

# Operation Allied Force: A Case of Humanitarian Intervention?

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## ABBREVIATIONS

ACHR	American Convention on Human Rights
AFDI	Annuaire français de droit international
AFSOUTH	Allied Forces Southern Europe
AJIL	American Journal of International Law
ANZUS	Australia, New Zealand, and U.S. Security Treaty
AU	African Union
BYIL	British Yearbook of International Law
CFSP	Common Foreign and Security Policy
CSCE	Conference on Security and Cooperation in Europe
EADRCC	Euro-Atlantic Disaster Response Coordination Center
ECOMOG	Economic Community of West African States Monitoring Group
ECOWAS	Economic Community of West African States
EC	European Community
ECPHR	European Convention for the Protection of Human Rights
EJIL	European Journal of International Law
EPC	European Political Cooperation
EU	European Union
FAO	Food and Agriculture Organization
FNLA	Front National de Libération de l'Angola
FRY	Federal Republic of Yugoslavia
FYBIL	Finnish Yearbook of International Law
FYROM	Former Yugoslav Republic of Macedonia
GATT	General Agreement on Tariffs and Trade
GC	Geneva Convention
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IFOR	Implementation Force
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
IMF	International Monetary Fund
KDOM	Kosovo Diplomatic Observer Mission
KFOR	Kosovo Force
MAPE	Multinational Advisory Police Element
MFO	Multinational Force and Observer

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MISAB	Mission interafricaine de surveillance des accords de Bangui (Inter-African Mission to Monitor the Implementation of the Bangui Agreements)
MUP	Ministarstvo Unutrasnjih Poslova (Ministry of Internal Affairs)
NAC	North Atlantic Council
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
OAS	Organization of American States
OAU	Organization of African Unity
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Cooperation in Europe
OSCE KVM	OSCE Kosovo Verification Mission
PBEIST	(NATO) Planning Board for European Inland Surface Transport
PCIJ	Permanent Court of International Justice
PfP	Partnership for Peace
RCADI	Recueil des cours de l'Académie de droit international
RGDIP	Revue générale de droit international public
ROE	Rules of Engagement
SACEUR	Supreme Allied Commander Europe
SAJ	Specijalne Anti-terroristicke Jedinice (Special Anti-Terrorist Unit)
SEEC	Countries of South-Eastern Europe Cooperation
SFOR	Stabilization Force
SFRY	Socialist Federal Republic of Yugoslavia
UCK	Ushtria Çlirimtare e Kosovës (Kosovo Liberation Army)
UMA	Unmanned Aircraft
UN	United Nations
UNAMET	United Nations Mission in East Timor
UNAMIR	United Nations Assistance Mission to Rwanda
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commissioner for Refugees
UNITA	Union Nacional Por la Independencia Totale do Angola
UNITAF	Unified Task Force
UNMIK	United Nations Mission in Kosovo
UNOSOM	United Nations Operation in Somalia
UNPREDEP	United Nations Preventative Deployment in Macedonia (FYROM)
UNPROFOR	United Nations Protection Force in Yugoslavia
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
VCLT	Vienna Convention on the Law of Treaties
VJ	Vojska Jugoslavije (FRY armed forces)
WEU	Western European Union
WHO	World Health Organization
WMD	Weapons of Mass Destruction

## **MONOGRAPH**

Miss Katariina Saariluoma (née Simonen) was born in Helsinki in 1970. She obtained a degree in law from the University of Helsinki in 1994, an M.LL in 2001, and is currently preparing a thesis for her Ph.D. In addition to her legal training and her European language skills, she has acquired a considerable amount of professional experience through posts she has held as reviser with the Central Bank of Finland, jurist-linguist with the Court of Justice of the European Communities, jurist-reviser with the European Parliament, in a consultative capacity with the Court of Justice of the European Communities, and most recently as a senior researcher with the Finnish Ministry of Defense.

# Introduction

February 6, 1999 was an important day. The Federal Republic of Yugoslavia (FRY, Serbia and Montenegro) and representatives of the Kosovar Albanians were convened by the International Contact Group<sup>1</sup> to start negotiations in a chateau near Rambouillet, France. The object was to achieve a peaceful solution to the conflict in Kosovo, Serbia's tiny southern province. However, negotiations were halted a month and a half later, viewed as having failed. There were no viable peaceful options remaining to persuade the Yugoslav authorities to adopt a peaceful settlement and stop the violent struggle between the Kosovo Liberation Army and Yugoslav and Serbian troops. Under these conditions, on March 23 the Secretary General of the North Atlantic Treaty Organization (NATO) authorized the initiation of air operations against the FRY: Operation "Allied Force" was launched. How, five years after the fact, are we to assess NATO's operation in terms of international law—as a case of humanitarian intervention, or as something else?

Operation Allied Force highlights questions in international law regarding the unilateral use of armed force. Humanitarian interventions—uses of armed force for human rights protection in another state—are undertaken in a gray area of international law, finding little support in the conventional structures of the UN. These structures, however, are under significant pressures of change. Namely, recent developments like Operation Allied Force (1999), the Afghanistan conflict (2001), and the Iraqi war (2003) all have had an influence on the law. Legal relations are supplemented by, and to some extent superseded by, politics.

In addition, humanitarian intervention has achieved an independent legal basis in customary law. Custom is a source of law equal in weight to international conventions, and the existence of parallel customary regulations on humanitarian intervention is perfectly possible. The question is, if there is a customary norm regarding intervention, does it supersede the UN Charter in cases of conflict, or vice versa? Or, in the alternative, can customary law on humanitarian intervention change Charter rules?

Operation Allied Force is highly relevant to the question of the legal assessment of humanitarian intervention. Not only can the current state of law be identified through the various phases of the Operation; the campaign also provides a significant impetus for the development of future law. This study focuses on the question of the intervention threshold: what are the conditions that must exist for the right to intervene to be exercised? In this vein, the facts of the Kosovo case before the intervention will be laid out, complemented by a discussion of the law on the recourse to force. Thereafter, the law will be applied to the facts.

I will argue that, at present, there is a gap between the legality and the legitimacy of humanitarian intervention. Namely, human rights and their effective protection are consoli-

dating into a collective interest of the international community; as we have seen, human rights violations do not stop at state borders. At the same time, the UN Charter deals very clearly with the question of member states' non-interference in the internal affairs of other states. Selective application of the Charter leads to an absurd result: the rules on the use of force are disregarded, whereas the principle of non-intervention is strictly respected. Simply put, international law is not able to meet the needs of effective human rights protection.

This gap in the law can be closed, since only a fine line separates humanitarian intervention from legality. The development of a legal right to intervene is ongoing, as is evidenced by the consequences of Operation Allied Force. The lessons of Kosovo, as well as those stemming from more recent international crises, provide useful guidance for the re-evaluation of the current state of the law. Legal regulation of international relations is, of course, a choice based on the shared values of nations. With common values, the creation of common rules becomes possible. This might be the case in the area of humanitarian intervention.

## CHAPTER 1

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# THE FACTS

### 1.1 The Kosovo Crisis

#### *1.1.1 Situation in Kosovo before the Break-up of the SFRY*

##### *Historical Kosovo*

Kosovo had always been a multiethnic province before the escalation of violence in 1999. According to a census that was carried out by the Yugoslav authorities in 1991, out of Kosovo's 2,150,000 inhabitants, approximately ninety percent were Albanians, with Serbs, Montenegrins, Turks, and Muslims of non-Albanian origin constituting the remainder.<sup>1</sup> The population of Kosovo represented six percent of the total population of the Socialist Federal Republic of Yugoslavia (SFRY).<sup>2</sup> The total number of Albanians living in the Balkans was slightly less than six million, divided as follows: 3,080,000 in Albania; 1,800,000 in Kosovo; 440,000 in the Former Yugoslav Republic of Macedonia (FYROM); 80,000 in Serbia; 50,000 in Greece; and 40,000 in Montenegro.<sup>3</sup> These figures are now out of date, with the multicultural character of the province having shifted to a more homogeneous Albanian population. There are no recent official estimates of Kosovo's population, and the gathering of data from municipalities, towns, and villages is somewhat difficult.<sup>4</sup>

##### *Serb-Albanian Antagonism*

Why did relations between the various ethnic groups of a multi-ethnic Kosovo degenerate into total antagonism, mainly between Serbs (Orthodox) and Albanians (chiefly Muslim, but also Catholic and Orthodox)? Without delving too deeply into this antipathy, which is said to have political, demographic, historical, religious, and emotional roots,<sup>5</sup> we shall merely point out that problems between various ethnic groups and minorities has existed throughout the long history of Kosovo in particular and the Balkans in general, and only finally came to a head in the twentieth century.

From the Serbian historical perspective, Kosovo is considered to be an integral part of the Serb nation and its history.<sup>6</sup> Slavs settled in Kosovo during the sixth and seventh centuries, at a time when the region was under Byzantine rule. The area was already inhabited by a mix of peoples, including Greeks, Thracians, Illyrians, Dardanians, Romans, Dacians and many others.<sup>7</sup> In the thirteenth century, the region of Kosovo was integrated into the then state of Serbia, which was subsequently ruled by the Ottomans after the Battle of Kosovo Polje.<sup>8</sup> Serbs continued to live under the Ottoman rule, with the Orthodox Church playing an important role in the consolidation of Serb nationalism. After centuries of Ottoman rule,

Serbia became independent following the Congress of Berlin in 1878, while Kosovo remained under Ottoman rule until the end of the First Balkan War in 1912, when Serbia again gained control of the province.<sup>9</sup> Albanian attempts to assemble a united Albania out of the wreckage of the Ottoman Empire failed in the face of the already organized states and armies of Serbia and Montenegro.<sup>10</sup>

From the outset, the Albanian account of Kosovo's history is bound to differ dramatically from that of the Serbs. As descendants of the ancient Illyrians who had been living in the region long before the arrival of the Slavs, the Albanians claimed to be one of the original peoples of Kosovo,<sup>11</sup> although the origins of the Albanian people are still not very clear.<sup>12</sup> Albanian nationalist aspirations did not emerge until the establishment of the League of Prizren in 1878, with a view to setting up an Ottoman Albanian province under an Albanian administration.<sup>13</sup> Albanian demands for administrative autonomy later gave way to claims for independence and the creation of an Albanian state, which came into being after the London Conference at the end of the First Balkan War. Since then, the Serbs have reasserted their power in Kosovo.<sup>14</sup>

While Kosovo was never formally or constitutionally incorporated into Serbia, it was considered as an integral part of the Kingdom of Serbia. As such, Kosovo became part of the Yugoslav Kingdom of Serbs, Croats, and Slovenes in 1918, then of the Kingdom of Yugoslavia in 1929, and, in 1945, of the Socialist Federal Republic of Yugoslavia.<sup>15</sup> Since then, relations between Kosovar Albanians and the Serbs have been conflict-ridden and marked by repression—instances of ethnic cleansing were recorded as early as 1914.<sup>16</sup>

### *Distinctive Improvement - Return of Repression*

The situation of Kosovo and its Albanian majority population improved during the 1960s, and reached a peak in 1974 with the adoption of the new Constitution of the SFRY.<sup>17</sup> Under the new Constitution, the provinces of Kosovo and Vojvodina became autonomous provinces, which in practice meant that they possessed a status similar to that of a Republic: autonomy at the provincial level with their own banking, police, legal and parliamentary system, as well as a representation equivalent to that of the Republics at the federal level.<sup>18</sup> This improved status led to the growth of Kosovo's own cultural and educational institutions, which, in turn, enabled Kosovar Albanians to express their identity more clearly.<sup>19</sup> Serbia viewed all this—along with the demographic changes in the province, which were unfavorable to it—as a sign that it was losing control in Kosovo.<sup>20</sup> In the early 1980s, increasing nationalist sentiment on the part of the Kosovar Albanians was countered by a hard-line response from the Serbs: the federal army was deployed, and a state of emergency was declared in Kosovo.<sup>21</sup> Serbian nationalism gained ground, fuelled by protests against anti-Serb discrimination in Kosovo.<sup>22</sup> In September 1986, the Serbian Academy of Arts and Sciences published a memorandum warning the Kosovo Serbs that they faced genocide unless the government established objective, lasting conditions for the return of exiled Serbs. The integrity of the Serbian people was the overriding concern of future policy regarding Kosovo.<sup>23</sup>

There followed a radical change in Serbia's policy towards Kosovo,<sup>24</sup> and a series of steps to restrict Kosovo's provincial autonomy were taken.<sup>25</sup> The culminating point came in

1990 with the introduction of amendments to the Constitution of Serbia abolishing the institutions of the autonomous provincial government and the autonomous status of the province, which became completely subordinate to Serbia.<sup>26</sup>

The Kosovar Albanians reacted swiftly, declaring the sovereignty of Kosovo,<sup>27</sup> organizing a referendum on and declaring independence,<sup>28</sup> all of which actions were declared illegal by Serbia and the SFRY. Doubts were expressed about the effectiveness of the strategy that the Albanians had adopted to resist repression: would their rights not be better defended through the existing political structures rather than by a parallel administration whose legality was highly disputed?<sup>29</sup>

### 1.1.2 Dissolution of the SFRY

#### *Role of the International Community*

Slovenia and Croatia declared their independence from Yugoslavia on 25 June 1991, followed by Macedonia on 8 September and Bosnia-Herzegovina on 15 October. Fighting broke out in these republics. The SFRY was in the process of dissolution;<sup>30</sup> one by one, the seceding republics gained recognition from the international community.<sup>31</sup>

The EC, which played a major role in the attempts to resolve the Balkan crisis, based its mediation policy on newly formulated guidelines for the recognition of new states<sup>32</sup> and on its Declaration on Yugoslavia,<sup>33</sup> adopted on 16 December 1991. EC policy was based on the principle of the inviolability of internal borders,<sup>34</sup> to which were added other parameters, such as respect for the UN Charter, the Helsinki Final Act, and the Charter of Paris; guarantees for the respect of the rights of ethnic and national groups and minorities; and commitments relating to disarmament and nuclear non-proliferation and to the settlement of issues relating to state succession or regional disputes.<sup>35</sup>

In practical terms, this policy meant that recognition could only be extended to those Yugoslav Republics that were already in existence at that point in time, thereby excluding the autonomous provinces of Kosovo and Vojvodina. However, the Netherlands Presidency of the EC put forward an innovative proposal, which envisaged a “voluntary re-drawing of international borders” as a possible solution.<sup>36</sup> But another avenue was chosen; the solution adopted, *uti possidetis*,<sup>37</sup> did not escape criticism either. As *uti posseditis* is not an imperative norm of international law, it would have been possible to envisage changes to internal borders within the SFRY.<sup>38</sup>

#### *Kosovo: International Recognition?*

Kosovo, which was seeking recognition for its independence<sup>39</sup> and which represented one of the eight constituent units of the SFRY, asked to be admitted to the International Peace Conference on the Former Yugoslavia (known as the London Conference).<sup>40</sup> Although its request was not accepted,<sup>41</sup> it was guaranteed limited access to a “salle d’écoute.”<sup>42</sup> A working group was set up to discuss matters relating to ethnic and national groups and minorities, as was a special group on Kosovo.<sup>43</sup> The solution to Kosovo was to be sought within the framework of the Federal Republic of Yugoslavia (FRY), proclaimed by Serbia and Montenegro.

### *Passive Resistance*

Ibrahim Rugova was elected President of Kosovo by an overwhelming majority in the 1992 elections, which were declared illegal by the Belgrade government. Led by Rugova, who organized a disciplined and non-violent resistance movement, the Kosovar Albanians set up a parallel system of government, schools, clinics, and tax collection, and the unrecognized Republic of Kosovo issued its own diplomas.<sup>44</sup> During the period from 1992 to 1995, the Albanians confined their action to passive resistance, and as a result the situation in Kosovo was relatively calm.<sup>45</sup> Nevertheless, the international community was aware of the potentially explosive situation in Kosovo and of its possible effects on the security of the entire region.<sup>46</sup> According to a special report on Kosovo, “at the international level, the question is whether and when there will be an explosion in Kosovo.”<sup>47</sup>

In the meantime, the situation gradually deteriorated as the Kosovar Albanians’ patience began to wear out. As the Albanians were unable to obtain concessions from the central government in Belgrade, and since they had been excluded from the Dayton Peace Agreement,<sup>48</sup> they became increasingly frustrated.<sup>49</sup> The situation was further aggravated when the (now) EU decided to extend recognition to the FRY; the EU dispensed with its requirement of special status for Kosovo, and considered that improved relations between the FRY and the international community would depend, *inter alia*, on a “constructive approach” by the FRY toward granting autonomy to Kosovo.<sup>50</sup>

In 1996, the reactions became more violent, and the Kosovo Liberation Army (the *Ushtria Çlirimtare e Kosovës*, or UCK) began to launch terrorist operations.<sup>51</sup> Support for the UCK increased, not only in Kosovo but also in neighboring Albania and Macedonia.<sup>52</sup> Attempts to establish a dialogue between the political leaders of Serbia and Kosovo came to naught, and both sides became more radical in their stance. The international community stepped up efforts to mediate a peaceful settlement, and there were repeated calls by numerous governments and international bodies for the opening of a dialogue between the two parties, but all to no avail.<sup>53</sup>

#### *1.1.3 Escalation: January 1998–March 1999*

The situation in Kosovo changed in 1998. In response to the UCK’s terrorist operations, Serbian forces were deployed to Kosovo: the federal army, or *Vojska Jugoslavije* (VJ),<sup>54</sup> which had been activated in the spring of 1998, was mainly used against the UCK. In addition, the Ministry of Internal Affairs (*Ministarstvo Unutrasnjih Poslova*, or MUP), which is in charge of security, deployed its militia, its special police forces (*Posebne Jedinice Policije*, or PJP), and a special anti-terrorist unit (*Specijalne Anti-teroristicke Jedinice*, or SAJ)<sup>55</sup> against the UCK. In short, the general security context was inflammable. The conflict gradually intensified, and came to a head in 1999.<sup>56</sup>

It is now appropriate to take a closer look at the security, human rights, and humanitarian aspects of the situation as it existed during the first three months of 1999, before the final decision was made to initiate NATO’s air campaign.<sup>57</sup> Prior to NATO’s intervention, the Kosovo conflict could be classified as a non-international armed conflict, in which the parties were bound by the specific provisions applicable to this type of a conflict: Article 3 of the four Geneva Conventions (GCs) of 1949;<sup>58</sup> Article 19 of The Hague Convention of

1954 on cultural property; and the Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the protection of victims of non-international armed conflicts (Protocol II) of 8 June 1977.<sup>59</sup> Following NATO's intervention, there also existed in the Kosovo theater a concurrent international armed conflict, with the full application of the laws of war.<sup>60</sup>

Bearing in mind this legal framework, we can now draw the following conclusions with respect to the situation in Kosovo. There was a lull in the level of direct military engagement during the period from mid-January to mid-February, followed by a sharp rise.<sup>61</sup> The security situation was clearly deteriorating, as evidenced by: confrontations between the UCK and the Serb security forces, with the development of a cycle of retaliation by one side for action taken by the other; the deployment of large numbers of Yugoslav army units beyond the agreed limits,<sup>62</sup> and the initiation of a series of combat 'exercises,' which began on 25 February;<sup>63</sup> the consolidation of the UCK's presence throughout the country; the inability of the OSCE Verification Mission to fulfill its mission, and the subsequent evacuation of all its personnel on 20 March 1999;<sup>64</sup> the risk of the conflict spilling over into neighboring countries;<sup>65</sup> failure to respect the October 1998 cease-fire;<sup>66</sup> and the lack of any political will to reach an agreement in order to prevent the situation from deteriorating further.<sup>67</sup>

The human rights situation in Kosovo was extremely serious, and was marked by clear and continuous violations of human rights and humanitarian law.<sup>68</sup> Let it be underlined, though, that both parties to the conflict played their part in committing violations of human rights. The list of acts perpetrated is depressing: killings, summary and arbitrary executions, acts of torture, abductions, taking of hostages, and arbitrary detention all increased significantly,<sup>69</sup> and almost every day there were instances of such acts being committed by both sides.<sup>70</sup> Responsibility was rarely claimed for acts of violence, so that the perpetrators could not be brought to justice.<sup>71</sup> The Yugoslav and Serb forces resorted to killing as an instrument of terror, coercion, and punishment against the Kosovar Albanians, as well as tool to promote their forced expulsion.<sup>72</sup> There was a specific focus on young Kosovar Albanian men, whom the Serbs regarded as potential terrorists.<sup>73</sup> In turn, the Serb community was terrorized by the UCK, especially in the cases of many Serbs who disappeared following abduction.<sup>74</sup> Civilians were deliberately targeted and killed because of their ethnic origin.<sup>75</sup> Attacks in urban areas increased and were aimed at terrorizing either the ethnic Albanian or Serbian population.<sup>76</sup> The Serbs frequently used excessive force in response to acts of violence by the UCK. In addition, the UCK set up its own judicial system and held arbitrary and summary trials for infractions that were frequently defined as violating the "UCK codes."<sup>77</sup> These measures exacerbated the climate of fear and insecurity, thereby further alienating the Serbian and Albanian communities from each other and destroying the few possibilities that remained for coexistence.

The forced expulsion (ethnic cleansing) of Albanians increased in proportion,<sup>78</sup> which exacerbated public opinion in the West to a high pitch: something had to be done. The logic behind such a policy decision by the Milošević government is unclear. The remaining possibility of any peaceful settlement of the dispute vanished with the escalating expulsions. The number of displaced civilians within Kosovo increased dramatically; by 22

March 1999, it was estimated that the number of displaced had already reached a total of 235,000 civilians,<sup>79</sup> and the number of externally displaced reached a total of 269,000, as many refugees had fled to other countries.<sup>80</sup> Forced expulsion was carried out deliberately in accordance with a strategic plan, and was often accompanied by looting and deliberate destruction of property.<sup>81</sup>

From the above, it can be seen that the humanitarian and human rights situation was extremely grave during the first three months of 1999. Not only the widespread character of the violations, but also their extreme nature contributes to such an assessment.<sup>82</sup> The situation was also rapidly deteriorating at the security and political levels, despite all the efforts by the international community (see below). The situation was characterized by the following large-scale violations of the laws of non-international armed conflicts:<sup>83</sup>

- Indiscriminate, disproportionate attacks without military necessity<sup>84</sup>
- Acts principally aimed at terrorizing the civilian population<sup>85</sup>
- Deliberate destruction of civilian property, cultural property, and property indispensable to the survival of the civilian population<sup>86</sup>
- Forced expulsions<sup>87</sup>
- Grave violations of humanitarian law, including: murder, mutilation, cruel treatment and torture, all forms of corporal punishment, taking of hostages, outrages upon human dignity, humiliating and degrading treatment, rape, arbitrary detention, and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court.<sup>88</sup>

## 1.2 The International Community and the Kosovo Dilemma

### 1.2.1 Parties and Their Requirements

In 1998, the international community became increasingly involved in trying to find a solution to the Kosovo crisis, but it was immediately faced with conflicting interests. On the one hand, the Kosovar Albanians' demands for independence were unacceptable to Serbia: how could it grant independence to one part of its territory? As far as Serbia and the FRY were concerned, the Kosovo crisis was a purely internal affair, which was to be resolved without external intervention.<sup>89</sup> The Serbian government even organized a referendum on the participation of foreign representatives in the resolution of the Kosovo crisis, in which 94.73 % of the voters opposed any such participation.<sup>90</sup> The Serbian government was not prepared to consider any kind of alteration to the status of the Kosovar Albanians.<sup>91</sup>

On the other hand, as far as Kosovar Albanians were concerned, they demanded the participation of a foreign mediator and were not willing to settle for autonomous status within Serbia:<sup>92</sup> how could they trust the Serbian leadership when it was this same leadership that had abolished that autonomy in the first place? In addition, political tension was building up within Kosovo following the failure by the non-violent independence movement to achieve any significant results and the outbreak of violent opposition on the part of the UCK.<sup>93</sup> Under these conditions, any attempt at dialogue was doomed to fail. Therefore,

the international community decided to intervene in order to establish a dialogue between the two parties.

### 1.2.2 *Political Action and Sanctions*

Several international actors were involved in resolving the crisis, in particular the Contact Group,<sup>94</sup> the EU, the UN, the OSCE, the Western European Union (WEU), and NATO. The international community's requirements may be summarized as follows:<sup>95</sup>

- Peaceful dialogue between the Belgrade authorities and the Kosovar Albanians
- Enhanced status for Kosovo within the FRY and respect for the FRY's territorial integrity, implying a greater degree of autonomy, meaningful self-administration, and full protection of the rights of the Kosovar Albanians, the Serbs, and the other inhabitants of Kosovo.<sup>96</sup>
- Condemnation of repression and excessive use of force by Serbia as well as of terrorist actions by the UCK or any other group or individual.
- The threat of sanctions against the Belgrade government in order to encourage its compliance with these requirements.
- The safe return of refugees and displaced persons, international surveillance, unhindered access to Kosovo for the International Committee of the Red Cross (ICRC) and other humanitarian organizations.

In order to achieve these aims, the international community took action. The Contact Group approved the following measures with immediate effect:

- Consideration by the United Nations Security Council of a comprehensive arms embargo against the FRY, including Kosovo
- Refusal to supply the FRY with equipment that might be used for internal repression
- Denial of visas for senior FRY and Serbian representatives responsible for repressive action by FRY forces in Kosovo
- A moratorium on government-financed export credit support for trade and investment, including government financing for privatizations in Serbia.<sup>97</sup>

Specific measures were also imposed, whereby President Milošević was called upon to withdraw the special police units and cease action affecting the civilian population; allow access to Kosovo for the ICRC and other humanitarian organizations as well as by representatives of the embassies of the Contact Group countries and other countries' embassies; commit himself publicly to begin a process of dialogue with the leadership of the Kosovar Albanian community; and to cooperate in a constructive manner with the Contact Group in the implementation of the actions specified by the Group that required action by the FRY government.<sup>98</sup>

The EU endorsed the measures taken by the Contact Group and adopted Common Positions and Regulations on the restrictive measures to be taken against the FRY,<sup>99</sup> on the freezing of funds held abroad by the Serbian and FRY governments, on the prohibition of new investment in Serbia, and on a ban on flights between the FRY and the EU.<sup>100</sup>

On the international level, the UN Security Council unanimously adopted, on 31 March 1998, Resolution 1160 (1998), imposing a comprehensive embargo on the sale or supply of arms to the FRY.<sup>101</sup> Noting that some progress had been made in implementing the actions suggested by the Contact Group on 9 March 1998 while stressing that further progress was required, and affirming the FRY's sovereignty and territorial integrity,<sup>102</sup> the Security Council, acting under Chapter VII of the United Nations Charter, called upon the FRY to take the necessary steps to achieve a political solution through dialogue and endorsed the actions indicated in the Contact Group's statements of 9 and 25 March 1998 (para. 1). To this end, it decided to impose a comprehensive embargo on arms and related equipment (paras. 8–12).<sup>103</sup> The aims of this Resolution may be summarized as follows: the opening of a meaningful dialogue between the Belgrade authorities and the Kosovar Albanian community (paras. 1–4); enhanced status for Kosovo, including a substantially greater degree of autonomy and meaningful self-administration based on the sovereignty and territorial integrity of the FRY (point 7 of the Preamble, para. 5); condemnation of terrorist action (point 3 of the preamble, para. 2); the withdrawal of the special police units; the cessation of action by the security forces affecting the civilian population; and allowing access to Kosovo by humanitarian and other organizations (para. 16).

Other members of the international community responded to the situation as well. NATO supported the international community's efforts to resolve the crisis and endorsed the aims of the Contact Group. In order to promote regional stability within the framework of the Euro-Atlantic Partnership Council and the Partnership for Peace (PfP), together with its partners NATO made efforts to make the best use of the instruments available to it, including a training exercise on PfP terrain near Tirana (Albania) from 17 to 22 August 1998;<sup>104</sup> a PfP training exercise near Krivolak (FYROM) from 10 to 18 September 1998;<sup>105</sup> and the Determined Falcon air exercise in Albania and FYROM.<sup>106</sup> In addition, NATO developed plans to assist Albania and FYROM in increasing the security of their borders and obtained authorization for NATO's Standing Naval Force in the Mediterranean to visit the port of Durres. Further potential deterrent measures were also examined in the event of continuing violence,<sup>107</sup> including a whole range of options aimed at stopping the violence and creating a favorable climate for negotiation,<sup>108</sup> with the possible support of the United Nations High Commissioner for Refugees (UNHCR) in the event of a humanitarian crisis in the region,<sup>109</sup> and support for UN and OSCE monitoring activities.<sup>110</sup>

The OSCE also supported these aims.<sup>111</sup> Although its long-term mission in Kosovo, Sandjak, and Vojvodina came to an end in 1993,<sup>112</sup> the OSCE continued to monitor the situation on the ground in Kosovo, as well as the compliance of the conflicting parties.<sup>113</sup> The Organization was also involved in the efforts to mediate with Belgrade,<sup>114</sup> and the data collected by it provided an important source of information for the UN Secretary-General's reports prepared pursuant to the Security Council's various resolutions on Kosovo. The WEU was also involved in the international community's efforts,<sup>115</sup> through the information it provided on the observance of the embargo that had been imposed by the Security Council's Resolution 1160 (1998).<sup>116</sup>

### 1.2.3 Results of the Initial Involvement

The various international players—the Contact Group, the EU, NATO, the WEU, the OSCE, and the UN—involved in trying to resolve the Kosovo crisis laid down clear requirements and imposed sanctions on the FRY in order to achieve specific aims. In order to improve its relations with the international community, the Belgrade government had to comply with these aims. The Contact Group stated its readiness to facilitate the dialogue. Thus, the framework for negotiations was set from the outside.

Despite the multitude of players and efforts, one can still wonder whether there were any feasible chances of success. First, the aims were no doubt set clearly, but their objectives were not realistic. The problems were manifest at the outset. On the one hand the initial lack of faith of the Belgrade government in the outside mediation efforts would make any serious commitment difficult, if not impossible, while on the other hand outside mediation was deemed highly beneficial by the Kosovar Albanians. Second, the imposition of general sanctions on the FRY would affect the policy-makers only indirectly and gradually, whereas targeted sanctions would have proved to be a far more effective incentive for negotiations.<sup>117</sup>

The initial differences between the two perspectives were obvious. After the London Declaration of the Contact Group of 9 March 1998, President Milošević authorized the Serbian government to start negotiations with the leaders of the “Albanian national minority,” ruling out third-party mediation.<sup>118</sup> In contrast, the Kosovar Albanian delegation insisted on negotiating solely with a FRY delegation, demanded the presence of an international mediator, and called for Kosovo’s independence.<sup>119</sup> Given the fact that both parties refused to budge from their positions, no progress was recorded—not even toward the opening of a dialogue.<sup>120</sup>

The international community’s requirements were ignored. Apart from some very occasional progress,<sup>121</sup> non-compliance continued to be highlighted in the reports of the Secretary-General prepared pursuant to the Security Council’s Resolution 1160 (1998),<sup>122</sup> to such an extent that in June 1998 the Contact Group once again laid down a set of essential requirements for the FRY/Serbia. These included:

- To cease all action by the security forces affecting the civilian population and to order the withdrawal of security units used for civilian repression.
- To enable effective and continuous international monitoring in Kosovo and to allow unimpeded access and freedom of movement for monitors.
- To facilitate the full return to their homes of refugees and displaced persons and to allow free and unimpeded access for humanitarian organizations to Kosovo.
- To make rapid progress in setting a clear timetable, within the framework of the dialogue with the Albanian community in Kosovo, in order to agree on confidence-building measures and to find a peaceful solution to the problems of Kosovo.<sup>123</sup>

However, one month later, the Contact Group reported that its requirements under points 1 and 4 had not been met.<sup>124</sup> How did the FRY/Serbia react to all this? In this respect, we may refer to talks that took place between Presidents Slobodan Milošević (FRY)

and Boris Yeltsin (Russian Federation) in Moscow on 16 June 1998, and in particular to the statement that was issued at the end of these talks. In order to resolve the situation in Kosovo, the Yugoslav party pledged to:

- Resolve existing problems by political means on the basis of equality for all citizens and ethnic communities in Kosovo.
- Provide full freedom of movement for and ensure that there would be no restrictions on representatives of foreign States and international institutions accredited to the FRY monitoring the situation in Kosovo.
- Refrain from carrying out any repressive actions against the civilian population.
- Ensure full and unimpeded access for humanitarian organizations, the ICRC and the UNHCR, and delivery of humanitarian supplies.
- Facilitate the unimpeded return of refugees and displaced persons under programs agreed upon with the UNHCR and the ICRC, and provide aid for the reconstruction of destroyed homes.<sup>125</sup>

The Contact Group stressed the importance of these undertakings and the need for the FRY to implement them; the Albanian community was also urged to engage itself fully.<sup>126</sup> In view of Belgrade's failure to comply with its previous commitments, particular emphasis was placed on verification.<sup>127</sup> As the FRY would not agree to the return of the OSCE's long-term missions,<sup>128</sup> verification was carried out on a temporary basis by diplomatic representatives of states accredited to the FRY, via the OSCE's Diplomatic Observer Mission in Kosovo. It should be noted that the Contact Group also decided to reconsider further action, in accordance with the UN Charter, which could require the adoption of a Security Council resolution.<sup>129</sup>

#### *1.2.4 Autumn 1998: Mediation Efforts*

##### *Multiple Diplomatic Action*

Given the ineffectiveness of diplomacy, the international community began to intensify its efforts. This translated into more intensive mediation, subsequently supported by the threat to use armed force. The Contact Group led the mediation efforts.<sup>130</sup> A first draft agreement was submitted to the parties on 1 October 1998, known as the First (Hill) Draft Agreement for a Settlement of the Crisis in Kosovo,<sup>131</sup> which was to serve as the basis for subsequent drafts.<sup>132</sup>

The draft was not acceptable to either of the parties.<sup>133</sup> In addition, the FRY referred to the eleven points it had stipulated for a political settlement in the context of the Holbrooke Agreement<sup>134</sup> and, by 25 November 1998, it submitted its own draft proposal for a political framework for the autonomy of the Kosmet.<sup>135</sup> These diplomatic efforts did not produce any results either, so that by December 1998 it had become clear that the parties were deadlocked and that it would be impossible to reach a negotiated settlement. Nevertheless, on instructions from the Contact Group, the negotiators continued to pursue the settlement on the basis of the draft proposals they had presented.

On 23 September 1998, the Security Council adopted Resolution 1199, in which it endorsed earlier demands contained in the Contact Group's statement of 12 June 1998.<sup>136</sup> Acting under Chapter VII of the United Nations Charter, the Security Council affirmed that the deterioration of the situation in Kosovo (Federal Republic of Yugoslavia) *constituted a threat to peace and security in the region*. This cleared the way for action under Chapter VII.

The wording used by the Security Council became firmer: it "demanded" the cessation of hostilities and the maintaining of a cease-fire in Kosovo (para. 1), the implementation of steps to improve the humanitarian situation and to avert the impending humanitarian catastrophe (para. 2), the parties' commitment to a meaningful dialogue (para. 3), the immediate implementation by the FRY of the measures called for under Resolution 1160 (1998), and the adoption of the measures contained in the Contact Group's statement of 12 June 1998 (para. 4). The Security Council also expressed its appreciation for the international community's mediation efforts, writing that they "welcome[d] the current efforts aimed at facilitating such a dialogue" (para. 3).

However, the Security Council abstained from taking any coercive action apart from that called for under Resolution 1160 (1998), and simply stated that, should the measures demanded in this resolution (1199) and resolution 1160 (1998) not be implemented, it would consider further action and additional measures to maintain or restore peace and stability in the region (para. 16). Although the Security Council was ready to envisage further action, it did not specify what such action might be, and it should be noted that the reference to possible further action would not, as such, be enough to provide a legal basis for any action involving the threat or use of armed force.<sup>137</sup>

Still, in line with the mediation efforts, the conclusion of the Holbrooke Agreements also marked an important stage in the mediation process. Following discussions between U.S. Special Envoy Richard Holbrooke and President Milošević at the beginning of October 1998, on 13 October the latter announced that an accord had been reached for a peaceful solution:<sup>138</sup>

[An] accord has been reached that problems in Kosovo and Metohija ... be resolved by peaceful means, by political means. The accords ... eliminate the danger of military intervention ... [and] will be directed towards the affirmation of the national equality of all citizens and all national communities in Kosovo and Metohija. ... The accords ... are fully in keeping with the interests of our country.<sup>139</sup>

However, the Serbian government still had to give its approval for the settlement of the Kosovo crisis:

The Serbian Government has fully endorsed the accords that have been reached as they fully preserve the territorial integrity and sovereignty of the country, avert a conflict and lay the conditions for a political dialogue on the basis of the principle that all solutions must be within the framework of legal systems of the Republic of Serbia and the Federal Republic of Yugoslavia.<sup>140</sup>

Also, the federal Yugoslav government fully supported these accords. In practice, this implied that,<sup>141</sup> as far as a political solution was concerned, the Serb government undertook

to find a solution within the framework of the eleven principles laid down in its declaration by 2 November at the latest and on the basis of the initial draft presented by the Contact Group on 2 October 1998.<sup>142</sup> It also implied that the solutions regarding the withdrawal of VJ and MUP forces were not formalized. The military commitments were not formalized by an agreement, but in the record of a meeting between the Serb/FRY authorities and NATO military representatives, with the aim of achieving full compliance with Resolution 1199 (1998).<sup>143</sup>

The NATO military representatives “noted” the position of the Serb and Yugoslav authorities in a statement that was annexed to this record.<sup>144</sup> The status of international surveillance was the result of two formal agreements: the agreement of 15 October 1998, between the chief of staff of the FRY armed forces and the Supreme Allied Commander Europe (SACEUR) on the establishment of an air verification regime in Kosovo<sup>145</sup> to complement the OSCE’s Verification Mission, and the agreement of 16 October 1998, between the FRY Foreign Affairs Minister and the OSCE Chairman-in-Office,<sup>146</sup> for the setting up of an OSCE verification mission in Kosovo.<sup>147</sup>

The NATO Secretary General urged President Milošević and the Kosovar Albanians to seize the opportunity offered by the two agreements, in that they represented the first step towards ending the conflict and providing urgently needed humanitarian aid.<sup>148</sup> The air verification régime (Operation Eagle Eye) was established fairly quickly, but the establishment of the OSCE’s verification mission was delayed.<sup>149</sup> NATO also deployed an Extraction Force in FYROM in order to provide the ability to withdraw OSCE observers from Kosovo in an emergency.<sup>150</sup>

At this stage, the Security Council intervened once again: in Resolution 1203 of 24 October 1998,<sup>151</sup> it “welcomed” the agreements signed on 15 and 16 October 1998 (Preamble, paras. 3 and 4), which it endorsed and supported, and demanded “the full and prompt implementation of these agreements by the Federal Republic of Yugoslavia” (article 1). It also called for the full implementation of the commitments of the Governments of Serbia<sup>152</sup> and the Federal Republic of Yugoslavia<sup>153</sup> (article 2). In addition, it demanded that both parties comply “fully and swiftly” with the international community’s previous requirements,<sup>154</sup> and that they cooperate fully with the verification missions (articles 3 and 4). Consequently, several articles of this Resolution call on the parties to the conflict to respect and guarantee the safety and freedom of movement of the OSCE Verification Mission and other international personnel (articles 6, 8, 9, and 11). The Security Council also stressed the urgent need for the parties to enter immediately into a meaningful dialogue without preconditions and with international involvement, and with a clear timetable (article 5). The situation in Kosovo continued to pose a threat to peace and security in the region, and the Security Council reaffirmed its primary responsibility for the maintenance of international peace and security, in accordance with the Charter of the United Nations.<sup>155</sup> However, it was obvious that no further resolution would be forthcoming for any enforcement mandate. Despite some references to armed force in earlier resolutions, there was nothing in them that would even permit the assumption of an implicit authorization.<sup>156</sup> By now, the Security Council’s inaction had become clear. Both China and Russia would have vetoed<sup>157</sup>

any proposal for armed enforcement,<sup>158</sup> thereby making it impossible to obtain Security Council authorization.

### *Coercive Diplomacy*

#### *ACTWARN and ACTORD Decisions*

NATO made two important decisions in order to support the international community's diplomatic efforts. First of all, on 24 September, the North Atlantic Council (NAC) approved the issuing of an ACTWARN decision, which translated into an increased level of military readiness and the preparing of both a limited air option and a phased air campaign.<sup>159</sup> However, it was stressed that the use of force would require the authorization of the NAC; this was, in fact, obtained when the NAC approved the issuing of an activation order (ACTORD) for both limited air strikes and a phased air campaign.<sup>160</sup> SACEUR was authorized to launch air strikes within a period of four days.<sup>161</sup> It was quite clear from both these decisions that NATO was prepared to use armed force if the FRY did not comply with the aims of Resolution 1199 (1998). The diplomatic signals were very clear:

The FRY has still not complied fully with the UNSCR 1199 and time is running out. Even at this final hour, I still believe diplomacy can succeed and the use of military force can be avoided.<sup>162</sup>

We would prefer—we would far prefer—to secure President Milošević's compliance with the will of the international community in a peaceful manner. But NATO must be prepared to act militarily to protect our interests, to prevent another humanitarian catastrophe in the Balkans.<sup>163</sup>

We have made clear to Milošević and [the] Kosovars that we do not support independence for Kosovo—that we want Serbia out of Kosovo, not Kosovo out of Serbia. But one of the keys to good diplomacy is knowing when diplomacy has reached its limits. And we are rapidly reaching that point now. We are not going to stop this conflict by constantly evaluating the situation, and simply waiting to see what happens. We need to act now to compel a realistic and durable settlement, and then see that it is implemented.<sup>164</sup>

#### *The Threat to Use Armed Force*

For NATO, the aim of the threat to use force was to obtain full Serbian compliance with Resolution 1199 (1998).<sup>165</sup> NATO's position was set out as follows by Secretary-General Javier Solana on 9 October 1998:

The FRY has not yet complied with the urgent demands of the international community, despite the UNSC Resolution 1160 of 31 March 1998 followed by UNSC Resolution 1199 of 23 September 1998, both acting under Chapter VII of the UN Charter. The very stringent report of the Secretary-General of the United Nations pursuant to both resolutions warned, *inter alia*, of the danger of a humanitarian disaster in Kosovo. The continuation of humanitarian catastrophe is evident, because no concrete measures towards a peaceful solution of the crisis have been taken by the FRY. The fact that another UNSC Resolution containing a clear enforcement action with regard to Kosovo cannot be expected in the foreseeable future. The deterioration of the situation in Kosovo and its magnitude constitute a serious threat to peace and security in the region as explicitly referred to in the UNSC Resolution 1199. On the basis of this discussion, I conclude that the Allies believe that in the particular cir-

cumstances with respect to the present crisis in Kosovo as described in UNSC Resolution 1199, there are legitimate grounds for the Alliance to threaten, and if necessary, to use force.<sup>166</sup>

Now, this threat—in contrast to the actual recourse to armed force a few months later—did not arouse any significant reaction on the part of NATO governments.<sup>167</sup> By linking compliance with Resolutions 1160 (1998) and 1199 (1998) to the humanitarian catastrophe, the threat to use armed force was presented as a forcible humanitarian action,<sup>168</sup> in order to find a political settlement for guaranteeing Kosovar human rights, and as such did not exceed the threshold for the UN Charter Article 2.4's prohibition against the use of force. A general right of humanitarian intervention was, however, not openly claimed.<sup>169</sup> The restrictive use of the threat was understood as implying that force was the last resort, to be deployed only when the inefficiency of other sanctions was evident and flagrant violations of human rights on a grand scale were highly likely. After all, the situation had been qualified by the Security Council as a threat to the peace and security of the region.

In turn, it should be noted that the NAC decisions to threaten or use armed force were the expression of the collective will of member governments arrived at by common consent. All member governments share in the consensus on which decisions are based,<sup>170</sup> although each individual NATO Member has to make its decisions beforehand. While member countries could agree on the moral and political requirement to act, at least six countries—Belgium, France, Germany, Greece, Italy, and Spain—had difficulty in defining a legal basis for their action.<sup>171</sup> Indeed, various governments found themselves in the following dilemma: the Security Council's almost total monopoly over the recourse to armed force seemed to rule out individual reactions, a fact that had to be balanced against blatant violations of humanitarian law in Kosovo. At this point, national governments endeavored to base their justifications for military action on the Security Council's existing resolutions and/or on extreme humanitarian necessity, justifying, or even recommending, military action.<sup>172</sup> Occasional references were made to Article 51 of the UN Charter, dealing with self-defense; the Washington Treaty; and the refugee flows.

As far as the humanitarian justification is concerned, the following argument, put forward by the UK, is an example of using extreme humanitarian necessity as a justification for military intervention:

Security Council authorization to use force for humanitarian purposes is now widely accepted.... A UNSCR would give a clear legal base for NATO action, as well as being politically desirable. But can force also be justified on the grounds of overwhelming humanitarian necessity without a UNSCR? The following criteria would need to be applied:

- That there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
- That it is objectively clear that there is no practicable alternative to the use of force if lives are to be saved;
- That the proposed use of force is necessary and proportionate to the aim (the relief of humanitarian need) and is strictly limited in time and scope to this aim—i.e. it is

the minimum necessary to achieve that end. It would also be necessary at the appropriate stage to assess the targets against this criterion.

There is convincing evidence of an impending humanitarian catastrophe (SCR 1199 and UNSG's and UNHCR's reports). We judge on the evidence of FRY handling of Kosovo throughout this year that a humanitarian catastrophe cannot be averted unless Milošević is dissuaded from further repressive acts, and that only the proposed threat of force will achieve this objective. The UK's view is therefore that, as matters now stand and if action through the Security Council is not possible, military intervention by NATO is lawful on grounds of overwhelming humanitarian necessity.<sup>173</sup>

It is important to note that a consensus was in fact reached (in tandem, though, not in unison),<sup>174</sup> and that the NAC was, therefore, able to approve the ACTORD decision. Instead of one legal basis, nineteen decisions of national governments were deemed sufficient,<sup>175</sup> each of these decisions contributed elements to a single legal basis.<sup>176</sup>

### *Use of Armed Force*

From the initial threat, a step was taken toward the use of armed force in March 1999. Legal justifications *ex post facto* were deepened a bit now, but the point of departure was still the humanitarian necessity for intervention. Along this line of thinking, the Foreign Affairs Committee of the British House of Commons stated that states have the "right to use force in the case of overwhelming humanitarian necessity where, in the light of all the circumstances, a limited use of force is justified as the only way to avert a humanitarian catastrophe".<sup>177</sup> However, it was concluded that such a right was contrary to "what might be termed the basic law of the international community—the UN Charter."<sup>178</sup>

Later, NATO's Secretary General also called for action on the part of the international community, "in response to grave humanitarian emergencies," adding that "there is an ever-growing body of international law, including of course the Universal Declaration of Human Rights, that requires the international community to respond when massive violations of human rights are being committed."<sup>179</sup>

The official U.S. position was hard to discern, and it seems that no formal legal justification has yet been presented.<sup>180</sup> However, in the case *Legality of Use of Force*, NATO actions were justified by "the humanitarian catastrophe that has engulfed the people of Kosovo as a brutal and unlawful campaign of ethnic cleansing has forced many hundreds of thousands to flee their homes and has severely endangered their lives and well-being" and "the series of violations of international humanitarian law and human rights obligations by forces under the control of the Federal Republic of Yugoslavia, constituting a threat to peace and security in the region, [that], pursuant to Chapter VII of the Charter, demanded a halt to such action." Therefore, "under these circumstances, a failure by NATO to act immediately would have been to irreparable prejudice of the people of Kosovo. The members of NATO refused to stand idly by to watch yet another campaign of ethnic cleansing unfold in the heart of Europe."<sup>181</sup>

Belgium went a few steps further, defending the NATO action as a "lawful humanitarian intervention." NATO acted to protect fundamental *jus cogens* values, such as the right to life and physical integrity, and to forestall a humanitarian catastrophe that had been ac-

knowledge by the Security Council.<sup>182</sup> NATO's action was supported by precedent, including prior interventions that had not been condemned by relevant UN bodies. As an alternative to arguments based on the necessity for humanitarian intervention, Belgium also resorted to an argument stemming from the "state of necessity ... which justifies the violation of a binding rule in order to safeguard, in the face of grave and imminent peril, values which are higher than those protected by the rule which has been breached."<sup>183</sup>

All in all, the NAC collective decisions implied the threat and use of armed force against an independent state. It should be noted that this was not the first time that NATO had threatened to use force and then used it; many such threats were, in fact, issued during the conflict in Bosnia-Herzegovina, but the threat to use force was mandated by the Security Council in that conflict, before the use of arms.<sup>184</sup> This was not the case in Kosovo. The threat to use force, such as was approved by NATO, was directed against the territorial integrity of Yugoslavia, threatening possibly even the political independence of that country, as goes the wording of Article 2.4 of the UN Charter. This goes for the actual use of force as well. But the purpose of the threat or the use of force was not concerned with either party's territorial integrity or political independence, as was carefully underlined by the Organization, but was rather focused on enforcing compliance with the UN resolutions and securing the human environment. Would the prohibition of Article 2.4 be lifted if the objective of the threat to use force were something other than those ends named explicitly in the article?<sup>185</sup> The legality of using humanitarian grounds as a trigger for armed intervention shall be evaluated in detail in Chapter 3.

### *1.2.5 Further Developments*

Despite some progress in the implementation of Resolutions 1199 (1998) and 1203 (1998),<sup>186</sup> and notwithstanding all the commitments made by the FRY government<sup>187</sup> and the Serbian government<sup>188</sup> and by President Milošević himself,<sup>189</sup> no solution could be found for the situation in Kosovo. The international community questioned the seriousness of the Yugoslav efforts to resolve the crisis, and the threat to use armed force was maintained. By November 1998, it was clear that insufficient progress had been achieved and that the situation in Kosovo was getting worse.<sup>190</sup> At the security level, the situation was characterized by intensified hostilities.<sup>191</sup> In December 1998 it was also clear that the political solution based on the Hill draft agreements had failed: Serbia had submitted its own proposal for an agreement, and the Kosovar Albanians were also dissatisfied with the Hill agreements.<sup>192</sup>

In order to get out of this deadlock, the Contact Group took the initiative once again on 29 January 1999, this time in a more insistent manner, in order to force the parties to negotiate within an international framework.<sup>193</sup> This initiative was quite remarkable. Initially, the Contact Group defined the framework and the basis for negotiations. In order to do so, it insisted that the parties accept that the basis for a settlement must include the principles set out by the Contact Group; considered that the proposals drafted by the negotiators at an earlier stage contained the elements for a settlement, and that they be refined further to serve as the framework for agreement between the parties; and recognized that the work

done by the negotiators had identified (a limited number of) points that required final negotiation.

The Contact Group went on to urge the parties to attend these negotiations and, it imposed a deadline on them. To this end, it convened the parties in Rambouillet, France, in order to begin the negotiations, with the Group's direct involvement. It demanded that the parties seize this opportunity, and that the negotiations be completed within seven days: "The future of the people of Kosovo is in the hands of the leaders in Belgrade and Kosovo. They must commit themselves now to complete the negotiations on a political settlement...."

Finally, the Contact Group issued a sort of ultimatum, stating that it would hold both sides accountable if they failed to take the opportunity offered, and declared its readiness to work with both sides to realize the mutual benefits of a peaceful solution. The Contact Group's demands vis-à-vis the FRY were strict: stopping the hostilities in Kosovo; complying with the OSCE and NATO agreements and relevant Security Council resolutions; promoting the safe return of displaced persons; and cooperating with the OSCE and its Kosovo Verification Mission and with the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>194</sup> The Kosovar Albanians were also required to comply with the pertinent Security Council resolutions, to abstain from provocative action, and to support the political process.<sup>195</sup>

International actors strongly supported the initiative. The Security Council unconditionally supported the Contact Group's efforts and endorsed its decisions:

[The Security Council] ... welcomes and supports the decisions [of the Contact Group]. ... It calls for the full implementation of these commitments and demands that the parties comply fully with these decisions and requirements as well as its pertinent resolutions. The Council reaffirms its full support for the efforts of the international community, in particular those of the Contact Group and the OSCE Kosovo Verification Mission....<sup>196</sup>

As far as NATO was concerned, the Alliance firmly supported the aims of the international community for reaching a political solution under the aegis of the Contact Group. In addition, it condemned the massacre in Račak; called for the cessation of hostilities and the withdrawal of security and special forces; demanded compliance with the agreements concluded with the OSCE and NATO and cooperation with the OSCE Kosovo Verification Mission and with the International Criminal Tribunal for the Former Yugoslavia; and maintained the ACTORD decision in force.<sup>197</sup> NATO sent its chief military leaders to Belgrade in order to demand full compliance with the international community's requirements. It also explicitly stated that it stood ready to act and ruled out no option to ensure full respect for the international community's requirements. Following the statement by the Contact Group on 29 January 1999, NATO went a step further: in renewing its threat to use armed force, on this occasion it explicitly threatened the FRY with air strikes against targets on Yugoslav territory:

4. The Kosovo crisis remains a threat to peace and security in the region. NATO's strategy consists in putting an end to the violence and working towards the reaching

of negotiations on a provisional political settlement in Kosovo, thereby preventing a humanitarian catastrophe....

5. If these steps are not taken,<sup>198</sup> NATO is ready to take whatever measures are necessary in the light of both parties' compliance with international commitments and requirements, in particular assessment by the Contact Group of the response to its demands, to avert a humanitarian catastrophe, by compelling compliance with the demands of the international community and the achievement of a political settlement. The Council has therefore agreed today that the NATO Secretary General may authorize air strikes against targets on FRY territory.<sup>199</sup>

### *1.2.6 Rambouillet: Failure of Negotiations*

The negotiations began on 6 February 1999 at the Château de Rambouillet in France,<sup>200</sup> and were to be concluded by 20 February 1999.<sup>201</sup> The stakes were high: would all the international community's efforts succeed in creating a credible dialogue between the two parties for the resolution of the crisis? And, if not, what other options were available to the international community? Given the failure of the international community's previous efforts, the margin for maneuver was in fact very small. While the success of the negotiations was crucial for the international community, was this aim desirable for the opposing sides? In other words, if the parties did not genuinely commit themselves to this process, the chances of success were non-existent. Indeed, the preliminary conditions for a dialogue were not promising: the Kosovo delegation, which was not fully united, had expressed its willingness to begin a dialogue at the international level, whereas international negotiations were less convenient for Serbia and could well turn out to be less favorable than the existing status quo. In retrospect, it may well be asked whether the failure of the negotiations—especially if the Kosovo delegation were the cause of it—did not in fact offer Serbia a better way out, since it stood to lose, at least to a certain extent, control over part of its territory. On the contrary, what would be the result if the failure could be blamed on Serbs? Three scenarios were likely: both parties would sign an agreement; neither party would sign; or only one of the parties would sign.<sup>202</sup> Let us return to our brief account of the negotiation process and its failure.

To begin with, the Contact Group presented to the parties its “non-negotiable principles/basic elements,”<sup>203</sup> which were to serve as the point of reference at the Rambouillet negotiations. The parties were not required to indicate their formal acceptance of these principles, as their formal acceptance was implied in their agreement to participate in the negotiations. The negotiations, therefore, were to be based upon:

#### *General elements:*

- Necessity of immediate end of violence and respect of ceasefire
- Peaceful solution through dialogue
- Interim agreement: a mechanism for a final settlement after an interim period of three years (this was completely new!)
- No unilateral changes of interim status
- Territorial integrity of the FRY and neighboring countries

- Protection of the rights of members of all national communities (preservation of identity, language, and education; special protection for their religious institutions)
- free and fair elections in Kosovo (municipal and Kosovo-wide) under the supervision of the OSCE
- Neither party shall prosecute anyone for crimes related to the Kosovo conflict (with exceptions for crimes against humanity, war crimes, and other serious violations of international law)
- Amnesty and release of political prisoners
- International involvement and full cooperation by the parties on implementation.

*Governance in Kosovo:*

- The people of Kosovo to be self-governed by democratically accountable Kosovo institutions
- A high degree of self-governance realized through their own legislative, executive, and judiciary bodies (with authority over, *inter alia*, taxes, financing, police, economic development, judicial system, health care, education and culture—subject to the rights of the members of national communities—communications, roads and transport, protection of the environment)
- Legislative: assembly; executive: President of Kosovo, government, administrative bodies; judiciary: Kosovo court system
- Clear definition of competencies at communal level
- Members of all national communities to be fairly represented at all levels of administration and elected government
- Local police representative of Kosovo's ethnic make-up with coordination on the local level
- Harmonization of Serbian and federal legal frameworks with Kosovo interim agreement
- Kosovo consent required, among other areas, for changes to borders and declaration of martial law.

*Human Rights:*

- Judicial protection of human rights enshrined in international conventions and rights of members of national communities
- Ombudsman selected under international auspices
- Role of OSCE and other relevant international organizations.

*Implementation through:*

- Dispute resolution mechanism
- Establishment of a joint commission to supervise implementation
- Participation of OSCE and other international bodies as necessary.<sup>204</sup>

The delegations<sup>205</sup> were issued with a draft political solution composed of a framework agreement, an annex to the Constitution of Kosovo, and two further annexes on elections

and the ombudsman.<sup>206</sup> The Contact Group negotiators<sup>207</sup> defined the following strict procedure to be followed in the negotiations:

- Both sides would be invited to submit comments.
- If *the two parties agreed on* modifications, these modifications would be adopted.
- If there was no agreement, the draft would remain unchanged, unless the negotiators were persuaded that the modifications were necessary.
- *No proposals could be made which were inconsistent with the non-negotiable principles.* (emphasis mine)
- No significant changes would be entertained in relation to the two annexes once they had been tabled.

What followed was an impressive demonstration of international diplomacy. In particular, the negotiators endeavored to engage the FRY/Serbian delegation in substantive dialogue, while the Kosovo delegation carefully submitted its comments on the documents that had been presented to it. While the initial draft appeared to be acceptable to the Kosovo delegation, it is unlikely that it was acceptable to the FRY/Serbia.<sup>208</sup> Indeed, the proposed solution implied that Belgrade would have its hands tied for a period of three years, followed by a complete review of the situation *at the international level*. Moreover, the agreement would guarantee and strengthen Kosovo's autonomous status, and this would quite probably provide the basis for its eventual independence.<sup>209</sup> Obviously, the parties' compliance with any agreement would be subject to strict review and monitoring at the international level.

On 18 February 1999, two days before the deadline, the parties were presented with a new draft framework agreement for a political solution.<sup>210</sup> This draft was also not acceptable to the parties. In addition, the annexes on civilian and military implementation had just been presented!<sup>211</sup> The deadline was, therefore, extended to 1500 hours on 23 February 1999.<sup>212</sup> The Serbian/FRY delegation continued to refuse to discuss the military annex: "The presence of foreign troops on our territory will never be accepted."<sup>213</sup> Notwithstanding this categorical refusal, the final version (incorporating the disputed annex) of the interim agreement for peace and self-government in Kosovo was presented on the same day: the Kosovo delegation stated that it was ready to sign within a timeframe of two weeks, subject to consultation in Kosovo.<sup>214</sup> In contrast, the FRY/Serbian delegation regarded the negotiations as by no means concluded. While major progress had been achieved during the negotiations, several essential points still needed to be defined further; the Serbian delegation therefore affirmed its readiness to *continue* the negotiations.<sup>215</sup> In particular, the Serbs viewed the fundamental issues of self-government, re-examination, and military presence as far from resolved. This divergence of views was not reflected in the Contact Group's statement on the conclusions of the negotiations, which noted that a political framework was now in place and that the groundwork had thereby been laid for finalizing the implementation chapters of the agreement, in particular the modalities of the invited international civilian and military presence in Kosovo.<sup>216</sup> Such a view was illusory, taking into account the fact that the Serbian side had clearly underlined the lack of any agreement on a political framework. A final agreement was to be achieved within the framework of a

conference that would neither be a simple signature conference nor a conference at which discussions about a political settlement would be reopened.<sup>217</sup> The Contact Group negotiators and the two parties were requested to convene in Paris on 15 March 1999. The Serbia/FRY delegation, backed up by its people,<sup>218</sup> was time and again exhorted to not allow the opportunity for a peaceful settlement to pass.

### *1.2.7 Paris: Fire at Will*

The starting point for this meeting was made clear by the Contact Group: there would be no more negotiations on the political part of the agreement, whereas some aspects of implementation could still be discussed. However, these clauses were presented as belonging inherently in an overall negotiation “package,” and could not be done without.<sup>219</sup> Second, on the one hand, if the Albanians were ready to sign, this should take place as soon as possible; on the other, if the FRY/Serbian delegation continued to reject negotiations on implementation, the discussions would be adjourned.<sup>220</sup>

The Kosovo delegation indicated that it was ready to sign the interim agreement that had been presented on 23 February 1999.<sup>221</sup> In contrast, instead of agreeing to engage in substantive discussions with the Contact Group,<sup>222</sup> the FRY/Serbia submitted its own version of the interim agreement, which implied an almost complete reopening of the political settlement.<sup>223</sup> Given this deadlock, on 18 March 1999 the Contact Group decided to open the text of the interim agreement for signature, in its form of 23 February 1999: the Kosovo delegation signed the agreement.<sup>224</sup> One last attempt was made to engage the FRY/Serbian delegation in substantive discussions. As this attempt proved fruitless, the Contact Group had to conclude, on 19 March 1999, that there was no point in pursuing the discussions any further:

1. The Rambouillet Accords are the only peaceful solution to the Kosovo problem.
2. In Paris, the Kosovo delegation seized this opportunity and, by their signature, have committed themselves to the Accords as a whole.
3. Far from seizing this opportunity, the Yugoslav delegation has tried to unravel the Rambouillet Accords.
4. Therefore, after consultation with our partners in the Contact Group (Germany, Italy, the Russian Federation, the United States, the European Union, the Chairman-in-Office of the OSCE), we consider there is no purpose in extending the talks any further. The negotiations are adjourned. The talks will not resume, unless the Serbs express their acceptance of the Accords.
5. We will immediately engage in consultation with our partners and allies to be ready to act. We will be in contact with the Secretary General of NATO. We ask the Chairman-in-Office of the OSCE to take all appropriate measures for the strategy of the KVM. The Contact Group will remain seized of the issue.
6. We solemnly warn the authorities in Belgrade against any military offensive on the ground and any impediment to the freedom of movement and of action of the KVM, which would contravene their commitments. Such violations would have the gravest consequences.<sup>225</sup>

Once again, diplomatic attempts to solve the Kosovo crisis had failed. The Yugoslav/Serbian party was clearly responsible for the failure of the negotiation process. Nevertheless, the door was left open for Serbia to take the initiative that would enable the talks to resume. In addition, a clear warning was issued to the Belgrade government: military action or action against the OSCE/KVM would have the gravest consequences.

In fact, the Yugoslav forces had been engaged in repressive operations in Kosovo since the end of the February 1999 talks, but were now carrying out large-scale offensive operations.<sup>226</sup> In view of this situation, the OSCE/KVM was withdrawn from Kosovo on 20 March 1999.<sup>227</sup> On 22 March 1999, the negotiators went to Belgrade to make one final attempt to persuade the FRY/Serbian authorities to cease offensive operations in Kosovo and to accept the Rambouillet interim agreement.<sup>228</sup> This attempt also failed. Belgrade had decided not to cooperate, although it was well aware of the possible consequences of its decision.<sup>229</sup>

On 23 March 1999, the NATO Secretary General authorized SACEUR to initiate air operations in the Federal Republic of Yugoslavia:

All efforts to achieve a negotiated, political solution to the Kosovo crisis having failed, no alternative is open but to take military action. We are taking action following the Federal Republic of Yugoslavia Government's refusal of the International Community's demands:

- Acceptance of the interim political settlement which has been negotiated at Rambouillet;
- Full observance of limits on the Federal Army and Special Police Forces agreed on 25 October;
- Ending of excessive and disproportionate use of force in Kosovo.<sup>230</sup>

On 24 March 1999, Operation Allied Force began.<sup>231</sup>

## CHAPTER 2

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# HUMAN RIGHTS VERSUS THE UN CHARTER

### 2.1 Basic Rights of a Human Person and the Collective Interest

#### 2.1.1 *Humanitarian Intervention Dilemma*

Humanitarian intervention signifies the use of armed force by a state or states to protect citizens of the target state from large-scale human rights violations there.<sup>1</sup> It should be borne in mind that humanitarian intervention differs from situations in which a state intervenes in another state in order to protect its own nationals, or to facilitate self-determination or democracy. Actions undertaken in protection of nationals are based mainly on arguments stemming from self-defense, whereas humanitarian interventions are not justified on the basis of self-defense, and the nationality of the persons to be rescued is of relatively secondary importance.<sup>2</sup> As far as self-determination is concerned, intervention is taken on behalf of a self-determination movement within the target state, whereas humanitarian intervention seeks not the creation of a new state, but only the protection of human rights within the existing state.<sup>3</sup> And last, a pro-democratic intervention is resorted to in order to enhance “world public order,” or simply to further the purposes of the UN, such as the protection of human rights, by a régime change;<sup>4</sup> in humanitarian interventions, the direct objective is the protection of human rights, not the overthrow of the régime. Common to all these uses of force, however, is their questionable legal foundation.

As regards humanitarian intervention, the object of this study, it needs to be noted from the outset that the use of military force for humanitarian protection is contradictory. On the one hand, the use of armed force *per se* is subject to many restrictions and prohibitions, the most important of them finding expression in the UN Charter. However, on the other hand, simultaneous with these restrictions, the increase in the quality and quantity of conventional and customary norms of human rights protection lends additional force to enforcement actions taken for human protection purposes. Moreover, pressures relating to even greater enhancements to human security alter the equation further, with an emerging body of thought surrounding ideas of collective interest. It is sufficient to refer on this point to the address made by the present Secretary-General of the UN Kofi Annan on January 26, 2004 to the Stockholm International Forum on Preventing Genocide: “Genocide ... is practically always, if not by definition, a threat to the peace. It must be dealt with as such—by strong and united political action and, in extreme cases, by military action.”<sup>5</sup>

Obviously, humanitarian intervention has been a subject of debate for many years. The debate goes on surrounding the legitimacy and legality of these actions as part of international law—war on behalf of the oppressed has deemed just, if not in legal, then at least in moral terms. The consolidation of state sovereignty added somewhat contradictory concerns for contemplation: what was more important, the preservation of international stability and order or the prevention of suffering of threatened individuals in areas of conflict?<sup>6</sup> The right to intervene and the concept of state sovereignty immediately clashed.

It is obvious that the state has long occupied the central role in international law, and one of the derivatives of this fact is the concept of state sovereignty. By definition, humanitarian intervention is carried out against the will of a particular state, thus, presumably, breaching its sovereignty; on the other hand, such a presumption is too hasty, since we might not be witnessing a breach of sovereignty when considering the overall context of the current state of international law in which attempts are made in order to shift the focus onto human security, also inside state borders. It should be remembered that international law has developed gradually from a state-centered idea to a more individual-centered concept, according to which the state is considered more as a guarantor of rights of individuals subject to its sovereignty. Writers on natural law as long ago as the sixteenth and seventeenth centuries came to the conclusion that the mistreatment by a sovereign of his own subjects was a *iusta causa* for war, implying the corresponding right to intervene against a government at the request of an oppressed people.<sup>7</sup> And, for that matter, even at its doctrinal apogee, state sovereignty never amounted to an unquestionable right of governments to do anything they pleased within their recognized borders.<sup>8</sup>

The international legal system is characterized by somewhat contradictory tendencies. However, the international legal system is a dynamic system, created and modified by those who are at the same time subjects of its norms. It is argued here that the emerging collective interests that will be discussed below are providing fertile ground for the development of human rights protection in the normative context of international law. Seeds of change pointing toward increased human rights protection are incorporated therein, depending, of course, on the value-choice of international legal subjects; the development of norms for enhanced human rights protection is and will always be an explicit choice of states and other international actors.

### *2.1.2 Bilateral and Collective Interests*

The development of the international system has long been characterized by state-centralized features. In other words, the consolidation of sovereign, independent states obviously contributed to the development of their relations from an individual, state-centered, bilateralist point of view.<sup>9</sup> Individual state interest was to play a pivotal role in the elaboration of inter-state relations. The obvious consequence of such a bilateralist approach was the evolution of international legal obligations merely at the level of individual states. Consequently, international law did not oblige states to adopt a certain conduct in absolute terms, but only in the context of relations with the particular state or states or other international legal subjects to which a specific obligation under conventional or customary law was owed. The state was traditionally the highest legislative authority, both on the national and

the international scene; there simply was no higher authority extant that could impose its will on individual states. Consequently, state consent to be bound by individual rules and norms became a precondition for any legal obligation, as was spelled out explicitly in a famous passage of the *Lotus* case: “The rules of law binding upon states ... emanate from their own free will as expressed in Conventions.... Restrictions upon the independence of States therefore cannot be presumed.”<sup>10</sup>

But the development of international law has continued towards a more co-operative, interdependent system of the coexistence of states, and towards the emergence of other, non-state international legal subjects, which are focused in some way on international solidarity (League of Nations, Permanent Court of International Justice, International Labor Organization, United Nations,<sup>11</sup> etc.). The resort to the notion of community interest frequently takes place, translating the idea of international society into a vision of a human collectivity whose global character leads necessarily to a multilateral approach to international law.<sup>12</sup> Thus bilateral relations are supplemented, and in some cases overridden, by the interests of this global community.

Manifestations of interest reflecting the idea of such a community are varied. Historically, the idea that humankind constitutes a united whole that is held together by legal ties has been reflected in the work of many authors, since the beginning of writing on international law.<sup>13</sup> Explicit references to the international community can nowadays be found in a great number of international legal documents. For our purposes, it is sufficient to mention the Vienna Convention on the Law of Treaties of 1969 (VCLT)<sup>14</sup> and its famous Article 53 on *jus cogen*: “a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole....” Similarly, in the *Barcelona Traction* case the International Court of Justice (ICJ) explicitly mentioned the obligations of a state towards the international community as a whole, such obligations being by their very nature the concern of all states.<sup>15</sup> Thirdly, in its Draft Articles on State Responsibility, the International Law Commission (ILC) acknowledged the existence of fundamental obligations stemming from peremptory norms of international law and allowed the invocation of state responsibility by any other state other than/beside the injured state when the breached obligation is owed “to the international community as a whole.”<sup>16</sup> Last, in the Rome Statute of the International Criminal Court (ICC), the signatory states affirmed that the most serious crimes were of concern to the international community as a whole.<sup>17</sup> Similar references to the international community and community interest are found in several General Assembly resolutions (e.g. res. 3281 (XXIX), the Charter of Economic Rights and Duties of States),<sup>18</sup> the Outer Space Treaty,<sup>19</sup> the Protocol on the Environmental Protection to the Antarctic Treaty,<sup>20</sup> and the 1982 UN Law of the Sea Convention.<sup>21</sup>

### 2.1.3 Developing International Law

The different sources mentioned immediately above invoke an idea of a set of collective interests of the international community.<sup>22</sup> These collective interests reach beyond the traditional sphere of bilateralist interest. Such interests are not necessarily in conflict with bilateralist interests, but exist side by side with them, although their all-embracing charac-

ter might also collide with bilateral interests, especially when it is felt necessary to enforce the collective interest. The case of humanitarian intervention raises this potential for collision with bilateralist interests in upholding state sovereignty. A more profound analysis of the issue, taking on the imperatives of being protected both in the collective and the bilateralist sense, makes any assessment of the (in)compatibility of interests more concrete. For instance, it is not to be denied that the protection of human rights is in the interests of a singular sovereign state, besides being in the interest of all states. (This is the case at least if we think of democratically elected regimes.) The fundamental purpose of the nation state was, after all, to protect the material and immaterial goods of its constituents. The defense of states is justified *qua* the defense of persons. There is no defense of the state as such that is not parasitic on the rights and interests of individuals.<sup>23</sup>

However, it cannot be denied that the persistent bilateralist character of international law affects its every layer, most flagrantly in the unilateral advancement of *national interest*. But it must also be admitted that the bilateral approach is no longer the only adequate way to measure the current status of international law and the legal interests of international legal subjects. First of all, the competence of the state as an international legal actor is not unlimited. The diminishment of its competencies stems, firstly, from voluntary limitations accepted by states themselves, through the renunciation of their sovereign powers for the benefit of diverse international bodies, which are empowered to act on behalf of their members in the relevant spheres of action. The consolidation of the European Union provides a good example of such a voluntary transfer of sovereign competencies. Second, a parallel development in the very essence of international law, implying a change in the nature of sovereign competencies, is taking place. This development, however slow, is based on the enhancement of the common system of values, considered in Kantian terms, in the international environment. Namely, there is a growing awareness in the present international legal community that an individual state's interest is not enough to guarantee certain fundamental interests which cannot be allocated on the state level; on the contrary, such interests are recognized, incorporated in norms, and sanctioned as *a matter of concern to all states*.<sup>24</sup> The breach of these common interests—which are shared by all states, and ultimately by individuals within those states—affects the legal interests of all states, as the offense is deemed to concern all members of the international community, and not simply the state or states directly affected by the breach. Subsequently, the right of *actio popularis*—the right or legal interest to institute proceedings and make complaints to international legal bodies—is recognized.<sup>25</sup>

There is an increasing awareness of the common interest of the international community, of states, and, in the last instance, of all individuals, relating, for example, to such areas as basic human rights, the environment, the global commons, nuclear weapons, and economic interdependence. In these areas, the repository of interests transcending those of individual states is vested somewhere other than states, namely in the very essence of the international legal community, the individual. The doctrine and works of the ILC, the jurisprudence of the ICJ, and the creation of the ICC all bear witness to the increasingly communal character of international interests and institutions, leading to the development of community interest concepts and norms, such as *jus cogens*, and obligations, such as

*erga omnes*. These in turn contribute to the gradual consolidation of community interest norms, whose breach activates the international responsibility of states and the international criminal culpability of individuals.<sup>26</sup> Now we shall have a look at the issue of community interest in general, and at the special interest in the protection of basic human rights in particular. The potential collision between this interest and the community interest regarding the prohibition of the use of force, even for human rights purposes, will be addressed in the second part of this chapter.

### 2.1.4 Community Interest: The Theory of *Erga Omnes*

#### *The Barcelona Traction Case*

The starting point for the theory of *erga omnes* is the ruling delivered by the International Court of Justice (ICJ) on 5 February 1970 in the *Barcelona Traction* case,<sup>27</sup> in which *erga omnes* obligations are referred to in the following paragraphs of the Judgment:

33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951, 23*); others are conferred by international instruments of a universal or quasi-universal character.

These two paragraphs constitute an *obiter dictum*, or a framework for the justification with a guiding function.<sup>28</sup> Regardless of this, the concept of *erga omnes* obligations was to have a substantial impact on state practice, international jurisprudence, and legal doctrine.<sup>29</sup>

#### *Erga Omnes Obligations in Jurisprudence*

As regards *Barcelona Traction*, the ICJ invoked the standard of community interest, in contrast to the traditional bilateralist interest, in its highly technical discussion on the diplomatic protection of shareholders (a right of a highly bilateralist character). The Court made a clear distinction between obligations towards the international community of states as a whole—namely, obligations that apply to all states—and obligations towards other states within the framework of diplomatic protection, which apply only to the states concerned. Hence, in the case in question, according to the bilateralist view, only the national state of the company was authorized to exercise diplomatic protection for the purpose of seeking redress, whereas no such restriction applies to the violation of *erga omnes* obliga-

tions, which are of a collective character.

What did the ICJ mean by these collective *erga omnes* obligations? Indications can be found through an examination of the ICJ's both previous and subsequent jurisprudence concerning the legal position of states other than the direct victim in cases of grave breaches of law. A grave breach, when dealing with obligations *erga omnes*, becomes the concern of each and every state.

In its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*,<sup>30</sup> the sphere of interested states was enlarged implicitly. The General Assembly had adopted resolution 2145 (XXI) on the termination of the Mandate for South West Africa in 1966, and subsequently the Security Council adopted resolution 276 (1970), which declared the continued presence of South Africa in Namibia to be illegal and called upon states to respond accordingly.<sup>31</sup> Obviously, such a decision bound member states,<sup>32</sup> but non-member states also became involved, as the ICJ went on to explicitly admit the *erga omnes* applicability of the UN decisions: "The termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law."<sup>33</sup> The court could not have been more clear. Such opposability meant, in the words of the ICJ, that it was incumbent upon "the non-member States to act in accordance with those decisions."<sup>34</sup>

In later jurisprudence, the use of the notion of obligations *erga omnes* is hardly uniform, nor has the ICJ provided us with any further details on its exact legal consequences (with the exception of some procedural consequences in the *East Timor* case in 1995).<sup>35</sup> The use of the language of *erga omnes* is equally inconsistent. In the *Nuclear Test* cases,<sup>36</sup> the ICJ did not pronounce on either jurisdiction or the merits of the cases:<sup>37</sup> however, it considered that certain statements of the President of France and members of the French Government made in the public domain constituted a unilateral commitment *erga omnes* by France not to conduct further atmospheric tests, so that France had become bound toward all states, without regard to the specific importance of the French undertaking.<sup>38</sup> In the case concerning *United States Diplomatic and Consular Staff in Teheran* in 1980, the ICJ did not explicitly use the term *erga omnes*, but instead contented itself only to draw the attention of the entire international community to the irreparable harm that might be caused by the events in Tehran, which were in violation not only of the fundamental principles of the UN Charter and the Universal Declaration of Human Rights, but also of those international rules of which diplomatic and consular law is constituted.<sup>39</sup> In its judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* in 1996, the ICJ was again more explicit. Referring to the legal consequences it had deduced from the object and purpose of the Genocide Convention in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* in 1951,<sup>40</sup> the ICJ drew the conclusion that the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*. Thus, the obligation of each state to prevent and to punish the crime of genocide is not territorially limited by the Convention.<sup>41</sup>

However, despite a prime occasion in 1995 to further the enforcement of *erga omnes* norms in practice, the ICJ declined such a possibility in its judgment in the *East Timor* case. The parties to the case were Australia and Portugal, but the effects of the judgment requested by Portugal<sup>42</sup> would have amounted to a determination that Indonesia's (a third party) entry into and continued presence in East Timor were unlawful. Indonesia's rights and obligations would thus have constituted the very subject matter of a judgment made in the absence of that state's consent.<sup>43</sup> Such a statement would have run counter to the so-called Monetary Gold principle, namely that the Court can only exercise jurisdiction over a state with its consent.<sup>44</sup> At the same time, the ICJ did accept that Portugal's assertion that the right of peoples to self-determination has an *erga omnes* character was irreproachable. We have thus a conflict between the third state's absence implying a procedural default and the argument *erga omnes*. The ICJ considered as follows:

[the] *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations involved, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State, which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.<sup>45</sup>

So while admitting the *erga omnes* character of the right of peoples to self-determination, the ICJ rejected the case on procedural grounds. The Court's judicial corroboration of the doctrine would have been highly desirable; instead, the situation was kept at the *status quo*, with the ICJ explicitly rejecting any opposition between an *erga omnes* right and the consent to jurisdiction. The ICJ's careful attitude at this point might best be understood as an attempt to avoid opening the Pandora's Box of the unlimited right of enforcement, taking into account the emerging, unfinished state of the core elements of international law. The consequences of such a ruling would undoubtedly have been wide-ranging, as subsequent claims for the enforcement of rights *erga omnes* would most likely have followed. Thus, the consolidation of the doctrine in jurisprudence will have to continue at a more cautious pace.

### ***Erga Omnes and Jus Cogens***

The concept of *jus cogens* is closely linked to that of *erga omnes*, both stemming from the sphere of the collective interest states. In fact, peremptory norms *jus cogens* were recognized well before the emergence of the concept of *erga omnes* obligations. The prohibition of wars of aggression, slavery, and the slave trade, as well as the laws of war and maritime law all included obligations owed to the entire community of states. Aggressive war was already the primary concern of the League of Nations, and such wars were also outlawed in the UN Charter. The Permanent Court of International Justice (PCIJ) specified the obligations and corresponding rights of states in maritime matters (*Lotus* and *Wimbledon* cases), and the League of Nations engaged in efforts to suppress the slave trade and to eliminate slavery. With regard to the law of war, the qualifications regarding "war crimes" and "crimes against humanity" were introduced in the wake of World War II (Nuremberg Military Tribunal Charter, Control Council Law No. 10, Tokyo Military Tribunal Charter),

confirming the absolute character of regulations concerning the means and methods of warfare.<sup>46</sup> All these specific examples bear evidence of the progressive potential of international society to create norms reflecting a common interest.

The codification of norms with the character *jus cogens* took place only later, in the works of the International Law Commission (ILC). It began with the preparation of a Convention on the Law of Treaties in 1949. The concept of *jus cogens* was introduced therein, in Article 53 of the said convention, which was accepted in 1969 as follows:

Treaties conflicting with a peremptory norm of general international law (*jus cogens*). A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>47</sup>

As regards the emergence of new peremptory norms, Article 64 read as follows: “If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”

A norm *jus cogens* is considered to be imperative on the following grounds: first, no derogation is permitted; second, only a subsequent norm having the same character can modify existing norms *jus cogens*; third, any treaty/norm in breach of norms *jus cogens* is null and void and cannot be enforced by any tribunal.<sup>48</sup> The origins of the concept of *jus cogens* relate to treaty law, but the concept has been so widely recognized by now that it is deemed to have entered the corpus of general international law.<sup>49</sup> At the outset, the history of the drafting of Article 53 shows that the ILC, as well as most states (except, obviously, for the advocates of bilateral self-interest), agreed on the existence of peremptory norms of international law *per se*, although there was no agreement on their content, which was accordingly left to be specified alongside the development of state and tribunal practice.<sup>50</sup> However, certain individual norms or categories of norms received considerable support as being norms with a *jus cogens* character: aggression, rules prohibiting international crimes, rules protecting basic human rights, the principle of the self-determination of peoples, and the prohibition of intervention.<sup>51</sup> We should add, though, that *jus cogens* is of somewhat limited application, as there are only a few easily recognizable norms whose character *jus cogens* is beyond doubt.<sup>52</sup> The appearance of the concept of norms *jus cogens* was related to the historical period, which was characterized by a certain legal revisionism defended by de-colonized states and some socialist states, and was thus opposed to a certain extent by Western states. In addition, the conventional definition has met with considerable problems of interpretation.<sup>53</sup> However, *jus cogens* is definitely embedded in the development of common interests of the international community.

Last, it should be mentioned that there is a substantial overlap between norms *jus cogens* and obligations *erga omnes*, as is evidenced by examples given by the ICJ regarding obligations towards the international community as a whole<sup>54</sup> and by those examples given by the ILC in its commentary to Article 53 of the VCLT.<sup>55</sup> But there is at least a different

emphasis: peremptory norms *jus cogens* focus on the scope and priority to be given to a certain number of fundamental obligations, whereas the focus of obligations to the international community is essentially on the legal interest of all states in compliance.<sup>56</sup> The basis of a peremptory norm, whether it be *jus cogens* or *erga omnes*, is exactly the same as that of any other type of norm, namely its acceptance and recognition by states; hence, these norms are embedded within the international system of norms.<sup>57</sup> Such norms entail rights whose protection concerns all states and whose violation leads to specific consequences.

### *Erga Omnes Obligations Identified*

The gradual and careful acceptance of *erga omnes* obligations reflects changes that have recently come about in modern international law. Clearly, these obligations are quite different from the bilateral organization of the international legal community, whereby a state cannot ask another state to fulfill an obligation unless it can show that it has a subjective legal interest.<sup>58</sup> However, this does not apply in the case of serious violations of the international community's vital interests.<sup>59</sup> As far as the more concrete nature of *erga omnes* obligations is concerned, let us go back to the ruling delivered by the ICJ in the *Barcelona Traction* case, in which it drew up a non-exhaustive list of such obligations: acts of aggression and genocide, and principles and norms concerning basic rights, including protection from slavery and racial discrimination. These are all examples of obligations arising out of general international law, they are part of *jus cogens*, and they are codified in international treaties that the majority of states have ratified.<sup>60</sup> As the Court observed, some of these rights "have entered into the body of general international law," and others "are conferred by international instruments of universal or quasi-universal character."<sup>61</sup>

The examples mentioned by the ICJ are clear—the prohibition of acts of aggression and genocide and the protection of principles and rules concerning basic human rights all create obligations *erga omnes* and corresponding rights of protection. It is in the collective legal interest of each and every state, or "the concern of all states," to see that they are respected, thus taking concrete steps toward protecting the collective interest. As to the identification of other possible obligations *erga omnes*, the Court's reference to the sources of such norms is relevant here, including general international law and international instruments of a universal or quasi-universal character. An all-inclusive list of norms that create *erga omnes* obligations cannot be presented, the reason being simply that the developing sphere of obligations *erga omnes* concerns all norms, which have strong moral connotations and which are recognized as belonging outside the sphere of state power. There are no absolute truths in this field; it is instead an area under development. The identification of the exact contents of an *erga omnes* norm is, therefore, an ongoing process. Such an evaluation regarding basic human rights is made later on which, if bearing an *erga omnes* character, fall under the collective interest sphere.

However, we shall first analyze what consequences emanate from a breach of an obligation *erga omnes* and a norm *jus cogens*, which brings us to the area of state responsibility and of international criminal culpability of individuals.<sup>62</sup> As said above, a breach of a norm *jus cogens* signifies nullity *ipso facto*; however, its execution in practice is linked to the

obligation *erga omnes* to respect corresponding norms. When a norm *jus cogens* is breached, we are usually at the same time in breach of an obligation *erga omnes*. Simply put, what can states, whether directly injured or not, do in order to protect the legal interest of the international community when facing a breach of an obligation *erga omnes*?

### 2.1.5 Implementation of Obligations Erga Omnes

When a norm has an *erga omnes/jus cogens* character, this implies that all states have a legal interest in ensuring the protection of that norm and in upholding the underlying community interest. A state that has suffered material injury is not the only state entitled to respond; a serious breach of obligations arising under peremptory norms of general international law can attract additional consequences, not only for the responsible state but also for all states.<sup>63</sup> In addition, all states are entitled to invoke responsibility for addressing breaches of obligations to the international community as a whole.<sup>64</sup> Should obligations *erga omnes*/norms *jus cogens* not be respected, each state is, in principle, accountable to all the other states. The rights corresponding to these obligations no longer belong exclusively to the domestic jurisdiction of states. The violation of an *erga omnes* obligation or a norm *jus cogens* engages the responsibility of the state. In turn, other states, acting individually, *uti universi*, may respond unilaterally to a violation of an *erga omnes* obligation/norm *jus cogens* by resorting to all those measures which are normally used to put an end to illicit acts.<sup>65</sup> The community interest provides the authority to act.

The international responsibility of states<sup>66</sup> is governed mainly by customary law, and this is a régime that is developing slowly.<sup>67</sup> However, the codification process was led by the ILC, whose careful elaboration resulted in the adoption of Draft Articles on “Responsibility of States for Internationally Wrongful Acts” in 2001; the Articles were then referred to the General Assembly for consideration.<sup>68</sup> It should be noted that the Draft Articles show a marked tendency not to rule out the possibility of decentralized responses to serious violations of international law, or at least on those occasions when the provisions of the UN Charter are not directly applicable or when the Security Council, representing the collective interest, cannot come to a decision about enforcement of the collective interest.<sup>69</sup> The community interest is delineated in Article 48 as follows:

(Invocation of responsibility by a State other than an injured State) 1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

- .....
- b) The obligation breached is owed to the international community as a whole.

The paragraph gives effect to the ICJ’s ruling in the *Barcelona Traction*, where a distinction was made between bilateral obligations and those that are owed “towards the international community as a whole.”<sup>70</sup> Again, no list of such obligations is provided, as the scope of the concept will necessarily evolve over time. Each state is entitled, as a member of the international community, to invoke the responsibility of another state in breach of obligations owed to the international community.

The question of countermeasures proved to be the most controversial aspect regarding the final adoption of the draft; the extreme sensitivity of some governments regarding

countermeasures was prompted by fears of abuse. However, specific articles were adopted as the best compromise in order to specify the preconditions for and the nature of countermeasures under international law. Measures taken by states other than the injured state are specified in Article 54 as follows:

Measures taken by states other than an injured state

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another state, to take *lawful measures* against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

We are still left with the question regarding the contents of “lawful measures,” especially when humanitarian intervention is concerned. Article 33 of the UN Charter mentions various ways of seeking peaceful settlement of disputes (negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of the parties’ own choice) or, if need be, coercive measures: reprisals not involving the use of armed force (examples of such responses are extremely varied and include vexatious measures targeted at foreign nationals of the litigant states—for example, expelling journalists or diplomats, severing diplomatic relations or recalling diplomats—or even hindering normal trade or economic relations).<sup>71</sup> The use of armed force is, in principle, prohibited, and may only be used in specific cases. Needless to say, we are interested exactly in the use of armed force. Let us now turn to the substantial regulation at hand, first as regards the status of human rights in international law, and second as regards the use of armed force to enhance such rights under conventional law.

### 2.1.6 The Core of Human Rights

The decisions of the ICJ provide explicit guidance for the purposes of identifying human rights as representing *erga omnes* obligations. The ICJ explicitly conferred *erga omnes* character to the principles and norms concerning basic human rights in the *Barcelona Traction* case. It has been suggested that the ICJ’s dictum is limited in its approach and concerns only those rights that are very “basic,” which would imply that the character of *erga omnes* does not apply indiscriminately to all the principles and norms for the protection of human beings.<sup>72</sup> The ICJ identified genocide, racial discrimination (apartheid),<sup>73</sup> and slavery as violations of basic human rights, and it observed that possible sources of such rights are general or conventional international law.

The preemptory character of basic human rights was already confirmed in the *Corfu Channel* case,<sup>74</sup> in which the Court referred to some general and well-recognized principles, such as elementary considerations of humanity, in order to underline a few years later, in its *Reservations on the Convention on Genocide Case*,<sup>75</sup> that the elementary considerations of humanity on which this Convention is based “are ... binding on States, even without any conventional obligation.” We are getting closer to the core of the notion of human rights. In its subsequent jurisprudence, the ICJ identified the following principles:

Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international charac-

ter. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick.... they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" (*Corfu Channel, Merits, ICJ Reports 1949*, 22, para. 215 above).<sup>76</sup>

Hence, the basic aspects of human rights are outlined in Article 3 common to the four Geneva Conventions, which reads as follows:

[the following actions] are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Article 3 is recognized as being part of *jus cogens*.<sup>77</sup> The interests protected belong to the very core values of the international community; hence, the *erga omnes* character of the prohibitions listed is hard to deny. Obviously, the protection that is afforded by Article 3 applies to both international and non-international armed conflicts. This protection was affirmed and strengthened by the Protocols of 8 June 1977 Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International (Protocol I) and Non-International (Protocol II) Armed Conflicts.<sup>78</sup> Subsequently, in its case on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ again confirmed that a number of rules of international humanitarian law applicable in armed conflict are so fundamental to the respect for human beings and for "elementary considerations of humanity" that such rights are binding "upon all states, regardless of whether or not they have ratified the conventional instruments which embody these rights, as such rights constitute intransigent principles of international customary law."<sup>79</sup>

Second, in addition to the jurisprudence bearing directly on the *erga omnes* character of preemptory human rights, the human rights protections afforded in conventional law explicitly identify some intangible rights which demand respect at all times and in all places of imperative interests relating to:

- The right to life<sup>80</sup>
- The right not to be subjected to torture<sup>81</sup>
- The right to freedom from slavery or servitude<sup>82</sup>
- The right to be protected from the retroactive application of criminal legislation.<sup>83</sup>

The above-mentioned four fundamental rights are also regarded as rights from which no derogation is permitted under customary law.<sup>84</sup> Consequently, it has been suggested that the intangible character of these rights reflects general principles of law that are accepted and recognized by the international community—that is to say, that they have become preemptory norms of international law amounting to *jus cogens*.<sup>85</sup> The demand for the respect of these rights also bears on the general principles of law recognized by civilized nations as laid down in Article 38(c) of the Statute of the International Court of Justice.<sup>86</sup>

The principle of humanity,<sup>87</sup> originating from natural law, also includes all these rights. This conclusion coincides with the *erga omnes* character of these norms.

It should be borne in mind that there are a number of conventions on human rights from which no derogation is permitted even though it is not explicitly spelled out, such as the Universal Declaration of Human Rights (1948); the International Covenant on Economic Rights (1966); the International Convention on the Elimination of all Forms of Racial Discrimination (1966); the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973); the International Convention against the Taking of Hostages (1979); the African Charter of Human Rights (1981); and the UN Convention on the Rights of the Child (1990). There would seem to be some justification here for applying the principle of *pacta sunt servanda* (Article 26 of the VCLT), which stipulates that a state contracting party is unconditionally bound by the obligations laid down in the treaties ratified by it.<sup>88</sup>

Third, still within the context of our analysis of the core elements of human rights, the above-mentioned ILC works on State Responsibility are relevant. According to (old) Article 19, point 3(c) of the Draft Articles, an international crime resulted from a serious breach on a widespread scale of an international obligation of essential importance for safeguarding human well being, such as those prohibiting slavery, genocide, and apartheid.<sup>89</sup> At present, the protection afforded by Draft Articles 40, 41, and 48 is more implicit, although no less important. On the one hand, serious breaches of obligations arising under peremptory norms of general international law can incur additional consequences, not only for the responsible state but also for all states. On the other hand, all states are entitled to invoke responsibility for breaches of obligations to the international community as a whole.<sup>90</sup>

Fourth, mention should also be made of simultaneous developments in international criminal law. International criminal law concerns rights from which no derogation is permitted, given that the violation of such rights is punishable under international law, regardless of the circumstances under which such violations are committed. The ensuing international criminal responsibility of individuals rests on national authorities, or on *ad hoc* international tribunals; the establishment of the ICC vests universal jurisdiction for the first time in a permanent international criminal tribunal. International crimes concern violations of the right to life, of the right to corporal integrity, of the right to freedom from slavery and forced labor, and of the right to protection from racial, religious, social, political, or cultural persecution.<sup>91</sup> Specific qualification of international crimes is incorporated in the Statute of the ICC regarding genocide, crimes against humanity, and serious violations of international humanitarian laws.<sup>92</sup>

Therefore, on this basis we may distinguish *fundamental* rights, such as the right to life and to corporal integrity; the right not to be subjected to torture, cruel, inhuman, or degrading treatment or racial discrimination; the right to protection from slavery and involuntary servitude; and the right to protection from the retroactive application of criminal legislation,<sup>93</sup> which are regarded as intangible and recognized as part of *jus cogens* by the international community as a whole. The *erga omnes* character of these rights is indisputable. These rights might well be regarded as creating a minimum basic framework for hu-

man rights, or as constituting the core values of human rights. The violation of these rights is an extremely serious matter, as they reflect the common interest of the international community, which has, accordingly, a specific legal interest in ensuring that these rights are respected.<sup>94</sup> Any state's authority to act in protection of these rights is based in the community interest in their protection.

This conclusion obviously applies to these core values. With regard to other rights concerning the protection of individuals, their *erga omnes* character has to be established separately and objectively on a case-by-case basis by relying on all relevant sources of law. As stated above, such a development is an open and continuous process, depending on the future development of international law and the value choices made therein. The development process has a dual nature: on the one hand, the enlargement of the *erga omnes* sphere in the fields of human rights and humanitarian law is very beneficial for the protection of each individual; on the other hand, such enlargement has to be a careful, well-balanced process, so that only the clearest collective interests of the international community can be accorded the status of imperative norms, which invokes the corresponding interest for protection and the community interest basis for action. The enhancement of community interests proceeds in a beneficial way if the views of states, large and small, are accorded an equal value in their development.

Now we shall proceed with the question regarding the "means" of action. First, the conventional basis of authority will be assessed. Thereafter, in Chapter 3, the customary basis for the humanitarian use of force will be evaluated.

## 2.2 Comprehensive Ban on the Use of Armed Force

### 2.2.1 General Remarks

Restrictions regarding the use of armed force *per se* are the result of decades, if not centuries, of development. By the end of the nineteenth century a gradual change had taken place, from a relatively unrestricted right of states to wage war towards a set of progressive limitations. The right to resort to war had previously been viewed as an inherent right of a sovereign state. Consequently, such a right was regarded as a question of morality and policy outside the sphere of law. Some restrictions of a legal character on uses of force short of war (reprisals and self-defense)<sup>95</sup> did, however, develop, either through customary law proceedings or conventional regulation.<sup>96</sup> This state of the quasi-unlimited right to wage war was about to change. Along with the improvement of the machinery for the peaceful settlement of disputes, the resort to war was more and more often considered *ultima ratio*, in terms of both international law and international politics.<sup>97</sup>

The First World War contributed to an increased sensitivity of states towards the use of force; the failure of a system of alliances to maintain peace; the geographical extent of the war; and the enormous loss of life and the following chaos created a climate favorable to a new, comprehensive conventional approach.<sup>98</sup> The League of Nations, the first international organization with a universal vocation,<sup>99</sup> was established to prevent the eruption of similar conflicts in the future.<sup>100</sup> The Covenant of the League of Nations<sup>101</sup> did not outlaw

war, but it included restrictions on the right to resort to war.<sup>102</sup> These were somewhat similar to the restrictions used in other instruments of that time: denial and prohibition of aggression (Geneva Protocol, Preamble, 2 October 1924,<sup>103</sup> Resolution of the Sixth International Conference of American States, 18 February 1928), peaceful settlement of disputes and prohibition of intervention (The Anti-War Treaty of Non-Aggression and Conciliation, Rio de Janeiro, 10 October 1933, or the so-called Saavedra-Lamas Pact, Article I; League Assembly Resolution, 24 September 1927), non-recognition of territorial acquisitions or special advantages acquired by using force (Convention on Rights and Duties of States, Montevideo 26 December 1933, Article II)<sup>104</sup> and, finally, the outlawing of war itself (General Treaty for the Renunciation of War, 27 August 1928, the so-called Kellogg-Briand Pact). As we know, however, these arrangements failed to prevent another World War.

The UN Charter was adopted, in turn, for the more effective prevention of future conflicts. At Dumbarton Oaks,<sup>105</sup> the view prevailed that the effectiveness of a system for the maintenance of peace and security depended on the unity of the states possessing the greatest power, and that the cooperation of these states could best be achieved by a commitment to act in accordance with defined purposes and principles of a general nature. Unilateral use of force by states was identified as a clear risk factor for world peace and, for that reason, instead of individual states resorting to force, a collective system was set up as a treaty in order to respond, by force if necessary, to actions and situations falling within the organization's field of competence.<sup>106</sup> Moreover, an additional step was taken, as the illegality of specific instances of the use of force was now presumed.<sup>107</sup>

Consequently, the main purpose of the organization was to "maintain international peace and security, and to that end, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace" (Article 1, paragraph 1 of the Charter).<sup>108</sup> Moreover, the peoples of the United Nations were determined "to ensure by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest" (Preamble to the Charter). A comprehensive ban on the use of force was explicitly stated (Article 2, paragraph 4), along with a categorical prohibition of intervention in the internal affairs of member states (Article 2, paragraph 7). Some provisions were made for exceptions to the rule (Chapters VII and VIII, Article 107),<sup>109</sup> and some exceptions follow from the specifications made in the wording of the rule itself.<sup>110</sup>

### *2.2.2 The UN Charter as a Treaty*

Before embarking on the interpretation of individual rules, a few words are necessary regarding interpretation itself. We need first to acknowledge the Charter's character as a founding treaty of an international organization. The starting-point of the interpretation offered here is the text of the treaty.<sup>111</sup> The basic rule for interpretation stems from the Vienna Convention on the Law of Treaties (VCLT) 31(1), which states that a provision "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Moreover,

the quasi-universal character of the UN, with its overarching competencies, especially in the maintenance of international peace and security (the cardinal purpose of the organization),<sup>112</sup> its specific organs, and their structures all should play an important role in any interpretation. Thus, for the sake of completeness, it is important to consider the entire context of the Charter and its relation to other immediately relevant sources of law, to the function and purpose of the specific provisions, to its historical genesis, and to the legislators' intent, while maintaining a dynamic interpretative attitude: the Charter needs to be interpreted *against the present international circumstances*.<sup>113</sup> Last, it should also be specified that the provisions of the Charter regarding the right to use armed force are not exhaustive, as they do not supersede customary law or the general principles of law.<sup>114</sup> The parallel existence of customary norms or general principles on the use of armed force is possible, since the Charter represents, after all, regulation by convention.<sup>115</sup> "The UN Charter by no means covers the whole area of the regulation on the use of force in international relations."<sup>116</sup>

### 2.2.3 Article 2.4 of the UN Charter

The comprehensive ban on the use of force is regulated by Article 2.4 of the Charter as follows:

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

4. 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.<sup>117</sup>

The prohibition of Article 2.4 is central to the Charter. The ICJ has stressed that the comprehensive ban on the use of force is a fundamental principle of general international law.<sup>118</sup> Not only that, it is also considered that Article 2.4 expresses customary law as well. Moreover, the prohibition against the use of force is not simply considered as customary, but it "constitutes a conspicuous example of a rule of international law having the character *jus cogens*."<sup>119</sup> In view of the fact that this article has been accepted as a rule of general international law, it is binding upon states.<sup>120</sup> However, there is another body of opinion, which maintains that the ban would be conditional, depending on the effective functioning of the collective security system outlined in Chapter VII of the United Nations Charter.<sup>121</sup> And since the collective security system has failed on many occasions, due to the vetopowers of permanent members of the Security Council, the conclusion would imply invalidity. We shall come to this possibility a bit later.

### 2.2.4 Comprehensive Ban

Literally speaking, Article 2.4 covers uses of force which are inconsistent with either the territorial integrity or the political independence of any state or, more generally, with the purposes of the United Nations.<sup>122</sup> Its field of application covers even a mere threat to use force. It should be noted from the start that the article concerns interstate relations, or "international relations." It does not, therefore, apply to the threat or use of force within

states.<sup>123</sup> The classification of a situation as internal becomes significantly more complicated in the event of intervention by third party states or organizations in internal conflicts, situations whose frequency cannot be denied.<sup>124</sup> There seems to be reason to support the overall applicability of Article 2.4 in the event of armed interventions within states by third party states or organizations, although with some exceptions.<sup>125</sup> The more external state or non-state interventions there are in such conflicts, irrespective of whether these parties intervene on the side of the legitimate government or the insurgents, or on both sides, the more internationalized such conflicts become, and the more interstate relations are called into play.<sup>126</sup> Also, in view of the aim and purpose of Article 2.4—a comprehensive ban on the use of force—the article calls for a broad interpretation. In addition, actual conflicts often have a mixed character, involving both intra- and inter-state elements, so that there are frequently no grounds to deny Article 2.4’s application to any such conflicts that could endanger international, or regional, peace and security.

As far as the goal of military intervention is concerned, the article refers to “territorial integrity” and “political independence.” The inclusion of these terms was not aimed at restricting the scope of the ban on the use of force, as the terminology was introduced at the San Francisco Conference at the request of several smaller states in order to reinforce the ban and to guarantee its comprehensive nature.<sup>127</sup> The ban on the use of force in violation of territorial integrity is regarded as the equivalent of viewing territorial inviolability as proscribing any kind of forcible trespassing.<sup>128</sup> This interpretation is reinforced by GA Resolution 2625 (XXV): “Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State.” In turn, the use of force in violation of political independence is linked to the prohibition on intervention<sup>129</sup> and, thus, to the protection of each state’s sovereignty to exercise its political rights to the full by choosing its system of government internally. It should also be noted that the two examples of recourse to force do not just refer to those cases in which territorial integrity or political independence are effectively altered or abolished.<sup>130</sup> Some have, however, proposed that an intervention that “does not result in territorial conquest or political subjugation” would not be contrary to the prohibition.<sup>131</sup> The justifiability of the aim, if it were toward an end other than conquest or subjugation, would justify the act. In fact, certain cases of threat or use of force within the law of the sea,<sup>132</sup> intervention in civil and mixed conflicts, humanitarian intervention, intervention to protect nationals abroad, intervention to surpass terrorism, and anticipatory self-defense all challenge the Article 2.4 paradigm regarding the unconditional character of the prohibition. Namely, the most common use of force in numerical terms since the Second World War has been precisely the cross-frontier action, for a wide variety of reasons. The categorical character of the prohibition is thus diminished somewhat.

As regards the third qualification, regarding the use of force in a manner inconsistent with the purposes<sup>133</sup> of the UN, it reinforces and enlarges the ban, lending itself, however, to a wide range of possible interpretations.<sup>134</sup> Semantically assessed—“or, in *any other* manner...”—it is clearly aimed at enlarging the ban,<sup>135</sup> along the lines of the legislators’ historical intent. But, on the other hand, if resort is made to dynamic interpretation, any firm conclusions become undermined. For instance, if the force is used for the furtherance of the UN’s purposes in the field of human rights, the following can be stated: It is evident

that the United Nations' field of action explicitly includes the achievement of international cooperation in solving international problems of a economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction of race, sex, language, or religion (Chapter I, Article 1, point 3, and Chapter IX, International Economic and Social Co-operation, Article 55, point c and Article 56).<sup>136</sup> Moreover, the peoples of the United Nations are determined "to ensure by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest" (Preamble to the Charter).<sup>137</sup> It might, therefore, well be argued that armed force could be used in order to attain other purposes or to accomplish tasks specified in the Charter. Also, the effective promotion of human rights has now become part of the mainstream of international law, including such fundamental conventional instruments as the Universal Declaration of Human Rights (1948); the four Geneva Conventions (1949) and the two Additional Protocols (1977) on international humanitarian law in armed conflict; the Convention on the Prevention and Punishment of the Crime of Genocide (1948); the two 1966 Covenants relating to civil, political, social, economic, and cultural rights; and the Rome Statute of the International Criminal Court (1998). In fact, the "just cause" might affect the peace vs. justice equation, with the inclination being towards justice. In short, the ban is not clear.

### 2.2.5 Prohibited Uses of Force

However, despite these difficulties in interpretation, some parts of the use of force régime are clearer. Namely, it is generally understood that the concept of "force" concerns armed force,<sup>138</sup> which is confirmed in the GA Resolution 2625 (XXV): only military force is addressed, as economic and other forms of coercion come under the rubric of non-intervention.<sup>139</sup> Of the different modes of using armed force, aggression constitutes the most serious violation.<sup>140</sup> Some contend, in fact, that the present core of Article 2.4 would forbid only cases of clear aggression, no more and no less.<sup>141</sup> Article 1 of GA Resolution 3314 (XXIX) defines aggression as follows: "Aggression is the use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations".<sup>142</sup>

The resemblance to the wording of Article 2.4 is close, but its significance for the interpretation regarding the scope of Article 2.4 remains limited, as the Resolution deals only with acts of aggression. But even so, it may be indicative of acts which, even if they do not meet the criteria for aggression *in casu*, might fall within the scope of Article 2.4. Namely, the resolution incorporates a non-exhaustive list of actions, which can eventually be characterized as acts of aggression, depending on the circumstances. The Security Council may also regard other actions as acts of aggression. Added to these are actions involving the use of force that are not characterized as acts of aggression by this body, or actions involving ordinary illicit uses of force. Such actions include, for example, armed reprisals, self-defense, or interventions which are legally authorized but which exceed the permitted level of response. Equally forbidden is the resort to armed force in order to resolve international disputes or, more generally, to assert rights.<sup>143</sup>

Are humanitarian interventions, then, compatible with the article in question? The original scope of the provision relates to the general circumstances surrounding its adoption. The tendency was clearly towards a restrictive interpretation, and the delegations were concerned that the UN should have a near monopoly on the use of force. The broad terms of Article 2.4 reflect the emphasis on prohibition rather than permission.<sup>144</sup> However, the interpretation of the prohibition on this point cannot be based exclusively on *travaux préparatoires*. The original intent of the legislator most likely does not correspond to the current situation at hand, over half a century after the adoption of the Charter. Therefore, subsequent national and UN practice needs also to be taken into account. State practice and its effect on the Charter are addressed separately in the next chapter. As regards UN practice, several later General Assembly resolutions<sup>145</sup> are significant for interpreting the ban on intervention in general:

- Resolution 2131 (20<sup>th</sup> Sess.) of 21 December 1965, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty<sup>146</sup>
- Resolution 2734 (25<sup>th</sup> Sess.), Declaration on the Strengthening of International Security<sup>147</sup>
- Resolution 2625 (XXV) of 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations<sup>148</sup>
- 1981 Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States<sup>149</sup>
- 1993 review of the implementation of the Declaration on the Strengthening of International Security<sup>150</sup>
- Resolution on Human Rights and Unilateral Coercive Measures, 15 February 2000.<sup>151</sup>

The General Assembly has interpreted the Charter as imposing a prohibition on intervention, which admits of no exception: intervention is always unlawful, regardless of the state or coalitions of states undertaking the intervention, and regardless of the motive or effects.<sup>152</sup> However, the GA interpretations no longer give sole authoritative guidance controlling the behavior of subjects of law, since state practice on the use of force in general, and on the humanitarian use of force in particular, represents a dual tendency. On the one hand, violations of Article 2.4 are many; on the other, state sovereignty is being conceived, in specific international *fora*, as being coterminous with the overriding concept of the security of the people.

### 2.2.6 Conclusion: *Question of Validity?*

According to the foregoing discussion, the UN system is characterized by a comprehensive ban on the use of armed force. Aggression represents the most serious violation of this ban, but other uses of armed force that fall short of aggression are also banned if directed against “territorial integrity,” “political independence,” or if they run counter to the “purposes of the UN.” Specific exceptions to the ban do exist, including the inherent right of states to self-defense and the collective security guarantee of Chapter VII, in connection

with regional arrangements of Chapter VIII. As far as the comprehensive ban itself is concerned, its contents are vague, as are the concepts that support them. Peace took precedence over justice when the UN was founded, but a shift towards a preoccupation with justice is taking place in some areas in which the use of armed force is in search of a more secure legal basis. One of these areas is humanitarian intervention.<sup>153</sup>

In fact, the validity of Article 2.4 needs to be assessed against the global interpretative environment, which includes both the conventional framework of the UN, taking precedence over other eventual—and perhaps even contradictory—obligations of members, and general international law, so that other equal and superior sources of law also need to be taken into account. Other conventions, customary laws, and legal principles do, in fact, have an effect on the Charter. As far as the Charter is concerned, firm conclusions regarding the actual contents of Article 2.4 are blurred by state practice, including a variety of violations of the article. Obviously, a “treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions” (VCLT Art. 38). The concepts of *desuetude*, subsequent practice, or custom supplanting a treaty norm all play a role if the law is based on consent: the changed consent of the parties must take precedence, whether it be expressed in the form of a new treaty that supersedes an older treaty or a new custom that supersedes an older treaty.<sup>154</sup>

The law of Article 2.4 is affected by state practice. A prominent list of problematic cases relating to Article 2.4 would include the Israeli, French, and British invasion of Egypt in 1956; the Soviet invasion of Hungary, also in 1956; the Indian invasion of Goa in 1961; the 1965 U.S. action in the Dominican Republic; the Warsaw Pact invasion of Czechoslovakia of 1968; the Arab action in the 1973 Middle East War; North Vietnamese actions against South Vietnam, from 1960–75; the Vietnamese invasion of Kampuchea in 1979; the 1979 Soviet invasion of Afghanistan; the Argentine invasion of the Falklands in 1982; the U.S. invasion of Grenada the following year; the American action in Panama in 1989; and the 1990 Iraqi attack on Kuwait. Such violations are not limited to bilateral conflicts. Actions by multi-state, international organizations fall into the category as well, such as ECOWAS actions in 1990 and 1997, NATO’s campaign in Kosovo (1999), multi-state action in Afghanistan (2001)<sup>155</sup> and Iraq (2003),<sup>156</sup> etc.<sup>157</sup> Cross-border clashes are also numerous, including the Iran-Iraq War of the 1980s; American air strikes against Iraq (1998–99); intermittent Israeli actions against Lebanon during the 1990s; U.S. air strikes against Libya (1986); the Pakistani incursion into Indian Kashmir (1999); the Uganda-Rwanda-Congo war (1997–99); Ethiopia vs. Eritrea (2000), and so on.<sup>158</sup>

If massive violations do not actually supersede Article 2.4, at least they create a state of uncertainty as to what the law is: *non liquet*.<sup>159</sup> As states have come to value goals other than those expressed in Article 2.4, the authority and control of the norm have disappeared;<sup>160</sup> this extensive body of international law is no longer predictive of the state of law.<sup>161</sup> The question is, then, whether there is a remaining “core” of Article 2.4. Some of the core remains, if it can be presumed that it is in the interest of states to have some predictable regulation on the unilateral use of force. Such an interest is bound to exist, taking into account the fact that since the beginnings of international law the state of peace was among the first things to be regulated, in order for any level of international cooperation to

be possible in the first place. What we are saying here is that a complete lack of norms governing the use of force would effectively undermine an international system that claims to be based on law instead of on mere power politics. Humanitarian intervention, for that matter, is not included in the core of the prohibition, but lingers in the grey area of *non liquet*. The protection of human rights that is embedded in the Charter, the Article 2.4 high threshold, exclusive of humanitarian intervention, as well as claims for an effective functioning of the collective security regime would serve as a basis for an eventual right of self-help in specific circumstances.<sup>162</sup>

At the very least, the use of force by the United Nations remains regulated by the Charter. We shall now turn to the Charter-based use of force in order to clarify the UN stance on humanitarian uses of force before contemplating the customary regulation of humanitarian intervention, either clearing the state of *non liquet* or not.

## CHAPTER 3

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# CONVENTIONAL EXCEPTIONS

### 3.1 The Charter: Exceptions to the Comprehensive Ban

#### 3.1.1 Self-Defense

##### *Scope of Self-Defense*

Self-defense has been invoked in a number of situations in order to justify the use of armed force.<sup>1</sup> Self-defense is one exception to the comprehensive ban against the use of force in the UN Charter. Self-defense is, however, not directly relevant as a legal grounds for any humanitarian intervention, since self-defense is defined by the defensive use of force for the protection and profit of states or coalitions of states, instead of being aimed at the general defense of human rights in another state or states. The relevance of self-defense to this topic lies elsewhere; developments in the field of self-defense affect the general prohibition of the use of force in the UN Charter, limiting its applicability while enlarging the gray area of non-regulation. The importance of developing our understanding of the legal frameworks surrounding the use of force in other contexts is increasingly urgent, and is accentuated by the need for enhanced predictability in the field of international relations. Here again we are facing a value-choice. The need for a clear regulation is dependant on the will of international actors: regulation of the uses of force enhances predictability of international relations on a legal basis, instead of leaving relations between states dependant on mere power politics. Presumably, such a will exists, since most states do continue to abide by the UN Charter. Let us now turn briefly to the law of self-defense and its decreasing role in conventional international law.

Self-defense was regulated well before the passage of the UN Charter. Conditions for permissible self-defense stem from the *Caroline* case.<sup>2</sup> For a state to be permitted to use force in self-defense, there must first be a proven necessity of self-defense, this necessity being “instant, overwhelming, and leaving no choice of means, and no moment of deliberation”<sup>3</sup>; second, the response would have to be proportionate, its actions neither unreasonable or excessive.<sup>4</sup> It is noteworthy that a state could take recourse to force not only against an actual armed attack but also in anticipation of an imminent armed attack.<sup>5</sup>

Did the concept of anticipatory self-defense established in the *Caroline* case survive the adoption of the UN Charter? Interpretations of the present state of conventional regulation are divided on this point. The Charter’s Article 51 reads as follows:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations,

until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The Article speaks of armed attack, but falls short of defining self-defense further, especially as regards the timing of its initiation. Two interpretations are brought forward: on the one hand, the “restrictionists” interpret the clause “*if an armed attack occurs*” to imply that self-defense is permitted only once an actual armed attack has occurred. This would seem to reflect the legislators’ intention to curb the unilateral use of force as much as possible.<sup>6</sup> On the other hand, the “counter-restrictionists” concentrate on the concept of “inherent”; because that word is used to describe self-defense, the framers of the Charter did not intend to circumscribe the pre-existing customary right but merely desired to list one situation in which a state could clearly exercise that right.<sup>7</sup>

The question of anticipatory self-defense has been discussed in various UN bodies a number of times. Already in 1946, the UN Atomic Energy Commission was considering the breach of a (future) international agreement on nuclear weapons to be potentially so grave a matter as to give rise to the inherent right of self-defense recognized in Article 51; other cases include the Cuban Missile Crisis in 1962,<sup>8</sup> the 1967 Middle East War,<sup>9</sup> the Israeli attack in 1981 on the Iraqi nuclear reactor at Osirak,<sup>10</sup> the ROEs of the U.S. and U.K. aircraft patrolling the no-fly zones over Iraq,<sup>11</sup> etc. However, states have been reluctant to invoke a justification based on explicitly anticipatory self-defense; such reluctance could, of course, be taken as evidence of the controversial status of the justification.<sup>12</sup>

Recent developments regarding the war on terrorism have made anticipatory claims more explicit than ever. The question of self-defense, by way of anticipation, is raising its head, approaching armed reprisals, which are illegal acts, involving the use of force in response to an injury suffered earlier. Namely, as the result of the September 11, 2001 bombings, the Security Council quickly moved on to adopt generic resolutions on combat against terrorism (Res. 1368/2001, 1373/2001), reaffirming the inherent right of individual or collective self-defense (preamble of the resolutions),<sup>13</sup> characterizing the terrorism as a threat to international peace and security and imposing on states strict obligations vis-à-vis the suppression of terrorism internally and internationally. And further, the Security Council explicitly commended international efforts to root out terrorism, welcoming the developments in Afghanistan, in where the US had resorted to force since October 6, 2001, in an effort to root out the terrorist network of Al-Qaida. Was there a *de facto* SC support for the US use of force in Afghanistan as a case of preventive self-defense? The state practice seems supportive of such a widening interpretation of traditional self-defense.<sup>14</sup> The question is, now, how far beyond do the Security Council resolutions and the supportive practice reach – extending from state acts to acts by groups, engaging the responsibility of the territorial state from which the groups operate, *in advance*?<sup>15</sup> No clear answer can be given. The reactions in the Security Council and of other subjects of international law<sup>16</sup> can be regarded as pointing to a new direction; a certain political agreement seems to have been

reached but its legal significance cannot yet be determined.<sup>17</sup> The fact is, that the scope of self-defense under such political understanding extends far beyond the Art. 51 of the Charter.

### *Implementation of Self-Defense*

The preconditions for the implementation of self-defense, once an action has begun, stem from Article 51, according to which the right of self-defense exists “until the Security Council has taken measures necessary to maintain international peace and security,” and “measures taken by Members ... shall be immediately reported to the Security Council ...” Obviously, the right of self-defense was meant to be a temporary right, subject to the control of the Security Council and to the principles of proportionality and immediacy stemming from the Webster formula in the *Caroline* case.<sup>18</sup> The implementation of collective self-defense is governed by the same conditions.<sup>19</sup> The Security Council’s main responsibility is to maintain international peace and security: hence, self-defense may be invoked until the Security Council has taken the necessary measures. Moreover, any measures taken on the grounds of self-defense are to be immediately reported to the Security Council. With respect to the character of the measures taken by the Security Council for abrogating the right of self-defense, it is presumed that only the effective and concrete character of these measures can abrogate the individual or collective right of self-defense.<sup>20</sup> However, as a result of political differences within the Security Council, it has become habitual for member states to invoke self-defense, and the obligation to report the measures taken and to put an end to defensive measures has frequently been neglected.<sup>21</sup>

Again, in practical implementation, the letter of the law is often not heeded. Common state practice makes it extremely difficult at present to evaluate the status of the law around self-defense. The UN Charter’s prohibitions, plus the material preconditions stemming from the *Caroline* case, are relatively strict, but state practice (see above, “Conclusion” in Chapter 2) includes major violations to the Charter’s letter. Earlier, such violations were viewed as rendering the state of law unclear, *non liquet*.<sup>22</sup> The points articulated by the advocates of anticipatory self-defense are now joined by those arguing for the right to use force, in anticipation, against potential terrorist actions: the imperatives of anticipatory self-defense and the protection of nationals become united, reaching far beyond the bounds of Article 51.<sup>23</sup> The conventional regulation, incorporated in Article 51 of the UN Charter, is thus neither controlling nor authoritative vis-à-vis state behavior. The consequences are drastic. Namely, there is an urgent need to define the right of states to self-defense if the UN régime governing the use of force is to remain at all relevant. More and more states can more easily resort to the unilateral use of force based on vague grounds of self-defense, anticipatory or otherwise, when they are in fact simply acting out of their national self-interest. Such a development gravely endangers the common regulation of the uses of force, achieved for the first time in 1945 after the Second World War. Obviously, the current state of law does not correspond to the facts on the ground, but the law can always be amended, so that new developments are incorporated into the realm of law, instead of simply leaving matters up to power politics.

Not only do these myriad inconsistencies exist, but the confusion regarding the conventional regulation of self-defense extends even further, undermining the general prohibition in Article 2.4 against the use of force. Self-defense grounds can be employed in an unlimited number of situations, making the general prohibition an exception and self-defense the rule. Unilateral thinking is gaining ground, as the collective interests of the world community fall by the wayside.

### 3.1.2 *Collective Security*

#### *General Remarks*

Beside the inherent right of states to self-defense, the Charter empowers the UN to use armed force when necessary to maintain international peace and security. Strictly speaking, interventions by the organization, even on humanitarian grounds, do not qualify as humanitarian intervention, but are instead classed as collective uses of force. Nonetheless, the organization's practice is relevant as it represents, more or less, the collective interest of UN members in protecting human rights, while shifting the terms of the debate from the ardent defense of state sovereignty to the concept of sovereignty as responsibility, which includes responsibility inside a state's borders. In addition to the UN's use of force, regional organizations may also be authorized to use armed force when appropriate. The most interesting question is whether UN enforcement is sufficient for purposes of protecting collective interests. If not, other modalities should be contemplated. Namely, if the law (i.e., the Charter) does not meet the demands for the protection of collective interests, states will look elsewhere to justify the actions they take in pursuit of their collective interests.

The original intent of the drafters of the UN Charter was to centralize enforcement power in international relations and to confer upon the Security Council primary responsibility for the maintenance of international peace and security, "in order to ensure prompt and effective action by the United Nations" and that to ensure that the members "agree that in carrying out its duties under this responsibility the Security Council acts on their behalf" (Article 24.1).<sup>24</sup> The member states of the United Nations agree to accept and carry out the decisions of the Security Council (Articles 25, 48, 49),<sup>25</sup> which is invested with extensive and essentially discretionary powers. However, any action decided by the Security Council must serve the purpose of maintaining international peace and security.<sup>26</sup> The successful centralization of the executive powers lies in the fact that the "Big Five" powers were (and are) represented, with veto power, on the Security Council, so that their interests are guaranteed to be defended by their veto. This political consensus was achieved for the purposes of creating a supra-national enforcement organ, save the veto right of the "Big Five." Thus, other than procedural matters, all Security Council actions are decided by an affirmative vote of nine members, including the concurring votes of permanent members (Article 27.3). The Security Council itself is competent to interpret the question on "procedural matters," and to determine its meaning by resorting to the non-procedural voting method.<sup>27</sup>

The veto right and its use have led to decisions being made under other frameworks, outside the Security Council.<sup>28</sup> The veto can effectively block Security Council decision-making, as was the case during the Cold War years. In that era, the Security Council very

rarely succeeded in taking action under Chapter VII. Other ways of taking action were felt to be necessary. Therefore, the institution of peacekeeping, arrived at through consensus, evolved via UN practice, without any express legal basis in the Charter.<sup>29</sup> If for some reason UN peacekeeping is not an option—for instance, if there is a lack of agreement in the UN—a regional solution arrived at through cooperation and consensus might be preferred. Two kinds of forces are considered in this respect: armed forces created by regional organizations, and armed forces created *ad hoc* by states for peace-keeping purposes. As far as forces of regional organizations are concerned, these are organs of the regional organizations themselves, and their status and legal nature are defined in the relevant organizations' founding documents.<sup>30</sup> Regional action is placed under the UN umbrella, with explicit regulation being found in the UN Charter Chapter VIII. The legal nature and status of *ad hoc* forces formed by states relies, on the contrary, on the rules of general international law, with an explicit emphasis on consent.<sup>31</sup>

The role played by the other UN organs in maintaining peace and security, first and foremost the General Assembly<sup>32</sup> and the Secretariat (Secretary General),<sup>33</sup> will not be discussed here, as they are outside the scope of the present study. Let it only be emphasized that other venues for Security Council action can well be (and have been) envisaged and developed further, in order to help the UN to more effectively meet the imperatives of maintaining international peace and security.

#### *Article 39: Inducing Security Council Action*

The Security Council's authority to act is relatively unlimited, as the purposes and principles of the Charter, which, according to Article 2.4, are to be taken into account, have more the character of guidelines. Moreover, the observance of international law is urged in the Charter only with respect to the peaceful settlement of disputes (Article 1.1), but not regarding collective measures under Chapter VII. Also, the domestic jurisdiction restriction of Article 2.7 is inapplicable, since the principle that actions "shall not prejudice the application of enforcement measures under Chapter VII" applies. The Security Council's authority is anchored to the law of the Charter, but not necessarily to international law; the Charter is based instead on a political approach to peace maintenance.<sup>34</sup>

The Security Council's power to respond depends on the existence of one of the situations referred to under Article 39. Under the terms of this article,

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.

First and foremost, the Security Council has to determine the existence of a threat to the peace, a breach of the peace, or an act of aggression. No further distinction or definition of the terms was included.<sup>35</sup> The Council enjoys ample leeway here, for it must be able to appraise any new and unforeseen situation that might prejudice peace and security. In order to determine whether there has been a breach of the peace or an act of aggression, the Security Council acts in a discretionary manner.<sup>36</sup>

Its discretionary power is even greater when it has to determine the existence of a threat to peace and security, since this is an inherently multi-purpose concept whose effective use depends on extremely variable considerations.<sup>37</sup> It can be seen from the preparatory works on Article 39 that, from the very beginning, the concept of “international peace” was understood *sensu largo*, as not being dependent only on trans-border elements but also permitting leeway for more expansive interpretations. Thus, after the Cold War there was a growing tendency within the Security Council to incorporate internal situations of states into the concept of peace, particularly in the case of violations of fundamental human rights.<sup>38</sup> It seems to be by now widely accepted that extreme violence within a state can give rise to Chapter VII enforcement action.<sup>39</sup>

This interpretation does not, however, meet with general acceptance. The opponents of an enlarged interpretation of threats correctly resort to the intent of the drafters of the Charter to keep all matters of domestic jurisdiction out of the UN’s reach.<sup>40</sup> A trans-boundary element was anticipated, as the authority to act was given “to maintain or restore international peace and security.” The domestic jurisdiction reserve was a clear question of principle for many states, permitting them to become members of an organization whose intervention was explicitly ruled out in domestic matters.<sup>41</sup> Another matter is, of course, whether human rights are excluded from domestic jurisdiction in the first place?<sup>42</sup> If this were the case, Article 2.7’s prohibition would not be violated; however, the internationality connection of Article 39 (“to restore international peace”) is still missing. But, then again, the right to qualify “threats” was not limited only to international threats.<sup>43</sup>

The recent practice of the Security Council will be examined in the following section. Will this examination show any change in the Security Council’s approach vis-à-vis human rights protection, given the fact that it is not always the external effects of an internal situation but, in some cases, the internal situation itself that constitutes a threat to peace and security? Is this in fact a case of collective enforcement of community interests?

### *Threat to the Peace: Breach of Human Rights*

Already during the Cold War period the Security Council considered as threats to the peace cases of full-scale civil war,<sup>44</sup> or internal situations where racist regimes and other government actions grossly and persistently violated a particular nation’s own citizens’ rights, which are firmly established in international law.<sup>45</sup> Some, however, were troubled by this expansive interpretation of the Security Council’s powers: a small group of 15 states (out of a body of nearly 200) were creating new interpretations of their powers.<sup>46</sup> Nonetheless, after the end of the Cold War, the range of Security Council enforcement has grown significantly. To demonstrate the strengthening of this human rights ideology, reference can be made to a press release issued by the Security Council on 26 February 1993,<sup>47</sup> in which it pointed out that the consequences of humanitarian crises, including mass movements of people, were beginning to make themselves felt in ways that were threatening to international peace and security.

The Security Council response reflects the fact that the traditional threat of an armed conflict between states has changed: situations are often no longer inter-state conflicts, but result from internal strife, often taking place in failed states, meaning a deteriorated gov-

ernment machinery is no longer able to fulfill the functions of a state, including providing security, order, and welfare for its citizens. Also, modern technology and the proliferation of highly destructive weapons, combined with the increased vulnerability of civilians, often involving their deliberate targeting, have created new security issues that inherently affect the concept of international/regional peace and security. In fact, these new security issues concern explicitly human security, as specifically underlined by the UN Secretary-General Kofi Annan in his address to the 54<sup>th</sup> session of the UN General Assembly in September 1999 on the “prospects for human security and intervention in the next century.” Annan challenged the UN member states to “find common ground in upholding the principles of the Charter, and acting in defense of our common humanity.”<sup>48</sup> He enlarged the concept of security beyond the simple security of states from external aggression to encompass the security of people against threats to life, health, livelihood, personal safety, and human dignity, all of which can be put at risk by external aggression but also by internal factors within a country. Security is thought of less in terms of merely defending territory, and more in terms of protecting people; once synonymous with the defense of territory from external attack, the requirements of security today have come to embrace the protection of communities and individuals from violence.<sup>49</sup> Needless to say, such a broad approach to security, and therefore to the UN’s mandate to preserve it, is not adhered to by all who agreed to the original, more strict interpretation of the concept of internationality, which necessitated an element of trans-border activity.<sup>50</sup>

Examples of the Security Council’s expanding concept of security are: Somalia–Resolution 794 (1992); Rwanda–Resolution 929 (1994); the region of the Great Lakes (Zaire)–Resolution 1078 (1996); Kosovo–Resolution 1199 (1998); East Timor–Resolution 1264 (1999) and Afghanistan–Resolutions 1267 (1999), 1333 (2000), and 1363 (2001). Such a list is far from exclusive, and should also include other cases where the qualification of the threat was based either on humanitarian considerations and trans-boundary elements<sup>51</sup> or on solely humanitarian considerations.<sup>52</sup>

In the case of *Somalia*, the Security Council noted in Resolution 794 (1992) that: “Determining that *the magnitude of the human tragedy* caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, *constitutes a threat to international peace and security*.”<sup>53</sup> Humanitarian considerations clearly contributed to the qualification of the threat, which was deemed to be international in nature. No reference was made to trans-boundary elements, which were, supposedly, not the main issue.<sup>54</sup>

In the case of *Rwanda*, the Security Council noted in Resolution 929 (1994) that: “Deeply concerned by the continuation of *systematic and widespread killings* of the civilian population in Rwanda .... Determining that *the magnitude of the humanitarian crisis in Rwanda constitutes a threat to peace and security in the region*.”<sup>55</sup> The humanitarian crisis provided the direct basis for determining the existence of a threat, at least on a regional level. Here, also, there was no explicit reference made to trans-border elements, and the emphasis was clearly on human rights.<sup>56</sup> However, all foreign presence was soon eliminated, and the incitements to genocide gained ground tremendously.<sup>57</sup>

In the case of the *region of the Great Lakes (Zaire)*, the Security Council noted in Resolution 1078 (1996) that: “Particularly concerned at the humanitarian situation and the large-scale movements of refugees and internally displaced persons ... Determining that *the magnitude of the present humanitarian crisis in eastern Zaire constitutes a threat to peace and security in the region.*”<sup>58</sup> The humanitarian crisis was once again the focus of the determination of the existence of a threat to regional peace and security. The mass-movements of people were a decisive element for the stability and security of the entire region.

In the case of *Kosovo (FRY)*, the Security Council noted in Resolution 1199 (1998) that: “Deeply concerned by *the rapid deterioration in the humanitarian situation* throughout Kosovo, alarmed by *the impending humanitarian catastrophe*, ... Deeply concerned also by reports of *increasing violations of human rights and of international humanitarian law*, ... Affirming that *the deterioration of the situation in Kosovo (Federal Republic of Yugoslavia) constitutes a threat to peace and security in the region.*”<sup>59</sup> The determination of the existence of a threat was based on the humanitarian crisis, which resulted in the mass displacement of people both in and outside the province. Several references were made to humanitarian considerations. Trans-border elements were obviously part of the security situation in Kosovo.

In the case of *East Timor*, the Security Council noted in Resolution 1264 (1999) that: “Deeply concerned by the security situation in East Timor, and in particular by *the continuing violence against and large-scale displacement and relocation of East Timorese civilians*, ... Appalled by *the worsening humanitarian situation* in East Timor, particularly as it affects women, children and other vulnerable groups, ... Expressing its concern at reports indicating that *systematic, widespread and flagrant violations of international humanitarian and human rights law* have been committed, ... Determining that the present situation in East Timor *constitutes a threat to peace and security.*”<sup>60</sup> Here again the humanitarian crisis constituted a threat to peace and security. No mention whatsoever was made of the regional or international character of the threat.

Finally, in the case of *Afghanistan*, the Security Council determined in its Resolutions 1267 (1999), 1333 (2000), and 1363 (2001) that the situation in Afghanistan and the failure of the Taliban authorities to respond to earlier demands of the international community represented a threat to international peace and security in the region.<sup>61</sup> The consequences of the internal situation created an obvious risk for both regional and international peace and security, and the UN authorized the use of force.<sup>62</sup>

### Conclusion

A threat to international or regional peace can emanate from the most varied internal situations, such as the failure to respect human rights and humanitarian law in an internal conflict, endorsement of terrorism,<sup>63</sup> or the failure to abide by conventions limiting weapons of mass destruction (as was the case with Iraq).<sup>64</sup> After a Security Council qualification, the internal situation becomes a subject for further Security Council action. Experience shows that a threat either emanates from several factors (including a humanitarian crisis), or is based primarily on a humanitarian crisis. The first category includes the cases of Iraq,

Yugoslavia, Haiti, and Afghanistan, while the second covers cases in Albania, Bosnia-Herzegovina, Somalia, Rwanda, Zaire, the Congo, Sierra Leone, Kosovo, and East Timor.

The human rights aspects of Security Council decisions are of special interest. In these cases, it was determined that the lack of respect for human rights and humanitarian law, as such, had exceeded the Security Council's tolerance and was, therefore, characterized as a threat to peace and security. More specifically, the respect for human rights and humanitarian law is considered an inherent part of the concept of international/regional peace and security, and therefore, does not belong exclusively to the domestic jurisdiction of states. International peace does not consist of the absence of armed conflict between states, but it includes another element: a minimal standard of orderly conditions within each state, including respect for basic human rights. And the preponderance of internal conflicts makes the latter aspect this minimal standard of order all the more acute in the current security network of international society. Therefore, severe and widespread suffering of the civilian population can give rise to a threat to international peace and security.<sup>65</sup> The Security Council has unanimously affirmed that "the deliberate targeting of civilian population or other persons and the committing of widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security."<sup>66</sup>

The following section will discuss the implementation of decisions under Article 39. What means are available to the Security Council to enable it to respond to situations that have been defined as fulfilling the conditions of Article 39, and what approaches have in fact been adopted in practice? Our analysis will concentrate on the military means available to the Security Council.

### *3.1.3 Military Action to Maintain Peace and Security*

#### *Means and Methods of Armed Action*

The qualification of a threat by the Security Council is followed by the implementation of recommendations, authorizations, and enforcement measures under Article 39.<sup>67</sup> The focus here will be on the use of armed force, but obviously the Security Council may also opt for non-military measures under Article 41.<sup>68</sup> The Security Council has established comprehensive sanctions against Iraq, Yugoslavia, Somalia, Libya, Liberia, Cambodia, Haiti, Angola, Rwanda, Sudan, Sierra Leone, Kosovo, Afghanistan, Ethiopia, and Eritrea, and has authorized force to secure the effective implementation of its measures in many of the cases cited. Generally, the resolutions only specified the breach of international law and the action needed to secure the lifting of the measures.<sup>69</sup>

Article 42 provides the legal basis for military enforcement that is carried out against the will of the state concerned.<sup>70</sup> Also here the Security Council enjoys considerable leeway: if it considers that non-military measures would not be sufficient, it may resort directly to Article 4, which provides a non-exhaustive list of permissible measures. According to Article 42, the Security Council "may take such action by air, sea or land forces"; it can be seen, therefore, that action is decided and implemented by the Security Council itself. This would imply that armed forces are available to the Security Council. Such forces were originally intended to be available, not on an *ad hoc* basis but rather ready to be de-

ployed at the Security Council's signal. These forces were supposed to be set up through bilateral agreements between the Security Council and a member state. However, it has not been possible to conclude these agreements, and a centralized force has never been implemented.<sup>71</sup> The deployment of peacekeeping forces has come closest to the original concept of such a force, as they operate under UN command, being mainly responsible to the Secretary-General and based on *ad hoc* arrangements with member states. Another mode of implementation, and the most common one, is action by several member states, authorized by the Security Council; member states decide whether, to which degree, and how long to participate in measures of collective security.

As regards the legality of the modes of implementation chosen by the Security Council, it has to be presumed that Article 42 does not require these agreements to be concluded in order for armed forces to be put at the disposal of the Security Council.<sup>72</sup> As the cardinal purpose of Article 42 was to enable the United Nations to take any necessary action for maintaining or restoring international peace and security, effective means for the achievement of such a purpose need to be available, regardless of how action is carried out in each individual case. A general rule is that words used in a treaty should be read as having the meaning they bore therein when the treaty came into existence, this meaning being consistent with the purposes sought to be achieved. In the case of the Charter, the purposes were guided by the maintenance of international peace and security, and thus the general rule stated above does not mean that the words in the Charter can only comprehend such situations as were within the minds of the framers of the Charter.<sup>73</sup>

This functional interpretation of Article 42, and for that matter of the Security Council enforcement action, was confirmed by the ICJ in the case *Certain Expenses of the United Nations*, in which it observed that: "It could not be said that the Charter had left the Security Council impotent in the face of an emergency situation when agreements under Article 43 had not been concluded ...." Furthermore, the Court considered that, "When the Organization took action which warranted the assertion that it was appropriate for the fulfillment of one of the purposes of the United Nations, the presumption was that such action was not *ultra vires* the Organization."<sup>74</sup> To ICJ practice was added Security Council practice; as early as 1956, the discussions on the Suez Conflict indicated that there was no principled objection against military action in the absence of agreements under Article 43. This view was only to be confirmed in later cases like Rhodesia and the Iraq-Kuwait War. Hence, within the framework of maintaining peace and security, the Security Council can authorize the use of force if the preliminary conditions set out in Articles 39 (and 42) have been fulfilled and the member states are called upon to offer armed forces to the Security Council, or are authorized directly to carry out the implementation in a decentralized way. The latter is confirmed by later state practice.

#### *Authorizations to Use Armed Force*

The past experience of the UN regarding armed action is based on the Chapter VII of the UN Charter, which has contributed to several variants in the framework of the authorized use of armed force, so that each operation has had its own particularities. On the one hand, one can distinguish between authorizations to use military force given directly to states and

peacekeeping activities. Also, enforcement actions have been carried out by resorting both to peacekeeping and to decentralized enforcement. A few examples of Security Council enforcement practice are presented below, bearing in mind that many of these authorizations were given with a view to enforcing humanitarian mandates.

In *Korea*, the Security Council merely “recommended” that member states take designated action in collective defense under Article 51 and provide assistance to South Korea in repelling the North Korean attack, as well as “military forces and other assistance” for a “unified command under the United States.”<sup>75</sup>

The peacekeeping operation in *Congo* in 1960–64 and its authorization contained elements which arguably fell under Article 42.<sup>76</sup> Article 42 provided the legal basis for the U.K. authorization to use force against tankers approaching the harbor of Beira in order to discharge oil for Rhodesia.<sup>77</sup>

In *Iraq*, the Security Council authorized “member states cooperating with the government of Kuwait ... to use all necessary means to ... [evict Iraq from the territory it had occupied] and to restore international peace and security in the area.”<sup>78</sup>

Another large-scale operation was mounted in *Somalia*, when all the necessary means were authorized in order to “establish a secure environment for humanitarian relief operations” and “the consolidation, expansion and maintenance of a secure environment.” The following year, enforcement powers were conferred on the peacekeeping force UNOSOM II, which was composed of peacekeeping forces and of a military contingent.<sup>79</sup>

In *Rwanda*, all the necessary means were, again, authorized for purposes of decentralized enforcement in order to “achieve the humanitarian objectives.”<sup>80</sup>

In *Bosnia-Herzegovina*, during the Bosnian war the authorization was given first to aid the delivery of humanitarian assistance and, later, to expand the enforcement of economic sanctions and the no-fly zone. The authorization was carried out both by the peacekeeping force UNPROFOR<sup>81</sup> and member states individually or acting through regional organizations. Later, in 1995, the multinational force (IFOR) and the member states were authorized to take all necessary measures to fulfill the wide-ranging objectives of the Peace Agreement that had been signed in Paris and to take all necessary measures either in defense of the multinational force or to assist the force in carrying out its tasks.<sup>82</sup>

In *Haiti* in 1994 a large-scale use of force was authorized in order to ensure the return of the elected president to Haiti after economic sanctions and a maritime blockade had proven unsuccessful.<sup>83</sup>

In *Zaire*, the multinational force was empowered to use all necessary means to achieve the humanitarian objectives.<sup>84</sup>

In the case of *Albania*, the Security Council permitted military action in order to protect the multinational force pursuing humanitarian objectives.<sup>85</sup>

In the *Central African Republic* the authorization for the use of force by member states was given in order to ensure the security and freedom of movement of the peacekeeping operation MISAB.<sup>86</sup>

In *Sierra Leone*, the Security Council endorsed the preceding ECOWAS intervention there and, under Article 53, empowered it to ensure the implementation of the economic

embargo imposed; the later peacekeeping operation introduced was to be endowed with powers to use force for purposes far beyond self-defense.<sup>87</sup>

In *Kosovo*, the international security force was equipped with all necessary means to establish, among other things, a safe environment for the entire population, and to facilitate the safe return of all refugees and displaced persons.<sup>88</sup>

In *East Timor* the multinational force was authorized to take all necessary measures to “facilitate humanitarian assistance operations.”<sup>89</sup>

In 2000, the Security Council empowered the UN observer mission in the *Democratic Republic of Congo* to use force, also in protection of civilians under imminent threat, and in 2001 it authorized an international force for the assistance of the Afghan Interim Authority in the maintenance of security in Kabul in *Afghanistan*.

The above-mentioned examples show that the absence of the agreements referred to in Article 43 does not in any way affect the Security Council’s ability to use armed force. The Security Council acts explicitly on the basis of Chapter VII, and selects the appropriate means for implementing coercive action on a case-by-case basis. However, the Security Council has relatively big challenges to overcome for purposes of effective implementation in its responses to future conflicts. On the one hand, the decentralized delegation of enforcement powers has taken place under a very general delegation framework that often lacks a precise definition of the delegated powers and an effective supervision of their exercise. On the other hand, peace-keeping operations have often been faced with a need for an additional enforcement mandate, which was given only in the cases of Somalia and Yugoslavia, due to the reluctance of the European permanent members of the Security Council, and only after the United States had committed itself to active participation. The latter cases, reflecting the use of force by the UN itself, face challenges stemming from the need for realistic, specific mandates regarding the use of force, particularly bigger and better equipped forces that are able to act as a credible deterrent. Only if the parties to a conflict are convinced of the firm intention of the UN will they move towards a political settlement. Lastly, enforcement needs to take into account the fact that situations cannot adequately be dealt with by military means alone.

### *Regionalism*

In addition to enforcement by UN organs, matters relating to the maintenance of international peace and security are dealt with in the framework of regional arrangements. Articles 52–54 of Chapter VIII of the UN Charter regulate regionalism, completing the general enforcement authority of the UN by granting international organizations powers to resolve local disputes within their own jurisdiction and on a local basis, and to thereby serve the purposes of the maintenance of international peace and security. Regional actions devoted to preserving international peace and security must concern matters that are “appropriate for regional action,” a standard that is defined by the regional agencies themselves.<sup>90</sup> Additionally, the regional framework must be “consistent with the Purposes and Principles of the United Nations” (Article 52.1).<sup>91</sup> The article in question goes beyond legitimizing regional action, since it also reinforces the principle of subsidiarity already present in Chapter VI of the Charter<sup>92</sup> by exhorting members to attempt to achieve peaceful settle-

ment of local disputes through regional frameworks before referring matters to the Security Council (Article 52.2). In the same vein, the Security Council is also encouraged to promote the peaceful settlement of local disputes through regional frameworks (Article 52.3). In practice, even if priority is given to the regional settlement, the party to a regional arrangement has the right to have its complaint considered by the Security Council or the General Assembly—although obviously an attempt should be made to achieve a settlement on a regional basis.<sup>93</sup>

As far the use of force by regional organizations is concerned, the Charter holds that regional arrangements shall only be used for enforcement action under the authority and by authorization of the Security Council (Article 53.1).<sup>94</sup> The use of force on the independent initiative of regional actors is thus to be subordinated to Security Council control, save in cases of the explicit recognition of the right of collective self-defense. Moreover, an authorization—an explicit one—prior to action is preferred, in order to permit effective Security Council control over regional enforcement actions,<sup>95</sup> although in certain cases the authorization has been given *ex post facto*. Enforcement action covers all measures the Security Council is authorized to take under Articles 41 and 42, although in practice the term has been given a more restricted interpretation by some members.<sup>96</sup> The Security Council has to be kept informed not only of activities undertaken under the regional framework, but also of those that are under consideration (Article 54).

Collective self-defense alliances by their very definition differ from regional arrangements or agencies since, instead of being based on Chapter VIII, they are based on Chapter VII (Article 51), serving as outwardly-directed systems of collective defense, whereas the discussion of regionalism in Chapter VIII favors inwardly-directed settlement of “local disputes.” However, such limitations become blurred in practice, as elements of collective self-defense are also exercised within the framework of regional agencies (e.g., OAS, AU, the Arab League<sup>97</sup>), and, in the end, the confinement of regional action to “local” disputes indirectly contributes to the securing of world-wide peace.<sup>98</sup> In addition, a regional arrangement or agency can resort to collective self-defense under Article 51.

As regards the right to use force, whether by regional organizations or self-defense alliances, both are under Charter-based limitations: aside from the inherent right of self-defense, there is no right to use armed force, except if authorized by the Security Council, under the framework of either Chapter VII or Chapter VIII. The authorization of Chapter VII, as elaborated above, is dependent on the fulfillment of conditions stated in Article 39, whereas the Chapter VIII authorization rests upon the discretion of the Security Council. Both authorizations are obviously conditioned by Article 2.7, with its domestic jurisdiction reserve. Other possible venues for the regional use of force have also been proposed, that of the “non-unauthorized enforcement action”<sup>99</sup> or “recommended”<sup>100</sup> regional action; however, both justifications rest on a highly narrow interpretation of relevant rules and have no general support in the scholarly literature.<sup>101</sup>

Regionalism and its increasing role in peace maintenance have been highlighted by the Secretary-General in the new security environment of the UN.<sup>102</sup> Universalism (read: the UN) and regionalism (read: regional arrangements or agencies) can be duly integrated for the purposes of addressing current problems and establishing measures to react to situa-

tions at earlier stages of prevention, not to mention in the executive phases, whether the Security Council channels the execution through such arrangements or agencies, or the latter resort to enforcement action by themselves. Since the end of the Cold War, during which regional action was resorted to only once by the Security Council,<sup>103</sup> regionalism could potentially gain more significance, offering substantial potential indeed for prevention, enforcement, and post-conflict peace-building.

### 3.1.4 Conclusion

#### *From the Comprehensive Ban ...*

The United Nations system is characterized by a comprehensive ban on the use of armed force. Aggression represents the most serious violation of this ban, but other uses of armed force not constituting aggression are also banned if directed against “territorial integrity,” “political independence,” or the “purposes of the UN.” Self-defense and collective security constitute the only exceptions to the ban. In the case of individual or collective self-defense, action is taken in response to a prior act, whereas action taken within the framework of collective security is initiated by the Security Council. States or regional organizations or arrangements are authorized to use armed force on behalf of the UN, either on the basis of delegated powers or in the framework of peacekeeping operations. Notwithstanding the absence of agreements provided for under Article 43, the Security Council may issue such authorizations on the basis of Chapters VII and VIII, based on a functional interpretation of the provisions on the maintenance of international peace and security. The extent to which armed force may be used in a particular case is specified in the relevant mandate. In addition to the UN use of force, peacekeeping by regional organizations and *ad hoc* forces of states based on cooperation and consensus can be resorted to as well.

As stated above in Chapter 2, the contents of the UN’s régime governing the use of force are relatively vague. State practice in violation of the régime makes us question the validity of the UN Charter’s use of force regulation *per se*; humanitarian intervention, among other actions, lingers in the gray area of non-regulation. However, at the very least, the use of force by the United Nations remains regulated by the Charter. As seen above, the security of people instead of states has clearly become part of the concept of international/regional peace and security, and the UN-mandated armed force may well be used—and has been used—for upholding basic human rights in the face of their flagrant violation. In purely internal cases, the UN’s authority to act is sometimes questioned, although if human rights are treated as a matter existing outside domestic jurisdiction, potentially endangering international/regional peace and security, then the situations are less complicated.

In general, the resolution of humanitarian crises has frequently played an important role in the mandates that were issued in the cases discussed above, and “all measures” were authorized in order to fulfill humanitarian objectives. The recent practice of the Security Council, translating into the enforcement of humanitarian mandates, implies its view on the contents of the law in the context of the Charter regarding the maintenance of international peace and security. Therein the security of people has become understood as a factor likely

to affect international/regional peace and security. The authority to interpret—and, if needed, to expand—the concept of the threat to peace and security lies in the Charter provisions giving the Security Council discretionary powers in determining threats to peace and security.

... to *Selective Collective Security*

A destabilizing factor for the Charter-mandated use of force régime lies in the contradictory functioning of the collective security system, itself contrary to the founding principle of sovereign equality of all members. On the one hand, humanitarian considerations are now obviously an integral part of the concept of international peace and security. On the other hand, these are political decisions, which always require the approval of the five permanent members of the Security Council. The danger with this line of reasoning is that it may lead to inconsistencies. If, on the one hand, it is accepted that humanitarian considerations bear on international peace and security, and if, on the other, the United Nations system does not function properly on those very occasions when human rights and humanitarian law are being violated, such inaction is difficult to justify. For collective security only applies to cases in which political consensus has been reached, and, if no such consensus exists, the bans on the use of force and intervention in the internal affairs of states would prevent other states from taking any kind of coercive action. The purpose of the maintenance of international peace and security remains partially unfulfilled, if the Security Council is unable to act. Is it not, then, possible to envision other ways to act, for precisely the purposes of peace maintenance? Institutional support is undoubtedly provided by the purpose itself: the maintenance of peace and security. Obviously, the purpose cannot be endangered by action taken explicitly for its furtherance. The Charter ends in a deadlock situation if the Security Council cannot function non-selectively in face of threats to international peace and security.

Regional action is also a possibility, although the UN Chapter VIII restrictions make the regional use of force dependent on the Security Council's functioning. The selective system of collective security leads simply to an impasse in cases where a pressing need to act is felt (e.g., flagrant human rights violations). Humanitarian interventions have, consequently, been carried out without the Security Council's cooperation, either with an *ex post facto* approval, or without it (e.g., the ECOWAS interventions in Liberia in 1990 and in Sierra Leone in 1997; and NATO's action in Kosovo in 1999). These and other operations are best approached from the customary point of view, as the law of the Charter seems to provide no satisfactory solutions to the collision of humanitarian imperatives and unilateral use of force. Besides, humanitarian intervention is by its very definition carried on outside the Charter structures. Other sources of law cover the gaps, or, being of equal (custom and legal principles) or superior authority (norms *jus cogens*, obligations *erga omnes*), take precedence over the Charter.

All in all, the UN Charter's regulation on the use of force is nowadays unclear. Many uses of force fall outside the regulation. In addition, the Charter itself bears inconsistencies. Thus, the focus of the next chapter is on customary regulation that makes the general law on humanitarian intervention less unclear.

## CHAPTER 4

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# CUSTOMARY LAW OF HUMANITARIAN INTERVENTION

### 4.1 Custom as a Source of Law

Customary law is listed in the ICJ Statute, Article 38, as a primary source of law. Traditionally viewed, elements of custom bear both an objective element and a subjective one. The objective element relates to the practices of the subjects of international law—mainly states and, to some extent, other legal subjects—consisting of requirements relating to the duration, consistency, and generality of acts that create customary law.<sup>1</sup> The subjective element means a sense of legal obligation: “States concerned must therefore feel that they are conforming to what amounts to a legal obligation....”<sup>2</sup> These main categorizations are obviously not entirely unproblematic: what acts are to be included under the objective element, and how are we to infer the subjective element out of them? There simply is no such thing as “state practice” that mechanically yields a legal rule. State practice is often ambivalent, so any interpretation of that practice has to rely on extra-legal values, stemming from our moral and empirical assumptions about the purposes of international law.<sup>3</sup>

Another issue is the variety present in the international legal community, leading to the question of the concordance of opinions, fair and forced,<sup>4</sup> as regards customary facts under interpretation. Since international law contains no authority above the level of the state, which would impose interpretations on all, the acceptance of interpretations remains to be done by the very same states that are simultaneously presenting those interpretations. There are no fixed rules for the creation of acceptance, which can be relatively quick, as was concluded by the ICJ in the *North Sea Continental Shelf* cases on “instant customary law” regarding 200-mile exclusive economic zones in the sea,<sup>5</sup> or it matures with time, as is the case with humanitarian intervention. The question of acceptance is obviously discussed in all those venues where states or other legal subjects’ voices can be heard: the UN, regional or sub-regional organizations, NGOs, diplomatic (bilateral or multilateral) correspondence, etc. The larger the portion of the legal community that is represented in the formation of acceptance, consenting to a development in customary law, the more weight their interpretations carry. The generality and consistency of a “representative” group’s practice is what counts most for the purposes of creating global rules.

## 4.2 Custom's Effect on the Charter

Customary law is equal in weight to conventional law. In principle, the superseding of conventional norms by later customary ones is perfectly possible, like the superseding of custom by later conventional norms. The Charter has its own rule for this process. According to Article 103, the conventional obligations stemming from the Charter outweigh the other conventional obligations of members. There is no explicit rule for custom, though. Many have consequently argued that customary superseding is not possible, on grounds relating to arguments of *jus cogens*, treaty practice, lack of *opinio juris*, etc.<sup>6</sup>

As far as the argument from *jus cogens* is concerned, we find ourselves in a deadlock situation: Article 2.4's ban<sup>7</sup> on the use of force can well be characterized as *jus cogens*, an imperative norm of international law, but most certainly the norm prohibiting genocide bears the character *jus cogens* as well. So, international law obviously forbids the general use of force, but cases warranting humanitarian intervention are exactly those cases that disclose other serious violations of international law. Is there an incompatibility in the first place and, if yes, which takes precedence over the other?

Another avenue is to regard the differing practice as a subsequent *treaty* practice, since a "treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions" (VCLT, Article 38). Not only does the Charter include a specific article for modifications, but also the practice of the parties, in order to modify existing agreements, necessitates "their implicit/explicit agreement," which is not achieved merely by the practices of few states out of the 195 total member states of the UN.

In addition, states' intent not to establish new norms of customary law is sometimes inferred from their unwillingness to acknowledge violation of a treaty, or further, from their failure to explicitly deny the obligatory effect of the rule in question. Realistically evaluated, however, confrontations are rarely in the interest of actors, and violations of the law are seldom admitted to, in desperate attempts to justify violations in the framework of existing norms.<sup>8</sup>

The above arguments approach the process of customary law superseding conventional law from different angles, giving a somewhat partial view of the problem. Illegal uses of force (according to Article 2.4) can constitute superseding custom. Many such actions have taken place, and Article 2.4 has been subject to widespread and repeated violations by large and representative groups of states. Such a fact is not without legal significance. We are confronted with two concurrent tendencies: on the one hand, there is the overall question of whether customary law *per se* regulates humanitarian intervention, and on the other hand the effect of customary law on the Charter needs to be evaluated.

## 4.3 Period Prior to the Charter

As far as customary law prior to the passage of the UN Charter is concerned, there is considerable support for the existence of humanitarian intervention in state practice in the nineteenth century.<sup>9</sup> Humanitarian intervention by a number of powers to prevent a state

from committing atrocities against its own subjects or suppressing religious liberties, such as happened in the Turkish empire in the nineteenth century, was recognized as valid in international law.<sup>10</sup> Such practice corresponded to the realities of the time. Many, however, were opposed to this doctrine, apparently more from fear of potential abuse than on considerations of principle.<sup>11</sup> As a matter of fact, only powerful states were capable of resorting to action under humanitarian cover, and when military operations were justified as “humanitarian intervention,” this was only one of several explanations offered for actions undertaken in circumstances that frequently indicated the presence of more selfish motives.<sup>12</sup> The right of intervention was rejected by classicists on another ground—namely, the fact that intervention was never invoked, or exercised, in the face of the greatest humanitarian catastrophes of the pre-Charter era.<sup>13</sup>

Interventions of this period were all of a collective character, and all were directed against the Ottoman Empire<sup>14</sup>:

Collective intervention by Great Britain, France, and Russia in Greece (1827–30) to stop the Ottoman massacres and suppression of the revolutionary Greek population;<sup>15</sup>

Military intervention in Syria (1860) by six thousand French soldiers due to the poor Ottoman administration and massacres of thousands of Christians there;<sup>16</sup>

Heavy-handed interference by Austria, France, Italy, Prussia, and Russia in 1866–68 in the Ottoman administration of Crete to protect the oppressed Christian population;<sup>17</sup>

Collective European Great Power interference and Russian intervention in 1875–78 in the Balkans (Bosnia, Herzegovina, and Bulgaria) in favor of the insurrectionist Christians, who had been subjected to massacres under Ottoman rule;<sup>18</sup>

Interference by the European great powers in 1903–08 in the internal affairs of Turkey in favor of the Christian Macedonian minority.<sup>19</sup>

A pure humanitarian intervention rarely occurred in the nineteenth century, except perhaps the French intervention in Syria in 1860 and 1861.<sup>20</sup> Humanitarian intervention was, however, recognized in legal theory, although the precise contents and the extent of the state doctrine could not be specified. And even if the use of armed force was not prohibited, states still deemed it necessary to justify their actions on the basis of political and moral considerations. The types of interventions described above included humanitarian considerations in situations where a state was mistreating its citizens. However, the grounds for humanitarian interventions were frequently, if not always, just as much political as humanitarian.<sup>21</sup> Such interventions were exclusively a matter of strong states pitting themselves against weaker states, and often the justification for the intervention was based on specific treaty provisions. In view of these contradictions, it is difficult to make strong statements regarding the customary basis of humanitarian intervention prior to the UN Charter.

Following this line of reasoning, the preliminary conditions for the formation of a customary rule around humanitarian intervention appear to have been insufficiently fulfilled during the period in question. The formation of a customary rule is based on the overall conduct of the subjects of international law.<sup>22</sup> Before such conduct can be considered customary, there must be a recurrence of such conduct in time and space. Recurrence in time

means the repetition of subsequent and, in principle, similar acts by the same subject,<sup>23</sup> as well as regular and repeated conduct.<sup>24</sup> Recurrence in space means the widespread practice of such conduct; universality cannot, however, be claimed if the coexistence of regional and general customary rules is accepted.<sup>25</sup> The nineteenth-century concept of an international legal subject was limited. The society of Western nations was expanding only gradually, and relations with other entities were carried out on the basis, if not of law, then at least of international morality. If the limited group of intervening states did consider themselves to be possessed of the legal right of humanitarian intervention, such understanding was unlikely shared by other entities not even recognized as international legal subjects, often themselves objects of the very intervention in question.

In addition to this material aspect, there is the psychological aspect: *opinio juris sive necessitatis* (the conviction of the right or the need). In this respect, the ICJ has observed that:

States must therefore have the feeling that they are conforming to what amounts to a legal obligation. Neither the frequency, nor even the habitual character of the action is enough. There are a number of international acts ... which are accomplished almost invariably but which are motivated by simple considerations of courtesy, opportunity or tradition and *not out of the feeling of a legal obligation* [italics mine].<sup>26</sup>

Again, such a psychological aspect could well have existed, but only in the minds of the Western interveners of the nineteenth century. On the basis of the preconditions for the formation of customary law, we may doubt the existence of a clear customary norm authorizing humanitarian intervention during the period under scrutiny. Indeed, the requirements mentioned above for the formation of a customary rule are not sufficiently convincing for differing conclusions, although the concept of preventing violations of fundamental human rights without any nationality bond has existed for a considerable time. Much of the doubt could, in fact, be attributed on the one hand to the limited area of application of the international legal subjectivity, and on the other hand to abuses of the institution of humanitarian intervention, instead of the actual concept itself of the armed protection of basic human rights. But if it cannot be stated that a clear rule existed, we can at least conclude that state practice did acknowledge the institution of humanitarian intervention and often made practical use of it. There is no obstacle to including the above-mentioned cases on a continuum of a customary practice that might later lead to a consolidation of a customary law norm around humanitarian intervention, which is, in fact, *in statu nascendi*, already at this stage.

However, the frequency of alleged humanitarian interventions in state practice started to decline during the first half of the twentieth century. Typical of that period was the tendency to restrict the uncontrolled right to use force. This, in turn, might have had an effect on states' abstaining from invoking humanitarian intervention as a justification for their uses of force in order to avoid confrontations. Theoretically, such a justification was possible, as the right to use armed force had not yet been outlawed generally.

#### 4.4 UN Charter: Change or Stagnation?

As discussed above, the UN Charter introduced a clear, comprehensive ban on the use of armed force. The use of force was categorized as either non-defensive or defensive, only the latter falling under the mantle of legality.<sup>27</sup> The question is whether the vague doctrine of humanitarian intervention continued to exist in customary law, despite the explicit conventional regulation of the use of force articulated in the UN Charter. This subject warrants particular attention in view of the fact that humanitarian intervention by states—or, more recently, by international organizations—did and does occur, despite the adoption of the Charter. Another preliminary argument to bear in mind tends to weaken the conventional regulation in favor of humanitarian considerations. Professor Tesson argues for the possibility that Article 2.4 would not have been the only norm that had a revolutionary impact on international law (especially since there was already a customary principle prohibiting the use of force in place at the time the Charter was adopted), since the human rights articles of the Charter opened the door to a much more innovative development of a concept of the law of nations, one that was centered around the individual rather than the nation-state.<sup>28</sup> Therefore, the right of humanitarian intervention would have been established since 1945, independent of the pre-Charter period, since this right was simply a natural corollary of a return to the original concept of *ius gentium*, that is, of an international law based on human rights, instead of on nation-states.<sup>29</sup>

The relevant state practice of humanitarian intervention carried out during the UN Charter period includes cases in which states either justified their action on general humanitarian grounds or explicitly on “humanitarian intervention” grounds, or, instead of the intervening states, other states or scholars have characterized these interventions as humanitarian in intent. A distinction is made between the Cold War period (1945–89) and the subsequent period: state practice during the Cold War period was abundant, but not very clear, whereas subsequent state practice, while the permanent members of the Security Council have found a consensus giving Security Council actions a totally new dimension, has contributed and is continuing to contribute to the role played by this organ in the field of collective humanitarian enforcement, enhancing the consolidation of collective human rights protection.

#### 4.5 Humanitarian Interventions in the Cold War Period (1945–1989)

After 1945, numerous cases exist in which a state intervened in another state using armed force. In most of these cases, the political interests of the intervening party or its interests for the protection of its nationals abroad seem to have formed the basis for intervention. More importantly, even in cases where the doctrine of humanitarian intervention might have been invoked, states most often have not done so, relying instead on arguments of self-defense.<sup>30</sup>

*Palestine conflict of 1948:* On 14 May 1948, the state of Israel proclaimed its independence, followed almost immediately by military action by a group of Arab states

against Israel. Among several justifications, the Arab states emphasized the ostensibly humanitarian objective of their action. Also, in answer to a Security Council query on the matter, both Israel and Egypt justified their extra-territorial use of armed force, at least in part, on humanitarian terms.<sup>31</sup>

*Congo cases:* On 10 July 1960, after the proclamation of Congolese independence and the ensuing round of chaos, Belgium dispatched paratroopers to its former colony. The operation was officially justified as “humanitarian.” The decision to intervene was made with the sole purpose of ensuring the safety of European and other members of the population and of protecting human lives in general.<sup>32</sup> The humanitarian grounds were both adhered to and negated.<sup>33</sup> Another intervention took place in late 1964, as rebels in the Congo seized thousands of non-belligerents and hundreds of foreigners, holding them as hostages for concessions from the central government and threatening to kill them, and actually carrying out executions. After having informed the UN of their intentions, Belgium and the U.S. intervened in a successful rescue operation.<sup>34</sup> The intervention force was withdrawn after the rescue operation. The intervention was met with criticism, and was attacked in the Security Council by several African states and the Soviet Union, which relied on arguments based on discrimination, non-intervention in internal affairs, and the political and economic objectives involved. The intervention was done with the consent of the Congolese government, which rules it out from being a humanitarian intervention.<sup>35</sup>

*Dominican Republic:* On 28 April 1965, some 500 U.S. marines landed at Santo Domingo in the Dominican Republic with a humanitarian mission to “protect the lives of Americans and the nationals of other countries in the face of increasing violence and disorder” which resulted from a protracted violent conflict between several civilian and military factions.<sup>36</sup> The lawfulness of the operation, as a humanitarian one, was undermined, as the U.S. force stayed on after the foreign nationals had been removed. Its action was subsequently legitimated by the OAS, which replaced the marines with an OAS force.<sup>37</sup> The geopolitical objectives were evident, judging by the words of President Johnson, as follows: “The American nation cannot, must not, and will not permit the establishment of another communist government in the Western hemisphere.”<sup>38</sup>

*India's intervention in Pakistan:* In December 1971, India launched an armed intervention in East Pakistan, invoking its right to humanitarian intervention on the grounds of a deterioration in the ongoing crisis following the government's violent reaction to the Awami League's aspirations to independence. Thousands of Bengalis were killed, and more than ten million people fled to India. Humanitarian considerations clearly played an important part in the decision to intervene. The humanitarian crisis was undeniable. India had previously appealed to foreign governments and the UN in the face of a situation in which “the general and systematic nature of inhuman treatment inflicted on the Bangladesh population was evidence of a crime against humanity.”<sup>39</sup> Also, India initially justified her actions to the Security Council as a humanitarian intervention.<sup>40</sup> Moreover, the UN Secretary-General had expressed his point of view on the human misery and the potential catastrophe, underlining that “the time has past [sic] when international community can continue to stand by.”<sup>41</sup> However, it cannot be denied that other considerations of a political and economic nature also played a part in India's decision to intervene.<sup>42</sup>

Other interventions in which humanitarian considerations were expressly invoked include the following cases: Indonesia intervened in 1975 in *East Timor* to put an end to the violence that had broken out between rival factions struggling for power in anticipation of independence from Portugal; South Africa intervened the same year from Namibian territory in the civil war in *Angola* to prevent atrocities committed by the FNLA-UNITA front in the areas under their control; Belgium and France intervened in 1978 in *Shaba, Zaire*, to rescue foreign residents being held as hostages by the National Congolese Liberation Army; the U.S. and six East Caribbean States intervened in 1983 in *Grenada* to restore order on the island after a violent *coup d'état* by radical Marxist opponents of the leftist Bishop régime.<sup>43</sup>

Finally, mention should be made of three cases where the humanitarian justification for intervention was not explicitly invoked, even if humanitarian considerations played a considerable part. France intervened in the *Central African Republic* in 1979 in a bloodless operation to stop the atrocities of the Bokassa régime, when the dictator himself was absent from the country; only a few states criticized this intervention.<sup>44</sup> Second, Tanzania intervened in 1979 in *Uganda*, forcing Idi Amin to flee into exile and installing a new government. The background to the intervention was two-fold: a conflict in the Kagera region and the atrocities committed by Amin régime.<sup>45</sup> Only a few states criticized the intervention, but the international reaction was largely muted, as the global community perceived the intervention as some kind of a blessing after the ruthless Amin régime.<sup>46</sup> And third, Vietnam invaded Khmer Rouge's Democratic *Kampuchea*, installing a new government for the People's Republic of Kampuchea. The previous Khmer Rouge régime was responsible for staggering violations of human rights, but despite this fact, Vietnam never resorted to humanitarian grounds for its intervention: the rationale lay in the conflict between Vietnam and Kampuchea and in the Kampuchean civil war *per se*.<sup>47</sup> Vietnam's intervention was, however, severely criticized by other states in various UN venues.<sup>48</sup>

Many other cases of intervention occurred as well during the period under scrutiny. Humanitarian considerations did play a role in all of the interventions, although the presence of other motives is clearly evident.<sup>49</sup> The state practice referred to above is colorful, and firm conclusions are not easily made, if at all, on its basis. Or, more precisely, conclusions do not differ much from those made regarding the pre-Charter period: humanitarian considerations are invoked, but also frequently abused in order to advance multiple motives of interested states;<sup>50</sup> the doctrine remains vague as motivations are mixed, with the effects of intervention multiple and the effects of inaction unknown; humanitarian intervention is not invoked in cases where humanitarian considerations are manifestly present, with the exception of the Palestinian intervention in 1948 and India's intervention in 1971; and finally, intervention remains a means for powerful states to justify resorting to the use of force against weaker states. In addition, expressions of legal opinion from the international community during this period on the subject evidence hesitancy and a seeming reluctance to accept any uncontrolled right of intervention,<sup>51</sup> not forgetting those very fundamental problems relating to the qualification of something as having been said *qua* community in the first place.<sup>52</sup> Simply put, the state of law is not clear – *non liquet*.

## 4.6 Humanitarian Interventions in the 1990s

As discussed above, the 1990s were marked by the revived activity of the UN Security Council; internal situations of states were viewed amenable to outside intervention when qualified as threats to the peace, and the Security Council issued diverse authorizations to use force in such situations. This, however, all took place within the framework of collective security, with some hesitancy reigning on the internationality aspects of the Security Council action. Regionalism was also promoted, and consequently ECOWAS intervened twice and NATO once. As far as coalitions of states are concerned, we will briefly cover the case of the first Iraq War (1991). NATO's Kosovo intervention is discussed separately in the next chapter, but is obviously counted in the customary cases under review here.

### *Examples of ECOWAS*

#### *Liberia*

At the end of 1989, Liberia was in a state of civil war, in which the civil population was directly targeted, and a widespread humanitarian crisis was causing a flood of refugees into neighboring countries.<sup>53</sup> There was no response from the international community, so the Economic Community of West African States (ECOWAS) decided to intervene militarily. The decision was supported by the Organization of African Unity (OAU) and the United States.<sup>54</sup> On 25 August 1990, the Economic Community of West African States Monitoring Group (ECOMOG)<sup>55</sup> moved into Liberia to restore peace, at the 'invitation' of President Doe<sup>56</sup> and the Monrovia authorities as follows:

It is therefore my sincere hope that in order to avert the wanton destruction of lives and properties and further forestall the reign of terror, I wish to call on your Honorable Body to take note of my personal concerns and the collective wishes of the people of Liberia, and to assist in finding a constitutional and reasonable solution to the crisis in our country as early as possible. Particularly it would seem most expedient at this time to introduce an ECOWAS Peacekeeping Force into Liberia to forestall increasing terror and tension and to assure a peaceful transitional environment.<sup>57</sup>

What was rather interesting, for humanitarian argumentation, was the fact that the President of the ECOWAS Permanent Committee, who supported the right to intervene, invoked the humanitarian catastrophe rather than the government's invitation or other grounds as the justification for the intervention:

I must emphasize that the ECOWAS Monitoring Group (ECOMOG) is going to Liberia first and foremost to stop the senseless killing of innocent civilian nationals and foreigners, and to help the Liberian people to restore their democratic institutions. ECOWAS intervention is in no way designed to save one part or punish the other.<sup>58</sup>

The operation was not authorized by the Security Council. However, the UN Secretary-General pointed out explicitly that this was an internal affair, which ruled out UN intervention, and that the Security Council's authorization was not required for the ECOWAS operation.<sup>59</sup> A presidential statement was issued six months after the beginning of the conflict, "commending" the West African efforts to secure a peaceful settlement of the dispute—no endorsement can be deduced therein.<sup>60</sup> After almost two more years the Security Council,

imposing an embargo on military shipments to the warring factions, cautiously referred to the ECOWAS action in the context of Chapter VIII, still refraining from endorsing any military action.<sup>61</sup> By mid-1993, after a peace agreement between the factions had been brokered, the Council created a UN presence in Liberia alongside ECOMOG, seeming to endorse the intervention retroactively.<sup>62</sup>

### *Sierra Leone*

Continuous rebel fighting and political unrest were characteristic of Sierra Leone's security situation for much of the 1990s.<sup>63</sup> In 1997, as a follow-up to the 25 May 1997 coup, the new junta headed by Major Koroma resumed power in Sierra Leone. The régime was condemned by ECOWAS and the international community, and thus found itself isolated, facing international economic sanctions. The internal conditions were deteriorating, with continuous fighting and human rights violations. In these conditions an ECOMOG force, headed by the Nigerians, invaded the country in June, when Nigerian gunships started shelling the capital of Freetown.<sup>64</sup> The objective of the intervention was achieved in February 1998, when ECOMOG restored constitutional legality and reinstated the government of the democratically elected president.<sup>65</sup>

The ECOMOG/ECOWAS intervention was not authorized by the UN Security Council, except perhaps *ex post facto*.<sup>66</sup> By resolution 1132 (1997) of 8 October 1997, the Security Council, gravely concerned by the continued violence following the military coup of 25 May 1997, by the deteriorating humanitarian conditions in the country, and by the consequences for neighboring countries, determined that the situation in Sierra Leone constituted a threat to international peace and security in the region. Also, deploring the fact that the military junta had not taken steps to allow the restoration of the democratically elected government and a return to constitutional order, the Security Council imposed a regime of mandatory sanctions, under Chapter VII of the UN Charter, against Sierra Leone.<sup>67</sup> But what about the ECOMOG armed action? A vague basis for the UN's tacit approval can be deduced from the following paragraphs of the resolution as the Security Council:

1. Expresses its full support and appreciation for the mediation efforts of the ECOWAS Committee (Preamble of the resolution, paragraph 5);
2. Expresses its strong support for the efforts of the ECOWAS Committee to resolve the crisis in Sierra Leone and encourages it to continue to work for the peaceful restoration of the constitutional order, including through the resumption of negotiations (Article 3);
3. Acting also under Chapter VIII of the Charter of the UN, authorizes ECOWAS, in co-operation with the democratically elected Government of Sierra Leone, to ensure strict application of sanctions under paragraph 5 of the resolution, and calls upon all States to cooperate with ECOWAS in this regard (Article 8).

Also, almost four months later, the Council further supplemented its relations with ECOWAS by authorizing its Observer Mission, thereby arguably ratifying the intervention retroactively.<sup>68</sup>

### *Operation "Provide Comfort" in Iraq*

As a result of the pacification of the northern (Kurdish) and southern (Shiite) regions of Iraq by the Iraqi army in 1991,<sup>69</sup> followed by a large-scale repression of the Iraqi civilian population, refugees began to flow out of these regions towards the adjoining countries of Iran and Turkey.<sup>70</sup> Western governments came under considerable pressure to intervene.<sup>71</sup> Under these conditions, the Security Council declared that:

Gravely concerned by the repression of the Iraqi civilian population ... which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions which threaten international peace and security in the region (3<sup>rd</sup> preamble para.);

Deeply disturbed by the magnitude of the human suffering involved (4<sup>th</sup> preamble para.);

... [the Security Council]

1. Condemns the repression ... the consequences of which threaten international peace and security in the region;
2. Demands that Iraq ... immediately ends this repression...;
3. Insists that Iraq allow immediate access by international humanitarian organizations ... to all those in need...;
- ...
6. Appeals to all Member States and to all humanitarian organizations to contribute to these humanitarian relief efforts.<sup>72</sup>

Consequently, two military interventions were carried out by Western states in Iraq: on 17 April 1991, Operation 'Provide Comfort' was launched to enforce a safe area and a corresponding air exclusion zone in order to facilitate the return of the Kurdish population who had fled the repression,<sup>73</sup> and, on 27 August 1991, Operation 'Southern Surveillance' was launched to enforce an air exclusion zone in order to protect the Shiite population.<sup>74</sup>

There were repeated protests against these two operations by the Iraqi government, which opposed these measures on the grounds that they constituted a serious, unjustifiable, and unwarranted attack on its national sovereignty and territorial security.<sup>75</sup> Other states protested too, especially against the second operation.<sup>76</sup> In fact, the air forces of the intervening coalition countries did use force on several occasions. The justification for this intervention was based mainly on Resolution 688 (1991).<sup>77</sup> France, the U.K., and the U.S. considered the resolution in question sufficient, for this was after all a humanitarian operation aimed at distributing humanitarian aid.<sup>78</sup> Only one of the three intervening states justified the operation on the basis of a new right of unilateral humanitarian intervention.<sup>79</sup> However, in the eyes of the UN Secretary-General, such an operation would have required another resolution or the consent of the Iraqi government.<sup>80</sup> It should be noted that the resolution did not contain any specific reference to Chapter VII, nor did it authorize military intervention for the creation of safe areas.<sup>81</sup>

## **4.7 Conclusion**

Conventional law on the use of force, namely Article 2.4 and Chapters VII and VIII of the UN Charter, regulate humanitarian intervention under strict preconditions, either as collec-

tive enforcement by the Security Council or within the framework of regional action, under the control of the Security Council. Later state practice vis-à-vis the (non)-application of Charter dispositions reflects the subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions (VCLT, Article 38) or, in the alternative, custom supplanting a treaty norm. The Charter regulation has been violated a number of times, both under treaty law and on the basis of *post*-UN Charter custom. If the law is violated repeatedly, it is difficult to defend its validity. The law of the Charter on the use of force is simply no longer clear. However, some parts of the regulation are probably still valid, assuming, of course, that the states continue to abide by the UN system. Opinions obviously vary regarding the contents of valid law and the role of the UN in the maintenance of international peace and security. The general nature of the prohibition of Article 2.4 can well be doubted and regarded as archaic, whereas Chapters VII and VIII of the Charter could still provide relatively authoritative guidance as far as Security Council action and regional action are concerned. Security Council authorization for any use of force is essential under both sub-régimes. Although a gap also exists here in the sense that the UN regulation is not aimed at interference in internal crises, but rather at governing the use of force between states. The Security Council has, by way of interpretation, expanded its authority and has, in fact, intervened several times in purely internal crises in light of flagrant human rights violations.

Neither is the customary law of humanitarian intervention very clear. State practice of humanitarian intervention is at best mixed, with elements both for and against intervention. The humanitarian motive is rarely advanced explicitly (Arab intervention in 1948, Belgium in Congo in 1960, India in Pakistan in 1971, ECOWAS in Liberia in 1990, NATO's Kosovo operation in 1999), whereas it implicitly plays at least a partial role in more than a few operations that have been carried out in the past fifty years. Also, the reactions of other states are highly varied, with hesitancy to create precedents that might be potentially dangerous for states with track records of human rights violations. Mixed motives are often present, with the national self-interest of both the intervening parties and of those judging the intervention coming into play. NATO's Kosovo operation might constitute a considerable exception, although its value as a precedent was questioned by some of the NATO representatives, who were reluctant to admit openly to the operation's custom-creating role.<sup>82</sup> Moreover, problems of interpretation of the precedents are many. Perhaps most notably, how to evaluate the state praxis with the variety of implicit and explicit motives of actors, let alone the opinions of the rest of the community of states, indicative of universal (non)acceptance? But, it may also be added, in a somewhat conciliatory tone, that the problem of interpretation of precedents is always present, when state practice and *opinio juris* are evaluated, regardless of the area of law in question. Custom is, nonetheless, a primary source of international law. The international legal community interprets the precedent, on the state and organization levels world-wide; after all, the rule on intervention is a matter of concern for all.

Regardless of the various character of state practice, it incorporates *elements* of customary norms on humanitarian intervention. Their practice evidences states' and the Security Council's conception of what humanitarian intervention is or, more likely, should be.

These emerging ideas will be identified in the next chapter, through NATO's Kosovo Operation, although similar nuances can be distinguished from many of the precedents mentioned above, especially the Iraq intervention in 1991 or ECOWAS's operations in 1990 and 1997.<sup>83</sup> It should be underlined, though, that we are not pleading for codification here. Codification aims at formalizing some legal criteria for intervention through a formal instrument such as a UN General Assembly declaration, or even a UN Charter amendment. A certain kind of anxiety regarding codification is due to a well-founded hesitancy concerning its effectiveness to attain the objective pursued (normative consolidation), as well as due to a certain realism regarding carrying out the codification in reasonable time (meager chances of success).

Those pleading for formal codification argue that any codification enhances legitimacy: a clear rule meets the requirements of transparency and predictability usually associated with a rule of law. The idea itself is good, but the codification in the case of humanitarian intervention meets with serious problems. The fixing of the balance between principles of state sovereignty and armed human rights protection for all future cases is unlikely, without opening a new general legal base for the use of force (beside the rights of self-defense and collective enforcement), which is a highly risky business, taking into account the unclear state of the Charter's regulations on the use of force in general. Instead, a gradual normative maturation over time is likely to lead to a result within the UN framework anyway, as the UN provides the optimal forum for all states' deliberations. Furthermore, anticipatory codification of principles on the use of force and on human rights protection via intervention criteria is doubtful, if not impossible, taking into account the fundamental character of legal principles: principles contain an element of weight, applying in a more-or-less fashion, needing casuistic balancing and evaluation that takes into account their relative weight. Such an approach might well lead to a degree of consolidation of principles governing humanitarian intervention via practice, if states and organizations discuss and evaluate potential humanitarian intervention cases openly, with a view toward developing international law for the enhancement of collective interests.<sup>84</sup> Let it be added, though, that no balancing of interests is an exact measurement, and will not often be entirely unproblematic. But the basic interests of international existence (bilateral and collective) are likely to guide such an evaluation.

Also, a certain realism forces us to admit that at present it is somewhat fanciful to hope to achieve universal acceptance for any codified criteria. The identification of criteria is one thing, whereas their acceptance in a formal instrument is quite another—it is sufficient to think of the G77 countries' (133 countries) collective denial of intervention, unless carried out under UN auspices.<sup>85</sup> At present there simply seems to be little prospect of universal agreement on unilateral intervention criteria. The consensus needs to be built on a solid foundation developed through a process of incremental change.<sup>86</sup> Simple discussion of customary elements in both national and international venues could provide such a basis for change.

In further evaluating customary elements of intervention, it should be noted that the focal points of codification attempts obviously coincide with customary elements, although with a considerable difference in approach. With customary elements, we strive for a con-

textual approach, an *in casu* assessment of crisis, founding a subsidiary right of intervention of states, while at the same time recognizing—and affirming<sup>87</sup>—the UN Charter’s central role in the regulation of the use of force. The customary elements are categories with a certain amount of flexibility inside each category, permitting considerable leeway for normative development, justification, and practical evaluation. Codification, in contrast, aims at formalizing fixed categories for cases in general. Nonetheless, the discussion on the identification of the criteria for codification provides guidance for the identification and evaluation of customary elements. After all, all these discussions take place in the very same context of the international legal community. And, as such, these discussions contribute directly to the consolidation of any future acceptance in a more explicit form, either on a customary basis or, eventually, in a codified form.

## 4.8 Criteria for Humanitarian Intervention

### *Attempts at Regulation: The Debate Continues*

Various proposals have been suggested for the institutionalization of certain humanitarian intervention criteria.<sup>88</sup> This idea was taken up by the International Law Association (ILA) in 1970, but its work came up against the following stumbling block: if the Security Council is blocked by a veto and unable to act, would states nevertheless be allowed to intervene, unilaterally or collectively?<sup>89</sup> However, in its third interim report, it proposed a list of twelve criteria for humanitarian intervention in the event of the non-functioning of the UN, defining the basis for humanitarian intervention;<sup>90</sup> the procedure to be followed in the execution of the intervention, specifying scrupulously the intervening party’s obligations;<sup>91</sup> underlining the principles of proportionality and necessity;<sup>92</sup> an introducing sanctions for the intervening party’s failure—constituting, *inter alia*, a breach of the peace—to respect the elements enumerated.<sup>93</sup> Moreover, intervention by the UN was to be preferred to an intervention by a regional organization, and an intervention by an organization was to be preferred to an intervention by a group of states or by a single state.

### *Renewed Legitimacy?*

State practice in the development of intervention criteria, particularly in the case of Kosovo, is significant and has helped to fuel doctrinal discourse on humanitarian intervention, giving rise to a number of proposals that are similar to those put forward earlier by the International Law Association. It was understood that the intervention dilemma could be approached from four different angles: (1) a *status quo* strategy, with an exclusive reliance on the Security Council to authorize humanitarian intervention; (2) an *ad hoc* strategy, so that humanitarian intervention is an “emergency exit” from norms of international law; (3) an exception strategy, with a subsidiary right of humanitarian intervention established under international law, and; (4) a general right strategy, according to which a general right of humanitarian intervention is established under international law.<sup>94</sup> The *ad hoc* strategy is dismissed outright, as we are discussing the explicit consolidation of a humanitarian intervention norm, not an excuse strategy with mitigating circumstances. The *status quo* strat-

egy is also dismissed from the beginning, as the unclear state of law is considered detrimental to the global regulation of an instance of a unilateral use of force. The subsidiary right of humanitarian intervention is eventually possible, which means that the humanitarian intervention norm provides only for a subsidiary right so that the primary right of intervention is vested somewhere else, and the subsidiary right is exercised if and only if the primary source does not provide results. The fourth possibility is the general right of humanitarian intervention, which is most likely unacceptable to all at present, taking into account the great hesitations states feel regarding the open use of humanitarian force.

Up to this point the focus of the discussion, departing either from a general or a subsidiary right of intervention, has been on the conflict between principles of sovereignty and of humanitarian intervention, in favor of allowing the latter in appropriate cases. The situation is something of an impasse, unless sovereignty is understood as an instrumental good, a means to other, more fundamental ends.<sup>95</sup> Secretary-General Kofi Annan presented this challenge to the international community at the General Assembly in 1999. On the one hand, he stressed that military interventions without Security Council authorization may erode the legal framework governing the use of force and undermine the Council's authority by setting potentially dangerous precedents. On the other hand, the Council's failure to act in the face of horrific atrocities betrays the human rights principles of the Charter and erodes respect for the UN as an institution. Thus, in order to make the Security Council meet the pressing demands of justice (and the gap with respect to the law), and in order to ensure that effective action is taken when needed, Secretary-General Annan made compelling pleas to the international community to try to find, once and for all, a new consensus on how to approach the intervention issue, to "forge unity" around the basic questions of principle and process involved:

"If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that affect every precept of our common humanity?"<sup>96</sup>

In September 2000, the Government of Canada took up the challenge, and the International Commission on Intervention and State Sovereignty (ICISS) was established accordingly. The report of the Commission, *Responsibility to Protect*, approaches the problem of intervention *de lege ferenda*, for the purposes of creating future law. Its central idea is to view state sovereignty as responsibility, incorporating three-fold contents: first, state authorities are responsible for the functions of protecting the safety and lives of citizens and their welfare; second, national political authorities are responsible to the citizens internally and to the international community through the UN; third, agents of the state are responsible for their actions and omissions.<sup>97</sup> The corresponding responsibility to protect includes, likewise, a three-fold dimension: responsibility to prevent, responsibility to react, and responsibility to rebuild.<sup>98</sup>

Humanitarian intervention actualizes in the framework of the responsibility to react: coercive measures may include political, economic, or judicial measures and, in extreme cases, military action. Therefore, in order to develop a legal strategy<sup>99</sup> regarding intervention on human protection grounds, the following four main points need to be considered:

1. To establish clearer rules, procedures, and criteria for determining whether, when, and how to intervene;
2. To establish the legitimacy of military intervention when necessary and after all other approaches have failed;
3. To ensure that military intervention, when it occurs, is carried out only for the purposes proposed, is effective, and is undertaken with proper concern to minimize the human costs and institutional damage that will result, and;
4. To help eliminate, where possible, the causes of conflict while enhancing the prospects for durable and sustainable peace.

The subsidiary right of intervention is favored, with the enhancement of clearer elements for intervention and its legality.

In addition to the ICISS, the Independent International Commission on Kosovo also advocates a process of formalization of a doctrine of humanitarian intervention in three stages.<sup>100</sup> First, a framework of principles is to be created, including threshold principles that must be satisfied in order for any claim of humanitarian intervention to be legitimate, as well as contextual principles that bear on the degree of legitimacy of the intervention (for *ex ante* or *ex post facto* evaluation). Next, the Commission chooses the formal codification for advancing its arguments, and it is proposed that the UN General Assembly would formalize the criteria, through its Humanitarian Intervention Declaration, followed by an amendment of the UN Charter to put humanitarian intervention on a firmer footing.

As stated, formal codification is not endorsed in the study, but elements enumerated in various discussions on the UN, state, and organization levels tackle the institution of humanitarian intervention widely, discussing its legal basis as a subsidiary or a general right, its objective (threshold or “trigger” conditions), plus a minimum of procedural preconditions to be followed when intervening and controlling such a course of action (additional precautionary principles). These elements represent an assembly of rules that are fundamental for the international legal community with respect to issues relating to humanitarian intervention, and which could well eliminate opposition to the humanitarian use of force. Thus, elements of discussion are in a key position for the development *statu nascendi*, contributing to it, and, in fact, being part of the development itself. Therefore, we shall now turn to a discussion of the elements of humanitarian intervention, which in this case are being identified in NATO’s Kosovo Operation and have been analyzed further in discussions in different venues, such as the afore-mentioned ICISS, Independent International Commission on Kosovo, the Secretary-General, etc. Such customary elements need a clearly understood foundation and the acceptance of all those involved in order to achieve the further consolidation of humanitarian intervention on legal grounds.

## CHAPTER 5

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# APPLYING HUMANITARIAN INTERVENTION ELEMENTS TO KOSOVO

### 5.1 Grave Violations of Human Rights

Since humanitarian intervention is an *extrema ratio* in search of its legality, it can only be used in extreme cases of severe<sup>1</sup> and massive violations of human rights and humanitarian law. Peace should thus best be preserved by focusing rather on the prevention of conflicts. Now, “if and only if” there is a serious human rights and humanitarian situation—an extreme case—can an armed action be justified.<sup>2</sup> The ICISS proposes two broad categories on the basis of which a justification for military action can be evaluated:

- Large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product of either a deliberate state action or state neglect or inability to act, or a failed state situation;
- Large scale ethnic cleansing, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.<sup>3</sup>

The qualification of acts can be linked to those acts “for which there is an individual criminal responsibility under international law.”<sup>4</sup> These acts are codified in the Statute of the International Criminal Tribunal for the former Yugoslavia,<sup>5</sup> and more recently, in the International Criminal Court’s Statute reflecting the current state of affairs in international criminal law, in which efforts are made to end the culture of impunity.<sup>6</sup> The ICC’s Statute lists “genocide,” “crimes against humanity,” and “serious violations of international humanitarian law” as such acts.<sup>7</sup>

“Genocide” means acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such by killing; causing serious bodily or mental harm; deliberately inflicting conditions of life calculated to bring about its physical destruction; conducting enforced birth control policies; forcibly transferring children, etc.

“Crimes against humanity” include—when committed as part of a widespread or systematic attack against any civilian population—murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, ethnic, and racial grounds; and other inhumane acts.

“Serious violations of international humanitarian law,” particularly when committed on a large scale, as part of an intentional policy, include violence to the life, health, and physical or mental well-being of persons, in particular murder and cruel treatment such as tor-

ture, mutilation, or any form of corporal punishment; the taking of hostages; acts of terrorism; outrages upon personal dignity, in particular humiliating and degrading treatment, rape, forced prostitution, or indecent assault; and pillage.

Violations amounting to a “just cause” for military action can either be acts of commission by the authorities of the country concerned (e.g., Kosovo) or of omission (e.g., Sudan, Darfur) or, in cases of failed states, because the authority concerned has ceased to exist (e.g., Somalia). In addition, the quantification of the violation—defined as being of “large scale”—needs an *in casu* assessment of the relevant circumstances of the case at hand.<sup>8</sup> Violations have to be appraised on the basis of fair and accurate information, by an organ providing satisfactory guarantees of impartiality, such as the Security Council, the GA, the OSCE, the UNHCR, etc. The question of which body makes such an assessment is clearly a potential discrepancy factor between interventionists and non-interventionist, exactly because of underlying risks of abuse. *A fortiori*, great attention is necessary in order to achieve wide acceptance of the fact that an extreme case is at hand that warrants effective action.

### 5.1.1 Ethnic Cleansing in Kosovo

A severe humanitarian crisis existed in Kosovo when the decision was made to launch Operation Allied Force. Independent analysts working in Kosovo had documented widespread violations of human rights and humanitarian law,<sup>9</sup> which were of an extremely grave nature,<sup>10</sup> amounting possibly even to genocide.<sup>11</sup> Expressing its deep concern at these violations, the Security Council adopted three resolutions in which it affirmed that the situation in Kosovo constituted a threat to peace and security in the region. Also, the humanitarian situation was deteriorating rapidly in the province. The territorial government was perpetuating human rights violations, and showed no inclination to stop.

Having established the facts at the beginning of this study, we then went on to analyze the legal framework. In Chapter 2, we discussed the applicable law with respect to certain basic human rights and the *erga omnes* obligation of all to respect these rights. Given that the protection of basic human rights stems from the collective interest of states, we concluded that states have a corresponding interest in protecting such rights. Classical legal means of protection do not include the unilateral use of armed force, however warranted a humanitarian intervention might be. But the legitimacy of intervention in specific cases approaches legality. The state of law is changing to correspond to the new realities: military action is admittedly necessary in extreme cases, like genocide.<sup>12</sup> This was reflected in the reactions to Operation Allied Force. Violations of fundamental human rights do not stop at state borders. In other words, a state that mistreats its citizens cannot find shelter behind the concept of sovereignty.<sup>13</sup>

As soon as the air strikes began, violations of human rights and humanitarian law increased dramatically. Serb forces began to implement a premeditated strategy of ethnic cleansing, often in retaliation to NATO’s air attacks.<sup>14</sup> In addition to its role as a tool for ethnic cleansing, the creation of a flow of refugees was part of the Serb/Yugoslav leadership’s strategy of destabilizing the security situation throughout the entire region.<sup>15</sup> The strategy was unexpected, and raised criticism regarding NATO’s preparedness to foresee

the tragedy.<sup>16</sup> The creation of a massive flow of refugees from Kosovo might, in fact, have been the only effective way in which the Yugoslavs could wage war against NATO, which had greatly superior and far more technologically advanced weaponry and equipment.<sup>17</sup>

We should also mention the impact these violations of humanitarian law and human rights had on public opinion. Far from breaking the NATO countries' cohesion vis-à-vis Operation Allied Force, this cohesion was strengthened by the atrocities committed in Kosovo; the Alliance would not lose.<sup>18</sup> Consequently, the cohesion remained intact when the air campaign was extended beyond the short-term campaign that had originally been planned.<sup>19</sup> In retrospect, we may wonder whether the air campaign might not have been abandoned long before Yugoslavia's capitulation if NATO had not had the backing of public opinion. This would not only have seriously damaged NATO's credibility, but also it would have considerably strengthened the positions of the Serb and Yugoslav governments, which would have emerged as the victors of the conflict.

The consensus of the NATO member countries was strengthened by the atrocities which were being committed in Kosovo, and the fact that the FRY was violating the fundamental rights of *its own citizens* was viewed as an extremely grave and indefensible act by the other member countries of the UN, which added to the level of public support for the intervention. Needless to say, the Yugoslav government itself was strongly opposed to the operation, claiming to have been the victim of aggression while taking care of an internal matter.<sup>20</sup> Reactions of ordinary people in Serbia are an interesting case, however: before the beginning of Operation Allied Force, the repression was met with passivity, either ignored or even adhered to due to the governmental media campaign for strengthening the nationalist feeling of the Serbs.<sup>21</sup> The operation obviously united the national front in the face of an overwhelming enemy.

Now, as far as the reactions of states are concerned with respect to NATO's unauthorized use of armed force *for human rights purposes*, these reactions are very pertinent to the discussion on armed protection of basic human rights and its role in customary law. We will, therefore, discuss these reactions immediately below.

### 5.1.2 The International Community's Immediate Reactions

Reactions were divided. As stated above, the Yugoslav government was strongly opposed to the operation. It was backed up by Belarus, China, India, and Russia who firmly condemned NATO's action as interference in Serbia's internal affairs<sup>22</sup> and, with the exception of China, introduced a draft resolution condemning NATO's use of armed force.<sup>23</sup> The draft was rejected. The matter was also brought up by the G77 group, which twice adopted declarations unequivocally affirming that unilateral humanitarian intervention was illegal under international law.<sup>24</sup> Protests made by others could not ignore the fact that the FRY was violating the basic human rights of its own citizens. The fundamental discrepancy stemmed from the use of force, which had not been authorized by the Security Council, against another independent state, in violation of the UN Charter; such a practice was deemed to constitute a dangerous precedent that risked upsetting the security balance throughout the region.<sup>25</sup>

However, other states in the Security Council, representing various regions of the world,<sup>26</sup> essentially concurred with NATO's conclusion that force was necessary in order to prevent a humanitarian catastrophe. Although the use of armed force was regrettable, it was needed in order to respond to the Yugoslav government's action, which was threatening to cause a widespread humanitarian catastrophe.<sup>27</sup> Faced with the atrocities, the situation could not be ignored.<sup>28</sup> Some situations call for decisive and immediate action; this was the case in Kosovo.<sup>29</sup> The international community's attempts to settle the crisis were futile, as evidenced by the Belgrade government's refusal to cooperate.<sup>30</sup> All means of peaceful settlement had been exhausted.<sup>31</sup> The pertinent resolutions of the Security Council had been violated.<sup>32</sup> Under these conditions, extreme humanitarian necessity justified the use of armed force as an exceptional measure.<sup>33</sup> In fact, NATO's operation was the first step towards peace.<sup>34</sup> Nevertheless, the Security Council's inaction was regrettable.<sup>35</sup>

Thus, initial discussions within the Security Council clearly showed that direct condemnations were few.<sup>36</sup> There were some states which regretted the use of armed force but did not condemn the intervention.<sup>37</sup> Otherwise, expressions of support ranged from open and unconditional support to carefully-worded statements welcoming NATO's action and underlining the need to act.<sup>38</sup> It should also be noted that, in the event of strong opposition to NATO's action, a group of states could have called an urgent meeting of the General Assembly, but this option was never pursued.<sup>39</sup> Instead, a resolution condemning the operation was defeated in the Security Council by a vote of twelve to three; the Russian draft resolution in the UN Commission on Human Rights calling for "an immediate cessation of the fighting" and attributing "victims and casualties amongst the civilian population (to) missile strikes and bombings" met defeat by a substantial margin; and, finally, the Security Council associated itself with the intervention by authorizing UN participation in the measures called for by the ceasefire agreement with the Serbs.<sup>40</sup>

The UN Secretary-General was also supportive of NATO's action. After the failures in Bosnia, he firmly concluded that there "are times when the use of force may be legitimate in the pursuit of peace."<sup>41</sup> Moreover, he emphasized that "ethnic cleansers" and those "guilty of gross and shocking violations of human rights" will find no justification or refuge in the UN Charter.<sup>42</sup> In this line of thinking, the Secretary-General underlined later that "genocide ... is practically always, if not by definition, a threat to the peace. It must be dealt with as such—by strong and united political action, and, in extreme cases, by military action. And that means that we need clear ground rules to distinguish between genuine threats of genocide (or comparably massive violations of human rights), which require a military response, and other situations where the use of force would not be legitimate."<sup>43</sup>

In addition, the European Union expressed its clear support. Heads of state and government reiterated that they could not tolerate killing and deportation in Kosovo, and that they firmly believed that the most severe measures, including military action, were necessary and justified. The statement by the foreign affairs ministers of the Countries of South-Eastern Europe Cooperation (SEEC) on 19 March 1999 was clearly supportive of the international community's efforts. The Non-Aligned Countries Movement issued a more carefully worded statement on 9 April 1999, in which it underlined the primary responsibility of the Security Council, but at the same time condemned the humanitarian catastrophe. The

Organization of the Islamic Conference issued a statement prepared by its contact group on Bosnia-Herzegovina and Kosovo on 7 April 1999, in which it regretted the inaction of the Security Council, deplored the humanitarian catastrophe, and affirmed its support for future efforts to solve the crisis.<sup>44</sup>

These initial expressions are indicative of specific group-thinking, providing a wide array of opinions for and against the operation. They obviously do not represent the entire international community, nor are these expressions clear and systematic for purposes of interpreting the precedent. Nonetheless, they represent a statement by states directly involved in the crisis via their membership in the Security Council, the GA, or other relevant regional organizations. Such statements are indicative of the mixed-motives dilemma typical of both the pre-UN Charter period as well as the post-Charter period, when diverse interests produce somewhat contradictory argumentation, in favor of effective human rights protection, the protection of state sovereignty, the maintenance of stability, Security Council action, etc. Definite conclusions are somewhat difficult to draw.

## 5.2 Failure of the Peaceful Settlement of Disputes

There must be a serious attempt made to find a peaceful solution to a conflict.<sup>45</sup> If, however, it is estimated that lesser measures would not be sufficient or timely if they were attempted, there must be reasonable grounds for believing that, under all circumstances, they would not have succeeded.<sup>46</sup> Regarding the Kosovo crisis, the entire panoply of instruments of mediation was applied in order to reach a peaceful settlement. The international community continuously reiterated its clear and uniform demands, backed up by various sanctions and, later, by the threat to use armed force. However, all these initiatives came to nothing, and the signs of the failure of diplomacy were clear.<sup>47</sup> International diplomatic efforts culminated in the Rambouillet and Paris negotiations at the beginning of 1999.<sup>48</sup> Although Serbia/FRY was unable to accept the contents of the draft interim agreement for peace and the autonomy of Kosovo that had been submitted to the parties' delegations,<sup>49</sup> there is no denying the fact that the international community did give the Serbs a fair chance to negotiate.<sup>50</sup>

Diverging views were obviously expressed in this regard.<sup>51</sup> In addition, there was to be one 'last surprise' before the air campaign was launched, which might modify our affirmative answer to the question of whether all means of reaching a peaceful settlement had in fact been exhausted. Namely, President Milošević unexpectedly allowed all the OSCE's 1,600 international observers to leave safely on 20 March 1999, contrary to the Bosnia experience, where they were used as 'human shields.'<sup>52</sup> Under these conditions, might there not have been some way of continuing the negotiations and achieving a different result? On the other hand, the Contact Group had left the initiative for finding a peaceful solution in the hands of the Serb/Yugoslav government,<sup>53</sup> following the recent failure of the Group's diplomatic efforts.<sup>54</sup>

In addition, the mediation strategy in choosing only an air threat was criticized on the grounds that the chances of reaching a peaceful settlement might have been enhanced by a credible threat to intervene using ground forces.<sup>55</sup> The international community was also

criticized for not having become actively involved in the Kosovo crisis earlier, since the situation in the province had existed since the early 1990s.<sup>56</sup> The Kosovo problem could, of course, have been handled differently, and the ground-forces option might have been more effective. The lessons learned from Bosnia-Herzegovina did have an (unwarranted) impact on decision-making during the Kosovo conflict.<sup>57</sup> However, the actual utility of these various hypotheses lies in the careful working out and refining of diplomatic methods and enforcement measures for future cases. As things stand at present,<sup>58</sup> in view of all of the international community's efforts during the course of 1999, we can only conclude that the efforts to reach a peaceful settlement failed.

### 5.3 Security Council's Inaction

The UN Security Council issued three resolutions before Operation Allied Force was launched: on 31 March 1998, Resolution 1160 (1998); on 23 September 1998, Resolution 1199 (1998); and on 24 October 1998, Resolution 1203 (1998). It endorsed the international community's objectives and supported its demands and action.<sup>59</sup> It should be noted that, on each occasion, the Council acted *on the basis of Chapter VII*. Beginning with Resolution 1199 (1998), the situation in Kosovo was defined as a threat to peace and security in the region. A resolution expressly authorizing the use of armed force was, however, inconceivable and the Security Council's unwillingness to act had become clear.<sup>60</sup> However, the military action was consistent with the purposes and aims articulated by the Council, and the interveners maintained a close relationship to the Council, which never criticized or condemned the action.<sup>61</sup> Also, the Council was able to regain some degree of control on 10 June 1999 with the adoption of Resolution 1244 (1999), which was intended to serve as a basis for the deployment of civil and military presences in support of the reconstruction of Kosovo.<sup>62</sup> We should also acknowledge that the Security Council assigned NATO a substantial role in future peace-support efforts in Kosovo.<sup>63</sup>

Before going any further, a few comments should be made regarding the requirement for a resolution expressly authorizing the use of armed force. Resolutions 1199 (1998) and 1203 (1998) did contain a few references for eventually resorting to more stringent measures: in Resolution 1199 (1998), the Security Council stated that it would consider further action, whereas reference was made in Resolution 1203 (1998) to action that might be needed to ensure the safety and freedom of movement of the Verification Missions.<sup>64</sup> However, there is nothing in these resolutions that would even permit the assumption of an implicit authorization for the use of armed force.<sup>65</sup> Similarly, the thesis of the Security Council's implicit authorization following the rejection of the draft resolution condemning NATO's action seems to be a bit far-fetched, too, for an authorization must have an incontrovertible basis that removes the Charter's comprehensive ban on the use of armed force.

This brings us back to the fundamental question of the use of armed force in the absence of the Security Council's authorization. The use of force within the framework of the Charter is based on Security Council authorization, either under the rubric of Chapter VII or Chapter VIII. The authorization of Chapter VII is dependent on the fulfillment of conditions stated in Article 39, whereas the Chapter VIII authorization rests upon the discretion

of the Security Council. Other possible venues for the regional use of force have also been proposed, such as that of the “non-authorized enforcement action”<sup>66</sup> or “recommended”<sup>67</sup> regional action; however, both justifications rest on a highly narrow interpretation of the relevant rules and have no general support in the scholarly literature.<sup>68</sup> Also, the question of *ex post facto* authorizations has been at issue: the authorization would stem indirectly from the post-conflict endorsement of the military action and its results (e.g., Liberia and Sierra Leone). Moreover, couldn’t such an *ex post facto* authorization be viewed as an “amnesty” granted by the international legal community for the action taken for the advancement of its aims?<sup>69</sup>

Simply put, a step outside the Charter framework is made in this line of thinking: if the Security Council is unable to state clearly the mandate justifying the use of force, no unilateral interpretation can remedy its objective absence.<sup>70</sup> Needless to say, the Charter’s (as well as the Security Council’s) authority becomes eroded. There is, namely, an enormous gap between the moral imperative of protecting human rights in specific cases and the selective vision of collective security based on national interests, instead of collective ones. Obviously, the Security Council is primarily responsible for maintaining international and regional peace and security.<sup>71</sup> The Security Council action is the preferable mode of reaction, although the General Assembly’s role as a representative organ of world nations could also be developed further.<sup>72</sup> Then, only in exceptional cases when the UN is not able to carry out its functions, would an armed action be resorted to outside of UN structures. Such an approach favors the subsidiary right of humanitarian intervention. The UN inaction (objectively assessed)<sup>73</sup> becomes an explicit element of and justification for humanitarian intervention. Obviously, the challenge is to make the Security Council (and the General Assembly) work better than it has, namely focusing on avoiding its dysfunction that is primarily due to a capricious use of the veto power.<sup>74</sup> However, as matters now stand, this is not the case. Indeed, it is perhaps appropriate to raise the question of whether greater damage to the international legal order would be done by bypassing the Security Council or by the slaughtering of human beings while the Security Council stands by.<sup>75</sup>

## 5.4 Intervening Party: A Regional Organization

The recourse to force should not be unilateral, but should instead enjoy some established collective support, both via a multilateral process of authorization and the participation of various countries in the undertaking. An action by a coalition of states or an international/regional organization is considered to possess a somewhat enhanced level of legitimacy and legality guarantees regarding eventual decisions to intervene, when they are made in accordance with the relevant organization’s founding charter. The intervening states’ burden of justification extends, consequently, not only to their domestic publics but also to their allies and to the international community.<sup>76</sup>

NATO’s action in Kosovo was obviously a collective operation. In the Charter framework, the debate has arisen around technicalities regarding whether NATO is a regional organization, in addition to being a self-defense pact according to Article 51 of the UN Charter.<sup>77</sup> As already discussed, regional use of force is subjected to the preconditions

stated in Chapter VIII of the Charter, one of them being Security Council authorization. Regionalism, in general, is favored by the UN as a viable, effective alternative to the maintenance of regional peace by UN forces—under Charter preconditions, of course. For instance, regional actions in Africa have been accepted by the UN, and the right of regional or sub-regional organizations to take action, including military action, against members in certain circumstances has been affirmed.<sup>78</sup>

## 5.5 Other Criteria for Legality

Other criteria for the legality of a humanitarian intervention focus on the intervention itself, how it is carried out and how the result of the intervention is to be guaranteed in the future. Since the focus of this study has been on the intervention threshold, or when to intervene (*jus ad bellum*), the following evaluation shall remain on a highly general level. A detailed analysis of the actual operation of an intervention warrants a totally different study.

### 5.5.1 Objective of the Intervention

The overriding objective of a humanitarian intervention is to stop violations of human rights and to restore the respect of those rights.<sup>79</sup> Not only does the intervention aim at preventing and/or stopping on-going violations, it also has to guarantee the future respect of these rights. As regards Operation Allied Force, NATO's objectives matched those that were presented on behalf of the international community.<sup>80</sup> With respect to the future guarantees of respect for human rights, NATO was already engaged in humanitarian activities during the active phase of the operation,<sup>81</sup> and, given the flow of refugees, these activities were, in fact, part and parcel of the military efforts to preserve stability throughout the entire region. Since the cessation of hostilities, NATO has been playing a major role in the reconstruction efforts in Kosovo.<sup>82</sup>

The principle regarding minimum interference to the state object of the intervention should be upheld further than justified on purely humanitarian intervention grounds, even at the risk of infringing upon state sovereignty.<sup>83</sup> Occupation of a territory, while not an objective as such, might be unavoidable, but there should be a clear commitment from the outset to returning the territory eventually to its sovereign owner, or, if that is not possible, administering it on an interim basis under UN auspices.<sup>84</sup> The only way to guarantee the status of the post-intervention state is on a case-by-case basis, depending on the very specific circumstances of each intervention case, since extreme examples could be imagined, such as a complete evacuation of the relevant group of people from the territory of the state or, as in the case of Kosovo, the creation of an international protectorate.

Admittedly the presence of mixed motives behind decisions to intervene is often a fact, taking into account the budgetary costs and manpower risks involved in any intervention case. At the same time, other factors, like concerns over refugee flows, havens for drug producers, terrorists, and criminal organizations—all of them related to the humanitarian issue—clearly have an effect on decisions to intervene. The more mixed motives are present, the harder it is to grant humanitarian intervention any blanket stamp of legality. The

humanitarian objective must be emphasized for the purposes of qualifying for any imprimatur of legality.

### 5.5.2 Method of the Intervention

The method of intervention must be reasonably calculated to end the humanitarian catastrophe as rapidly as possible, and must specifically include measures to protect all civilians, to avoid collateral damage to civilian society, and to preclude any secondary punitive or retaliatory action against the target government.<sup>85</sup> Moreover, the use of force must comply with the laws of war—most notably the 1949 Geneva Conventions, the 1954 Hague Convention on Cultural Property—and the 1977 Additional Protocols to the Geneva Conventions, and with a series of customary principles (necessity, proportionality, distinction, humanity) that bear directly on the tactics and methods of warfare.<sup>86</sup> Critically, the use of force is reserved strictly for human rights enforcement and, thus, should not be directed against the political or civilian structures of the target state.<sup>87</sup> However, such a requirement might not in practice be clear-cut.<sup>88</sup> Intervention is often carried out against the will of the government, or in the case of failed states, possibly against the will of some or all of the quarrelling factions. A certain amount of military logic will necessarily come into play in the planning and execution of the action. The law of armed conflicts is, nonetheless, applicable; the right of the parties to an armed conflict to choose the means and methods of warfare is not unlimited.

Ardent comments have been presented for<sup>89</sup> and against<sup>90</sup> the legality of the Kosovo operation, on the basis of individual and/or state responsibility.<sup>91</sup> The evaluation of legality made in these reports (enumerated under footnotes 88-92) bears on the issues involved in targeting (at 15,000 feet) in general and specific incidents in particular, the use of dubious weapons (cluster bombs, depleted uranium projectiles),<sup>92</sup> damage to the environment,<sup>93</sup> and violations of the principles of proportionality and discrimination. As regards the issue of individual criminal responsibility, the Prosecutor of the ICTY told the Security Council that she had decided not to open an investigation against NATO.<sup>94</sup> However, this is not the only forum in which such an investigation might be brought, as issues of legality are being addressed in some domestic courts.<sup>95</sup> In addition, the European Court of Human Rights has received an application regarding the attack on the RTS Belgrade studios.<sup>96</sup>

The general issues of NATO members' *state* responsibility (and compensation) and the compatibility of their actions with international law will possibly be evaluated on the basis of the FRY's demands in the proceedings against NATO countries. The case of *Legality of the Use of Force* against eight NATO members is under review at the ICJ. Even though the Court declined to indicate provisional measures demanded by the FRY, on grounds of lack of jurisdiction *prima facie*, it explicitly went on to emphasize that the question of the jurisdiction of the Court to deal with the merits of the case is in no way prejudged; even more, "whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law."<sup>97</sup> Obviously, the use of force in Yugoslavia "raises very serious issues under international law," in the words of the World Court.<sup>98</sup>

### 5.5.3 Miscellaneous

A humanitarian intervention is justified if it stands a reasonable chance of success.<sup>99</sup> If the protection aims cannot realistically be achieved, or if the cure is likely to be worse than the disease, there is little reason to resort to armed force. The “reasonable prospects” test adds an aspect of *in casu* realism to the contemplation of humanitarian intervention. Does it constitute a double standard? On this account, the ICISS underlines that realism forces us to admit that interventions may not be able to be mounted in every case (e.g., against a major power), or in every instance where there is justification for doing so, but there is no reason for them not to be mounted at all.<sup>100</sup> Other types of reactions (such as sanctions) need to be envisaged in cases warranting a humanitarian intervention but where such an intervention simply is not feasible.

An element of transparency also seems warranted regarding the engagement of the intervening party’s responsibility.<sup>101</sup> The observance of a certain amount of transparency contributes to a greater level of legitimacy for actions taken and their external justifiability. As regards Kosovo, the constant flow of information to the press enabled the media to cover, at least to a certain extent, each phase of the operation.<sup>102</sup> Indeed, the role played by the media in influencing public opinion was of crucial importance for the war effort. The coverage of the atrocities that had been and were being committed in Kosovo undoubtedly played a part in enabling the operation to continue.<sup>103</sup> The crucial question here is that of impartiality: both parties’ versions of the events must be taken into account—*audiatur et altera pars*.

From justifiability it is a short step further to the idea of responsibility, since any justified/pretending-to-be-legal military action must be able to stand up to evaluation against international law regarding the use of force. Any excess, objectively assessed by an independent judicial body like the ICJ, activates the international responsibility of the intervening party. As regards NATO’s responsibility, this question will be discussed within different legal venues, and most significantly within the framework of the ICJ case *Legality of Use of Force* referred to in the previous section, if the jurisdiction of the ICJ is established.<sup>104</sup> On a more general level, the question of responsibility needs to be embedded automatically in every aspect of humanitarian intervention: the customary consolidation of humanitarian norms will automatically include the question of the potential breach of the norm, leading to questions of state responsibility and individual criminal responsibility.

## CONCLUSIONS

This brings us to the end of our study. Humanitarian intervention is one of the greatest challenges the international community is facing in the new millennium. How is the rest of the world to react to flagrant human rights abuses inside a state, if the UN security structures do not provide effective channels for addressing the crisis? The inaction of the Security Council in cases such as Kosovo is the primary impetus that has led states to look for other ways of action, outside the UN Charter. Yet the unilateral use of force, however justified the purpose, easily amounts to a significant threat to world peace and security.

The right of humanitarian intervention outside Security Council procedures receives little support from the Charter, although it should be added that the general regime governing the use of force is itself nowadays somewhat unclear, since the Article 2.4 prohibition against the use of force and the rules regarding self-defense have been violated a number of times. The Charter is simply no longer able to provide authoritative guidance to states, let alone control their actions. Obviously, it is up to the very same states themselves to (re-)define the legal limits on their right to use force. The UN Charter, with the quasi-universal participation of states, would guarantee the universality of rules thus redefined, on the condition that the Charter can be amended so that it is able to dynamically meet the needs of a changing world.

In the meantime, humanitarian intervention can be evaluated on the basis of customary law, which is an equal source of law to the Charter. A customary continuum of cases of humanitarian intervention stretches from centuries past to the present. A clear legal right, however, has never been universally accepted, since interventions in practice are often driven by mixed motives, and the humanitarian justification is advanced openly only on rare occasions. The interpretation of precedents proves difficult. Nonetheless, the customary continuum incorporates elements of intervention. It clearly evidences states' and the Security Council's idea of what a humanitarian intervention should be: interference solely for the purpose of protecting human rights. The custom provides fertile ground for further normative development.

In parallel, the consolidation of human rights in international law has created significant pressures for exactly such normative development. The emerging concept of obligations *erga omnes* raises the question of basic human rights to one of the most important elements of international morality. A shift in thinking is being advocated in authoritative venues: state sovereignty cannot be a shield for the commission of appalling abuses, and the defense of a state is only justified *qua* the defense of its nationals. Consequently, it is in the collective interest of the international community, of states and of other legal subjects, to stop flagrant human rights abuses everywhere, including inside state borders. Genocide and crimes against humanity are a matter of concern to all.

The moral imperative is transformed to legal approval if the international community decides to afford effective legal protection for obligations *erga omnes* by consolidating the right of humanitarian intervention as a legal right. Such a shift entails a value choice for us all. A legal rule on intervention, instead of miring states in exit strategies and pleas of mitigation, clears the state of law, while at the same time restricting the scope of unilateral political action and the advancement of purely national interests.

Operation Allied Force is highly relevant to the development of a customary right of humanitarian intervention, as it is the most recent and massive operation carried out for mainly humanitarian motives. A careful analysis of the elements of intervention—when to intervene, how to intervene, and how to guarantee respect for human rights in the future—provides us with an idea of the contents of a future norm on humanitarian intervention. The legality of intervention is *in statu nascendi*.

Now, as regards this study, the focus has been on the intervention threshold, which was deemed to be fulfilled in the case of Operation Allied Force: flagrant human rights abuses were present, attempts at the peaceful settlement of disputes failed, UN inaction was clear, and the intervening party was a coalition of states. As regards the future development of the norm, all aspects of Operation Allied Force, as well as other past and future intervention cases, need open discussion, evaluation, and assessment, on various national and international stages. The fine line from legitimacy to legality is crossed, when discussions lead one day to the acceptance that in specific cases a humanitarian intervention is both necessary and legal. Whether the right to intervene is confirmed by conventional means is of secondary importance—the acceptance of states is what counts. Disagreements and discrepancies can be overcome if there is enough will to enhance the collective protection of human rights.

In the future, state practice is bound to draw even greater attention to the protection of human rights. The responsibility cannot lie solely with the UN; regional players, who are often more capable of handling problems at regional level, also have a contribution to make here, particularly in view of the fact that recent interventions have been carried out by exactly such regional players. This obviously applies to NATO, ECOWAS, the EU, the AU, and the like. Indeed, the future is open for regional organizations to contribute to this process of enhancing the consolidation of humanitarian intervention within the existing international structures while simultaneously consolidating subsidiary modes of reaction for cases of extreme humanitarian necessity when existing channels fail.

# NOTES

## Introduction

- 1 France, Germany, Italy, Russia, United Kingdom, and the United States.

## Chapter 1

- 1 See International Crisis Group Website: <http://www.intl-crisis-group.org/>. It should be noted that the census was boycotted by the Kosovar Albanians, and that the actual number of Albanians living in Kosovo was probably much higher than the figure recorded by the census (1,700,000). The population of Kosovo also included 43,000 Gypsies (*Maxhupet*, Roma) and 600-700 Circassians. See N. Malcolm, *Kosovo, A Short History* (London: Macmillan, 1998), 202–16.
- 2 J. Leerssen, ed., *The Disintegration of Yugoslavia*, Yearbook of European Studies (Amsterdam: Editions Rodopi B.V., 1992), vii ff.
- 3 T. Youngs and T. Dodd, “Kosovo,” *Research Paper 98/73* (7 July 1998), House of Commons Library, International Affairs and Defence Section, 8–9. To these figures should be added the 100,000 Albanians living in Italy.
- 4 Statistical Office of Kosovo, <http://www.sok-kosovo.org>.
- 5 Youngs and Dodd, “Kosovo,” 7–9. N. Malcolm offers an interesting point of view in rejecting the argument that attributes the origins of Serb-Albanian antagonism to age-old religious and ethnic conflicts on the grounds that this argument is not backed up by the historical facts: “There have been many battles and wars in Kosovo over the centuries, but until the last 100 years or so none of them had the character of an ‘ethnic’ conflict between Albanians and Serbs. ... over many centuries in Kosovo the ethnic divisions between Serbs and Albanians were never entirely clear-cut.” See N. Malcolm, *Kosovo*, xxviii–xxx. For a critical view, see A. Djilas, “Kosovo’s Ancient Hatreds,” *Foreign Affairs* (September/October 1998): 124–31.
- 6 A very strong nationalist sentiment is linked to Kosovo. However, nowadays the sentiment is somewhat milder among younger people in urban areas. Interview 16 January 2001, Sveta Matić and Goran Nišavić, OTPOR! Resistance Movement.
- 7 T. Judah, *The Serbs, History, Myth and the Destruction of Yugoslavia*, 2<sup>nd</sup> ed. (New Haven: Yale University Press, 2000), 7–9. The Slavs at this point could not be identified as Serbs, Croats etc., but were “undifferentiated.”
- 8 Which is an important and tragic historical event in Serbian national historic writing: the Prince Lazar Hrebeljanović (1371–89) chose “a heavenly kingdom for an earthly kingdom” leading both to his and Sultan Murad I’s death (by the hand of Miloš Obilić) and to the loss of the Serb army. See B. Anzulović, *Heavenly Serbia, From Myth to Genocide* (London: Hurst & Company, 1999), 11–17. The Albanians (at that time Christians) were fighting alongside the Serbs against their common Muslim enemy. See C. Lutard, *Serbia, Le Contraddizioni di un’identità ancora incerta* (Il Mulino, 1998), 33–34.
- 9 See “Kosovo/Kosova, As Seen, As Told, Part I, Chapter 3 Kosovo: the Historical and Political Background,” *Analysis of the Human Rights Findings of the OSCE Kosovo Verification Mission, October 1998-June 1999*, <http://www.osce.org/kosovo/reports/hr/part1/index.htm> (hereafter referred to as OSCE KVM Report Part I); and M. Weller, *The Crisis in Kosovo 1989-1999*, International Documents & Analysis, Vol. 1, Centre of International Studies, University of Cambridge, Documents & Analysis Publishing Ltd., 1999, 34–35.

- 10 Judah, *The Serbs*, 14–26.
- 11 Youngs and Dodd, “Kosovo,” 8.
- 12 Malcolm, *Kosovo*, 22 ff. The Albanians are divided into two groups: the Gëgs in the northern region, including Kosovo, and the Tosks in southern Albania.
- 13 Weller, *The Crisis*, 34–35.
- 14 Ibid.
- 15 Ibid., 35. Under the Serbian law of 3 September 1945, the Autonomous Region of Kosovo-Metohija was established as a constituent part of Serbia.
- 16 For further details, see Malcolm, *Kosovo*, 253–58. Serbia, of which Kosovo was part, was beginning to subject the Albanians to repression. During brief periods of Albanian domination, the Serbian population was in turn subjected to violence. The two post-World War periods were marked by reciprocal repression.
- 17 Ibid., 324–27.
- 18 1974 Constitution of the Socialist Federal Republic of Yugoslavia, Article 4: “The Socialist Autonomous Provinces are autonomous socialist self-managing democratic socio-political communities based on the power of self-management ... in which the working people, nations and nationalities realize their sovereign rights.” For the text, see Weller, *The Crisis*, 54–59. The question was also raised as to why Kosovo was not granted the status of a Republic. Malcolm disputes the explanation, which is based on a distinction between the nation (*narod*—a unit potentially capable of forming a state) and nationality (*narodnost*—displaced part of a nation) within the Yugoslav federal system, and argues that the reasons were political: the fear of secession and union with Albania. For further details, see Malcolm, *Kosovo*, 327–29.
- 19 Weller, *The Crisis*, 35–36.
- 20 Ibid. Demographic change is illustrated by the fact that the Serbs and the Montenegrins represented 27 % of the population in 1953, compared with a mere 10 % in 1991.
- 21 See OSCE KVM Report, Part I, Chapter 1, Kosovo: the Historical and Political Background.
- 22 Interview 16 January 2001, Goran Nišavić and Sveta Matic, advisors, OTPOR! Resistance Movement and interview 18 January 2001, Svetlana Đurđević-Lukić, political editor, NIN Independent Weekly.
- 23 Malcolm, *Kosovo*, 340–41.
- 24 Starting in 1987, Slobodan Milošević, who had become the President of the Serbian National Party and firmly controlled the Serbian government, began to focus his action program on issues relating to the treatment of the Serbs in Kosovo.
- 25 For these reforms, see, for example, “Constitutional Amendments of the SR of Serbia 1989,” *Official Gazette of the SR Serbia No. 30/89*; “Law on the Restriction of Real Property Transactions 1989,” *Official Gazette of the SR of Serbia No. 42/89*; “Law on the Amendment to the Law on the Restriction of Real Property Transactions 1989,” *Official Gazette of the SR of Serbia No. 15/90*; “Programme for the Realization of Peace, Freedom, Equality, Democracy and Prosperity of the SAP Kosovo of 30 March 1990,” *Official Gazette of the SR of Serbia No. 5/90*; and “Amendment of the University Law 1990,” *Official Gazette of the SR of Serbia No. 30/90*.
- 26 See “Law on the Actions on Republic Agencies under Special Circumstances of 26 June 1990,” and “Decision about the Existence of Special Circumstances on the Territory of the SAP of Kosovo of 26 June 1990,” *Official Gazette of SRS, No. 33/90*, and “SR Serbia, Decree and Law Terminating Work of the SAP of Kosovo Assembly and the Executive Council of 5 July 1990,” which abolished the Assembly and the Executive Council of the Autonomous Socialist Province of Kosovo.
- 27 See Assembly of Kosovo, Constitutional Declaration of 2 July 1990.
- 28 See Resolution of the Assembly of Kosovo of 7 September 1990, Constitution of the Republic of Kosovo of 7 September 1990, and Resolution of the Assembly of the Republic of Kosovo on Independence. It should be noted that the results of the referendum (Central Board of Kosovo for the Conduct of the Referendum, Result, 7 October 1991) showed that the percentage of voters taking part was 87.1 %, and that 99.87 % of them voted for independence.
- 29 Djilas, “Kosovo’s Ancient Hatreds,” 126–27. According to Djilas, if the Albanians had voted, this would have had a marked influence on the presidential elections in Serbia and Yugoslavia.

- 30 See Arbitration Commission for the former Yugoslavia (established on 27 August 1991/3 September 1991 by the EPC declarations), Opinion No. 1, 11 January 1993, 31 *ILM 1488* (1992).
- 31 It was only when Germany had recognized Croatia and Slovenia on 23 December 1991 that the EC extended its recognition, on 15 January 1992; Bosnia-Herzegovina was recognized on 6 April 1992. On 27 April 1992, Serbia and Montenegro proclaimed the Federal Republic of Yugoslavia (FRY), not yet recognized by the international community.
- 32 See EPC Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, 16 December 1991, EPC Press Release, 128/91 (16 December 1991).
- 33 See EPC Declaration on Yugoslavia, 16 December 1991, EPC Press Release 129/91 (16 December 1991).
- 34 For the principle of *uti posseditis iuris*, see Opinions Nos. 2 and 3 of the Arbitration Commission, *ILM 1488* (1992). Opinion No. 2 is particularly important, as Serbia had raised the question of the Serb minorities' right to self-determination in Croatia and Bosnia-Herzegovina. The Arbitration Commission was quite clear: "in no circumstances may the right to self-determination mean the changing of borders in existence at the time of independence (*uti posseditis iuris*) unless the states concerned decide otherwise."
- 35 As the importance of ethnic minorities to any comprehensive solution was fully realized, guarantees for minorities were imposed as a prior condition for EC recognition.
- 36 D. Owen, *Balkan Odyssey* (London: Victor Gollancz, 1995), 31–33.
- 37 The principle of *uti posseditis* implies respect of existing borders; the term originated in Latin America where the successor states in the wake of Spanish colonial rule resorted to *uti posseditis* in their border disputes. This principle is not obligatory, and states may resort to other principles or reach an agreement in another way. See I. Brownlie, *Principles of Public International Law*, 4<sup>th</sup> edition (Oxford: Clarendon Press, 1995), 134–35.
- 38 T. Christakis, *L'ONU, Le Chapitre VII et la Crise Yougoslave*, (Montchrestien: Cédin-Paris I, 1996), 66–81; and R. Caplan, "Crisis in Kosovo," *International Affairs* 74:4 (1998): 747–48. According to Caplan, "The EC was clearly innovating; there was no precedent for determining statehood on this basis."
- 39 See Kosovo Memorandum to the International Conference on the Former Yugoslavia, 26 August 1992.
- 40 See Memorandum, Albanian Political Parties and the Council for Defense of Human Rights in Priština, April 1992, S/24452.
- 41 Caplan, "Crisis in Kosovo," 747–49.
- 42 See Letter from Lord Carrington, Chairman, Conference on Yugoslavia, to Dr. I. Rugova, 17 August 1991.
- 43 See London Conference, Work Program, 27 August 1992.
- 44 Youngs and Dodd, "Kosovo," 13–14.
- 45 *Ibid.*, 14. However, the situation in Kosovo was far from satisfactory: the economy was in ruins, unemployment was high, and there was continual repression on the part of Belgrade.
- 46 Consequently, the situation in Kosovo was kept under constant review. See, for example, the activities of the special working group on Kosovo (*Report of the Secretary-General on the International Conference on the Former Yugoslavia*, 11 November 1992, S/24795; *Secretary-General Report: Recent Activities of the Working Groups*, 30 March 1993, S/25490); *Joint Action Program of France, Spain, Russian Federation, the United Kingdom and the U.S.*, 22 May 1993; St. Egidio Education Agreement of 1 September 1996 and Reports of the CSCE Missions and Related Communications (*Report of the Human Rights Rapporteur Mission to Yugoslavia*, 24 January 1992, CSCE Communication No. 41, Prague, 24 January 1992; *Report of the Conflict Prevention Centre Fact-Finding Mission to Kosovo*, 5 June 1992; *Report of the Exploratory Mission to Kosovo, Vojvodina and Sandzak*, 2–8 August 1992; *CSCE Mission in Kosovo, Report on Kosovo Stalemate*, 16 November 1992; *CSCE Mission of Long Duration Report: Concern over Police Brutality in Kosovo*, 23 December 1992; *7<sup>th</sup> Interim Report, Head of Missions to Kosovo, Sandzak and Vojvodina*, 16 December 1992; *CSCE Mission in Kosovo: Fortnightly Reports 1-5*, CSCE Mission in Kosovo, 6 January–4 March 1993). For all these documents, see Weller, *The Crisis*, 89–119.

- 47 Ibid., 117–19. See also the *Special Report: Kosovo-Problems and Prospects* by Tore Borgh, Head of Missions, 29 June 1993.
- 48 For a number of reasons, the situation in Kosovo was not one of the items open for negotiation. Caplan gives three reasons for this exclusion: 1. The already considerable number of items on the agenda; 2. Desire to ensure Milošević's co-operation; 3. The absence of war in Kosovo. See Caplan, "Crisis," 750–51.
- 49 "Europe and the evolving situation in the Balkans," Assembly of Western European Union, Report, Document 1608, 13 May 1998, 20.
- 50 Presidency Statement of 9 April 1996, *Bulletin of the European Union*, 4-1996, 58.
- 51 Militarization took place, and a massive transfer of arms found its way to Kosovo via northern Albania. The Dayton Accords and the lessons of Bosnia demonstrated to the Albanians that the weaker side (Bosnian Muslims) could only win if they took up arms and mobilized the international community. D. Triantaphyllou, *The Albanian Factor* (Athens: Hellenic Foundation for European and Foreign Policy, 2001), 35–38.
- 52 Caplan, "Crisis," 752.
- 53 "Europe and the evolving situation in the Balkans," Assembly of Western European Union, Report, Document 1608, 13 May 1998, 21.
- 54 For the strategic situation in March 1999, see OSCE KVM Report Part I, Chapter 3, "The Military/Security Context; Yugoslav Forces in Kosovo, and the Kosovo Liberation Army."
- 55 See OSCE KVM Report, Part I, Chapter 3: "The Military/Security Context." Reports were also coming in about the involvement of paramilitary units, volunteers, and state security forces (*Sluzba Drzavne Bezbednosti*).
- 56 For a more detailed account, see OSCE KVM Report Part I and "Kosovo/Kosova, As Seen, As Told, Part II," Analysis of the Human Rights Findings of the OSCE Kosovo Verification Mission, June 1999–October 1999, at [www.osce.org/kosovo/reports/hr/part2/index.htm](http://www.osce.org/kosovo/reports/hr/part2/index.htm) (hereafter referred to as OSCE KVM Report Part II).
- 57 This section draws mainly on two sources: the reports by the United Nations Secretary-General, and the OSCE/KVM Report Part I. The UN reports include: *Report of the Secretary-General Prepared Pursuant to Resolutions 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council*, 29 January 1999, S/1999/99; *Monthly Report on the Situation in Kosovo Prepared Pursuant to Resolutions 1160 (1998) and 1203 (1998) of the Security Council*, 26 February 1999, S/1999/214; *Report of the Secretary-General Prepared Pursuant to Resolutions 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council*, 17 March 1999, S/1999/293; and *Monthly Report on the Situation in Kosovo Prepared Pursuant to Resolutions 1160 (1998) and 1203 (1998) of the Security Council*, 23 March 1999, S/1999/315), prepared on the basis of the data gathered by the United Nations High Commissioner for Refugees (UNHCR), the United Nations High Commissioner for Human Rights, the Kosovo Diplomatic Observer Mission, the OSCE Chairman-in-Office, the NATO Secretary General, and various Member States. The OSCE/KVM report was based on ground reports for the period December 1998 to 20 March 1999 (when the OSCE/KVM was withdrawn), and, subsequently, on the statements made by victims and witnesses and authenticated by the OSCE/ODIHR.
- 58 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949; Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949; and Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949.
- 59 "A non-international armed conflict is a confrontation between the existing governmental authority and groups of persons subordinate to this authority, which is carried out by force of arms within national territory and reaches the magnitude of an armed riot or a civil war." See D. Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995), 47–49. See also Article 1, points 1 and 2 of Protocol II. It should be noted that the legal protection applicable to non-international armed conflicts depends on the intensity of the conflict: Article 3, which is common to the four Geneva Conventions, applies to all these conflicts, although Protocol II has a relatively high

threshold of application (see Article 1, paras. 1 and 2 of Protocol II). At the same time, the provisions of general international law and domestic law also apply.

- 60 See OSCE KVM Part I, Chapter 2, “The OSCE KVM Human Rights Operation, a State of Armed Conflict—Legal Definition.” There is no unanimous doctrine with respect to the effects of foreign intervention on an internal armed conflict: according to some, the conflict remains an internal one (with the provisions applicable to non-international armed conflicts remaining in force), except for relations between the intervening party and the counterparty (which are subject to the provisions applicable to international armed conflicts), while others maintain that foreign intervention “internationalizes” the conflict, bringing into effect the provisions applicable to international armed conflicts. See E. David, *Principes de droit des conflits armés* (Brussels: Bruylant, 1994), 125–38, in which reference is made to a symposium at which this issue was discussed at length. The symposium’s proceedings were published as: *Droit humanitaire et conflits armés* (Brussels: Centre de droit international de l’Institut de Sociologie de l’Université Libre de Bruxelles, Editions de l’Université de Bruxelles, 1970). Some insight into this issue is provided by the judgment that was delivered on 27 June 1986 by the ICJ on the case concerning “Military and Paramilitary Activities in and against Nicaragua.” The Court ruled that this was a split conflict, in that it constituted an international conflict between the United States and Nicaragua and an internal conflict between the Contras and the Managua government. See *ICJ Reports*, 1986, 114, para. 291. Whatever the prevailing view may be, relations between the Kosovar Albanians and the Yugoslav government during the period preceding NATO’s intervention were covered by the provisions applicable under Article 3 of the Geneva Conventions, Protocol II, and The Hague Convention of 1954.
- 61 See *Monthly Report on the Situation in Kosovo Prepared Pursuant to Resolutions 1160 (1998) and 1203 (1998) of the Security Council*, S/1999/315 (for the period 15 February to 20 March 1999) and OSCE KVM Part I, Chapter 3, “The Military/Security Context—Open Hostilities.”
- 62 See Naumann-Clark Agreement of 25 October 1998.
- 63 See OSCE KVM Part I Chapter 3, “The Military/Security Context—Open Hostilities.”
- 64 *Monthly Report on the Situation in Kosovo Prepared Pursuant to Resolutions 1160 (1998) and 1203 (1998) of the Security Council*, S/1999/315 (for the period 15 February to 20 March 1999), 11.
- 65 Compared with the relatively calm situation on the Albanian-Kosovo border, the situation on FYROM’s northern border was unstable and marked by constant fighting. On 22 March 1999, there were approximately 25,000 refugees in Montenegro, 269,000 refugees in other countries, and 235,000 displaced persons in Kosovo. See *Secretary-General, Press Release*, SG/SM/693, 22 March 1999. Since the beginning of March, there had also been a steep rise in the number of Kosovars seeking asylum, and the HCR and the Red Cross had registered 4,000 persons who were seeking to obtain the status of persons entitled to humanitarian assistance. See *Monthly Report on the Situation in Kosovo Prepared Pursuant to Resolutions 1160 (1998) and 1203 (1998) of the Security Council*, S/1999/315 (for the period 15 February to 20 March 1999).
- 66 See *Report of the Secretary-General Prepared Pursuant to Resolutions 1160 (1998) and 1199 (1998) of the Security Council*, S/1999/293, 17 March 1999, para. 34.
- 67 *Monthly Report on the Situation in Kosovo Prepared Pursuant to Resolutions 1160 (1998) and 1203 (1998) of the Security Council*, S/1999/315 (for the period 15 February to 20 March 1999), 6.
- 68 See resolution adopted by the UN General Assembly on 25 February 1999 on the human rights situation in Kosovo, A/RES/53/164.
- 69 See *Report of the Secretary-General Prepared Pursuant to Resolutions 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council*, S/1999/99, 29 January 1999, paras. 3–10 (period of the report 24 December 1998–29 February 1999); *Monthly Report on the Situation in Kosovo Prepared Pursuant to Resolutions 1160 (1998) and 1203 (1998) of the Security Council*, S/1999/214, 4–6 (period of the report mid-January 1999–mid February 1999); *Report of the Secretary-General Prepared Pursuant to Resolutions 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council*, S/1999/293, 17 March 1999, paras. 4–15 (period of the report 30 January 1999–17 March 1999); Security Council, Press Release SC/6637, 29 January 1999; Secretary-General, Press Release SG/SM/6936, 22 March 1999; *Resolution adopted by the General Assembly on 25 February 1999 on the Human Rights Situation in Kosovo*, A/RES/53/164; and *Resolution adopted by the General Assembly on 25 February 1999 on the*

*Human Rights Situation in Bosnia-Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)*, paras. 31–44.

- 70 The Serbian forces targeted the Kosovar Albanians, while the UCK targeted Serbs or Kosovar Albanians who were “sympathizers and loyal” to the Serbian authorities. See OSCE KVM Report Part I, Chapter 5, “Violation of the Right to Life.” Frequently, killings could not be clearly attributed to either of the two sides, as in the case of the killing of eleven men in the town of Pec/Peja during the period 1–31 January 1999.
- 71 See *Report of the Secretary-General Prepared Pursuant to Resolutions 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council, S/1999/99*, 29 January 1999, paras. 4–11. One flagrant example of indiscriminate and disproportionate attacks was the massacre that was perpetrated in the village of Račak in which 45 Albanians, including some civilians, were executed on 15 January 1999. The reports provided evidence of arbitrary detentions, extra-judicial killings, and mutilation. See OSCE KVM Report Part I, Chapter 5, “Violation of the Right to Life/Killings of Kosovo Albanians by Serbian Forces.”
- 72 See OSCE KVM Part I, Executive Summary.
- 73 Ibid.
- 74 Ibid.
- 75 Ibid., paragraphs 4–15. Individual killings became common practice throughout the region. No responsibility was claimed for the most violent incidents.
- 76 It should be added that the atrocities committed by the Serbian forces far exceeded those committed by the UCK. See OSCE KVM Part I, Executive Summary. Frequently, assailants selectively fired directly upon urban sidewalks and cafés or on a specific vehicle. For more details, see *Report of the Secretary-General Prepared Pursuant to Resolutions 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council, S/1999/99*, 29 January 1999, para. 5.
- 77 OSCE KVM Part I, “Arbitrary Arrest and Detention.”
- 78 Ethnic cleansing was no novelty in Balkan history. For instance, the arrival of Serbian and Montenegrin armies in Kosovo in 1912 led to a population fleeing *en masse* after being the object of violence at the hands the arriving forces. See Judah, *Kosovo*, 18–25.
- 79 See *Secretary-General, Press Release, SG/SM/6936*, 22 March 1999.
- 80 Ibid.
- 81 See OSCE KVM Part I, Executive Summary.
- 82 On 27 May 1999, the ICTY accused President Milošević of crimes against humanity, together with four other persons holding high-level positions in the FRY and Serbia. See Statement by Justice Louise Arbour, ICTY Prosecutor, The Hague, 27 May 1999, JL/PIU/404—E and Press Release, JL/PIU/403—E, 27 May 1999. The practice of ethnic cleansing was strongly condemned by the international community. See Press Release SG/SM/6942, 30 March 1999: *Secretary General profoundly outraged by reports of ‘ethnic cleansing’ conducted by Serbian forces in Kosovo*. The Secretary-General was to note later that the acts committed by the Yugoslav authorities met the criteria for genocide. See “Politics this Week,” *The Economist*, 10 April 1999, 22.
- 83 For further details of these violations, see OSCE KVM Part I.
- 84 Protocol II, Articles 4.1, 11, 13, and 15. It should be noted that the principles of proportionality and military necessity and the so-called *de Martens clause* were also applicable. See Fleck, *Handbook*, 28–33.
- 85 Protocol II, Articles 4.1, 4.2.d, 4.2.g, and 13.
- 86 Protocol II, Article 14, The Hague Convention of 1954, Article 19.
- 87 Protocol II, Article 17.
- 88 Article 3 common to the four Geneva Conventions, Protocol II, articles 4, 5, and 6.
- 89 “The position of Serbia is that Kosmet is that it is an internal affair of Serbia and that a consensus existed among all political actors in that respect.” See FRY Statement, “Serbia-Kosovo Methohija-Dialogue,” 13 March 1998. The Serbian government had underlined the need to engage in dialogue with the Kosovar Albanians, and had invited them to talks on several occasions. See “FRY/Serbian Government again invites ethnic Albanians to dialogue,” 14 March 1998; FRY/Letter of

- the Vice-President of Serbia to the President of the Democratic Alliance of Kosovo, 26 April 1998; "FRY/Ethnic Albanian Representatives fail to appear at Talks once more," 28 April 1998; "FRY/Serbian Vice Premier Marković invites minorities to Talks on 12 May," 5 May 1998; Statement on the talks of the FRY President S. Milošević with Dr. Ibrahim Rugova and his Delegation, 15 April 1998; FRY on talks in Priština, including statement by Albanian side read by B. Salja, 22 May 1998; Press Release of the Ministry of the Interior of the Republic of Serbia, 5 June 1998. For all these documents, see Weller, *Crisis*, 351–54.
- 90 The referendum was boycotted by the Kosovar Albanians.
- 91 The Serbian Parliament was controlled by Milošević's Socialist Party and Vojislav Seselj's Radical Party, and both parties were firmly opposed to the idea of an autonomous status for Kosovo. See Caplan, "Crisis," 756.
- 92 M. Roux, "La République fédérale de Yougoslavie en 1997. Le pouvoir de Slobodan Milošević affaibli," in *L'Europe centrale, orientale et balte en 1997*, EP Doc. 1998, 159, in particular footnote 17, according to which "the incompatibility of the parties' positions is evident, evidenced by the so far only official discussion (February 1998) in the U.S., in the framework of the Princeton project for inter-ethnic relations."
- 93 *Ibid.* The main parties are the Democratic League of Kosovo (LDK) and Adem Demaçi's parliamentary party.
- 94 The international Contact Group was set up in April 1994 in order to coordinate the policies of the concerned countries regarding the situation in Bosnia-Herzegovina. The Contact Group consists of France, Germany, Italy, Russia, the United Kingdom, and the United States, which bring together the following elements of persuasion: Russia is viewed as a state that can get Milošević to come to terms; the EU member states can resort to incentives/sanctions; and, in the background, the power of the United States represents the possible application of "hard power," including armed force. See Weller, *Crisis*, 221.
- 95 See Statement of the Contact Group Foreign Ministers, New York, 24 September 1997; Contact Group Statement on Kosovo, 8 January 1998; Statement by the Contact Group on Kosovo, Moscow, 25 February 1998; Statement by the Contact Group, London, 9 March 1998; OSCE Decision No. 218 of the Chairman-in-Office, 11 March 1998; Joint Statement by the Foreign Ministers of the Countries of Southeastern Europe, Bonn, 25 March 1998; WEU Ministerial Council, Rhodes Declaration, 12 May 1998; Contact Group and the Foreign Ministers of Canada and Japan, Statement, London, 12 June 1998; Contact Group Statement, Bonn, 8 July 1998; European Union: European Council Conclusions on Kosovo, 31 March 1998 and 27 April 1998; Declaration by the European Union on Kosovo, 11 June 1998; Conclusions by the Presidency, European Council in Cardiff, 15 and 16 June 1998; Conclusions, General Affairs Council, 29 June 1998; Statement by the North Atlantic Council on Kosovo, 5 March 1998 (Press Release 98 (29)) and 30 April 1998 (Press Release 98 (51)); Statement on Kosovo issued at the Ministerial Meeting of the North Atlantic Council in Luxembourg, 28 May 1998 (Press Release M-NAC-1(98)61); Statement on Kosovo issued at the Ministerial Meeting of the North Atlantic Council in Brussels, 11 June 1998 (Press Release M-NAC-D-1(98)77).
- 96 The Contact Group reiterated that: "We support neither independence nor the maintenance of the *status quo*. The solution of the Kosovo problem should be based upon the territorial integrity of the Federal Republic of Yugoslavia, and take into account the rights of the Kosovo Albanians and all those who live in Kosovo, in accordance with the Helsinki principles and the Charter of the United Nations." See Statement of the Contact Group on Kosovo, Moscow, 25 February 1998.
- 97 See Statement by the Contact Group, London, 9 March 1998. It should be pointed out that Russia opposed the immediate application of the measures contained in points 3 and 4.
- 98 See Statement by the Contact Group, London, 9 March 1998, in which it also: requested a mission to Kosovo by the United Nations High Commissioner for Human Rights; supported the proposal for a new mission by Felipe Gonzalez as the Personal Representative of the Chairman-in-Office of the OSCE for the FRY that would include a new and specific mandate for addressing the problems in Kosovo; supported the dispatch of new OSCE long-term missions to Kosovo, Sandjak, and Vojvodina; supported the efforts of the Sant'Egidio community to secure implementation of the education agreement; recommended that consideration be given to adapting the current mandate of the United Nations

Preventive Deployment Force (UNPREDEP); and supported the maintenance of an international military presence on the ground in FYROM when the current mandate of UNPREDEP expired.

At its next meeting, on 25 March 1999, the Contact Group maintained the sanctions that had been introduced on 9 March 1999 and all the members of the Group pledged to adopt an arms embargo within the UN Security Council.

- 99 These measures included an embargo on the export of arms and equipment which could be used for internal repression or terrorism, a moratorium on credits for export, trade, and investment in Serbia, and the denial of visas for senior FRY and Serbian representatives responsible for repressive actions by FRY security forces in Kosovo.
- 100 See Common Position 98/240/CFSP concerning restrictive measures against the Federal Republic of Yugoslavia, 19 March 1998, OJ L 95, 27 March 1998; Council Regulation (EC) No. 926/98 concerning the reduction of certain economic relations with the FRY, 27 April 1998, OJ L 130, 1 May 1998; Common Position 98/326/CFSP concerning the freezing of funds held abroad by the Federal Republic of Yugoslavia and Serbian Governments, 7 May 1998, OJ L 143, 14 May 1998; and Council Regulation (EC) No. 1295/98 concerning the freezing of funds held abroad by the Federal Republic of Yugoslavia and Serbian Governments, OJ L 178, 23 June 1998; Common Position 98/374/CFSP concerning the prohibition of new investment in Serbia, 8 June 1998, OJ L 165, 10 June 1998; Council Regulation (EC) No. 1607/98 concerning the prohibition of new investment in the Republic of Serbia, 24 July 1998, OJ L 209, 25 July 1998; Common Position 98/426/CFSP concerning a ban on flights by Yugoslav carriers between the Federal Republic of Yugoslavia and the European Community, 29 June 1998, OJ L 190, 4 July 1998; and Council Regulation (EC) No. 1901/98 concerning a ban on flights of Yugoslav carriers between the Federal Republic of Yugoslavia and the European Community, 7 September 1998, OJ L 248, 8 September 1998.
- 101 See Resolution 1160, 31 March 1998. China abstained from voting.
- 102 *Ibid.*, paragraphs 6 and 7 of the Preamble.
- 103 It should be noted that the Security Council's aims (paragraphs 1-5 and 16) were the same as those expressed by the Contact Group and the EU.
- 104 Exercise Co-operative Assembly 98, with the participation of the air, sea, and land forces of fourteen Alliance and Partnership for Peace countries, as well as observers from six other countries. The exercise was in fact called Exercise Pfp-Plus on account of Russia's participation. Interview with Lt.Col. V.P. Prugh, Office of the Legal Advisor, Allied Forces Europe/HQ (AFSOUTH), on 28 March 2000.
- 105 Exercise Co-operative Best Effort 98, in which the land forces of twenty-six countries participated in peacekeeping exercises. See Press Release 12.98, 3 September 1998.
- 106 NATO Defense Ministers' Decision of 11 June 1998, demonstrating NATO's ability to rapidly project power into the region. See Statement by Secretary-General Javier Solana on Exercise Determined Falcon.
- 107 Secretary-General's Remarks to the Press following the NAC Ministerial in Luxembourg, 28 May 1998: "Let me stress, nothing is excluded."
- 108 These military plans involved the use of ground and air forces and, in particular, a whole range of options solely for the use of air power. See Statement by the NATO Secretary General on Kosovo, Brussels, 12 August 1998. In addition to the use of air power, consideration was also given to the possibility of ground forces being used in Kosovo as a stabilizing element. Interview with Lt.Col. V.P. Prugh, Office of the Legal Advisor, AFSOUTH HQ, on 28 March 2000.
- 109 Statement on Kosovo issued following the North Atlantic Council's ministerial meeting in Luxembourg, 28 May 1998, Press Release M-NAC-1(98)61, para. 5.
- 110 Statement on Kosovo, issued following the North Atlantic Council meeting in Defense Ministers session, Brussels, 11 June 1998, paras. 4 and 5.
- 111 See Statements of the Chairman-in-Office of 2 and 10 March on the situation in Kosovo and Decision No. 218 of the OSCE's Permanent Council, 11 March 1998.
- 112 OSCE observers were replaced by diplomatic personnel from various states accredited to the FRY: the Kosovo Diplomatic Observer Mission (KDOM) which was later replaced by the OSCE Kosovo Verification Mission (OSCE/KVM).

- 113 This strengthened the OSCE's monitoring capabilities in Albania (cooperating with the European Community Monitoring Mission) and the OSCE Spillover Monitor Mission in Skopje (FYROM).
- 114 These efforts included the visit by the personal representative of the Chairman-in-Office, Max van der Stoel, to Kosovo, Belgrade, and Priština in February of 1998; direct talks between the Chairman-in-Office, Bronislaw Geremek, and President Milošević on 28 March 1998; and the appointment of F. Gonzalez as the personal representative of the Chairman-in-Office for the FRY. (F. Gonzalez was also appointed special representative of the EU). See Common Action, 8 June 1998, OJ L 165, 10 June 1998. The OSCE also deployed civilian police observers in Croatia, on the basis of Decision No. 239, 25 June 1998. For further details, see *OSCE Newsletters* 5:2 (February 1998); 5:3 (March 1998); 5:4 (April 1998); and 5:6 (June 1998).
- 115 See WEU Council of Ministers, Rhodes Declaration, 11–12 May 1998, Europe Documents, No. 2088, 20 May 1998, Bulletin Quotidien Europe, and the letter dated 18 June 1998 from the Secretary General of the WEU addressed to the Secretary-General of the UN, Annex II to the Report of the Secretary-General Prepared Pursuant to Security Council Resolution 1160, 2 July 1998 (S/1998/608).
- 116 A Multinational Advisory Police Element (MAPE) was deployed in Albania.
- 117 The sanctions would instead primarily punish the ordinary people, in the form of overall impoverishment of the country and its gradual and total isolation from the West. The sanctions imposed previously during the Bosnian war were a good example of the inefficiency, and even disadvantage, of a general embargo. Interview, 15 January 2001, Milan Pajević, Government of the FRY, Stability Pact Coordinator.
- 118 WEU Assembly, "Europe and the evolving situation in the Balkans," 13 May 1998, Doc. 1608, 35.
- 119 *Ibid.*, 35–36. However, some progress was made with the conclusion of an agreement on 23 March 1998 establishing the reintegration of Albanians into all levels of education in Kosovo.
- 120 *OSCE Newsletters*, 5:4 (April 1998): 2–4; and 5:6 (June 1998).
- 121 See, for example, the Secretary-General's report of 4 June 1998 (S/1998/470), which noted that a dialogue between the parties had begun following intensive diplomatic efforts by the international community. Some progress was also noted in the implementation of the education agreement. However, reference was also made to a report on compliance prepared by the OSCE Troika, which noted that there had been no progress on such central issues as the opening of an unconditional dialogue, the cessation of violence, and the acceptance of F. Gonzalez's mission in the FRY as the personal representative of the Chairman-in-Office.
- 122 See Secretary-General's Reports, 30 April 1998 (S/1998/361) and 4 June 1998 (S/1998/470); and Contact Group, Statements on Kosovo, London, 12 June 1998, and Bonn, 8 July 1998.
- 123 Contact Group, Statement on Kosovo, London, 12 June 1998, para. 3.
- 124 Contact Group, Statement on Kosovo, Bonn, 8 July 1998, para. 3. Nevertheless, some progress was noted on points 2 and 3. See para. 4 of this statement.
- 125 Letter dated 17 June 1998 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, S/1998/526, including an annexed Joint Statement by the President of the Russian Federation, Mr. Boris Yeltsin, and the President of the Federal Republic of Yugoslavia, Mr. Slobodan Milošević.
- 126 Contact Group, Statement on Kosovo, Bonn, 8 July 1998, para. 6.
- 127 Weller, *Crisis*, 288–89.
- 128 This would depend on the reinstatement of the FRY as a member of the OSCE. See Joint Statement by the President of the Russian Federation, Mr. Boris Yeltsin, and the President of the Federal Republic of Yugoslavia, Mr. Slobodan Milošević, 16 June 1998: "to announce the willingness of the FRY to begin negotiations with the OSCE on receiving their mission sent by that organization to Kosovo and on the reinstatement of the FRY as a member of the OSCE."
- 129 *Ibid.*
- 130 The Contact Group itself failed to agree unanimously on the modalities to be adopted. Its position was set out in the form of Chairman's Conclusions. See Contact Group meeting on Kosovo in London, 2 October 1998: "The Contact Group is united and intends to remain united. We expect *full compliance with UNSCR 1199*. This has not so far been achieved. We heard a report on the work of the U.S. facilitator, Ambassador Hill, on the negotiating track. We endorsed a revised paper which will now be

put to the parties on behalf of the Contact Group. We are united in condemning what is happening on the ground and in support for humanitarian efforts. We all concluded that time is running out.”

- 131 For this document, see also Weller, *Crisis*, 356–62.
- 132 See Revised Hill Proposal, 1 November 1998, 3<sup>rd</sup> Hill Draft Proposal for a Settlement of the Crisis in Kosovo, 2 December 1998, and Final Hill Proposal, 27 January 1999. For all these documents, see Weller, *Crisis*, 362–91. The Contact Group exercised considerable influence over the various drafts, which appeared to be issued by Ambassador Christopher Hill (United States Ambassador to FYROM) and his group; at this stage, the contents of these draft proposals were also influenced by a draft proposal produced by the Council of Europe (Venice Commission for Democracy through Law). For this document, see Weller, *Crisis*, and Venice Commission Outline for Main Elements for Agreement on Kosovo, 354–56.
- 133 This document was not acceptable to the Kosovo government because it did not provide any solution with respect to the status of Kosovo. In addition, it was not a genuine interim agreement, as it could be modified only with the consent of both parties. See M. Weller, “The Rambouillet Conference,” *International Affairs* 75:2 (April 1999): 219–21; and the reference to the “Statement on fundamental principles for a settlement of the Kosovo question issued by the government of the Republic of Kosovo, 3 November 1998” in footnote 13 of this article.
- 134 See below the conclusion of the Holbrooke Agreements.
- 135 According to this draft, Kosovo would be entirely subordinate to Serbia.
- 136 In addition to demanding the immediate implementation of the measures called for under Resolution 1160 (1998), the Security Council endorsed the Contact Group’s demands. See Resolution 1199 (1998), para. 4, points a-d.
- 137 B. Simma, “NATO, the UN and the Use of Force: Legal Aspects,” *EJIL* (1999): 6–7.
- 138 It should be noted that, while the text of Belgrade’s undertakings was not published, Belgrade clearly had to reduce Serb and Yugoslav military and special police forces to pre-February 1998 levels. See Weller, “Rambouillet,” 223.
- 139 See Statement, “President Milošević Announces Accord on Peaceful Solution,” Belgrade, 13 October 1998.
- 140 See Statement, “Serbian Government Endorses Accord Reached by President Milošević,” Belgrade, 13 October 1998, S/1998/953. Helsinki Watch, Belgrade, “International Community and Kosovo,” 1998, Belgrade, 20 November 1998.
- 141 See Statement of the Federal Government of the Federal Republic of Yugoslavia, 14 October 1998, S/1998/955.
- 142 See Statement, “Serbian Government Endorses Accord Reached by President Milošević,” Belgrade, 13 October 1998, points 1-11. Helsinki Watch, Belgrade, “International Community and Kosovo,” 1998, Belgrade, 20 November 1998.
- 143 Weller, *Crisis*, 272–74.
- 144 See *Record of NATO-Serbia Meeting in Belgrade*, 25 October 1998, Annex: Yugoslav Statement. In addition to the commitments regarding the withdrawal of VJ and MUP forces, it should be noted that special mention was made of the Yugoslav authorities’ right to legitimate self-defense: “The FRY intends to comply unconditionally with UNSCR 1199 and the actions described.... However, as a last resort, and consistent with the right of self-defense, the State authorities retain the right to respond adequately and proportionately to any form of terrorist activity or violation of law which could jeopardize the lives and safety of citizens and representatives of the State authorities.”
- 145 See S/1998/99, Annex. The aim of the agreement was to complement the OSCE’s Verification Mission and to verify all parties’ compliance with Resolution 1199 (1998). To this end, a NATO/Kosovo air verification mission was established, comprised of unmanned aircraft, reconnaissance platforms operating at high and medium altitude, including F-3s, Canberra, DeHaviland-7 Arl, and non-combatant platforms of the same configuration.
- 146 During their visit to Belgrade, NATO leaders stressed the need for President Milošević’s full co-operation: “The aim is to deliver a simple but strong message to President Milošević: he must comply fully and immediately with Resolution 1199. ... Let there be no doubt: we will keep the situation in Kosovo under the closest scrutiny. ... I also made clear to President Milošević that we expect the full coopera-

- tion of the Yugoslav government in carrying out the agreement on the air verification regime over Kosovo strictly.” See Press Points by the NATO Secretary General, Belgrade, 15 October 1998.
- 147 See S/1998/978. The aim of the agreement was to verify all parties’ compliance with Resolution 1199 (1998), followed by the submission of compliance reports. More specific tasks included: monitoring elections in Kosovo; surveillance of the cease-fire; submitting recommendations and reports to the OSCE and the UN; surveillance of and possible support for humanitarian organizations, including the FRY’s support; and liaising with the Serb and Yugoslav authorities. The agreement was initially concluded for one year. The FRY was to assist in setting up the mission and guaranteeing the safety of its observers. It was planned to deploy 2,000 unarmed observers, mainly in Priština and in all the municipal districts of Kosovo, with a liaison office in Belgrade.
- 148 See Press Points by the NATO Secretary General, Belgrade, 15 October 1998.
- 149 The OSCE/KVM was set up pursuant to Decision No. 263 of the OSCE Permanent Council of 25 October 1998. The OSCE experienced a number of problems in assembling 2,000 observers, and by the beginning of December 1998 only one base (manned by 50 personnel) had been set up in Kosovo. Hence the importance of maintaining its Diplomatic Observer Mission in Kosovo.
- 150 See Press Statement, Brussels, 5 December 1998, for the Extraction Force, and Statement on Kosovo, Ministerial Meeting of the North Atlantic Council, Brussels, 8 December 1998. The Extraction Force (Operation Joint Guarantor) was established following the issue of an activation order (ACTORD).
- 151 See S/RES/1203 (1998).
- 152 The Serb government had approved the accord agreed between President Milošević and Ambassador Holbrooke. See Statement, “Serbian Government Endorses Accord Reached by President Milošević,” Belgrade, 13 October 1998.
- 153 The commitment was to conclude negotiations on the framework for a political settlement by 2 November 1998. See Statement, “Serbian Government Endorses Accord Reached by President Milošević,” Belgrade, 13 October 1998.
- 154 As laid down in Resolutions 1160 (1998) and 1199 (1998) of the Security Council.
- 155 Ibid.
- 156 See S/RES/1203 (1998). It should be noted that Russia and China abstained from voting on the resolution in question, which, in their view, opened up the possibility of the use of armed force. In particular, Article 9 posed a problem: in this Article, the Security Council affirmed that “in the event of an emergency, action may be needed to ensure their [of the verification missions] safety and freedom of movement.”
- 157 During the voting on Resolutions 1160 (1998) and 1199 (1998), both these countries had circulated a statement in which they stressed that it would be impossible to resort to armed force on the basis of these resolutions. They also made it clear that they would veto any proposal for military action against the FRY regarding its conduct *in its own territory*. See A. Roberts, “NATO’s ‘Humanitarian War’ over Kosovo,” *Survival* 41:3 (Autumn 1999): 104. The United Kingdom endeavored to introduce a proposal for “all the necessary means” in Kosovo. See Youngs and Dodd, “Kosovo,” 35–37.
- 158 For Russia’s position, see Statement by the Government of the Russian Federation, 4 October 1998 (S/1998/921, Annex): “[the] use of force against a sovereign state without the due and proper approval of the Security Council would constitute a serious violation of the Charter of the United Nations, and would compromise the entire system of international relations as it now stands.” For China’s position, see C. Guicherd, “International Law and the War in Kosovo,” *International Spectator* 34:3 (July–September 1999): 29, pointing out that the Chinese government was firmly opposed to the threat or use of armed force in international relations, and that the Chinese authorities were disturbed by the fact that some countries were threatening to use armed force against Yugoslavia.
- 159 See Statement by the NATO Secretary General following the ACTWARN Decision, Vilamoura, 24 September 1998, and Press Release by the NATO Secretary General, Vilamoura, 24 September 1998.
- 160 See Statement by the NATO Secretary General following Decision on the ACTORD, 13 October 1998.
- 161 The deadline was postponed twice, to 17 and 27 October, and then suspended temporarily pending developments in the Kosovo situation. However, the ACTORD remained in force.
- 162 See Statement by the NATO Secretary General Following Decision on the ACTORD, 13 October 1998.

- 163 See Remarks by the U.S. President on Kosovo, 8 October 1998.
- 164 See Statement by U.S. Secretary of State Madeleine K. Albright, "Situation in Kosovo," 8 October 1998.
- 165 See Statement by the NATO Secretary General Following the ACTWARN Decision, Vilamoura, 24 September 1998, and Statement by the Secretary General Following Decision on the ACTORD, 13 October 1998.
- 166 Letter from Secretary-General Solana to the Permanent Representatives to the North Atlantic Council, dated 9 October 1998. See B. Simma, "NATO, the UN and the Use of Force: Legal Aspects," *EJIL* (1999): 7.
- 167 Weller, *Crisis*, 273.
- 168 Weller, "Rambouillet," 223.
- 169 J. Stromseth, "Rethinking Humanitarian Intervention: The Case for Incremental Change," in *Humanitarian Intervention. Ethical, Legal and Political Dilemmas*, eds. J.L. Holzgrefe and O. Keohane (Cambridge: Cambridge University Press, 2003), 234–38. France, for example focused on the FRY's non-compliance with the Security Council resolution; Germany emphasized the humanitarian disaster that made the NATO action consistent with the "sense and logic" of SC resolutions; the U.S. underlined the factual circumstances at hand, all of which foreshadowed a humanitarian disaster of immense proportions, along with the refugee crisis and its implications for regional security as well as the SC resolutions calling the crisis a threat to international peace and security. Other NATO states likewise avoided any doctrinal justification for NATO's action and emphasized instead both the extraordinary circumstances surrounding the intervention and the Security Council's resolutions.
- 170 *NATO Handbook*, 50<sup>th</sup> Anniversary Edition, Information and Press Office, Brussels 1998, 35–38.
- 171 See C. Guicherd, "International Law," in particular 26–29 and the footnotes therein.
- 172 Similarly, the recent developments in international criminal law (criminal courts for Rwanda and the former Yugoslavia and the setting up of the International Criminal Court) were perceived by some governments as strengthening the justification based on humanitarian considerations. An additional element was also provided by the national legislation of some states with respect to the implementation of international commitments for the protection of human rights and the application of humanitarian law.
- 173 One-page FCO note of 7 October 1998, "FRY/Kosovo: The Way Ahead; UK View on Legal Base for Use of Force," referred to by A. Roberts, "NATO's," 106 and note 6.
- 174 Stromseth, "Rethinking Humanitarian Intervention," 234–38.
- 175 Interview with Lt.Col. V.P. Prugh, Office of the Legal Advisor, AFSOUTH HQ, on 28 March 2000.
- 176 Arguments presented by NATO member states to the ICJ in the case *Legality of Use of Force* will shed more light on individual member states' positions. On 29 April 1999, the FRY instituted proceedings against ten NATO countries: Yugoslavia v. Belgium, Yugoslavia v. Canada, Yugoslavia v. France, Yugoslavia v. Germany, Yugoslavia v. Italy, Yugoslavia v. the Netherlands, Yugoslavia v. Portugal, Yugoslavia v. Spain, Yugoslavia v. the United Kingdom, and Yugoslavia v. the United States of America. After the hearings on provisional measures (10–12 May 1999), the Court decided to dismiss the cases against Spain and the United States on the basis of manifest lack of jurisdiction, and in the other eight the Court found that it could not order provisional measures as it lacked *prima facie* jurisdiction, but that it remained seized of those cases. See <http://www.icj-cij.org>.
- 177 House of Commons, Select Committee on Foreign Affairs, Forth Report, 124 (23 May 2000), <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmstaff/28/2813.html>.
- 178 *Ibid.*, 128.
- 179 Lord Robertson, NATO Secretary General, "Law, Morality, and the Use of Force," Address Before the Institut de relations internationales et stratégiques, Paris, 16 May 2000.
- 180 M.J. Glennon, *Limits of Law*, 25–26.
- 181 Statement of D.R. Andrews, Legal Advisor, U.S. Dept. of State, *Legality of Use of Force* (Yugoslavia vs. U.S.), 11 May 1999, <http://www.icj-cij.org/icjww/idocket/iyyu/iyuframe.html>.
- 182 Argument of Belgium before the ICJ, 10 May 1999, at 7–8. See <http://www.icj-cij.org> (5 March 2002).
- 183 *Ibid.*

- 184 Weller, *Crisis*, 272.
- 185 This is the point of view of a small but growing number of international scholars who argue that Art. 2.4 does not forbid the threat or use of force *simpliciter*. Holzgrefe and Keohane, *Humanitarian Intervention*, 37.
- 186 See Press Release by Secretary General Javier Solana, 27 October 1998, noting the improved security situation: diminishing violence, cease-fire, withdrawal of 4,000 special police force officers, and reduction in the numbers of police and military forces to pre-crisis levels.
- 187 See S/1998/955: Statement of the Federal Government of the Federal Republic of Yugoslavia, 14 October 1998.
- 188 See S/1998/953: The Serbian Government endorsed the accord reached by President Milošević.
- 189 See S/1998/526: Joint Statement by the President of the Russian Federation, Mr. Boris Yeltsin, and the President of the Federal Republic of Yugoslavia, Mr. Slobodan Milošević, 17 June 1998; and Statement: "President Milošević Announces Accord on Peaceful Solution," Belgrade, 13 October 1998.
- 190 See Statement on Kosovo by the North Atlantic Council, Brussels, 19 November 1998; Statement on Kosovo, Ministerial Meeting of the North Atlantic Council, Brussels, 8 December 1998; and Report of the Secretary General Prepared Pursuant to Resolutions 1160 (1998), 1199 (1998), and 1203 (1998) of the Security Council, S/1998/1221.
- 191 The FRY's refusal to cooperate with the International Tribunal for the Former Yugoslavia and with the OSCE/KVM did not facilitate the international community's efforts to reach a peaceful solution to the conflict in Kosovo. For further details, see Report of the Secretary-General Prepared Pursuant to Resolutions 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council, S/1999/99, 29 January 1999.
- 192 See Kosova Press Release, "Hill's draft plan should be further improved," 1 December 1998; Kosova Press Release, "UCK won't settle for anything less than full independence," 5 December 1998; Kosova Press Release, "Demaci rejects Hill's Plan," 8 December 1998; and Kosova Press Release, "Kosovo Parliament's commissions discuss draft Plan," 11 December 1998.
- 193 See S/1999/96, Contact Group Statement, London, 29 January 1999.
- 194 S/1999/96, paragraph 5, points a-g of the statement.
- 195 S/1999/96, paragraph 6 of the statement. In fact, the Kosovo government had supported the Contact Group's initiative and affirmed its willingness to reach a peaceful solution within the framework of meaningful international negotiations, with strong international participation, in order to conclude an interim agreement at the international level with international guarantors that would reflect the will of the people of Kosovo. See Response of Kosovo to Views Adopted by the Contact Group, 30 January 1999 cited in Weller, *Crisis*, 417–18.
- 196 See S/PRST/1999/2.
- 197 For further details, see Statement by the Secretary General of NATO, Dr. Javier Solana, on behalf of the North Atlantic Council, 17 January 1999, and Press Release 99 (11), dated 28 January 1999: Statement to the Press by NATO Secretary General Javier Solana.
- 198 Acceptance by both parties of the summons to begin negotiations ... for the completion ... of an interim political settlement within the specified timeframe ... full and immediate observance by both parties of the cease-fire and by the FRY authorities of their commitments to NATO (in particular the agreement of 25 October 1998).
- 199 See Statement by the North Atlantic Council on Kosovo, Press Release (99) 12, 30 January 1999.
- 200 The general account of the Rambouillet and the Paris negotiations is based on: Judah, *Kosovo*; W. Petrisch, K. Kaser, R. Pichler, *Kosovo, Kosova. Mythen, Daten, Fakten* (Wieser Verlag 1999, Klagenfurt – Wien – Ljubljana – Tuzla – Sarajevo); Weller, *Crisis*, 392–501; and Weller, "Rambouillet," 211 ff.
- 201 See Chairman's Conclusions, Contact Group Meeting, Paris, 14 February 1999.
- 202 The last option was backed up by powerful incentives: the KLA would be no longer financed if the Albanians refused to sign, whereas NATO would carry out its threat to use force in case of a Serb no-sign. This aspect was to undermine to some extent Serbia's faith in the process. P. Simić, "Die Amerikaner wollten nicht hören," *Die Zeit* 20/1999.

- 203 These principles reflected the structure of the final version of the Hill draft, which had been presented to the parties on 27 January 1999, and, to a certain extent, the eleven-point unilateral commitment for a political solution which had been presented by the Belgrade government on 13 November 1998.
- 204 See Contact Group Non-Negotiable Principles/Basic Elements, 30 January 1999, cited in Weller, *Crisis*, 417.
- 205 Yugoslavia was represented by both the FRY and Serbia. However, President Milošević did not attend the negotiations and, in principle, the Serbian delegation (led by Dr. Ratko Marković) bore the main responsibility for the negotiations in order to show that Serbia regarded this as an internal issue. The Kosovo delegation was composed of representatives of the elected government (including President Ibrahim Rugova), the United Democratic Movement (Rexhep Qosja), and the UCK (Hashim Thaci).
- 206 See Interim Agreement for Peace and Self-Government in Kosovo, Initial Draft, 6 February 1999, cited in Weller, *Crisis*, 421–28.
- 207 Ambassadors Christopher Hill (United States), Wolfgang Petritsch (EU), and Boris Mayorski (Russian Federation).
- 208 Interview with President Martti Ahtisaari in Helsinki, Finland on 2 March 2000.
- 209 This became even more likely following the introduction of a draft on 22 February 1999 for Chapter 8, Article 1 (3) of the interim framework agreement, according to which the final settlement of the Kosovo question was to be based on *the will of the people*. This draft was accompanied by a draft letter which stated that: “This letter concerns the formulation proposed for Chapter 8, Article 1 (3) of the interim framework agreement. We will regard this proposal, or any other formulation of that Article that may be agreed at Rambouillet, as confirming a right for the people of Kosovo to hold a referendum on the final status of Kosovo after three years.” For this document, see Weller, *Crisis*, 452.
- 210 For this document, see Weller, *Crisis*, 434–41.
- 211 The military annex provided for the establishment and deployment of a multinational implementation force in Kosovo by NATO; a multinational force (KFOR) would be responsible for ensuring the parties’ implementation of the framework agreement and its annexes. See Chapter 7, Implementation II of the Interim Agreement for Peace and Self-government in Kosovo, 23 February 1999 (the text was identical to the draft of 19 February 1999). For this document, see Weller, *Crisis*, 464–69. It should be emphasized that, while the FRY/Serbia was prepared, in principle, to discuss the issue of autonomous status for Kosovo, it could not accept the presence of foreign military forces on its territory. See D. Doder and L. Branson, *Milošević, Portrait of a Tyrant* (New York: The Free Press, 1999), 251.
- 212 See Conclusions of the Contact Group, Rambouillet, 20 February 1999.
- 213 See *JDW* 10 February 1999, “NATO Prepares to Send Peacekeepers to Kosovo.”
- 214 See Statement by the Delegation of Kosovo, 23 February 1999, 16.30 hrs.; and Letter from the Delegation of Kosovo to U.S. Secretary of State Albright, 23 February 1999. An interesting letter from Ismail Kadare, an Albanian writer living in Paris, for the delegation, was to contribute to the decision to sign. See Petritsch, Kaser, and Pichler, *Kosovo, Kosova*, 303–4.
- 215 See Letter from the FRY/Serb Delegation to the Negotiators, 23 February 1999, and Letter from the FRY/Serb Delegation to the Negotiators, 23 February 1999, 16.00 hrs.
- 216 See Co-chairmen’s Conclusions on the Rambouillet Accords, 23 February 1999.
- 217 Weller, “Rambouillet,” 233–34.
- 218 The parties in government strongly supported the negation of military troops. The opposition, however, considered the president himself as the main obstacle to the peace. As to public opinion, the danger to the state was grave enough so that the policies of the president were supported by the state media, playing a substantial role in constantly promoting the government’s position. Petritsch, Kaser, and Pichler, *Kosovo, Kosova*, 320–21.
- 219 The FRY/Serbia were made to understand that the Paris negotiations were the last chance for a political solution; this occasion would, however, not last long. The message was that a political solution should be in the interests of the Belgrade Government, since another kind of solution would bring tragic consequences for Yugoslavia. *Ibid.*, 336.
- 220 *Ibid.*, 331–51.

- 221 See Letter from Hashim Thaci, Chairman of the Presidency of the Kosovo Delegation, 15 March 1999: "We would be honored to sign the Agreement in your presence at a time and place of your choosing. The Agreement creates a chance for Kosova and its people."
- 222 The Contact Group finally decided that it could not grant any more concessions to the FRY/Serbian delegation and that the discussions would be limited *solely* to technical points: "The unanimous view of the Contact Group that only technical adjustments can be considered which, of course, must be accepted as such and approved by the other delegations." See Letter from the three Negotiators to the Head of the Republic of Serbia Delegation, 16 March 1999.
- 223 See FRY Revised Draft Agreement, 15 March 1999: (Interim) Agreement for (Peace) (and) Self-Governance in (Kosovo) Kosmet. For this document, see Weller, *Crisis*, 480–90.
- 224 See Declaration submitted by Kosovo to Negotiators upon Signature of the Rambouillet Accords, 18 March 1999, and Kosovo Statement on Formal Signing of Interim Agreement for Peace and Self-government, 18 March 1999. In this statement, "*The Delegation of Kosovo, Unanimously Declares and Confirms the Following*: In formally affixing the signatures of the authorized representatives of the Delegations of Kosova to the Interim Agreement for Peace and Self-government in Kosova of 23 February 1999, Kosova confirms its acceptance of said Interim Agreement." This statement also contained an interpretative statement. As a matter of curiosity, it should be noted that the Kosovo delegation signed the agreement in the presence of two of the three Contact Group negotiators (Ambassador Mayorski was absent).
- 225 Weller, *Crisis*, 493.
- 226 In his letter addressed to the Foreign Affairs Ministers of France and the United Kingdom, President Milošević used the external threat and the threat posed by separatists to justify the increased level of offensive operations: "You say that large movements of our security forces are a matter of great concern. If you think they are a matter of concern for the separatists who would like to take away part of the territory of Serbia and Yugoslavia, they of course should be concerned. If you have in mind some possible aggressors outside Yugoslavia, this should be a matter of concern to them too. Is it really possible for a normal person to think that somebody who is being threatened will not show the intention to defend himself?" See Doder and Branson, *Milošević*, 256.
- 227 The withdrawal of the OSCE/KVM took place without any disturbance. Although the Extraction Force followed closely the withdrawal of the OSCE/KVM observers, their safety would have been in question if Yugoslavia had not cooperated. Interview with Lt.Col. V.P. Prugh, Office of the Legal Advisor, AFSOUTH HQ, on 28 March 2000.
- 228 For the last time, the Belgrade authorities were warned of the consequences of their refusal to cooperate. President Milošević is reported to have said to Ambassador Holbrooke: "I understand that you are going to attack us. Your country is strong and powerful. There is nothing we can do about it." See D. Zandee, "Lessons Learned from the Kosovo Conflict," Speech delivered at a meeting of the Koninklijke Vereniging ter Beoefening van de Krijgswetenschap, Breda, 7 December 1999.
- 229 In fact, there were solid reasons for believing that NATO would not take the final step to use armed force: opposition by China and Russia (a member of the Contact Group) and the hesitation that continued to prevail among the NATO member countries in January 1999 could very well have prevented the Organization from taking this decision. However, it should be noted that, given the failure of the Rambouillet and the Paris talks, the North Atlantic Council was convinced that all efforts to achieve a political settlement had been exhausted.
- 230 See Press Statement by Dr. Javier Solana, Secretary General of NATO, Press Release (1999) 040, 23 March 1999.
- 231 See Press Statement by Dr. Javier Solana, Secretary General of NATO, following the Commencement of Air Operations, Press Release 1999 (041), 24 March 1999.

## Chapter 2

- 1 A.C. Arend and R.J. Beck, *International Law and the Use of Force* (London and New York, Routledge 2003), 113. See also footnote 5 for references therein, for further possible definitions.

- 2 D.W. Bowett, "The Use of Force for the Protection of Nationals Abroad," in *The Current Legal Regulation of the Use of Force*, ed. A. Cassese (Dordrecht: Martinus Nijhoff Publishers, 1986), 49.
- 3 Although, in practice, a humanitarian intervention might have a considerable effect on the target state's sovereignty; despite the commitment made in Res. 1244 (1999) of all UN Member States to the sovereignty and territorial integrity of the FRY, the fate of Kosovo territory, is in practice far from clear, as is proven by recent unrest in the province. S/PRST/2004/5 and, for general discussion, see <http://www.un.org/apps/news/search.asp>.
- 4 The argument based on world public order was advanced earlier, as a response to Security Council inaction in the face of the U.S. intervention in Grenada in 1983. The shift in emphasis took place after the Security Council became active again in the 1990s. The question is one regarding the furtherance of human rights via the institution of democratic proceedings. An example is the forcible, UN-authorized intervention to restore democratic governance in Haiti. The emphasis was on the uniqueness of the situation and the exceptional character of the response (SC Res. 841, 940). Again, force was used in 1997 in Sierra Leone by Nigeria, in the name of ECOWAS, for the purposes of restoration of the democratically elected government. For the intervention, see Section 3.2.6 on "Humanitarian Interventions in the 1990s" below. The Security Council did not condemn the use of force, but did not give any express approval either, until after the presence of ECOMOG was legitimized by a peace agreement. C. Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2000), 42–44.
- 5 Press Release SG/SM/9126, 26 January 2004.
- 6 *Humanitarian Intervention. Legal and Political Aspects* (Copenhagen: Danish Institute of International Affairs, 1999), 14–17; and S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2001), 7–8.
- 7 Comp. H. Grotius, *De iure belli ac pacis, Libri Tres*, Vol. II, tran. F.W. Kelsey (New York: William S. Hein & Co., Inc., 1995), Ch. 25; E. de Vattel, *Le droit des gens ou principes de la loi naturelle*, Vol. III (New York: William S. Hein & Co., Inc. 1995), 55–56.
- 8 J.L. Holzgrefe and R.O. Keohane, *Humanitarian Intervention. Ethical, Legal and Political Dilemmas*, (Cambridge: Cambridge University Press, 2003), 53–59.
- 9 The terms "bilateralist" and "bilateralism" adopted in this study are those used by Professor Simma to underline the strictly bilateral character of "traditional" international relations. See B. Simma, "From Bilateralism to Community Interest," *Recueil des cours de l'Académie de droit international* (hereafter R.C.A.D.I.) 250 (1994): 216–384.
- 10 1927 Permanent Court of International Justice, ser. A, No. 10, at 18.
- 11 The UN harbors its specialized agencies—for instance, the International Civil Aviation Organization (ICAO), the World Health Organization (WHO), the Food and Agriculture Organization (FAO), and the International Monetary Fund (IMF)—and to these agencies are added autonomous affiliated organizations, which are part of the United Nations system via specific accords, such as the International Atomic Energy Agency (IAEA) and the General Agreement on Tariffs and Trade (GATT). To these are added a number of regional or sub-regional organizations, each with a specific operative mandate.
- 12 J.-A. Carrillo-Salcedo, "Affirmation progressive de la notion de communauté internationale: règles de *ius cogens* et obligations *erga omnes* en droit international contemporain," *RCADI* 257 (1996): 132–33.
- 13 "Humankind as a whole, which in some sense is a polity, has the power to enact laws equitable and suitable for everyone, which belong to international law," Francisco de Vitoria, *De potestate civili*, 1528; "The human race ... always preserves a certain unity, not only as a species, but also a moral and political unity (as it were) enjoyed by the natural precept of mutual love and mercy..." Francisco Suárez, *De legibus, ac Deo legislatore*, 1612, as cited by Ch. Tomuschat, "General Course on Public International Law," *RCADI* 281 (1999): 73–75.
- 14 1155 UNTS 331.
- 15 *Barcelona Traction*, ICJ Reports (1970) 33.
- 16 Draft Articles on State Responsibility, Second Reading, Article 48.1.b, A/56/10, Supplement No. 10, *Official Records of the General Assembly. Fifty-sixth Session*.
- 17 Statute of the ICC, UN Doc. A/Conf.183/9 as amended by the summary records dated 10 November 1998 and 12 July 1999.

- 18 Thus, the General Assembly has defined some common responsibilities towards the international community. For instance, the international seabed and its resources are the common heritage of mankind, and the protection and preservation of the environment for present and future generations is the responsibility of all states. Cited by L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (Helsinki: Finnish Lawyer's Publishing Company, 1988), 269–71. Other GA resolutions referring explicitly to the international community relate specifically to humanitarian crises. Professor Tomuschat cites as an example resolutions 54/96 E-M, adopted during the fifty-fourth General Assembly session in 1999. See Tomuschat, "General Course," 76–77.
- 19 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 27 January 1967, 610 UNTS 205: Preamble, Art. I(1).
- 20 Of 4 October 1991, 30 ILM (1991), 1461.
- 21 21 ILM (1982), p. 1261 (UN doc. A/Conf.62/122).
- 22 Tomuschat, "General Course," 77–81.
- 23 F.R. Tesón, "The Liberal Case for Humanitarian Intervention," in *Humanitarian Intervention. Ethical, Legal and Political Dilemmas*, eds. J.L. Holzgrefe and R.O. Keohane (Cambridge: Cambridge University Press, 2003), 99.
- 24 See Simma, "From Bilateralism," 233–36.
- 25 Hannikainen, *Peremptory Norms*, 269–71. Nevertheless, hesitancy reigns on "how" to realize *actio popularis*. See for instance *South-West Africa* cases (1962, 1966), *Barcelona Traction* (1970), *Nuclear Test* cases (1974). The channeling of *actio popularis* through the UN barely raises any questions; the question, however, concerns an individual state's reaction to enforce community interests.
- 26 Professor Dupuy goes a step further, proposing to regard humanity itself as a point of reference for a progressive international law, instead of the state. The 1982 United Nations Law of the Sea Convention would be the most prominent example of a "mise en œuvre des intérêts globaux de l'espèce humaine." R.-J. Dupuy, *La communauté internationale entre le mythe et l'histoire* (Paris: Economica, 1986), 160, 180.
- 27 *Barcelona Traction, Light and Power Company Limited*, Second Phase, Judgment, *ICJ Reports*, 1970, 32, paras. 33 and 34. For the facts of this case, see, for example, M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford: Clarendon Press, 1997), 3.
- 28 *Obiter dicta* is defined by Professor Brownlie as: "lesser propositions of law stated by tribunals or by individual members of tribunals; propositions not directed to the principal matters in issue." See I. Brownlie, *Principles*, xlvii. For a more detailed examination of this question within the context of the *Barcelona Traction* case, see Ragazzi, *Concept*, 5–17.
- 29 For the doctrine, see, for example, R. Ago, "Obligations *Erga Omnes* and the International Community," in *International Crimes of State*, eds. J.H.H. Weiler, A. Cassese, and M. Spinedi (Berlin: de Gruyter, 1989), 237–39; C. Annacker, "The Legal Regime of *Erga Omnes* Obligations in International Law," *Austrian Journal of Public and International Law* 46 (1994): 131; I. Brownlie, "International Law at the Fiftieth Anniversary of the United Nations. General Course on Public International Law," *RCADI* 225 (1995): 77–89; J.-A. Carillo-Salcedo, "Affirmation progressive", 132–221; M.-J. Domestici-Met, "Aspects juridiques récents de l'assistance humanitaire," *AFDI* 35 (1989): 117–48; G. Gaja, "*Jus Cogens* beyond the Vienna Convention," *RCADI* 172 (1981): 271–316; G. Gaja, "Obligations *Erga Omnes*, International Crimes and *Jus Cogens*: a Tentative Analysis of Three Related Concepts," in *International Crimes of State*, 151–60; V. Grado, *Guerre Civile e Terzi Stati* (CEDAM, Padova: Casa Editrice Dottore Antonio Milani, 1998), 287–301; A. de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (The Hague: Kluwer Law International, 1996); P. Picone, "Interventi delle Nazioni Unite e Obblighi *Erga omnes*," in *Interventi delle Nazioni Unite e Diritto Internazionale*, ed. P. Picone (CEDAM, Padova: Casa Editrice Dottore Antonio Milani, 1995), 517–78; M. Ragazzi, *Concept*; B. Simma, "Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations *erga omnes*?" in *The Future of International Law Enforcement New Scenarios-New Law?* Proceedings of an International Symposium of the Kiel Institute of International Law, 25-27 March 1992, ed. J. Delbrück (Berlin: Duncker & Humboldt 1992),

- 127, note 5; B. Simma, "From Bilateralism," 229–321; and P. Weil, "Cours général de droit international public," *RCADI* 237 (1992): 261–312.
- 30 Advisory Opinion, ICJ Reports 1971, 16 ff.
- 31 ICJ Reports 1971, para. 45.
- 32 UN Charter article 25, ICJ Reports 1971, para 112.
- 33 ICJ Reports 1971, para. 126.
- 34 *Ibid.*
- 35 B. Simma, "From Bilateralism," 298–300.
- 36 In 1973, Australia and New Zealand instituted separate proceedings against France before the ICJ: *Nuclear Tests* cases (Australia v. France; New Zealand v. France).
- 37 Both Australia and New Zealand had pleaded for the character *erga omnes* of the customary obligation against atmospheric testing, having linked such character to the content of this prohibition and to the values it protects; the contention could not be tested after the ICJ decided not to pronounce on the merits.
- 38 *Nuclear Tests*, ICJ Reports 1974, 265–7 (paras. 34–40) and 469–71 (paras. 35–43).
- 39 *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports 1980, paras. 91–92.
- 40 ICJ Reports 1951, 23; when it observed "that the principles underlying the (Genocide) Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligations."
- 41 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment of 11 July 1996, ICJ Reports 1996, para. 31.
- 42 Portugal claimed that Australia, in negotiating and concluding the Timor Gap Treaty with Indonesia in 1989 and applying it, had acted unlawfully, infringing the sovereign rights of the people of East Timor to self-determination and to permanent sovereignty over their natural resources, and infringing the rights of Portugal as the administering Power and infringing the Security Council Resolutions 384 (1975) and 389 (1976).
- 43 *East Timor*, ICJ Reports 1995, para. 34.
- 44 *Monetary Gold Removed from Rome in 1943*, Judgment, ICJ Reports 1954, 32.
- 45 *East Timor*, ICJ Reports 1995, para. 29.
- 46 Hannikainen, *Peremptory Norms*, 132–45.
- 47 The tautology and formalism present here are primarily due to a reluctance to resume the long-standing philosophical discussion between naturalists and positivists on the limits of sovereign consent, and second, on the inability to agree on the concrete substance of *jus cogens*. See B. Simma, "From Bilateralism," 286–87.
- 48 For a thorough survey, see Hannikainen, *Peremptory Norms*.
- 49 Hannikainen, *Peremptory Norms*, 2–3; and Tomuschat, "General Course," 81–82.
- 50 Hannikainen, *Peremptory Norms*, 180–81.
- 51 *Ibid.* For a detailed study regarding certain categories of eventual norms *jus cogens* relating to aggression, self-determination of peoples, basic human rights, the law of war, and basic rules guaranteeing international status, order and viability of sea, air, and space areas outside national jurisdiction, see *ibid.*, 317–715.
- 52 In the words of Professor Brownlie regarding the use of norms *jus cogens*, "the vehicle does not often leave the garage." See P. Weil, "Cours general," 274–77.
- 53 First, because the rule is defined via a reference to a norm accepted and recognized by the international community of states, but there is no exact definition given either of the international community of states or of the meanings of "accept" and "recognize." Second, because it has never been possible to draw up a list of norms *jus cogens*. Third, because the theory of *jus cogens* does not fit into the structure of the international system. Whereas, in domestic law, the relevant authorities are there to establish the rules of public order, together with the judges to determine whether the rules have been respected, these characteristics are absent from the international order. In addition, the concept of public order itself is incompatible with the structure of international society. Since international law is created, for example, by treaties, the contradictory nature of a treaty vis-à-vis another norm of international law can

only be rendered void by the recognition of the superiority of custom over the treaty and the impossibility for states to deviate from customary rules by treaty. See Weil, "Cours general," 269–73.

- 54 As will be discussed below.
- 55 The ILC gave the following examples of treaties which would violate the article due to a conflict with a peremptory norm: a) a treaty contemplating an unlawful use of force contrary to the principles of the Charter; b) a treaty contemplating the performance of any other act criminal under international law; c) a treaty contemplating or conniving at the commission of such acts, such as trade in slaves, piracy, or genocide, in the suppression of which every state is called upon to cooperate. Treaties violating human rights, the equality of states, or the principle of self-determination were mentioned as other possible examples. *Yearbook of the ILC*, vol. II, 248.
- 56 The ILC Draft Articles on State Responsibility reflect this difference in focus: serious breaches of peremptory norms can attract additional consequences, not only for the responsible state but for all other states (Chapter III of the Draft Articles), whereas Article 48 deals with the entitlement of all states to invoke responsibility for breaches of obligations to the international community as a whole. *Official Records of the General Assembly. Fifty-sixth Session, Supplement No. 10 (A/56/10)*, 277–82.
- 57 J.-A. Carillo-Salcedo, "Affirmation progressive," 143.
- 58 B. Simma, "From Bilateralism", 295–97. According to this author, even if one does not accept the existence of an international *actio popularis*, in *Barcelona Traction* the ICJ seemed to allow some exceptions to this principle with respect to the violation of norms which incorporate *erga omnes* obligations, in order to ensure the effective upholding of the international community's vital interests.
- 59 J.-A. Carrillo-Salcedo, "Affirmation progressive," 143.
- 60 *Ibid.*, 132–46; B. Simma, "International Crimes: Injury and Countermeasures. Comments on Part 2 of the ILC Work on State Responsibility," in *International Crimes of State*, 289–90; and H. Thierry, "Cours général de droit international public," *RCADI* 222 (1990): 58–63. The latter underlines that *erga omnes* norms clearly arise out of norms of *jus cogens*; that norms of *jus cogens* have acquired a new dimension; and that no derogation is permitted, and protection rights are created which concern the legal interest of all states.
- 61 M. Ragazzi, *Concept*, 132–35. See also the works of the International Law Commission on State Responsibility, Part 1, Article 19, paras. 2 and 3, which earlier included examples of international crimes in conformity with the concepts of *jus cogens* and *erga omnes*. For the full text of this old article, see *Yearbook of the International Law Commission* (hereafter referred to as *YILC*), Vol. II, 1980 (second part), 30.
- 62 The international criminal responsibility of individuals is of a somewhat secondary nature for our discussion, as we are concerned with the enforcement of imperative norms by states and possibly organizations. However, a universal jurisdiction is granted by important international instruments, like the 1948 Genocide Convention or the 1949 Geneva Conventions, for acts explicitly qualified therein. So far, implementation has mainly rested on national authorities, but the *ad hoc* criminal tribunals of Nuremberg and Tokyo, Rwanda, and Former Yugoslavia have had jurisdiction vis-à-vis the relevant crisis. The establishment of the ICC in June 2002 introduced a true universal jurisdiction to enforce international criminal responsibility in cases of gross violations of international law.
- 63 See the *ILC Draft Articles on State Responsibility*, Part 2, Article 40. According to the Commission, there is one category of international obligations that differ from other international obligations by virtue of their aim—the safeguarding of the international community's basic interests. Hence, violations of obligations that are aimed at safeguarding the international community's fundamental interests were defined as *international crimes*. However, this definition was abandoned when the second reading of the draft articles was completed at the 53<sup>rd</sup> session (2001) of the ILC. Consequently, the qualification "serious breaches of obligations under peremptory norms of general international law" was adopted to reflect the community interests.
- 64 *Official Records of the General Assembly. Fifty-sixth Session, Supplement No. 10 (A/56/10)*, Ch. III.
- 65 P. Picone, "Interventi," 519–22; L.-A. Sicilianos, *Les réactions décentralisées à l'illicite, des contre-mesures à la légitime défense* (Paris: Librairie générale de droit et de jurisprudence, 1990), 174–77.
- 66 The international responsibility of international organizations presents various possibilities: the responsibility could be allocated to member states, to both member states and the organization, or in some

cases to the organization itself. As far as individuals are concerned, the standard of individual international criminal responsibility applies: certain acts of individuals are directly punishable under international law. What is said here regarding the international responsibility of states can be applied only to a limited extent regarding these other spheres of responsibility.

- 67 P. Daillier, N.G. Dinh, and A. Pellet, *Droit international public*, 5<sup>th</sup> ed. (Paris: Librairie Générale de Droit et de Jurisprudence, 1994), 729–31. The ILC has been working on this area since 1969 with a view to codifying the subject. For a detailed study of state responsibility, see L.-A. Sicilianos, *Les réactions décentralisées*.
- 68 J. Crawford, J. Peel, S. Olleson, “The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading,” *EJIL* (2001): 943–62. The ILC recommended to the General Assembly, first, to take note of and annex the Draft Articles in a resolution, with appropriate language emphasizing the importance of the subject, and second, to consider the Articles further at a later session of the assembly, with a view to the possible conversion of the Articles into a convention.
- 69 Initially, there was an idea that the reaction of third states necessitates a collective decision—of the UN, for instance—whereas such a point of view became later nuanced with the idea that the position of third states, and consequently their rights, was independent of any collective decision. International crimes had an *erga omnes* character which, in itself, created legal rights for third states. See, for example: *YILC* 1980, Vol. II, 1<sup>st</sup> part, preliminary report, 110, para. 28; *YILC* 1983, Vol. II, 1<sup>st</sup> part, 11, para. 50; *YILC* 1983, Vol. II, 1<sup>st</sup> part, p.12, para. 61; *YILC* 1985, Vol. I, session 1896, p.121, para. 30 (Njenga); and *YILC* 1985, Vol. I, session 1896, 118, para. 4 (Ogiso); session 1897, 127, para. 135 (Barboza); session 1898, 134, para. 40 (Akinjide); session 1899, 139, para. 29 (Lacleta Munoz); session 1899, 138, paras. 20-21 (Al-Qaysi); and session 1900, 142, para. 5 (Malek).
- 70 *Barcelona Traction*, ICJ Reports 1970, para. 33.
- 71 For these measures, see Daillier, Dinh, and Pellet, *Droit international*, 894–901.
- 72 Ragazzi, *Concept*, 140, and note 44.
- 73 In the case of apartheid, the Resolution of the General Assembly 2506 (XXIV) of 21 November 1969 defined apartheid as a crime against humanity; the Resolution of the Security Council of 19 June 1976 defined the policy of apartheid as a crime against the conscience and dignity of humanity; and the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) declared that apartheid is a crime against humanity.
- 74 ICJ Reports, 1949, 22.
- 75 ICJ Reports, 1951, 23.
- 76 *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports, 1986, paras. 218 and 220, 113–15. With respect to the general principles of humanitarian law, in para. 218 of its Judgment, the ICJ observed that, “the Geneva Conventions are in some respects a development, and in other respects no more than the expression of, such principles.”
- 77 P.A. Fernández Sánchez, “La violation grave des droits de l’homme comme menace contre la paix,” *Revue de droit international* 77:1 (1999): 26–29.
- 78 Both Protocols prohibit, *inter alia*, collective punishments, corporal punishment and internment or detention of men and women in common premises, and recognize the right of persons accused of an infraction to most of the guarantees of a regular trial recognized by the Covenant and by other human rights treaties (see Art. 75 of Protocol I and Art. 5 and 6 of Protocol II). They also contain specific rules for the protection of children (see Art. 77 and 78 of Protocol I and Art. 4, para. 3 of Protocol II).
- 79 ICJ Reports, 1996, para. 79.
- 80 See International Covenant on Civil and Political Rights (1966), Art. 6 (Covenant); European Convention for the Protection of Human Rights (1950), Art. 2 (ECPHR); American Convention on Human Rights (1969), Art. 4 (ACHR); and the Convention on the Prevention and Punishment of the Crime of Genocide (1948), Art. I and II.
- 81 See Covenant, Art. 7; ECPHR, Art. 3; ACHR, Art. 5; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 2(2).
- 82 See Covenant, Art. 8 and ECPHR, Art. 4, 6.
- 83 This is confirmed by the safeguard clause common to the instruments, which authorizes states to take exceptional measures derogating from their obligations, provided that such measures are not “incon-

- sistent with their other obligations under international law.” See Covenant (Art. 4, para. 1), ECPHR (Article 15, para. 1), and ACHR (Art. 27, para. 1).
- 84 “Rapport de la réunion des experts sur les droits non susceptibles de dérogation dans les états ou situations d’exception,” in *Droits intangibles et états d’exception. Association de consultants internationaux en droits de l’homme*, eds. D. Prémont, C. Stenersen, and I. Oseredczuk (Bruxelles: Bruylant, 1996), 16. For the incorporation of conventional international law into norms of general international law, see the *North Sea Continental Shelf Case* (1969), in which the ICJ agreed that a norm of conventional origin could be incorporated into general international law and accepted as such by the *opinio iuris*. See ICJ Reports, 1969, 41, para. 71. This norm is therefore binding upon states that are not contracting parties to the conventions concerned.
- 85 The International Law Association, Report of the Sixty-First Conference at Paris 1984 (Great Britain, 1985), 69, referred to by J. Mrazek in “Human Rights: Their International Standards and Protection,” *Coexistence* 27:4 (December 1990): 320–21.
- 86 H.-J. Blanke, “Menscherechte als völkerrechtliche Interventionstitel,” in *Archive des Völkerrechts*, 1998, 259; A.C. Arend, *Legal Rules and International Society* (Oxford: Oxford University Press, 1999), 50–53.
- 87 Arend, *Legal Rules*, 50–53.
- 88 See Covenant, Art. 15, ECPHR, Art. 7 and ACHR Art. 9; although the terminology used in the Covenant and the ECHR is somewhat fluid, here the reference is to “general principles.” In order to complete this list of rights from which no derogation is permitted, mention should be made of the right to freedom of thought, conscience, and religion (Covenant, Art. 18 and ACHR, Art. 12); rights of the family (ACHR, Art. 17); rights of the child (ACHR, Art. 19); the right to nationality (ACHR, Art. 20); political rights (ACHR, Art. 23); *ne bis in idem* (Protocol 7 of the ECPHR, Art. 4); and the right to juridical personality (Covenant, Art. 16 and ACHR, Art. 3).
- 89 *YILC*, 1980, Vol.II (second part), 30 ff.
- 90 *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/56/10)*, Commentary to Chapter III.
- 91 For the classification of crimes against the peace and security of humanity, see *YILC* 1 (1996): 33; and E. David, *Eléments du droit pénal international—deuxième partie: la répression nationale et internationale des infractions internationales*, 7<sup>th</sup> ed. (Brussels: Presses universitaires de Bruxelles, 1996–1997).
- 92 See Statute of the ICC, Part 2, UN Doc A/Conf.183/9 as amended by the summary records dated 10 November 1998 and 12 July 1999.
- 93 Where detention or imprisonment resulting from the retroactive application of new criminal legislation is considered to constitute an abusive form of loss of liberty.
- 94 V. Grado, *Guerre Civile*, 287–90.
- 95 Reprisal is an action that a state undertakes to redress an injury suffered during peacetime, which may or may not involve the use of force. Customary limitations developed for a reprisal to be considered lawful include: it is undertaken in response to illegal actions; it is preceded by an unsuccessful demand for redress; and it must be proportionate to the injury suffered. These criteria are enumerated in the arbitrator’s decision in the *Naulilaa* case (1914). Self-defense criteria are enumerated in the classic *Caroline* decision of 1937: there must be a proven necessity to act in self-defense, and the action must be proportionate. A.C. Arend and R.J. Beck, *International Law and the Use of Force*, 17–18.
- 96 Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, Hague Convention II of 1907. The limitation established in the Convention was, however, heavily qualified depending on the level of cooperation of the debtor State. *Ibid.* 17–19.
- 97 The state of war doctrine in the nineteenth and early twentieth century was subjective: war was a legal status whose existence depended on the intention of one or more of the states concerned. *Ibid.*, 26–28.
- 98 Most states felt that war was not caused by the aggressive intent of any one state, but rather that it resulted from a series of miscalculations and misinterpretations, exacerbated by the lack of procedural limitations on the recourse to war.
- 99 Members were either original (states which participated in the Paris Peace Conference and had later ratified the Covenant, or were neutral states invited to adhere to it) or non-original (states admitted by

the Assembly of the League of Nations by a two-thirds vote). The goal of universality was hampered by the absence of the U.S. from the very beginning. Even so, by 1938 the League had a total of 54 Members.

- 100 I. Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), 51–54. Also, other supranational organizations were set up, such as the Permanent Court of International Justice (1921) and the International Labor Organization (1919).
- 101 The Covenant was drafted in February 1919 by the Commission of the League of the Nations of the Paris Peace Conference, and it became an integral part of peace treaties. The date of the entry into force of the Peace Treaty of Versailles, 10 January 1920, was the date when the League of Nations became functional. The Covenant was the result of a compromise, and was fundamentally a political document. Therefore, some of its articles, like Article 10, remained relatively vague.
- 102 Obligation to submit a dispute either to arbitration or to inquiry by the Council of the League (Article 12, 13 and 15) and obligation not to resort to war until after a three-month cooling-off period (Article 12).
- 103 In its Article 2, the Geneva Protocol sought to limit the circumstances in which there could be a resort to war to defense from aggression and when authorized by a competent organ of the League. The Protocol failed, however, to receive the number of ratifications necessary to enter into force.
- 104 Dispositions alike are included in the Convention for the Maintenance, Preservation, and Re-establishment of Peace, Buenos Aires, 23 December 1936, and the Additional Protocol relative to Non-Intervention of the same date. For all above-mentioned references, see I. Brownlie, *International Law and the Use of Force by States*, 69–99.
- 105 The Dumbarton Oaks Conference was arranged for the purposes of securing the preliminary agreement of the four major powers at the expert level on the proposals to be submitted to a conference of Allied Nations, which would take place in San Francisco from April 25–June 26, 1945. The Dumbarton Oaks Conference took place in two phases: first, with the representatives of the Soviet Union, the United Kingdom and the United States (21–2 August 1944) and second, with the Republic of China, the United Kingdom and the United States (29 September–7 October 1944).
- 106 J. Combacau, “The Exception of Self-Defence in U.N. Practice,” in *The Current Legal Regulation of the Use of Force*, ed. A. Cassese (Dordrecht: Martinus Nijhoff Publishers, 1986), 9–10; and I. Brownlie, “The Principle of Non-Use of Force in International Law,” in *The Non-Use of Force in International Law*, ed. W.E. Butler (Dordrecht: Martinus Nijhoff Publishers, 1989), 17–23. Brownlie underlines the importance of the period preceding the Charter, in particular the period 1928–45, during which substantial progress was made in both the use of force and its prohibition.
- 107 I. Brownlie, *International Law and the Use of Force by States*, 214–15; and I. Brownlie, “International Law at the Fiftieth,” 209–10.
- 108 The Dumbarton Oaks proposals included more precise definitions of standards to govern the conduct of members and of the Security Council in the maintenance of international peace and security. In particular, it was proposed that justice and international law should be made criteria for collective measures taken to maintain or restore international peace and security. The attempt was, however, successfully resisted. The justice and international law principles were limited to cover only the adjustment or settlement of international disputes or situations, but not collective measures, as the tying of the Security Council’s hands on this account was deemed unwise. L.M. Goodrich, E. Hambro, and A.P. Simmons, *Charter of the United Nations. Commentary and Documents*. Third and Revised Edition (New York: Columbia University Press, 1969), 23–36.
- 109 *Ibid.*, 198–201. To this list, Brownlie adds the defense of third states (which does not equate to legitimate collective defense) and actions undertaken within the territory of a state with its consent. See I. Brownlie, “The Principle of Non-Use of Force in International Law,” 22.
- 110 The specifications are introduced in the wording of Article 2.4 in order to define the forbidden resort to armed force.
- 111 The treaty interpretation is thus based on the text of the treaty as the objective manifestation of the will of the parties, or of what is objectively laid down in the Charter.
- 112 The purpose of the treaty constitutes an element of such predominant weight for this interpretation that the will of the parties is reduced to an almost subsidiary means of interpretation. B. Simma, ed., *The*

- Charter of the United Nations. A Commentary*, 2<sup>nd</sup> ed., vol. I. In collaboration with H. Mosler, A. Randelzhofer, Ch. Tomuschat, and R. Wolfrum (Oxford: Oxford University Press, 2002), 15–32.
- 113 The Charter regulation was very much a response to the Second World War, and the provisions are mainly related to inter-state conflicts. However, the international scene of today is no longer strained with inter-state conflicts, but, on the contrary, is characterized by civil wars, cross-border guerilla incursions, limited inter-state fighting, struggles of national liberation movements for independence, and disagreements between the developing and developed states. The relative flexibility in interpretation is favored also by the ICJ in the *Nicaragua* case, in which it apparently regarded the Charter provisions as dynamic rather than fixed, being inclined towards the possibility of a dynamic interpretation of the provisions based on state and organization practice, which is capable of changing over time.
- 114 H. Thierry, “Cours general,” 135–36. Thierry points out that the right to use force has evolved, in that the legal uses of force have increased in number.
- 115 “On a number of points, the areas governed by the two sources of law (convention and custom) do not exactly overlap, and the substantive rules in which they are framed are not identical in content.” *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986, para. 175.
- 116 *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986, para. 176. Namely the right of self-defense and the principle of non-intervention were governed by both custom and convention.
- 117 This wording was used in several treaties on collective security. See the North Atlantic Treaty of 4 April 1949 (Article 1); Constituent Text of the League of Arab States of 22 March 1945 (Article V); the ANZUS Treaty (Article 1); the OAS Charter (Article 21); the Islamic Conference of 4 March 1972 (Article II, B, 5); Declaration on the Principles Governing the Mutual Relations of States Participating in the CSCE annexed to the Helsinki Final Act of 1 August 1975 (1<sup>st</sup> paragraph of the 1<sup>st</sup> principle); and Treaty on the Collective Security of the Commonwealth of Independent States of 15 May 1992 (Article 1). It should be noted that the article in question should be read in conjunction with its corollary article, Article 2.3, on the Peaceful Settlement of Disputes. According to Article 2.3, “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” See, for example, G.G. Shinkaretskaia, “Peaceful Settlement of International Disputes: an Alternative to the Use of Force,” in *The Non-Use of Force in International Law*, 39–52.
- 118 The principle was raised for the first time by the ICJ in the *Corfu Channel* Case, in which the Court dismissed the UK’s ‘Operation Retail’ for the mine-sweeping of the Corfu Channel. The UK based its justification for the action on two arguments. The first was that it was necessary in order to obtain evidence proving Albania’s responsibility for mining the channel. In this respect, the ICJ ruled that: “The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law.” See *ICJ Reports*, 1949, 35. The UK’s second argument concerned the concept of “self-help” in support of its right to use force. The Court dismissed this argument, too, and ruled that it constituted a violation of Albanian sovereignty. See V. Starace, “La responsabilité résultant de la violation des obligations à l’égard de la communauté internationale,” in *RCADI* 153 (1976): 281–82. For further study of the ICJ’s jurisprudence in this context, see G.M. Danilenko, “The Principle of Non-Use of Force in the Practice of the International Court of Justice,” in *The Non-Use of Force in International Law*, 101–10.
- 119 Paragraph 1 of the commentary of the Commission to Article 50 of its Draft Articles on the Law of Treaties (ILC Yearbook 1966-II, 247); and *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986, para 190.
- 120 *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports, 1986, paras. 188 and 189. The ruling in question is of particular importance for identifying the limits and similarities of customary law and the law of the Charter vis-à-vis the use of force. The Court based its judgment on the *opinio juris* as to the binding character of the principle of the non-resort to force, which may be deduced from, among others, the attitude of the parties and of states with respect to certain General Assembly Resolutions, and particularly Resolution 2625 (XXV). See V. Starace, “La responsabilité,” 280. It should be noted that this practice of associating the development of customary law with the attitudes

- expressed by states when voting takes place within the UN bodies has its drawbacks, too. See B. Simma, *Charter*, 126–27, as well as the references mentioned in footnote 167 therein.
- 121 P. Picone, “Interventi,” 529. As a matter of fact, by applying the principle of *rebus sic stantibus* (fundamental change of circumstances), this solution could be supported; states have consented to the non-resort to armed force restriction on the condition that the United Nations is capable of maintaining international peace and security. See F.R. Teson, *Humanitarian Intervention: an Inquiry into Law and Morality* (New York: Transnational Publishers, 1988), 137–38.
- 122 These specifications do not exclude the existence of the use of force being contrary to all of them or some of them, in any combination of the factors.
- 123 B. Simma, *Charter*, 116–17. The situation is different if the insurgents succeed in establishing and stabilizing a *de facto* regime.
- 124 V. Grado, *Guerre Civile*, 189–91. As shown, for example, by recent peacekeeping operations: of the five peacekeeping operations in place at the beginning of 1988, four were interstate conflicts and one (or 20 % of the total) was an internal conflict. In contrast, of the twenty-one peacekeeping operations undertaken since then, eight were in interstate conflicts and thirteen were in internal conflicts (or 62 % of the total). Of the eleven operations that have been launched since January 1992, all, apart from two, have been in internal conflicts (or 82 % of the total). See Supplement to an Agenda for Peace: Position paper of the Secretary-General on the occasion of the Fiftieth Anniversary of the United Nations, 3 January 1995, A/50/60-S/1995/1.
- 125 The problem of civil and mixed conflicts has been a popular topic for debate, in which many normative approaches have been formulated regarding intervention. Two conclusions can be drawn: first, the greatest official support is accorded to those norms that are most consistent with the basic Charter principles; second, despite this official support, states increasingly seem to be expressing their support for self-determination rule in civil and mixed conflicts. See Arend and Beck, *International Law and the Use of Force*, 80–92.
- 126 The ICJ in the *Nicaragua* case found it necessary to take the logic of the Charter restrictions and to attempt to apply it to civil wars and mixed civil/international conflicts. *Ibid.*
- 127 I. Brownlie, *International Law and the Use of Force by States*, 265–68; M. Dixon and R. McCorquodale, *Cases and Materials on International Law* (London: Blackstone Press Limited, 1991), 476–78. However, views differ in this area: for example, in the *Corfu Channel* case, the UK submitted that its ‘Operation Retail’ did not violate either the territorial integrity or the political independence of Albania and that it was, therefore, quite legitimate. See B.V.A. Röling, “The Ban on the Use of Force and the UN Charter,” in *The Current Legal Regulation of the Use of Force*, ed. A. Cassese (Dordrecht: Martinus Nijhoff Publishers, 1986), 4.
- 128 A. de Hoogh, *Obligations Erga Omnes*, 288–89.
- 129 The General Assembly’s *Friendly Relations Declaration* Res 2625 (1970) outlaws forcible intervention in absolute terms.
- 130 B. Simma, *Charter*, 117–18. This author mentions “in-and-out” operations as examples of such acts.
- 131 M.J. Glennon, *The Limits of Law. Prerogatives of Power. Interventionism After Kosovo* (London: Palgrave 2001), 22. The author makes reference on this point to F.R. Teson, *Humanitarian Intervention*, 151.
- 132 B. Simma, *Charter*, 124. Such uses of force are: the right of warships of a state to stop and seize a pirate ship or a ship engaged in slave trade (UNCLOS Arts. 105-110) and the right of hot pursuit (UNCLOS Art. 111).
- 133 The purposes of the United Nations (Chapter I, Article 1) include:
1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
  2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion; and
4. To be a center for harmonizing the actions of nations in the attainment of these common ends.
- 134 I. Brownlie, *International Law and the Use of Force by States*, 268; and B. Simma, *Charter*, 64–68, 117–118. The obligations of Article 2.4 are now interpreted explicitly in the light of the purposes of Article 1 of the Charter.
- 135 Glennon, *Limits of Law*, 21–30.
- 136 The drafters of the Charter realized that there was also the need to create conditions, other than purely political ones, favorable to the existence of peace. Therefore, peace is seen as more than the absence of war; it is an evolutionary development in the state of international relations, which is meant to lead to the diminution of issues likely to cause war. As far as security is concerned, it involves a subjective element, so that each state is assured that peace is not broken, or at least the impact will be limited, and an objective one, implying the right of every state to take advantage of any relevant security system, while also implying the legal obligations of every state to support such systems. In addition, apart from their interest in peace and security, the drafters recognized the need for international cooperation to promote human welfare in a world that no longer permits this objective to be adequately achieved by national action alone. The issue regarding the extent to which Article 1.3 imposes obligations on members and provides a legal basis for United Nations action has also caused some debates: a narrow interpretation refers to Article 2.3 and bases the legal obligation of a Member to respect a particular right or a freedom on its specific agreement. A wider interpretation argues, instead, that Article 1.3, together with Articles 55 and 56, places an obligation on Members to respect human rights and fundamental freedoms, that the General Assembly may consider alleged violations of rights, and that Members are required to cooperate with the Assembly in carrying out its recommendations by the terms of Article 56. Goodrich, Hambro, and Simmons, *Charter of the United Nations*, 34–35.
- 137 The “Preamble,” the “Purposes,” and the “Principles” are all provisions of the Charter, being indivisible as in any other legal instrument. Thus, each is to be construed and applied “in function of the others.” The Preamble has significance as a statement of motivating ideas and purposes of the Members, and its words can be used as evidence of these ideas in any interpretation of the articles that follow. *Ibid.*, 19–22; and Simma, *Charter*, 33–37.
- 138 There has been considerable discussion as to whether this term also includes the use of political and economic force, but it does not seem to be the case. See, for example, the preparatory works on the UN Charter; Brazil’s proposal of 6 May 1945 for the inclusion of economic force was explicitly rejected. Claims to that effect have been dealt with in other terms. See Dixon, and McCorquodale, *Cases*, 476–78. Moreover, Simma points to the teleological interpretation of Article 2.4: were the provision to extend to other forms of force, states would be left with no means of exerting pressure on other states that violate international law. Simma, *Charter*, 118. The opposite point of view is expressed by G. Tunkin, “Politics, Law and Force in the Interstate System,” *RCADI* 7 (1989): 331–32.
- 139 Simma, *Charter*, 112–13. According to Simma, the term “armed force” also covers indirect armed force, i.e. participation by one state in the use of armed force by another state, for example, by allowing part of its territory to be used in order to carry out acts of violence against a third state. Here again, Resolution 2625 (XXV) may help to shed some light on indirect armed force, in particular paragraphs 8 and 9 of the Resolution. See also case concerning *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports, 1986, para. 228, in which the Court observed that, “while the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance....”
- 140 H. Thierry, “Cours general,” 135–36. See also the ICJ’s judgment in *Barcelona Traction*, in which the prohibition on aggression is recognized as constituting an *erga omnes* obligation. See *Barcelona Traction*, ICJ Reports, 1970, 32, paras. 33 and 34.
- 141 A. Coll, “The Limits of Global Consciousness and Legal Absolutism: Protecting International Law from Some of its Best Friends,” *Harvard Journal of International Law* 27 (1986): 509, 613, 620. Clear aggression would include different typologies of coercive acts, which various traditions of ethical reasoning during different periods of history have condemned as unlawful and morally reprehensible.

- 142 Nevertheless, Article 2 of Resolution 3314 (XXIX) states that: "...a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity." Consequently, the characterizing of actions as acts of aggression is reserved for serious violations.
- 143 F. Capotorti, "Cours général de droit international public," *RCADI* 248:4 (1994): 297.
- 144 See Glennon, *Limits of Law*, 21–24, for references to the work of preparing the article.
- 145 The General Assembly's significance to the assessment of the state of international law is sustained by its truly representative character of the international legal community as a whole.
- 146 GA Res. 2131, UN GAOR, 20<sup>th</sup> Sess., 1408<sup>th</sup> plen. meet., UN Doc. A/6220 (1965).
- 147 GA Res. 2734, UN GAOR, 25<sup>th</sup> Sess., 1932<sup>nd</sup> plen. meet., UN Doc. A/8028 (1970).
- 148 GA Res 2625, UN GAOR, 25<sup>th</sup> Sess., Supp. No. 28, at 123, UN Doc. A/8028 (1970).
- 149 Glennon, *Limits of Law*, 20–21; and GA 91<sup>st</sup> plen. meet., 9 December 1981, 33/103. The prohibition against intervention was further specified in the declaration in question.
- 150 Glennon, *Limits of Law*, 21; and 81<sup>st</sup> plen. meet., 16 December 1993, 48/83.
- 151 A/RES/54/172, 15 February 2000.
- 152 *Ibid.*, 21.
- 153 As regards humanitarian intervention, in 1945 France had already proposed an amendment to the draft of the Charter that would have authorized states to intervene in other nations, even without the authorization of the Security Council, when "the clear violation of essential liberties and of human rights constitutes a threat capable of compromising peace." 12 UNCIO, Commission II, Committee 2, Doc. 207, III/2/A/3 (10 May 1945), 179 at 191.
- 154 Glennon, *Limits of Law*, 60–64. Glennon refers here specifically to the *Restatement (Third) of the Foreign Relations Law of the United States*, § 102, reporter's note 4 (1987).
- 155 The Afghanistan conflict fits under the traditional self-defense rubric only with great difficulty (UN Charter, Article 51). Self-defense, according to the Charter, is exercised in conditions of urgency and necessity, in response to an on-going or initial attack on a case-by-case basis (Webster formula: "instant, overwhelming, leaving no choice of means and no moment for deliberation"), instead of providing a *carte blanche* for any future preventive action. L. Condorelli, "Les attentats du 11 septembre et leurs suites: où va le droit international," *Revue Générale de Droit International Public* (2001): 829–47. Another question is, of course, how well the Charter régime responds to the current realities. The relevant Security Council Resolutions on Afghanistan underline the central role of the Charter and international law when terrorism is combated; no direct authorization is given for any unilateral use of force under the tenet of terrorism (1368/2001; 1373/2001; 1377/2001; 1378/2001) However, at the same time, Res. 1378/2001 *does* support international efforts to root out terrorism, encouraging member states to support security-building measures in the specific conflict of Afghanistan. The question regarding this case, then, is whether it had legitimacy but no legality?
- 156 Iraq has been on the SC agenda because of its weapons development program. Unilateral action had already been taken against Iraq in 1993 and 1998 on extensive reading of Res. 687/91 (disarmament obligations) and Res. 1154/98 ("violations would have serious consequences for Iraq"). F. Nguyen-Rouault, "L'intervention armée en Irak en son occupation au regard du droit international," *RGDIP* 108 (2003): 844–49. Again, massive reprisals were resorted to in 2003 on various grounds: Iraq's non-compliance with its obligations vis-à-vis WMD (no evidence of WMD was later found in Iraq); the dictatorial régime of Saddam Hussein; humanitarian intervention; combat against terrorism. The authority for armed action was seen stemming from the international community's struggle against terrorism and from an extensive reading of SC Res. 1441/02's recalling "in that context, that the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its (disarmament) obligations." The U.S., U.K. and Spain had drafted a resolution with a direct authorization for the use of force; however, as the French publicly promised to use the veto, the draft was never even introduced to the Security Council. No UN authority would be forthcoming. *Ibid.*, 844–49.
- 157 Arend and Beck, *International Law and the Use of Force*, 175–85.
- 158 Glennon, *Limits of Law*, 67–70. Other studies have documented even more numerous conflicts: e.g., International Institute at DePaul University estimated 285 conflicts globally from 1945–96.
- 159 Glennon, *Limits of Law*, 60–64.

- 160 Arend and Beck, *International Law and the Use of Force*, 9–10, 184–85. “Authoritative” reflects the perception of something to be law, *opinio juris*. “Controlling” relates to the fact that states actually do comply with the requirements of the rule. This approach is qualified as “rejectionist.”
- 161 T. Franck, “Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States,” *AJIL* 64 (1970): 835; T. Franck, *The Power of Legitimacy among Nations* (Oxford: Oxford University Press 1990), 32.
- 162 Arend and Beck, *International Law and the Use of Force*, 132–35. These arguments reflect a highly “counter-restrictionist” stance on humanitarian intervention, in opposition to a restrictionist stance based on the UN’s primary purpose of maintaining peace and security and the UN’s monopoly on the use of force, except in cases of clear self-defense and collective action and the fears of a geopolitical intervention if states were granted a right to use force outside of the two exceptions mentioned.

### Chapter 3

- 1 Self-defense has also been invoked within the context of action taken to protect nationals abroad. It is debatable whether such action could be justified on the basis of Article 51. See I. Brownlie, “Principle,” 23–24.
- 2 In 1837, a state of peace existed between the U.S. and the U.K. However, an armed insurrection took place in Canada, and a ship owned by U.S. nationals, the *Caroline*, was claimed to provide assistance to Canadian rebels. On 29 December 1837, while the *Caroline* was docked on the American side of the Niagara River, Canadian troops boarded the ship, killed several Americans, set the ship on fire, and sent it over the Niagara Falls. Following an American protest, Great Britain claimed that its forces were acting in lawful self-defense. A.C. Arend and R.J. Beck, *International Law and the Use of Force*, 18.
- 3 Letter from the U.S. Secretary of State Mr. Webster to British Foreign Minister Mr. Fox (24 April 1841), *Brit. & For. St. Papers* 29 (1857): 1129, 1138.
- 4 Arend and Beck, *International Law and the Use of Force*, 18.
- 5 *Ibid.*, 72–73.
- 6 Simma, *Charter*, 663–64. The intention was for the UN to have a quasi-monopoly on the use of armed force. For the discussions preceding the adoption of the article in question, see I. Brownlie, *International Law and the Use of Force by States*, 270–72.
- 7 Arend and Beck, *International Law and the Use of Force*, 72–73.
- 8 Blockade constitutes a violation of Article 2.4. At the time of the crisis, the official U.S. legal justification presented concentrated on the authorization by the OAS. Nonetheless, the question of anticipatory defense was widely debated in legal scholarship, along Cold War lines. *Ibid.*
- 9 In 1967 Israel launched an apparently pre-emptive strike against Egypt, Jordan, and Syria. It did not rely on the justification of anticipatory self-defense, but argued that the actions of these Arab states amounted to prior armed attacks.
- 10 In this case, Israel claimed anticipatory self-defense; it had acted to remove a nuclear threat to its existence, as the Iraqi reactor was designed to produce nuclear bombs whose target would have been Israel.
- 11 In 1999, the aircraft were given the authorization to take pre-emptive action against Iraq’s air defenses in anticipatory self-defense. Any threat to aircraft, such as a command centre, could be targeted.
- 12 Arend and Beck, *International Law and the Use of Force*, 72–73; and C. Gray, *International Law and the Use of Force*, 111–15.
- 13 The mandate for the use of force can barely be interpreted from the preambles of the resolutions (instead of the operative part). But then again, self-defense does not need to be authorized. Indeed, one interpretation was advanced according to which there was no request made to the Security Council at all in order to authorize the use of armed defense in Afghanistan, but just a request that it recognizes that the U.S. has the right to self-defense outside its own territory against those states which support international terrorism. M. Lehto, *Right to Use Force in International Relations: Report to the Committee of Foreign Affairs on the Basis of Para. 9 of the Finnish Constitution* 19 April 2002 (Helsinki: Foreign Ministry Publications Series, 2002), 1.

- 14 A. Cassese, "Terrorism is also Disrupting Some Crucial Legal Categories of International Law," *EJIL* 12 (2001): 993–1001; L. Condorelli, "Les attentats du 11 septembre et leurs suites: où va le droit international?" *RGDIP* 4/01 (2001): 829–48. Along these lines, see also Press Statement, NAC (2001/224) and "Conclusions et plan d'action" of the extraordinary European Council, 21 September 2001.
- 15 Condorelli, "Les attentats." In other words, is it legal to pursue the destruction of structures and means (of a state and/or of groups within a state) that aid and abet the commission of terrorist acts, in order to prevent any future terrorist action?
- 16 The U.S. National Security Strategy departs from national interests, and the use of force for the advancement of the national interest is seen as necessary, alone or in coalitions of states, with no further restrictions. See <http://www.whitehouse.gov/nsc/nss.html>.
- 17 L. Hannikainen, "The World after 11 September 2001: Is the Prohibition of the Use of Force Disintegrating?" in *Nordic Cosmopolitanism. Essays in International Law for Martti Koskenniemi*, eds. J. Petman and J. Klabbers (Dordrecht: Martinus Nijhoff Publishers, 2003), 452–55. The political agreement appears to accept armed self-defense against the Taliban regime, as the leading supporter of Al-Qaeda, but not necessarily in territories of other states, unless backed up by a separate and widely supported agreement within the UN framework.
- 18 L.-A. Sicilianos, *Les réactions décentralisées*, 300–3, 335–36.
- 19 *Ibid.*, 336.
- 20 Daillier, Dinh, and Pellet, *Droit international*, 886.
- 21 L.-A. Sicilianos, *Les réactions décentralisées*, 306–11. According to this study, the preparatory works do not provide us with many clues either. The formula proposed by the U.K. and the U.S. referred to "adequate measures." If we look at the language used in a number of defense treaties drawn up after the Charter (for example, the North Atlantic Treaty, Article 5, para. 2), and use it as a guide for interpretation, we can see that the measures *in abstracto* for ensuring the maintaining of peace do not seem to be adequate. It would seem reasonable to insist that measures be effective. It is the task of the Security Council to appraise their effectiveness.
- 22 See "Conclusion," Chapter 2 of this work.
- 23 C. Gray, *International Law and the Use of Force*, 115–19. Such combined grounds were suggested to justify the actions of Israel in 1968 in Beirut (attack of Beirut airport, as a response to earlier terrorist attack on an Israeli plane in Athens) and in 1985 in Tunis (attack against the PLO headquarters, in response to terrorist attacks on Israelis abroad), and the U.S. in 1986 in Libya (attack against Tripoli, in response to terrorist attacks against U.S. citizens abroad), in 1993 in Iraq (missile attack on Iraqi Intelligence Headquarters, in response to an alleged assassination attempt on ex-President Bush), in 1998 in Afghanistan (missile attack on a terrorist camp), in Sudan (destruction of a pharmaceutical plant, in response to terrorist attacks on its embassies in Kenya and Ethiopia in August 1998), and, last, in 2001 in Afghanistan (response to the September 11 bombings) and in 2003 in Iraq, on preventive grounds regarding WMD and terrorism.
- 24 Action is interpreted to mean not only enforcement action but also other actions to maintain peace and security, such as the adjustment or settlement of disputes and specific situations by peaceful means. Enforcement action, as determined in Chapter VII, is the specific action reserved to the Security Council. The first purpose of the UN is to maintain international peace and security and, to that end, to take "effective collective measures"—"effective" meaning enforcement action. The third statement is somewhat legally irrelevant (and incorrect), as a Security Council action is an act of the Organization itself, and thus to be imputed to the UN, not to the members. H. Kelsen, *The Law of the United Nations* 4<sup>th</sup> ed. (London: London Institute of World Affairs, 1964), 279–83.
- 25 The term "decision" is somewhat ambiguous as well, as is its obligatory character. However, it is considered to cover members' obligations to carry out only those decisions that the Security Council has made in accordance with the Charter, which leaves some decisions with a non-binding character (recommendations, plans). Thus, it can be taken to mean: Members are obliged to carry out all resolutions of the Security Council which the Security Council is authorized to issue with the intention to bind the Members at whom they are directed. The listing of Security Council acts in Chapter VI is helpful here: decisions to "call upon" (33.2), to investigate a situation and to determine the threat (34), specific recommendations (36.1, 37.2, 38) all require a qualified majority (+veto right). The obligation established

- by Article 25 is specified in provisions of Articles 48 and 49 with respect to decisions of the Security Council made under Articles 41 and 42 involving enforcement. Kelsen, *The Law of the United Nations*, 95–98.
- 26 Ibid., 302-303. See also Article 24.2, on the basis of which action for maintaining international peace and security may be exercised by the Security Council through Chapters VI, VII, VIII, and XII. The Security Council's role within the framework of Chapter VII is exclusive.
- 27 Kelsen, *The Law of the United Nations*, 245–49; Goodrich, Hambro, and Simmons, *Charter of the United Nations*, 204–207. See also the *Statement of the Four Sponsoring Powers on the Voting Procedure in the Security Council*, U.N.C.I.O. Doc 852, III/I/37 (I), dated 7 June 1945. The statement identifies two groups of decisions: 1. Direct measures in connection with the settlement of disputes, adjustment of situations likely to lead to disputes, determination of threats to the peace, removal of threats to the peace, and suppression of breaches of the peace, and; 2. Decisions not involving such measures. Decisions of the first type necessitate a qualified vote of seven (at that time) members, including the concurring votes of the five permanent members.
- 28 An Australian delegate emphasized the fact that a dispute dealt with outside the Security Council will not be in accordance with the consistent principle of just settlement of disputes, which is to characterize all the proceedings of the Council. Instead, such proceedings are a step backward, to the state of affairs that existed before World War Two, in which settlements of disputes were often made outside the League of Nations altogether. Kelsen, *The Law of the United Nations*, 271–72.
- 29 Two different kinds of peace-keeping units were originally introduced: on the one hand, military observer groups and, on the other, the so-called peace-keeping forces that were to contain a conflict—in particular to facilitate ceasefires and to prevent a resurgence of hostilities—without imposing a particular conflict solution by military force. Principles of “consensus of the local parties, impartiality and the use of force only in self-defense” were endorsed as basic principles. A wide variety of operations have been introduced during these phases. Most often, operations were interposed between states; they were generally limited to observational forces with the right to use force in self-defense, with a few exceptions. The operations were established either by the Security Council, or if it was non-operational, by the General Assembly. From 1989 onwards, peacekeeping operations have been characterized by a growing complexity and an increasingly wide geographical area of application.
- 30 Regional peace-keeping includes examples such as the following: Arab League Security Force in Kuwait (1961) and in Lebanon (1976); OAU Inter-African Force in Chad (1981); the OAU observer group in Rwanda and Uganda (1992); ECOWAS's ceasefire monitoring group (ECOMOG) in Liberia (1990 onwards) and in Sierra Leone (1997); the EC Monitor Mission in Yugoslavia (1991 onwards); and CIS operations in South Ossetia, Moldova, Abkhazia/Georgia, and Tajikistan (1990s).
- 31 *Ad hoc* forces have been used in Zaire in 1978 (Inter-African Force), in Egypt and Israel in 1981 (Multinational Force and Observer, MFO), in Lebanon in 1982 (August/September) and 1982-1984 (Multinational Force), and in Hebron in 1994 (Temporary International Presence in Hebron).
- 32 See Resolution 377 (V), “Uniting for Peace,” adopted by the GA on 3 November 1950 (the Security Council was blocked by a disagreement among the five permanent members). According to the Resolution, “If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force where necessary, to maintain or restore international peace and security.” This “Uniting for Peace” procedure was resorted to for the first time already in February of 1951 in connection with the North Korean crisis in the face of imminent Chinese hostilities; the procedure has also been relied upon since, for instance with the establishment of peacekeeping forces in the Middle East. The ICJ has, however, taken a more restrictive view, claiming that enforcement action needs to be referred to the Security Council. *Certain Expenses* case, ICJ Reports 1962, para. 151.
- 33 The Secretariat, one of the “principal organs” of the UN, and the authority, competencies, and especially the prestige of the Secretary-General, the chief administrative and political officer of the UN, could well be united more explicitly to support the peace efforts of the Organization, by making active

- use of the Secretary-General's authority for a wide range of initiatives on matters relating to the maintenance of international peace and security.
- 34 Simma, *Charter*, 710–12. Thus, especially humanitarian law and human rights norms form guidelines for the exercise of the Security Council's enforcement powers. Although, as they are explicitly included in the Purposes of the Organization (Article 1.3), the Security Council is to take them into due consideration under the law of the Charter. The Council is thus required to strike a concrete balance between humanitarian and human rights concerns and the goal of maintaining peace.
- 35 However, the lack of further definition has not been as much a source of controversy as the distinction between a "threat to the peace" under Article 39 and a dispute or situation that is "likely to endanger the maintenance of international peace and security" (the language used in Article 34). An example of such controversy was the debate concerning the quality of the threat posed by Franco's régime in Spain. Goodrich, Hambro, and Simmons, *Charter of the United Nations*, 295–97
- 36 Breaches of the peace have only been determined in few cases: for example, in Resolution 502, 3 April 1982, on the conflict in the Falkland Islands (Malvinas), between the United Kingdom and Argentina, and in Resolution 82, 25 June 1950, on the conflict in North Korea.
- 37 J.-M. Sorel, "L'élargissement de la notion de menace contre la paix," in *Le Chapitre VII de la Charte des Nations Unies*, Societe française pour le droit international, Colloque de Rennes (Paris: Editions Pedone 1995), 3-58.
- 38 Tomuschat, "Obligations Arising for States," 335–37.
- 39 B. Simma, *The Charter*, p. 722–726.
- 40 M.J. Glennon, *Limits of Law*, 102–12, and the references made therein. Problems of civil strife, or matters of a purely internal character, would be left outside the purview of the Security Council, which is concerned with classical trans-boundary uses of force. An intervention in an internal conflict is not authorized by Article 39, and it runs afoul of the principle of non-intervention in Article 2.7.
- 41 Ibid.
- 42 Ibid.
- 43 Holzgrefe and Keohane, *Humanitarian Intervention*, 36–43.
- 44 Congo (Resolution S/4741, 20 February 1961; RES 161). The Security Council was concerned with the danger of civil war, which constituted a threat to international peace and security. Consequently the peacekeeping force, ONUC, was vested with a robust mandate, as the use of force going beyond self-defense was allowed for purposes of preventing a civil war.
- 45 This was the case of Rhodesia (Resolution 217, 20 November 1965, and later resolutions) and South Africa (Resolution 418, 4 November 1977). In the case of Rhodesia, the Security Council said that the situation resulting from the proclamation of independence by illegal authorities was extremely grave, and that its continuation constituted a threat to international peace and security. Action was taken under Article 41 against a non-state entity. However, the use of force was also authorized (Resolution 221) to secure the effectiveness of Article 41 measures. In the case of South Africa, an arms embargo was imposed on the general basis of Chapter VII, after the SC had considered that the military build-up by South Africa, its acts of aggression against neighboring states, and its attempts to produce nuclear weapons all constituted a threat to the maintenance of international peace and security.
- 46 Glennon, *Limits of Law*, 115–17, and the references made therein. The advocates of domestic jurisdiction considered the Rhodesian matter, as well as that of South Africa, entirely domestic. The SC action was justified on the basis of a national policy of racial discrimination. The competence of the SC to decide its own authority is not considered enough of a justification for enlarged interpretations.
- 47 Press Release by the UN Security Council, 26 February 1993 (S/25344).
- 48 *The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty* (Canada Ottawa: International Development Center, 2001), 2, 15.
- 49 *Millennium Report of the UN Secretary-General; Freedom from Fear*, 43. For the entire report, see <http://www.un.org/millennium/sg/report/state.htm>. The need for a human-centered approach to security is also reinforced by the danger of weapons of mass destruction, most notably nuclear weapons.
- 50 Glennon, *Limits of Law*, 102–12.

- 51 *Iraq*, UN Doc. S/RES/688(1991); *Yugoslavia*, UN Doc. S/RES/713 (1991); *Haiti*, UN Doc. S/RES/841(1993); *Liberia*, UN Doc. S/RES/788 (1993); *Burundi*, UN Doc. S/RES/1072 (1996).
- 52 *Bosnia-Herzegovina*, UN Doc. S/RES/770 (1992); *Angola*, UN Doc. S/RES/929 (1993); *Albania*, UN Doc. S/RES/1101 (1997); *Sierra Leone*, UN Doc. S/RES/1132 (1997); *Congo*, UN Doc. S/RES/1234 (1999).
- 53 UN Doc. 751 (1992), 794 (1992).
- 54 Glennon, *Limits of Law*, 118, L.K. Frederic, Jr., "The United Nations at Fifty: The Security Council's First Fifty Years," *AJIL* (1995): 506, 513; and R. Gordon, "United Nations Intervention in Internal Conflicts: Iraq, Somalia and Beyond," *Michigan Journal of International Law* 15 (1994): 519, 554.
- 55 S/RES/929 (1994), preamble, paras. 8 and 10. See also para. 3 of the resolution explicitly authorizing the humanitarian operation to be carried out: "Acting under Chapter VII of the Charter of the United Nations, authorizes the Member States cooperating with the Secretary-General to conduct the operation referred to in paragraph 2 above using all necessary means to achieve the humanitarian objectives set out in subparagraphs 4(a) and (b) of resolution 925 (1994)." The SC's Resolution 918 (1994) had already noted the existence of a humanitarian crisis of enormous proportions, which could eventually constitute a threat to regional peace and security.
- 56 O. Paye, *Sauve qui veut? Le droit international face aux crises humanitaires* (Brussels: Editions Bruylant, 1996), 197–99. It should be noted that in this case the SC had also recognized that the situation in Rwanda constituted a unique case, which demanded an urgent response from the international community (Resolution 929/1994, preamble, para. 11).
- 57 Ten (Belgian) UNAMIR (UN Assistance Mission to Rwanda, established in September 1993) members were killed, followed by the consequent withdrawal of the rest of the Belgian troops. At the same time, Hutu propaganda broadcasts went into action dehumanizing the Tutsi, who were claimed to be organizing themselves to destroy the Hutu people. The genocide became a reality with the murder of an estimated 800,000 Tutsi civilians and Hutu sympathizers between April 6 and early June 1994. *Encyclopedia of Conflicts*, ed. J. Cimentí (Chicago – London: Fitzroy Dearborn Publishers 1999), 1125–36.
- 58 UN Doc. S/RES/1078 (1996), preamble, paras. 1, 3, and 19.
- 59 UN Doc. S/RES/1199 (1998), preamble, paras. 7, 10, 11, and 14.
- 60 UN Doc. S/RES/1264 (1999), preamble, paras. 4, 7, 13, and 14.
- 61 UN Doc. S/RES/1267 (1999), preamble, para. 8; UN Doc. S/RES/1333 (2000), preamble, para. 14 and UN Doc. S/RES/1363 (2001), preamble, para. 2.
- 62 The Taliban had been demanded to cease providing sanctuary and training for international terrorists (Res. 1214 (1998, paragraph 13), to turn over Osama bin Laden to appropriate authorities in a country where he has been indicted (Res. 1267 (1999), paragraph 2), and to halt illegal drug trafficking activities (Res. 1333 (2000), paragraph 9). A flight embargo and a freezing of funds (Resolution 1267 (1999)) and an arms and military and chemical material embargo (Resolution 1333 (2000)) were introduced to back up these demands. In addition, further restrictions were introduced by closing down Taliban and Ariana Afghan Airlines offices in member state territories (Res. 1333 (2000), paragraph 8).
- 63 The SC Resolution 1368 (2001) adopted after the New York and Washington attacks of 11 September 2001 clearly condemned terrorism as a threat to international peace and security and assured the UN's determination to combat terrorism by all means recognizing the inherent right of individual or collective self-defense in accordance with the UN Charter. UN Doc. S/RES/1368 (2001), especially preamble, paras. 2–3 and Articles 4–5. See also a further resolution UN Doc. S/RES/1373 (2001), especially preamble, paras. 3–5 and Articles 1–3.
- 64 SC Res. 1441 (2002), preamble, para. 3: "Recognizing the threat Iraq's non-compliance with Council resolutions and proliferation of weapons of mass destruction and long-range missiles poses to international peace and security."
- 65 Simma, *Charter*, 724–25.
- 66 SC Res. 1296 (2000) and SC Res. 1314 (2000).
- 67 Recommendations are limited to non-mandatory suggestions, whereas decisions on enforcement measures or authorizations (via SC practice) create binding effects in international law. Measures under Articles 41 and 42 can be the object of SC recommendations (indicating political support), but these are

- measures taken by individual states, which do not fall within the framework of collective security and, therefore, need to be carried out in accord with general international law. Authorizations constitute a middle ground between non-binding recommendations and binding decisions, as they allow member states to resort to certain actions. The authority of the SC to issue such authorizations, at least with respect to military measures, has been affirmed through its own practice. In such a case, the authorization relieves the acting states from the prohibition on the use of force and creates the same permissive effect as binding decisions. Simma, *Charter*, 728–29.
- 68 The Council has on several occasions called for the application of the kinds of measures listed in Article 41, without citing it and without determining that the situation was of the nature requiring action under Chapter VII. Examples of such cases are: South Africa, where the SC called for the boycott of South African goods, a cessation of the export of strategic materials, and an embargo on the sale of military material; Portugal, where the council called a similar halt to any assistance to Portugal that would aid in its continued repression of the peoples in its African territories; and Southern Rhodesia, as the SC called upon all states not to recognize the illegal authority, not to entertain any diplomatic or other relations with it, to refrain from any actions that would assist the regime, to desist from providing it with military goods, and to do their utmost to break all economic relations with Southern Rhodesia. Goodrich, Hambro, and Simmons, *Charter of the United Nations*, 311–14.
- 69 C. Gray, *International Law and the Use of Force*, 154–58.
- 70 Although, in practice, the SC has often taken military action under Chapter VII with the concerned state's consent. In the cases of Albania, the Central African Republic, Sierra Leone, Bosnia (after the Dayton agreement), and East Timor, the states concerned had expressed their consent for the action. With this consent, the measures no longer are enforcement actions and need not be based on Chapter VII. However, the use of the Chapter does endow the forcible action with greater legitimacy, and the operation becomes independent of the consent in the future, should the consent be revoked. Simma, *The Charter*, 754–55.
- 71 The Military Staff Committee that was established on the basis of Article 47 submitted a report on the subject which showed that there was a disagreement on: numbers of armed forces to be made available by the permanent members; stationing of these forces; the Article 45 clause for applying the agreements; supplementary assistance; and total manpower. See Simma, *Charter*, 633, 636–39, and 642–43.
- 72 T.M. Franck, "Fairness in the International Legal and Institutional System," 286–87. Franck cites Professor Sohn on this subject: "The SC may establish a UN Force under Article 42 independent of Article 43, since the latter does not limit the Council's using any forces it might be able to obtain by other methods"; passage cited in *AJIL* 52 (1958): 229, 230. See also J.A. Frowein, "International Law Enforcement in Case of Security Council Inaction," in *The Future of International Law Enforcement. New Scenarios-New Law* (Berlin: Duncker and Humboldt 1992), 112; and Simma, *Charter*, 633.
- 73 *Certain Expenses of the United Nations (Article 17, para 2 of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports 1962, 151, 182, 186 (separate opinion of Judge Sir Percy Spender).
- 74 *Certain Expenses of the United Nations*, Advisory Opinion, ICJ Reports, 1962, 167–68.
- 75 SC Res. 82 (1950) and 83 (1950).
- 76 SC Res. 161, 21 February 1961; SC Res. 169, 24 November 1961.
- 77 Resolution 217, 20 November 1965, and later resolutions (esp. 221).
- 78 SC Res. 661, 6 August 1991. The force consisted of contingents voluntarily deployed and commanded by states under unified American command.
- 79 Resolutions 794, 3 December 1992; and 814 (1992): 'Operation Restore Hope' was carried out by UNITAF (Unified Task Force) under U.S. command.
- 80 Resolution 929, 21 June 1994: 'Operation Turquoise' was implemented by France. The objectives were set out in para. 4 of Resolution 929 (1994) in the following way: "a) contribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, including through the establishment and maintenance, where feasible, of secure humanitarian areas; and b) provide security and support for the distribution of relief supplies and humanitarian relief operations...."
- 81 UNPROFOR was established by Resolution 743 (1992). UNPROFOR's mandate was enlarged to cover its humanitarian tasks [to facilitate the delivery of humanitarian assistance (Resolution 770/1992) and the "protection of safe areas" (Resolution 836/1993)]. Subsequently, it was authorized to use force

- in order to “respond, as far as necessary and possible, to attacks against safe areas, against convoys to and from these areas and against UNPROFOR personnel” (Report of the Secretary-General, S/25939, 14 June 1993).
- 82 Resolution 1031, 15 December 1995. The Security Council authorized the establishment of a multinational peace implementation force (IFOR) under unified command and control (para. 14), which was provided by NATO. IFOR’s legal successor, SFOR (the multinational Stabilization Force), was established under Resolution 1088 (1996), 12 December 1996, with NATO continuing to exercise its command role.
- 83 Resolution 1080, 15 November 1996. The Security Council authorized the establishment of a temporary multinational force in addition to authorizing the use of all necessary means to achieve the humanitarian objectives (facilitating the immediate return of humanitarian organizations and the effective delivery by civil relief organizations of humanitarian aid to alleviate the immediate suffering of displaced persons, refugees, and civilians at risk in eastern Zaire, and to facilitate the voluntary, orderly repatriation of refugees by the United Nations High Commissioner for Refugees as well as the voluntary return of displaced persons (articles 3 and 5). Canada offered to lead this force (S/1996/941, 14 November 1996). However, this authorization was not implemented.
- 84 SC Res. 1101, 28 March 1997.
- 85 SC Res. 1125, 6 August 1997; SC Res. 1136, 6 November 1997.
- 86 UN Doc. S/PRST/1997/36, 11 July 1997; SC Res. 1132, 8 October 1997; SC Res. 1270, 22 October 1999; and SC Res. 1289, 7 February 2000.
- 87 Resolution 1244, 10 June 1999. The SC authorized member states and relevant international organizations to establish the international security presence in Kosovo and to provide it with all the necessary means to fulfill its responsibilities under para. 9 (points a-h), and to this end authorized it to use all necessary measures. Deployment began on 10 June 1999 under the unified command of NATO. For the details of this operation, see the Internet site of the Allied Forces Southern Europe-Operation Joint Guardian, <http://www.afsouth.nato.int/kfor/int>.
- 88 Resolution 1264, 15 September 1999. The SC authorized the establishment of a multinational force under a unified command structure to restore peace and security in East Timor, to protect and support UNAMET (United Nations Mission in East Timor) in carrying out its tasks, and, within force capabilities, to facilitate humanitarian assistance operations. To this end, the multinational force was authorized to take all necessary measures. A multinational force was deployed on 20 September 1999 under the unified command of Australia.
- 89 SC Res. 1291, 24 February 2000; SC Res. 1386, 20 December 2001. Simma, *Charter*, 751–53.
- 90 Matters appropriate for regional action are most likely those between parties to regional arrangements; however, this does not necessarily exclude the possibility of the Security Council’s consideration of a request from one of the parties. Also, regional action is not appropriate in cases involving a state not a party to the regional arrangement. Goodrich, Hambro and Simmons, *Charter of the United Nations*, 354–59.
- 91 The requirement of consistency with “the Purposes and Principles of the United Nations” is in line with the general principle that the Charter obligations prevail over obligations of other international agreements entered into by members. Moreover, it respects the view that the global organization for peace and security is the primary one, whereas regional frameworks function within the global organization, being subject to the same overriding purposes and principles. *Ibid.*, 359–60.
- 92 Before appealing to the Security Council, the parties to a dispute must attempt to resolve it by other peaceful means.
- 93 Goodrich, Hambro and Simmons, *Charter of the United Nations*, 360–64.
- 94 The article includes an exception to the authorization: action against enemy states is allowed under conditions specified in Articles 53.1-2 and 107. The enemy state concept is, however, nowadays falling into *desuetude*.
- 95 Simma, *Charter*, 864–69. Unauthorized regional enforcement measures can be corrected under limited circumstances afterwards. As regards the question of an express authorization, Article 53 contains no further regulation that could be interpreted as either favoring an implicit interpretation or not. In practice, too rigid an interpretation in favor of an express authorization might be difficult to imagine, as it is

easily conceivable that there might be tacit support for the regional action under consideration, yet for various reasons some (permanent) members are unable to express their consent explicitly. Simma inclines towards the maintenance of Security Council control, at least in the sense that a resolution passed by the organ in question regarding the regional situation contains language that can point toward an implied authorization of enforcement measures.

- 96 Goodrich, Hambro, and Simmons, *Charter of the United Nations*, 354–59. The question of “enforcement action” came up in the Security Council in connection with the Dominican crisis in May and June 1965. An Inter-American Force authorized by an OAS resolution was planned, so that the force could cooperate in the establishment of normal conditions in the Dominican Republic. In the Security Council discussions, one representative argued that the function of the force was that of pacific settlement, under Article 52 of the UN Charter, instead of an enforcement action under Article 53, which would necessitate something to be endorsed, when here the OAS resolution included a mere recommendation on the matter.
- 97 Let it be added that the literature unanimously confers the status of a regional agency only upon these three international organizations.
- 98 Simma, *Charter*, 823–24. Although regional arrangements or agencies (Article 52) and collective defense alliances do distinguish themselves through a range of corresponding technical details—e.g., the obligation (under Chapter VIII) to report fully to the Security Council any activities contemplated or undertaken in the regional framework.
- 99 The contention is that the regional use of force would be lawful, if the Security Council had not disapproved it. This line of argumentation was obviously advanced by the U.S. during the Cuban missile crisis.
- 100 The contention here is that if a regional arrangement recommends that its member states use force against another state, such action cannot be considered an enforcement action under Article 53, exactly because such action is not mandatory.
- 101 Arend and Beck, *International Law and the Use of Force*, 62–63.
- 102 “Regional action as a matter of decentralization, delegation and cooperation with United Nations efforts could not only lighten the burden of the Council but also contribute to a deeper sense of participation, consensus and democratization in international affairs.” *An Agenda for Peace*, UN Doc. S/24111-A/47/277, para. 62, ILM 31 (1992), 971.
- 103 In 1964 the Security Council asked the OAU to attend to the Congo Crisis and cited Articles 52 and 54 of the Charter.

## Chapter 4

- 1 M.H. Mendelson, “Formation of Customary International Law,” *RCADI* 272 (1998): 198–04.
- 2 ICJ Reports 1969, Rep. 3, at 44, para. 77. See also 41, para. 71.
- 3 F.R. Tesón, “The Liberal Case,” 109.
- 4 The less powerful may often be pressured into supporting the positions of the “leading” states (carrot and sticks). As a result, *opinio juris* is dimmed. M. Byers and S. Chesterman, “Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law,” in *Humanitarian Intervention*, eds. J.L. Holzgrefe and R.O. Keohane (Cambridge: Cambridge University Press, 2003), 192.
- 5 ICJ Reports, Rep. 3, 44.
- 6 M.J. Glennon, *Limits of Law*, 37–48. Glennon adds to the list of arguments one relating to the Charter’s constitutional, and thus, inviolable, character, and another suggestion that the claim that subsequent custom has superseded the Charter’s rules regarding the use of force is no more persuasive than the contention that frequent crime has supplanted certain criminal laws.
- 7 *Ibid.* Glennon questions the fact that the Charter’s ban *jus cogens* applies only to states, but not to the Security Council.
- 8 *Ibid.*
- 9 As mentioned, Grotius and de Vattel concluded the existence of such a right. Otherwise, see I. Brownlie, *International Law and the Use of Force by States*, 338–42; Brownlie, “Thoughts on Kind-

- Hearted Gunmen,” in *Humanitarian Intervention and the United Nations* ed. R.B. Lillich (Charlottesville: University Press of Virginia, 1973), 139–48; *Humanitarian Intervention. Legal and Political Aspects* (Copenhagen: Danish Institute of International Affairs, 1999), 77–79; *Oppenheim’s International Law*, Vol. 1, 9<sup>th</sup> ed. (New York: Longman, 1996 [orig. 1905]), 442–44, esp. note 17; F.R. Tesson, *Humanitarian Intervention*, 155–59; W.D. Verwey, “Humanitarian Intervention,” in *The Current Legal Regulation of the Use of Force*, ed. A. Cassese (Dordrecht: Martinus Nijhoff Publishers, 1986), 57–78.
- 10 J.L. Brierly, *The Law of Nations* (Oxford: Clarendon Press 1963), 403.
- 11 J-P.L. Fontayne, “Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations,” in *Humanitarian Intervention and the United Nations*, ed. Lillich, 197–228; see especially footnote 10 for writers opposing humanitarian intervention.
- 12 I. Brownlie, *International Law and the Use of Force by States*, 338–42.
- 13 J.L. Holzgrefe and R.O. Keohane, eds., *Humanitarian Intervention*, 45. Grim examples include Armenians massacred by the Turks (1914–19), the forced starvation of 4 million Ukrainians by the Soviets (1930s), the massacre of hundreds of thousands of Chinese by the Japanese (1931–45) and the extermination of 6 million Jews by the Nazis (1939–45).
- 14 *Humanitarian Intervention. Legal and Political Aspects*, 77–79.
- 15 Yet the governments concerned did not refer to humanitarian intervention as a justification, and many other motives were presumed to be the basis of the action.
- 16 The humanitarian motives were genuine, but the Great Powers had suspicions of French ambitions in the area: therefore, to provide some guarantee of disinterestedness, the intervention was authorized by an agreement and a protocol of 3 August 1860 to which the Great Powers and the Ottoman Empire were parties. I. Brownlie, *International Law and the Use of Force by States*, 339–40.
- 17 The Great Powers were relying on international conventions and customary principles as regards their demands to Turkey; intervention was avoided when Turkey promulgated a new, more tolerant constitution as a consequence of Great Britain’s mediation efforts. M. Reisman, “Humanitarian Intervention to Protect the Ibos,” in *Humanitarian Intervention and the United Nations*, 181.
- 18 The Great Powers reserved the right to act in case Turkey did not maintain the minimum conditions demanded in the areas in question. Due to non-compliance Russia declared war on Turkey, and ultimately, through the Treaty of San Stefano and the Congress of Berlin in 1878, a system of Christian autonomy was established in Bulgaria, whereas Montenegro, Serbia, and Romania were made independent and Bosnia and Herzegovina occupied and annexed by the Dual Monarchy. *Ibid.*, 182.
- 19 Turkish troops were set upon the civil population in the course of the insurrection in Macedonia in 1903; as a consequence, the Dual Monarchy and Russia demanded that the Sultan provide for future protection in various procedures, and that he remit a year’s taxes by way of reparation. *Ibid.*, 183.
- 20 Although here the humanitarian objectives also become questionable when French troops stayed after the rescue operations had been completed and behaved like an occupation force. See Verwey, “Humanitarian Intervention,” 61.
- 21 I. Brownlie, *International Law and the Use of Force by States*, 339. The author underlines the difficulty involved in studying state practice due to the fact that the humanitarian justification is often secondary to the ‘real’ justification for the intervening state’s policy.
- 22 ‘Conduct’ is used to refer to acts by subjects of international law as well as to any opinions expressed on the appropriateness or legality of the conduct of other subjects of international law. See P. Daillier, D. Nguyen Quoc, and A. Pellet, *Droit international public*, 317–39.
- 23 The ICJ has observed that: “In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.” See *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986, para. 186, 88.
- 24 The solution is far less clear with respect to regular and recurrent practice: how often and for how long must a precedent be repeated? The ICJ has observed that, “although the passage of only a short period of time was not necessarily a bar to the formation of a new rule of customary law ... it was indispensable that State practice during that period, including that of States whose interests were particularly af-

- ected, should have been both extensive and virtually uniform.” See *North Sea Continental Shelf*, ICJ Reports 1969, 43 and 74.
- 25 Daillier, Nguyen Quoc, and Pellet, *Droit international public*, 319–23.
- 26 *North Sea Continental Shelf*, ICJ Reports 1969, 44.
- 27 Glennon, *Limits of Law*, 70–71.
- 28 F.R. Tesón, *Humanitarian Intervention*, 136–37 and 152–59.
- 29 *Ibid.*, 158–59.
- 30 *Humanitarian Intervention. Legal and Political Aspects*, 88–90.
- 31 A.C. Arend and R.J. Beck, *International Law and the Use of Force*, 114–15. Some remarks are presented against the qualification of the intervention as humanitarian: there was the request of the Palestinian people (however, the request was not emanating from any state, which is a precondition for an intervention not to be qualified as humanitarian); also, since the planned establishment of an Arab state in Palestine never became a reality, and since none of the neighboring Arab states at that time purported to annex any part of Palestine, Israel could have argued that her military operations were not taking place on territory under the sovereignty of another state (exactly the case of humanitarian intervention, which takes place in another state against its violations on its territory).
- 32 *Ibid.*, 115–16. The quote is from the Belgian representative to the United Nations.
- 33 *Ibid.* Italy, the U.K., France, and Argentina explicitly supported the humanitarian grounds, whereas Tunisia, Ecuador, Poland, and the USSR negated them, on the basis of the lacking Congolese consent. Professor Verwey argues that the protection of Belgium’s own nationals was justified, whereas the humanitarian intervention character could have been blurred by other motives (like economic interests). See Verwey, “Humanitarian Intervention,” 61.
- 34 Some 1300 white, 400 Asian, and 200 Congolese (nationals of 18 different countries) were rescued. See Verwey, “Humanitarian Intervention,” 61–62.
- 35 Arend and Beck, *International Law and the Use of Force*, 116–17.
- 36 Verwey, “Humanitarian Intervention,” 62–63.
- 37 Reisman, “Humanitarian Intervention,” 186–87.
- 38 As cited by Verwey, “Humanitarian Intervention,” 62–63.
- 39 International Commission of Jurists, *The Events in East Pakistan 1971* (Geneva, 1972), 92–93 and 96.
- 40 M. Akehurst, “Humanitarian Intervention,” in *Intervention in World Politics*, ed. H. Bull (Oxford 1984), 96. However, this statement was deleted from the final version of the Official Records of the Security Council. Akehurst argues that India most likely changed its mind, realizing that humanitarian intervention was not enough of a justification for the use of force, and claimed instead that Pakistan had attacked it first. Tesón argues, however, that this change of mind is irrelevant: what really mattered was the whole picture of the situation being one that warranted foreign invitation on humanitarian grounds. Tesón, *Humanitarian Intervention*, 186.
- 41 *Ibid.*, 79.
- 42 Verwey, “Humanitarian Intervention,” 63–64. In addition to the humanitarian considerations, other factors determining this intervention were: 1. Self-defense, which was invoked in response to the bombing of an Indian airport by Pakistani forces; 2. The enormous flow of refugees, which was causing serious economic problems in India; and 3. Political considerations due to the fact that India’s rival was considerably weakened as a result of the intervention—six days later, the independent State of Bangladesh was proclaimed.
- 43 Humanitarian considerations were explicitly invoked for the support of each of these operations. However, there is no firm evidence to sustain their pure humanitarian character—quite the contrary. On the one hand, as far as the rescue operations are concerned, they were primarily aimed at saving nationals of the intervening states. On the other hand, the size and/or duration of the military involvement in comparison with the requirements of the rescue operations was disproportionate and sustains the conclusion that there was in most, if not all, cases the desire to exert influence upon the authority structure in the target state. Exactly the same conclusion applies to the non-rescue interventions by Indonesia and South Africa. *Ibid.*, 66. Also along these lines see Glennon, *Limits of Law*, 74–75; and Arend and Beck, *International Law and the Use of Force*, 119–21.

- 44 *Humanitarian Intervention. Legal and Political Aspects*, 88–90. Because of the operation's humanitarian motives and its null cost in human lives, Professor Tesón has labeled it "an instance of humanitarian intervention *par excellence*." Tesón, *Humanitarian Intervention*, 177–78. The involvement of France's economic interests was, however, evident; Glennon, *Limits of Law*, 73. Also, the scope of the human rights violations by the Bokassa régime seems insufficiently broad for purposes of humanitarian intervention; Arend and Beck, *International Law and the Use of Force*, 125–26.
- 45 Tanzania justified the action mainly with three objectives: to respond to Ugandan aggression; to punish Idi Amin for his authorization of that attack; and to deter a second Ugandan assault on Tanzanian territory. *Ibid.*, 123–25.
- 46 *Humanitarian Intervention. Legal and Political Aspects*, 88–90. For a more detailed description of both of these interventions, see Téson, *Humanitarian Intervention*, 158–75. Although here again, Glennon adds self-interested grounds for intervention: Tanzania's President's (Julius Nyerere) personal friend had been overthrown in Amin's coup, Uganda had intervened in Tanzania a month before, and Tanzania had a previous record of intervention vis-à-vis disliked regimes. Glennon, *Limits of Law*, 72–73.
- 47 Arend and Beck, *International Law and the Use of Force*, 121–23. Vietnam accused Kampuchea of the initial act of aggression, whereas the civil war was fought by the people of Kampuchea, who eventually overthrew the inhumane regime.
- 48 *Ibid.* See also footnotes 100–101 for further references. The General Assembly was to make a political assessment of the events: for the first, it voted to accept the credentials of the defeated Khmer Rouge régime. For the second, the Vietnamese intervention was condemned.
- 49 Mention can be made of the U.S. intervention in Vietnam (e.g., the Gulf of Tonkin in 1964), and the U.S. intervention in Panama in 1989, capturing General Noriega, who was to be put on trial later in the U.S.
- 50 Glennon, *Limits of Law*, 76–78. Nyerere may or may not have invaded Uganda to restore a friend to power, to repel aggression, to stop genocide, etc.; the French may have overthrown Bokassa for his barbarism, to make the country safe for investors etc.; India may have invaded East Pakistan to halt genocide, to halt the massive flow of refugees, etc.
- 51 *Humanitarian Intervention. Legal and Political Aspects*, 89–90. See for instance the Declaration on Friendly Relations from 1970, or the 1975 Helsinki Final Act from the Conference on Security and Cooperation in Europe (CSCE), Declaration on Principles.
- 52 Glennon, *Limits of Law*, 79–84. If something is said at all, it is said by a handful of officials of some states; it is improper to infer the agreement of others from their silence.
- 53 G. Nolte, "Restoring Peace by Regional Action: International Legal Aspects of the Liberian Conflict," *Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht* 53 (1993), 605–9.
- 54 *Ibid.*
- 55 The deployment of a multinational group of ECOWAS member states (mainly Gambia, Ghana, Guinea, Nigeria, and Sierra Leone) to monitor the cease-fire (ECOMOG) was referred to as a peace-keeping operation rather than a peace-enforcement operation.
- 56 President Doe had lost almost all control over his country by the time that ECOWAS was invited to intervene militarily in Liberia. See *New York Times*, 12 September 1990, and *The Economist*, 1 September 1990, 39.
- 57 As cited by C. Walter, "Security Council Control over Regional Action," in *Max Planck Yearbook of United Nations Law*, Vol. 1, eds. J. Frowein and R. Wolfrum (The Hague: Kluwer International Law, 1997), 152.
- 58 UN Doc. S/21485, 10 August 1990 (Annex). The factors determining the intervention in question included the government's invitation, the maintenance of overall regional peace and security, the maintenance of the cease-fire, the restoration of peace and democracy, the rescue of nationals of ECOWAS countries, the rescue of Liberian nationals, and stemming the flow of refugees. See G. Nolte, "Restoring Peace," 618–19.
- 59 G. Nolte, "Restoring Peace," 626.
- 60 S/22133, 22 January 1991.
- 61 S/RES/788 of 19 November 1992.

- 62 S/RES/856 of 10 August 1993; T. Franck "Interpretation and Change," in *Humanitarian Intervention, Ethical, Legal and Political Dilemmas*, eds. J.L. Holzgrefe and R.O. Keohane (Cambridge: Cambridge University Press, 2003), 216–26.
- 63 In 1992, NPFL (National Patriotic Front of Liberia, aligned with the warlord Charles Taylor) forces had invaded the country, and continuous fighting with the Sierra Leonean army had begun. ECOWAS was involved in diplomatic efforts trying to mediate a cease-fire between the warring parties. Fighting continued in 1995 between the government forces and the Revolutionary United Front (RUF) rebel forces; ECOWAS was re-requested to mediate by Sierra Leone's President Strasser, who came to power in a military coup. Another military coup forced Strasser out of office in January 1996, and as a follow-up of the elections, Ahmed Tejan Kabbah and his United National People's Party were elected to power. Another military coup brought to power Major Johnny Paul Koroma in May 1997. *Encyclopedia of Conflicts*, 150–51.
- 64 Initially the ECOMOG presence was with the consent of the democratically elected president, soon to be overthrown in a coup by Sierra Leone's military.
- 65 *Achievements of ECOWAS, Regional Peace and Security 1*, at <http://www.ecowas.int/sitecedeado/english/peace.htm>. Parties of the conflict signed an agreement protocol on the final settlement of the Sierra Leonean crisis in Lome in September 1999. A UN force, UNAMSIL, replaced ECOMOG forces in Sierra Leone.
- 66 Months after the start of the intervention, the SC issued a presidential statement, welcoming the ECOWAS mediation efforts, but not specifically endorsing its use of force. S/PRST/1997/36.
- 67 Resolution 1132 (1997), preamble, para. 7, 8 and articles 1, 2, 5, and 6.
- 68 S/RES/1181 of 13 June 1998; Franck, "Interpretation and Change," 216–26.
- 69 The Kurds and the Shiites were engaged in an armed rebellion against their government, which had been weakened by its military defeat and withdrawal from Kuwait at the beginning of March 1991. The rebellion was encouraged by several Western states, which saw this as a means of bringing about the fall of the Iraqi President, Saddam Hussein. See O. Cortén and P. Klein, *Droit d'ingérence ou obligation de réaction* (Brussels: Bruylant, 1996), 223.
- 70 In a very short space of time, more than one million Iraqi refugees had been taken in by Iran, and more than 500,000 by Turkey.
- 71 T.B. Knudsen, "Humanitarian Intervention Revisited: Post-Cold War Responses to Classical Problems," in *The UN, Peace and Force*, ed. M. Pugh (London 1997), 146–65.
- 72 Resolution 688 (1991), 5 April 1991.
- 73 P. Malanczuk, "The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War," *JEDI 2* (1993): 119–23.
- 74 Paye, *Sauve qui veut?*, 143.
- 75 See Letter of the Minister of Foreign Affairs of Iraq addressed to the Secretary-General of the UN. S/22513, 22 April 1991; and *Le Monde*, 22 August 1992, 5; 29 August 1992, 5; and 1 September 1992, 8; *Le Soir*, 1 September 1992, 7; and 4 September 1992, 8. It was also suggested that Iraq would have allowed the coalition forces to act through an agreement reached with the United Nations on 18 April 1991 (the day after the coalition countries began their operation) on the situation concerning humanitarian organizations (Memorandum of Understanding), in which Baghdad agreed to the establishment of a humanitarian presence in Iraq. See UN Doc. S/22513, 22 April 1991.
- 76 *Le Monde*, 25 August 1992, 3.
- 77 M. Torelli, "La dimension humanitaire de la sécurité internationale," *RCADI, Le développement du rôle du Conseil de sécurité*, Symposium, 21–23 July 1993 (Dordrecht: Martinus Nijhoff, 1993), 202–3. Apart from the United Kingdom, which invoked extreme humanitarian need. See *Le Soir*, 21 August 1992, 7. It is interesting to note that the resolution in question was also used later as a basis for air strikes against Iraq.
- 78 Knudsen, "Humanitarian Intervention Revisited," 154.
- 79 Byers and Chesterman, "Changing the Rules," 183–84, in which the reference is made to A. Aust, Legal Counsellor, FCO, statement before HC Foreign Affairs Committee, 2 December 1992, *Parliamentary Papers*, 1991–1993, HC, Paper 235-iii, 85.
- 80 *Ibid.*

- 81 R.B. Lillich, "Humanitarian Intervention through United Nations: Towards the Development of Criteria," *Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht* 53 (1993): 565.
- 82 At one end of the spectrum, some allies adopted a "never again" stance. E.g., Germany's Foreign Minister argued that NATO's decision "must not become a precedent." The French Foreign Minister likewise stressed that the Kosovo intervention "must remain an isolated case and not constitute a precedent." (However, the door was left open for exceptional circumstances). The U.S., on the contrary, concluded that Security Council authorization is preferred but not always required. At the other end of the spectrum, Belgium and the Netherlands seem willing to argue for humanitarian intervention as a legal basis in the future if the Security Council is unable or unwilling to authorize force in compelling situations. J. Stromseth, "Rethinking Humanitarian Intervention: The Case for Incremental Change" in *Humanitarian Intervention*, 238–40.
- 83 *Ibid.*, 248–55, and footnote 60 therein, where references are made to specific studies on ECOWAS's operations.
- 84 R. Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1997), 22–28.
- 85 J. Stromseth, "Rethinking Humanitarian Intervention," 238–40; for G77 declarations, see Ministerial Declaration, 23<sup>rd</sup> Annual Meeting of the Ministers for Foreign Affairs of the Group of 77, 24 September 1999, <http://www.g77.org/Docs/Decl1999.html>; Declaration of the Group of 77 South Summit, Havana, Cuba, 10–14 April 2000, [http://www.g77.org/Docs/Declaration\\_G77Summit.htm](http://www.g77.org/Docs/Declaration_G77Summit.htm). For instance, in Africa the debate on intervention simply misses the point; military adventures of Western colonial powers have made Africa's new leaders wary of any form of intervention across borders. Although admittedly there is a new shift in thinking, presented by Africa's "new interventionists," who have been willing to violate the non-intervention and territorial integrity clauses of the OAU. Byers and Chesterman, "Changing the Rules," 190–91.
- 86 Stromseth, "Rethinking Humanitarian Intervention," 238–40.
- 87 Thereby clearing the state of *non liquet*, at least as far as humanitarian use of force is concerned.
- 88 Reisman, "Humanitarian Intervention," 194–95.
- 89 See Interim Report of the Sub-Committee on the International Protection of Human Rights by General International Law, ILA, Report of the Fifty-Fourth Conference 633 (The Hague); Second Interim Report of the Sub-Committee of the International Protection of Human Rights by General International Law, ILA, Report of the Fifty-Fifth Conference 608 (New York, 1972); Third Interim Report of the Sub-Committee on the International Protection of Human Rights by General International Law, ILA, Report of the Fifty-Sixth Conference 217 (New Delhi, 1974); Final Report of the Sub-Committee on the International Protection of Human Rights by General International Law, ILA, Report of the Fifty-Seventh Conference 519 (Madrid, 1976). See also Lillich, "Humanitarian Intervention through United Nations," 561–62.
- 90 Imminent or on-going violations of human rights, failure to settle the dispute by peaceful means, and inaction of the Security Council.
- 91 Inform the Security Council of the intervention and its limited specific objective (time permitting), stop violations of human rights, address a clear ultimatum to the state concerned demanding the cessation of violations of human rights and/or an improvement of the situation and, if possible, obtain an invitation from the government of the country in which the intervention is to take place.
- 92 The intervention must have as limited an effect as possible on the structure of authority of the state concerned; the duration of the intervention must be for as limited a period as possible, and the intervening party must withdraw as soon as the limited specific objective has been achieved; the coercive measures taken must not exceed those that are absolutely necessary for achieving the limited specific objective.
- 93 Such a failure leads to the application of the Chapter VII of the UN Charter.
- 94 *Humanitarian Intervention. Legal and Political Aspects*, 111–20.
- 95 Tesón, "The Liberal Case," 110–11. Thus, Tesón argues that a gross violation of human rights is not only an obvious assault on the dignity of persons, but a betrayal of the principle of sovereignty itself.
- 96 Kofi Annan, Address to the 54<sup>th</sup> Session of the UN General Assembly, 20 September 1999, reprinted as Kofi A. Annan, *The Question of Intervention: Statements by the Secretary-General* (New York: United Nations Department of Public Information, 1999), 39.

- 97 *The Responsibility to Protect*. Report of the International Commission on Intervention and State Sovereignty, December 2001, 13–15.
- 98 *Ibid.*, 19–45.
- 99 Adapting such a strategy to the normative framework *de lege ferenda*, which is obviously based on the current conventional and customary regulation, but enlarges to incorporate the effective protection of human rights in the realm of legality.
- 100 Independent International Commission on Kosovo, *The Kosovo Report*, <http://www.reliefweb.int/library/documents/thekosovoreport/htm>, 187–98. The Commission’s framework allows for humanitarian intervention without Security Council authorization in exceptional cases, but most of the elements would apply to interventions mandated by the Security Council as well.

## Chapter 5

- 1 The Independent International Commission on Kosovo proposes “severe violations” as a threshold criterion for humanitarian intervention. See [www.reliefweb.int/library/documents/thekosovoreport.htm](http://www.reliefweb.int/library/documents/thekosovoreport.htm).
- 2 See Secretary-General’s Address to the Commission on Human Rights, Geneva, 7 April 2004, <http://www.un.org/apps/sg/sgstats.asp>. The Secretary-General proposed an Action Plan to Prevent Genocide, involving the whole UN system. The fifth heading concerns swift and decisive action, a continuum of steps, which, ultimately, may include military action.
- 3 *Responsibility to Protect*, 32–35.
- 4 This solution is put forward in *Humanitarian Intervention. Legal and Political Aspects*, 106–7.
- 5 Article 4 and 5. See for more detail the website of the Tribunal, at [un.org/icty/basic/statut/statute-f.htm](http://un.org/icty/basic/statut/statute-f.htm).
- 6 See Secretary-General’s Address to the Commission on Human Rights, Geneva, 7 April 2004, <http://www.un.org/apps/sg/sgstats.asp>. The ending of the culture of impunity is part of the Action Plan (of the Secretary-General) to Prevent Genocide. The wide ratification of the ICC Statute is endorsed.
- 7 International Criminal Court, Statute, part 2; UN Doc. A/Conf.183/9, as corrected by procès-verbal of 10 November 1998 and procès-verbal of 12 July 1999.
- 8 Fixing some numerical limits could easily turn against those evaluating a crisis: for instance, if the limit is fixed to 1000, what to do in cases of 990?
- 9 See Chapter 1 of this study. See also 2<sup>nd</sup> Amended Indictment of Milošević, et al., Case No. IT-99-37-PT for detailed description; available at <http://www.un.org/icty/indictment/english/mil-2ai011029e.htm>.
- 10 On 27 May 1999, the International Criminal Tribunal for the former Yugoslavia accused President Milošević of crimes against humanity and violations of the laws or customs of war, together with four other persons holding high-level positions in the FRY and Serbia. See Statement by Justice Louise Arbour, ICTY Prosecutor, The Hague, 27 May 1999, JL/PIU/404-E, and Press Release, JL/PIU/403-E, 27 May 1999. Amended version, Case No. IT-99-37-PT. This was the first time that a head of state in office had been indicted. Before Pres. Milošević was replaced by Vojislav Koštunica (following contested elections of 24 September 2001, protests in Belgrade, and the occupation of the federal parliament), there had been calls from some quarters for a ‘safe exit’ to be arranged for him should he decide to relinquish power. See “What next for Slobodan Milošević?” *The Economist*, 5 June 1999, 38. Pres. Milošević was later extradited to the ICTY. See UNMIK/PR/604, Press Release 29 June 2001.
- 11 The practice of ethnic cleansing was very strongly condemned by the international community. See Press Release SG/SM/6942, 30 March 1999, “Secretary-General profoundly outraged by reports of ‘ethnic cleansing’ conducted by Serbian forces in Kosovo.” The Secretary-General was to note later that the acts committed by the Yugoslav authorities met the criteria for genocide. See “Politics this Week,” *The Economist*, 10 April 1999, 22.
- 12 SG/SM/9126, 26.01.2004, Secretary-General Kofi Annan, Speech to the Stockholm International Forum on Preventing Genocide.
- 13 In this context, President Martti Ahtisaari has put forward an interesting idea, whereby a state that mistreats its citizens would be declared a ‘failed state’ by an independent organ, such as the International Court of Justice, as a result of which the state in question would risk intervention by the international

- community in order to stop the violations. Interview with President Martti Ahtisaari in Helsinki on 2 March 2000.
- 14 See *OSCE KVM Report Part I, Chapter 3: The Military/Security Context*; military operations 20 March-10 June 1999.
  - 15 “War with Milošević,” *The Economist*, 3 April 1999, 16. The flow of refugees also served as a warning to neighboring countries: countries that help Serbia’s enemies will expose themselves to the most serious consequences, since the sheer number of refugees threatened to create internal problems in these countries. The Yugoslav government, therefore, urged Albania, Bulgaria, FYROM, Hungary, and Romania to abstain from any “direct or indirect” action in support of NATO. FYROM, Albania, Montenegro, and Bosnia-Herzegovina were the countries that were most seriously affected by the flow of refugees. In fact, FYROM initially refused to take in any refugees without a guarantee for their transfer to other states. Consequently, NATO’s humanitarian role became crucial in these countries; for example, the permission for the stationing of 12,000 NATO troops in FYROM could be withdrawn by the government at any time if the flow of refugees threatened to upset the domestic situation. Attention was drawn to the strategic importance of FYROM at this stage in terms of the possibility of a ground option vis-à-vis Kosovo. Interview with Lt.Col. V.P. Prugh, Office of the Legal Advisor, HQ AFSOUTH, on 28 March 2000.
  - 16 Independent International Commission on Kosovo, *The Kosovo Report, Part III: Conclusion*, <http://www.reliefweb.int/library/documents/thekosovoreport.htm>. Nor could the exclusive reliance on air power stop civilian expulsions, ethnic cleansing, and murder.
  - 17 Interview with Lt.Col. G. Danczyk, JOC, HQ AFSOUTH, on 20 April 2000. The flow of refugees seemed to be linked to NATO’s previous actions.
  - 18 Interview with Admiral James O. Ellis, Jr., Commander-in-Chief, Allied Forces Southern Europe, on 13 July 2000. At the 50<sup>th</sup> NATO Summit, the unanimity of the member states translated into a clear message to the opposite party: Alliance cohesion. However, compared with the initial consensus, there were a few NATO countries (in particular Greece and Italy, but also France and Germany) which, despite the apparent backing of their governments, did have difficulty in sustaining public support for this decision. Any extension of the war effort threatened to make it even more difficult for these countries to maintain the support of their publics. Interview with Lt.Col. H. Toler, Plans & Policy Division, HQ AFSOUTH, on 20 April 2000.
  - 19 Ibid. The air campaign was to consist of several phases whose duration was not specified.
  - 20 See Statement, Vladislav Jovanovic (FRY), Press Release, “NATO Action against Serbian Military Targets Prompts Divergent Views as Security Council holds Urgent Meeting on Situation in Kosovo,” SC/6657, 24 March 1999.
  - 21 The people were either unaware of the atrocities being committed in Kosovo (see “The West versus Serbia,” *The Economist*, 27 March 1999, 29-30), or were resigned and passive due to a multitude of factors, most of them relating to the dictatorial character of the Milošević régime, which translated into media-dominance (the high degree of illiteracy in the countryside and the limited availability of foreign journals in towns accelerated the importance of broadcast media). The internal strife of the Otpor!-resistance movement, the sullen passivity and non-unity of the opposition due to earlier set-backs in the 1996 fake elections, the increasing violence of the régime against any opposition and, Serbian-Albanian antagonistic feelings also played a role. The people’s sense that it was possible to influence government policies was as a result feeble or non-existent. Nenad Konstantinović, legal advisor, OTPOR! Resistance Movement, interview 24 January 2001; Sveta Matić and Goran Nišavić, advisors, interview 16 January 2001; Finnish Embassy to Belgrade, Ambassador Mäntyvaara, interview 15 January 2001; Svetlana Đurdjević-Lukić, political editor, NIN Independent Weekly, interview 18 January 2001; Milan Pajević, Stability Pact Co-coordinator, Government of the FRY, interview 15 January 2001.
  - 22 See Statement, Vladislav Jovanovic, Press Release, SC/6657, 24 March 1999.
  - 23 S/1999/328.
  - 24 Ministerial Declaration, 23<sup>rd</sup> Annual Meeting of the Ministers for Foreign Affairs of the Group of 77, 24 September 1999, at <http://www.g77.org/Docs/Decl1999.html> (“The Ministers ... rejected the so-called right of humanitarian intervention, which had no basis in the UN Charter or in international law”); Declaration of the Group of 77 South Summit, Havana, Cuba, 10-14 April 2000, at

- [http://www.g77.org/Docs/Declaration\\_G77Summit.htm](http://www.g77.org/Docs/Declaration_G77Summit.htm) (“We reject the so-called ‘right’ of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law.”) The 133 states voting included 23 Asian states, 51 African states, 22 Latin American states, and 13 Arab states. The subsequent literature, especially from American sources, barely mentions these statements. M. Byers and S. Chesterman, “Changing the Rules,” 189.
- 25 See Statements, Sergein N. Martynov (Belarus), Qin Huasun (China), Kamallesh Sharma (India), Martin Andjaba (Namibia), Sergei Lavrov (Russia), Press Release, “NATO Action against Serbian Military Targets Prompts Divergent Views as Security Council Holds Urgent Meeting on Situation in Kosovo,” SC/6657, 24 March 1999. In principle, Brazil and Gabon regretted the taking of military action. See Statements by Enio Cordeiro (Brazil) and Denis Dangué Rewaka (Gabon). Cuba joined these countries and firmly condemned the use of force. See Statement by Bruno Rodríguez Parrilla (Cuba), Press Release SC/6659, 26 March 1999. While condemning the use of armed force against a sovereign state, Ukraine noted that the ultimate responsibility lay with the government in Belgrade, which had refused to co-operate. See Statement by Volodymyr Yel’Chenko (Ukraine), Press Release SC/6659, 26 March 1999.
  - 26 Members rejecting the draft resolution were: Canada, France, the Netherlands, the U.K., the U.S. (5 NATO countries), and Argentina, Bahrain, Brazil, Gabon, Gambia, Malaysia, and Slovenia.
  - 27 Statements by Muhamed Sacirbey (Bosnia-Herzegovina) and Peter Burleigh (United States). Press Release SC/6659, 26 March 1999.
  - 28 *Ibid.*, Statement by Robert R. Fowler (Canada).
  - 29 *Ibid.*, Statement by Baboucarr-Blaise Ismaila Jagne (Gambia).
  - 30 *Ibid.*, Statement by Fernando Petrella (Argentina).
  - 31 *Ibid.*, Statements by Dieter Kastrup (Germany) on behalf of the European Council, Jassim Mohammed Buallay (Bahrain), Alain Dejammet (France), and Arnold Peter van Walsum (Netherlands).
  - 32 *Ibid.*, Statement by Danilo Türk (Slovenia).
  - 33 *Ibid.*, Statement by Jeremy Greenstock (United Kingdom).
  - 34 *Ibid.*, Statement by Agim Nesho (Albania).
  - 35 *Ibid.*, Statement by Hasmy Agam (Malaysia). See Press Release, “NATO Action against Serbian Military Targets Prompts Divergent Views as Security Council Holds Urgent Meeting on Situation in Kosovo,” SC/6657, dated 24 March 1999.
  - 36 It should be noted that three of the countries that condemned the use of force (China, India, and Russia) contain 40 % of humanity (even if two of the governments concerned do not necessarily represent the voice of the people). See “War with Milošević – Law and Right when they don’t fit together,” *The Economist*, 3 April 1999, 18. In addition to this, there was the resolution of 3 April 1999 concerning the statement adopted by the Inter-Parliamentary Assembly of States Members of the Commonwealth of Independent States concerning Military Operations by the North Atlantic Treaty Organization (NATO) in the Territory of the Federal Republic of Yugoslavia. This resolution underlined that the statement had been adopted unanimously by Armenia, Belarus, Kazakhstan, Kyrgyz Republic, Moldova, Russia, Tajikistan, and Ukraine. See A/53/920 and S/1999/461.
  - 37 This was the opinion expressed by Brazil, Gabon, and Namibia. The Rio Group’s declaration of 9 April 1999 supported this option. See A/53/884 and S/1999/347.
  - 38 In addition, the European Union expressed its clear support. Heads of state and government reiterated that they could not tolerate killing and deportation in Kosovo, and that they firmly believed that the most severe measures, including military action, were necessary and justified. See *Chairman’s Summary of the Deliberations on Kosovo at the Informal Meeting of the Heads of State and Government of the European Union held at Brussels on 14 April 1999*, S/1999/429. The European Union was of the opinion that the community had done its utmost to find a peaceful solution to the conflict in Kosovo, that the Yugoslav leadership had constantly refused to make any serious contribution to finding a political solution, and that, on the eve of the twenty-first century, a humanitarian catastrophe could not be tolerated within Europe. The European Union countries felt that they were under a moral obligation to prevent any repetition of excessive behavior and violence; the suspension of military action depended on President Milošević. See European Council, “Statement giving Reasons and Aims of European Par-

- icipation in Action against the Federal Republic of Yugoslavia—Putting an End to the Isolation of FRY,” *Bulletin Quotidien Europe* 7433-26/3/1999.
- 39 A. Cassese, “*Ex iniuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?” *EJIL* 19:1 (1999): 28-29.
- 40 J.L. Holzgrefe and R.O. Keohane, *Humanitarian Intervention*, 69-70. On the last account it should be emphasized that Security Council action to move forward with conflict management should not be viewed as a wholesale endorsement by all Security Council members of all preceding actions, but Russia’s and China’s willingness to support some level of ratification. On this account, see S. Murphy, “Calibrating Global Expectations Regarding Humanitarian Interventions,” presented at the Harvard University Conference “After Kosovo; Humanitarian Intervention at the Crossroads,” 18-19 January 2001, 5.
- 41 K. Annan, Address to the 54<sup>th</sup> Session of the UN GA, 20 September 1999, reprinted in Kofi A. Annan, *The Question of Intervention: Statements by the Secretary-General* (United Nations Department of Public Information, New York, 1999), 33.
- 42 K. Annan, Address to the UN Commission on Human Rights, 7 April 1999, reprinted in *Statements by the Secretary-General* (United Nations Department of Public Information, New York, 1999), 22.
- 43 K. Annan, “Genocide is a threat to peace requiring strong, united action,” Press Release SG/SM/9126, 26 January 2004.
- 44 For SEEC statement, see S/1999/319. For Non-Aligned Countries Movement statement, see S/1999/451. For the Organization of the Islamic Conference statement, see S/1999/394.
- 45 Independent International Commission on Kosovo, *The Kosovo Report, Part III, Conclusions. Responsibility to Protect*, 34-37.
- 47 Interview with Admiral James O. Ellis, Jr., Commander-in-Chief, Allied Forces Southern Europe, on 13 July 2000.
- 48 See Contact Group Statement, London, 29 January 1999, S/1999/96.
- 49 See Letter dated 24 March 1999 from the Chargé d’Affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council and, at annex, Conclusions of the National Assembly of the Yugoslav Constituent Republic of Serbia Relative to the Report of the State Delegation on the Rambouillet and Paris Talks, S/1999/318, 24 March 1999. The parties’ views on the draft agreement that had been submitted for their signature diverged significantly. While the Albanian delegation was able to sign the agreement, the Serb delegation would have preferred to continue the negotiations which were, according to it, far from being over. See Letter from the FRY/Serb Delegation to the Negotiators, 23 February 1999; and Letter from the FRY/Serb Delegation to the Negotiators, 23 February 1999, 1600 hours. For all these documents, see M. Weller, *The Crisis*, 470-71.
- 50 The conclusions reached by the National Assembly of the Republic of Serbia do not confirm this view: “II.1 ... the delegation designated by the Government of the Republic of Serbia ... has done everything possible to reach a political agreement on the peaceful settlement of problems in Kosovo and Metohija,” “III.2 In France, instead of direct negotiations and genuine efforts to reach a political agreement on substantial and large autonomy, instead of peace and political settlement, on offer were *diktat*, forgery, threats, blackmail, and NATO troops. 3. The National Assembly points out with regret that the international mediators as well as the Co-Chairmen of the Rambouillet and Paris talks have not succeeded in bringing the delegation of the separatist movement to sit at the same table with the State delegation of Serbia. Therefore, there were no negotiations between the two delegations.” See S/1999/318.
- 51 Interview with President Martti Ahtisaari in Helsinki on 2 March 2000. The fact that the Serbs quite quickly accepted the proposal for a peaceful settlement that had been presented by President Ahtisaari, representing the European Union, and Viktor Chernomyrdin, Special Representative of the Russian Federation, would prove the contrary. The proposal for a peaceful settlement was based mainly on the Rambouillet plan, although it was stricter than the original plan.
- 52 Interview with Lt.Col. G. Danczyk, JOC, and Lt.Col. H. Toler, Plans & Policy Division, HQ AFSOUTH, on 20 April 2000. In fact, the extraction force had been prepared to intervene in three scenarios: 1. Limited extraction for specific cases; 2. Use of special forces for hostage situations; and

3. General extraction in the event of open hostilities. The OSCE/KVM observers were escorted fairly rapidly to the border by MUP forces.
- 53 “The talks will not resume unless the Serbs express their acceptance of the Accords” (for a political solution in Kosovo). See Statement by the Co-Chairs of the Contact Group, France, 19 March 1999. On the other hand, the deadlock would seem to have arisen from the fact that the Serbs were unable to accept these accords on the 23 February format. However, it is tempting to suggest that an expression of *bona fide* goodwill by the Serb government on the reopening of the negotiations and a similar expression of goodwill to negotiate for a mutually acceptable solution would have been sufficient to allow the pursuit of a peaceful settlement to continue.
- 54 The negotiators went to Belgrade for a last attempt to persuade the Serb authorities to accept the Rambouillet interim accord. See Kosovo Chronology, at <http://www.state.gov/www/regions/eur/fs-kosovo-timeline.html>.
- 55 Interviews with Lt.Col. V.P. Prugh, Office of the Legal Advisor, HQ AFSOUTH, on 28 March 2000; and with Lt.Col. M. Wilson, Political Advisor’s Office, and Lt.Col. G. Dancyk, JOC, HQ AFSOUTH, on 20 April 2000. The Alliance’s reluctance to use ground forces must have been clear to President Milošević. In fact, the plans to use ground forces had been rejected quite early on—there was insufficient political will. Interview with Lt.Col. H. Toler, Plans & Policy Division, HQ AFSOUTH, on 20 April 2000. There were, of course, rumors circulating about the ground option during the air campaign, but we can only speculate about their merits. The United Kingdom declared itself openly in favor of the use of ground forces. See “Land Ahoy,” *The Economist*, 24 April 1999, 29-30.
- 56 See Chapter 1 of this study.
- 57 Interview with Lt.Gen. A. Lombardo, Chairman of the General Matters Subcommittee, NATO Planning Board for European Inland Surface Transport (PBEIST), on 30 March 2000.
- 58 To which should be added President Milošević’s reputation of *not honoring* his commitments. See, for example, U.S. Secretary of State Albright’s conclusions, Remarks on Kosovo, Washington D.C., 27 October 1998.
- 59 Resolution 1160 (1998), para. 1, Resolution 1199 (1998) paras. 4 and 5, and Resolution 1203 (1998), paras. 1-4.
- 60 B. Simma, “NATO, the UN and the Use of Force: Legal Aspects,” *EJIL* (1999): 6-7.
- 61 J. Stromseth, “Rethinking Humanitarian Intervention,” 245-55.
- 62 Only China abstained from voting.
- 63 NATO’s participation as the military arm was quite clear: see, for example, point 4 of the agreement on the principles (draft for peaceful settlement) submitted to the Yugoslav authorities—and accepted by them—on 3 June 1999 by President Martti Ahtisaari and Viktor Chernomyrdin, S/1999/649, 7 June 1999; and para. 4 of Annex 2 to Resolution 1244 (1999), 10 June 1999. The functions of the military presence are described in detail in the resolution in question as well as in the military-technical agreement that was concluded on 10 June 1999 between the NATO and FRY military authorities. See S/1999/682.
- 64 Russia and China abstained from voting on the resolution in question as, in their opinion, the resolution would open the way to the use of armed force.
- 65 N. Ronzitti, “Lessons of International Law from NATO’s Armed Intervention against the Federal Republic of Yugoslavia,” *The International Spectator* 34:3 (July-September 1999): 48-49. In this respect, see footnote 7 of this article and the reference to the Security Council debate on the use of armed force at its meeting on 24 October 1998, in which the views of the United States clashed with those of China and Russia.
- 66 The contention is that the regional use of force would be lawful, if the Security Council had not disapproved of it. This line of argumentation was obviously advanced by the U.S. during the Cuban missile crisis.
- 67 The contention here is that if a regional arrangement recommends that its member states use force against another state, such action cannot be considered an enforcement action under Article 53, precisely because such action is not mandatory.
- 68 A.C. Arend and R.J. Beck, *International Law and the Use of Force*, 62-63.

- 69 Such an “amnesty-argument” is advanced by N. Ronzitti; the amnesty-argument was used to legitimize the intervention carried out by Tanzania in Uganda in 1979. This intervention led to the fall of the Amin government, which had been responsible for grave violations of human rights, and the international community “excused” Tanzania for its action, which had violated the UN Charter. The same argument could be applied *a fortiori* to NATO’s action, since it had the formal blessing of the Security Council. See Ronzitti, “Lessons of International Law,” 51.
- 70 J. Lobel and M. Ratner, “Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime,” *AJIL* 93 (1999): 124–54; 124.
- 71 The fact that the permanent members hold the right to veto any action prevents the Security Council from working properly. Consequently, it confines itself to condemning violations of human rights and/or defining situations as constituting a threat to peace and security, or, worst of all, it does not respond at all. See A. Cassese, “*Ex iniuria ius oritur*,” 26–27.
- 72 However, as the decisions are made by a two-thirds majority of those present and voting, resort to the General Assembly might not always be the fastest way to react.
- 73 E.g., by the organs themselves, thus further delegating the enforcement role on a subsidiary basis.
- 74 *Responsibility to Protect*, 49–51. The ICISS brings up an idea of a “code of conduct” agreed upon amongst the Permanent Five, so that an approach of “constructive abstention” would be adopted resulting in the elimination any risk of inaction by the Security Council, even when the national interests of an individual permanent member are called into play.
- 75 *Ibid.*, 54–55.
- 76 J. Stromseth, “Rethinking Humanitarian Intervention”, 245–55.
- 77 In fact, some referred to collective self-defense as a justification for the intervention in Kosovo. However, neither the security of Greece nor that of Hungary, which are NATO member countries, was directly threatened. Certainly, the flow of refugees did constitute a destabilizing factor for the entire region, but this argument does not seem to warrant the invoking of Article V of the Washington Treaty on the grounds of self-defense. In contrast, there was definitely a far more direct threat to the security of two member countries of the Partnership for Peace (PfP), Albania and FYROM, mainly because of the number of refugees. But then again, the PfP does not include collective defense obligations.
- 78 The OAU has set up a mechanism for the prevention, management, and resolution of conflict, extending thereby its ability to deal with enforcement situations. The African Union, replacing the OAU, provides explicitly for the possibility of member states to intervene using armed force in flagrant human rights situations.
- 79 Independent International Commission on Kosovo, *The Kosovo Report, Part III: Conclusions* and J. Stromseth, “Rethinking Humanitarian Intervention,” 245–55.
- 80 Attention is drawn here to the following report, which was published recently: Lord Robertson of Port Ellen, Secretary General of NATO, *Kosovo One Year On. Achievement and Challenge*, at <http://www.nato.int/kosovo/repo2000/index.htm>. See also Press Statement by Javier Solana, Secretary General of NATO, Press Release 1999(040), 23 March 1999.
- 81 Some 8,000 troops from more than 20 nations (including 14 NATO member countries) took part in Operation Allied Harbor in Albania in order to support the humanitarian efforts and to assist the Albanian authorities in providing a safe environment for the refugees; the humanitarian efforts were also supported by the activities of NATO’s Euro-Atlantic Disaster Response Coordination Centre (EADRCC), which provided assistance to the UNHCR. In addition, the 12,000 NATO troops operating in FYROM (NATO’s Allied Command Europe (ACE) rapid reaction force, which is the foundation for future peacekeeping forces) contributed to the humanitarian efforts by constructing emergency accommodation for refugees and providing emergency aid, particularly in the form of humanitarian aid airlift operations for Albania and FYROM. See *JDW*, 14 April 1999, 3. The steps taken by NATO and the efforts of other international organizations and agencies were complementary and mutually reinforcing; Press Release 1999 (051), 12 April 1999; and interview with Lt.Gen. A. Lombardo, Chairman of the General Matters Subcommittee, (PBEIST), on 30 March 2000.
- 82 Resolution 1244 (1999), Articles 5-9 and Annex 2, para. 4. For thorough reporting of Kosovo’s international régime and its achievements, see <http://www.unmikonline.org/>.
- 83 Independent International Commission on Kosovo, *The Kosovo Report, Part III: Conclusions*.

- 84 *Responsibility to Protect*, 35–36.
- 85 Independent International Commission on Kosovo, *The Kosovo Report, Part III: Conclusions*.
- 86 More than 150 states have ratified Protocol I, although these do not include France, Turkey, and the U.S. Nevertheless, most of its content is widely considered to be operative as “customary international law.” *Ibid.*
- 87 *Humanitarian Intervention. Legal and Political Aspects*, 109–11.
- 88 *Ibid.*
- 89 Final Report to the Prosecutor (ICTY) by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, at [www.un.org/icty/pressreal/nato061300.htm](http://www.un.org/icty/pressreal/nato061300.htm). The ICTY report has been severely criticized by Professor Benvenuti on the grounds of unbalanced evidence; restriction of evaluations of collateral damage to civilian casualties; the poor grasp of legal concepts (damage to the environment, legality of weapons, target selection, proportionality); shortcomings in execution (analysis of specific incidents and confusion of individual and state responsibility); and deviation from well-established ICTY case law. P. Benvenuti, “The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia,” *EJIL* (2001): 503–29. For additional critical comments on the ICTY report, see M. Bothe, “The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY,” *EJIL* (2001): 531–35.
- 90 FRY Ministry of Foreign Affairs, *NATO Crimes in Yugoslavia (White Book)*, at <http://www.stramota.com/nato/>; Amnesty International, “Violations of the Laws of War by NATO during Operation Allied Force,” 7 June 2000; Human Rights Watch, “Civilian Deaths in the NATO Air Campaign,” <http://www.hrw.org/reports/2000/nato/>.
- 91 A mid-way stance has been adopted by the Independent International Commission on Kosovo; see *The Kosovo Report*, at <http://www.reliefweb.int/library/documents/thekosovoreport.htm>.
- 92 U.K. House of Commons, Foreign Affairs Select Committee, Fourth Report, 23 May 2000, at para. 151. The use of depleted uranium and cluster bombs reportedly raises doubts regarding their legality; thus, the future use of such weapons might warrant some consideration.
- 93 Balkan Task Force Report: *The Kosovo Conflict: Consequences for the Environment & Human Settlement*, at [http://www.grid.unep.ch/btf/\(reports\)](http://www.grid.unep.ch/btf/(reports)).
- 94 UNSC, Press Release SC/6870, 2 June 2000. The decision was met with criticism; see joint written statement submitted by Centre Europe-Tiers Monde, a non-governmental organization in general consultative status, and the American Association of Jurists, a non-governmental organization in special consultative status. Economic and Social Council, E/CN.4/Sub.2/2000/NGO/18, 2 August 2000.
- 95 For instance, the District Tribunal of Belgrade, on 21 September 2000, sentenced, *in absentia*, some of the highest government authorities of NATO and NATO member states to 20 years’ imprisonment for grave breaches of the Geneva Conventions and of the laws and customs of war. P. Benvenuti, “Review of the NATO Bombing Campaign,” 526–29. For details, see <http://www.iacenter.org/warcrime/wct2000.htm>.
- 96 Application No. 52207/99, *Banković and Others*.
- 97 See International Court of Justice, Press Release 99/23, 2 June 1999: “The Court rejects the requests for the indication of provisional measures submitted by Yugoslavia.” And the Court urged the parties to act in conformity with their obligations under the United Nations Charter and the other rules of international law, including humanitarian law; see 99/33 (United States), 99/31 (Spain), 99/32 (United Kingdom), 99/30 (Portugal), 99/29 (Netherlands), 99/28 (Italy), 99/27 (Germany), 99/26 (France), 99/25 (Canada), and 99/24 (Belgium).
- 98 See the order of provisional measures of 2 June 1999 against ten NATO member countries: <http://www.icj-cij.org/>. The FRY demands that the ICJ declare NATO members responsible for the commitment of various acts against international law in general, and international humanitarian law in particular and, what is more, that NATO be ordered to provide compensation for damages done.
- 99 *Responsibility to Protect*, 37.
- 100 *Ibid.*
- 101 O. Bring, “From Suez to Kosovo,” 37–38; A. Cassese, “*Ex iniuria ius oritur*,” 26–27; C. Guicherd, “International Law and the War in Kosovo,” 24–25; and M. Weller, *The Crisis in Kosovo 1989–1999*,

*from the Dissolution of Yugoslavia to Rambouillet and the Outbreak of Hostilities*, Vol. 1 (Cambridge: Center of International Studies, University of Cambridge, International Documents & Analysis Publishing, 1999), 273 and 396.

- 102 See Press Releases (1999) 042, 25 March 1999; (1999) 044, 27 March 1999; (1999) 045, 1 April 1999; (1999) 049, 6 April 1999; M-NAC-1 (1999) 51 and (1999) 058, 12 April 1999; S-1(99)62, 23 April 1999; 073, 28 April 1999; and 093, 10 June 1999.
- 103 Here we may cite the NATO spokesman: “The media campaign cannot win a war but it can well lose one.” Given the difficulties of obtaining unbiased information about the events in Serbia/FRY, it is difficult to reach a conclusion regarding transparency.
- 104 Respondent states raised preliminary objections to jurisdiction and admissibility by fixed dead-lines (5 January, 5 July 2000). The proceedings on the merits were accordingly suspended (Article 79 of the Rules of the Court). A written statement by Serbia and Montenegro on these objections was filed on 20 December 2002. Public hearings are being held at the time of this writing, from 19 to 23 April 2004. ICJ, Press Release 2004/13.