays a much more assertive language against the right of humanitarian intervention.

the action. Not even the combined right of victims to assistance and the right of the Security Council to authorise humanitarian interventions with military means do amount to a right to humanitarian intervention by states.⁵⁴

The case against the existence of this institution, represented by the overwhelming legal opinion, is quite conclusive: Both constitutive elements of the international custom, *diuturnitas* and *opinio juris* are lacking. Neither is there a consistent state practice nor the general agreement of the community of states required to establish an international custom is given. Therefore, it is clear that the institution of humanitarian intervention does not exist under customary international law.

⁵⁴ Bettati characterises this as an “hypocrisy” within international law: while the right of victims to assistance is recognised as part of customary international law, it is not possible to derive a right of states to bring this assistance by all means, including military force. See: Bettati 1996, p. 171.

2. Could the Establishment of the Institution of Humanitarian Intervention ‘Legalise’ Unauthorised Action?

While it cannot be argued that at present a legal basis exists for humanitarian interventions outside the UN-umbrella, a number of indices show that the concept of forcible humanitarian intervention is winning legitimacy.

It has been proposed that NATO could try to promote the establishment of this institution.⁵⁵ This argument is valid. One of the special characteristics of international law is that violations of law can lead to the formation of a new law, so that an international custom could be intentionally created. NATO could attempt to modify the legal system in order to overcome the legitimacy problem.⁵⁶

Certain statements by officials point in this direction. As shown above, UK Prime Minister Blair has vigorously defended the idea of humanitarian intervention, even formulating guidelines. For German Defence Minister Scharping international law should be further developed so that massive human rights violations could be considered as a legitimate basis for military intervention.⁵⁷

Further signs allow to diagnose that the concept of forcible action on humanitarian grounds is winning legitimacy. Only six years ago, the European Parliament invited EU members to contribute to the establishment of a right of humanitarian intervention in a majority resolution.⁵⁸ UN Secretary-General Annan seemed to condone the Kosovo intervention in an address to the Commission on Human Rights in Geneva with the following words: “[E]merging slowly, but I believe surely, is an international norm against the violent repression of minorities that will and must take precedence over concerns of sovereignty.”⁵⁹ Also the UN Special Representative of the Secretary General for Kosovo Bernard Kouchner has repeatedly stated that Kosovo is “the laboratory of a new international right”.⁶⁰

It appears that also among the ranks of legal experts the acceptance of the notion of humanitarian intervention is growing. Most legal experts condemned the Kosovo operation, but their reaction has neither been unanimous nor categorical. Some scholars reject any justifiability of the intervention outright, qualifying the intervention as a clear aggression and claiming that it

⁵⁵ Bring 1999, Cassese 1999, Guicherd 1999.

⁵⁶ However, the suitability of change of international law should not be overestimated. Allowing for a right of humanitarian intervention would constitute a partial derogation of the ban on force enshrined in Art. 2(4) of the UN Charter. Because the ban of force is *ius cogens*, it does not allow for derogations (See footnote 9) and it is not affected by violations (“*ex injuria ius non oritur*”). Nonetheless, the status of the ban of force as *ius cogens* does not make it completely impossible for humanitarian interventions to become legal. Art. 53 (in conjunction with Art. 64) of the Vienna Convention on the Law of Treaty of 1969 establishes that a peremptory norm can be modified by a subsequent norm having the same character. This means that humanitarian interventions could become legal if the (quasi) totality of the community of states would regard them as legal. As Higgins has pointed out, norms that are *ius cogens* cannot be derogated from because they have something like a ‘higher normativity’, but the inverse is right: because these norms are particularly dear to the community states as a whole, they continue to be a requirement of customary international law. See Higgins, Rosalyn: *Problems and Process. International Law and how we use it*, Oxford 1994, pp. 18-22.

⁵⁷ See *Frankfurter Allgemeine Zeitung*, 17 Oktober 1998. The cluster of reasons presented by Scharping’s predecessor Kinkel as well as by former NATO Secretary-General Solana reflects the belief that the combination of certain conditions make a military threat legitimate.

⁵⁸ European Parliament: Resolution of 20. April 1994, see: BT-Dr 12/7513 von 10.Mai 1994.

⁵⁹ Address of Secretary-General Kofi Annan to the Commission on Human Rights in Geneva, 7 April 1999. Similar statements of Annan’s predecessors include: Pérez de Cuellar stated at speech at the University of Bordeaux in 1991: “[W]e are clearly witnessing what is an irresistible shift in public attitudes towards the belief that the defence of the oppressed in the name of morality should prevail over frontiers and legal documents”. (quoted in Abiew 1998, p. 1) For his part, Boutros-Ghali observed in his “Agenda for Peace” that “the time of absolute and exclusive sovereignty...has passed”. (see Boutros-Ghali: *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, Report of the Secretary General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, New York 1992, p. 5)

⁶⁰ See for instance interview in the Swiss newspaper *Le Temps*, 23 Octobre 2000.

is unacceptable from a legal perspective.⁶¹ It has also been argued that the intervention can be justified on an exceptional basis, but that any precedential character should be denied.⁶² Not many authors contend that the intervention was in conformity with international law.⁶³

2.1. Exploring Ways of Establishing the Notion of Humanitarian Intervention

There are at least three conceivable ways for NATO to promote the establishment of this institution: by codification, by practice and through an authorisation mandate from the UN Security Council to regional organisations.

2.1.1. *Establishment by practice or by codification*

A possibility is to codify a checklist of criteria in the form of an international treaty allowing for the conduct of humanitarian interventions. This option clearly enjoys much wider acceptance among advocates of this institution than its establishment by practice. Experts invariably coincide in the need for codification of this kind of interventions in order to avoid its risks and to promote its long-term acceptance.

First, a clear definition would be needed of which human rights violations and what extent they would have to reach before interventionist action is taken.

Numerous suggestions for a set of criteria to determine the legality of a humanitarian intervention have been presented so far. Proponents insist that adherence to very strict conditions is essential in order to reduce the inherent dangers of abuse. In principle, there seems to be agreement among specialists about some of these conditions:

- a. The use of force should be resorted to only in situations of gross, persistent and systematic violations of human rights, such an imminent threat of loss of life manifested in mass killings, starvation or other activities.⁶⁴
- b. Intervention should be a "solution of last resort". Diplomatic means and unarmed coercion must have been exhausted, and the use of force must be the only way to avert a major humanitarian disaster. The Security Council must have proven non-operational.⁶⁵
- c. Interventions should preferably be carried out multilaterally. The rationale for this condition is the hope that building multilateral coalitions will filter out the worst forms of national self-interest.⁶⁶
- d. Force should be used to a minimum to prevent an escalation of violence.
- e. Intervention should not be aimed at a permanent transformation of pre-existing legal arrangements, e.g. the secession of a province.
- f. Participating states should act in close co-ordination with the UN and, when possible, hand the matter back to the UN.

⁶¹ See Pradetto, August: Die NATO, humanitäre Intervention und Völkerrecht, *Aus Politik und Zeitgeschichte*, 11/99; Remiro Brotons, Antonio: De la asistencia a la agresión humanitaria?, *Política Exterior*, 68. Mayo/Junio 1999; Deiseroth 1999; Mohr, Manfred: An der Schwelle zu einem neuen Völkerrecht?, *Wissenschaft und Frieden*, 4/99-1/00.

⁶² Simma 1999.

⁶³ Ipsen 1999b; Tomuschat 1999; Greenwood 1993, also as quoted in: War with Milosevic, *The Economist*, 3rd April 1999. A number of observers admit the illegality but defend the legitimacy of the strikes: Roberts, Adam: Willing the Ends but not the means, *The World Today*, 55(5), May 1999; Glennon, Michael J.: The New Interventionism, *Foreign Affairs*, 78(3), May/June 1999. See also footnote 3.

⁶⁴ See for instance Hoffman: Sovereignty and Ethics of Humanitarian Intervention, in Hoffman (ed.): *The Politics and Ethics of Humanitarian Intervention*, Notre Dame 1996, p. 38.

⁶⁵ See for instance Dallmeyer, L.: "National Perspectives on International Intervention, in Daniel and Halys: *Beyond Traditional Peacekeeping*, London, 1995, p. 25.

⁶⁶ Glennon 1999, p. 5.

Some proponents consider these prerequisites preferential rather than absolute.⁶⁷

An establishment by practice is also thinkable. NATO could also attempt to establish a practice of humanitarian intervention so that it becomes part of international customary law.⁶⁸

2.1.2. General authorisation by the UN Security Council to regional organisations

In the same line defended by Bring, Ronzitti suggests that the Kosovo operation could open an option for regional organisations to intervene. His proposal is grounded on the fact that Article 53 of the UN Charter does not state that the Council should not authorise regional organisations to resort to force on a case-by-case basis:

“The Council might thus give a general authorisation and adopt a resolution setting the conditions and limits within which a regional organisation or a regional arrangement may take action. The regional body should act under the scrutiny of the of the Security Council, which could always decide to stop a regional action, since it has the ultimate responsibility for maintaining international peace and security. But this means that the five permanent members could exercise a negative veto power - the regional organisation receives a general authorisation which can be stopped by a UN resolution, i.e. which can be blocked by a permanent member.”⁶⁹

2.2. Remaining problems

The institutionalisation of humanitarian interventions presents serious problems, the core difficulty resting with the danger of abuse.

It needs to be made clear that selectivity will remain a need.⁷⁰ Codification would not do away with the danger of abusing this right for political gains. Multilateralism cannot guarantee that interventions are not undertaken for the sake of national interests. Difficulties are also associated with the need of quantifying the number of people whose lives must be threatened or lost before the use of force is justifiable.

The option of an establishment by practice would be even more problematic. It does not have advocates. There are important dangers in replacing a formal system with a set of vague, half-formed principles that seem more the product of after-the-fact rationalisation than of pre-agreement.⁷¹

States may act where it is not necessary while they may be inactive where it is necessary. The historic record is not encouraging: there have been a large number of cases since 1945 where entire ethnic, religious or political groups were persecuted or even massacred by their own states without any third state coming to their assistance, like in Indonesia (1965), Nigeria (1968), Burundi (1972) and more recently Rwanda (1994). Cases of ‘humanitarian’ interventions actually aiming to accomplish other political goals abounded in the century previous to the adoption of the Charter.⁷²

On the official side, guiding principles do not seem to be completely formed. The stance of British Prime Minister Blair, the main advocate of a general doctrine for humanitarian intervention among NATO leaders, proved somewhat inconsistent. Some statements seemed to

⁶⁷ Greenwood would be contented with only three criteria met: that a catastrophe is occurring, that it poses a threat to international peace and that the responsible is identifiable. See: War with Milosevic, *The Economist*, 3rd April 1999, p. 18.

⁶⁸ See page 13. Glennon regards the demise of the UN Charter system as a *fait accompli*. See Glennon 1999, p. 7 or Woodward 1999, p. 277.

⁶⁹ Ronzitti 1999, p. 54

⁷⁰ “Selbst bei einer personell wie finanziell verbesserten Ausstattung der UN könnte die internationale Staatengemeinschaft nicht überall einschreiten, wo Bürgerkriege und menschliches Leid herrschen“. See Krennerich, Michael: Humanitäre Intervention, in: Nohlen, Dieter: *Wörterbuch Staat und Politik*, München 1991, p. 262.

⁷¹ See Glennon 1999, p. 9. See also Ress-Mogg, William: Where’s the justice?, *The Times*, 29 March 1999.

⁷² Critics like Chomsky also draw attention to the experiences in Laos, Colombia or Turkey. See Chomsky, Noam: L’OTAN, maître du monde, *Le Monde Diplomatique*, Mai 1999.

indicate that action should be taken whenever a situation of humanitarian necessity was amenable of intervention: “You can’t intervene everywhere. There are places you can’t intervene at all. But I believe that it is right that when we have the capability to make a difference that we do.”⁷³

Other declarations suggested a more restrictive approach, taking into account a wider number of factors on which a decision to act should be made dependent:

“First, are we sure of our case?...Second, have we exhausted all diplomatic options?...Third, on the basis of a practical assessment of the situation, are there military operations we can prudently and sensibly undertake? Fourth, are we prepared for the long term?...Having made a commitment we cannot simply walk away once the fight is over; better to stay with moderate numbers of troops than return for repeated performances with large numbers. And finally, do we have national interests involved? The mass expulsion of ethnic Albanians from Kosovo, demanded the notice of the rest of the world. But it does make a difference that this is taking place in such a combustible part of Europe.”⁷⁴

Even if a consistent practice and criteria for action were established, there are reasons to think that states will reject adhering to any such doctrine:

States still have divergent views about the inviolability of state sovereignty, and some states will be reluctant to codify a norm that might justify an attack on them on a future occasion.⁷⁵ Moreover, most states are uneasy about justifying in advance a type of operations which might further increase the prevalence of major powers.

There can be some reticence to create a doctrine which might oblige potentially intervening states to intervene in a situation where they would otherwise not be keen to do so and which might reduce their freedom of action or damage their credibility. In fact, it is not clear that NATO states are prepared to promote this institution. Rather, it seems that not even a majority of its members seem to have any intention of establishing and following such a doctrine. While almost all NATO states made some mention of humanitarian motivations in their policy stances on Kosovo, the doctrine of humanitarian intervention was not generally invoked as such. Both governments and the NATO Secretary-General preferred to use a terminology free of reference to any legal institution, such as “to prevent further humanitarian catastrophe”.⁷⁶

Most NATO governments emphasised the exceptional character of the intervention over Kosovo, making clear that it should not serve as a precedent for action without a Security Council authorisation.⁷⁷ France in particular manifested misgivings about justifying the Kosovo operation with the right to humanitarian intervention.⁷⁸

Furthermore, such a course would not take into account Germany’s specific legal obligations. Even after the July 1994 ruling by the Constitutional Court permitting participation in multinational peace operations under a case-by-case approval of the Parliament, Germany is still legally constrained with regard to the use of force.⁷⁹

⁷³ See Hoagland, Jim: Blair on NATO: We must defend human values, in: *The Washington Post*, 19 April 1999.

⁷⁴ Tony Blair’s speech ‘Doctrine of the International Community’, in Chicago, 22 April 1999.

⁷⁵ It should be noted that all advocates of legitimising humanitarian interventions have anglo-saxon origins.

⁷⁶ It has been suggested that the emphasis on ‘humanitarianism’ did not stem from an intention to originate a new rule, but was intended at diverting attention from the illegality of the operation. See Mohr 1999.

⁷⁷ Former German Foreign Minister Klaus Kinkel explained the German government’s position as follows: “The decision of NATO must not become a precedent. As far as the Security Council monopoly on force is concerned, we must avoid getting on a slippery slope.” See Deutscher Bundestag: Plenarprotokoll 13/248, October 16 1998, at 23129.

⁷⁸ See Bauer, Friederike: Mehr Druck vom Sicherheitsrat verlangt, *Frankfurter Allgemeine Zeitung*, October 16, 1998.

⁷⁹ Internally, Art. 26 (1) of the German Constitution forbids the country to initiate any war not grounded on self-defence. Internal legislation like Art. 80 StGB prohibits even preparations for war. Internationally, Germany acquired a further obligation to restrict the use of force under the “Two-plus-Four-Treaty” of September 12, 1990, which stipulates that a unified Germany would only employ force in conformity with its Constitution and with the UN Charter. See Art. 2 of “Abschließende Regelung in bezug auf Deutschland”, in: Auswärtiges Amt (Hrsg.): *Verträge der Bundesrepublik Deutschland*, 1992. Further, the Federal Constitutional Court has demonstrated a clear willingness to uphold the constitutional requirements for German participation in international organisations, which include the conformity of all these activities with the rules and procedures of the UN Charter. See Simma 1999, p. 14.

2.3. Difficulties in the qualification of Kosovo as a Humanitarian Intervention

Finally, legal problems stemming from the form of belligerence chosen by NATO can make it more difficult for the Alliance to sustain the humanitarian character of the intervention. At first sight, this seems to be a political or moral point, since this kind of intervention is not typified. But it could have legal consequences for the qualification of an operation as humanitarian-grounded in case this would ever be established.

It is not unanimously accepted that the operation in Kosovo would qualify as a humanitarian intervention. A number of scholars, among them defenders of the intervention, contend that the election of the means to carry out the operation makes its legality doubtful. They claim that only an operation solely and directly aimed at the rescue of the population in danger would qualify as a humanitarian-grounded intervention.⁸⁰ The following points are held to discredit the humanitarian rationale of the Kosovo operation:

a) Failure to accomplish the humanitarian objective of the operation due to inadequate means

Both the chosen strategy and the means (air warfare aimed at bringing about the signing of an agreement) were inadequate to rescue the population in danger. Therefore, observers have pointed to the indefensibility of the humanitarian character of the intervention. Since unilateral intervention can only be justified - it at all - as the sole remaining means to avert systematic human rights violations, military force should aim directly at protecting the endangered population. The use of force is no longer justified when the intervention attempts to force the political leadership into agreeing at a political solution, as was the case in Kosovo.⁸¹

Moreover, the intervention not only failed to protect the endangered population in a first stage, but its immediate effect was to exacerbate the ethnic onslaught. As Rogers reported:

“Instead of making the Milosevic regime pull back, the air war had the opposite effect as the regime embarked on a race against time to expel ethnic Albanians and defeat the KLA before the air war intensified.”⁸²

This risk was arguably foreseeable at the time when the operation was launched. The use of ground troops might well have prevented a great deal of the ethnic cleansing.

b) Civilian casualties and targeting of civilian objectives

Moreover, the targeting of civilian objectives and civilian casualties caused by so-called ‘collateral damage’ make the humanitarian character of the operation doubtful.⁸³

NATO’s action was clearly in conflict with Humanitarian Law when it destroyed a number of civilian objects of no military value, such as non-military related factories, oil refineries, power stations, water supplies or the Serbian Television building. This clearly constitutes a breach of the Geneva Conventions, which forbids the targeting of civilian objectives.⁸⁴ In particular, the targeting of water systems collides with the specific protection of objects indispensable to the

⁸⁰ For Tomuschat, “man (wird) den Entschluß der NATO, zum Schutz der Kosovo-Albaner mit militärischen Mitteln einzugreifen, nicht in ein Licht der Illegalität rücken können. Zweifel ergeben sich freilich angesichts der gewählten militärischen Strategie, lediglich auf das Mittel des Luftkrieges zu setzen.“ See Tomuschat 1999, pp. 35-36.

⁸¹ See Preuß, Ulrich K.: Zwischen Legalität und Gerechtigkeit, *Blätter für Deutsche und Internationale Politik*, 44(7), Juli 1999, p. 826.

⁸² Rogers 1999, p. 4. Some have argued that the withdrawal of the OSCE observer force immediately before the war left Serb paramilitaries with a free hand to drive out hundreds of thousands of Kosovar Albanians.

⁸³ Initially, only military objectives were targeted. During the second half of the war the target list in Serbia was progressively expanded.

⁸⁴ Article 52 of the First Additional Protocol of 1977 to the Geneva Conventions of 1949 reads: “Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation...offers a definite military advantage.”

survival of the civilian population.⁸⁵

Further, concerns were also raised about the use of cluster bombs, air-delivered weapons which fragment into a large number of bomblets.⁸⁶ Since unexploded ordnance has the same effect as landmines, the degree of "collateral damage" it can cause might well surpass that permitted by Humanitarian Law.⁸⁷

For the purpose of qualifying the operation, it is clear that the selection of a strategy which brings about civilian casualties runs counter to the humanitarian character of the operation. Both from a moral and legal point of view, it is highly questionable that humanitarian protection can be provided by infringing damage on non-participants - in the present case, the Yugoslav civilian population.⁸⁸

The difficulty is that NATO is likely to stick to low-risk warfare in future, so that the mentioned inconsistencies will persist.

⁸⁵ Article 54 (2) of the First Additional Protocol of 1977 to the Geneva Conventions of 1949 prohibits to attack objects indispensable to the survival of the civilian population, such as drinking water installations and supplies. Official statements corroborated that the destruction of water supplies was aimed at causing war-fatigue among the population. See statements by NATO Generals in *Philadelphia Inquirer*, 21 May 1999.

⁸⁶ See *Human Rights Watch*, NATO's Use of Cluster Munitions in Yugoslavia, 11 May 1999. For a short discussion of further charges see Kröning, Volker: Kosovo and International Humanitarian Law, *Humanitäres Völkerrecht*, 1/2000.

⁸⁷ Collateral damage is unintended, incidental damage inflicted upon civilians or property that is not itself part of a military target as a result of attacks on military objects. The Geneva Convention provides that the belligerents observe some requisites in the targeting such as the principles of Proportionality and Precautions in Attack. See Art. 35/2, 51/5 (a) 56, 57/2 (iii) and 57/2 (b) of Protocol 1.

⁸⁸ See Preuß 1999, p. 826. See also Merkel, Reinhard: Das Elend der Beschützten, *Die Zeit*, 12 Mai 1999.

3. The Political Inconvenience of Promoting the Establishment of Humanitarian Interventions

3.1. Is caution in place?

Indeed, neither NATO nor the EU have indicated that they would only act with a UN Security Council mandate when they undertake peace operations in future. Although crisis management operations have become NATO's main operational function since 1992⁸⁹, the organisation did not include crisis management among its core security tasks until the Washington Summit of 1999 when it adopted the New Strategic Concept.⁹⁰

At the beginning of the decade, NATO first announced the intention to engage outside the area of the member states in the form of supporting peace operations “under the authority of the UN Security Council or the responsibility of the Conference on Security and Co-operation in Europe”.⁹¹

A close look at the text of the new Strategic Concept shows that, despite numerous references to the UN Security Council, peace operations are at no point linked to a UN Security Council authorisation. Paragraph 10 of the new Strategic Concept characterises NATO as “an Alliance of nations committed to the Washington Treaty and the United Nations Charter.” Paragraph 15 of the new Strategic Concept reads:

“The United Nations Security Council has the primary responsibility for the maintenance of international peace and security and, as such, plays a crucial role in contributing to security and stability in the Euro-Atlantic area.”

Finally, paragraph 31 of the new Strategic Concept repeats the formulation of the 1994 Brussels Ministerial Declaration:

“NATO will seek, in co-operation with other organisations,...should a crisis arise, to contribute to its effective management, consistent with international law, including through the possibility of conducting non-Article 5 crisis response operations.”

These passages remain subject to interpretation. The formula “an Alliance of nations committed to...the UN Charter” can be interpreted as implying respect for its 'principles and purposes', but does not explicitly mention the UN Security Council's monopoly of force. The recognition of the “primary responsibility of the UN Security Council for the maintenance of international peace and security” is not equal to the recognition of a “sole” responsibility. A Slovenian representative stated before the Security Council that this had “the primary, but not exclusive, responsibility for maintaining international peace and security”.⁹² Finally, the offer to support operations under the authority of the UN Security Council does not exclude that crisis management operations will be conducted without a UN approval.⁹³

⁸⁹ Until 1999, its military intervention in former Yugoslavia was comprised of maritime operations to enforce the UN arms embargo (Res. 787), air operations to enforce no-flight-zones (Res. 781 and 816), air strikes (Res. 836) and ground operations (IFOR/SFOR) to implement the Dayton Agreement.

⁹⁰ The New Strategic Concept of NATO, April 4, 1999.

⁹¹ Originally, the Oslo Ministerial Declaration of June 1992 made this offer only to CSCE. Two years later, the same offer was made to the UN: “We reaffirm our offer to support, on a case by case basis in accordance with our own procedures, peacekeeping and other operations under the authority of the UN Security Council or (CSCE), including by making available Alliance resources and expertise.” NATO: Summit Declaration of the North Atlantic Council, January 11, 1994, title 7.

⁹² Taken from an account of the Security Council debate, UN Press Release SC/ 6659, March 26, 1999.

⁹³ This ambiguity has to be seen against the background of the virulent debate that took place within the Alliance on whether a legal basis to conduct crisis management was required. This debate was defined by the extreme stances of the US, who defended that a UN mandate was not always necessary for NATO actions, and France, who contended that the Alliance should bind itself to a Security Council authorisation. The imprecise references to the UN Security Council included in the final formulation result from a compromise eventually found between the two stances. See

The lack of a self-imposed obligation to act only with a mandate of the UN Security Council leaves open the possibility of unauthorised action.⁹⁴

The issue becomes even more preoccupying when the European Union follows this example. In the Helsinki Declaration, the EU declares its intention to engage in crisis management without explicitly binding its actions to a Security Council mandate.⁹⁵

What could be the consequences of NATO adopting a course that ignores the legal authority of the Security Council to allow for the use of force?

3.2. Consequences for NATO-Russia Relations

The intention to engage in crisis management, in particular when not accompanied by an explicit subordination to the UN Security Council, clearly collides with NATO's objective to develop an "enduring and equal partnership" with Russia.⁹⁶ The most immediate effect of the bombing of Yugoslavia on relations with Russia was the suspension of co-operation activities in the NATO - Russia Permanent Joint Council for about one year.

Russia's strong condemnation of the intervention is not just 'one more objection' to NATO's policies such as, e.g. enlargement. The assumption of crisis management by the Alliance places new terms on the NATO-Russia relationship. While enlargement was perceived by Russia as intended to reduce its area of influence, the intervention in Kosovo was seen as a precedent which could justify a potential aggression directed against her own territory. Legitimising humanitarian interventions could ultimately affect Russia's own integrity.⁹⁷

Further, Russia resented being excluded from the management of the Balkans questions, one of the few international questions in which she had been active in the last years, adding to the gradual alienation of Russia from the European security framework.⁹⁸

The circumvention of the UN Security Council comes to worsen a NATO-Russia relationship that is already feeble. NATO disregarded the Founding Act on Mutual Relations, Co-operation and Security between NATO and the Russian Federation signed in 1997, which explicitly reiterates mutual adherence to the UN Charter and the Helsinki Final Act with explicit reference to refraining from the threat or use of force and respect for sovereignty.⁹⁹

Russia's opposition and threats of countermeasures have often been dismissed by NATO leaders on the basis that this country could not afford to jeopardise its relations with the West, on whose economic support it ultimately depends.¹⁰⁰ They rely on the fact that Russia's chronic economic

Kamp, Karl-Heinz: Das neue strategische Konzept der NATO, Konrad Adenauer Stiftung, Arbeitspapier, Sankt Augustin, Juni 1998.

⁹⁴ As noted above, Allies do not hold any treaty obligation to act beyond the scope of collective self-defence. In Article 5 of the Washington Treaty, the Allies merely agreed to "assist the Party or Parties so attacked by taking...such action as it deems necessary, including the use of armed force." Participation in out-of-area operations will therefore continue to rest on a voluntary basis.

⁹⁵ Council of the European Union: Helsinki European Council Presidency Conclusions, December 10-11, 1999, paragraph 26.

⁹⁶ NATO: Founding Act on Mutual Relations, Co-operation and Security between NATO and the Russian Federation, see above.

⁹⁷ As early as in 1991 Weiss and Campbell reported indices of this preoccupation: "There is manifest concern in the Kremlin that UN operations in Iraq might provide a precedent for outside intervention in Moscow's domestic affairs." See Weiss, Thomas G. and Campbell, Kurt M.: Military Humanitarianism, *Survival*, 32(5), September/October 1991, p. 461.

⁹⁸ By progressively marginalising the arrangements where Russia has a veto, i.e. OSCE and the UN, Western leaders have effectively excluded that country from European security affairs. See Zelikow, Philip: The masque of institutions, *Survival*, 38(1), Spring 1996, pp. 6-18.

⁹⁹ See NATO: Founding Act on Mutual Relations, Co-operation and Security between NATO and the Russian Federation, Paris 27 May 1997, p. 3. The only out-of-area operations mentioned are peacekeeping operations under the authority of the UN or the OSCE.

¹⁰⁰ Russian leaders have consistently warned that such policies could lead Moscow to adopt countervailing measures,

weakness and military paralysis make the risk of external aggression negligible.

On the other hand, serious incentives remain for NATO member states to substantiate its partnership with Russia.

In the first place, NATO states, and in particular its European members, have an interest in Russia's long-term stability. There is still a risk that a feeling of exclusion could strengthen nationalist elements in the domestic arena and eventually trigger a backlash - or even a civil war. As long as Russia remains a nuclear power, the West will need her as a co-operative partner in such critical fields as arms control negotiations and non-proliferation efforts.

With NATO's engagement in regional conflicts, the list of incentives for good relations will be expanded.

Russia's co-operation can be extremely helpful for NATO. Occasions for contact with Russia will also arise more frequently and at an immediate level if the Alliance takes action in the Eastern part of the continent. The fact that Russia's engagement in Kosovo was a critical factor in resolving the crisis illustrates how that country, even in its enfeebled state, continues to have considerable diplomatic and political influence in key parts of Eastern Europe.¹⁰¹ Ambassador Blackwill put the point in a nutshell stating that "there is not a problem on the (European) continent that is not made more manageable through Russian co-operation, and none that does not become more intractable if Moscow defines its interests in ways that oppose Western interests."¹⁰²

These considerations evidence the core dilemma: While engaging in crisis management without UN approval alienates Russia, Moscow's diplomatic role is bound to be essential in resolving future contingencies in Europe.

3.3. Consequences for the relationship between NATO and the international community

Long term consequences should also be taken into account. Repeated Alliance actions without Security Council authorisation could severely worsen the relationship of NATO with the rest of the international community.

There is a danger that the relationship between NATO and UN in the field of peace operations moves from reinforcement to competition. However, the ongoing discreditation of the UN should not be reduced to a mere question of competition between two organisations, since they have a different nature. The UN remains the only organisation entitled to act of behalf of the international community. Despite its obvious flaws, the UN Security Council's monopoly of juridical capacity to authorise the use of force ensures a more universal acceptance of its actions than an alliance of Western states. The sidelining of the UN effectively implies the exclusion of the international community from decision-making in the domain of collective security.

Further, the abandonment of the non-interventionist regime of the UN Charter presents a number of important risks.

International inhibitions about the use of force could be undermined, with the potential effect of escalating hostilities rather than resolving them. This could lead to a return to the balance of power system where war was regarded as a legitimate military means to political ends as predicted by Mearsheimer.¹⁰³

NATO countries should be aware of possible boomerang effects:

or that they could even trigger a backlash in Russia by strengthening nationalist elements in the domestic arena.

¹⁰¹ Rogers wrote: "In perhaps the greatest irony of the entire Kosovo war, NATO was rescued from its predicament in Kosovo by its historic enemy." See Rogers 1999, p. 6.

¹⁰² Blackwill, Robert D., quoted in: Dannreuther, Roland: Escaping the Enlargement Trap in NATO-Russia relations, *Survival*, 41(4), Winter 1999-2000.

¹⁰³ See Mearsheimer, John J.: Back to the Future: Instability in Europe after the Cold War, *International Security*, 15(1), Summer 1990.

Any other state might follow their example and decide to act for the Security Council as a self-appointed guardian of the UN resolutions. This could eventually result in a growing reluctance by the Security Council to qualify a “situation as a threat to international peace and security”, given that such description could be interpreted by NATO as an excuse for action.¹⁰⁴

Finally, a perception of the Alliance as trying to impose its particular set of values could strengthen anti-Western sentiment in some parts of the world. The preoccupying nuclear proliferation in Third World countries could be ascribed to such perception. For Møller, the Alliance should adhere to international law precisely because it has the ability to violate it with virtual impunity.¹⁰⁵

¹⁰⁴ "In Zukunft werden andere Sicherheitsratsmitglieder große Zurückhaltung üben, Resolutionen in Menschenrechtsfragen zu verabschieden, die wie im Fall Kosovo als Rechtfertigung für ein einseitiges militärisches Vorgehen benutzt werden könnten." See Pradetto, August: Zurück zu den Interessen: Das Strategische Konzept der NATO und die Lehren des Krieges, *Blätter für Deutsche und Internationale Politik*, 44(7), Juli 1999, p. 813.

¹⁰⁵ "Violations of international law are all the more alarming as the perpetrator is an alliance which enjoys an unprecedented military superiority, with two thirds of global military expenditures, and which includes no less than three nuclear-weapon states. Both because of this position of military preponderance and by virtue of its three permanent seats in the Security Council, NATO can violate international law with virtual impunity." Møller 1999, p. 89.

Conclusions

This study has shown that:

- NATO cannot operate legally in a Kosovo-type situation without a mandate of the UN Security Council.

The result of the legal analysis is quite conclusive: forcible actions taken without a Security Council authorisation cannot be considered legal. Justifying unauthorised action on the ground of the doctrine of humanitarian intervention is not possible, as such institution is non-existent under current International Law. While it is true that the principle of national sovereignty is eroding, this is happening very slowly. Recent developments that have led certain analysts to sustain that such right is emerging can at best be interpreted as an indication that the notion of humanitarian-grounded military interventions is becoming more acceptable.

- It is dubious that NATO could succeed in promoting the institution of humanitarian intervention if it tried.

While some have suggested that circumstances are increasingly benign for promoting the establishment of a right of humanitarian intervention, which would provide a legal basis for humanitarian-grounded actions, this course presents serious problems.

First, the feasibility of reaching a universal consensus on the question is dubious. Because the establishment of humanitarian interventions would imply a derogation from *ius cogens*, no international custom can be established without universal acceptance.

Furthermore, it is unclear whether an intervention of the Kosovo type would qualify as a humanitarian intervention, even if this institution existed.

- NATO should not try to promote the institution of humanitarian intervention in order to establish a legal basis for future out-of-area actions.

Finally, a glance at the consequences that the establishment of humanitarian interventions would have for international relations suggests that costs would outweigh benefits:

NATO countries risk failing in its more important short-term objective of ‘integrating Russia’ into the West, since its increasing international isolation entails higher security risks.

Legal permission to undertake humanitarian actions unilaterally would leave a wide scope for abuse open, gravely undermining the cornerstone of the present system of International Law, the ban on the use of force. In exchange, acquiring the right to intervene in internal affairs for humanitarian reasons would address rather marginal, if any, national interest of states, including NATO members.

Furthermore, NATO will make its new role in crisis management more palatable to the international community if it abstains from taking forcible action without UNSC approval. Acting under a UN mandate enhances substantially the political acceptability of NATO actions. In conclusion, reasons for restraining NATO's crisis management action to UN Security Council mandated operations weigh heavily. NATO should link its new task to a UN mandate.

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