TITLES:

HUMANITARIAN INTERVENTION:
HISTORICAL, LEGAL AND MORAL PERSPECTIVES

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1. INTRODUCTION

In this dissertation I will give an outline and assessment of the doctrine of humanitarian intervention as a legal basis for the use of force against a sovereign state, and provide an argument as to the moral necessity of such a right.

The term ‘humanitarian intervention’ normally denotes armed interference by one or several states in the internal affairs of another state, without its prior consent or the authorisation of the United Nations Security Council, to prevent a situation where the most basic rights of the people of that state is being violated. The doctrine is controversial because it violates the most fundamental principle of international law, namely the principle of sovereignty. This principle is the very founding matter of international law, in that states are in principle only bound by what they consent to.

A right to humanitarian intervention therefore needs a strong justification and a clear legal basis. The moral justification de lege ferenda is not hard to find. There seems to be something wrong or incomplete with a legal system if it sanctions the killing of thousands, even millions of people, as long as it happens within the boundaries of a certain state. Surely, there must be some way of preventing this, of letting benevolent states act when a people is being terrorised by its own sovereign?

But the legal basis, the rules de lege lata, is harder to ascertain. Very few clear legal guidelines can be found in this matter, and some of the validations previously offered must arguably be rejected. What I subsequently will argue, however, is that according to our fundamental moral convictions, humanitarian intervention must be permissible. Moreover, such moral convictions must be taken in consideration in any legal enquiry on the subject, as they are an essential part of the very concept of international law.

I will start with a short overview of the historical evolution of the doctrine, with an account of some important philosophical theories. Of importance here is the roots of the theory in Christian notions of bellum justum, and the subsequent development into jus ad bellum when the brutal realities of the world were influencing political theory in the 15th and 16th centuries. Then came a more pacific trend, which culminated in the futile attempts to criminalize warfare in the early 20th century, before the Charter of the United Nations (UN) was finally signed right after the Second World War.

I will then go on to the main part of the dissertation, an inquiry into the legal basis and content of a potential right of humanitarian intervention. First I will analyse the UN Charter and its prohibition against the use of force, and assess some theories of
interpretation of this rule. The crucial point is if it can be seen as containing an exception allowing for humanitarian intervention.

Secondly I will look at state practice regarding humanitarian intervention from after World War Two. The question is if such interventions resulted in new customary law validating the use of force on humanitarian grounds. I will divide this treatment in two, as I believe there are fundamental differences in the political situation during and after the Cold War that resulted in changes in state practice regarding the use of force.

Finally I will look into some ‘fundamental principles’ of international law. When essential notions like sovereignty and the protection of human lives are in conflict, there must be some fundamental principles that can guide the interpretation and development of the law. They can be called principles of necessity, norms of natural law or fundamental moral convictions, but they have to be taken in consideration when crucial standards of humanity are at stake.

2. DEFINITION OF HUMANITARIAN INTERVENTION

Humanitarian intervention can briefly be described as the interference of one or more states in the domestic affairs of another state by means of armed force, with the intention of making that state adopt a more humanitarian policy.¹

There have been many attempts by several writers to properly define the term ‘humanitarian intervention’. But as Verwey notes:

‘[T]here may be few concepts in international law today which are as conceptually obscure and legally controversial as ‘humanitarian intervention’. This results from a lack of agreement on the legal meaning of both the term “intervention” and the term “humanitarian”.’²

However, some standard features seem to be included in most recognised authors’ definitions.³ I will consider some of these, as it is important to have a clear understanding of the subject of investigation before attempting an analysis.

¹ Taken from The Oxford Dictionary of Law (Oxford University Press, 4th ed 1997).
² V.D. Verwey Humanitarian Intervention Under International Law (1985) 32 Netherlands ILR 357 at 358. This was written in 1985, and the situation seems to have improved somewhat since then.
First, the sovereignty of the state intervened upon is being violated. Sovereignty is usually defined as legal independence of all other states or international organs. As Rostow writes:

“The formal structure of the international state system is built on the principle that each state is autonomous and independent, and has the right in its internal affairs to be free from acts of coercion committed or assisted by other states. This rule is basic to the possibility of international law.”

Internally, sovereignty means that the sovereign of the state has full powers to make laws and carry them out. Externally, sovereignty means that all states are equal, and that no state can force another to do anything without its consent.

The fundamental problem regarding humanitarian intervention lies in its inherent breach of the principle of sovereignty, and the question is ultimately which of the two principles that must prevail. This means that intervention by invitation from the target state must be excluded from the definition, because that is not really in conflict with the target state’s sovereignty.

Second, the use of armed force when intervening is central. This eliminates a wide interpretation of the term ‘intervention’, which includes eg political and economic interference with a state’s internal policy. Humanitarian intervention is usually not used in this broad sense.

Third, the term ‘humanitarian’ implies that violation of human rights on a large scale is involved. As Donnelly submits: ‘Human rights are ordinarily understood as the rights
one has simply because one is a human being. Furthermore, a concept of *gross human rights violations* must embrace notions such as ‘genocide’, ‘crimes against humanity’ and general humanitarian law. The noted scholar Lauterpacht famously stated that the right to intervene arises when:

“[A] State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental rights and to shock the conscience of mankind.”

Interventions not initiated for *primarily* humanitarian reasons must therefore be excluded. This is of course a matter of interpretation, as states seldom will intervene in total disinterest. But the minimum requirement must be that the intervention is designed to influence the humanitarian conduct of the target state, and that the intervening state does not profit extensively by it.

Furthermore, it is naturally the rights of the people of the target state that are relevant; humanitarian intervention is all about ‘saving strangers’. I will therefore exclude intervention to rescue own nationals. And finally, humanitarian intervention must be interpreted as to include *prevention* of massive human rights violations. As with self-defence, if the rule is to have practical meaning, it cannot be seen as forcing the intervener to wait until the destructive acts have been committed. As Fitzmaurice writes:

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11 See the exposition of this in Verwey (n 2) 369.
13 Malanczuk lists interventions to support a party in a civil war; to encourage self-determination of a people; or to primarily protect own economic and political interests, as not being ‘humanitarian’, even if they can result in humanitarian relief for a great number of people. See Malanczuk (n 3) 6.
14 See Parekh (n 3) 53.
15 See D. Kritsiotis *Reappraising Policy Objections to Humanitarian Intervention* (1998) 19 Michigan JIL 1005 at 1034 ff. Kritsiotis seems to emphasis ‘the practical outcome of the intervention’, instead of ‘making legal determinations on the basis of ulterior motives or hidden agendas’. Ie, if the intervening state is itself profiting on the intervention, this will be a more secure ground for dismissing the legality of the operation than the alleged pureness of motive. This is elaborated below, p 34.
17 See in contrast Simon (n 3) 120.
18 See Verwey (n 2) 370.
‘[N]o subsequent action, remedy, redress or compensation can bring the dead to life or restore their limbs to the maimed. There is no remedy except prevention.’

Fourth, humanitarian intervention is a legal notion, so sources of international law have to be examined to see if the right actually exists. Here one immediately comes upon the prohibition of the use of force in the UN Charter art 2(4). The principal question is therefore if an exception from this rule can be found, permitting use of force on humanitarian grounds.

Fifth, I will limit my interpretation of the term to interventions that are not authorised by the UN Security Council (SC). The reason for this is that authorised interventions are essentially no different from any other forceful operation approved by the SC. It is only when states multi- or unilaterally decide to intervene in another state that the legal complications of humanitarian intervention are really put to the test.

3. EVOLUTION OF THE DOCTRINE OF HUMANITARIAN INTERVENTION

3.1. THE LAW OF NATURE

In the early stages of our western culture, Greek philosophers began arguing that there existed a universal law of nature, which everybody was obliged to obey and all positive laws had to conform to. Aristotle (384-322 BC) made important assumptions about this natural law: ‘One part of what is politically just is natural, and the other part legal. What is natural is what has the same validity everywhere alike.’

It was the somewhat later Stoicists who developed this into a coherent theory of the Law of Nature. They saw the natural law as built into the very structure of the universe, directing the actions of all rational beings, and it was conceivable a priori. The law of nature is therefore universal and applies to all human beings alike.

The law of nature is the philosophical foundation of several basic moral and legal principles. In that it treated every human equally, it was the origin of inherently human rights. Because it constituted the rational basis of political society, it was the foundation

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20 UN Charter, adopted 26 July 1945.
21 See Verwey (n 2) 375.
22 In his Nichomachean Ethics, 1134b, 20.
on which theories of the social contract and state sovereignty were based in the Enlightenment era.

It is therefore also the earliest and most fundamental source of ideas concerning humanitarian intervention, and has been used as a basis for claims to such a right ever since.

3.2. JUST WAR-THEORIES

The doctrine of humanitarian intervention has strong historical roots in the moral-political theory of *just war* (*bellum justum*). Even the ancient Greeks held that war was not justifiable unless there was a just cause for waging it. The early Christian church was largely pacifist, and refused to recognise war as justified in any circumstance.

St. Augustine (354-430) was the first major theologian who spoke of a permissible, just war. He tried to bridge the gap between the Christian ideal of pacifism and the political reality of war, by introducing a set of criteria that would make the waging of war a justifiable act. Central in this theory was the concepts of *just cause* and *intention*, which was also a central feature of Christian moral theory. The justness of an action could not be judged without evaluating the driving intention, so also with the state action of going to war.\(^{23}\)

With Christianity’s increasing influence over political society, the theory of *bellum justum* came to be important as a foundation of rules of war.

St. Thomas Aquinas (1225-74) produced a powerful philosophical synthesis between the Greek classic writings, Aristotle’s in particular, and Christian theology. Thomas held that reason and faith were two complimentary methods of investigation. Since God had created the human mind, the things that could be discovered by using it was a supplement to that which could be discovered through divine revelation.

Thomas had a similar view on the law of nature. God had laid down an eternal law directing all things to act for the good of the community of the universe. A part of this eternal law was the *natural* law, which God had inscribed in the minds of every human being. The natural law was thus eternal and independent of individual humans, but it was nevertheless conceivable for humans *a priori*.

In writing about just war, Thomas tried to limit the pacifist commands from the bible, which seemed to prohibit all war whatsoever. Eg, Jesus stated that: ‘All who take
the sword shall perish by the sword!’ 24 Thomas held that the key word here was ‘take’, and that the maxim only meant that one should not fight without the authorisation of one’s sovereign. 25

In this way, he came to the conclusion that there is no general, valid objection to the act of waging war. But for the war to be just, it had to meet certain requirements. Firstly, it had to be waged by a competent authority, that is, ‘by the authority of princes or of the church’. 26

Secondly, there must be a just cause for the war, namely ‘that those who are attacked merit the attack because of some fault (culpa).’ 27 Just cause for war could be found in self-defence; restoration of peace; assistance of neighbours against attack and, most notably, ‘defence of the poor and oppressed’. 28

Finally, just war had to be waged with a right intention. Like Augustin, he relied on a basically Christian moral theory, where an act was only good in the eyes of God if it was motivated by a just cause:

‘Those wars are not sins which are waged …in quest of peace, so that the wicked may be coerced and the good supported.’ 29

Unlike Thomas, 16th century theorists like Vitoria, Suárez and Gentili acknowledged pacifism as a moral theory and a possible interpretation of the bible, but they argued that the theory was wrong:

‘God does not will the evils against which war is waged, but merely permits them; and therefore He does not forbid that they should be justly repelled.’ 30

Nevertheless, like Thomas, they all held that war had to be waged in accordance with certain basic requirements in order to be justified. And as they wanted to find a

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24 Mattheus 26:52.
universally applicable, *a priori* justification for the waging of war, they connected the *just cause* to the law of nature. From this they deduced that denying the right of innocent passage; denial of the freedom of the sea; piracy and killing of innocent humans, all had to be just causes for war. Suárez held that the defence of innocent people, no matter where in the world, would be a just cause.\footnote{F. Suárez *De Bello* (1583) I, para 5.} Moreover, admitting that it is not easy to present all just causes for war on a general basis, Gentili held that:

“It is the nature of wars for both sides to maintain that they are supporting a just cause. In general, it may be true in nearly every kind of dispute, that neither of the two disputants is unjust.”\footnote{See Mushkat (n 23) 284.}

The *intention*, however, they did not pay much attention to. Gentili simply noted that:

“[W]hether or not it is necessary for the justice of a war that the leader have a good motive, …is a matter for the theologians.”\footnote{A. Gentili *De Jure Belli Libri Tres* (1612) I, IV, para 48.}

Hugo Grotius is usually held to be the first Western philosopher who detached the law of nature from God.\footnote{Ibid I, VII, para 56.} He did not dismiss God entirely, but it was not necessary to use God as an explanatory factor:

“[The law of nature] would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God.”\footnote{See M.D.A. Freeman *Lloyd’s Introduction to Jurisprudence* (London, Sweet & Maxwell, 6th ed 1994, hereinafter cited as *Lloyd’s*) 100.}

Grotius elaborated Aristotle’s doctrine that man is basically a social animal, a *zoon politikon*. He postulated that man also strives to live in peace and harmony with his fellow humans. This will, the *custodia societatis*, and the rationality of the human mind, were the basic axioms from which Grotius built a methodically rationalistic theory of natural law.

\footnote{H. Grotius *De Jure Belli ac Pacis* (1625) prolegomena, para 11: ‘Etiamsi daremus non esse Deum...’ Grotius considered this a *deductio in absurdum*-argument. See *Lloyd’s* (n 34) 100.}
The individual and his natural rights are at the core of the law. The fundamental principles of good faith and solidarity are applicable to every individual, regardless of nationality or status. Thus, if an individual’s basic rights are violated, not only this individual himself, but every other person is entitled to use force to secure his rights.\textsuperscript{36}

Grotius’ most important contribution to legal theory is that he applied his concept of natural law in the sphere of international law; his Law of Nations was built on his Law of Nature.\textsuperscript{37} He held that the nation-state came into being because the individuals wanted to improve their security and prosperity within a community. The individual possessed some \textit{inherent} rights that the state was supposed to secure, and this represented the limit of the nation-state’s internal sovereignty. Therefore, if the sovereign violated the basic rights of his people, he had transgressed his jurisdiction, and other states would have the right to intervene and re-establish the order of the Law of Nature.

Grotius said it like this:

‘Certainly it is undoubted that ever since civil societies were formed, the rulers of each claimed some special rights over his own subjects. [But] …if a tyrant practices atrocities towards his subjects, which no just man can approve, the right of human social connexion is not cut off in such a case. It would not follow that others may not take up arms for them.’\textsuperscript{38}

These features in Grotius’ writings compelled Lauterpacht to comment that:

‘Grotius [made] the first authoritative statement of the principle of humanitarian intervention – the principle that exclusiveness of domestic jurisdiction stops when outrage upon humanity begins.’\textsuperscript{39}

He was thus not opposed to war as such, but it had to be waged on the basis of some \textit{just cause}.\textsuperscript{40} And in finding such cause, he had a more secular approach than his predecessors. He did not see heresy or the harassment of missionaries as a justifiable cause in itself, only if the missionaries were being treated contrary to their rights as \textit{humans}.

\textsuperscript{36} See Grotius (n 35) II, XXV, paras 6 ff.
\textsuperscript{37} See Lloyd’s (n 34) 99.
\textsuperscript{38} Ibid II, XXV, para 6(3).
\textsuperscript{39} H. Lauterpacht quoted in Malanczuk (n 3) 7 (reference not provided).
\textsuperscript{40} Grotius was more of a humanist than his three predecessors. He had deep respect for the humanist Erasmus Eroterodamus, whom he saw as ‘the light of Holland’, but held that he had overstated the case for peace. See Walters (n 25) 250.
Like his predecessors, he held that intention was irrelevant for the justice of war, but he treated the justifiable means by waging a war in far more detail.\(^{41}\) He asserted that the question of justifiable means was contingent on the justifiable cause. That is, the means had to be chosen in consideration of the cause for waging the war. Grotius here introduced a principle of proportionality, in that any means that lay outside what was necessary for fulfilling the just cause, would be unjust:\(^ {42}\)

> ‘The good which our action has in view [must be] much greater than the evil which is feared, unless, [when] the good and evil in balance, the hope of the good is much greater than the fear of the evil.’\(^ {43}\)

On this basis, there were certain actions that were essentially impermissible, no matter how just the cause was. This applied to the killing of innocents and civilians, the principal crime of war, and to sack and pillage of enemy cities, which would affect many innocent people. Also raping enemy women and taking innocent people into slavery were prohibited.\(^ {44}\)

Grotius noted, however, that sometimes the necessities of war meant that even these principles had to be violated:

> ‘Many things accompany the right of the agent indirectly and beyond the agent’s intention. …Thus in order to obtain what is ours, if we cannot get that alone, we have the right to take more. Similarly, we may bombard a ship full of pirates or a house full of thieves, even if there are within the same ship or house a few infants, women or other innocent persons.’\(^ {45}\)

To sum up, the authorities on natural law in the 16\(^{th}\) and 17\(^{th}\) centuries clearly considered humanitarian intervention, as a part of the doctrine of \textit{bellum justum}, to be in conformity with the law of nature. Wars were not prohibited \textit{per se}, but all wars had to fulfil certain requirements in order to be legal. In this way the natural law put limitations on the independence of states, in that their internal sovereignty was restricted by the principle of humanity, and their external sovereignty by the rules of \textit{bellum justum}.

\(^{41}\) Grotius is therefore regarded as the first important writer on the rules of \textit{jus in bello}, the law of war. See Walters (n 25) 353.

\(^{42}\) Ibid 367-70.

\(^{43}\) Grotius (n 35) III, I, para 4(2).

\(^{44}\) See Walters (n 25) 404 ff.

\(^{45}\) Grotius (n 35) III, I, para 4(1).
3.3. TOWARDS A *JUS AD BELLUM* FOR THE SOVEREIGN STATE

The change in political and legal theory that started with Grotius, with a shift away from the influence of Christian doctrine, resulted in a more realistic view on the theory of sovereignty and the law of war.

One of the great ‘political realists’, Machiavelli, sought to write about politics as it was, not as it ought to be. What he saw in renaissance Europe was that the Princes did what they wanted, there were no constraints on their power internally or externally. He therefore held that the sovereign did not have a moral superior; the moral good of the society was what *Il Principe* decided it to be. As regards to war, he said that:

‘When it is a question of the safety of the country no account should be taken of what is just or unjust, merciful or cruel, laudable or shameful, but without regard to anything else, that course is to be unswervingly pursued which will save the life and pursue the liberty of the [fatherland].’

Bodin was one of the first scholars to write systematically about the principle of sovereignty. He too held that the sovereign, as the supreme legislator, was free from the restraints of positive law. The sovereignty of the nation-state was therefore virtually unlimited.

In this respect, Bodin was a predecessor of Hobbes, who held that people had formed societies to protect them from the anarchy of all-against-all. As long as the government protects the majority of the people, the people have to obey the laws, no matter what. This absolute sovereignty also applied externally, therefore no other state had the right to interfere with the sovereign’s treatment of his own people. Locke, even though he argued for a somewhat weaker principle of sovereignty, also saw the social contract as the foundation of society, giving the sovereign very wide discretionary powers both externally and internally.

These theories of sovereignty must be seen on the background of the religious wars of the 16th and 17th centuries, which had caused constant disorders in Europe. It is therefore no surprise that the principle of sovereignty got its legal confirmation in the

46 N. Machiavelli *The Prince* (1513), quoted in Mushkat (n 23) 21, n 10.
47 See F.K. Abiew *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (Hague, Kluwer Law International, 1999) 27. The sovereign had to respect the natural law, divine law, and *jus gentium*, but these were not serious practical restraints.
48 See *Lloyd's* (n 34) 102.
49 Ibid ff.
Peace of Westphalia of 1648, which ended the Thirty Years War. This treaty inaugurated
the modern European state system and established the nation-state as the principal actor
in international law.  

However, the treaty put some limited restraints on the sovereign’s power, especially
regarding the practice of religion, which was the dominant political question. The Princes
could determine the principal religion within their territory, but freedom of religion was
to be granted to minorities. Thus, even the strict principle of sovereignty of the 17\textsuperscript{th}
century had some important limitations.

What is clear is that the theory of sovereignty that was developing in the 17\textsuperscript{th} and 18\textsuperscript{th}
centuries differed from Grotius teachings in a very fundamental way. The sovereignty of
the nation-state was not restricted by notions such as ‘justice’ or ‘humanity’, and
humanitarian intervention could therefore not be regarded as lawful. According to
Brownlie, the concept of \textit{just war} was relegated ‘to the realms of morality and
propaganda’. Instead, a principle of non-intervention was developed, \textit{inter alios} by
Vattel:

\begin{quote}
\textquote{It clearly follows from the liberty and independence of Nations that each has the
right to govern itself as it thinks proper. …No foreign State may enquire into the
manner in which a sovereign rules, nor set itself up as judge of his conduct, nor
force him to make any change in his administration.}
\end{quote}

Vattel later modified this view, however, and other contemporary scholars
recognised a limited right to intervention on humanitarian grounds. But this was hardly
in concordance with the legal reality of the times.

This does not at all imply that war was thought to be illegal \textit{per se}, but the
justification for waging war was no longer found in a concept of \textit{justice}. The \textit{justa causa}
had been replaced by a customary \textit{right} to go to war, in accordance with the states’

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\begin{itemize}
\item See Abiew (n 47) 29.
\item Ibid 44-6.
\item See Malanczuk (n 3) 8.
\item E. de Vattel \textit{Droit des gens} (1758) I, II, IV, paras 54-5.
\item See Abiew (n 47) 36 ff.
\item See eg Bernard \textit{On the Principle of Non-Intervention} (1860) 33-4: ‘[T]he law …prohibits intervention.
[But] there may even be cases in which it becomes a positive duty to transgress positive law.’ Quoted in
Abiew (n 47) 38.
\end{itemize}
practically unlimited external sovereignty. The states were thus said to have a *competence de guerre*. In the words of Kunz: ‘The concept of *bellum legale* replaced the concept of *bellum justum*.‘

3.4. INTERVENTIONS IN THE 19TH AND EARLY 20TH CENTURY

On the basis of this strict principle of sovereignty, the 19th century was ‘dominated by an unrestricted right of war and the recognition of conquests’. In 1860, Phillimore wrote that:

‘War is the exercise of the international right of action, to which, from the nature of the thing and the absence of any common superior tribunal, nations are compelled to have recourse, in order to assert and vindicate their rights.’

War was, however, only regarded as a last option when peaceful measures were not successful in solving a conflict. And increasing efforts were made to restrict the resort to warfare. In 1878, the World Peace Conference in Paris declared by resolution that: ‘*la guerre offensive est un brigandige international*’. State practice did not reflect this shift towards a more pacifistic regime immediately, but during the course of the 19th century, offensive war became increasingly difficult under the pressure of world opinion. What evolved instead was a doctrine of a right to ‘self-preservation’ of the nation-state, as a ‘*Droit absolut des Etats*’. Out of this doctrine evolved a practice of lesser measures of armed force, which did not amount to ‘war’, such as ‘self-defence’, ‘reprisal’ and ‘pacific blockade’.

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57 See Arend & Beck (n 3) 16.
58 Ibid 17.
59 J.L. Kunz *Bellum Justum and Bellum Legale* (1951) 45 AJIL 528 at 532. Ie, justice was no longer an element of the legal right to go to war.
60 Brownlie (n 52) 19.
62 ‘The offensive war is [an act of] international banditry.’ *Résolutions textuelles des Congrès universels de la Paix* (Berne, 1912). Quoted in Brownlie (n 52) 25.
63 See Brownlie (n 52) 42.
64 The doctrine of self-defence was developed on basis of the *Caroline-case*, (1841) 29 BFSP 1137-38, where it was established that forcible self-defence is justifiable if there is a ‘necessity, present and inevitable, for attacking’ (emphasis added). See D.J. Harris *Cases and Materials on International Law* (London, Sweet & Maxwell, 1998) 895.
65 See Brownlie (n 52) 26 and 28 ff. Eg, the Japanese invasion of Chinese Manchuria in 1931 was called an ‘incident’ in order to avoid the conventional ban on ‘war’. See B.V.A Röling *The Use of Force By States* in A. Cassese (ed) *The Current Legal Regulation of the Use of Force* (Boston, Martinus Nijhoff, 1986) 1 at 4.
This practice of lesser measures of force was eventually developed to include interventions justified on humanitarian grounds. In 1827 Western powers intervened in Greece to protect Greek Christians from the occupying Turks. The London Treaty, which formally authorised the intervention, stated that it was undertaken ‘by sentiments of humanity’.  

Another instance often referred to was the French invasion in Syria under the Ottoman Empire in 1860, to rescue severely persecuted Christians. The intervention was sanctioned by some leading European states at the Conference of Paris in 1860. Even if the French troops stayed on and later behaved as an occupational force, this instance is widely regarded as a case of humanitarian intervention.

Similarly, Russia intervened in Bosnia, Herzegovina and Bulgaria in 1877, which were also under Ottoman rule, upon authorisation from several European powers. The treatment of Christians in these areas was described by a British investigator as ‘the most heinous crimes that had stained the history of the century’. The intervention was therefore allegedly carried out on humanitarian grounds.

The US action against Cuba in 1898 has also been cited as a case of humanitarian intervention. President McKinley said in a speech to the Congress that the purpose of the intervention was ‘in the cause of humanity and to put an end to the barbarities, bloodshed, starvation and horrible miseries now existing there’.

Some authors, most notably Brownlie, hold that these interventions were not carried out solely on the basis of humanitarian considerations, but that power politics between Western and Eastern states were also in play, and that therefore ‘no genuine case of humanitarian intervention has occurred’. And regarding the Ottoman interventions, Fenwick states that the ‘alleged humanitarian motives were …influenced or affected by the political interests of the intervening state’. It is also argued that several of the

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66 The London Treaty for the Pacification of Greece (1827). See Abiew (n 47) 48-9. Brownlie (n 52) rejects the instance as genuine humanitarian intervention, at 339
67 See Abiew (n 47) 50.
68 Ibid 51, n 96 and Brownlie (n 52) 340.
69 Quoted in Abiew (n 47) 51, n 98.
70 See Brownlie (n 52) 340. See also M. Walzer Just and Unjust Wars (New York, Basic Books, 2nd ed 1992) 104.
71 Quoted in Abiew (n 47) 54.
72 Brownlie (n 52) 340. See also Verwey (n 2) 399.
73 C.G. Fenwick Intervention: Individual and Collective (1945) 39 AJIL 645 at 650. See also Malanczuk (n 3) 9, who is of the same view.
interventions were based on treaties, like the interventions in Syria and Greece, and were thus not carried out unilaterally.\(^7^4\)

Nevertheless, the language used by the intervening states clearly indicates some sort of *opinio juris* regarding the right of humanitarian intervention. Even if other considerations were also motivating, the states were ‘attaching primacy to that principle [of humanitarian intervention] over their treaty rights as the justification for intervention’.\(^7^5\) Thus, the states themselves were at the time clearly of the conviction that humanitarian intervention was a lawful measure of ‘lesser armed force’, drawn from international customary law.

Secondly, the argument that the interventions were authorised by treaties does not seem very convincing, as the treaties in question were far from universally adopted. They could therefore hardly give rise to a right to unilateral intervention imposable against the target state.

In the early 20\(^{th}\) century there was less willingness to intervene for the sake of humanity. Unilateral use of force was increasingly viewed as illegal, and basic human rights were instead given institutional guarantees in the League of Nations, which was to authorise collective measures of force.

In the 1920s, the enforcement system of the League worked quite well, and several treaties were signed that renounced war altogether. The Draft Treaty of Mutual Assistance of 1923 and the Geneva Protocol of 1925 both labelled aggressive war as an ‘international crime’. The Briand-Kellogg Pact of 1928 went a step further, by declaring in art 1 that:

> ‘The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.’\(^7^6\)

However, the League broke down in the early 1930s, as the members were both individually and collectively unwilling to intervene when faced with the totalitarian

\(^7^4\) See Brownlie (n 52) 340. See also Malanczuk (n 3) 10.
\(^7^5\) Sornarajah *International Colonialism and Humanitarian Intervention* (1981) 11 Georgia J of Int and Comp L 45 at 57. Quoted in Abiew (n 47) 59, n 123.
aggression of Germany and Italy. Thus, it is argued that the right of unilateral humanitarian intervention, as recognised in customary law from the 19th century, was retained by the states at the outbreak of the Second World War.

3.5. CONCLUSION – STATUS QUO BEFORE FOUNDATION OF THE UN

To sum up, the discussion ‘suggests that state sovereignty has coexisted with intervention for the cause of humanity since the inception of the state system’.

Lauterpacht, writing in 1955, therefore held that:

‘[T]here is a substantial body of opinion and practice in support of the view that there are limits to that discretion and that when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible.’

However, a substantial minority of writers, including Brownlie, dismissed the existence of such a customary right. These scholarly differences are not easy to reconcile, as whether the doctrine should be regarded as customary law or not is largely a question of interpretation. In this respect, it is reminiscent of a question I will return to, namely if our fundamental moral convictions are a prerequisite for our recognition of a legal rule with such a basic content. That is, the different scholars’ interpretation of state practice of the 19th century is perhaps influenced by their conviction that humanitarian intervention should or should not be lawful.

This I will get back to later. For now, I will submit that the correct view is held by Fonteyne, namely that:

‘While divergences certainly existed as to the circumstances in which resort could be had to the institution of humanitarian intervention, …the principle itself was widely, if not unanimously, accepted as an integral part of customary international law.’

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76 General Treaty for the Renunciation of War (1928, emphasis added). The treaty entered into force immediately, as it was signed by 63 states, an overwhelming majority of states at the time. The treaty has never been terminated, but has for all practical purposes been replaced by the UN Charter art 2(4).
77 Abiew (n 47) 58.
78 Oppenheim & Lauterpacht (n 12) 312.
4. TREATY LAW – THE UN CHARTER

The ICJ Statutes art 38(1)(a) makes it clear that ‘international conventions’, if applicable, will always be a relevant source of international law. I will therefore examine this source first.

The establishment of the UN created a new legal situation in the international community, in one of the most important aspects by generally prohibiting the use of force between states. Thus, the Charter seriously restricted the *jus ad bellum* as a customary right to warfare held by sovereign states.

Art 2(4) of the Charter prohibits any Member from ‘the threat or use of force’ against any other state. The question must therefore be if an exception regarding humanitarian intervention can be found by interpretation of the Charter. There are some general lines of argument that have been pursued to this effect.

4.1. TEXTUAL ARGUMENTS

It should first be noted that art 2(4) is not an *absolute* prohibition against the use of force, but a general one, opening up for exceptions in certain circumstances. For example, self-defence (art 51), collective operations (chapter VII) and measures taken against ‘enemy states’ (art 53) all include the use of force, but are still allowed. Stone has argued that once the right of self-defence in art 51 is conceded, the words of art 2(4) can no longer be regarded as an absolute prohibition of the resort to force. It is therefore a matter of interpretation whether other situations also merit an exception to the rule.

With this in mind, it has been asserted that the phrase ‘against the territorial integrity or political independence of any state’ is a *qualification*, and that use of force that does not infringe upon the state’s sovereignty in such a way, can be legal. Bowett, for instance, holds that since ‘the phrase hav[e] been included, it must be given its plain meaning’. Ie, if the drafters intended the prohibition to be absolute, they would simply have outlawed the use of force, full stop. Humanitarian intervention could therefore be

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80 Appendix I to the UN Charter, Statute of the International Court of Justice (ICJ).
81 See Abiew (n 47) 67-8.
83 See the exposition of arguments to this effect in Simon (n 3) 132 and in Verwey (n 2) 379 ff and 389.
84 D.W. Bowett *Self-Defence in International Law* (Manchester University Press, 1958) 152.
considered legal, because ‘it seeks neither territorial change nor a challenge to the political independence’.\(^{85}\)

In the *Corfu Channel-case*, the UK argued along exactly these lines:

‘[O]ur action …threatened neither the territorial integrity nor the political independence of Albania. Albania suffered thereby neither territorial loss nor any part of its political independence.’\(^{86}\)

However, the argument, although not specifically considered by the court, was rejected, and the UK was regarded as having violated art 2(4). Brownlie holds similarly that:

‘The conclusion warranted by the travaux préparatoires is that the phrase under discussion was not intended to be restrictive but, on the contrary, to give more specific guarantees to small states and that it cannot be interpreted as having a qualifying effect.’\(^{87}\)

The GA has passed several resolutions concerning the use of force. Such Resolutions are of course not legally binding, but they are important guidelines for the GA and SC when deciding what amounts to ‘use of force’ and a breach of the charter. They therefore have significant value when interpreting the Charter.\(^{88}\)

Firstly, GA Res 2131 (XX) states in para 1 that:

‘No state has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of another state. Consequently, armed interventions …against its political, economic and cultural elements, are condemned.’\(^{89}\)

Secondly, GA Res 2625 (XXV) restates this principle, and adds that:

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\(^{86}\) *Albania v UK* 1949 ICJ Rep 4, Pleadings, vol III, p 296. Quoted in Harris (n 64) p 865. The facts of the case was that UK had sent military vessels into Albanian territorial waters to remove some mines and clear the channel for passage. The question before the court was if this was illegal use of force against Albania.

\(^{87}\) Brownlie (n 52) 267.

\(^{88}\) See I. Brownlie *The UN Charter and the Use of Force, 1945-1985* in Cassese (n 65) 491 at 494. See also Verwey (n 2) 383 and 390.

\(^{89}\) Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States. Adopted 21 December 1965 (emphasis added).
‘Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by any other State.’

Thirdly, GA Res 3314 (XXIX) states in art 3(a) that:

‘The invasion or attack by the armed forces of a State …or any military occupation, however temporary, …shall qualify as an act of aggression.’

These texts seem to unconditionally prohibit the act of humanitarian intervention. Some authors try to refute this by arguing that the protection of basic human rights is not an ‘internal affair’, and that such intervention therefore could be warranted. But that is neither the intuitive interpretation of the Resolutions nor the common understanding of the texts. As Arend and Beck has noted:

‘[The] “restrictionist” theory most accurately reflects both the intentions of the Charter’s framers and the “common sense” meaning of the Charter’s texts.’

It has also been argued that the right to self-defence under art 51 of the Charter can include a right to humanitarian intervention. However, such an interpretation would be to stretch the words of art 51 too far. The conditions for a lawful act of self-defence is that ‘an armed attack occurs against a Member’, and this phrase obviously refers to attack against the states’ own territory. In the words of Bowett:

‘[W]ith humanitarian intervention the nationality of the persons to be rescued is essentially irrelevant and whatever the legal basis of such intervention might be, it is not self-defence.’

Most authors seem to concur with this view.

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91 GA Resolution on the Definition of Aggression, adopted 14 December 1974 (emphasis added).
92 See Verwey (n 2) 390.
93 Arend & Beck (n 3) 136.
94 D.W. Bowett The Use of Force for the Protection of Nationals Abroad in Cassese (n 65) 39 at 49.
95 See Verwey (n 2) 395-98.
Thus, an interpretation of the texts regarding the use of force in the UN Charter seems to prohibit humanitarian intervention unconditionally. But there are other factors than a strictly textual interpretation to consider.

4.2. THE PURPOSES OF THE UN – JUSTICE VS PEACE

Art 2(4) prohibits use of force that is ‘inconsistent with the Purposes of the United Nations’. This has been interpreted as another qualification by some authors, indicating that the Charter permits interventions that are in conformity with these purposes. Most writers, however, point out that the phrase by the drafters of the Charter ‘was considered a stronger pledge than the more conventional promise not to resort to violent means for the settlement of disputes’. It can therefore hardly be seen as a qualifying term.

The purposes of the UN can never be a source of rights in its own respect, but they can be an important factor when interpreting the legal content of the Charter. The purposes are given in art 1, and include ‘to maintain international peace and security’; ‘to promot[e] and encourag[e] respect for human rights’; ‘to solv[e] international problems of a …humanitarian character’, and all this is to be done ‘in conformity with the principles of justice’.

Téson identifies in these purposes a ‘congenial tension between the concern for human rights and the notion of state sovereignty – two pillars of international law’. Other authors claim that they have ‘equal legal weight’, and that the purpose of protecting human rights in some circumstances could override the prohibition of use of force. The fact that art 55(c) explicitly states that ‘respect for, and observance of, human rights and fundamental freedoms’ is to be promoted, adds weight to this argument.

Some writers go even further and hold that there is no real tension between the two goals, as respect for fundamental human rights is necessary to ensure peace in the long run. In the words of the respected scholar Lauterpacht:

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96 Ibid 381.
98 See the Vienna Convention on the Law of Treaties (1969) art 31(1), which states that treaties shall be interpreted ‘in the light of their object and purpose’.
100 Verwey (n 2) 391 (emphasis as quoted). See also Simon (n 3) 124.
The correlation between peace and observance of fundamental rights is now a generally recognized fact. The circumstance that the legal duty to respect fundamental human rights has become part and parcel of the new international system upon which peace depends, adds emphasis to that ultimate connexion.101

Humanitarian intervention, in promoting such basic rights, is thus not held to be in violation of the Charter, but in accordance with its ‘most fundamental peremptory norms’.102

In opposition to this, it is argued that peace is the most fundamental goal, and that any use of force should be outlawed because of the possibility of it development into a large-scale conflict. Röling holds that:

‘Art. 2(4) as a prohibition of the use of first military power, is the fundamental premise on which the U.N. Charter is built. …It is the precondition for life itself in the atomic era.’103

All violent enforcement measures should therefore be left to the Security Council, it is argued, even if this could mean that other fundamental rights would have to be forsaken in certain situations. As Verwey notes: ‘At times justice may have to pay a price if peace is to be secured.’104

An additional argument against perceiving the different goals as ‘equal’, is that there are numerous purposes mentioned in art 1. Surely, the ‘solving of international problems of an economic, social [or] …cultural character’ cannot take precedence over the maintenance of international peace. As Franck and Rodley writes, commenting on art 55:

‘[This] is not an invitation to members to attack fellow members to secure such objectives as “higher standards of living,” “full employment,” “cultural cooperation,” nor even “respect for, and observance of, human rights and fundamental freedoms”.’105

This position is confirmed in the three GA Resolutions we considered earlier, in their prohibition of intervention in internal matters for any reason whatsoever. Thus, it seems

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102 Reisman (n 85) 177.
103 Röling (n 65) 7.
104 Verwey (n 2) 385.
to me that humanitarian intervention can hardly be rendered legal within the regime of
the Charter by referring to the purposes of the UN.

4.3. THE INEFFECTIVENESS OF THE UN SC

A third general argument that has been advanced against a strict prohibition of the
use of force is that the UN system, as envisaged by the Charterists, is not functioning
effectively. More accurately, the SC is not carrying out its task as an executive power in
matters of ‘international peace and security’, because it is constantly being blocked by
veto. And when the international organisation that was going to replace the individual
states’ right to enforce international security is not functioning, this right has to be
retained. As Fonteyne writes:

‘The establishment of machinery for collective security and enforcement was so
basic a condition for the members of the U.N. in surrendering their right under
customary international law to use force for a variety of reasons, that failure by the
Organization to create this machinery would partially relieve the member states of
their obligation of restraint under the Charter.’

Thus, the ineffectiveness of the collective enforcement measures reinstates
customary rights of the state regarding use of force, ‘almost as if we were thrown back on
customary international law by a breakdown of the Charter system’. But how is it
possible for old customary law to override positive treaty law?

Lillich submits that this ‘is really a kind of subsequent interpretation approach, a
reinterpretation of the Charter necessitated by subsequent events’. Such an argument is
reminiscent of application of a clausula rebus sic stantibus to the UN Charter, ie a (tacit)
clause that the agreement is valid only insofar as the circumstances do not significantly
change.

But such a ‘subsequent interpretation approach’ is controversial, in that it contradicts
the fundamental priority that treaty law has over customary law; when a treaty is signed,
it takes precedence over customary law with the same content. Customary law can
‘survive’ treaties, as we shall see, but seldom overrule positive treaty rules.

106 Fonteyne (n 79) 257.
107 Lillich (n 85) 60.
108 Ibid 61.
109 See Verwey (n 2) 387.
110 See below p 26 on the Nicaragua-case.
More importantly, in the *Corfu Channel-case*, the ICJ did not attach any significance to the fact that the UN system might be ineffective, in stating that:

“The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to the most serious abuses and such as cannot, whatever be the present defects in international organisation, find a place in international law.”\(^{111}\)

Another counter-argument is that the UN system might actually be working *exactly as planned* when the SC is not authorising collective action. The veto system was designed to restrict the resort to force in international relations, and when no military actions are being authorised, can it really be argued that the system is not working? In the words of Franck and Rodley:

“True, the Security Council is constrained by the veto. But in this as in other cases, the veto serves the deliberate and valid purpose of ensuring that well-intentioned but untenable moves do not accidentally trip the world into the great abyss.”\(^{112}\)

### 4.4. A ‘HUMANITARIAN’ INTERPRETATION OF THE CHARTER?

A final contention, reminiscent of the ‘ineffectiveness’-argument, is that the UN was established to handle inter-state conflicts, but that the majority of contemporary conflicts are *intra-state*. It is therefore argued that the UN organisation has to shift its focus away from protection of the nation-state and its sovereignty, towards the protection of people against its own state, and that the Charter must be interpreted accordingly.

To allow for such an interpretation, the UN Charter must be found to *incorporate* a concept of ‘humanitarian values’ that can override the positive prohibition of art 2(4). And this is exactly what eg Reisman has submitted:

“The advent of the UN neither terminated nor weakened the customary institution of humanitarian intervention. In terms of its substantive marrow, the Charter

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\(^{111}\) *Albania v UK* 1949 ICJ Rep 4 at 35 (emphasis added). The intervention in question was not humanitarian, but UK intervened into Albania’s territorial waters to secure evidence for the subsequent ICJ case. This fact does not affect the significance of the court’s statement in relation to humanitarian intervention.

\(^{112}\) Franck & Rodley (n 105) 300.
strengthened and extended humanitarian intervention, in that it confirmed the homocentric character of international law.\textsuperscript{113}

However, this seems to me to be a far cry from a legal interpretation of the Charter in accordance with a sound method of international law. As the noted scholar Brownlie firmly established:

‘There is little or no reason to believe that humanitarian intervention is lawful within the regime of the Charter.’\textsuperscript{114}

In conclusion, it seems to me that many scholars are constantly trying to find a way around the strictly legal arguments as to the unlawfulness of humanitarian intervention, to find a solution more in accordance with some fundamental moral and human values. This is, in my view, what Reisman is trying to do, and it is also the driving force behind arguments trying to limit the scope of art 2(4) through ‘innovative’ textual interpretations.

My assertion, as I have mentioned before, is that such fundamental moral considerations are very important for our understanding and interpretation of significant legal questions like this, and that they therefore should be acknowledged and thereby subjected to a closer scrutiny.

I will treat this more thoroughly below, so it suffices to conclude here that I cannot see that the text of the UN Charter can honestly be interpreted to permit the act of humanitarian intervention. To sum up in the words of Arend and Beck:

‘Since the Charter’s entry into force, it has remained almost exclusively for scholars to articulate counter-restrictionist arguments supporting the lawfulness of humanitarian intervention. Such arguments, grounded far more in theory than in fact, have a certain visceral appeal but must ultimately be rejected.’\textsuperscript{115}

5. PRACTICE AFTER 1945

According to the ICJ statutes art 38(1)(b), ‘international custom, as evidence of a general practice accepted as law’ is one of the basic sources of international law. It is perhaps the most fundamental source, particularly when treaty law is scarce or non-

\textsuperscript{113} Reisman (n 85) 171 (emphasis added).
\textsuperscript{114} Brownlie (n 88) 500.
\textsuperscript{115} Arend & Beck (n 3) 136.
existent.\textsuperscript{116} Thus, even if the UN Charter prohibits the use of force, it can be argued that rules regarding the use of force can be found outside the Charter, in the realm of customary law.

The right of intervention by invitation can be used as an example. Under certain circumstances, such intervention can be considered lawful, even if there are no rules about it in the UN Charter.\textsuperscript{117} And on a more general basis, it was stated in the Nicaragua-case that:

\begin{quote}
‘[T]here are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter “supervenes” the former, so that the customary international law has no further existence of its own.’\textsuperscript{118}
\end{quote}

Thus, customary law \textit{can} be a source of rules regarding humanitarian intervention, even if art 2(4) is seen as prohibiting the use of force on a general basis.

5.1. PRACTICE AND OPINIO JURIS ESTABLISHING CUSTOMARY LAW

The mentioned art 38 sets up two requirements for establishing an international custom. Firstly, that there is a constant and uniform practice; secondly, that the states act according to this practice because they are of the opinion that they are following a rule of law – the \textit{opinio juris sive necessitatis}.

5.1.1. PRACTICE – USUS

Traditionally it was held that there had to be a ‘concordant practice by a number of States …over a considerable period of time’ for the establishment of custom to be considered.\textsuperscript{119} This requirement has been somewhat eased by the ICJ.

In the \textit{Anglo-Norwegian Fisheries Case}, the customary rule of drawing straight baselines for delimiting the territorial waters was established on the basis of unilateral Norwegian practice. And even if Norway had first done it in 1935, the court stated that:

\begin{quote}
\textsuperscript{116} See the assessment of customary law’s superiority over conventional law in Harris (n 64) 44-5.
\textsuperscript{117} See N. Ronzitti \textit{Use of Force, Jus Cogens and State Consent} in Cassese (n 65) 147. The South African intervention in Lesotho in 1998 is an example of such an intervention, and it was generally perceived as lawful. See A. Hillig \textit{The 1998 SADC Intervention in Lesotho: International Law Perspectives} (LLM thesis, UCT, 1999) 58.
\textsuperscript{118} \textit{Nicaragua v USA} 1986 ICJ Rep 14 at 94, para 177.
\textsuperscript{119} The noted scholar M. Hudson in (1950) 2 YBIL Comm’n 26. Quoted in F.L. Kirgis \textit{Custom on a Sliding Scale} (1987) 81 AJIL 146.
\end{quote}
‘This method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of [other] governments bears witness to the fact that they did not consider it to be contrary to international law.’

This judgment has been criticised, eg by Fitzmaurice, for establishing custom on a too thin basis. But as Lauterpacht has noted:

‘[W]hat matters is not so much the number of states participating in its creation and the length of the period within which that change takes place, as the relative importance, in any particular sphere, of states inaugurating the change.’

In this case, Norway’s coastline was considered unique, so there was really no other state’s practice that was relevant.

This case can also be seen as an illustration of the contention that customary law is sometimes established on the basis of its reasonableness, ie that the court finds that the custom would make an adequate rule of international law. In this case, the drawing of straight baselines was a rational and logic way to deal with Norway’s irregular and island-dotted coastline.

Thus, practice does not have to be particularly long or constant in order to provide a basis for customary law. Is it then the opinio juris that makes us recognise that state practice amounts to a customary rule in one case, and not in another?

5.1.2. OPINIO JURIS

The necessity of opinio juris was expressed in the North Sea Continental Shelf Cases in this way:

‘Not only must the acts concerned amount to a settled practice, but they must also …be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.’

This may seem as a difficult requirement to meet, and a serious barrier for the establishment of customary law, but it is not so in practice. Eg in the Nicaragua-case,

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120 UK v Norway 1951 ICJ Rep 116 (emphasis added).
121 See G. Fitzmaurice The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law (1953) 30 BYIL 1 at 18 ff. See also Harris (n 64) 382, n 55.
122 H. Lauterpacht Sovereignty Over Submarine Areas (1950) 27 BYIL 376 at 394 (emphasis added).
123 See Kirgis (n 119) 149.
customary rules regarding the illegality of use of force were established on a very thin basis. The court noted that GA resolutions such as the Declaration Concerning Friendly Relations\textsuperscript{125} had gained widespread support, and said that:

‘The effect of consent to the text of such resolutions …may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of non-use of force, for example, \textit{may thus be regarded as a principle of customary international law}.’\textsuperscript{126}

And regarding the principle of non-intervention, for which the same general consent could be established, the court declared that:

‘[T]hough examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law.’\textsuperscript{127}

Thus, what the court seems to be saying is that state practice does not really matter when there is a clear consensus about the content of the rule, at least when it comes to norms of \textit{fundamental} value, such as the principle of non-use of force.

This reflection was elaborated by Kirgis, who asserted that customary law is established on a \textit{sliding scale}. He wrote that:

‘On this sliding scale, very frequent, consistent state practice establishes a customary rule without much (or any) affirmative showing of an \textit{opinio juris}. …At the other end of the scale, a clearly demonstrated \textit{opinio juris} establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule.’\textsuperscript{128}

And Kirgis develops this even further. It is not only the available practice and consensus about the content of the rule that matter when establishing customary law, he says, but also:

‘…the activity in question and the reasonableness of the asserted customary rule. …The more destabilizing or morally distasteful the activity – for example, the

\textsuperscript{125} GA Res 2625 (XXV), see above, p 20.
\textsuperscript{126} \textit{Nicaragua v USA} 1986 ICJ Rep 14 at para 188 (emphasis added).
\textsuperscript{127} Ibid para 202.
\textsuperscript{128} Kirgis (n 119) 149.
offensive use of force or the deprivation of fundamental human rights – the more readily international decision makers will substitute one element for the other.'

Thus, when it comes to norms that are both reasonable and of fundamental value, there is a tendency to accept them as customary law, even if the legal requirements according to art 38(1)(a) are not strictly fulfilled. When the rule is of more peripheral importance, as in the *North Sea Continental Shelf Cases*, the requirements are more strictly adhered to.

But what is it that makes us *recognise* one norm as fundamental, and another as peripheral? There must be some basic guiding principles that make us reject a customary right to use force, but confirm the customary prohibition of torture, both contrary to evident state practice. Such guiding principles cannot be part of the law itself. My assertion, as already mentioned, is that they can be nothing but our profound moral convictions.

This I will get back to below. For now it suffices to note that the establishment of customary law is relative to the reasonableness and importance of the rule in question. Humanitarian intervention, at least at the core, concerns very fundamental considerations like the prevention of genocide. The threshold for asserting such a customary right should therefore be minimal.

Another paradox is that the requirement of *opinio juris*, strictly interpreted, seems to hamper the formation of any new customary rule whatsoever. If new state practice is to be regarded as a rule, then the first states to adopt this practice are supposed to be acting on the basis that they are already following a legal rule. The requirement of *opinio juris* is logically circular. This is what Lauterpacht called:

‘…the mysterious phenomenon of customary international law which is deemed to be a source of law only on condition that it is in accordance with law. To that extent custom is both a source of law and evidence of it – a suggestive reminder that the difference between a source of law and its evidence is only a matter of degree.’

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129 Ibid.
130 See Harris (n 64) 41.
131 Lauterpacht (n 122) 395.
This fact makes it difficult to pick relevant cases for a study of the development of a customary rule. Are instances that are undeniably illegal according to contemporary law to be left out? Or can these be taken as evidence of the evolution of a new customary regime? This problem seems to be particularly relevant in the case of the legality of various theories of intervention.

I will subsequently only pick cases that seem to be within the definition of humanitarian intervention as laid out at the start of this thesis. The legality according to previous customary law is of minor concern.

5.2. INTERVENTIONS DURING THE COLD WAR, 1945-1989

The period after the Second World War was characterised by distrust and enmity, ‘the Cold War’, between the Western and the Sino-Soviet countries and their allies. The two sides refused to co-operate on the international arena, and often supported different sides of a conflict merely in defiance of each other.\(^{132}\)

This had the direct consequence of rendering the UN Security Council (SC) virtually inoperative. In every case of humanitarian crisis where international intervention could have been the solution, one of the major powers exercised their right to veto the decision of the SC. The UN was therefore unwilling or unable to send security forces to Uganda, to Kampuchea and a range of other areas where human catastrophes were unfolding.

But the post-World War Two era nevertheless saw quite a few unilateral interventions without the support of the SC. And a number of these have been described, by scholars and governments alike, as genuine humanitarian interventions.\(^{133}\) However, a closer scrutiny shows that only a few of these can justifiably be described as such.

5.2.1. SELECTION OF CASES

The interventions in Palestine by a number of Arab states 14 May 1948 and by Belgium in Congo On 8 July 1960 were both justified by ‘humanitarian’ objectives. It was, however, evident that both were undertaken primarily for other purposes. The Belgian forces ‘took active part in a civil war on the side of the Katangese rebels who,

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\(^{132}\) The civil war in Angola is a good example. Here the MPLA (who later was recognised as the government) was self-declared Marxist-Leninist, while the rebel UNITA was Maoist. Nevertheless, while the Soviet Union gave support to MPLA, USA gave just as massive support to UNITA. See eg: [http://www.emulateme.com/history/anghist.htm](http://www.emulateme.com/history/anghist.htm).

\(^{133}\) See the expositions in Verwey (n 2) 398-404; Arend & Beck (n 3) 114-28; Abiew (n 47) 103-31; Téson (n 99) 179-223; Wheeler (n 16) 55-136 and Simon (n 3) 147-50.
Belgium hoped, would respect Belgian commercial interests’. And concerning the Arab invasion of Israel, it has been noted that ‘the political objectives involved …are far too well known, and need no comment’.

The Indonesian intervention on 7 December 1975 in East Timor must be dismissed for the same reason, as the ‘military units stayed on, and in July 1976 Indonesia annexed the island’. Similarly, the motives behind apartheid South Africa’s intervention in Angola in 1975 were obviously not ‘the fate of black Angolans’, as it was claimed.

The US invasion in the Dominican Republic 28 April 1965 was allegedly grounded in humanitarian concerns, and some authors seem to view it as a genuine case. But it later became clear that the real motive was to hinder, in the words of President Johnson, ‘the establishment of another communist government in the Western hemisphere’. Moreover, the intervention was undertaken, ‘at least in theory, with the consent of both the rival factions in the Dominican Republic’.

The Belgian and US intervention in Congo on 24 November 1964 to rescue almost 2000 people of various nationalities held hostage by rebel forces was officially described as ‘humanitarian, not military. It is designed to avoid bloodshed – not to engage the rebel forces in combat’. One author accordingly holds that ‘the episode presents one of the clearest modern instances of true humanitarian intervention’.

However, this is clearly not the consensual view. Firstly, the Congolese government, although not having control over much of the territory, consented to the intervention. Secondly, when the intervening forces left, the rebel ‘capital’ was in the government’s hands and its prospects in the civil war had been remarkably improved. Verwey claims that: ‘It was more or less clear that this had been the prime objective of US and Belgian...

134 Verwey (n 2) 400.
135 Ibid.
136 Ibid 403.
137 Ibid.
138 See Abiew (n 47) 108-12.
139 Documents on American Foreign Relations (1965) 245. Quoted in Abiew (n 47) 110, n 135. See also Franck & Rodley (n 105) 287.
139 M. Akehurst The Use of Force to Protect Nationals Abroad (1977) 5 Int Relations 11. Quoted in Arend & Beck (n 3) 117.
140 United States Department of State Bulletin (1964) 842. Quoted in Abiew (n 47) 105.
142 See Arend & Beck (n 3) 117 and Franck & Rodley (n 105) 287.
policy from the beginning.' Finally, the operation was mainly undertaken to rescue European citizens residing in Congo, not for humanitarian concerns about the Congolese people.

Similar doubts apply to the Belgian and French intervention in Zaire on 19 May 1978. Some 2400 Europeans were rescued, but the killing of 380 rebels and recapture of a rebel stronghold were ‘instrumental in helping the Mobutu regime to survive and regain control over the copper industries in the province’. It can therefore also be seen as an instance of intervention by invitation.

Somewhat more doubtful is the French intervention in the Central African Republic on 21 September 1979. Because of the ‘humanitarian’ motives behind the French operation and the fact that no lives were lost, Téson has labelled this ‘an instance of humanitarian intervention *par excellence*’. This has been challenged for two reasons. Firstly, it has been argued that the scope of the human rights violations were not such as to warrant an intervention. Bokassa’s rule was manifestly tyrannical, but it could perhaps not be characterised as instituting *gross* human rights violations. More importantly, France did not expressly justify the intervention on ‘humanitarian’ grounds; they initially even denied their implication in the coup. They also had substantial economic interests in the country, including diamonds and other minerals, and there were some rival coups being planned with the support of Cuba and the Soviet Union. The prospect of communist rebels taking over the government was definitely not in the interest of France. Moreover, it seems like most writers leave this incident out of their treatment of the subject, indicating the consensual view that it should be dismissed.

Finally, the United States invasion in Grenada, with support of six other Caribbean states, on 25 October 1983 was officially undertaken ‘to rescue others from bloodshed and turmoil and to prevent humankind from drowning in a sea of tyranny’. However, it

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144 Verwey (n 2) 401.
145 See Franck & Rodley (n 105) 288.
146 Verwey (n 2) 403.
147 See Ronzitti (n 117) 154.
148 Téson (n 99) 199. Simon concurs, (n 3) 147.
149 See Arend & Beck (n 3) 126.
150 Ibid.
151 Only Téson of the writers mentioned above in n 133, seem to include it.
152 The American Ambassador Kirkpatrick in the SC, quoted in Verwey (n 2) 404.
soon became clear that the real motive was to prevent another Caribbean island from becoming a communist state. Besides, the emphasis in the justifications was put on the right to rescue own nationals, not on ‘humanitarian’ considerations.

All these instances must thus be disregarded in the subsequent discussion, because they do not fit the definition of humanitarian intervention laid down at the outset of this thesis. What is left then are three instances meriting a closer investigation. I will first try to determine if they are genuine instances of humanitarian intervention, and then make a joint assessment as to the legal significance of the cases.

5.2.2. INDIA IN EAST PAKISTAN, 1971

On 25 March 1971, West Pakistan invaded East Pakistan in an attempt to suppress claims to autonomy of the province. The West Pakistani army conducted ‘mass murders and other atrocities’ on a vast scale. A large number of civilians were killed, and approximately ten million East Pakistanis fled to India, who appealed in vain to the UN to do something about the situation.

On 5 December 1971, India therefore invaded East Pakistan, and the next day, formally recognised Bangladesh as an independent state. After only 12 days of fighting, the West Pakistani army surrendered. In the following SC debate, India initially claimed the motive behind the action was ‘to rescue the People of East Bengal from what they are suffering’. However, this ‘humanitarian’ rationale was later changed to self-defence, as India claimed that Pakistan was guilty of ‘refugee aggression’ when they caused a massive flow of refugees into India. The official motive was therefore to ‘protect India’s territorial integrity and sovereignty’.

Regarding the authenticity of the instance, it has firstly been held that this lack of an expressly ‘humanitarian’ justification is a disqualifying factor. Akehurst argues that India’s change of mind signals their ‘realiz[ation] that humanitarian intervention was an insufficient justification for the use of force’. He thus ascribes significance to the reason India presented for the intervention.

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153 See Verwey (n 2) 404.
154 See Simon (n 3) 145-46.
155 Arend & Beck (n 3) 118.
156 UN Doc S/PV.1606, 4 Dec 1971, 86. Quoted in Franck & Rodley (n 105) 276.
157 See Wheeler (n 16) 62.
158 M. Akehurst (n 140) 12. Quoted in Arend & Beck (n 3) 119.
However, the question whether such subjective factors should have legal importance is controversial. The motives behind state acts are in general hard to ascertain, as a state does not have a uniform will, like a person. It is furthermore disputed whether such motives should optimally be a basis for ‘making legal determinations’. Téson holds that the Indian justifications were ‘of little importance’, and that what really mattered was that ‘the whole picture of the situation was one that warranted foreign intervention on the grounds of humanity’. Arend and Beck, on the other hand, claims that ‘[i]nternational legal scholarship has long recognised that state motives must be taken into account in legal assessments of state practice’.

Kritsiotis, arguing for a ‘middle position’, seems to emphasise the official reasons presented, but he too rejects the significance of underlying motives:

‘Even where the true motives behind an international action are discernible, using these motives to trump the lawfulness of an operation is unreasonable where the sole consequence of a given operation is the actual protection of human life, where this reason is given as the legal justification for action and is accepted as such by the world community.’

It seems to me that such motives must be taken in consideration if they have external, objective manifestations, in the form of an official statement or in the form of facts proving such a statement untrue. This would also be in accordance with the definition of humanitarian intervention, as given at the outset. Thus, India’s change of statement should be taken in consideration.

This cannot be decisive, however, since any state which is the first to adopt a new practice will be reluctant to justify it by asserting a customary rule with that content. Ie, India might have thought that humanitarian intervention was illegal, but that does not mean that the instance looses significance as support for new customary law.

Secondly, it is claimed that India had both political and economic interests in overturning the regime in East Pakistan. Pakistan was an enemy, and this was an

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159 Kritsiotis (n 15) 1035.
160 Téson (n 99) 208.
161 Arend & Beck (n 3) 119.
162 Kritsiotis (n 15) 1038 (emphasis added).
163 See the discussion of opinio juris above p 28.
opportunity to ‘deal it a blow’. Furthermore, Pakistani refugees were a heavy economic burden on India, and they could be returned to Bangladesh if the operation was successful. Pakistan had also bombed an Indian airport in December 1970, which provided the rationale behind the official justification of self-defence.

These counter-arguments have only a minor impact, in my opinion. According to the definition of humanitarian intervention at the outset, interventions that are primarily but not entirely undertaken for humanitarian reasons can still be included. As Wheeler says it:

“The final threshold requirement for an intervention to qualify as humanitarian is that any non-humanitarian motives for acting and the means employed must not undermine a positive humanitarian outcome.”

In conclusion, it seems like the lack of an expressly ‘humanitarian’ justification and the authenticity of the self-defence situation are the only substantial arguments challenging this instance as a humanitarian intervention. The impact of these arguments is of course disputed. Fonteyne holds that ‘the action in the Bangladesh situation probably constitutes the clearest case of forceful individual humanitarian intervention in this century’. Others dismiss it totally.

I will submit that the Indian intervention in East Pakistan can be regarded as a genuine case of humanitarian intervention.

5.2.3. VIETNAM IN KAMPUCHEA, 1978-79

The infamous regime of the Khmer Rouge in Cambodia was one of the worst in the history of mankind. In less than three years of effective government, as much as one-sixth of Kampuchea’s six million people may have died at their hands.

On 25 December 1978, after a series of border incidents between the two communist neighbours, Vietnamese forces invaded Kampuchea together with a small Kampuchean
rebel faction, the National United Front for National Salvation. On 7 January 1979, the capital of Phnom Penh was captured. The Vietnamese forces soon established control over most of Kampuchea’s territory and installed a new government composed of United Front members.

However, Vietnam never claimed that they had intervened to protect human rights in Kampuchea. They put forward a ‘two wars’-theory, claiming that the incident had been composed of the conflict between Vietnam and Kampuchea and a separate Kampuchean civil war. Regarding the former, they claimed self-defence, while the latter had been fought by the Kampuchean rebel forces, which by themselves had overthrown the Khmer Rouge regime.\(^{171}\)

Many scholars dismiss the incident as a true humanitarian intervention for this reason. Neither Téson, a supporter of the doctrine, nor Verwey mentions it at all.\(^{172}\) But as said earlier, I do not think that statements of motive should be taken for granted; if the facts indicate otherwise, they should be taken in consideration. And the Kampuchean case was no doubt ‘a perfect candidate for humanitarian intervention’,\(^{173}\) considering the scale of the human rights violations.

However, there are serious doubts as to the legitimacy of any ‘humanitarian’ justification in this case. The tensions between the two countries were very real, and it seemed convenient for Vietnam to use the situation to invade Kampuchea and install a ‘puppet government’.\(^{174}\) Vietnamese troops even stayed in Kampuchea for more than a decade after the invasion.\(^{175}\)

It is therefore held that ‘Hanoi’s regional hegemonistic motives for invading Kampuchea seem clear’.\(^{176}\) Even Abiew, who is generally positive to the doctrine, has his doubts as to ‘whether in fact, the objective of the Vietnamese was merely humanitarian’.\(^{177}\)

On this basis, Wheeler concludes that:

\(^{171}\) Ibid 122.
\(^{172}\) See above n 133.
\(^{174}\) Abiew (n 47) 130.
\(^{175}\) Ibid. The last troops reportedly left in 1993.
\(^{176}\) Arend & Beck (n 3) 122.
\(^{177}\) Abiew (n 47) 131.
‘If the primacy of a humanitarian motive is the defining character of a legitimate humanitarian intervention, then this case fails to meet the test.’

I conclude that the instance probably has to be disregarded in the subsequent discussion.

5.2.4. TANZANIA IN UGANDA, 1979

On 11 April 1979, forces from the Ugandan National Liberation Front entered Kampala and established a provisional government, with substantial support from Tanzanian troops. That was the end of eight years of brutal dictatorship by President Idi Amin. Under his regime, as many as three hundred thousand people had been killed, many after suffering extensive torture. The Tanzanian foreign minister described this as ‘a tremendous victory for the people of Uganda and a singular triumph for freedom, justice and human dignity’. 179

However, Tanzania never justified the action on humanitarian grounds. They put forward a similar ‘two wars’-justification as Vietnam had. There had been extensive fighting between Uganda and Tanzania in the preceding years, with territories captured on each side of the border. The Tanzanian President, Nyerere, declared that:

‘[The] war between Tanzania and Idi Amin’s regime in Uganda was caused by the Ugandan army’s aggression against Tanzania and Idi Amin’s claim to have annexed part of Tanzanian territory. There was no other cause for it.’ 180

The toppling of Amin, on the other hand, was done by the Ugandan rebels themselves. Consequently, many scholars dismiss this instance as a case of humanitarian intervention. 181 Again, I do not think that statements of motive should be decisive, but will look at the facts present.

Firstly, Tanzania’s official claim that the action was taken in self-defence does not hold under closer scrutiny. 182 This does not at all mean that it must be legal for some other reason, but other justifications must also be considered.

178 Wheeler (n 16) 105.
180 Ibid.
181 Eg Arend & Beck (n 3) 125. Verwey (n 2) totally excludes it from his treatment.
182 See Abiew (n 47) 125.
Secondly, many authors claim that ‘especially the casual killings of a large number of people, provided the justification for humanitarian intervention: Amin’s treatment of subjects was revolting to the human conscience’.183 Neither did Tanzania have any other interests in Uganda, and harboured ‘no claim to an inch of Ugandan territory’.184 Accordingly, Téson holds that ‘considerations of humanity are the only conceivable legal justification for the Tanzanian overthrow of Amin’.185

Thus, whether this should be regarded as an instance of humanitarian intervention is largely dependent upon what weight is accorded to the official Tanzanian motive. In light of the obvious relief to the Ugandan people that the intervention brought, and the lack of Tanzanian interests other than humanitarian concerns, I submit that Bazyler is right when he asserts that:

‘The sheer brutality of Idi Amin’s regime, the unwillingness of the United Nations and the Organization of African Unity [OAU] to do anything about Amin despite knowledge of his brutalities, and the limited intervention by Tanzanian forces, indicate that, on balance,186 the Tanzanian intervention in Uganda can be justified on humanitarian grounds.’

5.2.5. LEGAL SIGNIFICANCE OF THE CASES

Now, even if some instances have to be regarded as true cases of humanitarian intervention, this does not say anything about the legal significance to be assigned to them. As made clear earlier, not only state practice, but something more; a conviction that this practice is the manifestation of a legal rule, is needed to establish customary law.

And here the intervening states’ expressed reason for intervening is significant. As we saw, none of the interveners made humanitarian intervention the final legal validation of their action. Moreover, even if neither India nor Tanzania could invoke self-defence, as the legal requirements for this were not present, that was what they did. This is an important indication that they did not believe that the doctrine of humanitarian intervention was legally valid at the time.

Another important indication is the reaction of observer states to the incidents. The Indian intervention, while never condemned by the SC, received a largely negative

184 President Julius Nyerere in 1979 *Keesing’s* 29670.
185 Téson (n 99) 185.
response in the GA. \textsuperscript{187} And even those who were generally positive, like the Soviet Union, never submitted a ‘humanitarian’ justification, but accepted that India had acted in self-defence. \textsuperscript{188}

The Tanzanian overthrow of Amin was more welcomed by the international community. A number of states supported Tanzanian claims of self-defence and quickly recognised the new government of Uganda. \textsuperscript{189} And the OAU remained silent at its summit in July 1979, probably indicating consent. \textsuperscript{190} However, not one state invoked the doctrine of humanitarian intervention. \textsuperscript{191} This is a significant indication of the lack of \textit{opinio juris} in the international community as to the legality of the doctrine.

I therefore think Arend and Beck were correct when they held that:

‘[T]he majority of scholars and the majority of states now appear to accept the “restrictionist theory” which posits that such intervention …is not permissible.’ \textsuperscript{192}

Another argument is the scarcity of genuine cases of humanitarian intervention. As Verwey notes, there are ‘relatively few instances, in comparison to the many instances of non-humanitarian armed intervention, in which the doctrine [has been] invoked’. \textsuperscript{193} Indeed, I have only identified two real instances in my treatment, with two more as possible candidates.

I therefore seems like the foundation for establishing customary law regarding humanitarian intervention is very uncertain. Even if Kirgis’ ‘sliding scale’ is considered, both the practice and the \textit{opinio juris} are virtually non-existent. \textsuperscript{194} The only conclusion must therefore be that a customary right to humanitarian intervention could not have been established during the cold war.

\textsuperscript{186} Bazyler (n 173) 551 (emphasis added).
\textsuperscript{187} See Abiew (n 47) 116 and 120.
\textsuperscript{188} See Arend & Beck (n 3) 131.
\textsuperscript{189} Ibid and Abiew (n 47) 123.
\textsuperscript{190} See Téson (n 99) 186.
\textsuperscript{191} See Arend & Beck (n 3) 131.
\textsuperscript{192} Ibid.
\textsuperscript{193} Verwey (n 2) 407.
\textsuperscript{194} See Brownlie (n 88) 500.
5.3. INTERVENTIONS AFTER THE COLD WAR, 1990→

The early 1990s witnessed changes in the international community so profound that they would have been unimaginable only a few years before. The disintegration of the Soviet Union and the ‘Eastern Bloc’ with it, and the end of East-West hostilities, created a new international political climate. Finally the UN and its SC could perhaps function as planned. As Lillich expressed the prevailing optimism:

‘The conclusion of the Cold War …presented a once-in-a-lifetime opportunity for the nations of the world, acting individually, collectively and through the UN, …to help achieve two principal purposes of the UN: the maintenance of international peace and security and the promotion and encouragement of human rights and fundamental freedoms.

However, partly as an effect of the demise of one of the super-Powers of the world, state order collapsed in some sectors of the globe, especially in the Balkans, the southern section of the former Soviet Union and parts of Africa. From the situation of one all-encompassing, static international conflict, the focus shifted to several intra-state conflicts. Thus, the problem for the international community was no longer that the SC was unwilling to take control, but that it perhaps was unable; art 2(7) seems to prohibit intervention by the UN in matters ‘essentially within the domestic jurisdiction of any state’.

However, the SC soon interpreted art 39 of the Charter as permitting collective involvement in internal conflicts. The international community could therefore resume responsibility for action during humanitarian catastrophes, and the right of states to unilaterally intervene on humanitarian grounds became less important.

Such collective enforcement is not a subject for this thesis. What is a subject, on the other hand, is whether considerations from the Cold War era still are of value when other aspects of international power politics manage to paralyse the SC, like in the Kosovo crisis. Ie, if a doctrine of multi- or unilateral humanitarian intervention can retain some sort of validity in the new climate of international co-operation.

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195 See Abiew (n 47) 137.
197 See Abiew (n 47) 139.
198 Ibid 137.
199 See Wheeler (n 16) 15.
5.3.1. SELECTION OF CASES

As a result of the restored functioning of the UN, the majority of interventions after 1990 have been authorised by the SC, and therefore have to be dismissed from the subsequent investigation. 200

This applies to the US intervention in Somalia in 1992-93, which nevertheless is an important landmark in SC practice regarding collective interventions for the sake of ‘humanity’. 201 It was the first incident where the SC expressly characterised a ‘human tragedy’ as a ‘threat to international peace and security’, and therefore justifying forcible measures in accordance with the UN Charter Chapter VII. 202

It also applies to the intervention in Former Yugoslavia in 1992 by the UN Protection Force (UNPROFOR). 203 And the Rwandan Genocide, however awful, must be dismissed for the same reason. Both the UN force, UNAMIR, and the French forces were authorised by SC Resolution 918. 204 Finally, the intervention in Haiti has been mentioned by many writers on the subject, but I will disregard it. The Organization of American States (OAS) intervened in 1992, but in March 1995 the UN Mission in Haiti (UNMIH) took over by authorisation of the SC. 205

There are then left three instances from the last ten years that merit a closer investigation as to whether they have formed customary rules regarding unilateral intervention on humanitarian grounds.

5.3.2. USA, UK AND FRANCE IN NORTHERN IRAQ, 1991

The Kurdish people have claimed their right to sovereignty since the late nineteenth century, but are divided between Iraq, Iran, Turkey and Syria, and have been persecuted to some extent by all the states they inhabit. 206 In 1985, Saddam Hussein’s Iraqi regime

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200 Many authors do not exclude interventions authorised by the SC in their definition of ‘humanitarian intervention’, and therefore treat such instances at length. See Abiew (n 47) 137-222 and to some extent Wheeler (n 16) 139-284.
204 Passed 17 May 1994.
started to systematically destroy Kurdish villages and even used chemical weapons against some settlements, killing as many as 10,000 Kurds.\textsuperscript{207}

In the aftermath of the Persian Gulf War in February 1991, Kurdish rebels took advantage of the unstable political situation and made significant military advances.\textsuperscript{208} This was soon reversed, however, when Iraqi forces again started attacking Kurdish villages and massacred the civilian population on a large scale. Out of a Kurdish population of 3-4 million, an estimated 1.5 million refugees fled towards Turkey and Iran.\textsuperscript{209}

On 3 April 1991, the SC passed resolution 668, stating that the SC:

‘\textit{Condemns} the repression of the Iraqi civil population... \textit{Demands} that Iraq, as a contribution to removing the threat to international peace and security in the region, immediately end this repression... \textit{Appeals} to all Member States and to all humanitarian organizations to contribute to these humanitarian relief efforts.’

This resolution, even if it refers to a ‘threat to international peace and security’, fell short of invoking forceful measures under Chap VII of the Charter.\textsuperscript{210} It does not mention any collective enforcement measures and does not expressly authorise any military intervention.\textsuperscript{211} The text was a compromise, passed with the least possible support, and it was clear that such an authorisation would never have been accepted by China or the Soviet Union in the SC.\textsuperscript{212}

However, later in the same month, USA, UK and France announced their plans of the ‘Operation Provide Comfort’ to establish ‘safe havens’ and a ‘no-fly-zone’ in Northern Iraq. The UN Secretary General (SG), Perez de Cuellar, expressed concerns that without Iraq’s consent, their sovereignty would be violated, or ‘consent would have to be obtained from the Security Council’.\textsuperscript{213}

Nevertheless, on 16 April about 8,000 US, UK and French troops intervened to establish the proposed safe zones in order to get the Kurds safely down from the mountains and back to their homes. The operation was ‘motivated by humanitarian

\begin{itemize}
\item[\textsuperscript{207}] See Abiew (n 47) 146.
\item[\textsuperscript{208}] See Stromseth (n 206) 83.
\item[\textsuperscript{209}] See Wheeler (n 16) 141 and Abiew (n 47) 148.
\item[\textsuperscript{210}] See Wheeler (n 16) 146.
\item[\textsuperscript{211}] See Malanczuk (n 3) 18.
\item[\textsuperscript{212}] See Wheeler (n 16) 156.
\item[\textsuperscript{213}] Quoted in Wheeler (n 16) 153. See Stromseth (n 206) 90.
\end{itemize}
concerns’, in the words of President Bush.\textsuperscript{214} The UN SG also acknowledged the importance of acting from a ‘moral and humanitarian point of view’.\textsuperscript{215} The British Foreign Minister, Douglas Hurd, stated that:

‘[W]e operate under international law. Not every action that a British Government or an American Government or a French Government takes has to be underwritten by a specific provision in a UN resolution provided we comply with international law. International law recognizes extreme humanitarian need.’\textsuperscript{216}

Shortly after the intervention, however, the allied countries tried to make the UN take over responsibility for the operation. This could not be done without Iraqi consent, and on 18 April, agreement was reached concerning a limited force of UN guards and the establishment of 100 civilian humanitarian aid centres around Iraq. This has made some commentators claim that Iraq \textit{acquiesced} in the intervention, and thus making it legal through consent.\textsuperscript{217}

This seems to me like an overly legalistic interpretation of political events. The facts were that a relatively large allied force intervened, and that Iraq later was forced to accept a much smaller UN presence. The initial intervention cannot be seen as anything else than a multilateral operation undertaken for humanitarian reasons. I submit that Malanczuk presents the right interpretation when he concludes that:

‘Resolution 688 by itself did not provide the legal basis [for the operation]. The legal significance of the allied action as state practice, on the other hand, for the development of customary international law will become apparent only in a longer-term perspective.’\textsuperscript{218}

Thus, the allied intervention in northern Iraq can be regarded as a case of humanitarian intervention. But was it rendered lawful on this ground, and did it result in a development of an international customary right to such intervention? To answer this we also have to investigate whether there was a general \textit{opinio juris} on the lawfulness of the operation in the international community.

\textsuperscript{214} Quoted in Wheeler (n 16) 151.
\textsuperscript{215} Ibid 153.
\textsuperscript{217} See Wheeler (n 16) 154 and the writers mentioned in Malanczuk (n 3) 19.
\textsuperscript{218} Malanczuk (n 3) 19.
In a memorandum to the British Foreign Affairs and Commonwealth Office, it was held by the legal counsellor that:

‘[T]he intervention in northern Iraq “Provide Comfort” was in fact, not specifically mandated by the United Nations, but the states taking action in northern Iraq did so in exercise of the customary international law principle of humanitarian intervention.’219

Similar statements were made by US officials.220 This was, however, never an official claim of the allied governments. That fact is a strong indicator that they did not view the principle of humanitarian intervention as legal at the time. The mentioned statements from the SG also give this impression.

On the other hand, it has been argued that the members of the SC, by staying silent about the operation, tacitly accepted the doctrine and acknowledged that such rules were part of customary international law.221 The reason China and the Soviet Union were reluctant to pass a resolution permitting the use of force was allegedly just that they did not want to set a precedent limiting the principle of sovereignty.222

I do not think it is judicious to interpret state actions in this way. Importance should be assigned to the expressed concerns of the members of the SC about the legality of humanitarian intervention, and not to their failure to protest when illegalities are committed.223

Another aspect of the case was that the intervention had strong UN support in resolution 688 and from the SG. It can therefore only be a precedent for a limited right of humanitarian intervention, namely a right that requires support from the SC and is restricted to ‘humanitarian relief efforts’.224

To sum up, the case of northern Iraq cannot be seen as rendering humanitarian intervention legal in customary international law. There was no opinio juris expressed in the international community to that effect. But, as Wheeler argues:

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219 Printed in loc cit (n 216) 827.
220 See Abiew (n 47) 155.
221 See Wheeler (n 16) 167.
222 Ibid 144.
223 Wheeler concurs, ibid 169.
224 Ibid.
“[T]hese caveats do not alter the fact that the safe havens marked a solidarist moment in the society of states. It is claiming too much to argue that the silence that greeted Western action supports a new custom of humanitarian intervention, since international law requires that there be supporting opinio juris. Yet, by raising new humanitarian claims, the language of safe havens entered the normative vocabulary of the society of states.”

Thus, the significance of the case is that for the first time, humanitarian values were being publicly expressed by Western leaders as justifying intervention and to a certain extent limiting the principle of sovereignty. This can be interpreted as expressing an evolving opinio juris regarding the legality of humanitarian intervention.

5.3.3. ECOWAS IN LIBERIA, 1990-92

In December 1989, the National Patriotic Front of Liberia (NPFL), led by Charles Taylor, invaded the country from the Ivory Coast to overthrow a Samuel Doe regime guilty of massive human rights abuses in the preceding years. By August 1990, the NPFL forces controlled most of the country while Doe still controlled Monrovia. The civil war raged on, with factions separating from both parties and adding to the chaos. All sides were reportedly murdering and torturing the civilian population, thousands faced starvation, and more than 1.3 million people were fleeing the country or were internally displaced.

The Economic Community of West African States (ECOWAS) decided to do something about the situation. The ECOWAS Standing Mediation Committee justified an intervention on the grounds that:

“[There] is a state of anarchy and total breakdown of law and order in Liberia. …These developments have traumatised the Liberian population and greatly shocked the people of the sub-region and the rest of the international community.”

On 23 August 1990, the ECOWAS Monitoring Group (ECOMOG) intervened, but soon came under attack from NPFL and other factions that did not want any foreign

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225 Ibid.
226 See D. Wippman Enforcing the Peace: ECOWAS and the Liberian Civil War in Damrosch (n 206) 157 ff.
227 See Abiew (n 47) 200 ff.
228 Final Communiqué of the First Joint Meeting of the ECOWAS Standing Mediation Committee and the Committee of Five, paras 6-9. Quoted in Abiew (n 47) 206.
interference in the conflict.\textsuperscript{229} The ECOMOG was partially successful, eg in establishing a peace treaty in October 1991 that lasted somewhat longer than the previous ones, but the fighting was never stalled for long.

On 19 November 1992, the SC passed resolution 788, where it stated:

\begin{quote}
Determining that the deterioration of the situation in Liberia constitutes a threat to international peace and security… Recalling the provisions of Chapter VIII of the Charter of the United Nations… Recognising the need for increased humanitarian assistance… Commends ECOWAS for its efforts to restore peace, security and stability in Liberia… Requests the Secretary General to dispatch urgently a Special Representative to Liberia to evaluate the situation.’
\end{quote}

This resolution, like resolution 688, did not authorise collective use of force. The ECOWAS intervention was also initiated long before the SC showed any interest in the situation. And even then, the SC members were reluctant to authorise forceful measures in yet another conflict area, as they had just been through the Persian Gulf War and were experiencing trouble in Somalia.\textsuperscript{230}

However, the resolution refers to the regional arrangements in chapter VIII of the Charter. Some authors therefore argue that the intervention can be regarded as legal under art 52, which leaves to regional organisations:

\begin{quote}
‘…such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.’
\end{quote}

The argument is that an intervention on humanitarian grounds \textit{would} be consistent with the purposes of the UN, namely the protection of fundamental human rights, an argument we also saw above.\textsuperscript{231}

This cannot be a correct interpretation of the Charter, however. Art 53 expressly states that ‘no enforcement action shall be taken under regional arrangements …without the authorisation of the Security Council’. And art 51 and chapter VII are generally regarded as the \textit{only} exceptions from the prohibition on the use of force in art 2(4).\textsuperscript{232}

\begin{flushleft}
\textsuperscript{229} See Wippman (n 226) 167.  \\
\textsuperscript{230} See Abiew (n 47) 207.  \\
\textsuperscript{231} Ibid 208. See above p 20.  \\
\textsuperscript{232} See Brownlie (n 88) 502.
\end{flushleft}
Thus, the ECOWAS operation in Liberia cannot be regarded as anything else than a multilateral intervention undertaken on humanitarian grounds. It has been claimed that ‘the ECOWAS intervention in Liberia satisfies virtually every proposed test, and in many respects constitutes an excellent model [of humanitarian intervention]’. But was there any support for the action in the international community, indicating *opinio juris* regarding its legality?

Firstly, although the SC did not authorise the intervention, it *commended* ECOWAS for its effort in Liberia, thus indicating its support. It has been argued that the members of the SC thereby sought to avoid the creation of a precedent for future violations of the principle of sovereignty, while regarding the intervention as lawful *per se*. This, as indicated above, must be rejected. When the members of the SC have denied authorisation to use force on humanitarian grounds, it cannot be inferred that their reluctance to criticise a forceful operation amounts to *acquiescence* to its legality.

The wording of the resolution nevertheless indicates a generally more positive attitude towards this operation than the Iraqi incident. Several African leaders also indicated their support to the operation, eg the Ugandan and Zimbabwean presidents. And in the debate in the SC, the US delegate maintained that:

‘[W]e must not lose sight of what ECOWAS has accomplished through intervention and negotiation. …Although the dispatch of peacekeeping forces to Liberia was a decision taken by the ECOWAS Governments on their own initiative, we supported this effort from its inception.’

Thus, it seems to me that the consent to the ECOWAS operation was somewhat broader than the sanctioning of the allied intervention in Iraq.

However, the regional character of the incident limits its significance as a precedent for humanitarian intervention. At most, the intervention in Liberia signifies the opinion in the world community that interventions undertaken with the *support* of the SC, and by a strong regional organisation, in situations where human rights are grossly violated, can be regarded as lawful.

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233 Wippman (n 226) 179.
234 See Abiew (n 47) 208.
235 See Wippman (n 226) 181.
236 UN SCOR, 47th Sess, 3138th meeting, 74-6. UN Doc.s/pv.3138 (1992). Quoted in Abiew (n 47) 205.
5.3.4. NATO IN KOSOVO, 1999

When the Dayton agreement that marked the end of the Bosnian war was finally concluded on 21 November 1995, it was thought to be the end of armed conflict in the Balkans.\textsuperscript{237}

This was not to be so, however. It was soon clear that the treatment of Kosovo-Albanians (Kosovars) by the Federal Republic of Yugoslavia (FRY) President Slobodan Milošević was causing tensions in the Kosovo region. He had suspended their rights under the 1974 FRY constitution, and implemented strict segregation policies, by some described as an ‘apartheid system in Kosovo’\textsuperscript{238}

Already in the summer and fall of 1996, the Kosovo Liberation Army (\textit{Ushtria Çlimitare e Kosovës} – the UÇK) started a campaign of provocation and terrorist attacks. The UÇK wanted to direct international attention to the situation in Kosovo. They also felt that the pacifist boycott-policy was only making matters worse, by securing Serb control over a region where 90% of the population was Albanian.\textsuperscript{239}

The FRY army stepped up its action against the UÇK, and the conflict intensified. But it was not until early 1998 that the Western powers took serious interest in the conflict. On 31 March 1998 the SC adopted resolution 1160, in which it condemned ‘the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as all acts of terrorism by the Kosovo Liberation Army.’ But it did not prescribe any solution to the conflict, except that it imposed a weapons embargo and called upon the parties to solve the conflict ‘through dialogue’.

The fighting continued, and it became increasingly clear that the Serbs, in their effort to wipe out the UÇK, were driving the civilian Kosovar population out of Kosovo and into Albania and Macedonia. The Western allies, with USA and the UK in the lead, felt that more drastic measures were needed. On 23 September 1998, resolution 1199 was passed where the SC stated that:

\begin{quote}
\textit{A firming} that the deterioration of the situation in Kosovo, Federal Republic of Yugoslavia, constitutes a threat to peace and security in the region… \textit{Demands} … that the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanian leadership take immediate steps to improve the humanitarian situation and to avert the impending humanitarian catastrophe.'
\end{quote}


\textsuperscript{238} See Wheeler (n 16) 257.

\textsuperscript{239} See Misha (n 237) 656 ff.
Although the situation was now regarded as falling under chapter VII of the Charter, the demands made in the resolution were not backed up by a threat of military action. Such a clear authorisation was not possible to obtain from the SC, as both China and Russia would have vetoed that.\(^{240}\)

As the fighting still did not stop, the NATO countries decided to take the matter in their own hands, and on 13 October 1998 they issued an activation order for air strikes if the Serbs did not cease their attacks on Kosovar settlements.\(^{241}\) In the last minute, they sent US Special Envoy Holbrooke to Belgrade, and he persuaded Milošević to accept a cease-fire and the presence of 1.700 inspectors from the Organisation on Security and Cooperation in Europe (OSCE). The agreement was endorsed by the SC in resolution 1203 on 24 October 1998, which also affirmed the statements made in resolution 1199. However, many SC members expressed concerns that the NATO air strike-order was illegal according to the UN Charter.\(^{242}\)

This fragile cease-fire was again shattered when UÇK, who was left out of the OSCE agreement, refused to respect it. In retaliation, the FRY forces massacred 45 civilians in the village of Racak, an event that shocked the world community.\(^{243}\) In a last, peaceful effort to end the hostilities, the parties were invited to Rambouillet outside Paris for peace talks. Here the UÇK agreed to drop their demand for total independence, and the FRY would in turn have to accept the presence of a NATO force in Kosovo. The Serbs eventually refused to accept this last hope for peace, and instead began a new campaign of ethnic cleansing of Kosovo.\(^{244}\)

The NATO countries were now faced with the dilemma of engaging in war against a large state in its own region or renege their public commitment to do so.\(^{245}\) After the last pleas for restraint were rejected by Milošević, the NATO headquarters decided to launch air strikes against the FRY on the night of 23 March 1999.

\(^{240}\) See Wheeler (n 16) 260 ff.
\(^{241}\) See B. Simma NATO, the UN and the Use of Force: Legal Aspects (1999) 10 EJIL 1 at 5, where the text of the activation order is provided.
\(^{242}\) See Wheeler (n 16) 263 ff.
\(^{243}\) See D. Kritsiotis NATO’s Armed Force Against Yugoslavia (2000) 49 Int Comp L Quart 330 at 337.
\(^{244}\) Ibid 339.
\(^{245}\) See Misha (n 237) 657.
Four key rationales were presented to justify the NATO intervention in Kosovo.\(^{246}\) Firstly, that NATO’s credibility as a collective defence organisation was at stake, but this could evidently not serve as a legal foundation for waging war.\(^{247}\)

Secondly, that the operation was in conformity with the three SC resolutions. But since China and Russia so clearly objected to the intervention, both in the debates in the SC and when it was a *fait accompli*, this was also an evident misconception.\(^{248}\)

Thirdly, that the ethnic cleansing posed a long-term threat to European peace and security, that NATO was obliged to act to prevent. This clearly suggests the contention that the action should be regarded as legal under the UN Charter chapter VIII.\(^{249}\) But as we saw in the Liberia-case, this is a misinterpretation of the charter and its recognition of regional arrangements. Outside the right to self-defence, regional organisations still have to obtain authorisation from the SC to use force.\(^{250}\)

Finally, it was held that the action was aimed at averting an impending humanitarian catastrophe. And this is the only basis on which the intervention can be regarded as lawful. As the British Foreign Secretary stated in the Parliament:

‘We were left with no other way of preventing the present humanitarian crisis from becoming a catastrophe than by taking military action to limit the capacity of Milošević’s army to repress the Kosovar Albanians.’\(^{251}\)

This soon became the principal official validation from the NATO countries.\(^{252}\) Wheeler argues that:

‘[T]he evidence points to this being a case where a key determinant of the use of force was the Prime Minister’s and the President’s belief that this was a *just war*.’\(^{253}\)

But was this ‘just war’ justified? To answer this, two aspects have to be considered. Firstly, if the human rights situation in Kosovo was severe enough to warrant a

\(^{246}\) See Wheeler (n 16) 265 ff.
\(^{247}\) See Misha (n 237) 657.
\(^{248}\) See Wheeler (n 16) 267.
\(^{250}\) See Simma (n 241) 6.
\(^{252}\) See Kritsiotis (n 243) 340.
\(^{253}\) Wheeler (n 16) 267 (emphasis added).
humanitarian intervention. Second, if the other motives behind the operation, prevention of damage to the credibility of NATO and the issue of security, were central enough to disqualify an interpretation of the operation as predominantly humanitarian.

To answer the latter first, as we have seen before, the lack of ‘purity’ of motive cannot undermine the lawfulness of an operation ‘where the sole consequence …is the actual protection of human life’. As it was admitted by Prime Minister Tony Blair:

‘[O]ur actions are guided by a …subtle blend of mutual self-interest and moral purpose in defending the values we cherish …values and interests merge.’

As to the first question, there were concerns expressed that NATO would ‘become the [UÇK’s] air force’, ie simply engaging in an internal conflict on one party’s side. But the conflict was very one-sided in the first place, and the FRY forces’ treatment of the Kosovar civilian population was particularly abhorrent. Before the NATO bombing began, it is estimated that some 500 civilian Kosovars had been killed and 400.000 internally displaced or driven out of Kosovo. And perhaps most importantly, Milošević did not show any signs that he was going to stop before Kosovo was ethnically ‘clean’, and this scenario certainly warranted an intervention on humanitarian grounds.

But a third question has to be considered, and this is somewhat special for the Kosovo crisis, where the intervening force was so massively superior to the target state. Did the means or the extent to which the intervention was carried out, render it illegal?

NATO chose high-altitude air strikes to combat the FRY forces, because this would limit the risk of NATO casualties and make the operation politically feasible. It was also presumed that Milošević would back down after a few days of bombing, as he had done prior to the Dayton agreement. But it soon became apparent that far from backing

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254 Kritsiotis (n 15) 1038, see above p 34. See also Kritsiotis (n 243) 342.
255 Speech by Prime Minster Blair 22 April 1999. Quoted in Wheeler (n 16) 267.
256 NATO official, quoted in Wheeler (n 16) 259.
257 See Wheeler (n 16) 269.
258 See, on the other hand, J.I. Charney Anticipatory Humanitarian Intervention in Kosovo (1999) 93 AJIL 834 at 839, who expresses doubts regarding the seriousness of the human rights abuses and holds that the instance should be disregarded because NATO performed an ‘anticipatory humanitarian intervention’.
259 This problem was raised by Grotius, as we saw earlier; that excessive means can render the whole operation unjust or unlawful. See above p 11.
260 See Wheeler (n 16) 268.
down, the FRY forces were actually escalating the ethnic cleansing of Kosovo. As Wheeler claims:

‘The bombing almost certainly led the Serbs to intensify their campaign against the Kosovo Albanians, since …it created the cover of war for the ethnic cleansers …inflaming the latter’s desire to extract revenge against the defenceless Albanians they despised.’\(^{261}\)

On the other hand, it is argued that Milošević’s campaign in Kosovo would have been even worse had it not been for the NATO air strikes. The Serbs had planned and were starting to implement ‘Operation Horseshoe’ when the air strikes started, a strategy to totally remove all Kosovars from Kosovo.\(^{262}\)

But the NATO strikes did not stop, and the bomb targets were increasing in numbers when the FRY refused to give up. It became clear that the only way to stop the atrocities and get Kosovars to return to their homes was to employ land forces. But this would only be done if a ‘permissible environment’ was established in Kosovo. That meant that the infrastructure had to be destroyed, to limit rapid transfer of FRY troops, and massive bombing of bridges, roads, oil refineries etc, was initiated.\(^{263}\) This also meant that an increasing number of Serb and Kosovar civilians were being killed, and that stray bombs were hitting civilian areas.\(^{264}\)

All this raises serious doubts about the proportionality of the operation, and thereby also about its humanitarian nature. As the campaign evolved, it became more of a penal exercise, rendering the FRY shattered without really alleviating the Kosovar suffering.\(^{265}\) Another aspect is that after NATO’s withdrawal, thousands of Serbs in Kosovo found themselves at the receiving end of a new ethnic cleansing, from Albanians seeking revenge.

Nevertheless, the campaign eventually had its peace-restoring effect when Milošević agreed to sign a EU-Russian peace agreement on 3 June 1999.

\(^{261}\) Ibid 269.
\(^{262}\) Ibid.
\(^{263}\) Ibid 271.
\(^{264}\) Ibid 270.
\(^{265}\) The damages caused by the air strikes are estimated to be in the region of US$ 11 billion. See Kritsiotis (n 243) 357.
Thus, it is highly doubtful whether this can be categorised as an instance of humanitarian intervention. As Wheeler articulates the problem:

‘NATO’s intervention is not a good model of humanitarian intervention. …There are important questions to be asked over whether NATO’s actions meets the defining tests of necessity, proportionality, and a positive humanitarian outcome.’

But even if the humanitarian character of the operation was doubtful, it can be argued that if there is sufficient *opinio juris* regarding its lawfulness, then it can be regarded as a genuine instance, in accordance with Kirgis’ ‘sliding scale’-theory.

Most Western states indicated support of the intervention. Britain reiterated its previous justification of the Iraqi intervention, and argued that humanitarian intervention was legal and recognised in customary international law. On the other hand, a Chinese official characterised the operation as ‘absolute gunboat diplomacy’, and the Russian UN Ambassador stated that:

‘[W]hat is in the balance now is the question of law and lawlessness. It is a question of either reaffirming the commitment of one’s country and people to the basic principles and values of the United Nations Charter, or tolerating a situation in which gross force dictates *realpolitik*.’

On 26 March, Russia, with the support of India and Belarus, presented a draft resolution condemning the operation as unlawful under the UN Charter. It is significant that of fifteen votes on this draft, twelve were against, among them six non-western members. For the first time, a majority of the members of the SC had legitimated the use of force on purely humanitarian grounds. Moreover, the UN SG expressed his limited support of the intervention, and ‘no strong opposition …emerged in the majority of Member States of the United Nations’.

266 Wheeler (n 16) 275.
267 See Kritsiotis (n 243) 340.
270 See Wheeler (n 16) 280.
271 See Kritsiotis (n 243) 347.
272 Ibid 348.
And this is what makes the case significant; it was no longer just the ‘exaggeration of jurists sympathetic to humanitarian intervention, but, rather, the real working and practice of States’, as it was expressed in the UN fora, that supported the doctrine of humanitarian intervention.

But did the Kosovo crisis really establish humanitarian intervention as a part of customary international law? Firstly, there are several special circumstances that limit the application of the Kosovo case as a precedent for humanitarian intervention. It was undertaken ‘in conformity with the “sense and logic” of the resolutions that the Security Council had managed to pass’. It was carried out by a large regional organisation, in many respects similar to the ECOWAS operation in Liberia. And most importantly, the lack of proportionality undermines the operation as a precedent in an important aspect; if it is a precedent, it can surely not be a precedent for the legality of bombing a target state to ruins. But is it therefore only a precedent regarding the initial intervention, or of the legality of bombing the original military targets? Where should the line be drawn?

Secondly, it can be asked whether the instance should be regarded as a precedent at all, or just a single incident without legal significance. Most authors seem to conclude that the Kosovo intervention ‘is best seen as an exception from which may be derived a few useful lessons for the future, rather than the future itself’. In advocating a more lenient approach, Simma argues that in ‘hard cases’ like this, legality can be a matter of degree:

‘[U]nfortunately there do occur “hard cases” in which terrible dilemmas must be faced and imperative political and moral considerations may appear to leave no choice but to act outside the law. …The Alliance made every effort to get as close to legality as possible… In this regard, NATO has done a rather convincing job. In the present author’s view, only a thin red line separates NATO’s action from international legality.’

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274 Kritsiotis (n 243) 358.
275 See Wheeler (n 16) 293.
276 Simma (n 241) 6.
277 Ibid 7 ff.
278 T.M. Franck Lessons of Kosovo (1999) 93 AJIL 857. See also Charney (n 258), Henkin (n 249) and Wedgwood (n 249).
279 Simma (n 241) 22 (emphasis added). See on ‘hard cases’ below, n 299.
Simma therefore sees this as an important incident in the *process* of establishing a new customary rule. As we have seen, even an illegal incident can be a precedent for a new rule of international customary law. In the words of Cassese:

‘[T]his particular instance of breach of international law may gradually lead to the crystallization of a general rule of international law authorizing armed countermeasures for the exclusive purpose of putting an end to large-scale atrocities.’

To sum up, the value of the Kosovo case as a precedent for the legality of humanitarian intervention can perhaps not be judged until the next time a similar situation comes up. It is then the *opinio juris* of the legality of the Kosovo operation is put to the test: how many states will *then* accept claims to a right of humanitarian intervention? As Kritsiotis concludes, writing in 2000:

“The NATO intervention …witnessed an important and undeniable invocation of the so-called right of humanitarian intervention in state practice, and it now remains for the wider normative implications of this development to be calculated.”

5.4. CONCLUSION

It is not easy to draw a definite conclusion from the cases of humanitarian intervention we have investigated. It seems like the notion of intervention to protect nationals of other sovereign states gained a fairly wide recognition in the international community in the 1990s. It can thus be argued that humanitarian intervention is established as legal after the Kosovo case, but I do not think this can be ascertained until the doctrine is put to the test again.

It also seemed like many state officials and scholars expressed regret that interventions such as in Kosovo and Liberia had to be regarded as unlawful. But is it not something wrong with international law when there is a general consensus that certain unlawful acts are justified ‘from an ethical viewpoint’? As Téson comments:

‘[T]he widespread feeling that the human rights cause had been served caused the international community to refrain from criticizing the Tanzanian intervention.

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280 Cassese (n 273) 28.
281 Kritsiotis (n 243) 358.
282 Cassese (n 273) 25.
There must be something deeply wrong with an international legal system that protects tyrants like Amin.\textsuperscript{283}

Situations like the Kosovo crisis seem to pinpoint the inherent conflict between our profound moral convictions and the legal regime of the UN Charter. As the SG Kofi Annan poignantly asks:

‘If, in those dark days leading up to the genocide, a coalition of states had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorisation, should such a coalition have stood aside and allowed the horror to unfold?’\textsuperscript{284}

In situations like this, the positive law opposes the moral bedrock it is founded on, so to speak.\textsuperscript{285} The question is then if our instinctive feeling that something must be done can override the rules of the positive law; can intervention for reasons of humanity ‘be justified, or even required, on “higher grounds” of “morality” or “justice”?\textsuperscript{286} This is what I will now turn to.

6. FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW

The ICJ statute art 38(1)(c) states that ‘general principles of law recognised by civilised nations’ are to be regarded as a source of international rules.\textsuperscript{287} When both the written and customary law is uncertain, as we have seen it is when it comes to humanitarian intervention, then solutions must be found by argumentation from ‘general principles’ or from other fundamental considerations of international law.\textsuperscript{288}

There seems, however, to be some differences as to what can be regarded as ‘general principles’.\textsuperscript{289} Fitzmaurice claims that certain principles in the sense of art 38(1)(c), ‘involving inherently necessary principles of natural law, are such as to cause natural law

\textsuperscript{283} Téson (n 99) 188.
\textsuperscript{284} Secretary General Presents His Annual Report to General Assembly UN Press Release SG/SM/7136, GA/9596, 20 September 1999. Quoted in Wedgwood (n 249) 831, n 20.
\textsuperscript{285} See L.L. Fuller \textit{Positivism and Fidelity to Law – a Reply to Professor Hart} (1958) 71 Harvard LR 630: ‘Law cannot be built on law’. Printed in Lloyd’s (n 34) 396.
\textsuperscript{286} Malanczuk (n 3) 5.
\textsuperscript{287} The last part of the phrase is outdated, and it now means nothing more than principles of law recognised in the major legal systems of the world today.
\textsuperscript{288} See M. Koskenniemi \textit{The Pull of the Mainstream} (1990) 88 Michigan LR 1946 at 1950 on whether ‘general principles are …natural or even quasi-natural principles [or] generalizations from municipal jurisprudence’.
\textsuperscript{289} See Harris (n 64) 47 ff.
…to be a formal, not merely a material, source of law’.\(^{290}\) With a slightly different approach, Degan lists as a separate source of international law:

“The So-Called “Fundamental Principles of International Law”. …In question are very broad legal principles, which are supposed to be binding on all States, …as the kind of peremptory norms of general international law, i.e. \textit{jus cogens}. …These principles originate from naturalist teachings.\(^{291}\)

In opposition to this natural law approach, there is the positivist approach, where natural law is ‘at best a material source of international law’.\(^{292}\) Positivists eschew natural law, which they view as ‘incapable of being analysed in terms of what really is, and [it is] no more than an assertion of what \textit{ought} to be the case’.\(^{293}\) This debate between the two main views on the fundamental nature of law is one of the major topics in the field of jurisprudence, and it would lead too far astray to go into this discussion here. I will only submit that I intend to include moral or ‘natural law’ considerations in my subsequent discussion, as part of what I will call ‘fundamental principles of international law’, in accordance with Degan.

6.1. THE INHERENT MORALITY OF INTERNATIONAL LAW

The legal theoretician Fuller has made important contributions to an understanding of the relationship between law and morals. His basic premise is simply that ‘law is the enterprise of subjecting human conduct to the governance of rules’.\(^{294}\) But to be able to govern the conduct of people, a normative statement must comply with certain basic requirements. Eg, it must be clear and understandable, sufficiently constant through time and not demand the impossible.\(^{295}\) A failure on any of these requirements ‘does not simply result in a bad system of law; it results in something that is not properly called a legal system at all’.\(^{296}\)


\(^{291}\) V.D. Degan \textit{Sources of International Law} (Hague, Martinus Nijhoff, 1997) 83.

\(^{292}\) Harris (n 64) 52.

\(^{293}\) \textit{Lloyd’s} (n 34) 207, n 10. The distinction of the \textit{is} from the \textit{ought} is the positivist partition of law from morals in a nutshell. See also \textit{Lloyd’s} (n 34) 56 ff.

\(^{294}\) L.L. Fuller \textit{The Morality of Law} (Yale University, Revised ed 1969) 106.

\(^{295}\) Ibid 39.

\(^{296}\) Ibid. On this basis, Fuller rejects the laws in Nazi Germany as proper laws, see Fuller (n 285) 646.
And as humans are the subjects of legal norms, a central requirement must also be an observance of human nature:

‘[A legal rule] cannot be neutral in its view of man himself. To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent.’

Similar thoughts have been expressed by Hart, who holds that rules regarding human conduct must have a minimum content reflecting the ‘human condition’. Humans possess some features, e.g. vulnerability, limited altruism, limited strength of will etc, which necessitates a minimum level of protection of persons, property and promises. Positive legal rules must therefore have a ‘minimum content of natural law. …It is in this form that we should reply to the positivist thesis “law may have any content”.’

Fuller also rejects the positivist approach, by using the analogy of the judge in a ‘hard case’:

‘Is it not …clear that our judge can never achieve a satisfactory resolution of his dilemma unless he views his duty of fidelity to law in a context which also embraces his responsibility for making law what it ought to be?’

Thus, a basic requirement of a valid legal system is that it reflects fundamental human concerns, or else its ability to direct human conduct is jeopardised. In Fuller’s terminology; the subjects have to be given a fair opportunity to comply with the law, or else the law is not, properly speaking, law.

However, these requirements are not absolutes, as Fuller does not attempt to reach a finite definition of law. The more a legal code complies with these basic guidelines, the

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297 Fuller (n 294) 162.
299 Ibid.
300 The term ‘hard cases’ is taken from R.M. Dworkin *Taking Rights Seriously* (London, Duckworth, 1978). Dworkin opposes the natural law contention that the positive law can be ‘amended’ by the underlying natural law in ‘hard cases’. He argues that any legal system is a seamless web where an answer always can be found. Two judges can reach opposing conclusions, but this can be attributed to different interpretations of legal guidelines, not to their own moral convictions. See *Lloyd’s* (n 34) 1270.
301 Fuller (n 285) 648 (emphasis added).
302 See *Lloyd’s* (n 34) 118.
303 Ibid 119.
more ‘fully legal’ the system would be. In this, he opposes Dworkin’s assertion that while concepts like baldness are ‘a matter of degree’, a line can be drawn between law and non-law; ‘…in other words, [that] law does not just fade away, but goes out with a bang’. [304]

Fuller holds that this conception is caused by our language regarding aspects of law; we do not use terms like ‘a little bit illegal’. [305] He writes:

‘We may know perfectly well that a particular statute is so vaguely drawn that it is impossible to determine just where its boundaries lie, but our modes of speaking about the matter will normally continue to run in either-or terms.’ [306]

This seems to me like a sound reflection, especially when international law is considered. Rules of international law are often very hard to ascertain, especially when it comes to the establishment of customary law, as we have seen. At exactly what stage is a customary rule established? And such difficulties must be even more overwhelming when trying to identify a rule of ‘fundamental international law’. The infinite polemics of international legal scholars seem to verify that such legal rules can indeed ‘half-exist’. [307]

Furthermore, Fuller and Hart’s arguments show that any legal system that does not take basic human needs in consideration must be incomplete, or is not even a proper legal system. This reflection can also easily be transferred to the international scene. In extremely ‘hard cases’, where the duty to prevent genocide is in opposition to another positive rule of international law, the international community must surely have a responsibility to consider what the law ‘ought to be’? [308]

Téson seems to think so, and holds that:

‘There is a necessary link between international law and moral and political philosophy. …A discussion of humanitarian intervention is particularly apt to illustrate [this]. This is so because the legal principles and rules that deal with human rights are not just technical, or morally neutral, precepts. Instead, they speak to some of our most basic moral principles, convictions and institutions.’ [309]

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[304] Fuller (n 294) 199. Dworkin’s assertion was taken from R.M. Dworkin Philosophy, Morality, and Law – Observations Prompted by Professor Fuller’s Novel Claim (1965) 113 U Pennsylvania LR 668.
[305] Fuller (n 294) 199.
[306] Ibid.
[307] Ibid 198.
[308] Fuller (n 285) 648 (emphasis added).
[309] Téson (n 99) 9 and 12.
As Kirgis argued, the establishment of a new customary rule of international law is dependent upon, *inter alia*, how ‘morally distasteful’ the activity in question is. This clearly suggests that when legal scholars or state officials assert a new customary rule, they are influenced by some kind of moral concerns:

‘[A]t least in the areas of use of force and human rights, the determination of “custom” in international law presupposes a value judgment. …[I]nternational legal propositions are the children both of institutional history (diplomatic history, treaty texts) and political philosophy.’

But why is it that legal scholars, many of whom accept Kirgis’ ‘sliding scale’ as a plausible concept, refuse to accept that value judgments are part of their contemplations on international law? Koskenniemi has noted with insight that modern lawyers have a fear of anything that resembles natural law:

‘It is [because of] the difficulty of justifying conceptions of natural justice in modern society that lawyers have tended to relegate into “custom” all those important norms that cannot be supported by treaties… In this way, they might avoid arguing from an essentially naturalistic – and thus suspect – position.’

And, as Kirgis implied, but did not articulate, Koskenniemi argues that it is our profound moral convictions that makes us recognise an instance of state practice as more significant than another:

‘[It is] our certainty that genocide and torture is illegal that allows us to understand state behaviour and to accept and reject its legal message, not state behaviour itself that allows us to understand that these practices are prohibited by law.’

But Koskenniemi does not stop there, he also claims that if such moral considerations are a foundation for our understanding of international law, then they should be recognised as *legal arguments* in their own respect, at least when it comes to fundamentally important issues, the very ‘hardest cases’:

‘Might it not be that the certainty we have of the illegality of genocide, or of torture, …is by itself sufficient reason to include those norms in international law? What does it

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310 Kirgis (n 119) 149. See above p 29.
311 Téson (n 99) 15 (emphasis added).
312 Koskenniemi (n 288) 1947.
313 Ibid 1952 (emphasis added).
add to such certainty if we find, or do not find, a precedent, a state, or the United Nations General Assembly, saying the same? Very little, I feel."

This is a drastically different approach to international law than what we have previously seen; Koskenniemi argues that moral considerations, in special circumstances, can be a *formal source* of international law. However, even if this is controversial, it seems to me like a sound conclusion to draw from the previous discussion. In the case of human suffering on a large scale, we have a very real ‘responsibility for making law what it *ought* to be’, and solve the ‘hard case’ in favour of our deepest moral convictions. The law will then also be more ‘fully legal’, in the sense that it to a larger extent conforms to one of its fundamental requirements, namely the ‘commitment …that man is …a responsible agent’.

Thus, since value judgments are of importance both for the development of international law and for our understanding of it, they should be accepted into the sphere of legal discussion. They can then be subjected to a closer scrutiny for an assessment of their validity. I will therefore briefly consider some arguments *de lege ferenda*, pro et contra humanitarian intervention.

6.2. ARGUMENTS PRO HUMANITARIAN INTERVENTION

Walzer has produced a powerful moral argument in support of just intervention. He sees sovereignty as a moral good in itself, because self-determination, and hence sovereignty, is the only way that a people can be free. The principle of sovereignty is therefore, in principle, inviolable.

But there are a few instances in which intervention can be justified. When states grossly violate their own citizens’ human rights, Walzer argues, they lose their right to sovereignty:

‘When a government turns savagely upon its own people, we must doubt the very existence of a political community to which the idea of self-determination might

314 Ibid (emphasis as quoted).
315 Fuller (n 285) 648 (emphasis added).
316 Fuller (n 294) 162.
317 See Walzer (n 70) 89.
319 This is reminiscent of Grotius’ theory of sovereignty. See above p 9.
apply. …People who initiate massacres lose their right to participate in the …processes of domestic self-determination. Their military defeat is morally necessary. 320

Furthermore, Walzer rejects that humanitarian intervention can be referred to ‘the realm not of law but of moral choice’, 321 and be regarded as unlawful but permissible, in order not to corrupt the rule of law. He holds that:

‘[T]hat is only a plausible formulation if one doesn’t stop with [the law], as lawyers are likely to do. For moral choices are not simply made; they are also judged, and so there must be criteria for judgment. If these are not provided by the law, or if legal provision runs out at some point, they are nevertheless contained in our common morality, which doesn’t run out, and which still needs to be explicated after the lawyers have finished.’ 322

That is, reliance upon ‘our common morality’ as a criterion for permissible acts of intervention does not increase the possibility of abuse. There are constraints on permissible actions also in the realm of morality.

On a similar note, Verwey argues that if the law does not reflect our most fundamental moral concerns, it can result in a deterioration of the general respect for the rules of law. He rejects Friedmann’s interpretation of the Bangladesh case, namely that ‘[w]hat was in formal terms an illegal act was morally acceptable’, 323 on the grounds that:

‘[W]e would open another Pandora’s box and jeopardize respect not only for the UN Charter but for the rule of law in general. …The point is that international law must be able to cope with such situations. …For if international law …does not provide room for genuinely unselfish, morally obligatory, last-resort humanitarian intervention, then it would lose control of, and become irrelevant in, some of the most dramatic situations.’ 324

This seems to me as an obviously valid reflection. It is never a good solution to avoid a hard decision by pushing it outside the realm of law. If the law is to have any meaning, it has to cover all cases, also the ‘hard’ ones. And again, if the law recognises

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320 Ibid 101 and 106.
321 Franck & Rodley (n 105) 304.
322 Walzer (n 70) 106 (emphasis as quoted).
323 W. Friedmann in Lillich (n 85) 114.
324 Verwey (n 2) 411-12 (emphasis as quoted).
fundamental moral considerations as valid arguments, it will be more in concordance with its ‘commitment to the view that man is ... a responsible agent’.  

However, Verwey presents another argument as his ultimate justification of the right of humanitarian intervention, namely that it is supported by a theory of legal necessity. This solution is not based upon a revival of or search for customary rules, but ‘upon the perpetual application of one of the superior, overriding maxims, which govern the functioning of positive international law from an atmospheric level’.  

Verwey notes that the ILC in its Draft Articles on State Responsibility has recognised the principle of necessity ‘as a ground for precluding the wrongfulness of an act of that State’. In its interpretation of the Draft Articles, the ILC holds that this is applicable ‘particularly where it is necessary to protect a humanitarian interest of the population’. 

Thus, Verwey claims that by introducing a principle of necessity as supporting the right of humanitarian intervention, the discussion can be ‘legalised’, and the naturalist controversy avoided. But is not the principle of necessity, as a ‘superior, overriding maxim’, simply a norm of natural law? What is gained in terms of consistency and predictability by introducing a norm to the effect that humanitarian intervention is permissible when it is legally necessary? 

In the words of Koskenniemi: ‘Very little, I feel.’  

6.3. ARGUMENTS CONTRA HUMANITARIAN INTERVENTION 

An obvious argument against permitting humanitarian intervention is the potential for abuse. This is in a sense the core of the problem concerning the doctrine, in that it opens for violations of the principle of sovereignty. And humanitarian concerns have been invoked on many occasions where it was far from legitimate. Even Hitler claimed 

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325 Fuller (n 294) 162. 
326 Ibid (n 2) 413. 
329 See Franck & Rodley (n 105) 304, who holds that: ‘This sense of superior “necessity” belongs in the realm not of law but of moral choice’. 
330 Koskenniemi (n 288) 1947.
that the necessity of protecting the German minority and the ‘security of more than 3 million human beings’ was the reason he invaded Czechoslovakia in 1938.\footnote{Letter from Hitler to Prime Minister Chamberlain, 23 September 1938. Quoted in Franck & Rodley (n 105) 284.}

However, the potential for abuse of a legal rule does not entail that the rule itself should be abolished. As Fonteyne argues:

‘It is a big mistake, in general, to stop short of recognition of an inherently just principle, merely because of the possibility of non-genuine application.’\footnote{Fonteyne (n 79) 269.}

Rather, the prospect of abuse should generate efforts to \textit{regulate} the application of the rule, and provide \textit{conditions} for the exercise of the right of humanitarian intervention. And as Kritsiotis notes:

‘[T]he principle of humanitarian intervention …must mean that the use of force is not only permitted in the name of a greater good but it is also controlled and hopefully contained by it.’\footnote{Kritsiotis (n 15) 1026 (emphasis as quoted).}

Some authors have treated the fact that state practice regarding humanitarian intervention has been very \textit{selective}, as an argument against the doctrine.\footnote{See Verwey (n 2) 407 and Franck & Rodley (n 105) 290 ff.} As Frank and Rodley noted:

‘If there is an historic international “right” of forceful humanitarian intervention, that will also come as a surprise to Biafrans, Rhodesians, and South Africans.’\footnote{Franck & Rodley (n 105) 296.}

But such an argument has to be rejected. It is the \textit{right} of humanitarian intervention that is asserted, not the \textit{obligation} to intervene for the sake of other nationals. As Kritsiotis correctly states: ‘Inherent in the very conception of a right is an element of selectivity in exercise of that right.’\footnote{Kritsiotis (n 15) 1027.}

Finally, it has been argued that the danger of escalation of an armed conflict means that any intervention, also on humanitarian grounds, should be avoided. This is an
important concern, and the possibility of a large-scale war is especially worrying in the atomic era. In our time, ‘[a]ny war involves the risk of developments leading to a nuclear war …and even to the destruction of life on this planet’.\footnote{Röling (n 65) 7.}

And as Franck and Rodley observed:

‘Nothing would be a more foolish footnote to man’s demise than that his final destruction was occasioned by a war to ensure human rights.’\footnote{Franck & Rodley (n 105) 300.}

The dangers involved when states intervene without international support was evident in the Kosovo case, which caused serious tension between the three super-powers of the world. But this argument is reminiscent of the abuse-argument, in that it is not really the right itself that is flawed, but that the exercise of that right has certain unfortunate consequences. This concern should therefore lead not to the rejection of the doctrine of humanitarian intervention altogether, but to the formulation of a \textit{criterion} that it should only be undertaken when it ‘does not constitute a threat to international peace and security of such a magnitude that it might trigger more human loss and tragedy than it purports to prevent or eliminate’.\footnote{Verwey (n 2) 418.}

7. \textbf{CONCLUSION}

In this thesis I have tried to show that the current legal basis of the much-discussed right of humanitarian intervention is an uncertain one indeed. Even if the UN Charter permits customary exceptions to the prohibition of the use of force, state practice is both scarce and somewhat inconsistent. The Kosovo crisis provided a strong argument in favour of a unilateral right to rescue fellow humans from an oppressor from which they cannot escape. But the legal significance of the case, as a precedent for the establishment of a new customary rule, can probably not be ascertained before the next time the doctrine is invoked.

However, I have argued that in cases when fundamental concerns like the prevention of genocide is involved, we can draw upon a heterogeneous source of \textit{fundamental principles of international law} as a basis for legal justifications. I submitted that international law and fundamental moral concerns are essentially linked. Therefore, when we are confronted with those ‘hard cases’ where the positive rules oppose our most
fundamental moral convictions, these convictions should be accepted as not only morally, but also legally valid arguments.

The much respected Lauterpacht articulated perhaps the most famous definition of humanitarian intervention, and that is where I started off. I will therefore end with Walzer’s reflection on his celebrated words, which perfectly summarises the discussion:

‘Humanitarian intervention is justified when it is a response to acts that “shock the moral conscience of mankind”. The old-fashioned language seems to me exactly right. …The reference is to the moral convictions of ordinary men and women, acquired in the course of their everyday activities.’

Every human being has the moral capacity to see that a Pol Pot or an Idi Amin cannot be allowed to operate freely. When the regime of international law does not correspond with such a realisation, there is more likely something wrong with international law than with basic instincts common to the human race.

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\(^{340}\) Walzer (n 70) 107.
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