

## DOES HUMANITARIAN INTERVENTION SERVE HUMAN RIGHTS? THE CASE OF KOSOVO

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“[I]t is highly undesirable to have a new rule allowing humanitarian intervention, for that could provide a pretext for abusive intervention ... [and] would open a wide gap in the barrier against unilateral use of force.”<sup>1</sup>

### Introduction

The new trend of interventionism, illustrated by the North Atlantic Treaty Organisation (NATO)’s bombing campaign against Serbia in 1999, has raised serious concerns related to human rights under International Law. One concern, in particular, has to do with the legality of interventions in the name of human rights under the Law of the Use of Force and creates a tension between the prohibition on the use of force and the protection of human rights.

In this context, Operation Allied Force has revived the debate on the existence of a right of humanitarian intervention that would entitle a State or a group of States to military intervene in the domestic affairs of another State in order to put an end to widespread deprivation of internationally recognised human rights, despite the absence of a Security Council (hereinafter: Council) authorisation. Indeed, for more than sixty years, the Charter of the United Nations (hereinafter: UN Charter) has governed the use of force between member States, and both international peace and security and the promotion of human rights are listed within the purposes of the UN Charter. Moreover, the sacrosanct principle of sovereignty has been progressively challenged by the development of a body of rules protecting human rights at the international level, to the extent that some now argue that a new norm of customary international law has emerged. This norm would recognise a right of unilateral intervention in response to human rights violations and the Kosovo case represent its best illustration.

The aim of this article is thus to reaffirm that no right of humanitarian intervention exists under International Law, and that such right would lead to abuses in the name of human rights. To do so, we will revisit the UN Charter, before briefly assessing the state practice since the adoption of the

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<sup>1</sup> O. Schachter, quoted in: L. Henkin, ‘NATO’s Kosovo intervention: Kosovo and the law of “humanitarian intervention”’, 93 *A.J.I.L.* 1999-4, p. 826.

latter, with a special emphasis on the intervention against Serbia in 1999. We will conclude by highlighting the potential abuses to which the recognition of a right of unilateral humanitarian intervention might lead.

## I. The UN Charter

With the establishment of the Organisation of the United Nations in the aftermath of the Second World War, one clear objective of the international community was to bring and ensure peace and stability around the globe.<sup>2</sup> To this end, the recourse to force was outlawed, except in very restrictive instances. At the same time, it also reaffirmed ‘faith in fundamental human rights’ and in human dignity,<sup>3</sup> and listed the promotion of human rights as one of the Organisation’s purposes.<sup>4</sup> In order to characterise the existing relationship between the principle of sovereignty and the protection of human rights, we will successively look at the UN Charter’s structure, the possible limitations to the prohibition on the use of force laid down in its article 2 paragraph 4, and the scope of the exceptions to this prohibition, i.e. the inherent right of individual or collective self-defence set forth in article 51 and the actions authorised by the Council under Chapter VII.

### I.1 The Structure of the UN Charter

Despite the tension between sovereignty and human rights that arises from the opening words of the UN Charter, the substantive provisions of the latter clearly privilege peace over dignity.<sup>5</sup> Indeed, while the principle of equal sovereignty is recognised in article 2, paragraph 1, of the UN Charter and its preservation guaranteed by the prohibition on the use of force laid down in subsequent paragraph 4, the promotion of human rights is only dealt with in “the more or less hortatory”<sup>6</sup> articles 55 and 56 of the UN Charter.<sup>7</sup> It results, as Tom J. Farer observes, that:

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<sup>2</sup> UN Charter, Preamble and art. 1.

<sup>3</sup> UN Charter, Preamble.

<sup>4</sup> UN Charter, art. 1.

<sup>5</sup> S. Chesterman, *Just War or Just Peace*, Oxford: Oxford University Press 2001, p. 45. See also S. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*, Philadelphia: University of Pennsylvania Press 1996, p. 70, which states that “[t]he protection of national sovereignty and the maintenance of peace were indeed the central features of the UN Charter ...”.

<sup>6</sup> Chesterman 2001, *supra* note 5, p. 45.

<sup>7</sup> UN Charter, art. 55-56 :

*“Article 55*

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

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

“[a]nyone who considers with some measure of objectivity the Charter’s normative logic, its allocation of coercive jurisdiction, its omissions, as well as the preferences manifested by most participants in the drafting process and their immediately subsequent behaviour, cannot help concluding that the promotion of human rights ranked far below the protection of national sovereignty and the maintenance of peace as organizational goals.”<sup>8</sup>

This apparent hierarchy within the purposes of the UN Charter, combined with the absence of an explicit authorization to use force for the purpose of enforcing human rights provisions, leads Antonio Cassese to rightly conclude that “[u]nder the UN Charter system, ... respect for human rights ..., however important and crucial it may be, is never allowed to put peace in jeopardy. One may like or dislike this state of affairs, but so it is under *lex lata*”.<sup>9</sup>

## I.2 Article 2 Paragraph 4 of the UN Charter: Scope and Limitations

Turning to the provision governing the recourse to force, article 2, paragraph 4, of the UN Charter provides that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. This prohibition on the use of force has provoked many column inches among the doctrine, particularly in the debate on the existence of a right of humanitarian intervention.

Indeed, the proponents of such right have maintained that the phrase ‘against the territorial integrity or political independence of any state’ refers to a certain threshold to be reached by the threats and uses of force.<sup>10</sup> As a humanitarian intervention is not aimed at depriving a State of its territorial integrity or its political independence but, on the contrary, at enhancing such attributes, they argue that it falls below the threshold of the prohibition.<sup>11</sup>

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### *Article 56*

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.”

<sup>8</sup> T. Farer, quoted in Murphy 1996, *supra* note 5, p. 70.

<sup>9</sup> A. Cassese, ‘*Ex iniuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?’, 10 E.J.I.L. 1999-1, p. 25. See also Murphy 1996, *supra* note 5, p. 70, which considers that “[t]he provisions of the UN Charter in its final form weigh heavily against the use of armed force solely to protect human rights in a target state”.

<sup>10</sup> Murphy 1996, *supra* note 5, p. 71.

<sup>11</sup> F. Teson, *Humanitarian Intervention: An Inquiry into Peace Law and Morality*, 2<sup>nd</sup> Ed., New York: Transnational Publishers 1997, pp. 150-51; F. Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, The Hague, London, Boston: Kluwer Law International 1999, pp. 94-95. See *contra*, Murphy 1996, *supra* note 5, p. 71, which counters this argument by stressing that a humanitarian intervention, in any case, is above the threshold and constitutes a violation of a State’s territorial integrity and political independence.

Nevertheless, the *travaux préparatoires* make it clear that the contentious phrase “reflected an effort to clarify, not curtail, the comprehensive nature of the prohibition”.<sup>12</sup> Indeed, far from restricting the scope of the prohibition, the words “against the territorial integrity or political independence of any state” were inserted as a guarantee for small States to reinforce the impermissible character of recourses to force against a State.<sup>13</sup> This interpretation has been implicitly favoured by the International Court of Justice (ICJ) in the *Corfu Channel* case and prevails today.<sup>14</sup>

The words ‘or in any other manner inconsistent with the Purposes of the United Nations’ have also given rise to a debate in the academic spheres. Some writers have asserted that this phrase was intended to restrict the scope of paragraph 4 and that any use of force was lawful as soon as it did not go against the purposes of the United Nations. The promotion of human rights being one of the United Nations’ purposes, a forcible action in the name of these rights falls outside the prohibition laid down in article 2, paragraph 4 of the UN Charter and is undoubtedly lawful.<sup>15</sup> Nevertheless, the negotiating history rather supports the view that the drafters of the UN Charter did not intend to restrict paragraph 4, the contentious words being, in fact, meant to reinforce the prohibition laid down in that paragraph.<sup>16</sup> ‘Or in any other manner inconsistent with the Purposes of the United Nations’ must therefore be interpreted as having an inclusive meaning,<sup>17</sup> since it is not designed, as Bruno Simma observes, “to allow room for any exceptions from the ban, but rather to make the prohibition watertight”.<sup>18</sup>

It results from this analysis of article 2, paragraph 4 of the UN Charter that the prohibition on the use of force among States does not only concern the recourses to force expressly cited but is absolute, and may not reasonably constitute a legal basis for a right of humanitarian intervention. The next subsection will now examine the only two exceptions to the prohibition on the use of force enclosed in the UN Charter.

### **I.3 The Exceptions to the Prohibition on the Use of Force: Article 51 and Chapter VII of the UN Charter**

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<sup>12</sup> Murphy 1996, *supra* note 5, p. 71.

<sup>13</sup> I. Brownlie, *International Law and the Use of Force by States*, Oxford: Oxford University Press 1963, p. 267; Chesterman 2001, *supra* note 5, pp. 49-50.

<sup>14</sup> *Corfu Channel* case [1949] ICJ Rep 4, 34. See Chesterman 2001, *supra* note 5, p. 50; C. Gray, *International Law and the Use of Force*, Oxford: Oxford University Press 2000, p. 25.

<sup>15</sup> Teson 1997, *supra* note 11, p. 150.

<sup>16</sup> Brownlie 1963, *supra* note 13, p. 268. See also Murphy 1996, *supra* note 5, pp. 72-73, which notes that “the ‘or’ indicates that this phrase supplements, not qualifies, the initial text”.

<sup>17</sup> Chesterman 2001, *supra* note 5, p. 52.

<sup>18</sup> B. Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’, 10 E.J.I.L., 1999-1, p. 3.

Article 51 of the UN Charter, which contains the first exception to the prohibition on the use of force, states:

“[n]othing in the present Charter shall impair the *inherent* right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”  
[emphasis added]

This provision, and the term ‘inherent’ in particular, have conducted the proponents of a right of humanitarian intervention to interpret article 51 as preserving the practice of self-help that predated the UN Charter. These writers argue that the words ‘if an armed attack occurs’ is only exemplary and that forcible actions may be undertaken in other instances than armed attacks, for example when fundamental human rights have been seriously affected.<sup>19</sup> However, nothing, arising from an appraisal of the negotiations, supports this view.<sup>20</sup> A close examination rather shows that article 51 “unequivocally limits whatever farther-reaching right of self-defence might have existed in the pre-Charter customary international law to the case of an ‘armed attack’”.<sup>21</sup> This restrictive interpretation has been strengthened by the ICJ’s finding in the *Nicaragua* case, when the Court affirmed that “... under international law in force today – whether customary international law or that of the United Nations system – States do not have a right of ... armed response to acts which do not constitute an ‘armed attack’”.<sup>22</sup>

Looking at NATO’s intervention against Serbia in 1999, it is unquestionable that the repressive actions committed by the Federal Republic of Yugoslavia (FRY) against the ethnic Albanian population, however ignominious they may have been, did not equate to an armed attack against a neighbouring State.<sup>23</sup> In addition, for NATO to exercise the right of collective self-defence

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<sup>19</sup> Murphy 1996, *supra* note 5, pp. 74-75, which remarks that “if this view is correct, then one might ask whether an expansive view of the right of self-defence preserved by article 51 includes the right to humanitarian intervention on a theory that the destruction of human rights values, at least on a large scale, threatens the stability and expectations of the global community. Such an expansive view of self-defence, however, might then be used to justify a wide range of coercive behaviours by states and ultimately eviscerate virtually all normative restraints on the use of force”. See also Chesterman 2001, *supra* note 5, p. 53.

<sup>20</sup> Brownlie 1963, *supra* note 13, p. 271.

<sup>21</sup> Simma 1999, *supra* note 18, p. 3.

<sup>22</sup> *Military and Paramilitary Activities in and against Nicaragua* case (Nicaragua v. United States of America) [1986] ICJ Rep 14, 211.

<sup>23</sup> F. Dubuisson, ‘La problématique de la Légalité de l’Opération ‘Force Alliée’ contre la Yougoslavie : Enjeux et Questionnements’, in *Droit, Légitimation et Politiques Extérieures: L’Europe et la Guerre du Kosovo*, Brussels: Bruylant & Université Libre de Bruxelles 2000, p. 163.

enshrined in article 51, the hypothetical neighbour State victim of the armed attack should have requested the assistance of the regional organisation, as States are not entitled to exercise such right on their own initiative, without a request from the State concerned, per the ruling of the ICJ in the *Nicaragua* case.<sup>24</sup> In the absence of a request addressed to NATO by a neighbouring State of the FRY, and, more importantly, of an armed attack, Operation Allied Force did not fall within the scope of article 51 and therefore does not constitute a legal exercise of the right of self-defence recognised by the UN Charter.

Turning to the second exception to the prohibition on the use of force, the Council, acting under Chapter VII of the UN Charter, may authorise the recourse to force so as to maintain international peace and security. However, it must first determine the existence of a “threat to the peace, breach of the peace, or act of aggression”.<sup>25</sup> This prerequisite finds its origin in the drafters’ willingness to prevent the Council from intervening in matters unrelated to international security.<sup>26</sup> In order to leave some flexibility to the Council in the determination required under article 39 nevertheless, no definition of what constitutes a ‘threat to the peace, breach of the peace, or act of aggression’ has been included in the UN Charter.<sup>27</sup>

It results from the Council’s practice that the traditional sense of the concept has been extended in some instances in order to include internal conflicts<sup>28</sup> or humanitarian crises.<sup>29</sup> With regard to the second extension however, the determination of a threat to the peace on humanitarian grounds appears limited in different ways. Some writers first remark that “[t]he nature of the Security Council’s power under Chapter VII is such that it is unlikely to be invoked in response to a humanitarian crisis unless it occurs in a time of conflict”.<sup>30</sup> In addition, the transboundary effects of human rights deprivations also seem to have some influence on the determination made by the Council. In the cases of Liberia, Iraq, Somalia and Rwanda, there were external effects in the flows of refugees to neighbouring States. However, “they were *not* the central focus of the Security Council’s deliberations ...”.<sup>31</sup>

With regard to the military intervention against Serbia in 1999, NATO Member States generally argued that their action had been authorised by the

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<sup>24</sup> *Military and Paramilitary Activities in and against Nicaragua* case, *supra* note 22, 196 and 199.

<sup>25</sup> UN Charter, art. 39.

<sup>26</sup> Murphy 1996, *supra* note 5, p. 76.

<sup>27</sup> *Idem*, p. 77; B. Leppard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions*, Philadelphia: Pennsylvania State University Press 2002, p. 167.

<sup>28</sup> See for instance SC Res 864 (1993) with regard to the situation in Angola. On this extension, see Chesterman 2001, *supra* note 5, pp. 128-139; Murphy 1996, *supra* note 5, p. 287.

<sup>29</sup> Chesterman 2001, *supra* note 5, pp. 140-151.

<sup>30</sup> *Idem*, p. 140.

<sup>31</sup> Murphy 1996, *supra* note 5, p. 285.

Council in Resolutions 1160, 1199, 1203 and 1244. Although Resolution 1160<sup>32</sup> was adopted on 31 March 1998 under chapter VII of the UN Charter, the Council did not explicitly determine the existence of a threat to international peace and security.<sup>33</sup> As this determination is a prerequisite for the Council to pursue measures under Chapter VII, including the use of force, Resolution 1160 alone does not constitute a legal basis for Operation Allied Force.

Turning to Resolution 1199<sup>34</sup> passed on 23 September 1998, the Council, acting under Chapter VII, stated that “the deterioration of the situation in Kosovo constitutes a threat to peace and security in the region”.<sup>35</sup> It requested from the FRY the implementation of a series of measures aimed at achieving a peaceful solution to the crisis<sup>36</sup> and added that “should the concrete measures demanded in this resolution and in resolution 1160 (1998) not be taken, to *consider further action* and additional measures to maintain and restore peace and stability in the region”.<sup>37</sup> Deducing from the determination of the existence of ‘a threat to the peace’ in Resolution 1199 that the Council implicitly authorised Member States to take necessary actions in case the FRY would not comply with the requirements of Resolutions 1160 and 1199 is not tenable for different reasons. First, paragraph 16 of Resolution 1199 is not directed at states acting individually but rather provides the Council with the option of considering taking measures in case of non-respect by the FRY. Furthermore, the authorisation to use force does not automatically result from the sole determination of the existence of a threat to international peace and security.<sup>38</sup> Indeed, military action is only one of the measures to be taken by the Council, beside non-forcible actions such as the interruption of economic relations<sup>39</sup> or recommendations.<sup>40</sup> Lastly, it results from the debate preceding the adoption of Resolution 1199 that Russia and China were clearly opposed to any resolution that would have authorised the use of force against the Milosevic regime.<sup>41</sup> The very fact that these States did not veto Resolution 1199 supports the view that the resolution did not contain, even implicitly, an authorisation to use force.

One month later, the Council, acting under Chapter VII, passed Resolution 1203.<sup>42</sup> For the same reasons that those just exposed, this resolution, which characterised the situation in Kosovo a “threat to peace and security in the

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<sup>32</sup> SC Res 1160 (1998). On this Resolution, see Chesterman 2001, *supra* note 5, p. 208; Simma 1999, *supra* note 18, pp. 6-7; Dubuisson 2000, *supra* note 23, pp. 156-158.

<sup>33</sup> Chesterman 2001, *supra* note 5, p. 208; Simma 1999, *supra* note 18, p. 6.

<sup>34</sup> SC Res 1199 (1998).

<sup>35</sup> *Idem*, Preamble, paras 1-2.

<sup>36</sup> *Idem*, para 4.

<sup>37</sup> *Idem*, para 16 (emphasis added).

<sup>38</sup> Cassese 1999, *supra* note 9, p. 24.

<sup>39</sup> UN Charter, art. 41.

<sup>40</sup> UN Charter, art. 39.

<sup>41</sup> Chesterman 2001, *supra* note 5, p. 208; Dubuisson 2000, *supra* note 23, pp. 157-158.

<sup>42</sup> SC Res 1203 (1998).

region”,<sup>43</sup> does not constitute a legal ground for initiating a military operation against a sovereign state.<sup>44</sup>

Finally, Resolution 1244,<sup>45</sup> adopted following the suspension of NATO’s air strikes and endorsing the peace agreement reached between the FRY and NATO,<sup>46</sup> has occasionally been interpreted as validating *ex post* the military intervention. Nevertheless, three elements run counter this interpretation. First, nowhere in the resolution is it dealt with the legality of the Alliance’s action. Second, the debates preceding the adoption of the resolution show once again that States such as Russia and China maintained that the intervention was illegal.<sup>47</sup> Therefore, Resolution 1244 may only be interpreted as endorsing the peace agreement, not as validating *ex-post facto* Operation Allied Force.

As none of the resolutions adopted by the Council under Chapter VII in the context of NATO’s intervention in Kosovo constitute a legal basis for the military operation, we must now turn to the state practice in order to determine whether a customary norm authorising the recourse to force for humanitarian reasons has emerged since the adoption of the UN Charter.

## II. The State Practice

For a new norm of customary law to emerge, two elements are required, namely a state practice and an *opinio juris*. The ICJ, which recalled these requirements in the *Nicaragua* case, defined the latter as follows: “[e]ither the States taking such action or other States in a position to react to it, must have behaved so that their conduct is ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’”.<sup>48</sup> The Court also insisted on the determinant role played by the legal arguments put forward by States when justifying their actions in the possible emergence of a new norm of customary law. Indeed, “[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend toward a modification of customary international law”.<sup>49</sup>

In addition, the *jus cogens*<sup>50</sup> character of the prohibition on the use of force means that for a rule to trump the interdiction laid down in article 2, paragraph 4 of the UN Charter, it must have the same status. However,

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<sup>43</sup> *Idem*, Preamble.

<sup>44</sup> Chesterman 2001, *supra* note 5, p. 210; Simma 1999, *supra* note 18, pp. 10-11.

<sup>45</sup> SC Res 1244 (1999).

<sup>46</sup> *Idem*, para 1.

<sup>47</sup> Dubuisson 2000, *supra* note 23, pp. 160-161.

<sup>48</sup> *Military and Paramilitary Activities in and against Nicaragua* case, *supra* note 22, 207.

<sup>49</sup> *Ibid.*

<sup>50</sup> Under article 53 of the 1969 Vienna Convention on the Law of Treaties, “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm which no derogation is permitted and which can

“... it does not follow from the mere fact that human rights may now be *jus cogens*<sup>51</sup> that this overrides the prohibition on the use of force. For this further, crucial step in the argument it would be necessary to show not only that human rights are accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted, but also that states have accepted the right to use force to protect them.”<sup>52</sup>

A brief survey of the state practice since 1945 will follow so as to determine whether a right of humanitarian law has emerged as a norm of customary law.

## II.1 State Practice from 1945 to 1999

Until recently, States did not rely on a right of humanitarian intervention so as to justify their military actions.<sup>53</sup> During the Cold War, States invoked a broad understanding of the right of self-defence as the legal ground on which their actions were based. This is the case for the Indian invasion of East Pakistan in 1971,<sup>54</sup> the Tanzanian intervention in Uganda in 1978-1979<sup>55</sup> and the Vietnamese military action against Cambodia in 1978.<sup>56</sup> Although the outcomes of these interventions were viewed as desirable in terms of human rights, the reluctance of intervening States to refer to a right of humanitarian intervention as a legal basis for their action, the dubious existence of humanitarian concerns and the rejection, by the international community, of the human rights preservation as a justification for an intervention strongly challenge the existence of an *opinio juris* in these instances.<sup>57</sup>

With the end of the Cold War, some States started to refer to a doctrine of humanitarian intervention as a justification to their military actions. This is

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be modified only by a subsequent norm of general international law having the same character”.

<sup>51</sup> See for instance the prohibition of torture, genocide and trade in slaves.

<sup>52</sup> Gray 2000, *supra* note 14, p. 39.

<sup>53</sup> *Idem*, p. 26.

<sup>54</sup> For a thorough description of the Indian action, see Chesterman 2001, *supra* note 5, pp. 71-75; Murphy 1996, *supra* note 5, pp. 97-100.

<sup>55</sup> For more details, see Chesterman 2001, *supra* note 5, pp. 77-79; Murphy 1996, *supra* note 5, pp. 105-107.

<sup>56</sup> See for instance Chesterman 2001, *supra* note 5, pp. 79-81; Murphy 1996, *supra* note 5, pp. 102-105.

<sup>57</sup> Regarding the Vietnamese intervention in Cambodia, Sean Murphy notes that “[d]espite what appeared to be a significant gain for humanity in the overthrow of Pol Pot, the international community, with the exception of the Soviet bloc, condemned the intervention ... In any event, whether Vietnam intervened also out of concern for the human rights of Cambodians is even less clear; at best, it would appear as secondary consideration. The traditional antipathy between Cambodians and Vietnamese suggest that, absent a threat to Vietnamese security or a perceived strategic gain for Vietnam, it is unlikely that Vietnam would have intervened solely or even largely to prevent human rights abuses against Cambodians”. Murphy 1996, *supra* note 5, pp. 104-105.

particularly the case with the intervention in Iraq in 1991.<sup>58</sup> The US, the UK and France first grounded their action – the air strikes aimed at enforcing the no-fly zones imposed both in Northern and Southern Iraq in order to guarantee the delivery of humanitarian aid – on the traditional concept of a Council authorisation. However, Resolution 688<sup>59</sup> never authorised the use of force, even implicitly. This is evidenced, among other things, by the fact that the Council refrained from referring to Chapter VII,<sup>60</sup> that the determination of a ‘threat of the peace’ was linked to the transboundary effect of the refugee flows rather than the human rights violations committed against the Kurdish minority,<sup>61</sup> and that the principle of non-interference within the domestic affairs of a State, enshrined in article 2, paragraph 7 of the UN Charter, was strongly reaffirmed. Although the Allied powers did not rely on humanitarian grounds at an early stage, the UK openly espoused the doctrine of humanitarian intervention in 1992 in statements and publications, but notably not before the Council.<sup>62</sup> At the same time, however, the Foreign and Commonwealth Office argued that the action was consistent with Resolution 688.<sup>63</sup> The British reluctance to present the doctrine of humanitarian intervention as a justification independent of the more traditional ground of a Council authorisation,<sup>64</sup> as well as the mixed reaction of the international community to the intervention,<sup>65</sup> only confirm that the doctrine of humanitarian intervention had not yet emerged as a legal justification for the use of force under customary international law. We shall now examine NATO’s intervention in Kosovo in order to determine whether a new norm allowing for the unilateral recourse to force in cases of humanitarian crises has been crystallized at this occasion.

## II.2 NATO’s Intervention in Kosovo

From 24 March to 10 June 1999, NATO launched a bombing campaign against the FRY in reaction to the atrocities perpetrated against the ethnic Albanian population in Kosovo.<sup>66</sup> Some members of the Alliance were reluctant to intervene in the absence of a Council authorisation, but they soon realised that China and Russia would veto any proposition of resolution legitimating the use of force against the FRY. Despite the absence of a Council authorisation, the coalition members privileged this traditional justification and none of them relied on a doctrine of humanitarian intervention in order to justify Operation Allied Force, except Belgium

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<sup>58</sup> For an analysis of this intervention, see for instance Chesterman 2001, *supra* note 5, pp. 130-133; Murphy 1996, *supra* note 5, pp. 165-198.

<sup>59</sup> SC Res 688 (1991).

<sup>60</sup> Chesterman 2001 *supra* note 5, p. 134.

<sup>61</sup> SC Res 688, Preamble; *idem*, p. 132; Murphy 1996, *supra* note 5, pp. 170-171.

<sup>62</sup> Gray 2000, *supra* note 14, p. 29.

<sup>63</sup> *Idem*, pp. 29-30; Chesterman 2001, *supra* note 5, pp. 203-204.

<sup>64</sup> Gray 2000, *supra* note 14, pp. 30-31.

<sup>65</sup> Murphy 1996, *supra* note 5, p. 193.

<sup>66</sup> For a comprehensive analysis of the intervention, see *idem*, pp. 257-284; Chesterman 2001, *supra* note 5, pp. 206-218; Simma 1999, *supra* note 18, pp. 6-14.

before the ICJ.<sup>67</sup> References to humanitarian grounds were made in a political or ethical, not legal, context.<sup>68</sup>

Beyond the reluctance of the Alliance members to ground their military action on the doctrine of humanitarian intervention, the reaction of the international community's to Operation Allied Force also significantly weakens the possible emergence of a rule of customary international law. Indeed, a large number of States, including two permanent members of the Council, have condemned NATO's intervention.<sup>69</sup> In addition, Foreign Ministers of 132 countries passed a Declaration within the Group 77 in which they "rejected the so-called right of humanitarian intervention, which has no basis in the UN Charter or in international law".<sup>70</sup> It results from these elements that the *opinio juris* necessary for a norm to reach the status of customary law is still lacking.

## Conclusion

A close analysis of the UN Charter, followed by an overview of the state practice since the adoption of the latter, have demonstrated that the recourse to force for humanitarian reasons constitutes a clear violation of the prohibition on the use of force enshrined in article 2, paragraph 4 of the UN Charter and that a so-called doctrine of humanitarian intervention sometimes referred to in the literature as a legal justification has not yet emerged as a rule of international customary law. This position is supported by the ruling of the ICJ in the *Nicaragua* case, in which the Court considered that "the argument derived from the preservation of human rights ... cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy ... based on the right of collective self-defence".<sup>71</sup> Indeed, this affirmation undoubtedly runs counter the existence of a right of humanitarian intervention when it maintains that the recourse to force does not represent a suitable way to ensure the preservation of human rights.

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<sup>67</sup> *Legality of Use of Force* case (provisional measures) [1999] ICJ, pleadings of Belgium, 10 May 1999, CR 99/15. On 29 April 1999, in the midst of the bombing campaign, the FRY instituted proceedings against 10 NATO members so as to obtain provisional measures, the end of the air strikes. It grounded its arguments on the violation of the prohibition on the use of force laid down in article 2, paragraph 4 of the Charter. The Court dismissed the request for provisional measures on 2 June 1999 and, eventually, ruled that it lacked jurisdiction to entertain the case on 15 December 2004, arguing that Serbia and Montenegro were not members of the United Nations at the time the case had been brought before the Court and could not therefore have access to it.

<sup>68</sup> O. Corten, 'Un Renouveau du 'Droit d'Intervention humanitaire'? Vrais Problèmes, Fausses Solutions', 41 Rev. trim. dr. h. 2000, p. 698.

<sup>69</sup> Russia, China, South Africa, Namibia, Gabon, former member states of the USSR, most Latin American countries, Cuba, Libya, Iran, Iraq. See *idem*, pp. 698-699; Dubuisson 2000, *supra* note 23, p. 180.

<sup>70</sup> Quoted in Corten 2000, *supra* note 68, p. 700 and in Dubuisson 2000, *supra* note 23, p. 180.

<sup>71</sup> *Military and Paramilitary Activities in and against Nicaragua* case, *supra* note 22, 268.

Irrespective of the absence of recognition, under International Law as it stands today, of a right of humanitarian intervention, States have recently launched military interventions allegedly grounded on humanitarian concerns. It may therefore be enlightening to have a look at the way in which such interventions were conducted, in order to assess whether, in practice, they have strengthened human rights. In particular, NATO's intervention against Serbia has seen its 'humanitarian' character questioned in many regards. Not only the motives, but also the means and methods used during the campaign, have been highly controversial. Because national interests were involved in Kosovo, the attacks focused, not on alleviating the sufferings of the Albanians and stopping the human rights violations perpetrated, but rather on the surrender of Slobodan Milosevic.

However, in the specific context of an intervention the alleged purpose of which is to put an end to widespread violations of human rights, the protection of the population should not only be a reason to go to war, it should also be implemented in the course of the intervention. This was clearly not the case in Kosovo. The US invasion in Iraq, soon presented by the Bush administration as a tool for restoring the Iraqi population's human rights, is the most recent illustration of potential abuses to which the recognition of a right of humanitarian intervention might lead. In light of these elements, therefore, one needs to seriously wonder whether humanitarian intervention really serves human rights.