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WHETHER THE INTERNATIONAL LAW RULES REGULATING THE USE OF FORCE ESTABLISH A LEGAL BASIS FOR THE UNILATERAL HUMANITARIAN INTERVENTION TO OCCUR?

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ABBREVATIONS

AU - African Union

DRC - Democratic Republic of Congo

ECOMOG - The Economic Community of West African States Monitoring Group

ECOWAS - the Economic Community of West African States

EU - European Union

UNGA - The United Nation General Assembly

IASC - UN's Inter-Agency Standing Committee

ICISS - International Commission on Intervention and State Sovereignty

ICTY - International Criminal Tribunal for Former Yugoslavia

ICTR - International Criminal Tribunal for Rwanda

ICC - International Criminal Court

MSC - Military Staff Committee

NATO - North Atlantic Treaty Organization

NGO - Non Governmental Organization

OCHA - Office for the Coordination of Humanitarian Affairs

OSCE - Organization for Security and Co-operation in Europe

R2P - Responsibility to Protect

P5 - Permanent Member of Security Council

SCR - Security Council Resolution

SPLM/A - Sudan Peoples Movement/Army

UIC - Union of Islamic Courts UN - United Nations

UNAMID - UN African Union Mission in Darfur

UNSC - United Nations Security Council

SUMMARY (ENGLISH)

In the meaning of the Article 2(4) of the UN Charter, humanitarian interventions do not offend the territorial integrity or political independence of the target state, because the intervening state(s) try to withdraw the humanitarian catastrophe and do/does not undermine or attack the government of the target state. However, despite this fact, humanitarian intervention in the state practice becomes an instrument to implement unilateral humanitarian intervention on the basis of humanitarian considerations but on their own authority. At the beginning of the 21st century the concept of responsibility to protect (R2P), replaces the doctrine of humanitarian intervention. Considering R2P two kinds of event were specified as military intervention for human protection purposes and justified by two broad sets of circumstances such as: large scale loss of life and ethnic cleansing. But the principle differed from the older concept of humanitarian intervention by placing emphasis on the primary responsibility of the state to protect its own population and empowered the international community to fulfill that duty if any nation or UN fails to do it. So R2P downplayed the role of armed intervention, rejected the criteria to guide decision-making in the use of force, disposed of humanitarian intervention that would be authorized by the UN Security Council and in that way empowering the right of unilateral humanitarian intervention. Therefore, the opinion around the international actors are divided between those who appeal to the restrictive provisions of the UN Charter, that reserves the use of force on the humanitarian grounds to the Security Council, and those who maintain that changing norms of *state practice* have led to a more permissive regime, that allows an unilateral humanitarian intervention based on the international customary law. Consequently, nowadays there is still no common agreement about the emergence of new norm, its legality, content, legal regulation, compliance with state sovereignty principle and requirements to the international law

The main goal of this work is to give an answer to the legal question: whether the international law rules regulating the use of force establish a legal basis for unilateral humanitarian interventions to occur?

The analysis of cases studies of different countries will be presented to support the hypothesis suggesting that unilateral armed intervention on the humanitarian ground is illegal and only intervention authorized by UN Security Council is to be treated as legal.

The tasks of this work are to analyze the evolution of humanitarian intervention in accordance with the legal regime in the use of force in the period of pre-Charter and the UN Charter

era, to review critically the exceptions to the prohibition of the use of force with reference to the international customary law, to analyze what kind of legal status and the legitimacy of humanitarian intervention under the customary international law rules were existing until Operation Allied Force, try to detect if the international legal situation after Operation Allied Force can apply as an emerging norm of the customary law and if yes, then how it can apply and finally, to explore and to find the arguments to justify or rebut the emergence of the principle of R2P allowing the unilateral humanitarian intervention in accordance with the treaty law, international customary law and UN Charter.

In the conclusion of the work, it is presented that at most of the analyzed cases until *Operation Allied Force* were denied that the intervention provided some humanitarian relief. In *state practice* humanitarian interventions have not concerned themselves with identifying a legal basis for such authorizations beyond a general reference to Chapter VII of the UN Charter. Besides, *opinio juris* did not support the idea of humanitarian intervention being legalized through customary international law and the idea of lawful unilateral humanitarian intervention has been met with skepticism by the international community. The situation after *Operation Allied Force* also showed that there was no evidence about the legality in *state practice* to support an emerging norm allowing the unilateral humanitarian intervention. Considering the emerging norm of a collective international R2P, R2P can not only be invoked by the Security Council, but also persist the possibility that it can also be invoked by states or regional organizations without Security Council authorization. In the UN World Summit 2005, it has been widely suggested that R2P ‘‘legalizes“ the case for unilateral action in the absence of the UN action, and also suggested the key parameters limiting the scope of permissible intervention. However, analyzing the R2P in accordance with the international law is important to stress that there has been no new treaty dealing with the legal framework for the use of force since Kosovo‘s crisis. The most significant change of relevance to the unilateral use of force has actually not been achieved by any formal amendment. The Charter provisions relating to voting remain today as they were originally drafted, but the law of the Charter, as implemented by practice, ignores the need for the affirmative vote in authorizing humanitarian intervention. Besides, humanitarian interventions without *prior or any at all* UN authorization become legitimate if others validate either the moral or legal justifications offered by the interveners. However, this emerging aspect of humanitarian intervention should be treated as illegal, because it violates the UN Charter, treaty law and the international customary law.

SUMMARY (LITHUANIAN)

Vienašališka humanitarinė intervencija – ginkluotas jėgos panaudojimas nesiremiant JT Saugumo Tarybos sankcija, suteikta pagal Chartijos VII skyrių, t.y. iškilus grėsmei tarptautinei taikai ir saugumui, kurį įgyvendina valstybė ar grupė valstybių, siekdamos nutraukti žmogaus teisių pažeidimus, arba ginkluotas jėgos panaudojimas valstybės teritorijoje, kai nėra valstybės, kurios teritorijoje vykdoma humanitarinė intervencija, sutikimo.

Jungtinių Tautų (toliau - JT) Chartijos 2 str. 4 d. nustatyta, kad „visos narės tarptautiniuose santykiuose susilaiko nuo grasinimo jėga ir jos panaudojimo tiek prieš kurios nors valstybės teritorinį vientisumą arba politnę nepriklausomybę, tiek kuriuo kitu būdu nesuderinamu su Jungtinių Tautų tikslais“. Atsižvelgiant į JT chartijos 2 str. 4d. kontekstą, humanitarinė intervencija nedraudžiama, nes ji tiesiogiai nėra nukreipta prieš valstybės politinę nepriklausomybę, nei pažeidžia jos teritorinį vientisumą. Pagrindinė problema tarptautinėje teisėje kyla, kai Saugumo Taryba nesugeba arba nejaučia poreikio sankciuonuoti ginkluotos jėgos panaudojimo humanitarinės katastrofos atveju, t.y. neužtikrinama žmogaus teisių nepažeidžiant valstybės suvereniteto, kai valdžia savo piliečiams negarantuoja pagrindinių teisių ir laisvių. Dėl šios priežasties valstybių vykdomos humanitarinės intervencijos, nors ir deklaruojant humanitarinius pagrindus, dažnai tampa tik „instrumentais“, kurių pagalba siekiama vykdyti vienašališką ginkluotą jėgos panaudojimą ginant savo strateginius interesus ar siekiant užsibrėžtų tikslų.

Šios problemos sprendimu tapo XXIa. pradžioje pasirodęs naujas tarptautinės teisės „pareigos ginti“ principas, kuriuo bandoma, keičiant valstybės suvereniteto sampratą, pakeisti humanitarinės intervencijos doktriną. Remiantis „pareigos ginti“ principu, valstybės bei valstybės institucijų pagrindinė pareiga - būti atsakingiems už funkcijų vykdymą saugant savo piliečių gyvybes, o tarptautinei bendruomenei suteikta pareiga - „papildyti“ šią pareigą, jeigu ši valstybė arba JT nepajėgia ar nejaučia poreikio užtikrinti šių funkcijų. Šis principas suteikia teisinį pagrindą valstybėms vykdyti vienašališką humantarinę intervenciją, kadangi stengiamąsi sumažinti ginkluotos jėgos panaudojimo vaidmenį bei atmesti JT Saugumo Tarybos vaidmenį sankciuonuojant ginkluotos jėgos panaudojimą. Todėl šiandien pasaulyje, humanitarinės intervencijos teisėtumo klausimas, vis pasikartojant naujoms humanitarinėms krizėms, išlieka itin aktualus teisinių diskusijų objektas dėl tarptautinės bendrijos nesėkmių, apatijos ar nesutarimo dėl naujai iškilusios tarptautinės teisės normos, jos teisėtumo, teisinio sureguliavimo, suderinamumo su valstybės suvereniteto principu ir tarptautinės teisės reikalavimais.

Norint geriau įsigilinti į šią įvairialypę temą darbe keliamas toks tikslas ir uždaviniai:

Darbo tikslas: atsakyti į teisinį klausimą, ar tarptautinė teisė, susijusi su ginkluotos jėgos panaudojimu, nustato teisinius pagrindus vienašališkai humanitarinei intervencijai vykdyti?

Darbe iškelta hipotezė, jog vienašališka humanitarinė intervencija yra neteisėta ir tik JT Saugumo Tarybos sankcionuota humanitarinė intervencija turi būti laikoma teisėta.

Siekiant pagrįsti arba paneigti iškeltą hipotezę, šiame darbe buvo iškelti tokie uždaviniai: išanalizuoti ginkluotos jėgos panaudojimo, kaip teisėtos priemonės naudojimą, vystymąsi humanitarinės intervencijos kontekste prieš ir po JTO organizacijos sukūrimo, kritiškai išanalizuoti ginkluotos jėgos panaudojimo išimtis siejant jas su tarptautine paprotine teise, išsiaiškinti, humanitarinės intervencijos teisėtumo bei pagrįstumo tarptautinėje teisėje pagrindus iki Jungtinių Pajėgų Operacijos Kosove, išsiaiškinti, ar pasikeitė situacija po Jungtinių Pajėgų Operacijos Kosove ir ar tai būtų galima įvardinti, kaip naujai kylančią tarptautinės teisės normą, kuri leidžia vienašališką humanitarinę intervenciją, jeigu taip, kaip ji yra taikoma, išanalizuoti ir rasti argumentus pateisinančius arba atmetančius naujai iškilusios tarptautinės teisės normos, kuri leidžia vienašališką humanitarinę intervenciją, teisėtumą, remiantis sutarčių teise, tarptautine paprotine teise bei JT Chartija.

Išanalizavus darbe iškeltus uždavinius buvo padarytos tokios išvados: iki Jungtinių Pajėgų Operacijos Kosove valstybių vykdytos humanitarinės intervencijos nesiėmė jokių priemonių sumažinti iškilusias humanitarines katastrofas ar tiekti tikrą humanitarinę pagalbą. Valstybių praktikoje, vykdant humanitarinės intervencijas, nebuvo siekiama pagrįsti JT Chartijos VII skyriumi, t.y. ginkluotas jėgos panaudojimas buvo vykdomas be Saugumo Tarybos sankcijų. Tačiau tokios praktikos pripažinimas teisine norma, kas reiškia, kad valstybės ne tik laikosi tam tikrų įprastinių taisyklių, bet aiškiai išreiškia savo įsitikinimą (*opinio juris*), kad tokia taisyklė yra privaloma, nebuvo palaikyta, priešingai tokia valstybių praktika buvo priimta su skepticizmu tarptautinėje bendruomenėje. Tarptautinė situacija po Kosovo krizės taip pat parodė, jog vienašališka humanitarinė intervencija, kaip kylanti tarptautinė norma, nėra teisėta tarptautinėje teisėje. XXIa. naujai susiformavęs tarptautinės teisės „pareigos ginti“ principas sudarė prielaidą valstybėms ar regioninėms organizacijoms vykdyti vienašališką ginkluotos jėgos panaudojimą be Saugumo Tarybos sankcionavimo. 2005 m. Pasaulio valstybių ir vyriausybių vadovų susitikime, šis „pareigos ginti“ principas buvo įtvirtintas JT dokumentuose, kuriuo įteisino vienašališkus valstybių veiksmus be Saugumo Tarybos pritarimo, tačiau nustatant tam tikrus apribojimus, kuriais remiantis vienašališka humanitarinė intervencija, yra teisėta, tik kai atitinka šiuos kriterijus: Saugumo

Tarybos nesugebėjimas primti sankcijos bei didelis mirusiųjų skaičius ar etniniai valymai. Todėl darbe išanalizavus „pareigos ginti“ principą buvo padaryta išvada, jog nebuvo sudaryta jokių tarptautinių sutarčių dėl vienašališkos ginkluotos jėgos panaudojimo, JT Chartijos nuostatos, susijusios su ginkluotu jėgos panaudojimu, išliko tokios pačios, kaip ir 1945 m. Išlieka vienintelė problema - pačios valstybės ignoruoja Saugumo Tarybos pareigą sankcionuoti ginkluotas humanitarines intervencijas, o vienašališkai įsiveržusios valstybės/regioninės organizacijos tokius vienašališkus veiksmus bando pateisinti moraliniais ar pačių valstybių praktikos pagrindais, tačiau toks pateisinimas vienašališkai humanitarinei intervencijai vykdyti yra neteisėti, kadangi pažeidžia tarptautinę paprotinę teisę bei JT Chartijos nuostatas.

INTRODUCTION

The relevance of the thesis and its problematic

An unilateral humanitarian intervention, by the the UN Security Council under Chapter VII not authorized the threat or use of force by a state or group of state aimed at preventing or ending widespread and grave violations of fundamental human rights of individual other than its own citizens, or without the permission of the state within whose territory force is applied.[1] In the meaning of the Article 2(4) of the UN Charter[2], humanitarian intervention does not offend the territorial integrity or political independence of the target state, because the goal of intervening state(s) is to withdraw the humanitarian catastrophe and does not in any way undermine or attack the government of the target state. Further, the reference to the purposes of the UN in Article 2(4) is read so it could to qualify and limit the scope of the prohibition of the use of force with the result that humanitarian intervention is permissible because, in aiming the prevention of massive human rights violations, it advances the main purposes of the United Nations Charter. However, despite this fact, humanitarian interventions in the *state practice* usually become an instrument to implement unilateral humanitarian intervention on the basis of humanitarian considerations but on their own authority.

During the Cold War or with the end of the Cold War, the humanitarian interventions were justified under the right to self-defence or as a way to protect other states nationals. This method has increasingly relied on Chapter VII of the UN Charter and has significantly broadened the scope of the doctrine of humanitarian intervention, which was not based on a general right to intervene on humanitarian grounds.[3] At the beginning of the 21st century the concept of responsibility to protect (R2P) replaces the doctrine of humanitarian intervention. The principle differed from the older concept of humanitarian intervention by placing emphasis on the primary responsibility of the state to protect its own population and empowering the international community to fulfill that duty if nation or UN fails to do it. Two kinds of event are specified as military intervention for human protection purposes and justified by two broad sets of circumstances such as: large scale loss of life and ethnic cleansing. In this view the R2P seems a dangerous and imperialist doctrine, because

[1] Gabija Grigaitė, „Humanitarinės intervencijos samprata ir teisėtumas Jungtinių Tautų Chartijos kontekste“, *Teisė*, (2010, Nr. 75), p. 186.

[2] The Article 2(4) of UN Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

[3] Daphné Richemond, „ Normativity in International law: The Case of unilateral humanitarian intervention“, *Yale Human Rights and Development Law Journal 45,* (2003, No. 6), p.1.

downplayed the role of armed intervention and rejected the criteria to guide decision-making in the use of force or disposed the prospect of humanitarian intervention that would be authorized by the UN Security Council under UN Charter norms.[4] Beside the legal side, the opinion around the international actors are also divided between those who appeal to the restrictive provisions of the UN Charter, that reserves the use of force on the humanitarian grounds to the Security Council, and those who maintain that changing norms of *state practice* have led to a more permissive regime, that allows an unilateral humanitarian intervention based on the international customary law. Consequently, states could rely on different theories or apply it in the use of military force that has been claimed to have a humanitarian objective or to have been based on the humanitarian consideration. Therefore, nowadays, there is still no common agreement about legality, content, legal regulation of humanitarian interventions, which are shocking in their consequences and have been considered as illegal in the international law context for many years.

The main goal and tasks of the thesis

The main goal of this work is to give an answer to the legal question: whether the international law rules regulating the use of force establish a legal basis for the unilateral humanitarian interventions to occur?

The tasks to achieve the goal are as follows:

- To analyze the evolution of humanitarian intervention in accordance to legal regime on the use of force in the period of pre-Charter and the UN Charter era.
- To critically review the exceptions to the prohibition of the use of force with reference to the international customary law.
- To analyze what kind of legal status and the legitimacy of humanitarian intervention under the customary international law rules were existing until *Operation Allied Force*.
- Try to detect if the international legal situation after *Operation Allied Force* can apply as an emerging norm of the customary law and if yes, then how it can apply.
- To explore and to find the arguments to justify or rebut the emergence of the principle of R2P allowing the unilateral humanitarian intervention in accordance with the treaty law, the international customary law and the UN Charter.

[4] Alex J. Bellamy, „The Responsibility to Protect—Five Years On“, *Ethics & International Affairs, 24*, (2010, No. 2), p.143.

To implement tasks, the analysis of cases studies of different countries will be presented to support the **hypothesis** suggesting that unilateral armed intervention on the humanitarian ground is illegal and only intervention authorized by UN Security Council is to be treated as legal.

The methods of the thesis:

An analytical, logical, descriptive, comparable and explanatory analysis methods are used in the thesis to set tasks.

The limits of the thesis:

The thesis focuses only on the legality of humanitarian intervention authorized by the UN Security Council and the term of legitimacy will be used strictly just in a legal sense.

The structure of the thesis:

The first part defines and clarifies the concept and the content of the subject of research – a (unilateral) humanitarian intervention. The second part analyzes an evolution of the use of force with reference to the humanitarian intervention and explores exceptions to the prohibition of the use of force in the international law. The third part studies legal status and the legitimacy of humanitarian intervention under the international customary law rules until *Operation Allied Force*. This part presents that the international legal situation after *Operation Allied Force* apply an emerging norm (R2P) of the international customary law. The fourth part analyzes arguments to justify or rebut the emergence of the principle of R2P allowing unilateral humanitarian intervention in accordance with the treaty law, the international customary law and UN Charter. This part also presents future perspectives of R2P, relations between the United Nation and regional organizations in accordance with the principle of R2P.

1. THE CONCEPT OF HUMANITARIAN INTERVENTION

Humanitarian intervention can be defined as the use of force by state, a group of states or international/regional organizations, with the purpose of stopping or preventing widespread suffering or death among innocent civilians in another state affected by grave violations of human rights, such as genocide and ethnic cleansing. But this broad definition does not imply any legal justification for the forcible action. Many legal justifications for the use of force may involve a humanitarian component or motivation: for example, authorization by the Security Council, self-defence, the protection of nationals abroad and armed action upon invitation or with the consent of the target state.[5] Humanitarian intervention here will be used on measures which are taken only within the UN framework and aimed at preventing or ending widespread and grave violations of fundamental human rights of individual other than its own citizens, or without the permission of the state within whose territory force is applied.

Humanitarian intervention also has a narrower meaning, as an autonomous justification for the use of armed force in another state, distinct from other legal justifications. The concept of humanitarian intervention in this narrower sense can be defined as the use of force to protect people in another state from gross human rights violations committed against them, or more generally to avert a humanitarian catastrophe when the target state is unwilling or unable to act.[6] Alternative terminologies are used in the literature, such as „military intervention for humanitarian purposes,"[7] „military coercive force to protect civilians,"[8] or „the responsibility to protect"[9]. However, not everyone agrees with this narrow definition of humanitarian intervention. Nevertheless, the main problem with the humanitarian intervention is not the lack of consensus in defining the concept, because still nowadays is not an international agreement about the concept of humanitarian intervention, but rather more contentious issues such as the legality and the legitimacy of an intervention. The main contraversies are with „an unilateral" humanitarian intervention, which is not the antonym of „multilateral". Intervention by a group of states or an international organization

[5] Lowe/Tzanakopoulos, Humanitarian Intervention, in: Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, (2010), p.1.
[6] Ibid.
[7] This definition were found in Lowe/Tzanakopoulos, Humanitarian Intervention, in: Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, (2010), p.1.
[8] Michael Newman, „Revisiting the `Responsibility to Protect'', *The Political Quarterly*, Vol. 80, (January-March 2009, No. 1), p.93.
[9] Ibid, p.96

on its own authority is literally multilateral, not unilateral, but the legally significant point is that it is not collective because it does not take place under the procedure the UN Charter has established for this purpose.[10] Collective humanitarian intervention is only incidentally, while other justifications for the use of armed force that may involve humanitarian motives but have an independent justificatory ambit. Such justifications include meanings as ”protection of nationals abroad” and a legal category that is sometimes called „humanitarian intervention *stricto sensu*“ but is often considered as a subspecies of self-defence. Either the concept of intervention in defence of „democracy“ is an unstable legal category which could perhaps be characterized as humanitarian intervention in accordance to extent that the right to democracy is an internationally protected human right, against the violation of which intervention takes place.[11]

The interpretation of humanitarian intervention and international law has been a matter of dispute between both camps „restrictionists“ and „counter-restrictionists“.[12] Restrictionists base their arguments on the principle of sovereignty (the Westphalia system[13]) and the norm of non-intervention. They point at the Article 2(4) of the UN Charter and argue that military humanitarian intervention is bound to be illegal since the Charter forbids the use of force against a sovereign state. The UN charter Article 2(4) states that „all members shall refrain in the international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations“. [14] Restrictionists argue that sovereignty allows states to arrange their internal issues independently and therefore external interference is unacceptable. Restrictionists base their argument on Article 2(7), which states that „nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state“.[15] Contrary for the restrictionists, non-restrictionists state that humanitarian intervention directly breaches the UN Charter and any interference in the affairs of the sovereign cannot be justify. In fact, non-restrictionists argue that this could lead to abuse, since interveners only pursue their „national

[10] Supra note 5, Lowe/Tzanakopoulos, p.3.
[11] Ibid, p.3
[12] Restrictionists are ‘international lawyers who argue that humanitarian intervention violates Article 2(4) of the UN Charter and is illegal under both UN Charter law and customary international law’ and counter-restrictionists are ‘international lawyers who argue that there is a legal right of humanitarian intervention in both UN Charter law and customary international law’. Cf. Rudi Guraziu, „Is humanitarian military intervention in the affairs of another state ever justified?‘‘, *Global Security Political & International Studies, MA International Relations*, (January, 2008), p.3.
[13] Chris Brown and Kirsten Ainley, „*The Westphalian system can work only if states recognize each other's sovereignty', Understanding International Relations*, Third Edition (Palgrave Macmillan, Basingstoke, 2005), p. 222.
[14] Charter of the United Nations, Article 2(4). Available from: http://www.un.org/aboutun/charter/.
[15] Charter of the United Nations, Article 2(7). Available from: http://www.un.org/aboutun/charter/.

interests“ they may use issues regarding human rights as a pretext for intervention in order to achieve their political objectives.[16]

2. THE USE OF FORCE IN THE INTERNATIONAL LAW

The legal argument of humanitarian intervention goes back to the seventeenth-century when international lawyers viewed military intervention in „lines of the just war tradition“. According to *Grotius,* citizens had the right to revolution in extreme cases of tyranny.[17] While this right was to be exercised first and foremost by the citizens of the nation in question, other states were allowed to support the suppressed citizens if the latter had asked the foreign power for help. *Grotius'* defence of humanitarian intervention was linked to the doctrine of legitimate resistance to repression. *Grotius* idea was aided by the fact that by the international law did not yet know an absolute prohibition of the use of force as modern day international law knows since the Briand-Kellog-Pact and now in Art. 2(4) UN Charter as well as in *ius cogens*. The ideas put forward by *Grotius* were supported by the majority of legal scholars until the end of the 19th century.[18] Especially the 19th century saw a number of interventions allegedly for humanitarian purposes such interventions by the Great Powers in the moribund Ottoman Empire for the protection of that Empire's Christian populations have often been claimed by jurists to be instances of humanitarian intervention. The legal justifications on this humanitarian intervention such as the European powers collectively intervention in the Balkans in 1875 - 1878 in favor of the insurrectionist Christians in Bosnia, Herzegovina and Bulgaria, the naval battle of Navarino in 1897 in support of the Greek rebellion or in the French occupation of Lebanon and Syria, referred to treaty obligations of the Ottoman Empire, its consent to the intervention, the protection of trade interests, the prevention of piracy. Even the US intervention in Cuba during the latter's war with Spain in 1898, described sometimes as genuine humanitarian intervention, was justified by the US on the basis of protection of US citizens and property in Cuba, the protection of US commercial interests, and even self-defence.[19] Forcible humanitarian interventions during this period were commingled with numerous other less

[16] Rudi Guraziu, „Is humanitarian military intervention in the affairs of another state ever justified?‘‘, *Global Security Political & International Studies, MA International Relations*, (January, 2008), p.4
[17] Cf. Stefan Kirchner, *Human rights and international security - Humanitarian Intervention and International Law*, 1st edition, (GRIN Verlag, München/ Ravensburg, 2008), p.39
[18] Ibid.
[19] Supra note 5, Lowe/Tzanakopoulos, p.1-2.

laudable considerations and were never exclusively or explicitly relied on as sufficient legal justifications in themselves.

2.1 Just war theory under principles of the international law

Since its modern emergence in the seventeenth century, the international law on the use of force has been conceived to sit comfortably within the just war tradition. Indeed, the most comprehensive and influential contemporary articulation of just war treats it as falling within a „legalist paradigm".[20] It is worth to remind the origins of the just war before assessing the relationship of the tradition to the structures of contemporary international law. Since the concept of just war developed over a long time, there is no definitive set of principles, but the main focus of international law in the use of force refers to some or all of five principles for going to a war (*ius ad bellum*) and two principles during the war (*ius in bellum*). The criteria for legitimate resort to military force are: a just cause, right intention; lawful authority within the state; a reasonable probability of success and war is the last resort. The criteria for legitimacy during the war are: proportionality in the use of force and the goal of war must be peace.[21] J.T. Johnson argues that the first three criteria are original, derived from Aquinas and they are to be given preeminence with the final four criteria applying only when the first three are met.[22] These criteria for a just war assumed that there exists an international society composed of nation states. This society is governed by a set of laws establishing the rights of its members, especially the rights of territorial integrity and political sovereignty. Any use of force by one state against the territorial integrity and political sovereignty of another state is aggression, a criminal act.[23] Aggression justifies two kinds of just war, a war of self-defence by the victim of the aggression, and a war of law enforcement by the victim and by other members of the society of states.[24]

As we see, in the context of the use of force, the international law distinguishes between *ius ad bellum* and the international law.[25] *Ius ad bellum* regulates the situations in which states can lawfully resort to force. Under this law, the terms "war" and "armed attack" are of particular significance. First with respect to "war", in classic pre-Charter *ius ad bellum*, this was the

[20] M. Walzer, „*Just and Unjust Wars*", 3rd edn, (New York:Basic Books, 2000), p.62.
[21] J.T. Johnson, „*Just War Tradition and the Restraint of War: A Moral and Historical Inquiry",* (Princeton: Princeton University Press, 1981), p.27.
[22] Ibid.
[23]Jutta Brunnée and Stephen J. Toope, „Slouching towards new „just" wars: international law and the use of force after September 11th*", Netherlands International Law Review*, (2004), p.363-392.
[24] Supra note 20, M. Walzer, p. 62-63.
[25] Christopher Greenwood, „*Essays on War in International Law"*, (London: Cameron May Ltd, 2006), p.13.

international law term used to describe the situation of armed conflict between states, and it is still in use today. The conceptual distinction between *jus ad bellum* and *jus in bello* is seen as one of the basic principles of the international law. It ensures that the rules governing the protection of the individual are applicable whenever there is an armed conflict, regardless of the legality or illegality of the use of force, and can be seen as establishing the principle of equality of the belligerents under international law. Even those who are responsible for a ‘‘war of aggression’’ are protected by *jus in bello*.[26]

2.2 The role of UN and the limitation of power in the decision making

Modern developments in *jus in bello* and *jus ad bellum* show that while these two areas of law are separate, they do share a common catalyst – the emergence of ‘‘total war’’. The devastation of the First World War raised sensitivity to the use of force, to the point at which attempts were made to hold Kaiser Wilhelm II responsible for unjustified recourse to war (the polemical war-guilt clause). Nonetheless, the general opposition to any kind of restriction on the use of military means prompted the Dutch government to refuse the ex-Emperor’s extradition.[27] During the interwar period there was a trend towards prohibiting states use of arms, through such instruments as the Covenant of the League of Nations (1919) and the ‘‘General Pact for the Renunciation of War’’, also known as the Kellog-Briand Pact (1928).[28] Following the collapse of the League of Nations and the devastation of the Second World War, the creators of the new order sought once again to institutionalize the use of force in relations between states. The principal objective of the United Nations is the maintenance of international peace and security.[29] The Preamble to the Charter makes clear the desire to ‘‘save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind’’. The establishment of the United Nations signifies the responsibility shared by the world community to protect human rights, to maintain international peace and security in the world and to restrain states from acts of aggression. Human Rights Officer at United Nation Ekkehard Strauss observes that the UN Charter reflects awareness of the interrelationship between the respect for human rights and international peace and security. It contains not only institutions setting provisions, but establishes fundamental norms for the behavior

[26] Marco Sassoli and Antoine Bouvier, „*How Does Law Protect in War?*“, ICRC, (Geneva, 1999), p. 85.
[27] Ian Brownlie, „*International Law and the Use of Force by States“*, (Clarendon: Oxford, 1963), p.53-54.
[28] Japan, China and the United States had ratified the Kellog-Briand Pact.
[29] Charter of the United Nations, Article 1(1). Available from: http://www.un.org/aboutun/charter/.

of states in their international relation. The main exception is the collective security system, set up on the basis of the coercive powers of the Security Council under Chapter VII and Articles 25 and 103 of the Charter.[30]

The Security Council can take any and all of the measures that it considers useful and suitable for dealing with the situation or any of its consequences, whether those actions are of a military, administrative, regulatory or even primarily judicial nature.[31] These set of options to the Security Council has opened a debate on the limits of its power. The limitations can briefly be summed up as 1) as the Security Council derives its powers from the Charter, it must abide by it. The Appeals chamber of the ICTY said that the UN Charter does not conceive of the Security Council as *legibus solutes* (unbound by law).[32] Security Council since 1990 has extended the interpretation of „threat to the peace" to the point that widespread human rights violations within a single state were accepted, along with purely internal armed conflicts, can constitute such a threat.[33] The SC must act in accordance with the object and purpose of the UN,[34] and it should give respect to sovereign equality[35] and may not violate a state's political independence and territorial integrity. The SC must evaluate the impact of its decisions on the human rights of the people affected by those decisions,[36] shall not take any enforcement action under Chapter VII without making a prior determination, the determination shall be made by the Security Council only in the light and scope of the purposes, principles and object under the UN and, finally, the Security Council is obliged to act in good faith.[37]

2.3. The exceptions to the prohibition of the use force

Within the international community, which is an imperfect association with limited purposes and mostly made up of states still keeping to all intents and purposes a monopoly on the

[30] United Nations, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, A/47/277-S/24111, United Nations, (New York: 1992), para. 14. The system as created provided for military forces to be at the disposal of the Security Council if required. But as the agreements required under Article 43 were never signed, it became UN practice from the beginning of the 1990s to authorize member states that are ''able and willing'' to conduct military action.
[31] David Schweigman, „The Authority of SC under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice", *Kluwer Law International*, (The Hague, Netherlands, 2001), p. 165.
[32] Appeals Chamber Decision, Jurisdictional Motion: *Prosecutor Vs. Dusko Tadic a/k/ "Dule*", Case No. IT-94-1-AR72, (2 Oct. 1995), para. 28.
[33] Supra note 5, Lowe/Tzanakopoulos, p.5
[34] Article 24 (2) of the UN Charter.
[35] Article 2(1)of the UN Charter.
[36] Article 1(3) of the UN Charter.
[37] Supra note 31, David Schweigman, p. 165.

legitimate use of physical violence, the general interdiction of the threat or use of force written in Article 2(4) of the United Nations Charter is usually considered as a peremptory rule of international law (*jus cogens*), accepted and recognized as such by the international community, and forbidding any derogation whatsoever. Two exceptions were nevertheless forecasted in the Charter and have been framing the legitimate use of force since 1945. On the one hand, the authorization to take any measures judged necessary to maintain or restore international peace and security that the UN Security Council can give in pursuance of Charter Articles 24, 39, and 42. On the other hand, Article 51 of Charter allows states to keep the inherent right of individual or collective self-defence if an armed attack occurs until the Security Council is able to take appropriate measures. In the narrow meaning of the Article 2(4), humanitarian intervention would not offend the territorial integrity or political independence of the target state, because the intervening state(s) withdraws immediately upon the aversion of the humanitarian catastrophe that provoked the intervention, and does not in any way undermine or attack the government of the target state. Further, the reference to the Purposes' of the UN in Art 2(4) is read so as to qualify and limit the scope of the prohibition of the use of force, with the result that humanitarian intervention is permissible because, in aiming at the prevention of massive human rights violations, it advances the main purposes of the United Nations Charter.[38]

2.3.1. An article 51 of UN Charter - use of force in self-defence

Humanitarian intervention in order to alleviate the suffering of a local population cannot be justified without more than self-defence.[39] Article 51 of UN Charter reserves the right of individual or collective self-defence if an armed attack occurs against any member of the United Nations and this right is described as the inherent right.[40] It was recognized in *Nicaragua* when the Court observes that the UN Charter by no means covers the whole area of the regulation of the use of force in the international relations and this treaty itself refers to pre-existing customary international law. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of customary nature, even if its present contents has been confirmed and influenced by the

[38] Supra note 5, Lowe/Tzanakopoulos, p.4.
[39] Ibid, p.8
[40] Article 51 of the UN Charter.

Charter.[41] It is reasonable to assume that the Court was referring in principle to the customary law existing in 1945, together with any subsequent developments.[42]

Self-defence was regarded either as synonymous with self-preservation or as a particular instance of it. The statesmen of the period used as self-preservation, self-defence, necessity, and necessity of self-defence as more or less interchangeable terms, and the diplomatic correspondence was not intended to restrict the right of self-preservation which was in fact reaffirmed. Since 1945 the state practice generally has been opposed to anticipatory self-defence. For example, in the 1981 The SC Resolution was adopted unanimously that Israeli attack on an Iraqi nuclear reactor in 1981 was strongly condemned as a clear violation of the Charter of United Nations. [43] The Bush doctrine, published in 2002, claimed a right of "pre-emptive action" against States who are seen potential adversaries. This doctrine is applicable in the absence of any proof of an attack or even imminent attack.[44] This doctrine lacks a legal basis, but it does have an historical parallel to the attack on Serbia by Austria-Hungary in 1914.[45] When the United States Expeditionary Force began military operation against Iraq in March 2003, the letter to the Security Council of 20 March relied upon The SC Resolutions as the putative legal basis of the action, rather than the principles of general international law.[46]

But the Charter regime presents some question of interpretation. The first question concerns the formulation "against the territorial integrity or political independence of any State". [47] The United Kingdom employed this type of argument to defend the mine-sweeping operation to collect evidence within Albanian waters in the *Corfu Chanel* case.[48] Preparatory work of the Charter was sufficiently clear and this phrasing was introduced precisely to provide guarantees to small States and was intended to have restrictive effect.[49] The term "armed attack" has a reasonably clear meaning, which necessarily rules out anticipatory self-defence, but this position calls for clarification. Since the phrase "armed attack" strongly suggest a trespass against the territorial integrity or political independence of a state in the same time it is very doubtful if it applies to the

[41] ICJ Report: *Nicaragua* case, (1986), para. 176.
[42] Ian Brownlie ,, *Principles of Public International Law"*, 7 nt edition, (Oxford university press, 2008), p.732.
[43] The SC Resolution 487 (1981).
[44] *The national Security Strategy of the United States of America*, White House, (Washington: September 2002), p. 15; Cf. Christine Gray, Chinese Journal of I.L. 2, (2002) p. 437-447.
[45] Supra note 42, Ian Brownlie ,, *Principles of Public International Law"*, p.734.
[46] U.N.Document S/2003/351. See further the United Kingdom letter of the same date, which also places reliance exclusively upon Security Council resolutions: U.N. Doc. S/2003/350 and the similar australian letter the same date: U.N. Doc. S2003/352. See also ICLQ 52(2003), p. 811-814.
[47] Article 2(4) of the UN Charter.
[48] ICJ Report: *Corfu Chanel case*, para 4.
[49] Cf. Supra note 42, Ian Brownlie ,, *Principles of Public International Law"*, p.732-734.

case of aid to revolutionary groups and forms of subversion which do not involve offensive operations by the forces of state. Sporadic operations by armed bands would also seem to fall outside the concept of an ”armed attack“, because bands cannot be understand as taking armed action by state authority and they do not have a power to authorize armed attack actions. However, it is conceivable that the co-ordinated and general campaign by bands of irregulars, with obvious or easily proven complicity of the government of state from which they operate, would constitute an ”armed attack”, especially if the purpose of the attack were the forcible settlement of a dispute or the acquisition of territory.[50]

The definition of armed attack had obvious importance in the *Nicaragua* case where the complaint of Nicaragua and defence of the United States involved alleged support to the operation of irregular forces.[51] ICJ decided the case on the basis of customary international law rather than Articles 2(4) and 51 UN Charter. The base argument of the Court was that in customary international law as well as Article 51 UN Charter and the use of force in self-defense is justified only in response to an “armed attack” and use force against another is lawful only when the wrongful act provoking the response was an “armed attack”. In the view of the Court, under customary international law or the UN system, states do not have a right of collective armed response to acts which do not constitute an ”armed attack“.[52] So we could assume that ICJ indicated two conditions for the lawful exercise of collective self-defence. The first one is that the victim state should declare its status as victim and request assistance[53] and the second is that the wrongful act complained of must constitute „an armed attack“.[54]

2.3.2 An Authorization by the Security Council under Chapter VII of the Charter

Under Chapter VII of the Charter, the UN Security Council may take action with respects to threats to international peace and security, but the Charter makes it very clear that the SC could legitimately use force to restore international peace and security only after exhaustion of the non military measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of

[50] Cf. Supra note 42.
[51] Supra note 41, *Nicaragua* case, para.14.
[52] Ibid. para. 211.
[53] Ibid. para. 14, 103-105.
[54] Ibid. para.14, 102-104, 127.

diplomatic relations[55] as happened with South Africa, Iraq or Yugoslavia. As supporters of humanitarian intervention confirm the existence of the principle prohibiting the use of force in international relations, the customary character of which was stated by ICJ in *Nicaragua* case: the course to force is justified as an exception to the general prohibition.[56] Thus, military intervention could be authorized by the Security Council under Chapter VII of the Charter if the Security Council determines the existence of any threat to the peace, breach of the peace.[57]

Furthermore, the rules mentioned above clearly demonstrate that the founding fathers of the UN have reserved a pivotal role for the SC in the UN system for the maintenance of international peace and security.[58] Furthermore, the Charter also vests the SC with the powers to authorize regional arrangements or agencies for enforcement action under its authority.[59] But the effectiveness of this possibility is limited severely due to decision-making process of the SC: unless deciding on procedural questions, a decision by the SC requires nine votes in favor, including the votes of all permanent members.[60] But the misuse of the veto power to further self interests of the P5 has furthered the concerns of many, especially in decision authorization with regard to humanitarian interventions. According to the UN Charter,[61] states are only allowed to threaten or use force against another state for reasons of self-defense or when it is authorized by the Security Council as necessary to maintain or restore international peace and security. [62] The notion of "international peace and security" is flexible enough to allow for a broad range of interpretations and on occasion the Security Council has invoked it as justification for actions that seem primarily humanitarian in character. Also has been suggested by international actors that the UN Charter can be modified by the practice of the member states crystallizing as a new principle of customary law,[63] one can also see customary law as existing alongside the U.N. Charter to deal with situations not envisaged, or not adequately dealt with in the Charter. [64]

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[55] Chapter VII: Action with Respect to Threats to the Peace, Breaches to the Peace and Acts of Aggression. available at http://www.un.org/en/documents/charter/chapter7.shtml.
[56] Natalino Ronzitti, „*The Current Status of Legal Principles Prohibiting the Use of Force and Legal Justifications of the Use of Force*", p. 91-110.
[57] Article 39 of the UN Charter.
[58] Niels Blokker, „Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by Coalitions of the Able and Willing", *EJIL*, Vol. 11, (2000, No.3), p. 541-568.
[59] Ibid.
[60] Supra note 17, Stefan Kirchner, p.37.
[61] Charter of the UN Article 51, Available from: http://www.un.org/aboutun/charter/.
[62] Chapter VII: Action with Respect to Threats to the Peace, Breaches to the Peace and Acts of Aggression available at: http://www.un.org/en/documents/charter/chapter7.shtml.
[63] Ian Brownlie & C. J. Apperley, „*Kosovo Crisis Inquiry: Memorandum on the International Law Aspects"*, 49 INT'L & COMP. L.Q. (2000), p. 878, 892-93.
[64] *Military and paramilitary Activities in and against Nicaragua,* ICJ Reports ,(1986), para. 14, 94.

2.4 The UN Security Council's relationship with the ICJ

In 1992 Libya challenged the SC Resolution 748 at the ICJ, which was based on the threat to the peace, orders Libya to surrender two of its nationals accused of bombing Pan Am flight 103 which Libya considered to be *ultra vires*.[65] In *Libya vs. the United States* case Judge *Weeramantry* raised new questions in the light of the respective powers of the SC and the ICJ under the UN Charter and in a light of their relationship to each other. [66] The Court find that both Libya and the US, as members of the UN, are obliged to accept and carry out decisions of the SC in accordance with Article 25 of the Charter, including the obligations imposed by the SC Resolution 748[67] and whereas, in accordance with Article 103 of the Charter, the obligations of the parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention.[68] However, several judges in this case opined, that, under certain circumstances, a decision by the Security Council might be viewed as invalid. It seems difficult to locate substantive limitations on the Council's actions taken under Chapter VII as the Charter provides wide discretion to the SC.[69] Nevertheless, the SC is an organ of the UN and acts should be in accordance to the Charter. The legality of actions by any UN organ must be judged by reference to the Charter as a constitution of delegated powers.[70] Resolutions are the means through which the Security Council acts and authorizes, because without such powers to authorize the SC will be left impotent if it is necessary to take military enforcement measures. The SC has explicit power under 39 Article of the UN Charter to take military enforcement actions and to perform its functions, if measures provided for in Article 41 would be inadequate or have proved to be inadequate.[71]

The SC has as well as implicit power to to take military enforcement actions and this power is not established directly under UN Charter. In the UN Charter there is still the idea of a permanent UN army, which has been never realized. This idea is established under Article 47 of UN Charter; the establishment of a Military Staff Committee (MSC), consisting of the Chiefs of Staff,

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[65] http://www.icj-cij.org/docket/files/88/7207.pdf.
[66] *Libya vs. the United States*, Summaries of Judgments,Advisory Opinion and Orders of ICJ, 14 April 1992, p.9
[67] *Libya vs. U.S.*, request for the Indication of Provisional Measures, General List no. 89 (order of Apr.14) available at http://www.icj-cij.org/docket/files/89/7213.pdf.
[68] The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, ("Montreal Convention"), 1971. For example, states parties may establish jurisdiction in cases when the offense takes place in the territory of that state;
[69] Supra note 58, Niels Blokker, p. 541-568.
[70] The SC Resolution 748, (1992).
[71] Charter of the UN Article 42, Available from: http://www.un.org/aboutun/charter/.

or their representatives, from the five permanent members of the Security Council provides the international mechanism meant to facilitate this commitment.[72] The intent of these provisions, deliberated at the end of World War II, was to create for the UN continued access to the enormous Allied forces. But the five permanent members of the Security Council had differing views on the nature of UN army from the start. The U.S. advocated that the UN needed a mobile force able to strike quickly at long range and brought to bear the maximum armed force in the minimum time.[73] The USSR, on the other hand was unwilling to support a force which could complicate its hegemonic plans.[74] The UK, China, and France also favored a smaller force to preserve the influence of their own contributions.[75] During The Cold War, it became obvious that negotiations conducted by the MSC would not result in the ratification of the agreements specified in Article 43. Moreover, failure of the Security Council to agree on principles governing the conclusion of agreements under Article 43 made it impossible for the MSC to make any progress toward establishing levels of strength of national contingents to be made available to the Council. Disagreements over member force contributions, force roles and missions, command and control arrangements, and criteria for disengagement produced a stalemate.[76] Thus, the Security Council had no armed forces that would enable it to exercise power under Chapter VII of the Charter, and a central part of the peace-enforcement system failed to become operative.[77] Overall, the goal of the establishment of the UN was to signify the responsibility shared by the world community to protect human rights, to maintain international peace and security in the world and to restrain states from acts of aggression and to ensure by the acceptance of principles and the institution of methods, that armed force shall not be used.[78] And without the SC coalitions and willing authorized no other instrument is available to the UN to use military force. If the Council were not entitled to use the authorization instrument, the UN could not have acted in most or all of the cases in which it has now played role.[79]

[72] Charter of the UN Article 47, Available from: http://www.un.org/aboutun/charter/.
[73] William R. Frye, „*A United Nations Peace Force*" (New York City: Oceana Publications, 1957), p. 176.
[74] Ibid. p. 177
[75] Ibid. p. 177
[76] Ibid.
[77] Ibid.
[78] Preamble of the Charter of the UN, Available from: http://www.un.org/aboutun/charter/.
[79] Supra note 58, Niels Blokker, p. 541-568.

3. CUSTOMARY LAW: HUMANITARIAN INTERVENTION IN STATE PRACTICE UNTIL THE BIRTH OF R2P

As the ICJ confirmed in *Nicaragua*, that no one has the "authority to ascribe to states legal views which they do not themselves advance".[80] Starting to analyze international customary law, it is important to recognize that customary law combines two elements: state practice and *opinion juris.* Only if states act because they believe themselves to be exercising a legal right or complying with a legal obligation, they are demonstrating that practice is matched by the required *opinion juris*.[81] Legal justification for unilateral or not humanitarian interventions is the assumption that if one of these has became a rule of the international customary law.[82]

3.1. The situation of humanitarian intervention during the Cold War

Over the years during the Cold War, the Security Council has not exercised its power against states that have engaged in gross and persistent violations of human rights of their own citizens. There are identified two phases in the Council's treatment for human rights: the first from 1946 to 1989 and the second from 1989 to 1994. [83] In the first phase the SC acted in a cautious, empirical and haphazard way, while in the second period, the SC began to venture forth in the area of human rights.[84] The most prominent cases of intervention with humanitarian background in the period 1945 – 1990 are the Belgian to Congo intervention in 1964, the U.S. intervention in the Dominican republic of 1965, the Indian intervention in East Pakistan (Bangladesh) in 1971, the Tanzanian intervention in Uganda in 1978, the Vietnamese intervention in Democratic Kampuchea in 1978, the French intervention in the Central African Empire (later Republic) in 1979, the US interventions in Grenada (1983). In none of these case can it be denied that the intervention provided some humanitarian relief, because in those cases where humanitarian intervention were significant more just in official declaration, as in the case of the U.S. intervention in the Dominican

[80] Supra note 41, *Nicaragua Case*, par. 109, p.207.
[81] Steven Haines, „The influence of Operation Allied Force on the development of the jus ad bellum'', *International Affairs 85: 3*, (2009) p.486.
[82] Danish Institute of International Affair (DUPI), „*Humanitarian intervention, Legal and political Aspects"*, 1st ed, DUPI, (København, 1999), p. 87.
[83] Sydney Dawson Bailey, „*UN Security Council and Human Rights*", New York, N.Y. : St. Martin's Press, 1994 cited in B.G. Ramacharan, „*The Security Council and the Protection of Human Rights"*, (The Hague:Nijhoff, 2002), p. 15
[84] Ibid.

Republic, they played just a minor role[85], because primary goal of the U.S. intervention has been the intent to halt the expansion of the communist influence in the Americas.

Similarly a number of humanitarian intervention practice since 1945 have been invoked by authors and less by the states, as evidence of a general practice of the unilateral right to intervene.[86] For example, in 1971 India intervened in East Pakistan where large scale human rights violations had been committed. The intervention has been motivated by humanitarian concerns but India did not invoke the doctrine of humanitarian intervention as justification for the intervention. Furthermore, while the Security Council was paralyzed, the General Assembly criticized the intervention.[87]

The second example would be contrary to India's, when the Security Council has not exercised its powers against states when Viet Nam, despite the uncontested atrocities committed by the Khmer Rouge in Cambodia, invoked the doctrine of humanitarian intervention to justify the 1978 / 1979 invasion of Cambodia on the installation of a new (pro-Vietnamese) government.[88]

The same was with Tanzania's intervention in Uganda, although the result of this action was the removal of one of the bloodiest dictatorships modern Africa has known, but the government of Tanzania also tried to justify the intervention as an act of self-defence.

In both cases the military operation aimed at the deposition of a foreign government and at the installation of a government friendly to the intervener can be qualified as an act of self-defence according to Article 51 of the UN Charter as this provision implies that the measures adopted are proportional, i.e. strictly necessary to repel the attack.[89] These events and reactions of international community showed that the necessary elements for the formation of a customary rule allowing measures of humanitarian intervention were relevant state practice which a thorough confirmation of the rule excludes the permissibility of such interventions.[90] The western world rejected the humanitarian intervention claim while the then Soviet Union used her veto right to block a decision by the Security Council. [91]

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[85] Sean D. Murphy, „Humanitarian intervention – the United States in an evolving World order", (Philadelphia, University of Pennsylvania Press, 1996), p. 94.
[86] Supra note 7, Lowe/Tzanakopoulos, p.9.
[87] Supra note 17, Stefan Kirchner, p.54.
[88] Supra note 82, Danish Institute of International Affair (DUPI), p. 88.
[89] Randelzhofer, „Article 51", in B. Simma (ed.), „*The Charter of United Nations — A Commentary"* (1995) p. 677, at para. 37.
[90] Peter Hilpold, „Humanitarian intervention: Is there a need for legal reprisal?", *EJIL*, Vol. 12, (2001, No. 3), p.445.
[91] Supra note 82, Danish Institute of International Affair (DUPI), p. 89.

For the first time, the SC invoked Article 39 against South Rhodesia in 1966 holding that a state's violations of human rights constituted a threat to the peace.[92] The Cold War mainly precluded the SC from acting by using veto in decision making process.

The unanticipated Cold War and more than the forty year standoff between the Soviet Union and the West was the first obstacle to the realization of the UN Charter's norms in the creating of the collective security system creating by the UN Security Council and based in the military strength of its five permanent members.[93] However, it is not only the Cold War, the UN Security Council lacked teeth as it did not have a standing UN force at its disposal, because the power to veto further excluded the Security Council from playing the crucial role even though time and place demanded.[94] The state practice during the Cold War does not support the idea of humanitarian intervention being legalized through customary international law but to the contrary that the idea of lawful unauthorized humanitarian intervention has at best been met with skepticism by the international community. [95]

3.2 An era of humanitarian intervention after the Cold War

Furthermore, the end of Cold War did not end conflicts in the world rather increased the complexity of wars. The predominant nature of wars changed from wars between states to wars within states.[96] The end of Cold War brought much activity in the Security Council. Since the 1990 the UN Security Council has adopted many resolutions and has frequently resorted to Chapter VII. The decade of the UN was able to take actions to such humanitarian intervention to Panama in 1989, the ECOWAS/ECOMOG interventions in Liberia in 1990 to Sierra Leone in 1997, the US, UK, and French (the latter until 1998) intervention in Iraq to protect Kurdish and Shia populations from 1991 to 2003, the interventions in Somalia in 1992, in Rwanda in 1994, and East Timor in in 1999 and of course the NATO intervention in Kosovo in 1999. These interventions have not concerned itself with identifying a legal basis for such authorizations beyond a general reference to

[92] UN Security Council Resolution 232 (1966) on Sothern Rhodesia.
[93] Brian Urquhart, „*Limits on the Use of Force, in Leashing the Dogs of War: Conflict Management in a Divided World"*, edited by Chester A. Crocker, Fen Osler Hampson, and Pamela Aall, Washington, (D.C. : United States Institute of Peace Press, 2007) p. 265.
[94] Supra note 58, Niels Blokker, p. 541-568.
[95] Supra note 17, Stefan Kirchner, p.55.
[96] Jeffrey Sluka, „On Common Ground: Justice, Human Rights and Survival, Chapter 10, Justice As a Basic Human Need", Edited by Antony James Williams Taylor, *Nova Science Publishers*, (NY, 2006), p. 124.

Chapter VII of the UN Charter. These were all internal conflicts, with the controversial exception of the conflict in the former Yugoslavia, or at least were not traditional inter-state conflicts.[97]

The first major active resolution after the end of the Cold War was taken when Iraq invaded Kuwait. UN Security Council condemned the invasion of Kuwait by Iraq and determined that there exists a threat to international peace and security.[98] The resolution demanded Iraq to end the repression against her own civilian population and especially against the Kurds and request the immediate unconditional withdrawal of the Iraqi forces.[99] In the SCR 688 did not mention UN Chapter VII or did not mark about authorization „to use of all necessary means".[100] Resolution 687 reaffirmed Resolution 688 which determined that Iraq had committed a breach of the peace and authorized member states to use all necessary means to uphold and implement Resolution 668 and all subsequent resolutions and to restore international peace and security in the area.[101] This Resolution was regarded as a basis to the use of force in Iraq and to establish „safe havens" by the U.S. and their European allied force such as United Kingdom and France and „no-fly zones" in 1991-1992. It was argued to have been in support of previously humanitarian intervention while the use of force to enforce the „no-fly zones" in 1993 was claimed by the U.S. to be based on the right of self-defence against threats of attacking coalition aircraft patrolling the zones. [102] But France combined this justification with a claim to be responding to violations of SCR 687 in 1991[103] and the UK enunciated a free-standing right of humanitarian intervention, but then combined this with the argument that aircraft patrolling the „no-fly zones" had the right to use force to defend themselves against any attack. Even if the UN had condemned the Iraqi repression of civilians as a threat to international peace and security before the intervention took place, it did not explicitly authorize the application of military force.[104] Despite the fact that the intervening states justified their action as being in support of the UN Resolution 688, this resolution did not specifically authorize intervention, and the three interveners further justified their action as an exceptional right to intervene on humanitarian grounds.[105] The Security Council for the first time in its history stated a clear and explicit connection between human rights violations materially within a state and a

[97] Christine Gray „From Unity to Polarization: International Law and the Use of Force against Iraq", *EJIL Vol. 13*, (2002, No. 1), p. 4.
[98] The Security Council Resolution 688 (1991).
[99] Ibid.
[100] Peter Malanczuk, „*Humanitarian Intervention and the Legitimacy of the Use of Force",* (1993) p. 18.
[101] The UN Security Council Resolution 688 (1991).
[102] Supra note 5, Lowe/Tzanakopoulos, p.10.
[103] The UN Security Council Resolution 687 (1991).
[104] Ibid.
[105] Cristina G. Badescu, „Authorizing Humanitarian Intervention: Hard Choices in Saving Stranger", *Canadian Journal of Political Science*, (University of Toronto, March, 2007), p. 65.

threat to international security. [106] Since 1945 the UN Security Council apparently has had the authority to authorize the use of force to correct human rights violations and Resolution 688 was more connected to „cross border incursion“ and „massive flow of refugees“ than to the humanitarian crisis itself.[107]

In 1990, ECOMOG took action to stop the killings of civilians in Liberia and restore peace and democracy. In 1997, the same ECOWAS mandated ECOMOG to restore order and protect human rights in Sierra Leone, where Nigeria had also intervened in the same year, separately, for similar purposes. Consequently, it has been argued that without prior authorization from the UN and without consent of the host government, both military actions were as involving the assertion of a right of humanitarian intervention.[108] In general, the international response to these interventions was positive and the UN issued statements supporting both of them retrospective.[109]

In 1992 the Security Council authorized the use of force to restore peace, stability, law and order in Somalia, because the magnitude of the human rights tragedy there and further exacerbated by the obstacles being created to the distribution of humanitarian assistance, were constituted a threat to international peace and security.[110] The Security Council widened its interpretation of what constitutes threat to international peace and security by considering human rights violations in Somalia. The Resolution 794 in 1992 for the first time a threat to international peace and security was found and the requirement of a consequential enforcement measure under Chapter VII stated without any recourse to the transborder effects of the crisis.[111] The international community took an important step in developing a strategy for dealing with the potential disorder and conflicts of the post cold war world. Through its various resolutions the SC is of the opinion that the internal situation in and of itself warrants action.

In 1994, the Security Council authorizes use of force in Haiti, which arguably, is considered the purest UN humanitarian intervention to date.[112] Resolution 940 of 1994 with regard

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[106] Kelly Kate Pease and David P. Forsythe, „Human Rights, Humanitarian Intervention and World Politics“, *Human Rights Quarterly, Vol. 15*, (May, 1993, , No. 2), p. 290-314.

[107] This is the prevailing interpretation of Resolution 688 (1991). See, for example, Philip Alston, „The Security Council and Human Rights: Lessons to be Learned from the Iraq-Kuwait Crisis and its Aftermath“, *Australian Yearbook of International Law*, (1992) p. 132.

[108] International Commission on Intervention and State Sovereignty, „*The Responsibility to Protect*“. Supplementary volume, (Ottawa: International Development Research Council. 2001): 166.

[109] Supra note 105, Cristina G. Badescu, p. 65.

[110] The Security Council Resolution 794 (1992).

[111] Supra note 90, Peter Hilpold, p. 446.

[112] Robert Cryer, „*The Security Council and Article 39: A threat to Coherence?“* 1 J. Armed Conflict L. , (1996) , p. 180.

to the Haitian crisis and the attempt of the world community to restore the legitimate presidency of Jean-Bertrand Aristide, ousted from office by a military coup. The Security Council expressed its grave concern caused by the significant further deterioration of the humanitarian situation in Haiti, in particular the continuing escalation by the illegal *de facto* regime of systematic violations of civil liberties [113] and determined the situation in Haiti as a threat to peace and security in the region.[114] The SC authorized the formation of a multinational force under unified command and control to restore the legitimately elected President and authorities of the Government of Haiti and extension of the mandate of the UN mission in Haiti.[115]

Probably the most genuine case of a collective humanitarian intervention was realized with the Security Council Resolution 929 of 1994 in Rwanda. The Security Council authorizes the use of force with the Secretary-General to conduct a military operation under national command and control aimed at contributing to the security and protection of displaced persons, refugees and civilians at risk.[116] Without any reference to the transboundary effects of the crisis or the presence of a „failed state" the Security Council stated purely and simply that the magnitude of the humanitarian crisis in Rwanda constituted a threat to peace and security in the region.[117] It could mention that comparing with the past cases this mean a clear refocusing of the priorities the Security Council had set for itself in the ambit of the recourse to Chapter VII measures.[118] Also in the Resolution 929 (1994) the Security Council stated, however, that the crisis in Rwanda constituted „a unique case", which demands an urgent response by the international community thus denying precedential value to this measure.[119]

3.3. The change of legal situation in the world after *Operation Allied Force*

The question arises whether, irrespective of the legal position prior to 1999, the NATO intervention in the (then) Federal Republic of Yugoslavia may have provided the requisite state practice and *opinion juris* for the emergence of a customary exception from the prohibition of the

[113] The Security Council Resolution 940 (1994).
[114] Ibid.
[115] Ibid.
[116] UN Security Council Resolution 929 (1994)
[117] Ibid.
[118] Supra note 90, Peter Hilpold, p.446.
[119] In 1990 the Economic Community of West African States (ECOWAS) intervened in Liberia where public order had been totally disrupted by a civil war. ECOWAS had no authorization for this measure but the Security Council legitimized this action retroactively. Another unilateral intervention made by ECOWAS in Sierra Leone in 1998 was also approved subsequently by the Security Council.

use of force along the lines of "humanitarian intervention".[120] Humanitarian intervention in Kosovo was authorized under SCR 1244 (1999) which establishes an international security presence „with all necessary means to fulfill its responsibilities". This formulation differs from previous resolutions authorizing the use of necessary measures, because it did not directly authorize force.[121] It was designed to secure support from Russia and China for the resolution in the Security Council. According to Russia, the resolution did not itself authorize force, despite its reference to Chapter VII. [122] Here the issue of the precedential status of the earlier use of force against Iraq could be seen as playing a decisive role.[123] NATO's official statements at the start of *Operation Allied Force* against Yugoslavia in March 1999 were not particularly clear on legal argument, but there are indications of a claim to implied authorization in NATO's assertion that it is taking action „to support the political aims of the international community".[124]

Certain NATO states suggested that there had been implied authorization for their bombing campaign on the basis of SCR 1160, 1199 and 1203.[125] These resolutions were all passed under Chapter VII. SCR 1160 called for a political solution to the problem of Kosovo and imposed an arms embargo on Yugoslavia.[126] The SCR 1199 determined that the deterioration of the situation in Kosovo constituted a threat to peace and security in the region and demanded an end to hostilities and it set out certain measures to be taken by Yugoslavia and concluded that if these measures were not taken it would consider further action and additional measures to maintain or restore peace and stability in the region.[127] The third, Resolution 1203 (on which both China and Russia abstained) welcomed the agreements between Yugoslavia and NATO and the OSCE, determined that the situation constituted a continuing threat to peace and security in the region and demanded full implementation of the agreements. [128]

Limited resources at the disposal of the UN and its inability to mount an enforcement action meant that it had to authorize Member States to take enforcement action. The lack of capacity of the UN to deploy, command and control an enforcement action meant that it would be folly for it to undertake them.[129] In this way the operation against Iraq has served as a crucial

[120] Supra note 5, Lowe/Tzanakopoulos, p.11.
[121] Supra note 97, Christine Gray, p. 5.
[122] UN Press Release, SC/6686
[123] Supra note 97, Christine Gray, p. 13.
[124] Ibid
[125] Christine Gray „*International law and the Use of force*", (2000), p. 34, p.193
[126] http://www.un.org/peace/kosovo/98sc1160.htm.
[127] http://www.un.org/peace/kosovo/98sc1199.htm.
[128] Supra note 97, Christine Gray, p. 14.
[129] UN Yearbook (1995) 175, S/1995/1, at p. 177.

precedent, a catalyst for a shift in the UN system.[130] Even some of the states participating in the intervention expressly denied that they considered the Kosovo campaign to be an instance where they had the right to act as they did under international law.[131] The main significance of the argument of implied authorization thus seems to have been to stress that the intervention should not be seen as unilateral, that its aims were consistent with those of the Security Council, and to limit any doctrine of humanitarian intervention by a requirement of Security Council determination under Chapter VII of a threat to international peace and security.[132]

Importantly, the German Foreign Minister stated in the Federal Parliament (1998) that the NATO decision on air strikes in Kosovo "must not become a precedent", while the denial of precedential value to the Kosovo intervention was the major theme in the German parliamentary debate,[133] Belgium stated in the General Assembly that Security Council Resolution 1244 of 1999 had achieved the return to legality [134]and that it hoped that resort to force without Security Council authorization "would not become a precedent".[135] U.S. arguments on the legality of the Kosovo intervention did not espouse any clear doctrine of humanitarian intervention, but rather relied when referring to such humanitarian intervention to a mixture of circumstances and principle in order to qualify any Universalist principle or wide-ranging rule that might prove less attractive in other hands.[136] This connects well with the German and other denials of the precedential value of the Kosovo intervention, and highlights the lack of any *opinio juris* with regard to the right on unilateral humanitarian intervention.

The response of other, non-NATO, states to arguments that there was a legal basis for the Kosovo bombing campaign and for a right of humanitarian intervention was overwhelmingly negative. NATO is not a regional organization in the sense of Chapter VIII of the UN Charter. Consequently, the requiremement enshrined in Article 53 of the UN Charter *prior or post facto* authorization of use of force under regional arrangements or by regional agencies is not applicable in the case of NATO.[137] Contrary, the NATO constitute an international organization on the basis of Article 51 of the Charter and they stated that the only enforcement action envisages in Article 51 or self-defence.[138] In this case, the requirement of such authorization would result not from Chapter

[130] Supra note 97, Christine Gray, p. 6.
[131] Supra note 5, Lowe/Tzanakopoulos, p.11.
[132] Supra note 97, Christine Gray, p. 14.
[133] Bruno Simma NATO, „The UN and the Use of Force: Legal Aspects*", 10 EJIL 1*, (1999), p.13-20.
[134] Supra note 5, Lowe/Tzanakopoulos, p.11.
[135] N. D. White, „*The Legality of Bombing in the Name of Humanity*", 5 JCSL 27, (2000), p.37
[136] Supra note 5, Lowe/Tzanakopoulos, p.11.
[137] Supra note 133, Brunno Simma p.10.
[138] Ibid.

VIII, but from Chapter VII of the Charter, and NATO could be authorized by the Security Council to threaten or use of armed force against FRY not only expressly and prior but also implicitly *ex post* though, and not tacitly as happened. [139] The Non-Aligned Movement, numbering well over half of the member states of the UN, unequivocally condemned the use of force against the (then) FRY, as did many other states, some of which are nuclear powers. In these circumstances, no right of unilateral forcible humanitarian intervention can be said to have emerged as a rule of customary international law, because these humanitarian intervention was „unlawful but legitimate".[140] The position in 1999, when the operation took place, was that there was little or no authority and little or no state practice to support the right of individual States to to use unilateral force on humanitarian grounds in the international law.[141] The legal situation may be different in cases where Security Council or regional organization takes such action in accordance with provision of the Charter. State practice has been overwhelming hostile to the concept of intervention on such a selective and subjective basis.[142] The weak legal position was recognized by the United Kingdom Government when it informed the Select Committee on Foreign Affairs of the House of Common of its aim establishing in the United Nation "new principles governing humanitarian intervention".[143] The Ministers stressed the need to maintain a clear distinction between humanitarian assistance and other activities of the United Nations. They rejected the so-called „right" of unilateral humanitarian intervention, which was said to have no basis in the UN Charter or international law.[144]

Yet, the Security Council did not act in all situations alike: there has been no consistency in the Council's actions. It decides and act depends from the will of the Security Council. This shows the reality that the Security Council acts only when the situation affects one of the permanent members. The SC authorizations have become a major practice, asking countries concerned to take all measures necessary including the use of force against the offending country. Concerns grew more after the Security Council Resolution 678 on Iraq. Colombia expressed its concern saying that, "the SC is delegating authority without specifying to whom. Nor do we know where that authority is to be exercised or who receives it. Indeed, whoever does receive it is not accountable to anyone."[145] Yemen referred to SC Resolution 678 as a classic example of authority without

[139] Ibid.
[140] Independent International Commission on Kosovo, „*The Kosovo report: conflict; international response; lessons learned*", (Oxford: Oxford University Press, 2000).
[141] Supra note 63, Ian Brownlie & C. J. Apperley, p. 878-910.
[142] Supra note 42, Ian Brownlie „*Principles pf Public International Law*", p.744.
[143] House of Common, Foreign Affairs Committee, Fourth Report, Kosovo, Vol. I, liii, para 144, pp. cxi-cxii (para 23,)
[144] Supra note 42, Ian Brownlie „*Principles pf Public International Law*", p.744
[145] UN Doc S/PV.2938, 25 August 1990, p.22-25

accountability.[146] Malaysia noted that when UN Security Council provides the authorization for countries to use force, these countries are fully accountable for actions to the Council through a clear system of reporting and accountability, which is not adequately covered in Res 678.[147] Such authorizations have enabled scholars to ask questions such as what is the role of the Security Council.

But would be important to mention that UN Security Council has taken over the role of world legislature de facto, the legitimacy of the Council legitimacy to act still remains controversial. 148 ,, The fact that the Council gets to act as de facto legislator is owed to the permissiveness of states which have failed to restrict the Council to the tasks which were originally allocated to it in the UN Charter. The fall from grace came with Resolution 1373, which created binding law applicable to all member states".[149] Alvarez states that "States and their lawyers turn to the Council for guidance on these extraordinarily significant legal issues because they believe that the Council acts in accordance with the international law and the Security Council decisions incorporating declarations of legality are legally binding and because they have so few alternative sources for collective legitimating."[150] The UN Security Council still nourished by the expectation of states that the Council will act in accordance with the law, even when creating new law.[151]

3.4 Does the legal situation after *Operation Allied Force* is applying an emerging norm in the international customary law?

Only the cases of the unilateral military intervention could provide such evidence of *opinion juris* in favor of a new exception allowing unilateral humanitarian intervention. But no *opinion juris* in a favor of a new customary law exception to the Charter prohibition of the use of force can be deduced from state action authorized by the Security Council, such as interventions in Somalia, Rwanda, East Timor, and arguably ECOWAS/ECOMOG interventions in Liberia and Sierra Leone (which were explicitly condoned, and at least arguably in part explicitly authorized, by the Security Council).[152] In none of those cases did that the intervening states argue that their

[146] Supra note 145.
[147] Ibid.
[148] Stefan Kirchner, „*Effective Law-Making in Times of Global Crisis – A Role for International Organizations"*, Goettingen Journal of International Law 2 (2010) 1, p.283.
[149] Ibid.
[150] J. E. Alvarez, „*International Organizations as Law-makers*" (2005), p. 198
[151] Supra note 148, Stefan Kirchner, p.283.
[152] Supra note 7, Lowe/Tzanakopoulos, p.10.

actions were justified by a rule of customary international law which allows use of force on humanitarian grounds. In the interventions of India in East Pakistan, Tanzania in Uganda, and Vietnam in Cambodia, the intervening states claimed to have been acting in self-defence in response to border incursions and other acts or threats of force and even then the response of the international community was far from unequivocal acceptance of the interventions. [153] Rather, self-defence was the primary justification offered in the each case, with humanitarian (and other) justifications being at best secondary considerations.[154]

All in these humanitarian intervention mentioned above, humanitarian objectives were the motives for action and thus irrespective of the legal justifications interrelated with the acting states, where the States constitute clear state practice in favor of a right of the humanitarian intervention. Such a view, however, runs counter to explicit and clear statements of the ICJ on the formation of custom case which requires both: *state practice* and *opinion juris*. While unilateral humanitarian intervention by a state associate with the acceptance by other states, this state practice, as legal justification, may be presumed to be accompanied by *opinion juris* to the effect that those humanitarian intervention is lawful on some basis or other. Notwithstanding, the same cannot be said when the states explicitly denies *opinio juris* to a specific justification or elects to base its action on some legal bases to the exclusion of others. These excluded bases have been denied *opinio juris* in those cases of unilateral humanitarian intervention. But the fact that intervening states have been contradictory depend on the right of humanitarian intervention means that there is no *opinion juris* support or consider the establishment of a right of humanitarian intervention.

4. RESPONSIBILITY TO PROTECT

In the aftermath of the Kosovo crisis shows that the inability of the Security Council to act in the preventing humanitarian catastrophe when action is opposed by the minority of its permanent members. Some part of the international society took the position that if no right of unilateral

[153] Supra note 7, Lowe/Tzanakopoulos, p.10.

[154] See generally Sean D. Murphy, „*Humanitarian Intervention: The United Nations in an Evolving World Order*“, (Philadelphia: University of Pennsylvania Press, 1996), p. 83-281. Other examples sometimes cited include Belgian intervention in the Congo (Léopoldville) (1960), Belgian and US intervention in the Congo (1964), US intervention in the Dominican Republic (1965), Israeli intervention in Uganda (the Entebbe Operation) (1976), Belgian and French intervention in Zaïre (1978), French intervention in the Central African Empire/Republic (1979), US intervention in Grenada, (1983), and US intervention in Panama, (1989-90).

humanitarian intervention existed in positive law, the law should be developed to respond to the terrible dilemma of inaction on the part of the international community in the human suffering around the world.[155] Secretary General K. Annan was concerned about this issue to throw down a challenge at the Millennium General Assembly: „If humanitarian intervention is indeed an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?"[156] In response to this challenge, Canada initiated the International Commission on Intervention and State Sovereignty[157]. Although it was not established by the UN, the ICISS could be regarded as the starting point of the review process in the relation to possible reform of UN mechanisms for authorizing the use of force.[158] The ICISS made a number of recommendations, but in this thesis are significant two of them. First, trying to make the UN system work and to weaken the possibility of unilateral humanitarian intervention. It suggested that the possibility of veto action by the permanent members should be weaken by compass an agreement on their part and not to intervene without the authorization of Security Council unless vital national interests were engaged. If the veto was still deployed, the Uniting for Peace route should be pursued. The second important recommendation was in the ICISS report's title: Responsibility to protect.[159] The main aim of R2P was to find a balance between the wish to respond effectively to humanitarian crises and maintaining a strong legal framework for such responses. [160]

The Report sets down six specific and important conditions: *right authority, just cause, right intention, last resort, proportional means and reasonable prospects*.[161] In defining *just cause* the Report excludes intervention to restore democracy or to stop human rights abuses that do not entail large-scale killing and ethnic cleansing, or intervention by states to protect their nationals in foreign territory. *Right intention* is similarly limited to alleviation of acute human suffering rather than alteration of boundaries or even supporting claims of self-determination. Outright overthrow of oppressive regimes is not justified, while destroying their ability to cause harm to their own people is justified. As with *just cause*, this criterion, along with the stipulation of multilateralism as a key

[155] Supra note 7, Lowe/Tzanakopoulos, p.15.
[156] From Kofi Annan's Millennium report of the Secretary-General of the United Nations, quoted in Gareth Evans, „*The responsibility to protect: ending mass atrocity crimes once and for all"* (Washington DC: Brookings Institution Press, 2008), p. 31.
[157] ICISS
[158] Supra note 81, Steven Haines, p.482.
[159] Ibid.
[160] Amitav Acharya „Redefining the dilemmas of humanitarian intervention*'', Australian Journal of International Affairs, Vol. 56*, (2002, No. 3,), p. 373.
[161] Supra note 108, The Responsibility to Protect, p.32.

indicator of *right intention*, would make humanitarian intervention less ideological and controversial.[162]

The R2P primary goal was to establish clear rules, procedures and criteria of humanitarian intervention, especially those related to the decision to intervene and to make humanitarian intervention not only legitimate, but also more efficient. The R2P redefines humanitarian intervention as not „a right to intervene", but as „a responsibility to protect". [163] This R2P is carrying a broader meaning than intervention and implying not just an obligation *to react*, but also equally important and parallel obligations *to prevent and rebuild*. In 2000 the UN General Assembly and the Security Council adopted resolutions recognizing the vital role of all parts of the United Nations system in conflict prevention, and obligating to consolidate their effectiveness.[164] The Report of the Panel on United Nations Peace Operations made much of the need to avoid such operations by more effective prevention. The important report of the UN Secretary-General K. Annan on Prevention of Armed Conflict in 2001 in which he tried to renew focus on cooperation for prevention, especially stressing the importance of responding to the root causes of conflict and the need to pursue long-term effective preventive strategies.[165] The Charter thus provides the foundation for a comprehensive and long-term approach to conflict prevention based on an expanded concept of peace and security. Another key feature of ICISS report's of R2P is its affirm requirement that humanitarian intervention is to be „an exceptional and extraordinary" measure. Two kinds of event are specified as military intervention for human protection purposes is justified in two broad sets of circumstances such as: large scale loss of life and ethnic cleansing.[166] According these criterion, natural disasters, democratic breakdowns or conflicts that do not produce „serious and irreparable harm" to human beings, do not justify the violation of sovereignty by the international community and these humanitarian interventions, when the Security Council do not authorize it, are considering as „unilateral" and violate the territorial integrity and/or political independence of a state. According this view, the R2P is a dangerous and imperialist doctrine that, that it is little more than rhetorical posturing that promises little protection to vulnerable populations. For instance, since 2005 the UN World Summit it has been widely suggested that R2P „legalizes" or „legitimizes" unilaterally intervention potentially without the sanction of the UN

[162] Supra note 160, Amitav Acharya, p. 374-375.
[163] Ibid. p. 373,
[164] Supra note 108, The Responsibility to Protect p.19.
[165] The Report of UN Secretary-General, *Prevention of Armed Conflict*, (2001 June 7), p. 7.
[166] Supra note 108, The Responsibility to Protect, p.32.

Security Council.[167] The principle of R2P has been ambivalent applied of it complicate matters and still remain profound disagreements about the function, meaning, and proper use of R2P. For example, France (in relation to Myanmar) and Russia (in relation to Georgia) used R2P to justify the actual or potential use of coercive force in contexts where there was no apparent manifest failure to protect populations from genocide and mass atrocities. Contrary, the principle has not been used by governments and diplomats in the context of Somalia, Afghanistan, and Iraq despite the commission of many atrocities against the populations of these countries.[168]

4.1. The evolution of R2P

The R2P gained much acceptance by politicians, academics, some states as well as international organizations seem to embrace this concept. The politically influential Report the High Level Panel on Threats, Challenges and Change in December 2004 almost completely adopted the concept as laid down in the ICISS report.[169] According to the the High Level Panel on Threats, Challenges and Change report, the Security Council and the wider international community have come to accept that „under Chapter VII and in pursuit of the emerging norm of a collective international responsibility to protect, it can always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a "threat to international peace and security", not especially difficult when breaches of international law are involved…".[170] Considering this emerging norm of a collective international R2P, R2P can only be invoked by the Security Council, but also persist the possibility that it can also be invoked by states or regional organizations without Security Council authorization.[171] From a legal point of view the Security Council has the power to authorize states to use force to end serious human rights violations, but nevertheless, the High Level Panel on Threats, Challenges and Change report emphasizes that the effectiveness of the collective security system not only depends on the legality of the actions being taken, but also on the perception of their legitimacy, their being made on solid grounds and for the right reasons. Therefore, the High Level Panel on Threats, Challenges and Change report proposes

[167] Alicia L. Bannon, „The responsibility to protect: the UN World Summit and the question of unilateralism", *Yale Law Journal 115: 5*, (2006), p. 1156–65.
[168] Supra note 4, Alex J. Bellamy, p.144.
[169] The High Level Panel on Threats, Challenges and Change report, at p. 56-57, paras. 201-203
[170] Ibid. p. 64, para. 202
[171] Gelijn Molier, „Humanitarian intervention and the Responsibility to protect after 9/11", *Netherlands International Law Review*, (2006), LIII, p. 51.

that the Security Council, in considering whether to authorize or endorse the use of military force, should always address five basic criteria of legitimacy. Each decision of the Security Council regarding the authorization of the use of force has to be tested against these criteria, in order to make its decisions more respected.[172]Although the High Level Panel on Threats, Challenges and Change report criteria are considered applicable to any kind of force authorized by the Security Council and not only to force for human protection purposes, they are exactly the same as the ICISS criteria, except „*right authority"*, which have been changed to s*eriousness of threat*. [173]

Towards development of R2P as an emerging norm, on the 25th of March 2005 in the Security-General K. Annan Report *Larger Freedom; Towards Development, Security and Human Rights for All* to General Assembly, the concept of R2P was fully adopted by the Secretary-General.[174] The principle was also endorsed by the UN GA in 2005 and unanimously reaffirmed by the SC in 2006.[175] The Secretary-General endorses the five legitimacy criteria as formulated in the High Level Panel on Threats, Challenges and Change report and each decision of the Security Council regarding the authorization of the use of force has to be tested against these criteria, in order to make its decisions more respected.[176] In 2005 the World Summit Outcome, which was adopted by the General Assembly on 24 October 2005, the most important passage here as follows:

„Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. … The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, … should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[177]

The principles agreed at the Summit failed to represent the core of R2P, as originally outlined by the ICISS or at the High-Level Panel and Secretary General's Report. For example the most important ICISS proposals were not included in the Outcome document, such as: restriction on the use of the Permanent Five veto, criteria regarding the use of force and the original R2P had been seriously weakened from an obligation to simple preparedness of the state, empowering the

[172] A/59/2005, 21 March 2005, p. 33, para. 126.
[173] The High Level Panel on Threats, Challenges and Change p. 67, para. 207. The first one is labeled 'seriousness of threat'. Hereby is meant that the threatened harm to state or human security must be sufficiently clear and serious to justify the use of military force.
[174] A/59/2005, 21 March 2005, at p. 35, para. 135.
[175] The UN General Assemmbly Resolution 1674, (2006),
[176] Supra note 174, p. 33, para. 126.
[177] A/RES/60/1, p. 30, paras. 138-139.

international community to effectively avoid its R2P.[178] This gap leaves permanent members with a powerful negotiating tool, permitting bad faith vetoes in the face of clear atrocities. The agreement's limitation of coercive measures to a „case-by-case" basis[179] further encourages such bad faith actions. State practice,[180] academic commentary[181] and close reading of the U.N. Charter Articles 55 and 56 oblige states to take joint and separate action in cooperation with the United Nations in defense of human rights. While Article 2(4) of the Charter prohibits the threat or use of force against the territorial integrity or political independence of a state or in a manner inconsistent with the purposes and principles of the United Nations, humanitarian intervention is not aimed at the territorial integrity of a state and is consistent with human rights principles.[182] This agreement suggests that unilateral (or regional) intervention in the absence of U.N. action may be acceptable under some circumstances. The Summit agreement strengthens the case for unilateral action in the absence of U.N. action but also suggests key parameters limiting the scope of permissible intervention. The World Summit affirmed this view of sovereignty, defining protection as a responsibility and empowering the international community to fulfill that duty if a nation fails to do so.[183]

The Summit agreement strengthens the justification for unilateral action in two main ways: by affirming important limit on national sovereignty by recognizing a state's responsibility to protect its own citizens and by setting clear responsibilities for the international community when a country fails to protect its own citizens.[184] The agreement emphasizes the need for "timely and decisive" action when peaceful persuasion is inadequate and particularly it broadens the concept of "international peace and security",[185] which permits coercive action by the Security Council.[186]

Most humanitarian intervention had been authorized by the Security Council under Chapter VII with reference by „case-by-cases" basis (according international customary law) particularly humanitarian interventions as we see above, involved the consent of the nation in

[178] Supra note 167, Alicia L. Bannon, p. 1158.
[179] 2005 World Summit Outcome, 139, U.N. Doc. A/60/L.1, (Sept. 14-16, 2005)
[180] NATO's unilateral action in Kosovo was not condemned by the Security Council or "in the wider society of states." Nicholas J. Weeler, „The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purposes in International Society", *Humanitarian Intervention and International relation*, p. 29- 30.
[181] Adam Roberts, „The United Nations and Humanitarian Intervention", *Humanitarian Intervention and international relations*, (Jennifer M. Welsh ed., 2004), p. 85.
[182] Michael Reisman & Myres S. McDougal, „Humanitarian Intervention To Protect the Ibos", Humanitarian intervention and the United Nations, (Richard B. Lillich ed., 1973), p. 175-77 .
[183] 2005 World Summit, Sept. 14-16, 2005, 2005 World Summit Outcome, 139, U.N. Doc. A/60/L.1
[184] Supra note 167, Alicia L. Bannon, p. 1159.
[185] U.N. Charter articles: 42, 43, 47, 48, 51
[186] UN Charter articles: 39, 41, 42

question or were justified in the name of regional security.[187] In contrast, the Summit agreement in 2005 suggests that Chapter VII action is also appropriate for purely internal matters when peaceful means are inadequate and national authorities are failing to protect their populations. Violence do not need cross borders to justify Security Council involvement when certain international human rights norms are being violated.[188]

The Summit agreement is an important statement regarding the duties of the international community, but it fails those duties to address whether the United Nations is the only international actor that can exercise the R2P. The agreement articulates a clear responsibility for the United Nations to act. The need for unilateral or regional action would become an issue only if the United Nations failed to fulfill its duties, something that the drafters may have preferred not to countenance, but the problem still exist, because the Summit agreement does not address the structural issues that the wart effective U.N. action to protect vulnerable populations. [189]

In early 2009 the secretary-general released his report, ''Implementing the Responsibility to Protect.''[190] The report explain the nature of the 2005 the UN World Summit agreement and outlined measures that individual states, regional organizations and the UN system might consider in order to implement R2P's three pillars: the responsibility *to prevent*, the responsibility *to react* and the responsibility *to rebuild.* As a first step toward implementation, the secretary-general revived his plan for a joint office for R2P and the prevention of genocide and repackaged the proposal as a means of strengthening the UN's early - warning and assessment capacity - something specifically called for in the World Summit agreement.[191] The report states that „sovereignty does not bestow impunity" and that there is an international responsibility to „respond collectively in a timely and decisive manner" when a state is manifestly failing in its protective responsibility.[192] Collective enforcement measures could include targeted sanctions imposed by the Security Council, or indicated by the General Assembly under the „Uniting for peace" procedure.[193] The report stressed that „the responsibility to protect does not alter, indeed it reinforces, the legal obligations of Member States to refrain from the use of force except in conformity with the Charter".[194] Coercive military action is reserved for „extreme cases" and must be authorized by the Security Council or by

[187] Supra note 181, Adam Roberts, p. 71, p. 81.
[188] Supra note 167, Alicia L. Bannon, p. 1159.
[189] Ibid.
[190] ICISS, ''*Implementing the Responsibility to Protect*'', (21 July, 2009), paras. 7 & 10 (a).
[191] Supra note 4, Alex J. Bellamy, p.146.
[192] Supra note 190, *Implementing the Responsibility to Protect*''.
[193] Ibid. paras. 11 (c), 54.
[194] Ibid. 56-57, 63.

regional or subregional arrangements under UN Charter Article 53 with the prior authorization of the Security Council.[195]

4.2. RtoP and the conception of State Sovereignty

What about the underlying idea of the R2P, about the idea of viewing sovereignty in terms of responsibility and not in terms of rights of the state?[196] The principle „Sovereignty as responsibility" focused on the responsibilities of host governments and maintained that vulnerable populations were best protected by effective and legitimate states.[197] But in other situations, the doctrine would point to the referral of cases to a „higher authority" - the UN SC.[198] These principles recognized that primary responsibility for displaced people rested with the local authorities but asserted that consent to international aid should not be „arbitrarily withheld", especially when the local authorities were unable or unwilling to provide the necessary assistance.[199] The principles were adopted by the IASC, the OSCE and the AU. ECOWAS called upon its members to disseminate and apply them. In addition, several countries (Burundi, Colombia, the Philippines and Sri Lanka) have incorporated the principles into national law and others are looking at following suit.[200]

F.R. Tesón advocated a similar approach to the concept of sovereignty in international law.[201] He states that sovereignty of the state lies in the protection of the fundamental rights of the individuals who live on the territory of the state and the only justification for exercising power over its population is that the rights of that population are guaranteed and protected by the state. From this point of view, the state has the international rights of territorial integrity and political independence if, and only if, it is a legitimate state from the standpoint of domestic justice when it protects and guarantees the rights of its subjects.[202] The implication here is that a state which violates the human rights of its population systematically not only rejects its internal legitimacy, but also its external legitimacy. The state which constitutes a threat to its own population can not

[195] Supra note 190, *Implementing the Responsibility to Protect*''.para.3.
[196] Supra note 171, Gelijn Molier, p. 49.
[197] Alex J. Bellamy ,,*The Responsibility to Protect and the problem of military Intervention*'', International Affairs 84: 4 (2008) p.620.
[198] Ibid.
[199] Principles 3 and 25 of the 'Guiding principles on internal displacement'. Alex J. Bellamy ,,*The Responsibility to Protect and the problem of military Intervention*'',International Affairs 84: 4 (2008) p.619.
[200] Ibid.
[201] F.R. Tesón, „*Humanitarian Intervention: An Inquiry into Law and Morality*" (New York: Transnational Publishers 1997), p.98.
[202] Ibid.

supposed to protect that same population in its inter-state relations. Sovereignty as responsibility is a kind of conditional sovereignty from the perspective of the state concerned. When the state is unwilling or unable to act responsibly in protecting the basic rights of its citizens, it no longer has the rights which derive from its sovereign status. By taking over this responsibility, the international community in turn does not have to respect these sovereign rights any longer. [203] As we seem above the same point lies behind the reasoning of the R2P in the ICISS Commission Report, just the basic disparity in the principle of R2P is that a military intervention for human protection purposes without Security Council authorization is at most legitimate and only when the following five criteria are fulfilled: there must be a *just cause* for the intervention; the intervening state(s) must have the *right intention*; the intervention must be the *last resort*, the means *used must be proportional* and there must be *reasonable prospects* that the intervention can stop or end the human rights violations.[204]

The ICISS tried to reconcile the traditional notion of sovereignty, in which sovereignty rests with the state, with a concept in which sovereignty also rests in the people. The ICISS emphasizes the aspect of responsibility of state sovereignty by shifting the emphasis from „sovereignty as control" to „sovereignty as responsibility", it tries to remove the intensity between humanitarian intervention, on the one hand, and state sovereignty on the other.[205] Sovereignty as responsibility" implies „a dual responsibility". The primary responsibility is for the state which is responsible for the security of its citizens and for the protection of the human rights of its citizens.[206] But when states are incapable of living up to that responsibility or are willingly causing grave harm to their own people, the R2P shifts to the international community. Since the primary responsibility of „protecting people" lies with their governments, R2P implicates their unwillingness and/or inability to offer such protection as a legitimate cause for international intervention. No other policy document has gone further in specifying the criteria for humanitarian intervention.[207] The consequence of this „dual responsibility" is that an intervention would be allowed in humanitarian emergency cases in which the government is unable or unwilling to protect its citizens.[208]

The text of the agreement is limiting the UN action, but its implications are much broader. The agreement undermines the objection that the unilateral coercive action violates national

[203] Supra note 171, Gelijn Molier, p. 49.
[204] Supra note 108, The Responsibility to Protect, p.32-37.
[205] Supra note 171, Gelijn Molier, p. 47.
[206] Supra note 108, The Responsibility to Protect, p.13.
[207] Supra note 160, Amitav Acharya, p. 374-375.
[208] Supra note 108, The Responsibility to Protect, p.16.

sovereignty. If nations have no sovereign right to commit or passively permit atrocities against their own populations, then they cannot object on sovereignty grounds to coercive actions halting the commission of those atrocities. Sovereignty simply does not extend that far. This understanding of sovereignty does not affirmatively establish the legality of unilateral action, but it does undercut an important legal objection. While the agreement strengthens the case for unilateral responses to protect populations from genocide and other atrocities, it also suggests important limitations that affect how the agreement might be utilized by future unilateral actors.[209]

4.3. R2P and state practice: Darfur – the case of unilateral humanitarian intervention or failure to implement the principle of R2P

Since the passage of Resolution 1674, the Security Council has reaffirmed its position with the Security Council Resolution 1894 in 2009, which reaffirmed the provisions of the 2005 World Summit Outcome Document regarding the protection of civilians in armed conflict, including paragraphs 138 and 139 thereof regarding the R2P populations from genocide, war crimes, ethnic cleansing and crimes against humanity", but the principle of R2P has referred to only once in relation to a crisis—in on the situation in Darfur.[210] Darfur is the latest example of an operation authorized by a regional organization – AU. Nonetheless humanitarian intervention was considered as legitimate of its *just cause* threshold, but as well was supported as unilateral humanitarian intervention by U.S. to stop the genocide in Darfur when the UN Security Council failed to act. Despite the massive atrocities observed, first in Rwanda and now in Darfur, a wide number of observers oppose the idea of unilateral humanitarian intervention.[211] Contemporary posture typifies the idea that legal recognition of unilateral humanitarian intervention destabilizing world order because some member states would provoke evil hostilities in the motivation of humanitarianism, thereby weakening the effectiveness and „primary role"of the UN Charter. Initially, the Security Council displayed a willingness to use R2P in its consideration of ongoing crises, albeit reluctantly. It has shifted, however, to referring to R2P only in thematic resolutions, perhaps recognizing that it

[209] Melvin P. Leffler, „*Bush's Foreign Policy"*, FOREIGN POL'Y, Sept.-Oct. 2004, p. 22; Richard L. Morningstar & Coit D. Blacker, „*World Orders: Unilateralism vs. Multilateralism*", HARV. INT'L REV., Fall 2004, p. 74.
[210] UN SC Resolution 1706 (2006).
[211] Df. Ian Brownlie, „*Thoughts on Kind-Hearted Gunmen, in humanitarian intervention and the united nations"*, Richard B. Lillich ed., (1973), p. 139, 147-48 (arguing that recognition of a right of unilateral intervention would act as a "general license" for vigilantes and opportunists); Cf. Simon Chesterman, „Just War Or Just Peace?" , (2001), p. 235-236; Louis Henkin, How Nations Behave: Law And Foreign Policy, 2d Ed. 1979) p. 144-45 (arguing that attempts to modify the use-of-force provisions of the UN Charter on humanitarian grounds are "dangerous" because unilateral humanitarian intervention is vulnerable to being used as a "pretext" for aggression);

is not appropriate for the Security Council to use the principle ahead of further consideration by the General Assembly. Opposition to implementing of R2P was also evident in other UN bodies. For example, when the UN Human Rights Council's High-Level Mission to Darfur reported in 2007 that the government of Sudan was failing in its responsibility to protect Darfuris, the Arab Group, the Asia Group,[212] and the Organization of the Islamic Conference all questioned the report's legitimacy and tried to prevent deliberation on its findings.[213] Humanitarian crisis in Darfur would seem too many to present precisely the circumstances that those justifying the NATO intervention over Kosovo believed ought to qualify for exceptionalism in relation to the law of the Charter. [214] Still neither the AU nor the UN has been able significantly to improve the situation with the military forces they have deployed. Plausible solution in this event Britain or the US would have pushed for action if they had not been started humanitarian military intervention in Iraq and Afghanistan which were not motivated principally by humanitarian concerns. The military intervention to Afghanistan was justified by reference to self-defence and was almost unanimously supported by the UN membership. Contrary, with the intervention to Iraq, which was not specifically authorized by the UN.[215]

Sudan's claim is supported by a strict reading of Article 2(7) of the Charter, which is "represent the respect for sovereignty, territorial integrity, and political independence, which directly interrelate with the principle of the non use of force underlying in Article 2(4) [216] of the United Nations Charter. It is important to stress that these provisions have generally been accepted as creating a „duty of non intervention." This substantial duty prohibits one state from interfering in the internal affairs of another sovereign state without the consent of the target state or authorization from the UN Security Council, except in matters of self-defense referring to Article 51 of UN Charter. The biggest political dispute arose when the United Nations Security Council authorized humanitarian military intervention without Sudan's consent. According these Sudan's government political statement, the UN was ineffective to stop the atrocities in Darfur, even though it is

[212] High-Level Mission of the UN Human Rights Council, ''*Report of the High-Level Mission on the Situation of Human Rights in Darfur Pursuant to Human Rights Council Decision S-4/101*,'' A/HRC/4/80, (March 9, 2007) and A/HRC/5/6, (June 8, 2007).
[213] Supra note 4, Alex J. Bellamy, p.145-146.
[214] Supra note 81, Steven Haines, p. 487-488.
[215] Supra note 105, Cristina G. Badescu, p. 64.
[216] U.N. Charter art. 2(4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.")

empowered to give such authorization according to Articles 41 and 42 of the Charter.[217] Even if the Commission found that the Sudanese government implemented a policy of genocide against its citizens and violated the Genocide Convention, such a finding would not impose any duty upon any member state to act outside its own territory, because the Genocide Convention does not create a right or duty to engage in any form of humanitarian intervention over and above what conventional and customary law may already provide.[218] The legal duties imposed under the Genocide Convention have been interpreted to be very limited in scope, only requiring member parties to prevent genocide from occurring within their own states.[219] The United States called upon the UN Security Council to stop the killings in Darfur and hold a position that the Genocide Convention has ever invoked it as a mechanism to stop genocide since the treaty was adopted.[220] Meanwhile, the happening events in Darfur raise question about the inquiry of the unilateral humanitarian intervention, because the Darfur atrocities constitute an ongoing, government-inflicted human rights catastrophe that must be stopped.[221] The fact that the Sudanese government was aware about the mass killings of its citizens, and the UN Security Council was virtually paralyzed by vetoes or anticipation, may lend some support to the position that consideration of unilateral humanitarian intervention is both legally and morally appropriate.[222] But observers claim that states would use unilateral humanitarian intervention as a pretext for waging war and it would weaken or blemish the United Nation's authority, under its Charter, to curtail aggression.[223] But many scholars argue that the duty of non intervention, specifically under the UN Charter, must be recognized, because the

[217] U.N. Charter art. 41 ("The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, elegraphic, radio, and other means of communication, and the severance of diplomatic relations."); U.N. Charter art. 42 ("Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.").

[218] David Luban, „*Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur and the UN Report*", 7 CHI. J. INT'L L. , (2006), p. 303, p. 305;

[219] Article 1 of the Genocide Convention obligates its parties to „undertake to prevent and to punish' the crime of genocide, but Article 6 makes it clear that the 'obligation to punish genocide applies only to genocide committed within the state's own territory, and international lawyers generally assume that the legal obligation to prevent genocide has no wider extension than genocide within a state's own territory.'"). This conclusion is reinforced by Article 8, which states that parties to the Convention may call on the UN Security Council to take actions for prevention and suppression of genocide. Convention on the Prevention and unishment of the Crime of Genocide art. 8, Dec. 8, 1948, 78 U.N.T.S. 277.

[220] Scott Straus, „*Darfur and the Genocide Debate*", Foreign Aff., (Jan.-Feb. 2005), p. 123.

[221] Samuel Vincent Jones „*Darfur, the authority of law, and unilateral humanitarian intervention*'',U.S. Congressman Al Green at the Crisis in Darfur conference held at the Thurgood Marshall School of Law, (November 9, 2006), p. 109

[222] Ibid.

[223] Ibid.

UN Charter was created to regulate interstate relations rather than internal violations of human rights law.

This existed obstacles about authorized humanitarian intervention in Darfur, might suggest that the rarity of unilateral humanitarian interventions is the result of a gap between preexisting norms and emerging international norms and values. There is no evidence in *state practice* that can be deployed to support what some believed was an emerging norm allowing for unilateral humanitarian intervention at the time of Kosovo.[224] Notwithstanding this argument we could assume that legal jurisprudence has long established that a law is ineffective if it fails to contribute to the realization of the goals it was intended or desired to further.[225] The situation in Darfur and the international reaction to it have done absolutely nothing to advance the cause of an emerging customary norm of R2P to do with humanitarian intervention unauthorized by the UN. According the legitimacy and legality of the use of force under UN Charter the premise of the pretextualist claim becomes unsustainable when examined in relation to the Charter's aim to protect and preserve human rights. Because an article 1(3) of the Charter states that the United Nations exists to „achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedom for all."[226] Articles 55 and 56 of the Charter also provide that all member states „pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of . . . universal respect for human rights."[227]

4.4. Missing implementing action of R2P in Somalia

While the international response to the crisis in Somalia in the early 1990 often referred to as an important precursor to R2P, the crisis occurred again in Somalia in 2006. U.S. supported Ethiopian intervention which deposed the Union of Islamic Courts and proclaimed a new period of conflict which has not been viewed through the prism of R2P, despite the commission of war crimes, crimes against humanity, and ethnic cleansing, as well as the very real threat of further escalation.[228] Ethiopia repeatedly argued that its intervention was justified by invitation of the internationally recognized government of Somalia and its inherent right to individual and collective

[224] Supra note 81, Steven Haines, p. 487.
[225] Supra note 221, Samuel Vincent Jones, p. 111.
[226] U.N. Charter Article 1 (3)
[227] U.N. Charter Article 55(c), 56.
[228] Supra note 4, Alex J. Bellamy, p.155-156.

self-defense under the Charter of the United Nations.[229] Despite widespread attacks on civilians, international actors have remained unwilling to associate the situation with the principles of R2P. Indeed, ICISS co-chair Gareth Evans suggested that Somalia was a „classic example of R2P situation" in which the government is not only unwilling but also unable to protect the people of the country.[230] But the international response to the crisis has been slow and hesitant. The international community has responded to events has tended to prioritize the interests of external actors over those of Somali civilians.[231] In the case of Somalia, therefore, the Commission of war crimes, ethnic cleansing, and crimes against humanity has not prompted outsiders to view the problem through the prism of R2P and to take timely and decisive action or to prioritize the protection of Somali civilians. Where governments have called for and supported intervention, this has been motivated more by strategic concerns than by humanitarian concerns and it is fairly clear that in terms of civilian protection, the Ethiopian intervention did more harm than good, that AMISOM has been relatively ineffectual, and that the Security Council has not been proactive in trying to create conditions that are conducive to the deployment of UN peacekeepers. As such, this case in Somalia highlights R2P's limited capacity to act by helping to manufacture political will. In the absence of states choosing to use R2P either as a diplomatic tool or to legitimize coercive intervention, the norm has simply not been part of the international political discourse about how to respond.[232]

4.5. Does the emergence of R2P allow unilateral humanitarian intervention according treaty law and the law of the UN Charter?

In principle, the humanitarian intervention should be authorized by the Security Council, but when the Security Council is not able to decide because of a veto or is otherwise unable to make a decision, interventions by ad hoc coalitions or individual states should not be ruled out.[233] This does not mean, however, that such an intervention is legal. When other criteria are met and the intervention is seen by world public opinion as successful, it can be legitimate at the most.[234] The UN should remain the body with authority to approve intervention, and when it provided this it would be doing so more in recognition of states responsibilities to protect than in acknowledgement

[229] Ibid.
[230] Gareth Evans Says: *Somalia's Not Covered*,'' Inner City Press, (September 17, 2009); available at www.innercitypress.com/r2p1evans091708.html.
[231] Supra note 4, Alex J. Bellamy, p.156.
[232] Ibid. p.157
[233] Supra note 108, The Responsibility to Protect , p.55.
[234] Ibid.

of their rights to intervene on humanitarian grounds as such.[235] „If the law relating to the use of force in general and humanitarian intervention in particular has changed at all since 1999, that change will be manifest in some way in the sources of law. These include treaties (or conventions), customary law, the opinions of legal specialists and the judgments arrived at by various international tribunals".[236] In the article 38 of the statute of the International Court of Justice, the sources of law also include general principles of law recognized by civilized nations. Treaty law and customary law are fundamental sources; opinions expressed by specialists or included in judicial decisions are by and large an interpretation of what is contained in or derived from either treaty law or customary law. The main question appears here does R2P can we consider as already crystallized norm? Trying to answer to this question we need first to consider relevant treaty law that a right of unilateral humanitarian intervention existed in customary law in 1999 and whether or not a new norm of R2P (letting unilateral humanitarian intervention) has crystallized.[237]

4.5.1. R2P and UN Charter

Since the adoption of R2P by the GA of UN in its 2005 resolution, academic and policy debates continue over whether R2P has legal content, whether it should have legal content and whether identifying legal content matters.[238] Relevant actors continue to debate the principle's status in international law and policy. Some say it is a tool of „moral suasion",[239] others a combination of legal and political norms[240] , and yet others state that it is grounded in international law. [241] It would be an important to stress that there has been no new treaty dealing with the legal framework for the use of force since Kosovo's crisis. The most significant change of relevance to the use of force has actually not been achieved by any formal amendment.[242] In the earliest days of the UN, the provision of the article 27(3) required the concurrent vote of all five permanent

[235] Supra note 81, Steven Haines, p. 483.
[236] Supra note 81, Steven Haines, 484.
[237] Ibid. p. 483.
[238] Jose E. Alvarez, „*The Schizophrenias of R2P*", Panel Presentation at the 2007 Hague Joint Conference on Contemporary Issues International Criminal Law: Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference, (30 June 2007), p.4-5
[239] Presentation by Kimberley N. Trapp, "*Can There be International Responsibility For Failing to Prevent Terrorism*?," CCIL Annual Meeting, (October 2006).
[240] National Security Council, The National Security Strategy of the United States of America (Sept. 2002), available at http://www.whitehouse.gov/nsc/nss.pdf. Sheri P. Rosenberg, „*Responsibility to Protect: A Framework for Prevention*" , Global Responsibility to Protect 1 (2009) p. 445.
[241] Allen Buchanan and Robert O. Keohane, "*The Preventive Use of Force: a Cosmopolitan Institutional Proposal*," Ethics & Int'l Aff. (Apr. 2004), p 1.
[242] Supra note 81, Steven Haines, p. 484.

members on all non-procedural votes (including, authorized the Security Council Resolutions under Chapter VII of the Charter) was implemented and the practice establish the positive decision of the Security Council despite the abstention of a permanent member in the voting.[243] The Charter provisions relating to voting remain today as they were originally drafted, but the law of the Charter as implemented by practice ignores the need for the affirmative vote.[244] R2P guide some hope among advocates of UN reform that a further shift in practice might occur. But only when all permanent members of Security Council agreed with the principles of R2P and essential proposal of the *High-Level Panel's* that they should not reject a draft resolution authorizing military sanctions for humanitarian purposes related to genocide and large-scale human rights abuses.[245]

R2P's first pillar - *to react* is like a reaffirmation and codification of already existing norms. This principle also request states to assist and encourage each other for the fulfillment of their R2P (pillar two), and to take timely and decisive action in cases where a state has manifestly failed in its R2P (pillar three).[246] Whether *to react and to rebuild* are properly called norms is depends on the expectation if governments and international organizations exercise this responsibility, that they recognize a duty and right to do so, and that failure to act will attract criticism from the society of states. [247] Looking at the positive law and *opinio juris* we could affirm that such duties really exist. According independent researches, the secretary-general of UN recognized the organization's failure to prevent the Rwandan genocide as a failure of the whole UN system that UN should act to prevent and halt genocide.[248]

4.5.2. R2P and treaty law

The notion of collective responsibility resembles the tentative positive duty of cooperation found in Articles 40 and 41(1) of the International Law Commission's Articles of State Responsibility. [249] These Articles provide that certain breaches of international law may be so grave as to trigger not only a right but an obligation (a positive duty) of cooperation among states to foster

[243] Benedetto Conforti, „The law and practice of the United Nations" , *Kluwer Law International, (* The Hague, 1996), p. 66-68.
[244] Supra note 81, Steven Haines, p. 484.
[245] The Report of Secretary-General's Report of the High-level Panel on Threats, Challenges and Change, "*A more secure world: Our shared responsibility"*.(2004), para. 256.
[246] Supra note 4, Alex J. Bellamy, p.160-161.
[247] Ibid.
[248] „Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda,'' S/1999/1257, (December 16, 1999).
[249] Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GA or, 56 th Sess., Supp. No. 10, UN Doc A/56/10 (2001).

compliance with the law. The Responsibility of States for Internationally Wrongful Acts gives states a duty to cooperate to bring an end to breaches of the law.[250] The principle of emergence of R2P was affirmed in *Bosnia vs. Serbia*, the International Court of Justice (ICJ) found that states have a legal obligation to take all measures reasonably available to them to prevent genocide.[251] As well such duty exist in treaty law, because Article 1 of the Geneva Conventions (1949) requires that states „ensure respect'' for international humanitarian law as well as obey it themselves. Combined with international society's commitment to R2P, these legal developments have given rise to claims that a positive duty to prevent genocide and mass atrocities is emerging.[252] At the June 2010 Kampala Conference showed also that emergence of R2P trying to incorporate into international criminal law. The text of Article 8 *bis* adopted in Kampala defines the individual crime of aggression and contains „primary" requirement that the act of aggression must constitute a manifest violation of the Charter of the United Nations. An act of aggression is defined as the use of armed force by one State against another State without the justification of self-defense or authorization by the Security Council.[253] The definition of the act of aggression, as well as the actions qualifying as acts of aggression contained in the amendments are influenced by the UN General Assembly Resolution 3314 of December 14, 1974. The Definition of aggression has scarcely ever been used for its primary purpose as a guide to the Security Council in determining aggression by States. With this Resolution had been taken „on a new life" as a source for discussion of the definition of the individual crime of aggression within the jurisdiction of the International Criminal Court .It is important to notice that the amendment accepted in Kampala needs to be ratified by at least thirty states before it becomes operational, although it will not begin to operate in any case before 1st of January, 2017. After this date it will apply to all states parties to the Rome Statute, regardless of their ratification of the amendment unless they have explicitly rejected it. [254] But the state practice suggests that mutual recognition of a positive duty to implement of responsibility *to react* and the responsibility *to rebuild* is incompatible in the international society.[255] Indetermination is produced by a combination of uncertainty about what is expected, when the use of force in the pursuit of humanitarian purposes would be justified, disagreements about what ought to be expected, and an

[250] Ibid..
[251] International Court of Justice, ''*The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Serbia and Montenegro*),'' judgment (February 26, 2007), paras. 428–38.
[252] Louise Arbour, „*The Responsibility to Protect as a Duty of Care in International Law and Practice,*'' Review of International Studies 34,no. 3 (2008), pp. 445–58
[253] Stefan Kirchner, „The Crime of Aggression after Kampala,American Society of International law", (2010), available at: http://www.asil.org/accountability/winter_2010_9.cfm#_edn4. [visited: 19, May, 2011]
[254] Ibid.
[255] Supra note 4, Alex J. Bellamy, p.160-161.

interest in preserving flexibility for the future. This indeterminacy restricts R2P's implementing in states practice and, and without its ability to encourage states to find consensus, R2P let to commit additional resources to the protection of civilians. [256] As a result, it was about forceful humanitarian intervention and no-fly zones in Darfur, the deployment of IGAD, AU or UN peacekeepers in Somalia; the deployment of Western troops to the DRC, Sudan, and Somalia, military intervention to Iraq, sanctions, engagement or the status quo in relation to Myanmar and much else by reference to R2P.[257]

Despite general disappointment at Outcome of the World summit, it did not fail entirely to affect some measure of change. The General Assembly voted unanimously on a Resolution which endorsed the Summit's Outcome document, [258] dealing with the principles of R2P. While General Assembly resolutions are not legally binding, some prove particularly significant in relation to the development of international law. Importantly, this act by the General Assembly was followed up by the Security Council which, reaffirmed „the provisions of paragraphs 138 and 139 of the World Summit Outcome Document" and made reference to R2P.[259] The R2P norm as was asserted in the Summit Outcome addresses some of legality requirements. While it did not promulgate the norm into law, it did publicize the foundations upon which a legal norm would grow and set the parameters for further normative debate.[260] The Outcome tied the R2P to a set of established international crimes speaks to a number of the legality requirements. Compared to the formulations in the ICISS and High Level Panel Reports, the Outcome's consolidating of the R2P to existing legal categories significantly reinforcement the clarity and scope of the norm.[261] The incorporation also ensures the norm's consistency with established international law – a point that was stressed in the Secretary General's report and by several participants in the Assembly debate – thereby addressing the requirements of non-objection and constancy over time.[262] Indeed, individual states R2P their own populations from the listed crimes as well as the international responsibilities to assist and, if necessary, to take collective action through the Security Council, are grounded *inter alia* in the law of state responsibility.[263] It is important to sress an important fact that none of the

[256] Ibid. p.160-163.
[257] Supra note 4, Alex J. Bellamy, p. 160-163.
[258] UN General Assembly Resolution 60/1, 16 Sept. 2005
[259] Supra note 81, Steven Haines, p. 485.
[260] Jutta Brunnée and Stephen J. Toope, „*The Responsibility to Protect and the Use of Force: Building Legality*?" Global Responsibility to Protect, (2010), p.13.
[261] Carlo Focarelli, „*The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine*", J. Confl. & Sec. L. 13: (2008), p. 191-213.
[262] Supra note 283, Jutta Brunnée and Stephen J. Toope, p.13.
[263] Supra note 249.

R2P-related documents (*Responsibility to protect, A more secure world, In larger freedom or the world summit outcome document*) have said anything other than that military intervention will require a Security Council mandate to confer legitimacy.[264] Far from creating a new exception to the Charter prohibition of the use of force, they place the „primary" use of force to the Security Council acting under Chapter VII. In relation to the law of the Charter, prior to the World Summit, the Security Council acted on the basis of states „collective rights to use force"(rights effectively transferred to the Security Council by states on their ratification of, or accession to, the UN Charter), in future the Security Council may well increasingly be seen as acting in the light of the international community's obligation to protect the rights of victims or potential victims of mass atrocity crimes.[265] In limiting the R2P to „genocide, war crimes, ethnic cleansing and crimes against humanity", the Outcome Document tied the R2P to norms that are widely considered to have both *erga omnes* effect and *jus cogens* status and all humanitarian intervention must be authorized by Security Council.[266]

4.6. The future perspectives of R2P, the UN and regional organization

The incompatibility in the UN Charter with respect to authorization of the use of force make emergence of R2P difficult. Many consider that international law evolves based on changing state practice such as changing experiences shape principles and norms or just as principles and norms influence policies, decisions, and operations.[267] Beyond the codified international law, custom also dictates what is legal, illegal and legitimate. Those arguing against an absolute requirement for UN authorization turn to customary international law to support their position in favour of the potential legality of military interventions proceeding outside the Charter's framework. Also many scholars refer the advantages of the gradual emergence of normative consensus based on recent practice. The latter argue that international law allows states to reject the practice of the new customary norm during its "crystallization."[268]

If *state practice* appears „interesting" and supports the view that a customary norm supports unilateral humanitarian intervention and if the UN do not act, then as we saw above, these humanitarian intervention practice usually do not get a support from an examination of the extent of

[264] Supra note 81, Steven Haines, p. 486.
[265] Supra note 81, Steven Haines, p. 486.
[266] Supra note 27, Jutta Brunnée and Stephen J. Toope, p.381.
[267] Supra note 105, Cristina G. Badescu, p. 60.
[268] Ibid. p. 61.

relevant *opinio juris*.[269] The practice after 1999 shows a clear refusal to allow a unilateral right of military intervention under international law by *opinio juris*. In the international community do not exist yet the generality of the supporting unilateral humanitarian intervention and there is a legal obligation to intervene in extreme circumstances of humanitarian distress caused by mass atrocity crimes, because there are some large and powerful states, such as China, India and Russia, that have usually expressed strong opposition in achieving its political interest.[270]

The lawfulness of unilateral humanitarian intervention has been showed also at the International Court of Justice (ICJ) in the legality of the use of force case brought by Yugoslavia against ten NATO states. But the ICJ refused provisional measures on the ground that it did not have *prima facie* jurisdiction on the merits of the case and did not take judgment on the legality or otherwise of NATO's intervention. Nevertheless, the court did take the opportunity to express its profound concern about the use of force by NATO in Yugoslavia.[271] Interestingly, a number of NATO members, including the US and Germany, have stressed the exceptional or *sui generis* nature of the Kosovo intervention.[272] While the practice after *Operation Allied Force* also seems support the development of a new norm, the evidence of *opinio juris* to match that practice before *Operation Allied Force* or after that is like less convincing.[273]

The only two examples of intervention for expressed humanitarian purposes initiated since Kosovo crisis have been into East Timor in 1999 and Côte d'Ivoire in 2003 and both were authorized by the Security Council.[274] Also several humanitarian interventions undertaken by regional organizations since 2000 without *prior* the SC authorization, such as ECOWAS intervention in Liberia in 2003, African Union missions in Burundi in 2003 and in Darfur in 2003. Two missions authorized by ECOWAS: in Ivory Coast and in Liberia faced with the same problems - felt by all regional or sub-regional actors on the African continent, namely those residing in the gap between capacity to intervene and the political will to react. Nonetheless, ECOWAS has a rapid-deployment capacity, the ECOWAS Ceasefire Monitoring Group, which permitted it to react quickly partly due to Nigeria's role. In February 2003, the AU heads of state approved the first armed peace operation of this regional organization, in Burundi, which was undertaken without UN Security Council authorization. Additionally, it was widely seen as a legitimate operation,

[269] Supra note 81, Steven Haines, p. 488.
[270] Adam Robert, „Law and the use of force after Iraq", *Survival 45: 2*, (2003), p. 49.
[271] ICJ Reports 124, *International legal materials*, vol. 38, (1999), p. 950.
[272] Stefan Talmon, „Changing views on the use of force: the German position", *Baltic Yearbook of International Law 5*, (2005), p. 64–71.
[273] Supra note 81, Steven Haines, p. 489.
[274] UN SC Resolutions 1264 (1999) and 1464 (2003).

especially because the Security Council refused to deploy troops in Burundi for more than a decade but supported it *ex post facto* and later mandated the UN mission in Burundi.[275]

These instances are used to support the argument of an emerging norm that requires less than prior UN authorization in instances of grave humanitarian emergencies.[276] Coalitions of the willing began humanitarian intervening to stop gross human rights violations had been also in Sierra Leone, Albania, Democratic Republic of Congo. Such interventions were followed up by a UN or EU peacekeeping mission and they signified the trend to using coalitions of willing state as „first responders" to requests for intervention, as opposed to waiting for a UN-mandated operation.[277]

Also, for example, in 2003 Australia led humanitarian intervention in the Solomon Islands and it is one example of an intervention undertaken without the SC authorization but with the consent of the host state. Nonetheless, this example is noticeable because Australia even did not seek the approval of the Security Council before undertaking the mission. In one side this humanitarian intervention seems to support the arguments of the proponents which emphasize an emerging new norm - the eclipse of the UN. Moreover, these Darfur and Solomon Island instances presented the offer drawbacks of either the UN or regional organizations as sources of authority for intervention. Analyzing humanitarian intervention authorized by individual states, coalitions of the willing or regional arrangements appears that regional organizations seem to be nowadays more appropriate and stronger alternative to UN authorization in terms of legitimacy.[278] Additionally, a humanitarian interventions without *prior or any at all* UN authorization becomes legitimate if others validate either the moral or legal justifications offered by the interveners and this emerging aspect of humanitarian intervention violate the UN Charter, treaty and customary law.[279]

Humanitarian interventions may or may not be authorized by the Security Council in the future, regardless of whether it is acting in exercise of a collective right or in recognition R2P principle. The actual extent of the shift in the jurisprudential ground of the employment of force cannot yet be strictly defined, because it will be revealed over time, in the practice of the Security Council and in the future development of customary law. If it becomes the case that states increasingly accept as a legal principle of R2P it is possible that they will also develop a greater tendency to intervene when extreme humanitarian catastrophe occurs or seems imminent even that

[275] Supra note 105, Cristina G. Badescu, p. 66.
[276] Supra note 105, Cristina G. Badescu, p. 64-65.
[277] Ibid.
[278] Ibid. p. 66.
[279] Ibid. p 63.

tendency of happening atrocities or government-inflicted human rights catastrophe, is just low or slight.

4.6.1 The R2P and humanitarian situation in Libya

On March 2011 – the UN Secretary-General has called for immediate action on the Security Council's authorization of the use of "all necessary measures" to protect civilians in Libya terming it as a "historic affirmation of the global community's R2P people from their own government's violence".[280] The Security Council passed Resolution permitting the use of all necessary measures, including the imposition of a no-fly zone. Military operation *Force Odyssey Dawn* consisted from an international coalition began to operate and to prevent further attacks and the loss of innocent lives in Libya, where the regime of Muammar al-Qadhafi has conducted a military offensive against citizens.[281]

The indiscriminate and widespread use of force by Gaddafi's government against the Libyan population has clearly turned this situation into one where human rights violations may constitute crimes against humanity, one of the crimes included in the R2P framework. Under the 2005 World Summit Outcome Document and under the UNGA Resolution 60/251, emphasizing the responsibilities of all States,[282] international community have a clear and unambiguous responsibility to protect the people of Libya. The applicability of the responsibility to protect or R2P principle to the current situation in Libya is undeniable. First and foremost, R2P reflects the negative duty for states to refrain from committing atrocities against its own people, a responsibility the regime of Muammar al-Qaddafi was failing to take up.[283] Despite the lack of verifiable information, the UN Security Council referred to „widespread and systematic attacks" against the people of Libya that „may amount to crimes against humanity", and explicitly recalled „the Libyan authorities" of R2P its population. In the case of Libya R2P was invoked by the Security Council, the Secretary-General's Special Advisers on the Prevention of Genocide and R2P, and a number of civil society organizations. The international community, through the United Nations, has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect the Libyan population. Because the Libyan national authorities were manifestly failing to protect their population from crimes against humanity, should peaceful means be inadequate, member states were obliged to take collective

[280] http://www.un.org/apps/sg/sgstats.asp?nid=5145.
[281] SC Resolution 1973 (2011), S/RES/1973 (2011)
[282] UNGA Resolution 60/251, A/RES/60/251
[283] http://www.usip.org/publications/libya-and-the-responsibility-protect.

action, in a timely and decisive manner, through the Security Council, in accordance with the UN Charter, including Chapter VII.[284] Also it very important to stress that the UN recognized the important role of the League of Arab States in the maintenance of international peace and security in the region, and bearing in mind the United Nations Charter's Chapter VIII, the Security Council asked the League's member States to cooperate with other Member States in implementing the no-fly zone.[285] In this case the basic catalyst was the Arab League's willingness to endorse some kind of military intervention, which was one of the more important characteristics of „the Arab Spring" - the fact that Arab countries have endorsed this kind of action. [286]

The UN suggested that this is the first time that R2P has been mentioned in a formal Security Council statement in reference to an ongoing crisis. Civil society groups all around the world have also started calling on the UN, EU, AU and other world leaders to meet their R2P obligation to the Libyan people. NGO recommendations included imposing sanctions on key regime members and an arms embargo; establishing a no fly zone over the entire country and establishing a commission of enquiry; and if necessary referral to the Prosecutor of the International Criminal Court. [287] These the UN Security Council Resolution was very helpful to start humanitarian intervention or as now called R2P and the biggest role took the regional organizations (NATO, AU, EU) in protecting human rights and g assuring peace and security in this region. [288] Moreover, it is important to stress that Russia and China this time restrained from veto in voting to authorize a no-fly zone at the UN Security Council and did not leave this time the international community weak in authorizing the humanitarian intervention. The representatives of China and the Russian Federation, explaining their abstentions, prioritized peaceful means of resolving the conflict and said that many questions had not been answered in regard to provisions of the resolution, including, as the Russian representative put it, how and by whom the measures would be enforced and what the limits of the engagement would be.[289] China had not blocked the action with a negative vote in consideration of the wishes of the Arab League and the AU, its representative said.[290]

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[284] Open Statement on the Situation in Libya, Global Centre for Responsibility to protect, 22 February 2011.
[285] http://blog.unwatch.org/index.php/2011/02/20/urgent-ngo-appeal-to-world-leaders-to-prevent-atrocities-in-libya/
[286] http://www.theglobeandmail.com/news/world/africa-mideast/explainer-what-is-libyas-responsibility-to-protect-its-citizens/article1947578/page2/.
[287] http://www.undispatch.com/a-responsibility-to-protect-in-libya.
[288] http://www.natowatch.org/node/472
[289] http://www.theglobeandmail.com/news/world/africa-mideast/explainer-what-is-libyas-responsibility-to-protect-its-citizens/article1947578/page2/.
[290] http://www.un.org/News/Press/docs/2011/sc10200.doc.htm.

The explicit invocation of R2P within a Chapter VII resolution is a significant, perhaps even historic breakthrough in our stated commitment to end mass atrocities. But it is of monumental importance that the international community goes beyond condemnations urging that the Libyan regime halts the atrocities and lives up to its commitment of readiness to take "timely and decisive action". A repeat of the 2010 Kyrgyzstan scenario, where the international community was unable to develop an effective response to halt the atrocities or take measures to prevent its recurrence, could not only endanger the lives of many Libyans, but also undermine the development of R2P as a norm as well as the credibility of the United Nations.[291] Proponents of the measure have hailed it as a victor for the R2P doctrine, while critics say is being used for political and not purely humanitarian, purposes.[292] The R2P concept emerged out of the international community's inability to halt genocides like those in Rwanda and Bosnia. In one side the R2P includes use of military force by the international community if peaceful measures prove inadequate, but in other side this provision that the doctrine's supporters point to for justifying the air strikes in Libya by some Western countries or regional organizations, such as NATO. Others note more pressing cases for humanitarian intervention--from the DRC to the Ivory Coast--to question Libya as the R2P test case.[293] R2P proponents point to regional backing for the no-fly zone from organizations such as the Arab League, the Gulf Cooperation Council, and the Organization of the Islamic Conference, stressing its international legitimacy „The international military intervention in Libya is not about bombing for democracy or Muammar Qaddafi's head, but legally, morally, politically, and militarily it has only one justification: protecting the country's people" says Gareth Evans, a principal author of the R2P concept.[294] But we need to note that Libya presents the best case for humanitarian intervention unlike „failed" humanitarian intervention in Congo or Darfur. Western intervention in the Congo wouldn't have solved the problem, while military action in Darfur might well have provoked a massive backlash in the Islamic world. But Libya is a case where force could work and where it will be deployed only after non-coercive methods have proved unavailing, as the doctrine of the R2P requires.[295] The biggest questions surrounding the mission in Libya are about its objectives, its command structure, its likely duration and there is no clarity over end-goals or criteria for success which are the most important criterion on the R2P principle or the core of *ad just bellum* principles.

[291] http://www.usip.org/publications/libya-and-the-responsibility-protect.
[292] http://www.hindu.com/2011/03/24/stories/2011032455031200.htm.
[293] http://www.cfr.org/libya/libya-responsibility-protect/p24480.
[294] http://www.cfr.org/human-rights/dilemma-humanitarian-intervention/p16524.
[295] http://www.foreignpolicy.com/articles/2011/03/11/stepping_in?page=0,1.

CONCLUSION

1. The Charter reverses the 17th century‘s ‘‘lines of just war tradition“ presumption that the war is a legitimate mode of political action to the point of replacing the ancient absolute power regarding the use of force to a general prohibition of the use of force according to the principles of *jus ad bellum.* Security Council authorizing the use of force must act in accordance with the object and purpose of the UN and *jus in bello,* also it should give respect to sovereign equality and may not violate a state’s political independence and territorial integrity.

2. In the international customary law as well as in the Article 51 UN of Charter there are two conditions for the lawful exercise of collective self-defence: the first one suggests that the victim state should declare its status as victim and request assistance and the second claims that the wrongful act must constitute „an armed attack“. Under Chapter VII of the Charter, the UN Security Council may take action with respects to threats to international peace and security. But the effectiveness of this possibility is limited due to the slow decision-making process of the UN Security Council or the misuse of the veto power to further self interests of the P5, especially in the decision authorization with regard to humanitarian interventions.

3. In most of the analyzed cases until *Operation Allied Force,* it may be denied that the intervention provided some humanitarian relief. In *state practice* humanitarian intervention were significant more just in the official declaration, because primary goal of the humanitarian intervention has been the intent to halt the expansion of the influence. These interventions have not concerned themselves with identifying a legal basis for such authorizations beyond a general reference to Chapter VII of the UN Charter. Consequently, it has been argued that without prior authorization from the UN or without consent of the host government, both military actions were involving the assertion of a right of unilateral humanitarian intervention. But *opinio juris* did not support the idea of humanitarian intervention being legalized through customary international law and the idea of lawful unilateral humanitarian intervention has been met with skepticism by the international community.

4. These existed obstacles about authorized humanitarian intervention after *Operation Allied Force,* showed that the rarity of unilateral humanitarian interventions is the result of a gap between preexisting norms and emerging international norms and values. But there is no evidence about the legality in *state practice* to support an emerging norm allowing the unilateral humanitarian intervention at the time of Kosovo, which was ‘‘unlawful but legitimate“.

5. Considering this emerging norm of a collective international RtoP, RtoP not only can be invoked by the Security Council, but also persist the possibility that it can also be invoked by states or regional organizations without Security Council authorization. However, since the UN World Summit 2005, it has been widely suggested that RtoP „legalizes“ or „legitimizes“ the case for unilateral action in the absence of UN action and also suggested the key parameters limiting the scope of permissible intervention. The World Summit affirmed this view of sovereignty, defining protection as a responsibility and empowering the international community to fulfill that duty if a nation fails to do so.

6. Analyzing the RtoP in accordance with the international law is important to stress, that there has been no new treaty dealing with the legal framework for the use of force since Kosovo‘s crisis. The most significant change of the relevance to the use of force has actually not been achieved by any formal amendment. The Charter provisions relating to voting remain today as they were originally drafted, but the law of the Charter, as implemented by practice, ignores the need for the affirmative vote. In limiting the R2P to „genocide, war crimes, ethnic cleansing and crimes against humanity“, the Outcome Document tied the R2P to norms that are widely considered to have both *erga omnes* effect and *jus cogens* status and all humanitarian intervention must be authorized by Security Council.

7. The principle of emergence of RtoP was affirmed in the International Court of Justice and found that states have a legal obligation to take all measures reasonably available to them to prevent genocide. Treaty law was used (The Responsibility of States for Internationally Wrongful Acts, *Bosnia vs. Serbia,* Geneva Conventions)) to clearly define that the use of armed force by one State against another State without the justification of self-defense or authorization by the Security Council must be consider as an act of aggression. But indetermination is produced by a combination of uncertainty about what is expected, when

the use of force in the pursuit of humanitarian purposes would be justified, thereby weakening the effectiveness and „primary role“ of the UN Charter.

8. Analyzing the humanitarian intervention authorized by individual states, coalitions of the willing or regional arrangements appears that regional organizations nowadays seems to be more appropriate and stronger alternative to UN authorization in terms of legality. Additionally, a humanitarian interventions without *prior or any at all* UN authorization becomes legitimate if others validate either the moral or legal justifications offered by the interveners but this emerging aspect of humanitarian intervention violates the UN Charter, treaty and customary law.

RECOMMENDATION

An attempt to refrain the threat and use of Veto

The veto power of the Permanent Member of Security Council has been described as the "bane" of the Security Council that limits its effectiveness and causes inaction. ICISS has called for the Permanent Member to refrain from the use of veto when situations such as mass atrocities are on the floor. This power of veto was given to the powerful five in 1945 by the members of the United Nations. Even though there is no clear understanding about such reform of refraining from use of Veto, when it comes to matters related to mass atrocities, or human rights violations, the Security Council must refrain itself from using veto. By creating a Sub – Committee or independent representatives for the Security Council on RtoP could settle an agreement with veto problem. Analyzing the information about these arising international problems or situations together with other UN bodies, they could make an independent and fair opinion or assessment, which would assist to the Security Council to make a right decision based on it.

Also it is possible, if the UN Security Council fails to act in authorizing humanitarian intervention, the General Assembly could take measures according Resolution 377 – known as „Uniting for peace".

Role of regional organization

The Security Council is usually facing the significant problem of a slow decision-making process, that averts humanitarian intervention from taking place within the right time frame or even leting an unilateral intervention to occur. As the record of humanitarian interventions described above suggest, where the UN did not authorize a peace operation for a long time, despite the obvious need or international legitimacy for peace operations undertaken without explicit Security Council authorization required hard work to justify it under the *just cause* discourse. In the meantime, instead of assuming that humanitarian interventions can only take place when the SC authorizes them, we should regard regional organizations, such as the EU, ECOWAS, AU or NATO, as legitimate alternatives to UN authorization when the Security Council is at a deadlock. It is important to stress that nowadays regional organizations may be better than the UN because they are familiar with the intricacies of the local situations and actors. The shared background and experiences of the countries in one region help regional organization understand neighboring actors and local cultures and thus make them more effective in bringing the conflict to an end. Furthermore, regional actors agendas are not overloaded with all the global problems, as we could

noticed with the UN framework, therefore regional organizations might guarantee that humanitarian interventions would take place. [296] Besides, the Special Committee on Peace-keeping Operations concluded in February 2006 that the UN and regional organizations could be vital partners in providing peace and security.[297] Good example would be a „legitimacy pyramid" that lists the Security Council authorization as the most desirable one to achieve and requires states to seek to attain the highest "level" of legitimacy that they can[298]. So having the UN watch over global security, while the Permanent Members of Security Council will not pay attention to humanitarian emergencies outside their areas of interest, the future role of regional institution in the humanitarian interventions will remain an important part.

[296] Welsh, Jennifer. "Review Essay: From Right to Responsibility: Humanitarian Intervention and International Society." *Global Governance 8,* (2002, No.4), p. 516.
[297] Supra note 105, Cristina G. Badescu, p. 70-71.
[298] Ibid.

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