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**HUMANITARIAN INTERVENTION: LEGALITY,
LEGITIMACY AND MORALITY– ANY PROSPECTS
FOR A SOLUTION?**

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Danışman
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Tarih

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Yunus Berker YETİŞTİ

İmza

ÖZET

Yüksek Lisans Tezi

**İnsani Müdahale: Yasallık, Meşruluk ve Ahlakilik –
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Soğuk savaş sonrasında uluslararası ilişkiler literatüründe çok sık anılmaya başlanan İnsani Müdahale Kavramı kökleri çok eski çağlara dayanan haklı savaş anlayışının bir ürünü olmakla beraber bugün evrimleşerek şimdiki tartışmalı, standart tanımı olmayan halini almıştır.

İnsani müdahale tartışmalarında meşruluk ve ahlakilik doğru orantıda işlenirken, müdahalenin hukuksallığı bu ilişkiye zıt bir değer olarak ortaya çıkar. Mevcut devletlerarası hukuk sistemine göre BM Sözleşmesinde belirlenen kurallar haricinde devletlerin birbirine karşı askeri güç kullanması ve birbirlerinin iç işlerine karışması yasaktır. Müdahale tartışmaları, hukukun üstünlüğünü öne sürenler ile hukukun ve egemenliğin insan haklarının önüne geçmesini eleştirenler arasındadır. Soğuk Savaş sonrası gerçekleştirilen her müdahale bu tartışmalarda yeni sorunlar ve başlıklar ortaya çıkarmıştır.

Bu çalışmada ilk kısımda insani müdahale kavramının bir tanımı yapılmaya çalışılmış, tarihi açıdan meşru, ahlaki ve hukuksal gelişimi ortaya konmaya çalışılmıştır. İkinci kısımda günümüzde insani müdahale tartışmalarının meşruluk, ahlakilik ve hukuki açıdan sorun odaklı bir incelemesi yapılmıştır. Son kısımda ise mevcut sorunlara getirilebilecek çözüm önerileri ile insani müdahale için bir model sunulmaya çalışılmıştır.

Anahtar Kelimeler: İnsani Müdahale, Haklı Savaş Kriterleri, Etnik Çatışma

ABSTRACT

Master Thesis

Humanitarian Intervention: Legality, Legitimacy, and Morality – any Prospects for a Solution?

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Humanitarian Intervention concept which began to be referred so frequently in the international relations literature after the end of the Cold War is a product of Just War tradition which has its roots in ancient ages and Humanitarian Intervention concept has changed into the present status which is contentious and without a standard definition.

While the legitimacy and morality are handled in direct proportion, the legality of the intervention emerges as a conflicting value against the former two in the humanitarian intervention debates. According to the existing international law, the states are banned from using military force against each other except for the situations specified in the UN Charter. Humanitarian Intervention debate is between those who argue that existing international legal rules should not hinder the protection of the basic human rights and required reforms should be done and those who assert that superiority of existing international law and sovereignty rights should protected and should not be violated. Every intervention in the Post-Cold War period produced new problems and topics in these debates.

In this study, a definition of humanitarian intervention concept was endeavored to be made and its legitimate, moral and legal development was sought to be presented in terms of historical process in the first chapter. In the second chapter, a problem focused observation of present day humanitarian intervention debates was established in terms of legitimacy, morality and legality. In the last chapter, a model for humanitarian intervention was sought to be presented through the solution propositions which can be suggested for the existing problems.

Key Words: Humanitarian Intervention, Just War Criteria, Ethnic Conflict

**HUMANITARIAN INTERVENTION: LEGALITY, LEGITIMACY, AND
MORALITY—ANY PROSPECTS FOR A SOLUTION?**

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ABBREVIATIONS

AU	African Union
CAT	The Committee Against Torture
CED	The Committee on Enforced Disappearance
CEDAW	The Committee on the Elimination of Discrimination against Women
CERD	The Committee on the Elimination of Racial Discrimination
CESCR	The Committee on Economic, Social and Cultural Rights
CMW	The Committee on Migrant Workers
CRC	The Committee on the Rights of the Child
CWPD	The Committee on the Right of Persons with Disabilities
EC	The European Community
EU	The European Union
FRY	The Federal Republic of Yugoslavia
ICC	The International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICISS	The International Commission on Intervention and State Sovereignty
ICJ	The International Court of Justice
ICTY	The International Criminal Tribunal for the former Yugoslavia
IECD	International Commission of Inquiry on Darfur
IGO	Intergovernmental Organization
IICK	The Independent International Commission on Kosovo
IMF	The International Monetary Fund
JEM	The Justice and Equality Movement
JNA	The Yugoslav People's Army
KFOR	The Kosovo Force
KLA	The Kosovo Liberation Army
NATO	The North Atlantic Treaty Organization
NGO	Non-governmental Organization
OAU	The Organization of African Unity
OHR	Office of the High Representative

OHCHR	The Office of the High Commissioner for Human Rights
RPF	The Rwandan Patriotic Front
P-5	Permanent Five
R2P	Responsibility to Protect
SLA	The Sudan Liberation Army
SC RES	Security Council Resolution
SWOT	Strengths, Weaknesses, Opportunities, and Threats
UN	The United Nations
UNAMID	The United Nations-African Union Mission in Darfur
UNAMIR	The United Nations Assistance Mission for Rwanda
UNITAF	The Unified Task Force
UNOMUR	The United Nations Observer Mission Uganda-Rwanda
UNOSOM	The United Nations Operation in Somalia
UNPROFOR	The United Nations Protection Force
UK	The United Kingdom
US	The United States of America
WMD	Weapon of Mass Destruction

INTRODUCTION

Human rights and human security have gained increasing importance with the end of World War II. The Nazi atrocities showed to all to what extent the state can harm the civilians whether they are its own citizens or not. At the end of the war, the world witnessed for the first time the tribunals being established to bring before justice those responsible for the atrocities. The mark of a new era in terms of humanitarianism was sealed by the formation of the UN Charter which contained clauses concerning the protection of human rights. .

However, the UN Charter included a dilemma. On the one hand, the Charter sought to lay down the rules for humanitarian action, though not clearly in terms of *humanitarian intervention*, while, on the other hand, it attributed unprecedented importance to the maintenance of inter-state order so as to prevent any future conflicts like the Second World War. With regard to the latter, the principles of state sovereignty and non-violation were reinforced. This dilemma did not surface much until the end of the Cold War.

Meanwhile, many treaties on the protection of human rights were drafted and signed. However, their implementation has turned out to be problematic due to the variations in states' commitments.

The debates on humanitarian intervention remained insignificant until the end of the Cold War. During that period the two opposing super powers generally remained silent on the human rights abuses within their own spheres of influence due to their strategic interests. The balance of power and nuclear deterrence kept two parties from intervening into one another's sphere.

The debate over the *humanitarian intervention* gained importance when the West desired to establish a new international order after the collapse of the communist bloc. During the Cold War the governments of the periphery (the so-called Third World) had been supported by their patron states through economic and military aid for strategic reasons. With the end of the bi-polar system many of these

governments lost that key support and could not maintain their internal order. Ethnic rebellions or secessionist movements appeared against the ruling groups in those peripheral states.

The Western engagement in these states caused much controversy in a number of important respects: decision making for the interventions, the timing of interventions, the conduct of operations, and commitments as well as motives of the intervening states.

This controversy is deep and seems to last long as the phenomenon of *humanitarian intervention* itself is highly contentious. To start with, it is not clear whether it is limited to military intervention or not. More importantly, there is not a clear guide or a set of rules (i.e. criteria) for humanitarian intervention in the international law.

While there is not a clear set of legal rules for intervention, state sovereignty was firmly institutionalized through the principles and practice which developed and evolved over the centuries. The intervention into the realm of the sovereign, which was entitled with supreme authority on its territory and population, conflicts with the long-standing practice and understanding of non-intervention.

There are two views on the applicability of *humanitarian intervention*. The first one is the *solidarism*. According to the solidarists, the international community has moral commitment to help those in need, and they accordingly regard intervention into the sovereign's territory as necessary and possible. This intervention need not be authorized by an international institution in the face of the urgency of human suffering.¹ On the other hand, the *pluralist* view asserts that if such an intervention is required, it should be authorized by a competent body (e.g. the UN Security Council) without any motive other than helping people. The pluralists regard authorization as necessary to prevent the abuse of humanitarian discourse for *self interest* as much as possible. From the pluralist point of view, the

¹ Nicholas Wheeler and Timothy Dunne, "Hedley Bull's Pluralism of the Intellect and Solidarism of the Will", **International Affairs (Royal Institute of International Affairs 1944)**, Vol. 72, No.1, 1996, p. 102

main concern in the implementation of the *humanitarian intervention* should be the compliance with the principles of international law, which uphold state sovereignty.²

On the other hand, the solidarist view has different concerns within itself. The historical roots of present day understanding of *humanitarian intervention* can be traced back to the *Just War* tradition. In history the principle of Just War principle was first referred to by St. Thomas Aquinas who was then followed by many after him. The core of that principle is that a battle cannot be just if it is fought for aggrandizement of self-interest. For a war to be considered just, it needs to be fought in order to save others' lives and prevent greater suffering as well as for self-defense. The Just War tradition developed certain criteria to regard a war as just. Briefly, they are: the authorization of war by right authority; the existence of a just cause; the right intention; the use of force as last resort; proportional use of force; and the requirement of reasonable hope.

Present day interventionists, or moralists as they are called for their commitment to the humanitarian intervention as a moral duty, consider the above criteria as the basic requirements for a *just* and *legitimate* humanitarian intervention.

However, even though the above criteria are truly fulfilled, there is a remaining problem. While the morality and legitimacy of the *humanitarian intervention* generally converge, the legality of humanitarian intervention clashes with the legitimacy. As will be explained, it is currently almost impossible for the *humanitarian intervention* to be deemed as both *legal* and *legitimate*.

The Kosovo case and others used in this study show that both sides, namely the solidarists and pluralists, have valid concerns. There is an absolute need for intervention in cases of grave human suffering; on the other hand, states need to be checked against their possible abuse of humanitarianism to further their material interests.

This study shall attempt to define the problems of humanitarian intervention and suggest possible solutions to overcome them. It is based on a qualitative and

² Wheeler and Dunne, p. 94.

critical analysis of the literature view with a view to presenting the conflicting views on the issue and making some humble recommendations towards a solution.

The first chapter covers the debates over the definition of humanitarian intervention. Having agreed with a certain definition as its basis, the rest of the chapter looks into the historical evolution of humanitarian intervention in terms of morality, legitimacy and legality with regard to a number of cases. The related development of international law is also presented.

The second chapter defines the moral and legal problems of humanitarian intervention. The criteria for the legitimacy and morality of humanitarian intervention that were explained in the first chapter are deployed to highlight the current problematic topics. The latter are: selective action and non-intervention; motives versus outcomes debate; right authority; the proportionate action; the moral hazard of humanitarian intervention on minorities; and 'nirvana fallacy', which refers to the problem that those societies and governments which are faced with humanitarian disasters do not endeavor to help themselves, but wait for the Western intervention as a savior.

Finally, in the third chapter, the above mentioned problems are evaluated through the help of case studies. A humble attempt is made to make some suggestions for the solution of those problems. They concern, among others, the realization of an agreement on the acceptability of humanitarian intervention, and the conduct of intervention. The chapter ends with side notes on the importance of establishing a post-intervention, peace building settlement.

FIRST CHAPTER

HUMANITARIAN INTERVENTION: DEFINITION & HISTORICAL EVOLUTION

Humanitarian Intervention has turned out to be a controversial phenomenon, which has given rise to many debates especially after the end of the Cold War. There are many views on the debate. However, what is certain is that humanitarian intervention threatens the international order. This is due not only to the nature of the means of intervention, namely military means, but also to the problems concerning its justification, conduct and aftermath.

This chapter aims to describe the concept of humanitarian intervention, and to provide a succinct account of its historical, moral and political evolution. A brief evolution of international law concerning the principles of state sovereignty and non-intervention are also reviewed. The chapter benefits from various historical cases. However, it should be noted that these cases are not included with a view to judging whether they can be considered as acts of humanitarian intervention. Rather, they are used to better exemplify the subjects under consideration.

I. DEFINITION OF HUMANITARIAN INTERVENTION

Being a controversial issue, humanitarian intervention does not even lend itself to an agreement on its definition. As Jonathan I. Harney states there is no established rule and definition for 'Humanitarian Intervention' although there is an existing and evolving doctrine in the international society.³ There are various views on its definition as well as those on its resolution, process and consequences. The

³ Jonathan I. Charney, "Anticipatory Humanitarian Intervention in Kosovo", **The American Journal of International Law**, Vol. 93, No.1, 1999, p. 836.

term humanitarian intervention consists of two interacting words, which are deemed to be complementary by those who support the existence of a humanitarian intervention doctrine. On the other hand, those who oppose the humanitarian intervention in terms of violation of existing sovereign rights and principle of non-intervention describe the joint use of these two terms as an oxymoron. The compound term consists of two distinct terms. The word 'humanitarian' is an adjective in itself and it defines the quality of an action, decision or idea which encapsulates a range of concepts from humanitarian aid to military enforcement.⁴ And as for the word 'intervention', it refers to a range of actions from aid distribution to condemnation of a state due to its violation of basic human rights or to the extent of military intervention.⁵ When considered in terms of each concept, the joint use of such two terms, which are conflicting by nature, is a controversy in itself.⁶

Eventually, it turns out that these two terms bring about two contradictory concepts: First, since the word 'humanitarian' is an adjective which is necessarily evaluated on normative grounds, what is humanitarian and what is not is not clear while deciding for the reasons of an intervention. Secondly, intervention is loaded with two ends of a range of actions from non-coercive actions to military (coercive) actions. Such a broad range of actions should necessarily be classified in terms of whether they are humanitarian intervention. However, even the starting point regarding the classification of actions is in itself a problem, since there is not a clear definition. Such ambiguity of a clear definition causes the most ferocious debates on the goals, limits and evaluation of humanitarianism. Consequently, ambiguity prevents a standardization of action by the UN, which is deemed to be the sole, self-powered arbitrator in cases of humanitarian crises⁷. On the other hand, such a definition is not only limited to the categories of such action. It also necessarily includes the causes, application and evaluation of the aftermath.

⁴ Saban Kardas, "Humanitarian Intervention: A Conceptual Analysis", **Alternatives Turkish Journal of International Relations**, Vol. 2, No.3&4, 2003, p.25.

⁵ Kardas, p. 25.

⁶ C. A. J. Coady, "The dilemmas of militant humanitarianism", **Global Change, Peace & Security**, Vol. 20, No. 3, 2008, p. 256

⁷ Randolph C. Kent, "International Humanitarian Crises: Two Decades Before and Two Decades Beyond", **International Affairs**, Vol. 80, No. 5, 2004, p. 867.

A. The Problem with the Categorization of Actions

The first question concerns the categorization of actions. ‘What actions fit in the definition of humanitarian intervention?’ While a particular view tries to confine it only to the military action, another one tends to include also non-military actions such as aid campaigns and economic sanctions, almost redefining it as humanitarian action.

Patrick M. Regan defines all the action, including both military and economic, to topple a government in order to end a humanitarian emergency as humanitarian intervention.⁸ However, a modification should be made concerning the economic intervention, since the tools of economy is not only used for toppling down a government. Instead they have also been used to direct the developing countries’ governments to a line desired by the West. Michael Wesley argues that the Western states, which were not more than donors of financial aid to the developing world after the World War II, discovered the power of the ‘carrot & stick’ functionality of the aids. At the beginning of the 1980s the West began to use the latter to amend policies of the developing countries by linking the aids to the conditions which required implementation or modification of the policies in these countries. In this way a check on the governments was established through neo-liberal policy tools as the World Bank and IMF.⁹

Another scholar who incorporates economic sanctions into the definition of humanitarian intervention is Eric A. Heinze.¹⁰ Although he also defines humanitarian intervention within the narrow limits of military intervention, as it will be seen later, Heinze states that a coercive action either military or non-military (economic sanction) taken against another state by a state or a group of states can regarded as humanitarian intervention. Here, the point is that the action is taken against the

⁸ Patrick M. Reagan, “Conditions of Third-Party Intervention in Intrastate Conflicts”, **The Journal of Conflict Resolution**, Vol. 40, No. 2, 1996, p. 339.

⁹ Michael Wesley, “Toward a Realist Ethics of Intervention”, **Ethics & International Affairs**, Vol. 19, No.2, 2005, p. 60.

¹⁰ Eric A. Heinze, “Humanitarian Intervention: Morality and International Law on Intolerable Violations of Human Rights”, **International Journal of Human Rights**, Vol. 8, No. 4, 2004 (Humanitarian Intervention: Morality and International Law), pp. 472–473.

sovereign will of the target state. This is also one of the assumptions of this thesis that humanitarian intervention is taken without the consent of the target state. Thomas Hill also defines humanitarian intervention as “a forcible interference in the governance of one legitimate state by another for the primary purpose of protecting the latter’s subjects from abuse and oppression by its own government.”¹¹ However, he excludes interventions on failed states where the legal government no longer exists.

Also The International Commission on Intervention and State Sovereignty, supported by Canadian government, states in its report:

*Intervention for human protection purposes, including military intervention in extreme cases, is supportable when major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator.*¹²

The report mentions about intervention as inclusive of all the means, including the military ones. This is another view in terms of a broader definition.

On the other hand, there is the view against such a broad definition. For instance, in his January 1995 report to the Security Council which is supplementary to his 1992 Agenda for Peace, the former UN Secretary-General Boutros Boutros-Ghali emphasizes the separation between peace-making (peace building measures) and the use of force:

Conflicts the United Nations is asked to resolve usually have deep roots and have defied the peacemaking efforts of others. Their resolution requires patient diplomacy and the establishment of a political process that permits, over a period of time, the building of confidence and negotiated solutions to long-standing differences. Such processes often encounter frustrations and set-backs and almost invariably take longer than hoped. It is necessary to resist the temptation to use military power to speed them up. Peace-keeping and the use of force (other than in self-defense) should be

¹¹ Thomas Hill, “Kant and Humanitarian Intervention”, **Philosophical Perspectives**, Vol. 23, No. 1, 2009, p.222.

¹² International Commission on Intervention and State Sovereignty, “The Responsibility to Protect”, 2001, <http://www.iciss.ca/pdf/Commission-Report.pdf> (21.08.2010), p. 16.

seen as alternative techniques and not as adjacent points on a continuum . . .
13

Kofi Annan also defies the congregation of humanitarianism and military intervention:

We must get right away from using the term 'humanitarian' to describe military operations... military intervention should not... in my view, be confused with humanitarian action. Otherwise, we will find ourselves using phrases like 'humanitarian bombing' and people will soon get very cynical about the whole idea. (Annan, 2000)¹⁴

Aidan Hehir states that the use of force to serve humanitarian reasons has the potential to abuse humanitarianism at the expense of “political measures designed to bring about the settlement of the dispute between the parties”. He considers humanitarianism as “an altruistic, apolitical concern” while military action as belonging to the realm of politics. In that sense, any state may use humanitarian reasons as pretexts to use force against another state.¹⁵

On the other hand, there is a group of scholars who confines the concept of humanitarian intervention solely to military intervention. In their article “Can military intervention be “humanitarian?”” Alex de Waal and Rakiya Omar define humanitarian intervention as the external military intervention to remedy the crimes of the tyrannous government against its own public after other means are exhausted.¹⁶

John Linarelli quotes J.L. Holzgerefe as:

The threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens,

¹³ Tom J. Farer, “Intervention in Unilateral Humanitarian Emergencies: Lessons of the First Phase”, **Human Rights Quarterly**, Vol. 18, 1996, p.13.

¹⁴ Aidan Hehir, **Humanitarian Intervention: An Introduction**, Palgrave Macmillan, New York, 2010 (Humanitarian Intervention: An Introduction), p. 13.

¹⁵ Hehir, **Humanitarian Intervention: An Introduction**, pp. 12-13.

¹⁶ Alex de Waal and Rakiya Omar, “Can Military intervention be humanitarian?”, **Middle East Report**, No. 187/188, 1994, p. 5.

*without the permission of the state within whose territory force is applied.*¹⁷

Patrick Macklem also borrows the same definition to use in his “Humanitarian Intervention and the Distribution of Sovereignty in International Law”.¹⁸

This list regarding the scholars who deem humanitarian intervention as the military action taken against a state for the relief of its own citizens is quite long. But the question to be asked should be: ‘Why do they employ such a limitation and exception?’ The answer for this question is provided by Oded Löwenheim. Oded Löwenheim gives us a definition of humanitarian intervention as “an armed action taken by one state to protect civilians other than its own in a foreign country or jurisdiction.” In his explanation, Löwenheim states that the humanitarian action that covers “humanitarian aid and relief operations” does not cause dispute since they are held in the territory of the target state with its consent. However, military action without the consent of the target state is problematic. It provokes questions concerning the legality, legitimacy and morality of an intervention.¹⁹

Lastly, Alex Bellamy provides the same key, arguing that the issue of consent differentiates the solidarists who argue for the right of states to intervene into another state to stop a humanitarian emergency from the pluralists who assert that no reason can provide an exception to the principle of non-intervention among states²⁰. The issue of consent is the key for the separation of two groups. If the target state invites the interveners to stop the humanitarian emergency, there is no problem for the pluralists, since it is the target states will. However, when the interveners impose the coercive action against the target state, then there is a serious problem from their perspective.

¹⁷ John Linarelli, “When does might make right?”, *Journal of Social Philosophy*, Vol. 40, No.3, 2009, p. 345.

¹⁸ Patrick Macklem, “Humanitarian Intervention and the Distribution of Sovereignty in International Law”, *Ethics and International Affairs*, Vol.22, No.4, 2008, p. 369.

¹⁹ Oded Löwenheim, “Do Ourselves Credit and Render a Lasting Service to Mankind’: British Moral Prestige, Humanitarian Intervention, and the Barbary Pirates”, *International Studies Quarterly*, Vol. 47, 2003, p. 23.

²⁰ Alex J. Bellamy, “Humanitarian Intervention and the Three traditions”, *Global Society*, Vol. 17, No.1, 2003 (Humanitarian Intervention and the Three traditions), pp. 5-6.

Finally, a categorical definition for the humanitarian intervention to be used throughout the rest of this thesis might be established in the light of the above cited views. Firstly, there are two types of activities with humanitarian concern; *humanitarian action* and *humanitarian intervention*. Humanitarian action includes the consensual action by a state, a group of states, international governmental organizations (IGOs) or non-governmental organizations (NGOs) for the development of human conditions. On the other hand, humanitarian intervention includes the military and non-military coercive action taken by a state or a group of states with or without a mandate of the UN against the will of target state.²¹ Hereafter, these terms will be used as corresponding to those meanings. However it should be stated that although the terms of “military” and “non-military” are employed in the definitions, since the military intervention causes much more debate in the literature than the non-military intervention, where not stated explicitly, military intervention will be referred to in the hereafter.

II. A HISTORICAL VIEW ON HUMANITARIAN INTERVENTION

A. Just War Tradition

Although the humanitarian intervention literature mainly focuses on the last 20 years, a broader perspective would be more illuminating to apprehend the concept of humanitarian intervention. In that regard this section attempts to highlight the historical roots of the concept as far as the foundation of the Just War tradition. The endeavor of this section will be to present a descriptive evolution of the concept from the very beginning of human history till the end of the Cold War in terms of the ideas and practices.

Even in the earliest forms of the military intervention, the decision makers sought a way to justify their actions through a moral concept, although this justification was not related to the common good of humanity as it will be seen later. For instance, in the famous Melian Dialogue, the Athenians justify their action against Melos during the Peloponnesian War on the basis of necessity and rule that drive the strong's initiatives. In that, the Athenian's did what the strong had to do and they were not inherently performing their actions but they were acting according to the moral duty for their own people in a manner that befits the realist thinking.²²

This act of justification was never left aside during the historical evolution and found itself a sound place within the Just War tradition. The following part will present the evolution of this concept. However, such a description will not address the question of whether the resort to force required a justification or such a justification gave the ground to resort to force. On the other hand, this historical account may miss some important points and debates given the lack of space.

To begin with, Just War tradition unites the domestic and international politics within the same scope.

²² Hehir, *Humanitarian Intervention: An Introduction*, p. 167.

In comparison to the Just War thinkers, the realist scholars like Hobbes and Machiavelli consider the human being as inherently evil for the original sin that they bear and unreliable; in their view human beings must be controlled under supreme authority of the state and the wellness, safety and interests of the state is more important than the establishment of the rights of society, because it is the states which can maintain order on earth.

Just War thinkers also act on the original sin. However, unlike the realists who consider the international system as a plural entity, Just War thinkers mould a singular humanity out of this plurality, which consist of people, families, clans, societies and states. Such different factions of society also bring about different ways of thinking on the decision making in the international affairs and use of force. Maybe the deepest difference is the one between the perceptions on the might of the state. Both realism and Just War tradition assume the state as the power holder on earth. According to the realist view, the might is the central drive for forceful action and resort to war; might give the right to wage war. On the contrary according to the “classical” Just War thinkers, might never gives right, but sometimes serve those who wants to establish the right and justice.²³ The word “classical” was used and a classification for the Just War thinking was made, because there are two perceptions regarding the resort to force. The first view is the classical one in which the force is used by the state in order to ameliorate the suffering and human violations conducted by other sovereigns. As it can be deduced, this view violates the present day principle of non-intervention. On the other hand, the second view, namely the current Just War thinking, only allows resort to war in the event of self-defense. And this view actually has mutual relationship with and effects on the current international legal system.²⁴ Although Just War tradition is acknowledged as a major pillar under the current humanitarian intervention approach, it was not widely observed in the literature as a justification for humanitarian intervention until recently.²⁵

²³ Jean Bethke Elshtain, “Just War and Humanitarian Intervention”, **Ideas**, Vol. 8, No. 2, 2001, pp. 4-5.

²⁴ James Turner Johnson, “The Idea of Defense in Historical and Contemporary Thinking About Just War”, **Journal of Religious Ethics**, Vol. 36, No.4, 2008, p. 543.

²⁵ Mona Fixdal and Dan Smith, “Humanitarian Intervention and Just War”, **Mershon International Studies Review**, Vol. 42., No.2, p. 285.

Just War tradition appeared on stage as a product of Christian religious thinking and was developed by the scholars of Christian and Western world. However, according to Jack Donnelly and Joseph Boyle, these origins lost their dominance when the Just War understanding turned out to be a universal concept embracing all mankind.²⁶ Similarly, Mona Fixdal and Dan Smith state that the debate on the use of force and violent means in order to cease the suffering of others and peoples responsibility toward each other in the same regard has some roots in ancient Greek philosophy and also has equivalence in Quran and Islamic philosophy.²⁷

The first appearance of the concept extends in the history till 2000 years ago. The first examples of these thoughts were seen in Cicero's writings which later affected St. Augustine of Hippo who is generally quoted as the progenitor of this school. Although Just War tradition is primarily based on Christian teachings, it was not on the stage during the time of Jesus. Jesus tried to establish a life among people based on mutual love and respect. And since this life was considered temporary, and the life after death was the real life to be cared, no conflict or war was worth to be fought. And, since war was opposite to the commands of God, no war was just. During his time and soon after the Christian pacifism became prevalent.²⁸

It was the second century AD, when people gave up their belief in pacifism as well as their hope for Jesus' return to Earth. At this very point, Roman Empire was at constant threat from the surrounding barbaric clans and many Christians were serving in the Roman army, and the Church had to find a way to settle its relations with the Empire. For the Church, the Roman order that prevailed in Europe, North Africa and Anatolia was more preferable than the pagan rule and the authority divided among their chieftains. In 312 AD, Emperor Constantine converted to Christianity and Christianity was proclaimed to be the official religion of the Empire. With this new empowerment, the Church left the original teachings of Christ and created a new way which is based on the heroism and bellicose traits of the Old

²⁶ Hehir, *Humanitarian Intervention: An Introduction*, p. 25.

²⁷ Fixdal and Smith, p. 286.

²⁸ Hehir, *Humanitarian Intervention: An Introduction*, p. 26.

Testament, and a new interpretation of the New Testament was also created to help the cause of the Church.²⁹

It was such a period when St. Augustine (354-430) wrote on the just war. He was critical of Pax Romana and Roman expansionism. For Augustine, violence was sinful depending on the motivations of the rulers. Force could only be justified “if the intention was just and the act was ordered by a just ruler”.³⁰ There were four reasons which justified resort to war: “self-defense, to collect reparations or reclaim stolen property, if divinely sanctioned, and to maintain religious orthodoxy”.³¹ In Augustine’s idea of a just war, the role of authority in the use of force was crucial. He argued that war could only be waged by states due to the fact that it was the rulers who were given the duty to establish God’s rules on earth according to the fashionable belief in the period. On the other hand, Augustine also mentioned about the wickedness of mankind and the corrupt authorities who would soon be punished by God.³²

After the fall of Roman Empire and St. Augustine, “Just War” concept was maintained but not underlined until the Crusades when Just War concept was modified according to the wishes and interests of the Church. St Thomas Aquinas (1224-1274) wrote in the last years of the Crusades and based his works on those of St. Augustine.³³ Other than the classification of Just War tradition as the old and current, the tradition was originally based on two categories, *jus ad bellum* and *jus in bellum*. *Jus ad bellum* is considered when we decide to resort to war and question our reasons for war. *Jus in bellum* is related to the means used and conduct of the war.³⁴

Thomas Aquinas did not employ such a separation, and his views were built on Augustinian ideas. Aquinas did not favor the “Crusade” understanding which was a “proactive” action; instead his views supported a “reactive” stand for the justness

²⁹ Hehir, Humanitarian Intervention: An Introduction, pp. 26-27.

³⁰ Hehir, Humanitarian Intervention: An Introduction, pp. 26-27.

³¹ Alex J. Bellamy, **Just Wars: From Cicero to Iraq**, Polity Press, Cambridge, 2006 (Just Wars), p.28.

³² Hehir, Humanitarian Intervention: An Introduction, p. 27.

³³ Hehir, Humanitarian Intervention: An Introduction, p. 28.

³⁴ Fixdal and Smith, p. 286.

of war.³⁵ In the *Summa Theologiae* Aquinas stated three conditions to be met for a just war:

*Firstly, the authority of the ruler at whose command war is to be waged... Secondly, there is required a just cause: that is that those who are attacked for some offence should merit the attack... Thirdly, there is required, on the part of the belligerents, a right intention, by which is intended that good may be accomplished or evil avoided.*³⁶

As in Augustine's theory, Aquinas gives the right authority as a condition to be met. Aquinas states that only the sovereign of the state can decide on the use of force against an enemy since the sovereign is the primary authority responsible for the protection of his people. Despite the absence of a list on the just causes, Aquinas provides a key while stating that the just cause underlies any action which is a reaction to harm done by others to one's state. As for the right intention, Aquinas clearly states the good intention which is purified from hatred, revenge or any political designs of worldly interests. Aquinas's another contribution to the literature was his introduction of 'The Doctrine of Double Effect'. According to his 'Doctrine of double effect' unintended negative consequences could be excused if four criteria were met: Firstly, the desired end must be good in itself. Secondly, out of all the effects, only the good one is intended. Thirdly, the good effect must not be the product of the evil effect. And lastly, the good of the good effect must outweigh the evil effect, which is known as the principle of proportionality in present day.³⁷ Although Aquinas cited the bad effects as excusable under the cited conditions, according to Robert Holmes, Aquinas wanted to warn people about the possibility of making more harm than the intended good.³⁸

After the Western Schism in 1378 and the subsequent division of the Church among three separate papacies, many crusades were declared against Christians. These crusades against "Christians" harmed and undermined the idea of a divine war,

³⁵ Hehir, *Humanitarian Intervention: An Introduction*, p. 28.

³⁶ Hehir, *Humanitarian Intervention: An Introduction*, p. 28.

³⁷ Hehir, *Humanitarian Intervention: An Introduction*, pp. 28-29.

³⁸ R. L. Holmes, "Can War be Morally Justified? The Just War Theory", *Just War Theory*, ed. J. B. Elshtain, Blackwell, Oxford, 1992, p. 200.

and “natural law” emerged as a new concept and a reference point.³⁹ Terry Nardin states that European moralists justified war to establish and protect law and rights, and self-defense was only one of these justifications. According to these moralists, rulers held a right and even a duty to establish certain laws outside their own territory. Nardin mentions two kinds of universal law at this point. Some of these moralists claim a “law of nations” (*jus gentium*) which is not an international law, but “general principles recognized in many different communities”. The law of nations is a body of norms applicable to all or most peoples. The second one and relatively more important one regarding the emergence of today’s international law is “natural law”. Natural law is composed of the precepts which can be known by reason and thus binding for all rational beings. Terry Nardin gives the following example to show the difference between them. Slavery was a permitted application and there was a norm about it since it was not forbidden. Since there was permission for slavery, it was not against the law of nations. However, slavery cannot be defended under natural law, since human reason could know the wrongness in such a fashion. However, Nardin adds that slavery was defended mistakenly under natural law.⁴⁰ Natural law and law of nations are important concepts for history of international law, because the notion of universality enabled the emergence and prevalence of a common international law today.⁴¹

During the 14th and 15th centuries theology lost its effect on the Just War tradition. Especially with the advent of the chivalric code, medieval knight’s duty to protect the non-combatants and the weak became an important issue in the conduct of war; *jus in bellum*. The 16th century reformation played an important role in *jus ad bellum* concept. The reformation eroded the effect of Christian theology, and established a partial secularism in scholars’ ideas for a common law of nations. Despite the division between the Protestant and Catholic Christians, the main division occurred among those religious philosophers who claimed that warring for

³⁹ Hehir, *Humanitarian Intervention: An Introduction*, p. 29.

⁴⁰ Terry Nardin, “The Moral Basis of Humanitarian Intervention”, *Ethics & International Affairs*, Vol. 16, No. 1, 2002, p. 58.

⁴¹ Hehir, *Humanitarian Intervention: An Introduction*, p. 29.

religion was the most just cause and the secular philosophers who thought of war in terms of natural law.⁴²

It was Francisco de Vitoria (1492-1546) who first argued the impossibility to know the justness of a war. In his design, divine revelation was not required to determine natural law. A war could be just or not, but it was only known by God himself. Briefly, the states could not wage a just war when they felt its justness and Vitoria suggested wide consultation before using force and this consultation should include those who are against the use of force. According to Vitoria, the Law of Nations and customary law should be equated with human positive law and not with the Natural Law. Vitoria argued that citizens should obey their sovereigns and every self-sufficient and independent community had the right to wage war. This argument along with the one that claimed the subjectivity of a just war paved the way for the claims of realists and legalists that wars waged by the states were just in themselves. As an example of his view of state interventions in the situations that violate the collective morality, Vitoria appraises Spain's war against the aborigines in America who had cannibal practices. Although he was critical of Spanish colonialism, he approved the Spanish intervention on the basis that it had been undertaken against the violation of a certain moral norm.⁴³

Vitoria was an important figure in the transformation of Just War tradition. After him the debate took the shape of the evolution which resulted in modern international law. Hugo Grotius (1583-1645) another important figure in the tradition, also referred to as the father of international law, rejected the notion of a divinely sanctioned war. For him, there had to be a secular basis for the resort to force. His views were shaped by the holy wars of the 17th century, especially the Thirty Years War (1618-1648) when warring parties claimed divine rights and justice against each other.⁴⁴ For Grotius such a law could exist not in the form of a divine one from heavens but as an outcome of formal agreement between states. And it must be for the good of humanity rather than the states that created it. In his argument for this law, the criteria for a Just War were "self-defense, the punishment

⁴² Fixdal and Smith, pp. 286-287.

⁴³ Hehir, *Humanitarian Intervention: An Introduction*, p. 30.

⁴⁴ Hehir, *Humanitarian Intervention: An Introduction*, p. 30.

of wrongdoers, the enforcement of legal rights, the reparation of injuries and situations when there was no possibility of effective arbitration.”⁴⁵

After Grotius, Samuel von Pufendorf (1632-1694) tried to formulate a regulation of state conduct and warfare increasingly with respect to positive law. He believed in the universality of law and argued that law was not particular to Christian societies.⁴⁶ According to Pufendorf, the civil authority of the sovereign state is not subject to a higher authority. And he also argues that “duties to humanity, . . . is best served through a states-system because rights and duties can only be established and maintained by a functioning sovereign state.”⁴⁷ Pufendorf presented state system as the most rational way in the legal organization of the international system and also regarded civil society’s laws as not bound by abstract metaphysical laws.⁴⁸

Emmerich Vattel (1714-1767) another important figure in the evolution of international law endeavored to establish a codification for sovereign equality and inviolability. He argued that “war could not be waged justly on behalf of foreign citizens as this created an easily abused pretext for intervention.”⁴⁹ War could only be just in the event of self-defense.

Immanuel Kant (1724-1804) was suspicious about the power of natural law and moral persuasion, because states were not “subject to a common external constraint”.⁵⁰ However, he wanted to add normative view into “clear legally binding treaties between states.”⁵¹ In his view, common morality based on the natural law would establish higher authoritarian norms than the authority of the sovereign state. Therefore, if the “perpetual peace” was to be achieved, it could only be ensured by state’s subordination to international and cosmopolitan law. This could enable the extension of moral duties to all mankind beyond the fellow citizens.⁵²

⁴⁵ Hehir, *Humanitarian Intervention: An Introduction*, p. 31.

⁴⁶ Hehir, *Humanitarian Intervention: An Introduction*, p. 31.

⁴⁷ Richard Devetak, “Between Kant and Pufendorf: Humanitarian Intervention, Statist Anti-cosmopolitanism and Critical International Theory”, **Review of International Studies**, Vol. 33, 2007, p. 152.

⁴⁸ Devetak, p. 152.

⁴⁹ Hehir, *Humanitarian Intervention: An Introduction*, p. 31.

⁵⁰ Bellamy, *Just Wars*, p. 82.

⁵¹ Hehir, *Humanitarian Intervention: An Introduction*, p. 31.

⁵² Devetak, p. 152.

After the French Revolution (1789), the emphasis on *jus ad bellum*, the reasons for the use of force, was left aside and the debate went over the *jus in bellum*, the conduct of war. This prevalence of *jus in bellum* on *jus ad bellum* continued until the mid-twentieth century. Prominent scholars, namely Hegel, Meinecke and Clausewitz, generally ignored the question of right authority because of their belief that states possessed this right. The break of the First World War destroyed any claims for justness and legitimacy since there were no valid arguments. Every aggression was defended as self-defense during the Great War, as Kaiser Wilhelm II did for the invasion of Belgium in 1914. After the World War I, The League of Nations was established, asking for the submission of any dispute to the organization before resorting to war. However, it proved to be a failure since the revisionist states as well as Britain and France acted against the rules of the organization. After World War II which broke to allegedly tackle the unjust settlement of the WWI, the Cold War started, and the Just War tradition along with the debate over the natural law and positive law lost its importance against Realpolitik. However, the foundation of the UN marked an important point for the development of the international law on the use of force and sovereign inviolability. The evolution of international law involved the incorporation of many key prescriptions of the Just War tradition.⁵³ With the end of the Cold War period and the balance of power, the states returned to the practice of intervention this time under the name of humanitarian intervention. At this point, the interventionists sought ways to justify and legitimize the practice of humanitarian intervention before the international community. And they have increasingly referred back to the criteria of the Just War tradition in that endeavor.

As much as the modern Just War thinking enabled the development of current international legal system, the original one survived long enough to be referred by those scholars who spoke about the rightness of waging a humanitarian war at the point when second millennium passed and the third has come. The Just War criteria, which are prevalent today, are divided into two: *Jus ad bellum* and *Jus in bellum*, with the former being related to the cause of war, and the latter concerning the conduct of war. The common criteria for *jus ad bellum* are; right (legitimate) authority, just cause, right intention, last resort, proportionality and reasonable

⁵³ Hehir, Humanitarian Intervention: An Introduction, pp. 31-32.

hope.⁵⁴ These criteria are still deemed effective today. As to the first criteria of right authority, he was the Pope who held it in the early times. Later it was transferred to the rulers, and now is claimed to be vested in the UN, sometimes NATO and even every state with a just cause.⁵⁵ Concerning the criteria of just cause, in the classical Just War thinking involving St. Augustus, Aquinas and their followers, self defense was not a just cause, for it was an action to defend an earthly entity like one's own goods, body and life. However, if someone defended another person it would be a just cause, since it was an act of sacrifice without selfish incentives. It was also deemed to be a duty to help others in Christendom. However, that thinking in itself represents the problematic nature of the humanitarian intervention. There are two conflicting codes in Christianity on violence. The first view is that no harm should be done to anyone. This view conflicts with the view concerning the just cause that a man should help everyone whenever possible in defense of others. This conflict is very similar to the one ongoing today: whether to intervene to help others or not? The main point defended by the pro-interveners is that acts like genocide and massive human rights violations, which shock the human conscience, are beyond any legal boundaries and impose every man on earth a duty to intervene.⁵⁶ At this point Kofi Annan states:

*To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might say: leave Kosovo aside for a moment, and think about Rwanda. Imagine for one moment that, in those dark days and hours leading up to the genocide, there had been a coalition of states ready and willing to act in defense of the Tutsi population, but the council had refused or delayed giving the green light. Should such a coalition then have stood idly by while the horror unfolded?*⁵⁷

The criterion of just cause is related to the decision to wage war and to inflict injury on people whether they are foe, neutral or friend. It is an assessment of the situation which will entail inflicting such a blow. On the other hand, the criterion of

⁵⁴ Fixdal and Smith, p. 291.

⁵⁵ Fixdal and Smith, pp. 291-292.

⁵⁶ Fixdal and Smith, pp. 295-298.

⁵⁷ Kofi A. Annan, "Two concepts of sovereignty", **The Economist**, 18.09.1999, http://www.un.org/News/press/docs/1999/19990901_kofoan.htm (28.07.2010).

right intention is about the motives behind the act. In its clearest definition, the right intention refers to the act without an interest, profit, power or opportunity to gain comparative superiority for any strategic design.⁵⁸ Although motives cannot be known by other people, in terms of Just War thinking, their importance lies in the fact that God is omniscient and nothing can be hidden from Him. Even the act is not good as it was first planned, they must be meant on good intention.⁵⁹ The motives are still an issue within the Just War terminology and will be part of the debate in the later stages of this study.

Another criterion of Just War tradition is the last resort. According to the criteria, force is usable “only if all peaceful means are exhausted”. However, as it will also be explained later on, the outbreak of humanitarian emergencies may render that criteria obsolete since they require a quick response.⁶⁰

Just War tradition has also two other criteria which have consequentialist traits. The first one is that the ‘Just War’ must have “proportionality”, meaning that the action should bring more good than harm. In other words, the criterion actually urges a comparison between the possible results of intervention and non-intervention. On the other hand, such a war may only be just if there is sufficient proof that the military operation will be concluded with a victory. Then, any futile action is prevented before acting. Such a criterion requires a realist calculation of a possible victory or failure. This criteria still takes its place in the debate on intervention versus non-intervention.⁶¹

Lastly, as mentioned above, the Just War tradition also covers the criteria regarding the conduct of war; *jus in bellum*. However, these criteria are almost unanimously accepted in international relations, and thus are relatively free from controversy. To mention briefly, in terms of ‘discrimination’ criteria, force is allowed to be used only against aggressors and combatants. Secondly, ‘proportionality’ criterion requires the use of minimum necessary military force to

⁵⁸ Fixdal and Smith, p. 299.

⁵⁹ Fixdal and Smith, p. 300.

⁶⁰ Hehir, Humanitarian Intervention: An Introduction, p.24.

⁶¹ Hehir, Humanitarian Intervention: An Introduction, p.24.

achieve the desired result. And lastly, ‘just conduct’ criterion envisions that during the use of force all the laws for the use of force should be respected.⁶²

These criteria are known today as the criteria of a just war. They occupy substantial space within the discussions of morality and legitimacy debates on humanitarian intervention. As mentioned before, these criteria were derived from the natural law thinking, which is seen as the basis for legitimacy of an intervention. However, the intervention proves to be problematic, when it conflicts with the present international law developed on the positive law idea pioneered by Hugo Grotius. The following section will seek to present the current regulations and law regarding the use of force, which constitute the basic source of problems in the humanitarian intervention debate.

B. Evolution of the Legal Structure and State Practices

1. A Historical Account

The current international state system is generally considered to have been founded with the Westphalia Treaty in 1648. The most important fact about the Westphalia Treaty and the system referred to by it is that the concept of state sovereignty and the corollary principle of non-intervention are based on this treaty.

Mohammed Ayoob, one of the prominent proponents of state sovereignty and principle of non-intervention, defines sovereignty “as authority (the right to rule over a delimited territory and the population residing within it”).⁶³ In another view the sovereignty is sourced from the will of the society living on that specific territory. For example, John Stuart Mill states:

⁶² Hehir, *Humanitarian Intervention: An Introduction*, p.24.

⁶³ Mohammad Ayoob, “Humanitarian Intervention and State Sovereignty”, **The International Journal of Human Rights**, Vol.6, No.1, 2002 (Humanitarian Intervention and state Sovereignty), p. 82.

*a people the most attracted to freedom, the most capable of defending and making good use of free institutions, may be unable to contend successfully for them against the military strength of another nation much more powerful. To assist a people thus kept down is not to disturb the balance of forces on which the permanent maintenance of freedom in a country depends, but to redress that balance when it is already unfairly and violently disturbed.*⁶⁴

On the other hand, the principle of non-intervention is defied mainly by moralists to supersede absolute sovereignty of the state. As Jennifer M. Welsh states, the main tension of the humanitarian intervention lies on this conflict between the international law safeguarding state sovereignty through the principle of non-intervention and the international norms shaped by humanitarian needs to be met through the use of force.⁶⁵

The international legal system based on the Westphalian principles still prevails with some modifications. However, in less than two centuries after the settlement of the Westphalia Treaty the difference was so obvious that there was an order, whether imperfect or not. The legalization process in international relations presented a total change. On this issue, Costas Douzinas paraphrases Nietzsche: “if God, the source of natural law, is dead, he has been replaced by international law”.⁶⁶ Despite being rooted for centuries, the principle of non-intervention, being a legal norm, was open to violations. And it was abused by states since its inception, for every military action taken by a state was at the expense of the other’s sovereignty.⁶⁷ As it was stated before, all of them were attempted to be justified in terms of direct self defense as a basic right to use of force, or as a an act perpetrated on the criteria of Just War Tradition.

The Westphalian concept of sovereignty was not totally uncontroversial. Especially after the European powers embarked on their military conquests beyond Europe, they considered themselves as the sole authority to consider the sovereign qualities of the non-European powers. In other words, the situation was that the

⁶⁴ James Mayall, “Non-Intervention, Self-Determination and the ‘New World Order’”, **International Affairs (Royal Institute of International Affairs 1944-)**, Vol. 67, No. 3, 1991, p. 423.

⁶⁵ Jennifer M. Welsh, “From Right to Responsibility: Humanitarian Intervention and International Society”, **Global Governance**, Vol. 8, No. 4, 2002, p. 503.

⁶⁶ Costas Douzinas, “Humanity, Military Humanism and The New Moral Order”, **Economy and Society**, Vol.32, No. 2, 2003, p. 160.

⁶⁷ Hehir, *Humanitarian Intervention: An Introduction*, p.42.

imperial western powers were holding the ‘right’ to determine the qualities of other states; they judged whether to perceive the latter as ‘sovereigns’. Western ‘sovereigns’ militarily invaded the territories in Africa and India. In other territories like Ottoman Empire, China and Japan where the rule of the local sovereign was not totally ignored, the West did not recognize and accept the domestic regulation of these territories and declared the principle of extraterritoriality for their subjects. The sovereigns of these states remained in power as inferior rulers of the lands which would be colonized.⁶⁸ As David Chandler quotes David Held, “might became right”.⁶⁹

The present day debate of the abuse of state sovereignty also existed in the 19th century. However, the departure point to violate sovereignty was not the ‘human’ but the ‘minority’ rights. If Mohammad Ayoob had lived a century ago, he wouldn’t have had to change his study area but the vocabulary. It wouldn’t be a coincidence that most of these violations occurred over the Ottoman lands which composed the territory of the infamous ‘Eastern Question’. The subsequent events cast light on the issue.

The line begins with the 1821 Greek Uprising. Shortly, Mehmed Ali Pasha, the governor of Egypt defeated the Greek rioters in 1826. Then combined fleets of France, Britain and Russia destroyed the Ottoman fleet in Navarino in 1827. Mehmed Ali Pasha’s armies were forced to withdraw. With the European intervention, the territorial integrity of the Ottoman Empire was broken and Greece was founded. After further confrontation between Russia and the Ottoman Empire on the autonomous rights for the Balkans, the war ended with 1829 Edirne (Adrianople) Agreement which created a greater Greece.⁷⁰ Of course, the point in this case is not whether the Greeks acquired a just independence or not. The matter is that the great powers, by exploiting the issue of minority rights and upsetting the principle of non-intervention, broke the territorial integrity of the Ottoman Empire.

⁶⁸ David Chandler, **From Kosovo to Kabul**, Pluto Press, London, 2006 (From Kosovo to Kabul), pp. 123-124.

⁶⁹ Chandler, *From Kosovo to Kabul*, pp. 123-124.

⁷⁰ William Hale, **Turkish Foreign Policy 1774-2000**, Frank Cass Publishers, London, 2000, pp. 23-24.

The second case of this line is the Crimean War. Crimean War, although a military confrontation, is actually a result of the rivalry between the two major powers of the time. On the one side, there was France under the rule of Napoleon III, then the president who had deep ambitions to proclaim his emperorship, was getting his main support from the Church and the clergy. When the problem of the 'Sacred Places' appeared, he did not miss the opportunity to strengthen its relations with the Church as the protector of the Catholics in Jerusalem. On the other side, Russia and Czar Nicholas I, having plans to have influence on the Ottoman lands, took a position of guardianship of the Orthodox rights beyond Russia. These two forces with different designs other than the religious rights deepened a minor problem and it led to the Crimean War in 1853.⁷¹ The discourse and the motives were very different from each other, the debate of which still continues today regarding the problem of abuse of human rights.

The last case of the period is the bloody fight between Maronite Christians and Druses in Lebanon in 1860. Maronites rioted against the land barons and they were suppressed by Druse fighters in a bloody way. France, the sworn guard of the Catholics in the Ottoman lands, established a European force half of which consisted of the French troops which intervened and occupied Beirut and its region. The actual motive of France was to establish its own rule in Syria. However, it was prevented by the Sublime Port with British support.⁷²

These three are just a few examples of many cases to show the violation of principle of non-intervention and state sovereignty under a pretext. These cases are meaningful to show the evolution of these violations. A century ago state sovereignty was violated in the name of minority rights. Now, it is claimed by pluralists like Mohammed Ayoob that state sovereignty is jeopardized to protect human rights. However, there is a difference. Whereas there is major agreement on the issue of abuse in the 19th century and especially during the period of the Eastern Question, today the topic is too contentious to decide on.

⁷¹ Fahir Armaoğlu, **19. Yüzyıl Siyasi Tarihi (1789-1914)**, Türk Tarih Kurumu Basım Evi, Ankara, 2003, pp. 230-237.

⁷² Erick Jan Zucker, **Modernleşen Türkiye'nin Tarihi**, İletişim Yayınları, İstanbul, 2004, pp. 84-85.

Above mentioned system, which upheld might as the right, could not sustain itself in that way. The non-Western states, especially Japan, had relative development and modernization at the end of the 19th century. Western states had fear that with a possible decline in Western power, the non-Western states would act in the same way as the West did and could try to have gains through the use of power. They needed to settle and stabilize the international society. The first Hague Conference is a proof of this view. China, Japan, the Ottoman Empire, Persia and Siam were among the attendants. The defeat of Russia by Japan in 1905 shocked European powers, and their confidence in their power and racial superiority was shaken by this defeat. Upon this defeat, the second Hague Conference in 1907 was the first truly international gathering of modern sovereigns. The non-Westerns outnumbered the Western states in the conference. After this transformation, European power decadence with the turmoil of the Great War and the fear to lose the colonies led to a total change in the European view of the international system. This change might be described as from ‘might is right’ towards the supremacy of international law. This was the point, when the West was not able to have no more territorial gains but tried to hold what it already had. With the foundation of League of Nations, colonial powers’ sovereignty was restricted with the introduction of the mandate system, according to which colonial powers had to act with a view to the interests of their subjects. However, the new establishment promoting the Wilson’s principles did not end the racial discrimination for the equality of the sovereigns. The rejection of Japan’s proposal to include a clause for racial equality into the League of Nations Charter was a proof of that.⁷³ The sovereign equality came along with the US dominance after the Second World War. US policy planners realized that Britain would never reclaim its global role and the US had to take over its role. The new situation required the abolition of colonial and imperial mechanisms in order to establish the new institutions to manage international relations. The UN Charter system has become the first attempt to create a law-bound international system which assumes the equality of all nation-states.⁷⁴

⁷³ Chandler, *From Kosovo to Kabul*, pp. 124-125.

⁷⁴ Chandler, *From Kosovo to Kabul*, p. 126.

The UN Charter Article 1 (2) underlines ‘the respect for equal rights and the principle of self-determination’. Article 2 (1) states the sovereign equality of all members.⁷⁵ These principles are also repeated in Article 55.⁷⁶ Basic presumption of the international law since 1945 is that states have been prohibited from using force or threatening the others to use force according to Article 2 (4). The only exception to this prohibition is the self defense as defined in Article 51 and collective security, according to which the Security Council authorizes the use of force for common security through a resolution to be taken under Chapter VII of the UN Charter. However, the UN system has not been a truly equal one. The internal working of the UN mechanism, with its assumption of the sovereign equality of all states, actually includes inequality. The Security Council and the right to veto of the five permanent members, the US, Russia, China, France and Britain, is the cause of this inequality.⁷⁷ Although, the term veto is referred in the Charter, it is implicit in Article 27 (3).⁷⁸

*Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members ; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.*⁷⁹

The UN mechanism to take actions has always been problematic due to two reasons: the first one is the above mentioned veto problem and the other one is the inherent nature of the UN system which is not able to cast new laws. If we return to the veto problem, the possibility of veto has always blocked the full operation of the UN. For example, in Kosovo operation of the NATO in 1999, the Western states did not bring the issue before the Security Council since they were sure that Russia would veto such a western operation in the Balkans.⁸⁰

⁷⁵ The United Nations, **Charter of The United Nations and Statute of the International Court of Justice**, San Francisco, 1945, p. 3, <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf> , (21.09.2010).

⁷⁶ The United Nations, p. 9.

⁷⁷ Welsh, p. 504.

⁷⁸ Hehir, Humanitarian Intervention: An Introduction, p. 136.

⁷⁹ The United Nations, p. 7.

⁸⁰ Hehir, Humanitarian Intervention: An Introduction, p. 136.

On the other hand, according to Article 27 (2) of the Charter, Security Council may only vote on the non-procedural matters.⁸¹ “Decisions of the Security Council on procedural matters shall be made by an affirmative vote of seven members.”⁸² However, since the fact of deciding whether an issue is a procedural or not is itself a non-procedural matter, the Charter grants the members a ‘double-veto’ power. In this way any attempt to treat a matter as procedural might be vetoed by a permanent member if it accepts it as non-procedural.⁸³

If we return to the second problem, as mentioned above, the fact is that the Council’s powers are used in a reactive manner, meaning that they are used in case of a breach of peace and act of aggression. The powers of the Council were designed for the maintenance of peace, and not as a tool to enforce the law. The Council does not have the authority to create binding legal precedents or to enforce a new law. As defined in the article 38 of the Statute of International Court of Justice, the main sources of international law are: 1) treaties; 2) practice; 3) general principles of the law.⁸⁴ The Security Council only watches for the breaches.⁸⁵ And this fact is one of the departure points of those NGO’s and scholars who argue for the establishment of a new order with power to act in a proactive manner.⁸⁶ In this way, the institute to replace the UN will have the power to enforce international legislation to intervene for humanitarian reasons and to punish the crimes against humanity.

Despite the discrimination it makes among its members as the permanent five and the others, the UN system constitutes a historical turning point since it accepted the sovereign equality of the non-western states. This equality concerned the legitimacy of being a sovereign in the legal sense of the term, not in the economic and military spheres. This agreement on equality was further confirmed with two UN resolutions: “the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Protection of their Independence and Sovereignty of 21 December 1965 (Resolution 2131 (XX)) and the Declaration on Principles of

⁸¹ Hehir, *Humanitarian Intervention: An Introduction*, p. 136.

⁸² The United Nations, p. 7.

⁸³ Hehir, *Humanitarian Intervention: An Introduction*, p. 136

⁸⁴ Hüseyin Pazarcı, **Uluslararası Hukuk**, Turhan Kitabevi Yayınları, Ankara, 2003, pp. 36-37.

⁸⁵ Hehir, *Humanitarian Intervention: An Introduction*, p. 135.

⁸⁶ David Chandler, “The Road to Military Humanitarianism: How the Human Rights NGOs Shaped a New Humanitarian Agenda”, **Human Rights Quarterly**, Vol. 23, No. 3, 2001, pp. 684-685.

International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations of 24 October 1970 (Resolution 2625 (XXV)).” Especially the latter one establishes that every state is equal in sovereign rights, and that no others have the right to intervene to each other’s domestic affairs and they are forbidden to use or threaten to use force against each other’s will and in violation of international law.⁸⁷

The violation of sovereignty, as mentioned above, goes as far back as to the primitive forms of the state. And despite all the mentioned settlements and resolutions of the modern period, there have been three violations before the end of the Cold War: Indian intervention in Bangladesh in 1971, Vietnam’s intervention in Cambodia in 1978 and Tanzania’s Intervention in Uganda in 1979.

a. Indian Intervention to Bangladesh

After the secession of Pakistan from India in 1948, Pakistan has never become a completely united country in terms of economic, social and cultural interaction of the population. In Western Pakistan the majority of the population was Muslim, and this part had interaction with the neighboring Muslim states like Iran and Afghanistan, and Saudi Arabia, the United Arab Emirates and Oman over the Persian Gulf. Due to their cultural and economic interactions with India, and Pakistan (Western Pakistan) government’s ignorant policies towards them, Bengalis (Eastern Pakistan) felt themselves singled out and were also treated as the West Pakistan Government’s colonial outpost. The discriminative policies bore a movement called the Awami League, which requested greater regional autonomy for the Eastern Pakistan. In 1969, the first elections were held to choose the first civilian government of Pakistan. Awami League took the majority of the votes and did not accept parity rights claim of the Pakistan People’s Party on drafting the new constitution. Due to the intransigent manner of the Awami League, Pakistan government feared of the secessionist tendencies of the League and martial law was

⁸⁷ Chandler, *From Kosovo to Kabul*, p. 127.

declared with the deployment of government troops on the streets of East Pakistan. Although the talks were held between the East and the West Pakistan leaders and commanders, no results were achieved. On 25 March 1971, West Pakistan army attacked on the East in order to end the rebellion of the Awami League and its supporters.⁸⁸

Although the international society showed reactions on the humanitarian issues in East Pakistan, the main view was that it was Pakistan's internal problem and would remain its own sovereign sphere. Then Secretary General of the UN, U Thant acknowledged this issue as belonging to the domestic jurisdiction of Pakistan as befitting the UN Charter Article 2(7) in his letters to President Yahya Khan of Pakistan on 5 and 22 April 1971. The US policy on the issue is a good example. Nixon administration was calling for international assistance for the suffering people in East Pakistan while it was also supplying arms for the Pakistani government and not condemning it.⁸⁹ Mass murders and rapes were causing refugee flows to India. This was a problem for social and economic stability of India and India was calling the international society to take action and stating its resoluteness to intervene for its own security. However in those days the Cold War confrontations made the USA and China to align with Pakistan and the Soviet Union with India. Such a confrontation would not bring about the necessary international action. On 3 December Pakistan launched an attack on India who already had a plan to attack on Pakistan on 4 December. Upon Pakistan's attack on India, the Security Council met urgently.⁹⁰ Before the Security Council, India defended its use of force as self-defense in terms of Article 51 of the Charter, since it was Pakistan who attacked first. Although Indian resort to force was defensible as self-defense, it is known from certain Indian actions such as the training of Bengali guerillas, and Indira Gandhi's rhetoric that Indian intervention would also have occurred if Pakistan had not attacked.⁹¹

⁸⁸ Nicholas J. Wheeler, **Saving Strangers: Humanitarian Intervention in International Society**, Oxford University Press, New York, 2000 (Saving Strangers), pp. 56-57.

⁸⁹ Wheeler, *Saving Strangers*, p. 58.

⁹⁰ Wheeler, *Saving Strangers*, p. 59.

⁹¹ Wheeler, *Saving Strangers*, p. 60.

b. Vietnam's Intervention to Cambodia

The relations between Vietnamese and Cambodian people have always been problematic throughout history. After Khmer Rouge came to power, Pol-pot first tried to find a solution to the existing territorial conflicts in reply to Vietnamese attempts. Although there had been talks to settle disputes and reported clashes on the borders in 1975, no results could be achieved. Two parties had different views on the borders. Vietnam adopted the post-colonial international society's view of *uti possedetis* as it established the territoriality as the basement of the state. On the other hand, Cambodia followed an ethno-nationalist view and maintained its claims on the Mekong Delta and the area around Saigon. Between the years 1975-1977 Khmer Rouge held many attacks on Vietnamese people in Cambodia and border villages. Their policy was to flame the hatred among Cambodian people on Vietnamese and to reclaim Mekong Delta and Saigon area referred by them as "Kampuchea Krom" (Lost Territories). Their dream was to realize the greater Cambodia, which was further flamed by the supra-nationalist waves. For this end, Khmer Rouge attacked the Vietnamese villages to create hatred among the Vietnamese against the Cambodian people and Khmer Rouge became successful in this plan.⁹²

In September 1977, upon Cambodian attack on Tay Ninh province, Vietnam decided to resort to military force. In October, 50,000 Vietnamese troops marched into Cambodia, but this military show up had to stop out of fear of a Chinese attack on Vietnam. In February 1978, Vietnam made a peace offer which envisioned the territorial integrity and border security of both states, but Pol Pot, the leader of the Khmer-Rouge, declined it and continued the war. Upon this development the Vietnamese government realized that it had to topple Pol Pot. For this reason, Vietnam used the human rights and violations propaganda for the first time against Cambodia. The 12 Cambodian Divisions on the border and the Chinese threat on Northern borders were pressing on the Vietnamese government. On the Christmas Day of 1978, Vietnam divisions attacked Cambodia. Cambodian Army was easily defeated. On the other hand, Vietnamese army had a maneuver. The National

⁹² Wheeler, *Saving Strangers*, pp. 79-81.

Salvation Front was declared to have been established two days before the the fall of Pol-Pot government. Hanoi Radio also announced that the fight against Pol Pot for revolution was realized by the National Salvation Front. In this case, Vietnam could declare that it had nothing to do with the government change in Cambodia and everything was realized by Cambodian people for more freedom. A new government was founded in Cambodia. However, despite his defeat, Pol Pot was seeking for the international support against Vietnam. His Foreign Minister Leng Sary called for the Security Council meeting to condemn Vietnam. However the Soviet Union and Czechoslovakia, in support of Vietnam and the new Cambodian government, defied the demand as the Pol Pot regime as a government did not exist anymore. Nonetheless, this was a procedural matter as it was directly related with the operational mechanism of the Security Council. According to Article 27 (2) of the UN Charter, seven affirmative votes are enough for the decision⁹³ Then, the Security Council met nine days later on 11 January 1979 to take a decision on the conflict, despite the countervote of the Soviet Union for the UN Security Council action on Cambodia against Vietnamese interests.⁹⁴

When the international society condemned Vietnam, it did not use humanitarianism as a justification. It regarded the use of force as an act of self-defense against the attacks from the Cambodian territory in 1977-78 as well as the overthrow of the Pol Pot regime as the work of the National Salvation Front.⁹⁵

c. Tanzanian Intervention to Uganda

The last example of the use of force during the Cold War, which is included in the humanitarian intervention debates, is Tanzania's use of force in Uganda in early 1979. In 1971, Idi Amin seized power and established his dictatorship; this was a bloody rein as Amnesty International declared that 300.000 people were killed between 1971 - 1979. The period was also a shame for African Continent. However,

⁹³ The United Nations, p. 7.

⁹⁴ Wheeler, *Saving Strangers*, pp. 81-84.

⁹⁵ Wheeler, *Saving Strangers*, pp. 85-86.

African states did not intervene by using Article III of the Organization of African Unity (OAU), according to which intervention in the internal affairs of member states is prohibited.⁹⁶

The tension between Tanzania and Uganda began when Tanzanian President Julius Nyerere condemned Idi Amin for seizure of power through a military coup in 1971. Nyerere was against military coups in Africa and the former leader of Uganda, Milton Obote, who had been democratically elected and deposed by Idi Amin, was a friend to Tanzania President. Nyerere viewed Obote as the legitimate leader of Uganda. Tanzania provided asylum for Obote and his 1000 soldiers. In 1972 Obote's soldiers launched an invasion of Uganda to seize the power for Obote, but they failed due to Libya's support of Uganda and since Tanzania did not support the soldiers. And after the incident, Tanzania and Uganda signed the Mogadishu Agreement on 5 October 1972 and accepted not to commence military operations against each other. Until October 1978, Tanzanian president Nyerere continued his sharp criticism of Idi Amin. In October 1978, Ugandan army invaded Tanzanian territory and occupied the Kagera Salient. Uganda defended its invasion on the pretext that the territory had belonged to Uganda according to the old colonialist division between German and British spheres of influence. The actual reason behind the invasion was that there were dissidents and deserters in the Ugandan Army. In order to conceal this erosion in his power, Idi Amin allowed his troops to follow these deserters into Tanzania.⁹⁷ Tanzania gave a strong and decisive response and drove these forces back to Uganda. Although Idi Amin requested ceasefire, Nyerere did not accept this as well as the mediation offers of Nigeria and Libya. Having finished the first phase of the war, Nyerere initiated the second phase of the plan. According to that, the exiled political dissidents of Idi Amin met in Dar es Salaam in the end of October 1978 and built up the Front for the National Salvation of Uganda. On the other hand, Obote's soldiers were also armed and trained by the Tanzanian army. On 13 January 1979 Obote called on Ugandans to launch an armed struggle against Idi Amin regime. In April,

⁹⁶ Wheeler, *Saving Strangers*, p. 112.

⁹⁷ Wheeler, *Saving Strangers*, p. 113.

Amin's forces were scattered and Tanzanian army initiated an offensive operation to take all Uganda back from Amin regime for Obote.⁹⁸

Tanzania was seen to have forcefully overthrown the Amin regime. Although Uganda called for the Security Council action on the issue, the OAU countries and also the great powers did not want to hear Uganda before the Security Council. On the other hand, Tanzania did not use the necessity of a democratic regime change in Uganda as a reason to justify its actions. Instead, it used the self-defense clause of the UN Charter as Uganda attacked the Tanzanian soil first. The subsequent war on the Ugandan territory and toppling of Idi Amin were defended in terms of the further threat caused by the Amin's regime.⁹⁹

In all these three cases of military intervention of the Cold War period, each was defended on the basis of self defense before the international community. And except for Tanzania, these interventions were quickly condemned by the international society as a violation of the Article 2 (4) of the UN Charter.¹⁰⁰ Although some humanitarian effects came out of them, no attempt was made to justify the use of force was with regard to the human rights or the democratic rights of the people on the intervened territory. This is in contrast to the period in the 19th century where, as illustrated above, states intervened to other countries under the pretext of minority rights.

As it might be seen, the summary of legal evolution told until here has been the legal evolution of the law and institutions among states. This account was built up on the view that “[s]tates and states alone enjoy a *locus stansi* in the law of nations: they are the only wearers of international personality.”¹⁰¹ Since the subject of this study is humanitarian intervention and it is the human and states which is in the center of the discussion, a brief story of the legal debate should also be given by including the human.

⁹⁸ Wheeler, *Saving Strangers*, pp. 114-120.

⁹⁹ Wheeler, *Saving Strangers*, pp. 120-124.

¹⁰⁰ Louise Arbour, “The Responsibility to Protect as a Duty of Care in International Law and Practice”, **Review of International Studies**, Vol. 34, 2008, p.446.

¹⁰¹ William J. Magnuson, “The Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection Under International Law”, **Vanderbilt Journal of Transnational Law**, Vol. 43, No. 2, 2010, p. 261.

2. Human in International Law

After World War I, the protection of groups within the states was recognized on the basis of the Wilsonian principles. Since one of the main reasons of World War I was the presence and insurgency of large minority groups in the empires on European soil, and due to the fact that the aim of Wilson's principles was to reestablish a stable international system, the Wilsonian Principles invoked the principle of self-determination in order to ensure that minority groups, at least the larger ones, could declare freedom and separate themselves from the main state and in that way the possibility of another war would be avoided. To that end, in the Paris Peace Conference, the victors of the Great War imposed such treaties on the defeated to ensure fair treatment of the minority groups within their states and reconfigured the territories of the states where they saw as necessary. However, the Nazi atrocities proved the inefficiency of the post World War I settlements for human security. After World War II, the individual started to have a more central place in international law. Although the general view until that time was that states could not be held responsible for injuries they inflicted on non-citizens, and not be held accountable to the outside world for their affairs with their own citizens, that view started to change when the victors of World War II held Nazi administration responsible for the crimes against their own citizens as well as their crimes against peace and humanity at the Nuremberg trials in 1945. After World War II, the pressure of the Holocaust and the failure of the existing settlement until that date forced a new establishment among the circles which had influence in the negotiations to found the UN. Groups like the American Law Institute, the International Labor Organization, the American Jewish Committee and the American Bar Association lobbied for the inclusion of a bill of rights in the UN Charter.¹⁰² Although such a bill was not included in the Charter, some articles referred to human rights. For instance, according to Article 55 the UN is going to promote "universal respect for, and observance of, human rights and fundamental freedoms for all..." Article 56 states that the members are to take "joint and separate action... for the achievement" of

¹⁰² Magnuson, pp. 261-264.

universal respect for human rights. And the Article 68 commits that a Commission for the purpose of promoting human rights shall be created.¹⁰³

After the foundation of the UN, a more active institutionalization of the human rights protection was witnessed through the treaties and agencies. The Human Rights Commission was formed in 1946. In 1948, the convention on the Prevention and Punishment of the Crime of Genocide and the Universal Declaration of Human Rights were adopted. International Covenant on Civil and Political rights (ICCPR) was adopted by the UN General Assembly in 1966.¹⁰⁴ According to the Office of the United Nations High Commissioner for Human Rights (OHCHR), there are 9 core human rights bodies founded by treaties today, including the ICCPR. These are:

The Human Rights Committee (CCPR) monitors implementation of the International Covenant on Civil and Political Rights (1966) and its optional protocols;

The Committee on Economic, Social and Cultural Rights (CESCR) monitors implementation of the International Covenant on Economic, Social and Cultural Rights (1966);

The Committee on the Elimination of Racial Discrimination (CERD) monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (1965);

The Committee on the Elimination of Discrimination Against Women (CEDAW) monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women (1979) and its optional protocol (1999);

The Committee Against Torture (CAT) monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984);

The Committee on the Rights of the Child (CRC) monitors implementation of the Convention on the Rights of the Child (1989) and its optional protocols (2000);

The Committee on Migrant Workers (CMW) monitors implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990);

¹⁰³ Magnuson, p. 264.

¹⁰⁴ Magnuson, pp. 264-265.

The Committee on the Right of Persons with Disabilities (CRPD) monitors implementation of the International Convention on the Rights of Persons with Disabilities (2006); and

The Committee on Enforced Disappearance (CED) monitors implementation of the International Convention for the Protection of All Persons from Enforced Disappearance (2006).¹⁰⁵

Despite this proliferation of the treaties and broad coverage on human rights, there remained a problem. Firstly, these treaties were only binding for those states which ratified them, and secondly the individuals are mainly dependent on their own states to defend their rights even if it is the same state which violates those rights.¹⁰⁶ Similarly the question was the same in terms of prevention or alleviation of the human suffering. What if the sovereign state ignores its responsibilities, jeopardizes its own citizens or is unable to act to protect them?

During the Cold War, the US and the West were too occupied with the expansion of their sphere of influence against the Soviet threat. In this regard, many countries were given military and economic support for strategic reasons like the US support on Saddam Hussein. However, after the end of the cold war, things began to change. The end of the superpower rivalry enabled the states to focus on the prevention of abuse by governments.¹⁰⁷ With the UN Charter and the international treaties remaining as the only legal basis to use force, some circles have been fiercely criticizing the prohibition on the use of force regulated by them. Among those critics are the scholars, NGOs, media and some Western political figures. According to them, the UN Charter can no longer respond to the needs of the Post-Cold War period.¹⁰⁸

¹⁰⁵ Office of the United Nations High Commissioner for Human Rights, “Human Rights Treaty Bodies”, <http://www2.ohchr.org/english/bodies/treaty/index.htm> (16.08.2010).

¹⁰⁶ Magnuson, p. 265.

¹⁰⁷ Chandler, From Kosovo to Kabul, p. 6.

¹⁰⁸ Chandler, From Kosovo to Kabul, p. 6.

a. Wars Waged on behalf of Humanitarianism

This period witnessed the first examples of the use of force for reasons other than self defense. The following are the cases which will also be referred to in the rest of this study. The cases were selected according to their general acceptability by the scholars. In this regard, two contentious cases, Afghanistan War in 2002 and Iraq War in 2003 were not included since they are not generally regarded as humanitarian interventions because of the controversy surrounding their rationale and their dubious conduct in terms of humanitarianism.

(1) Operation Provide Comfort in Iraq

The first case concerns the UN Security Council Resolution to create safe heavens in Iraq after the 1991 Gulf War and its implementation. After his defeat in the First Gulf War in 1991, Saddam Hussein wanted to punish Kurds and Shiites for their attempts to rebel and topple his regime when the Security Council Resolution 686 was taken to establish a peace settlement.¹⁰⁹ Although the US president George W. Bush Sr. had called the Iraqi people to rebel against Saddam Hussein, the West decided not to support the rebels due to the fact that Kurdish rebellion might destabilize the region, as there were also Kurds living in Turkey, Syria and Iran. With the inaction of the coalition forces Saddam's Republican Guards swiftly headed to the north that created floods of refugees at the Turkish and Iranian borders.¹¹⁰ Turkey was solid on its decision not to accept them through its borders, since such a large group of Kurdish people might threaten the stability in South Eastern Anatolia.¹¹¹ Instead, the then Turkish President Turgut Özal suggested George W.

¹⁰⁹ James Cockayne and David Malone, "Creeping Unilateralism: How Operation Provide Comfort and the No-Fly Zones in 1991 and 1992 Paved the Way for the Iraq Crisis of 2003", **Security Dialogue**, Vol. 37, No. 1, 2006, p. 123-141.

¹¹⁰ Cockayne and Malone, pp. 124-125.

¹¹¹ İlhan Uzgel, "ABD ve NATO'yla İlişkiler", **Türk Dış Politikası, Kurtuluş Savaşından Bugüne Olgular, Belgeler, Yorumlar**, Cilt I, ed. Baskın Oran, İletişim Yayınları, İstanbul, 2002, p. 260.

Bush Sr. the creation of safe heavens on the plains on the other side of the mountainous area between Turkey and Iraq.¹¹² On the other hand, the region was being closely followed by the international media, and the scenes of refugees covering TV screens created public pressure on the US government to help the almost 2 million refugees.¹¹³ With the rising public pressure, the Security Council took Resolution 688 which “condemns the repression of the Iraqi civilian population in many parts of Iraq . . . the consequences of which threaten international peace and security in the region” (SC Res 688, 5 April 1991).¹¹⁴ Also this resolution called the member states and humanitarian organizations to join in the aid efforts.¹¹⁵ Due to the intensity of the public pressure, the US decided to initiate air drop campaign in the region and on 10 April it announced the area above 36th parallel as a no-fly zone.¹¹⁶ On 16 April the US and the UK along with France decided to send ground troops to support the establishment of safe heavens and the distribution of humanitarian aid in the region. That operation came to be known as *Operation Provide Comfort*.¹¹⁷ On the same day, the coalition forces were announced entering the region to create six safe camps which later proved insufficient for the large number of refugees. Then, the protection area of the coalition forces were extended to cover several important towns, including Dohuk.¹¹⁸ On 18 April, the UN and the Iraqi government signed a Memorandum of Understanding, according to which the Iraqi military forces would not violate the safe zones.¹¹⁹ The operation expanded as to include 20.000 soldiers from 13 countries with the support of 30 countries within an area of 5500 square kilometers. US troops continued to operate in the region until July 1991 when the UN High Commission for Refugees took control of the camps.¹²⁰

¹¹² Uzgel, p. 260.

¹¹³ Cockayne and Malone, p. 125.

¹¹⁴ Nicholas J. Wheeler, “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 Relations**, ed. Jennifer M Welsh, Oxford University Press, New York, 2004 (The Humanitarian Responsibilities), p. 33.

¹¹⁵ Cockayne and Malone, p. 127.

¹¹⁶ Uzgel, p. 261.

¹¹⁷ Cockayne and Malone, pp. 127-128.

¹¹⁸ Carol McQueen, **Humanitarian Intervention and Safety Zones: Iraq, Bosnia and Rwanda**, Palgrave Macmillan, New York, 2005, p. 28.

¹¹⁹ McQueen, p. 29.

¹²⁰ Cockayne and Malone, p. 128.

On the other hand, a closer analysis suggests that the permanent Western members of the Security Council (P-3); the US, the UK and France, employed a broad interpretation of the UN Resolution 688 with the passive acceptance of Russia and China. This led to the de facto division of Iraq into three parts with the introduction of no-fly zones in the Iraqi air space.¹²¹ With the *Operation Provide Comfort* Northern Iraq was forcibly separated from Baghdad administration. The subsequent developments, including the 2003 Iraq War, indicate that the operation was not performed out of pure humanitarian motives; the weakening of the military and political governance of Iraq by the P-3 intervention paved the way for another war in 2003 to depose the Saddam regime.¹²² Although the US-led coalition referred to the existence of the weapons of mass destruction in Iraq to justify their intervention in 2003, they quickly changed course and deployed humanitarian justifications when no such weapons were later found by the UN arms inspectors.¹²³

(2) Somalia

The second case is Somalia. Somalia had been living on the food aid of the Western countries since the 1970s. However, due to civil war in Somalia, this help ceased and by the end of 1992 about 400.000 people had been estimated to die due to starvation. 4.500.000 Somalis were in need of international aid in general.¹²⁴ The famine resulted in the fall of the dictatorship of Mohammed Siad Barre by an insurgency in January 1991. After the fall of the central authority, warlords competed to seize power in the country.¹²⁵ On 23 January 1992, Security Council adopted Resolution 733 which enforced an arms embargo on Somalia under Chapter VII of the Charter since the conflict in Somalia was a threat to international peace and

¹²¹ Cockayne and Malone, p. 137.

¹²² Cockayne and Malone, p. 136.

¹²³ Alex J. Bellamy and Nicholas J. Wheeler, "Humanitarian Intervention in World Politics", **CADAI**, 2005, <http://cadair.aber.ac.uk/dspace/bitstream/2160/1925/1/Wheeler%2c%20Bellamy.pdf>, (21.09.10).

¹²⁴ Leonie G. Murray, **Clinton, Peacekeeping and Humanitarian Interventionism Rise and Fall of a Policy**, Routledge, New York, 2007, p. 91.

¹²⁵ David N. Gibbs, **First Do No Harm Humanitarian Intervention and the Destruction of Yugoslavia**, Vanderbilt University Press, Nashville-Tennessee, 2009, p. 135.

security.¹²⁶ On the other hand, notwithstanding the provision of the required aid to Somalia, deaths occurred due to the lawless distribution of aid by the local warlords.¹²⁷ To improve the situation, the Security Council adopted Resolution 775, which authorized the deployment of 3500 peacekeepers to Somalia. The first party of these 500 peace keepers, UNOSOM I (United Nations Operation in Somalia), were the Pakistani soldiers who were attacked at Mogadishu airport during their mission to guard the UN aid provision to the country. The force could do no more than waiting at the airport.¹²⁸ Later, the UN adopted Resolution 794 on 3 December 1992 authorizing the US-led Unified Task Force (UNITAF) for Somalia, also known as *Operation Restore Hope*.¹²⁹ This force was authorized to use all necessary means to create the safe environment for the success of the relief operations. However, since the Security Council failed to explain the exact goals and requirements for this “secure environment”, the UNITAF and the later UNOSOM II missions were not an example of absolute success at all.¹³⁰

(3) Rwanda

The third case is Rwanda. The crisis and conflicts in Rwanda were not products of a short term as it is the case in all the examples. The conflict between Tutsis and Hutus dates back to the colonial times, when Belgians favored Tutsis over the Hutu majority due to their belief in the racial superiority of Tutsis. In 1959, Hutus rebelled against the Tutsis and the Belgians. 20,000 people were killed, the Tutsi administration was overthrown, Belgians left Rwanda and Rwanda became an independent state in 1961. Many Tutsis fled to Uganda in 1959 with significant repetitions in 1963, 1967 and 1973.¹³¹

¹²⁶ Wheeler, *Saving Strangers*, p. 176.

¹²⁷ Wheeler, *Saving Strangers*, p. 176.

¹²⁸ Wheeler, *Saving Strangers*, p. 177.

¹²⁹ Murray, p. 93.

¹³⁰ Murray, p. 93.

¹³¹ Murray, p. 125.

Until the end of 1980s several coups were attempted by both the remaining Tutsis and Hutus to capture power. The refugees in Rwanda founded the Rwandan Patriotic Front (RPF) which helped Yoweri Museveni to overthrow the government. In return they secured material help. The aim of the RPF was to protect the Tutsi refugees in Uganda and capture power in Rwanda. RPF invaded Northern Rwanda with the help of Uganda on 1 October 1990.¹³² In the beginning of the civil war between Rwandan Government and the RPF, Government had been weakened by the economic problems and deteriorating social problems. The military successes of the RPF gave it more power to negotiate with the government. This in turn aggravated the whole situation, since the RPF's gaining more power meant the empowerment of the demands of Tutsis and the less likelihood of agreement between the warring parties.¹³³

The RPF's first aim was to force the government to agree to some reforms in Rwanda and a new power sharing government constituted by two societies. In February 1991, the Rwandan Government accepted to negotiate with the RPF and Dar Es Salaam Declaration was signed. Reform requests of the RPF and international pressures resulted in a coalition government of various groups in April 1991. This peace was interrupted by the killing of 300 Tutsis and the following violence in February 1992. The UN Security Council was requested to send a mission to the Ugandan side of Uganda – Rwanda border to monitor the RPF and Ugandan Army. On 22 June 1993, the UN Security Council adopted Resolution 846 and launched the United Nations Observer Mission Uganda–Rwanda (UNOMUR).¹³⁴

After long negotiations, Arusha Accords were signed on 4 August 1993. According to this agreement, a democratically elected, broadly representative government was to be established. The army and governmental posts would be occupied by the Tutsis and Hutus together. An international force was also requested to police the working of the agreement and also to keep security of Kigali where the mass killings of many Tutsis had taken place in February 1992 events. On 5 October

¹³² Hehir, *Humanitarian Intervention: An Introduction*, pp.180-181.

¹³³ Brian C. Schmidt, "Rwanda On My Mind", *International Journal of Human Rights*, Vol. 8, No. 4, 2004, p. 494.

¹³⁴ Murray, pp. 126-127.

1993, the UN Security Council Resolution 872 was adopted to establish the United Nations Assistance Mission for Rwanda (UNAMIR).

On 6 April 1994, President Habyarimana and the President of Burundi, Cyprien Ntaryamira were killed by a missile attack on the plane at Kigali airport. Upon the murder, a planned massacre of moderate Hutus and Tutsis began. Many governmental figures from Tutsi origins were killed along with Belgian peacekeepers to force Belgium withdraw its support from UNAMIR as it was the largest contributor. In response the RPF forces mobilized and fought successfully against the Rwandan Army. In two months they gained control most of the country. During the killings UNAMIR could not be effective due to the small numbers of peacekeepers.

The reaction of the UN Security Council was to reduce the number of the peacekeepers by Resolution 912 on 21 April to protect its own personnel. The remaining staff would monitor the events and would act as mediators between the parties. However, despite being late, the Security Council adopted Resolution 918 on 17 May, upon acknowledgement of the suffering of the non-combatants, to strengthen UNAMIR (UNAMIR II) with a number of 5000 peacekeepers. But, the genocide could not be prevented and forces were deployed to Rwanda too late.

Due to the deployment problems, France requested authorization to intervene unilaterally, and Resolution 929 was adopted on 22 June 1994. The French operation, known as *Operation Turquoise* began on the same day. The French troops evacuated the camps where remaining Tutsi refugees were dwelling and would be killed by the Rwandan Army. However, the problem with the evacuation was that French force also moved extremist Hutus with their equipment and arms to Zaire, Uganda and Burundi while rescuing the Tutsis.¹³⁵ The UN missions and operations are always remembered as great failures for humanitarian intervention. Maybe the greatest among those is the response of the Security Council to the call of Canadian Major-General Romeo Dallaire, the commander of UNAMIR, to strengthen UNAMIR to defend non-combatants from the expected massacre, about which he had also warned the UN in his reports. The Security Council responded to this call by reducing the

¹³⁵ Murray, pp. 127-132.

number of the peacekeepers.¹³⁶ The calculated number of deaths, which occurred, is between 50.000 and 100.000 depending on the method for calculation. And there were rapes between 250.000 and 500.000.¹³⁷ Rwanda has now come to constitute a ground for anti-interventionists who criticized the intervention on the grounds of inaction, inefficient action, and wrong conduct as well as wrong motives.

(4) Bosnia

The fourth case is Bosnia-Herzegovina. Yugoslavia, which was founded after the First World War, was consisting of many nationalities. During the Second World War, the territory of Yugoslav Kingdom was occupied by Germany, Italy, Hungary and Bulgaria and Yugoslav people fought successfully against the Axis invasion. After the Second World War, Josip Broz Tito established his rule which lasted until the 1980's..During Tito's administration different nationalities could live peacefully in six autonomous republics and two autonomous regions of Serbia, and Kosovo and Vojvodina. However, with his death, problems among different nationalities arose.¹³⁸ After Tito, Slobodan Milosevic emerged as the new major political figure and he was elected as the president of The Federal Republic of Yugoslavia through the first democratic election in December 1990.¹³⁹

Joseph Tito had been an important figure to settle the problems and forge a new Yugoslav national identity among people until his death. After his death in 1981, it was the ethno-nationalist policies and discourses of Slobodan Milosevic, Radovan Karadzic and Franjo Tudjman which deteriorated the situation for people of old Yugoslavia.¹⁴⁰

The crisis for Yugoslavia began with the Croatian and Slovenian declarations of independence on 25 June 1991. Fighting immediately began between Yugoslav

¹³⁶ Murray, p. 127.

¹³⁷ Hehir, Humanitarian Intervention: An Introduction, p. 183.

¹³⁸ Gibbs, p. 52.

¹³⁹ Gibbs, p. 63.

¹⁴⁰ Murray, p. 43.

National Army (JNA) and Slovenian Army which defeated the former shortly after. Then the fight between JNA combined with Serb militia and Croatian forces began. The second war took relatively longer than the Slovenian fight and lasted with declared and broken ceasefires.¹⁴¹ In reaction to this fight, the UN Security Council adopted Resolution 713 for an arms embargo on Yugoslavia on 25 September 1991.¹⁴² However, the embargo had no effect and fighting went on. The breakup of Yugoslavian unity created an insecure environment for Bosnia, where Muslims, Serbs and Croats lived together. Thus it was the breakup of the federation which entailed the Bosnian declaration of independence.¹⁴³ Fearing a violent reaction of the Serbs and JNA, Bosnia-Herzegovina administration waited until 1 March 1992, when a referendum was held. On 3 March 1992, Bosnian president Alija Izetbegovic declared independence. Slovenia and Croatia were recognized by the European Community on 15 January 1992 and Bosnia-Herzegovina on 7 April 1992. The US recognized three countries on 7 April 1992 and the UN General Assembly granted membership to them on 22 May 1992.¹⁴⁴

The war in Bosnia began on 5 April when Serb snipers shot the demonstrators who condemned the radicalization between Serb and Muslim groups in the country and demanded the deployment of international peacekeepers in order to prevent the war. The conflict quickly spread over the country.¹⁴⁵ By the end of 1992, the JNA had ethnically cleansed many parts of the country through mass killings and forceful deportations.¹⁴⁶ The establishment of an international protectorate would require the Security Council Resolution which was not sure due to the possibility of a Russian veto. Moscow might see the intervention as an attempt to extend Western influence on the Balkans. On the other hand, Bush administration was solid that no American ground forces would be deployed in such a mission with the bitter experience of losses in Somalia.¹⁴⁷

¹⁴¹ Murray, p. 43.

¹⁴² Wheeler, *Saving Strangers*, p. 247.

¹⁴³ Gibbs, p. 106.

¹⁴⁴ Karin von Hippel, **Democracy by Force: US Military Intervention in the Post-Cold War World**, Cambridge University Press, Cambridge, 2004, pp. 130-131.

¹⁴⁵ Wheeler, *Saving Strangers*, p. 249.

¹⁴⁶ Wheeler, *Saving Strangers*, p. 249.

¹⁴⁷ Wheeler, *Saving Strangers*, p. 251.

The revelation of Serb detention camps in Bosnia marked a turning point in international reaction to Bosnia. The pressure of the countries, especially of the Muslims was regarded to have caused the belated UN action. The UN Security Council Resolution 770 was adopted on 13 August 1992. According to the Resolution, member states were authorized under Chapter VII of the Charter “to use all necessary means to deliver humanitarian aid to the civilians of Bosnia”. This action was welcomed by the Bosnian government and in this regard, it was not an action against the will of the sovereign.¹⁴⁸ This resolution was followed by further engagement of the Security Council.¹⁴⁹ However, the willingness of the UN Security Council members were not as sound as expected. For instance, the British and French governments confined the participation of their soldiers to the peace keeping mission in terms of UNPROFOR II. However, the humanitarian aid procured to Bosnian people during the winter of 1992-1993 was of great help to keep suffering people alive.¹⁵⁰

From 1991 to 1998 a total of eighty three resolutions were adopted by the Security Council. These also included the deployment of a UN Protection Force (UNPROFOR) to undertake a series of actions in Bosnia beginning in April 1992. Until 1995, this force commenced operations including peacekeeping, aid provision and preparing necessary conditions for a peace settlement. However, during its term of mission UNPROFOR was blamed for its inaction against the Serbian military gains violating the international law and its human rights violations.¹⁵¹ The war in Bosnia between Serbs, Bosnians and Croats lasted until the Dayton Accords in November 1995.¹⁵²

The severe conflicts continued without remarkable intervention of the West. However, NATO had authorized the NATO and UNPROFOR commanders to use NATO air force to bomb targets when required to defend the safe areas where refugees dwelt as well as the UN and NATO personnel.¹⁵³ After the NATO bombing

¹⁴⁸ Wheeler, *Saving Strangers*, p. 251.

¹⁴⁹ Wheeler, *Saving Strangers*, p. 252.

¹⁵⁰ Wheeler, *Saving Strangers*, p. 252.

¹⁵¹ Gibbs, p. 132.

¹⁵² McQueen, p. 53.

¹⁵³ Murray, p. 48.

campaign began, although it was highly criticized in the aftermath, Croatian and Bosnian forces had significant success against Bosnian Serbs. War in Bosnia ended in October 1995 and a peace agreement was signed in Dayton on 21 November 1995.¹⁵⁴ Dayton Agreement defined the allocation of Bosnian soil among the subject societies and the settlement on the administration.¹⁵⁵ However, Dayton itself had problems in the application phase.¹⁵⁶

With the Bosnian conflict, the NATO assumed a new duty to intervene in humanitarian crises in addition to its existing duties against the member states.¹⁵⁷ Although the initiation of the NATO action was based on the UN Resolution 770 taken under Chapter VII, the problem of the NATO air campaign was that the NATO expanded the campaign unilaterally without obtaining a further resolution. This action turned the NATO's role from a support mission into a full scale belligerence.¹⁵⁸ The failure to act on time showed the importance of preventive action in humanitarian crises rather than acting after the unfolding of ethnic cleansing.¹⁵⁹

(5) Kosovo

The next case is Kosovo. Although the roots of crisis lay in the history of the Balkans as it was in Bosnia, the turning point was Milosevic's repeal of Kosovo's autonomy in 1989 which had been established by Joseph Tito. From 1990 to 1995 Kosovo Albanians remained in peace and maintained their own rule in a number of spheres from taxing to education while Serb minority adhered to Belgrade.¹⁶⁰ In 1995, the absence of any provisions for Kosovo in the Dayton Accords came as a shock for Kosovo Albanians. This also signaled the end of the time for Ibrahim

¹⁵⁴ Nicholas Morris, "Humanitarian Intervention in the Balkans", **Humanitarian Intervention and International Relations**, ed. Jennifer M. Welsh, , Oxford University Press, New York, 2004, p. 102.

¹⁵⁵ Hippel, pp. 151-154.

¹⁵⁶ Hippel, pp. 154-155.

¹⁵⁷ Gibbs, p.170.

¹⁵⁸ Wheeler, *Saving Strangers*, p. 255.

¹⁵⁹ Wheeler, *Saving Strangers*, p. 282.

¹⁶⁰ Hehir, *Humanitarian Intervention: An Introduction*, p. 202.

Rugova and the Democratic League of Kosovo which had till then followed a pacifist policy. The Kosovo Liberation Army (KLA) took up arms and initiated attacks on the Serbian police and military of the FRY. Their aim was to generate domestic support for their cause against FRY, but more importantly to invoke international reaction and intervention into Kosovo.¹⁶¹

As KLA predicted, FRY and Serbian forces responded with force and violence. The fight went on with the escalation of political violence in 1997. Although Serbian forces were much superior to the KLA, the later could gain some success in controlling some regions like Drenica region. However, Serbs were determined to exterminate the KLA and initiated the extermination operation which transformed the street wars into a full-scale war in February 1998.¹⁶²

Although many international observers and fact-finding groups working on Balkans and FRY had warned that Kosovo was a ticking bomb ready to explode, there had been little effort by the international community to take the necessary measures.¹⁶³ It was the mid-1998 when the international society realized the emergency in Kosovo by the numbers of refugees and internally displaced persons.¹⁶⁴ In October 1998, a settlement was negotiated but it failed since Richard Holbrooke, the chief US negotiator, gave personal guarantee that KLA would abide by the agreement. However, KLA did not act according to the agreement and violence increased. On 15 January 1999, Serb army moved into Racak where media shot pictures of corpses belonging to 45 Albanian civilians later. This provoked deep anti-Milosevic view within international opinion.¹⁶⁵

After this point, the credibility of the West as well as the issue of humanitarianism came under increasing scrutiny. At the end of January, the Contact Group (the US, UK, France, Russia, Germany and Italy) which also served during Bosnian War, called all parties to Rambouillet, France on 6 February to negotiate

¹⁶¹ Hehir, *Humanitarian Intervention: An Introduction*, p. 203.

¹⁶² Marie-Janine Calic, "Kosovo in the twentieth century: A historical Account", **Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship**, eds. Albrecht Schnabel and Ramesh Thakur, United Nations University Press, Tokyo, 2000, p. 28.

¹⁶³ Hehir, *Humanitarian Intervention: An Introduction*, p. 204.

¹⁶⁴ Hehir, *Humanitarian Intervention: An Introduction*, p. 205.

¹⁶⁵ Hehir, *Humanitarian Intervention: An Introduction*, p. 206.

peace. And the NATO threatened to use force against the parties who would not comply with its call. The Rambouillet negotiations broke down when FRY representatives rejected to reach an agreement.¹⁶⁶

On 24 March 1999, NATO began its bombing campaign (Operation Allied Force) against Serbian targets. As in Bosnian war, this bombing operation was also highly criticized in the aftermath. The bombing campaign lasted for 11 weeks, causing much Serbian reaction with thousands of deaths and refugees. The war could only come to an end with the Technical Military Agreement signed on 9 June 1999 between the FRY and NATO after the G-8 states had agreed on the text of the UN Security Council Resolution 1244. According to this resolution and the report of the Secretary-General of 12 June (S/1999/672), the NATO-led Kosovo Force (KFOR) was established and deployed in the region. The Albanian population continued to insist on independence and declared it on 17 February 2008.¹⁶⁷ NATO intervention in Kosovo crisis is a turning point in the use of force. The use of force in Kosovo was not one of self-defense. Although, it was defended under Chapter VII of the UN Charter, the operation was a direct violation of a state's sovereignty and the territorial integrity of the state, with the de facto autonomy granted to Kosovo which culminated in its independence.¹⁶⁸ After Kosovo intervention of NATO, a new debate has begun whether this intervention constituted a precedent for future violations of sovereignty for the sake of human rights. After the intervention, Independent International Commission for Kosovo found NATO intervention illegal for lacking the necessary UN Security Council mandate, but stated its legitimacy, since the ongoing humanitarian urgency required the intervention.¹⁶⁹

¹⁶⁶ Hehir, *Humanitarian Intervention: An Introduction*, p. 206.

¹⁶⁷ Calic, p. 30.

¹⁶⁸ Aidan Hehir, "NATO's "Humanitarian Intervention" in Kosovo: Legal Precedent or Aberration?" *Journal of Human Rights*, Vol. 8, No. 3, 2009 (NATO's Humanitarian Intervention in Kosovo), pp. 246-247.

¹⁶⁹ Hehir, *Humanitarian Intervention: An Introduction*, p. 214.

(6) Darfur

The last case is Darfur. Sudan's borders were defined by the British colonial government between 1899 and 1956. These borders were not drawn with regard to any population structure or geographical feature of the country. After independence in 1956, a civil war broke out in 1967 between the Islamic Northern Sudan and Christian Southern Sudan. The war took about 2 million lives but world ignored it.¹⁷⁰

There are two primary groups in Sudan; the first one is the Africans who dwell on agriculture. The second one is the Arabs who are semi-nomadic people living on their livestock. The conflict has mainly been between the Arabs and the Africans. The recent crisis in Darfur dates back to 1970s when the Sudanese Government disturbed the system which had settled the disputes among tribes on food, water and land. The erosion of the dispute settlement mechanism caused inefficiency in preventing and mediating conflicts of the Sudanese administration such as in Darfur. Since people of Darfur felt themselves insecure and disenfranchised from the national political system, they formed their own village defenses and in 2001 the Sudanese Liberation Army (SLA) and the Justice and Equality Movement (JEM) were formed from these militias.¹⁷¹

In 2003, the SLA and JEM launched attacks on the government military posts. The fight between the government and the rebels got tougher when the Janjaweed militia was introduced into the conflict. The counter-insurgency resulted in 30.000 deaths in April 2004 and there was no agreement. After a long period of 16 months of inaction after the conflict began, the Security Council adopted Resolution 1547 on 11 June 2004 which called the parties to use their influence to bring an immediate halt to the fighting in the Darfur region. Resolution 1556 was adopted on 30 July 2004 recognizing the territorial integrity of Sudan. It called the Sudanese government to protect its civilians against the Janjaweed. The Security Council threatened the Sudanese government with using force if it did not disarm the

¹⁷⁰ Hehir, *Humanitarian Intervention: An Introduction*, p. 241.

¹⁷¹ Hehir, *Humanitarian Intervention: An Introduction*, p. 242.

Janjaweed in a month. However, the fact was that the government was working with the Janjaweed.¹⁷²

Following an international debate whether to act or not, the Security Council adopted Resolution 1564 in September 2004, which recognized the non-compliance of the Sudanese government with the Resolution 1556. In January 2005, International Commission of Enquiry on Darfur (IECD) published its report which found the Sudanese government and Janjaweed to be responsible for the violations of human rights. In 2005, five resolutions were adopted; however, they did not prescribe punitive action. In March 2005, Resolution 1593 assigned the situation to the International Criminal Court (ICC). In August 2006, the UN Security Council authorized the deployment of 17,300 troops and 3,300 civilian police to Darfur through the Resolution 1706 upon Sudanese Government's consent.¹⁷³

On 31 July 2007, Resolution 1769 was adopted by the Security Council under Chapter VII which authorized the foundation of African Union (AU)/UN Hybrid operation in Darfur (UNAMID). The core mandate of UNAMID was the protection of the civilians, assisting for humanitarian aid, monitoring and verifying implementation of agreements, contribution for a political process to include all groups, working to promote human rights and rule of law and monitoring the border situation of Sudan with Chad and the Central African Republic.¹⁷⁴ The UNAMID lacking the necessary support and resources from the powerful countries failed to be effective and in 2008 the killings and rapes were reported to be continuing by the UN special reporter on Sudan.¹⁷⁵ Today the UN estimates that about 4.7 million Sudanese people have been deeply affected by the Darfur Crisis.¹⁷⁶ The Darfur Crisis is still on the top of the intervention debate as it is seen as the solid proof for the hazard of non-intervention and inaction.

¹⁷² Hehir, Humanitarian Intervention: An Introduction, pp. 243-244.

¹⁷³ Hehir, Humanitarian Intervention: An Introduction, pp. 244-246.

¹⁷⁴ The Peace and Security Section of the United Nations Department of Public Information, "The United Nations and Darfur Fact Sheet", 2007, http://www.unis.unvienna.org/pdf/UN-Darfur_fact_sheet.pdf (07.11.2010), p. 2.

¹⁷⁵ Hehir, Humanitarian Intervention: An Introduction, p. 246.

¹⁷⁶ "What Has Happened in Darfur?", <http://www.savedarfur.org/pages/primer> (29.10.2010).

b. The Responsibility to Protect: A New Era?

The Responsibility to Protect is the most recent pro-intervention approach. In this chapter, following the definition of humanitarian intervention, the basics of the interventionist idea were presented. And then the principles of non-intervention and the immunity of state sovereignty were reviewed from a historical perspective. Later on, the violation of sovereignty was illustrated through cases from the 19th and 20th centuries. This was followed by a brief account of the legalization process of the state sovereignty in the international system. And it was seen that several interventions in the 20th century were undertaken with the pretext of self-defense during and after the Cold War, except for Kosovo. The atrocities that shocked the international community in Rwanda and former Yugoslavia, although they were justified under Chapter VII or claimed to be so, led the interveners to found ad hoc tribunals to try those who were responsible for the crimes against humanity. This was a direct intervention to the realm of the externally invulnerable state sovereignty.¹⁷⁷ The increase in the humanitarian emergencies caused a need to expand and empower the doctrine for intervention by transcending the obstruction of the state sovereignty.¹⁷⁸

...if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity? Kofi Annan¹⁷⁹

At the turn of the millennium, the debate started to change its form. The existing debate was turning into that between the pluralists of the existing debate and the solidarists who were developing a preemptive interventionism. Then the interventionist bloc had to answer and elaborate on two questions; ‘Whether to intervene?’ and if yes, then ‘how the humanitarian disasters can be prevented?’

¹⁷⁷ Arbour, p. 446.

¹⁷⁸ Heraldo Muñoz, “The Responsibility to Protect: Three Pillars and Four Crimes”, **Human Rights and Human Welfare**, 01.08.2009, <http://www.du.edu/korbel/hrhw/workingpapers/2009/53-munoz-2009.pdf> (19.08.2010), pp. 2-3.

¹⁷⁹ International Commission on Intervention and State Sovereignty, p. 7.

In September 2000, the Government of Canada announced that it established the International Commission on Intervention and State Sovereignty (ICISS). The aim of the ICISS was to find answers to the legal, moral, operational and political questions of humanitarian intervention. In this effort, the ICISS published the Responsibility to Protect (R2P) in December 2001.¹⁸⁰

The report was prepared as a reaction to the inefficiency of the existing UN system vis-à-vis the violations of basic human rights and human security. The UN system was founded to maintain peace and security in the international system. However, the events which destroy peace and create the insecure conditions are increasingly of intra-state rather than of interstate origin.¹⁸¹ Along with the internationalization of the internal affairs of the state, the other debate has been that the UN Charter is originally paradoxical as it both aims to maintain international peace by protecting state sovereignty and the human rights. Then a new approach had to be found. The R2P suggests that sovereignty defined as “supreme authority within a territory”,¹⁸² brings about a responsibility entailing that being sovereign is not being immune to the international reactions and free from responsibilities against its own citizens. Such a responsibility is threefold. Firstly, the state authorities are responsible for the security and well-being of their citizens. Secondly, the state authorities are responsible to their citizens and also international community through the UN. And thirdly, the authorities are held responsible for their actions and omissions while ruling.¹⁸³

According to the report, the responsibility to protect consists of three elements. The first element is the responsibility to prevent, i.e. preventing humanitarian crises before their eruption by monitoring the situation of problematic regions and acting with the necessary non-military and/or military means.¹⁸⁴ The second element, the responsibility to react envisions that all states as well as the host state are responsible to react against the humanitarian disasters. And the evaluation

¹⁸⁰ Hehir, *Humanitarian Intervention: An Introduction*, p. 113.

¹⁸¹ International Commission on Intervention and State Sovereignty, p. 13.

¹⁸² “Sovereignty”, *Stanford Encyclopedia of Philosophy*, 08.06.2010, <http://plato.stanford.edu/entries/sovereignty/>, (19.02.2011).

¹⁸³ International Commission on Intervention and State Sovereignty, p. 13.

¹⁸⁴ International Commission on Intervention and State Sovereignty, p. 13.

of a conflict as a disaster is to be made on the basis of the defined thresholds.¹⁸⁵ The third element is that, if any military intervention takes place, all states have the responsibility to rebuild in the sense that the conditions of public safety and order will be reconstituted.¹⁸⁶ No matter which of these elements is at issue, the important point was that there has been an outcry for the existing legal discourse; every state is responsible for the security of its own citizens; and if they are unable or unwilling to provide for their safety, then the duty will be born by the international society.¹⁸⁷

The aim in preparation of the report was the establishment a new norm and a set of rules for humanitarian intervention, which all the states were expected to comply with.¹⁸⁸ The ICISS defined these rules as the six ‘Principles for Military Intervention’. These principles are based on those that are associated with the Just War tradition back in history: right authority, just cause, right intention, last resort, proportional means and reasonable prospects.¹⁸⁹ Since those criteria were elaborated above, they will not be repeated here.

The Responsibility to Protect was on the agenda of the 2005 U.N. World Summit in New York on 14-16 September 2005. Although it is hard to know how much effect the continuing US-led invasion of Iraq had on the topic, R2P took place in the Outcome Document to some extent.¹⁹⁰

As paragraphs 138 and 139 of the Outcome Document state:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

¹⁸⁵ International Commission on Intervention and State Sovereignty, p. 29.

¹⁸⁶ International Commission on Intervention and State Sovereignty, p. 39.

¹⁸⁷ Hehir, Humanitarian Intervention: An Introduction, p. 115.

¹⁸⁸ Dorota Gierycz, “From Humanitarian Intervention (HI) to Responsibility to Protect (R2P)”, **Criminal Justice Ethics**, Vol. 29, No.2, 2010, pp. 112-113.

¹⁸⁹ Hehir, Humanitarian Intervention: An Introduction, p. 117.

¹⁹⁰ Hehir, Humanitarian Intervention: An Introduction, p. 118.

*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 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, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity...*¹⁹¹

The provisions of the World Summit were repeated in the UN Security Council Resolution 1674 on 28 April 2006 to protect the civilians and Resolution 1796 on 31 August 2006 which appealed to the members for the deployment of a UN peacekeeping force in Darfur.¹⁹²

However, the R2P as accepted in the World Summit is much 'lighter' when considered as a definition of a doctrine or as the criteria to be followed. In fact, the outcome document only accepts the existence of such a responsibility without defining any principles or rules to follow. At this point the international society, including the governments, NGOs and other groups, is divided. One group is satisfied that the R2P was mentioned and accepted as a reality and it will have further prominence and develop gradually as signifying the international law's evolution vis-a-vis the individual rights. On the other hand, the other group is not content with such a limited inclusion without the inclusion of principles of using force and any provisions for states.¹⁹³

The R2P has been a breakthrough, since its initial announcement. Many expectations were based on it as well as many criticisms were targeted at it. Currently the debate is still going on about its legality, legitimacy and efficiency as a novelty on the subject.

¹⁹¹ The United Nations General Assembly, "2005 World Summit Outcome", 15.09.2005, <http://daccess-ddsny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> (05.11.2010), p. 31.

¹⁹² Gierycz, p. 114.

¹⁹³ Gierycz, p. 114.

SECOND CHAPTER

MORALITY, LEGITIMACY AND LEGALITY OF HUMANITARIAN INTERVENTION

The previous chapter elaborated on the meaning, historical and legal evolution of the humanitarian intervention, including the Just War tradition.

This chapter will present the current views and debates on the issues of legality, legitimacy and morality of the intervention. Since such an effort to expose all the problems in the respected realms might be exhausting and time-consuming, only major problems will be focused upon by means of cases reviewed in the previous chapter. Although this chapter will handle each problem separately, it should be noted that those issues are actually intermingled. For instance, when legitimacy is at issue, legality problem cannot be excluded, or when morality is at issue legitimacy is also involved.

I. WHAT MAKES A LEGITIMATE INTERVENTION?

Humanitarian intervention has become a controversial topic concerning almost all its aspects, from definition to implementation. The issue of definition and the debates on it were reviewed in the previous chapter.

This part will go through the conditions of a legitimate humanitarian intervention as cited in the literature with a view to finding out the common points regarded as the criteria for a legitimate intervention.

The present day criteria are mainly based on the Just War criteria, which have their origins in Thomas Aquinas' writings. With the proliferation of humanitarian emergencies and international efforts to alleviate the human suffering in the post-

Cold War era, a new search began to legitimize interventions and to avoid the argument that states abuse humanitarianism for their national interests.¹⁹⁴

However, there is also a counter-view even on this effort. Alex J. Bellamy states that since decisions on the criteria and justifications to intervene will be political and pragmatic due to the competition among states, the effort is futile. Only righteousness may be found in the outcomes in terms of pragmatic view.¹⁹⁵ Even though such criteria were to be accepted, there is no guarantee that states would agree concerning their fulfillment.¹⁹⁶

Another view questions the blind adherence of states to the criteria for humanitarian intervention if they were to come into being.¹⁹⁷ For instance, if states are to follow all the criteria as a rule, that would bring no good. Suppose that there is a humanitarian emergency in a state where the government concerned holds systematic massacre or forceful displacement of ethnic minority. However, according to the criteria of Just War, states which are able to intervene should wait for the exhaustion of non-military means to halt the emergency. If states strictly follow the criteria, they should wait to deploy military means as a last resort, no matter how many people are killed during the procedure. The critical view suggests that states should be able to reverse the ordering of the Just War criteria, or even eliminate the criterion of last resort when necessary.

As stated in the previous chapter, there are two sorts of criteria to wage a legitimate humanitarian war. These are two categories based on the historical evolution of the Just War tradition: *jus ad bellum* (to wage a just war) and *jus in bellum* (to conduct a just war).¹⁹⁸ They involve right (legitimate) authority, just cause, right intention, last resort, proportionality and reasonable hope.

¹⁹⁴ Emilian Kavalski, "Contending Interventions: Coming to Terms with the Practice and Process of Enforcing Compliance", **Human Rights & Human Welfare**, Vol. 6, 2006, p.141.

¹⁹⁵ Bellamy, Humanitarian Intervention and the Three traditions, p.17

¹⁹⁶ Alex J. Bellamy, "Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit", **Ethics and International Affairs**, Vol. 20, No. 2, 2006 (Whither the Responsibility to Protect), p. 148.

¹⁹⁷ Carola Weil, "The Protection-Neutrality Dilemma in Humanitarian Emergencies: Why the Need for Military Intervention?", **International Migration Review**, Vol. 35, No. 1, 2001, p. 103.

¹⁹⁸ Fixdal and Smith, p. 286.

Although each of these criteria is deemed crucial in the literature, there is the prerequisite that there must be an event which urges states to intervene and prompts the international community to apply them. That event should be of the kind which “shocks the moral conscience of mankind”.¹⁹⁹ This shocking event does require an audience to be perceived as ‘shocking’ and the reaction to it leads to the intervention.²⁰⁰ Then what is this shocking event?

Nicholas Wheeler defines this shocking event as the just cause to wage war.²⁰¹ Accordingly, no state can claim to have a right or duty to intervene unless there is an exceptional humanitarian emergency. However, there is not a specific definition of this shock. In Wheeler’s view, although some claim that the number of deaths or displaced people might be a valid indicator for the existence of such a just cause to intervene, he states that endorsing such a threshold would be arbitrary. Instead, he defines this supreme humanitarian emergency as the situation in which the human suffering cannot be stopped without the intervention of a foreign state or group of states.²⁰² Michael Walzer also defines the aim of the humanitarian intervention as to stop the actions that “shock the conscience of humankind”.²⁰³ Although, the threshold cannot be exactly known or defined, this humanitarian urgency is something different than the claims of general human rights violations. In other words, violations of the right to free speech and of the right to live do not constitute similar emergencies. From a utilitarian perspective, as Heinze argues, one cannot exercise his right to free speech when he is dead.²⁰⁴

The number of cases which became subject to the debate of humanitarian intervention has increased since the end of the Cold War and it is expected to rise further. The detection of a humanitarian emergency, though not properly defined, can be used to distinguish and limit the number of the cases to be intervened. Heinze uses

¹⁹⁹ J. L. Holzgrefe, “The Humanitarian Intervention Debate”, **Humanitarian Intervention: Ethical, Legal and Political Dilemmas**, eds. J. L. Holzgrefe and Robert Keohane, Cambridge University Press, Cambridge, 2003, p.33.

²⁰⁰ Catherine Goetze, “When Democracies Go to War: Public Debate and the French Decision on War in 1999 and 2003”, **Global Society**, Vol. 22, No. 1, 2008, p. 62.

²⁰¹ Wheeler, *Saving Strangers*, p. 34.

²⁰² Wheeler, *Saving Strangers*, p. 35.

²⁰³ Michael Walzer, **Arguing About War**, Yale University Press, London, 2004, p. 69.

²⁰⁴ Heinze, *Maximizing Human Security: A Utilitarian Argument for Humanitarian Intervention*, “Maximizing Human Security: A Utilitarian Argument for Humanitarian Intervention”, **Journal of Human Rights**, Vol. 5, No. 3, 2006 (*Maximizing Human Security*), p.284

utilitarian reasoning to define such situations. He refers to large scale, imminent or ongoing, and deliberately perpetrated deprivations of basic human goods as situations for which humanitarian intervention is morally permissible.²⁰⁵

According to this view, the basic human goods refer to the basic rights, such as the right to life, the right to physical integrity, the right to food and shelter, and the right not to be tortured, without which other human rights cannot be protected as stated above.²⁰⁶ Secondly, there must be a large scale violation of those basic rights. However, measuring this scale is also problematic. If a threshold is to be set, the only solid and analytical way may be to count the death. However, such an approach is seen as immoral and inhumane, because this may lead to intentional non-intervention to let some killing happen so as to justify a military intervention later on.²⁰⁷ Then this situation must be an emergency which can be halted only by way of intervention from the outside.

Thirdly, the violation must be deliberate as part of a sinister plan to destroy an opposition group.²⁰⁸

And lastly, in order to defend the legitimacy of an intervention, there must be an ongoing violation or a recent one since the first duty of the intervention is to halt atrocities. The past violations, which happened before but has no more effect on the human conscience other than a rueful memory of a humanitarian disaster cannot be claimed as a just cause to resort to war.²⁰⁹

The Responsibility to Protect doctrine, which has become the latest norm on humanitarian intervention accepts an amalgamation of all of the criteria that have been referred to in this study so far.²¹⁰ On 2 December 2004, the Secretary-General's High-Level Panel on Threats, Challenges, and Change following the ICISS report on the issue accepted the following as the criteria to be followed in case of a decision to intervene:

²⁰⁵ Heinze, *Maximizing Human Security*, p. 290.

²⁰⁶ Heinze, *Maximizing Human Security*, p. 290.

²⁰⁷ Heinze, *Maximizing Human Security*, p. 291.

²⁰⁸ Heinze, *Maximizing Human Security*, p. 292.

²⁰⁹ Heinze, *Maximizing Human Security*, p. 295.

²¹⁰ Magnuson, p. 273.

Seriousness of threat. Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify prima facie the use of military force? In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?

Proper purpose. Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?

Last resort. Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?

Proportional means. Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?

Balance of consequences. Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?²¹¹

Having put forward the assumed criteria for a legitimate humanitarian intervention as above, the following part shall seek to explain the major problems associated with them.

²¹¹ Magnuson, p. 274.

II. CONFLICTING ISSUES OF HUMANITARIAN INTERVENTION: LEGITIMACY AND MORALITY

Morality has been increasingly emphasized since the end of the Cold War, while the analysis in International Relations moved away from the domain of Realpolitik to that of the so-called normative theory.²¹² Morality of humanitarian intervention is intertwined both with the legality and legitimacy of using force. As Eric A. Heinze states, the moral side of the humanitarian intervention, which is also in close relation with the natural law and moral justice, has been always in conflict with the legal side of the topic.²¹³ On the other hand, morality is very closely related with legitimacy so that it is almost impossible to separate one from the other.

In this section of the chapter, certain issues will be handled within the context of morality. These topics, as may be predicted, are the most problematic issues of humanitarian intervention: motives-outcomes debate; proportionality problem; non-intervention or limited intervention not to risk the lives of soldiers, and moral effects of humanitarian intervention.

A. Guessing the Motives or Being Satisfied with the Outcomes?

It is difficult to separate the debates on the legitimacy and morality of humanitarian intervention. One point is that actually both of these topics rest on the Just War tradition and its threshold criteria, including the fundamental criterion of the just cause.²¹⁴

According to David Chandler, moral claims uttered for a cause help to legitimize the move, let's say an intervention, much more than pure institutional

²¹² Chandler, *From Kosovo to Kabul*, p. 89.

²¹³ Heinze, *Humanitarian Intervention: Morality and International Law*, p. 471.

²¹⁴ Heinze, *Humanitarian Intervention: Morality and International Law*, p. 473.

attempts to codify and internalize it in the international society.²¹⁵ He further argues that the moral validity “norm” or “tradition” is actually the product of the rejection of existing Left or Right state politics in a purely individual focused fashion.²¹⁶ Thus, moral aspirations associated with humanitarian intervention cause as much controversy as its definition and legitimacy.

Noam Chomsky depicts this controversy in his essay ‘Humanitarian Imperialism: The New Doctrine of Imperial Right’, through a critical view on the historical record.²¹⁷ He states that there are two views on norm-building, which conflict with each other. The first one asserts that although a state may have a record of interest-based action disguised under humanitarian intervention, this does not necessarily prove that that state will never act out of humanitarian concerns in the future.²¹⁸

However, according to the other view, to which Chomsky adheres, the institution, which makes new norms, is the one which abused the human rights violations or ignored them in the Cold War period. For instance, it was the same West which ignored human rights violations in the countries where the responsible administrations were deemed strategically important for the Western interests. Due to the existence of the path dependency within the institutions, Chomsky implies that states are not fully trustable in their naive moral drive for humanitarian intervention, at least for the action against violations or ignorance of them.²¹⁹

Chomsky is supported by Mohammed Ayoob in his doubts of pure humanitarian motives of the intervening states. Ayoob claims that in cases where there is not a firm UN Security Council authorization and when the institutions with dubious authority, like the NATO, act, the emerging selectivity problem casts light

²¹⁵ Chandler, From Kosovo to Kabul, p. 5.

²¹⁶ Chandler, From Kosovo to Kabul, p. 63.

²¹⁷ Noam Chomsky, “Humanitarian Imperialism: The New Doctrine of Imperial Right”, **Monthly Review**, Vol. 60, No. 4, 2008, p. 23.

²¹⁸ Chomsky, p. 23.

²¹⁹ Chomsky, p. 23.

on the more strategic and interest-based motives of the interveners as happened in Kosovo.²²⁰

In this regard, David Chandler states that the critics of humanitarian intervention questioning the moral aspirations behind the intervention argue that these aspirations are mere pretexts for war. He adds that the moral reason behind the intervention is actually the solution against the political impediment before using force other than self-defense.²²¹

One of the main criticisms on the moral claims for the justness of the humanitarian intervention lies in the fact that Western powers might abuse universal moral values to violate the existing international law. For instance Slavoj Zizek asserts that when morality is not enough to outweigh law, the West produces *fait accompli* policies which violate the international law as happened in Afghanistan.²²² In a similar vein, on another path, Ken Booth also criticizes the hypocrisy of the great powers. He states that governments recognize the boundaries of laws when obeying them conforms to their interests. If not, they ignore or violate them with pretexts.²²³

Afghanistan and Kosovo constitute both a similarity and a stark contrast in the acceptance of intervention as a violation of state sovereignty. They are both violations of the international legal principle of non-intervention. However, resorting to force was initially based on different premises in two situations. Afghanistan was not considered as a case of humanitarian intervention in the previous chapter. However, it is being used as an example to show the difference for the reception of the moral assertion by the international community. In Afghanistan case, the original motive was self-defense and retaliation. It was the security of the US which was at stake. Upon the 9/11 attacks the Security Council unanimously adopted Resolution

²²⁰ Mohammed Ayoob, "Humanitarian Intervention and International Society", **Global Governance**, Vol. 7, No.3, 2001 (Humanitarian Intervention and International Society), http://findarticles.com/p/articles/mi_7055/is_3_7/ai_n28126063/?tag=content;col1 , (25.08.2010).

²²¹ Chandler, *From Kosovo to Kabul*, 107.

²²² Slavoj Zizek, **The Fragile Absolute or, Why is the Christian Legacy Worth Fighting For?**, Verso, London, 2000, p.56.

²²³ Ken Booth, "Military Intervention: Duty and Prudence", **Political Quarterly, Special Issue: Military Intervention in European Conflicts**, ed. Lawrence Freedman, Blackwell, Oxford, 1994, p. 57.

1368 on 12 September 2001. Shortly, it stressed that every organization, government, nation and person related to the attacks would be held responsible for the crime, as George W. Bush also stated in his own public statement after the attacks.²²⁴

On October 7, the US informed the UN that it would initiate operation in Afghanistan in order to end the Al-Qaeda activities and Taliban existence in the country.²²⁵ The US operation, “Operation Enduring Freedom”, was originally depicted as an act of self-defense in the form of a pre-emptive war.

Nonetheless, the US also used the humanitarian discourse as it is seen in the letter submitted by Washington to the UN Security Council: “...In addition, the United States will continue its humanitarian efforts to alleviate the suffering of the people of Afghanistan.” There were two major reasons for the US administration’s use of humanitarian discourse: to induce the Afghan people to give support to its operation against Taliban and to create a common motive to keep united the coalition forces who would fight beside the US in Afghanistan.²²⁶ However, there were two points which were widely criticized following the operation. The first one was that the US food aid distributed from the air was not sufficient in quantity and quality. The aid was claimed to be a mere “window dressing”. Secondly, the conduct of the operations was also criticized. There was collateral damage inflicted on the civilian targets such as schools, hospitals and even camps of the international relief organizations. This led to the questioning of the operation’s humanitarian side.²²⁷ The use of humanitarian discourse in order to forge an alliance for the US pre-emptive war, which was an act based on self-interest, and to raise Afghan public support for the Allied invasion increased the doubt of moral abuse within the international community.

²²⁴ Simon Chesterman, “Humanitarian Intervention and Afghanistan”, **Humanitarian Intervention and International Relations**, ed. Jenniffer M. Welsh, Oxford University Press, New York, 2004, p. 164.

²²⁵ Chesterman, p. 166.

²²⁶ Chesterman, p. 163.

²²⁷ Chesterman, p. 166.

After long years of war and deaths, the current situation in Afghanistan is still uncertain.²²⁸ The coalition forces could not achieve their target to eliminate the Taliban regime,²²⁹ despite inflicting heavy injuries on it. However, the latest signs are that Taliban is inclined to reach an agreement to end the war in Afghanistan and to depart with Al-Qaida.²³⁰ Nonetheless, the situation is still uncertain and the fight may continue even if the Taliban departs with Al-Qaida, as Al-Qaida continues to exist in Afghanistan and Pakistan's adjacent regions.

As mentioned in the previous chapter, Kosovo case can also be considered as an intervention against state sovereignty. Shortly, after the Dayton Agreement and the settlement of Bosnian independence along with that of the Slovenians and the Croatians, Kosovo Albanians had also expectation of autonomy, at least. However, no commitments or settlement were made for the subject. The KLA took up arms against Serbian police and militia in order to provoke Serbian retaliation on Kosovo. As the Serbian police and militia inflicted harsh blows on the KLA, and initiated a substantive operation into Kosovo, intentionally targeting the civilians, the NATO warned Belgrade administration to stop violence and attend the Rambouillet Talks. However, as Serbs left the table and carried on genocidal actions, the NATO initiated an air campaign which would last for about 78 days. After that, Serbia accepted to sign The Rambouillet Agreement. During the air campaign NATO also hit many civilian targets, causing significant collateral damage from the air.²³¹

Although there are similar elements in these two cases like the violation of another state's sovereignty, hitting civilian targets and deployment of humanitarian discourse, the debate on Kosovo intervention of the NATO focused on different factors. In contrast to the war in Afghanistan, the main theme of debates after Kosovo was not morality, but legality versus legitimacy. After Kosovo intervention, the Independent International Commission on Kosovo initiated a substantive review

²²⁸ "Central & South Asia Report: 2010 Worst for Afghanistan", 20.07.2010, **Al Jazeera**, <http://english.aljazeera.net/news/asia/2010/07/201071292938573363.html> (15.10.2010).

²²⁹ Timothy Bancroft-Hinchey, "The Worsening Situation in Afghanistan", 11.08.2010, **Pravda**, http://english.pravda.ru/hotspots/conflicts/11-08-2010/114577-situation_afghanistan-0/ (26.10.2010).

²³⁰ "Separating the Taliban from al Qaeda", 07.02.2011, **Ethiopian Review**, <http://www.ethiopianreview.com/news/201003/?p=3792> (23.02.2011).

²³¹ "World: Europe Nato bombs hit hospital", 07.05.1999, **BBC Online Network**, <http://news.bbc.co.uk/2/hi/europe/337989.stm> (09.08.2010).

of the intervention and the outbreak of the conflict. The commission criticized both the diplomacy prior to the intervention and the methods of intervention. However, the commission found the NATO's intervention illegal for violating the UN Charter, but legitimate with regard to the motives of the interveners, and called for state action to close the gap between the legitimacy and the legality of humanitarian intervention.²³² It should be noted that the FRY applied to the International Court of Justice (ICJ) asserting that the NATO intervention into its territory was illegal on the grounds that there was no authoritative Security Council resolution and that the NATO attacks caused many civilian deaths, which had to be considered as genocide. However, the ICJ rejected the FRY's bid due to "provisional measures" by 12 to 4 votes and added that it would decide on later whether the ICJ has jurisdiction on the issue or not.²³³

This comparison between the two cases show that if it is predominantly believed (although there are also opposite views) that the primary motives of the actors are just and humanitarian, interventions are not regarded as moral abuse of humanitarianism.

However, according to another view as represented by Alex J. Bellamy such a deduction solely depending on the motives to judge the morality aspect is not plausible. Bellamy depicts three problems associated with the issue of motive-oriented action.

Firstly, humanitarian intervention does not fit into the realist understanding that states should not risk their own citizens in order to save strangers.²³⁴

Secondly, motives can be abused by the state leaders in order to justify their military aggression.²³⁵ A crucial example is provided by E. A. Heinze in his article

²³² Aidan Hehir, **Humanitarian intervention after Kosovo: Iraq, Darfur and the record of global civil society**, Palgrave Macmillan, Basingstoke, 2008 (Humanitarian intervention after Kosovo), pp. 47-48.

²³³ A. J. R. Groom and Paul Taylor, "The United Nations system and the Kosovo crisis", **Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action and International Citizenship**, eds. Albrecht Schnabel and Ramesh Thakur, The United Nations Press, New York, 2000, p. 310.

²³⁴ Alex J. Bellamy, "Motives, Outcomes, Intent and the Legitimacy of Humanitarian Intervention", **Journal of Military Ethics**, Vol. 3, No. 3, 2004 (Motives, Outcomes, Intent and the Legitimacy of Humanitarian Intervention), p. 223.

“Maximizing Human Security: A Utilitarian Argument for Humanitarian Intervention”. In that article, Heinze refers to the allied invasion of Iraq in 2003. Following their failure to find the weapons of mass destruction (WMD), the US-led alliance shifted their discourse and described themselves as the rescuers of Iraqi people from the sufferings caused by Saddam regime. Thus, the main reason to topple the Saddam regime was later on claimed to be humanitarianism, although the original motive was self-defense via a pre-emptive war. At the time of intervention, despite the ongoing authoritarianism of Saddam’s rule, there was not a gross and imminent violation of human security.²³⁶ Thirdly, according to Bellamy, focusing on motives may cause negligence on the possible outcomes of an intervention.²³⁷

The question raised by those who prioritize outcomes of the action over motives is “Does the motive of a military action matter when it brings about humanitarian good?”²³⁸ In terms of the motives versus outcomes debate, the point is that sole motive- or sole outcome-oriented approach has problems of its own. The good motives may not always result in human goods. And humanitarian good may not always be generated out of good motives. A state may conduct illegal, bad or inhuman acts towards a community, which bring about human good. States may attempt to cover their inhumane conducts and abusive motives through the unintentionally obtained humanitarian good. In this regard, Heinze criticizes the sole dependence on outcomes as a legitimizing factor of intervention. In the previous chapter, the case of Vietnamese intervention in Cambodia was given as an early case of humanitarian intervention whose outcome led to the change of Pol Pot regime and freed Cambodian citizens from its tyranny, as referred by Wheeler.²³⁹ Heinze states that allowing states to act with the confidence of consequent regime change would allow partisan, warmonger behavior to topple the enemy regime.²⁴⁰ The solution for the question of motives-outcomes debate might be to employ the ‘doctrine of double effect’ of Thomas Aquinas. According to that, as explained in the previous chapter,

²³⁵ Bellamy, *Motives, Outcomes, Intent and the Legitimacy of Humanitarian Intervention*, p. 223.

²³⁶ Heinze, *Maximizing Human Security*, p. 295.

²³⁷ Bellamy, *Motives, Outcomes, Intent and the Legitimacy of Humanitarian Intervention*, p. 223.

²³⁸ Bellamy, *Motives, Outcomes, Intent and the Legitimacy of Humanitarian Intervention*, p. 217.

²³⁹ Wheeler, *Saving Strangers*, pp. 81-86.

²⁴⁰ Heinze, *Humanitarian Intervention: Morality and International Law*, pp. 473-474.

good motives should lead to good results and good outcomes should follow good motives.²⁴¹

The difference between the intentionally achieved good and accidentally achieved good must be distinguished. However, such a separation requires concrete evidence in order to test the consequence of the behavior. Such data cannot be observed explicitly. It might be derived through discourse analysis of leaders' statements and the set of actions held by the state. However, even with explicit statements of leaders, one cannot be sure about the real intentions. There might be deeper plots within the state policies. However, this does not weaken the assumption of Aquinas. When the state publicly announces its intention, and obtains the intended good, the legitimacy of intervention is considerably strengthened. On the other hand, in case of an obtained good, which is an accidental result of an action which is not related to humanitarian concerns and where there is not a public intention for the good, the case for legitimacy will be much more dubious than the former case and remain weak.

On the other hand, if a good intention does not bring the target good for many reasons like unproportional use of force, lacking enough commitment or resources and etc., the intervention cannot be regarded as legitimate. Though, every variable cannot be calculated in the course of intervention, this will cause the states to take more points into their consideration and prevent them from embarking on adventures the results of which are not clear enough.

B. Proportionate War

Any use of force should be proportionate to achieving the humanitarian purpose and carried out in accordance with international law. We should be sure that the scale of potential or actual human suffering justifies the

²⁴¹ Bellamy, Motives, Outcomes, Intent and the Legitimacy of Humanitarian Intervention, p. 228.

*dangers of military action. And it must be likely to achieve its objectives.*²⁴²

As depicted in the first chapter, proportionality is a criterion of just war thinking in order to regulate *jus in bellum*, the conduct of war. When proportionate use of force is at issue, the consideration is that “the means deployed in fighting a war must be proportionate to ends.”²⁴³ In other words, the force used to stop a violation of human security or to halt suffering of people should not cause greater suffering and remain limited as much as possible.²⁴⁴ In addition, such force should be deployed for a period required for the accomplishment of desired ends, not longer.²⁴⁵

Another meaning of the proportionality, in terms of Just War criteria based on Thomas Aquinas’s ‘Double Effect Doctrine’ is that a war or an action on behalf of humanitarianism, in the modern sense, should generate greater good than the targeted evil. Although, Iraq is a contentious case for humanitarian intervention, there is a point in the historical course of the conflict. After the first Gulf War in 1991, economic sanctions were deployed to get the Saddam Hussein regime to comply with the demands of the international community. However, they eventually inflicted greater harm on the people than on the regime, as they deprived people from the essential nutrition and medicine, and caused the death of nearly 500.000 children under five years old until 2003.²⁴⁶ And the international community insisted on the continuance of the sanctions regime despite the deaths and the spread of disease as well as the success of Saddam Hussein to remain in power.²⁴⁷

Concerning the use of force, the intervening force in a humanitarian intervention, different from a war in which the main target is to destroy the opponent

²⁴² Robin Cook, “Guiding Humanitarian Intervention”, 19.07.2000, **Speech In American Bar Association Meeting**, <http://www.fco.gov.uk> (20.09.2010).

²⁴³ Elshtain, p.6

²⁴⁴ Elshtain, p.8

²⁴⁵ Aidan Hehir, Humanitarian intervention after Kosovo, p.21.

²⁴⁶ Souad N. Al-Azzawi, “Violations of Iraqi Children's Rights”, **Global Research**, 19.03.2010, <http://www.globalresearch.ca/index.php?context=va&aid=18205> (22.02.2011).

²⁴⁷ Alex J. Bellamy, “Ethics and Intervention: The ‘Humanitarian Exception’ and the Problem of Abuse in the Case of Iraq”, **Journal of Peace Research**, vol. 41, no. 2, 2004 (Ethics and Intervention), p. 137.

forces, aims to stop the suffering of innocent people, establish peace and restore the rule of law. Then, the intervening force should plan and foresee the necessary and proportionate force required to meet the desired ends.²⁴⁸

Since the criterion of proportionality requires achieving more good than causing more harm as a consequence of resorting to force, it necessarily embodies certain consequentialist traits.²⁴⁹ As shown in the previous section, in terms of the consequentialist evaluation of humanitarian intervention it is the humanitarian gains through which the success, legitimacy or morality of an intervention are weighed. That criterion approaches the morality issue from a utilitarian perspective in that when more harm is caused than the aimed good, the time and resources for the operation are considered to have been wasted in vain.²⁵⁰

Mona Fixdal and Dan Smith suggest that it would be more reasonable for an actor or group of actors to consider the consequences in terms of doing good or harm with as much detailed calculation as possible. Such calculation may include a “feasibility test”, which is similar to the SWOT analysis in business management, in order to examine the existing strengths, facilities, and capabilities.²⁵¹ Nevertheless, Michael Walzer criticizes the notion of calculation as he states that it is almost impossible to have an accurate calculation of good and harm that are probably to come out of an intervention. This is because the main predictions are made through the variables which are based on non-mathematical values such as “the value of a country’s independence against the value of the lives that might be lost in defending it.”²⁵² The same point is also highlighted by Heinze in his reference to the disposal of the Saddam regime in Iraq. He argues that it cannot be known in advance whether the regime change by foreign intervention into a country will bring good or more

²⁴⁸ James Pattison, **Humanitarian Intervention and the Responsibility to Protect Who Should Intervene?**, Oxford University Press Inc., New York, 2010 (Humanitarian Intervention and the Responsibility to Protect), p. 106.

²⁴⁹ Fixdal and Smith, p.304.

²⁵⁰ Fixdal and Smith, p.305.

²⁵¹ Fixdal and Smith, p.305.

²⁵² Walzer, pp.89-90.

harm. He adds that the situation would improve if a stable government could be established in the place of the deposed government.²⁵³

In modern warfare, the most important problem in disproportionate use of force has been the air campaigns with their targeting of essential civilian structures, inflicting collateral damage and causing high civilian deaths.²⁵⁴ As mentioned in the previous chapter, the NATO's 1999 intervention to Kosovo was much criticized because of its violation of the principle to use proportionate force and its causing more harm than the desired good.²⁵⁵ In that intervention there are three points that do not benefit the perspective of morality: i) the use of force harmed the civilians; ii) the action caused more harm rather than suspending it; iii) the interveners gave priority to the lives of their own soldiers to the detriment of those that needed help. The first and the last points in particular are closely interwoven.

To start from the last point, it concerned the NATO commanders' decision to employ high altitude bombing over 15,000 feet and their reluctance to deploy land forces to repel Serbian forces from Kosovo.²⁵⁶

As to the first point, the conduct of the bombing campaign in Kosovo, there are contentious views. For instance, Hugh Walker refers to the presence of military lawyers during the campaign and their adherence to the fourth Geneva Convention which prohibits damaging civilian targets. Walker adds that the precision-guided missile technology also had great contribution to the campaign. It was claimed that 99 % of the missiles hit their targets. Independent International Commission on Kosovo (IICK) also acknowledged this claim and found no proof for deliberate targeting of the civilians.²⁵⁷ According to this view, the absence of any proof for the intentional targeting of the civilian targets as well as the use of precision guided

²⁵³ Eric A. Heinze, "Humanitarian Intervention and the War in Iraq: Norms, Discourse, and State Practice", *Parameters*, Spring 2006, p. 28.

²⁵⁴ Ann Orford, **Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law**, Cambridge University Press, Cambridge, 2003, p.12.

²⁵⁵ Allen Buchanan, "Reforming the International Law of Humanitarian Intervention", **Humanitarian Intervention: Ethical, Legal, and Political Dilemmas**, ed. J. L. Holzgrefe and Robert O. Keohane, Cambridge University Press, Cambridge, 2003, p.159.

²⁵⁶ Hugh Walker, "The Case of Kosovo", *Civil Wars*, Vol.7, No.1, 2005, p. 46.

²⁵⁷ Walker, p 47.

weaponry points to the calculation of “means and ends” before the intervention.²⁵⁸ On the other hand, Grant argues that the NATO could overcome the problem of intentional targeting of Serbian civilian targets during the air campaign by referring to Article 52 (2) of Protocol I of the Geneva Convention. According to that article, when a means offered “a definite military advantage” to secure the end (in the Kosovo case, one of the aims of the military campaign was to get the Serbian administration to attend the Rambouillet Talks), that means would be used.²⁵⁹ However, the NATO representatives did not describe the NATO action as a means fitting into the provision of Article 52 (2). On the other hand, the International Criminal Tribunal for the Former Yugoslavia (ICTY) considered that point while deciding on the accusations against the NATO intervention by the Serbian government when it decreed that no more investigation was required against the interveners. The same was also considered by the Independent International Commission on Kosovo (IICK). However, these clarifications were made under the heading of the causes of intervention, not the use of means. And in relation to the subject, Walker also confirms the uncertainty on the issue of selection of the “means employed”.²⁶⁰

For the second point, concerning the issue of relative benefit/harm resulting the intervention, the views are also contentious. Firstly, the criticisms made against the NATO intervention to Kosovo focus on the point that the air campaign got Milosevic to force thousands of Kosovar Albanians to leave their homes. And this negative result is coupled with the fact that the attack on civilian infrastructure also caused harsh living conditions for the civilian population in the region, aggravating the aggregate wellbeing of people.²⁶¹ However, this view is encountered with another, as of Jane Stromseth. She argues that the aim of generating greater good was achieved by Kosovo intervention as people no more suffer, and a new government

²⁵⁸ Walker, pp. 46,47.

²⁵⁹ Walker, p.48.

²⁶⁰ Walker, pp. 48,49.

²⁶¹ Mient Jan Faber, “Peace, Human Rights, and the Moral Choices of the Churches”, **A Matter of Principle: Humanitarian Arguments for War in Iraq**, ed. Thomas Cushman, University of California Press, London, 2005, p. 164.

came to power for the administration of Kosovo.²⁶² According to this view, intervention is inevitable for accomplishing greater humanitarian good and some casualties should be tolerated. The clearest words to describe this stance were expressed by Jamie Shea, a spokesperson of NATO, in a speech on just war in 1999: “The ulcer cannot be removed from the stomach, unless the patient is operated upon.”²⁶³

C. Saving Soldiers or Saving Strangers?

Another debate which is closely related with the previous debate of proportionality is the question of whether states should risk the lives of their own soldiers to save strangers.

One of the criticisms made against humanitarian intervention is that states should not risk the lives of their own soldiers or bear economic costs for the sake of people other than their own.²⁶⁴ This view derives from the realist idea that states act only upon their national interest with a sound calculation of the gains and losses. In a calculation on intervention, the gains are the acquired interest, while the losses concern, among others, the lives of soldiers and economic costs. From that perspective since states are only responsible for the security of their own citizens and intervening for humanitarian reasons only does not serve national interest, humanitarian intervention is unacceptable.²⁶⁵ And even if it is accepted that states have the right or duty to employ their soldiers and resources for humanitarian intervention, not all states are granted the right. The state to intervene should have the necessary capability and resources to act, otherwise it would bring more harm than the desired good.²⁶⁶ The inefficiency of interveners has been at issue for the

²⁶² Jane Stromseth, “Rethinking Humanitarian Intervention: The Case for Incremental Change”, **Humanitarian Intervention: Ethical, Legal, and Political Dilemmas**, eds. J. L. Holzgrefe and Robert O. Keohane, Cambridge University Press, Cambridge, 2003, p. 249.

²⁶³ Faber, pp. 163-164.

²⁶⁴ Wheeler, *Saving Strangers*, p. 30.

²⁶⁵ Bellamy, *Humanitarian Intervention and the Three traditions*, p.10.

²⁶⁶ Pattison, *Humanitarian Intervention and the Responsibility to Protect*, p.17.

African Union (AU) interventions in Darfur, where the AU proved its inefficiency to stop killings. According to Wheeler, if one accepts the realist premise of using forces and resources only for the national interest, then there will be no solution in that debate.²⁶⁷

Foreign military intervention has always been a policy tool whether it is held for self-defense, aggression or humanitarian purposes. Since the government risks the lives of its own soldiers, citizens, then the intervention should have an interest at its core.²⁶⁸

Allen Buchanan differentiates between the internal and external legitimacy of an intervention. For external legitimacy, the intervention should be accepted by the target community as well as the international community. As for the internal legitimacy, it has two dimensions. Buchanan describes the internal legitimacy as ‘the discretionary association’. It holds that a government and its citizens have responsibilities to each other. Government is responsible for the well being of its own citizens and cannot deploy its soldiers in risky humanitarian missions. Acting otherwise is not considered legitimate in this regard. On the other hand, citizens confer some of their rights to the state with the expectation that their security will be ensured. Soldiers are also part of those citizens and share a similar expectation. The state should use its soldiers for the purpose of self-defense. If it acts on motives other than self-defense, it is against this social contract.²⁶⁹

Similar to Buchanan’s view on internal legitimacy, James Pattison states that a humanitarian intervention, which aims at improving the human security in the target country, decreases the security of its citizens, soldiers. Then the state loses internal legitimacy on performing humanitarian intervention.²⁷⁰

²⁶⁷ Wheeler, *Saving Strangers*, p.31

²⁶⁸ Jeffrey Pickering and Emizet F. Kisangani, “Political, Economic, and Social Consequences of Foreign Military Intervention”, **Political Research Quarterly**, Vol. 59, No. 3, 2006, p.367.

²⁶⁹ Allen Buchanan, “The Internal Legitimacy of Humanitarian Intervention”, **The Journal of Political Philosophy**, Vol. 7, No. 1, 1999, pp.73-75.

²⁷⁰ James Pattison, “Legitimacy and Humanitarian Intervention: Who Should Intervene?”, **The International Journal of Human Rights**, Vol. 12, No. 3, 2008 (Legitimacy and Humanitarian Intervention), p. 400.

On the other hand, the above view based on the rationalist and especially realist reasoning is not the only one and the following statement might be considered and should be noted as an important questioning of the realist view: “If states are presumed to only engage in humanitarian action to defend or advance their interests, then questions regarding the legitimacy of risking soldiers’ lives to save strangers should never arise.”²⁷¹ If today states by militarily intervening are provoking the realist arguments of irrationalism and internal illegitimacy, then they should not be acting out of pure self-interest but humanitarian reasons.²⁷²

Michael Walzer also states that there is a difference between the soldiers who fight to defend their own country and the humanity. Those fighting for the sake of humanity may not prefer (if they could have chosen) to risk their lives when compared to fighting for their own country.²⁷³ Moreover Walzer argues that leaders should not require soldiers to sacrifice themselves for the sake of strangers. However, if combatants are free of such a risk, then intervention to stop human suffering can be possible. Walzer states that the guided missiles, along with the long-range weapons preventing hot contact between armies of the intervening and target states, enable interventions with lesser risks for the lives of soldiers. He adds that such a war without the risk of a counter attack does not also infringe the just war principles as long as civilians are not harmed.²⁷⁴ Although this view cannot legitimize the wrongs in the Kosovo intervention, it may cast light on the problem and contribute to a possible solution.

Fernando R. Teson also detects the problem with humanitarian intervention concerning the risk it poses to soldiers’ lives. He states that regularly conscripted soldiers, in line with the social contract that define the mutual responsibilities of the state and the citizen, will fight for the defense of the state and to pursue its interests. However, they will not be eager to fight to save lives that do not belong to their

²⁷¹ Luke Glanville, “Norms, Interests and Humanitarian Intervention”, **Global Change, Peace and Security**, Vol. 18, No. 3, 2006, p. 163.

²⁷² Glanville, p. 163..

²⁷³ Walzer, p. 16.

²⁷⁴ Walzer, p. 16.

fellow citizens.²⁷⁵ Teson's suggestion is to deploy voluntary armed forces in humanitarian interventions. Such troops will not question their involvement in the action since that will be their reason to join the armed forces.²⁷⁶

The last problem on the dilemma between saving soldiers and strangers is that the public reaction to the soldiers' death is an important reason in deciding to act or not. The US government lost its interest in the intervention to Somalia after losing its soldiers in Mogadishu in 1993, the event which became the topic for Hollywood movies.²⁷⁷ The US intervention in Somalia was initially problematic. The US miscalculation of threats and losses led to the perceptual failure of the intervention. The US planners could not foresee that their own soldiers might be targeted and give casualties.²⁷⁸

The casualties in Somalia marked the beginning of the disengagement policy of the US and the other governments vis-à-vis the humanitarian crises.²⁷⁹ Governments who responded to the events in Rwanda in 1994 prioritized the safety of their military and civilian staff over that of the Rwandan people. For instance, following the onset of the genocide, ten Belgian peacekeepers were killed on 14 April 1994, prompting the Belgian government to decide to withdraw its troops. Then, although Roméo Dallaire, the commander of UNAMIR, declared that around 5.000 troops were required to stop the genocide, the Security Council decided to leave only 270 troops in Rwanda and limit the mandate.²⁸⁰ Such disengagement and reluctance to act were also observed by the late and limited intervention in Bosnia in 1995, Kosovo in 1999 and Darfur in 2003.

The leaders' disinterest in deploying troops to the emergencies is also based on the fact that they do not want to lose the support of their constituencies for risking the lives of soldiers. On the one hand, one can talk about the 'CNN effect' which

²⁷⁵ Fernando R. Teson, "The Liberal Case for Humanitarian Intervention", **Humanitarian Intervention: Ethical, Legal, and Political Dilemmas**, eds. J. L. Holzgrefe and Robert O. Keohane, Cambridge University Press, Cambridge, 2003, p.127.

²⁷⁶ Teson, p. 127.

²⁷⁷ Robert O. Keohane, "Political Authority After Intervention: Gradations in Sovereignty", **Humanitarian Intervention: Ethical, Legal, and Political Dilemmas**, eds. J. L. Holzgrefe and Robert O. Keohane, Cambridge University Press, Cambridge, 2003, p.275.

²⁷⁸ Glanville, p. 167.

²⁷⁹ Kent, p. 855.

²⁸⁰ Orford, pp.100-101.

refers to the public pressure on the government to act when the scenes of suffering people are displayed on the media. However, when the news of casualties (dead and/or injured soldiers) arrive, then people begin to criticize the intervention in question and quit supporting it.²⁸¹

The debate of saving soldiers or strangers has been a contentious issue regarding the morality of the intervention since the Somalia intervention of the US, and it has been intensified by the Kosovo intervention. And if the question of humanitarian intervention is to be resolved, this issue cannot be ignored.

D. Provoked Masses, Abused Interveners

In “The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans”, Alan J. Kuperman mentions an ignored or much abused moral problem of humanitarian intervention.²⁸² According to him, with the increasingly deterrent effect of the emerging norm of humanitarian intervention against genocidal action, minorities have been encouraged to act against the host state even if they are under a threat of brutal retaliation. On the other hand, it is generally the case that a humanitarian intervention cannot fully protect the rebels.²⁸³

This problem which Kuperman calls as ‘the moral hazard of humanitarian intervention’ has its roots in the economy. According to that concept, actors who are under protection against the market risks (generally through insurances), act more recklessly than those who are under risk without any insurance. Likewise, the possibility of diplomatic or military intervention encourages secessionist movements even though they are exposed to the threat of the use of disproportionate force by the

²⁸¹ Steven Livingston, “Media Coverage of the War: An Empirical Assessment”, **Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship**, ed. Albrecht Schnabel and Ramesh Thakur, The United Nations University Press, Tokyo, 2000, p.376.

²⁸² Alan J. Kuperman, “The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans”, **International Studies Quarterly**, Vol. 52, 2008, pp. 49-80.

²⁸³ Kuperman, p. 49.

host state.²⁸⁴ According to Kuperman, the moral hazard has two dangers. Firstly, it causes irresponsible movements and decisions of the group leaders. Since they are provoked by the possibility of the humanitarian intervention in favor of their cause, the rebels take up arms with a view to secessionism without calculating their losses or, at least, they consider as reasonable the possible losses to arise from retaliation. They believe that they will achieve freedom under the protection of humanitarian intervention.²⁸⁵

Secondly, the rebels may deliberately provoke the intervention of outside actors, abusing it for their own cause. They may attack the government's forces to induce retaliation, which will create an environment where civilians are likely to suffer. Such a scenery will draw international reactions and is likely to be followed by an intervention.²⁸⁶

Concerning the Bosnian declaration of independence, Izetbegovic and other political figures of Bosnian Muslims initially did not opt for the independence. They negotiate with the Bosnian Serb and Belgrade administration. However, after ten days, the Bosnian Muslims left and renounced the negotiations and began to arm themselves, although the Serbian army was much more powerful than them.²⁸⁷ According to Kuperman, the power inequality between the parties was so obvious that there was no room for miscalculation of losses, but the Muslims did not withdraw. The answer to this policy change might be found in the sentences of Izetbegovic as he addressed the parliament on 14 October 1991: "Will we accept peace at any price in Bosnia, bend our heads once and for all, because of peace accept an inferior position for the next 15 years, or shall we say, we want sovereignty, risking a conflict?"²⁸⁸ According to Kuperman, the possible loss of the Muslims was considered as reasonable to attract the attention of the international community to intervene in the region and the Muslim leadership continued in this way which ended up as it was told in the previous chapter.²⁸⁹

²⁸⁴ Kuperman, p. 50.

²⁸⁵ Kuperman, p. 51.

²⁸⁶ Kuperman, p. 51.

²⁸⁷ Kuperman, p. 57.

²⁸⁸ Kuperman, p. 59.

²⁸⁹ Kuperman, p. 60.

In Kosovo, the issue of moral abuse is much more evident. Until 1997, Kosovar Albanians enjoyed somewhat de facto autonomy as they could hold their own elections and maintain their own education system through peaceful policies of Ibrahim Rugova. This period ended with Kosovo Liberation Army's (KLA) attacks on Serbian police as it was retaliated by Belgrade.²⁹⁰ The rebellion cannot be explained through miscalculation of Serbian retaliation. And at that time, there was no sign of Serbian genocide as the setting was peaceful until KLA started its attacks.²⁹¹ Kosovar Albanians also did not expect to ruin the Serbian army by themselves.²⁹²

Briefly, the peaceful stance of the Kosovo administration was actually a strategy. Since, they did not have the military power, they had to remain peaceful.²⁹³ Meanwhile, the KLA ranks were aware of their weakness and started to believe that they had to gain international support for independence, which can be inferred from their statements. They had too limited access to arms until 1997 when they could provide the necessary weapons from Albania. After that date, KLA began to act in order to provoke retaliation of the Serbian Army with a view to drawing attention of the international community.²⁹⁴ The NATO has been aware of this problem at least since 1998. During the Kosovo conflict the NATO tried to decrease the violence and they were aware of the fact that their air campaign was initially caused by nothing but the Kosovar aggression. However, nothing has changed or no steps have been taken against this moral abuse since then.²⁹⁵

²⁹⁰ Kuperman, p. 65.

²⁹¹ Kuperman, p. 67.

²⁹² Kuperman, p. 68.

²⁹³ Kuperman, p. 68.

²⁹⁴ Kuperman, p. 69.

²⁹⁵ Kuperman, p. 53.

E. Nirvana Fallacy²⁹⁶

According to the general belief of the pro-intervention side, foreign military intervention into a humanitarian crisis generates more good than non-intervention. However, when the data on the successful humanitarian intervention is analyzed, it is seen that the result has not always been a success. It should be noted that a successful intervention not only means the cessation of inhumane behavior that shocks the human conscience, but it also includes the reconstruction of the institutions and the society in order to prevent the suffering from happening again. Accordingly, as an example, only 26 % of the US interventions and initiatives to reconstruct the institutions have been successful since the late 19th century.²⁹⁷

There is a tendency among the governments that are unable to distribute the necessary security and human goods that these tasks can be met better by foreign governments, although this is not true. This is called ‘Nirvana Fallacy’, which is mainly observed in regions where central government cannot function properly or totally failed. Such an assumption ignores several possibilities including that foreign intervention may not succeed; that efforts may culminate in more harm than the designed good; and that local government may establish or modify institutions better than foreign governments.²⁹⁸

This problem, though not much covered in the literature, is an important impediment for the development of regional intergovernmental institutions, which can take action on humanitarian emergencies, and complicates a legitimate solution as target governments tend to underestimate their capabilities or tend not to take the trouble to act while the West is waiting out there to intervene.

²⁹⁶ Christopher J. Coyne, “Reconstructing Weak and Failed States: Foreign Intervention and the Nirvana Fallacy”, *Foreign Policy Analysis*, Vol. 2, 2006, p. 344.

²⁹⁷ Coyne, p. 344.

²⁹⁸ Coyne, p. 344.

F. Inability or Reluctance to Intervene?

The debate on the inaction or selective response of states to humanitarian conflicts is one of the most contentious topics, which concerns the morality and legitimacy of humanitarian intervention. The inaction or selective responses of the Western powers to humanitarian crisis have been a question since the end of the Cold War.²⁹⁹

As for the selectivity problem, the main issue seems to be the question of whether an intervention is held out of genuine humanitarian motives. The criticism is that targets for intervention are selected on the basis of the national interests such as strategic gains or losses. For instance, a Western state would not intervene in a country which is a strategic ally or partner, or an important market.³⁰⁰ Unfortunately, as explained above, the real motives can never be known.

David Chandler analyzed the reactions of the US to the human rights violations around the world. He states that the US would voluntarily take the lead to condemn or sanction states such as Cuba, Iran, Iraq, Libya, North Korea, Serbia, Sudan and Syria, while it does nothing against those in Egypt, Israel, Mexico, Saudi Arabia, since it considers doing so against American interests.³⁰¹ A similar and directly related comparison is the NATO's Kosovo intervention and the non-intervention into Sudan. Kosovo as a country in Europe had to be settled, otherwise the Western powers would have been accused for having failed to clean their own backyard. However, the Sudanese case involved neither the prestige nor the security of the West in a significant way.³⁰² The selective response of the West to Kosovo and Sudan provoked three sarcastic criteria: in order for the Americans to intervene, those being killed should be white Europeans; the target state which causes the

²⁹⁹ Jens Bastian, "Humanitarian Intervention: Ethics and Legal Aspects", **Southeast European and Black Sea Studies**, Vol. 5, No. 1, 2005, p.147.

³⁰⁰ Nicholas J. Wheeler, "Decision-making Rules and Procedures for Humanitarian Intervention", **The International Journal of Human Rights**, Vol.6, No.1, 2002 (Decision-making Rules), p.133.

³⁰¹ Chandler, *From Kosovo to Kabul*, p. 85.

³⁰² Coady, p. 261.

human suffering should not be an American ally; and there should be intense media coverage of the intervention.³⁰³

Thus, the Western intervention record and the inconsistency of these interventions clearly reveal that the West has selectively intervened so far. The main reason of this selectiveness is the lack of large resources.³⁰⁴ And as Wheeler suggests, the possibility of selective (abusive) response can never be eliminated from the practice.³⁰⁵ However, the basis on which the West chooses its targets to intervene is still cannot be explained truly. Then the question which should be asked again is: ‘how the selection is driven?’ or ‘what causes states to ignore a case and to intervene in another?’

The authorization process of the intervention is also claimed to be selective or unequal. Here, the problem is that the resolution which authorizes the humanitarian intervention is taken by the Security Council members and especially with the influence of the Permanent-5 (P-5). Then, if a P-5 member commits humanitarian crimes, it will be invulnerable against any resolution by its veto power or it will veto any resolution against its interests.³⁰⁶

As a point concerning both morality and legitimacy, the essence of selectivity problem lies within this core moral question: ‘are those saved more human or precious than those who are not?’³⁰⁷ The main criticism on the selectivity problem is that it is not applied consistently and this shadows the universality claims of intervention. In this regard, the legitimacy of humanitarian intervention cannot be claimed since universality and impartiality are deemed to be the legitimacy criteria of humanitarian intervention. In other words, arbitrary application of a norm damages its moral argument.³⁰⁸

³⁰³ Doug Bandow, “NATO’s Hypocritical Humanitarianism”, **NATO’s Empty Victory : A Postmortem on the Balkan War**, ed. Ted Galen Carpenter, Cato Institute, Washington, 2001, pp. 37-38.

³⁰⁴ Fixdal and Smith , p. 301.

³⁰⁵ Wheeler, *The Humanitarian Responsibilities*, p. 63.

³⁰⁶ Gierycz, pp. 115,117.

³⁰⁷ Pattison, *Humanitarian Intervention and the Responsibility to Protect*, p. 169.

³⁰⁸ Pattison, *Humanitarian Intervention and the Responsibility to Protect*, p. 170.

During the course of this study, it has been observed that almost every scholar acknowledges the existence of selective action whether they support or criticize humanitarian intervention. For this reason, this section looks at the rationale that is put forth. In this regard one can identify four main reasons that are given for the selectivity issue: humanitarian intervention is a voluntary duty but not an obligation; intervention is interest-driven; scarce resources; and outcomes of intervention.

First of all, in terms of legal arguments, although the legality of humanitarian intervention is another source of conflict per se, it is claimed that humanitarian intervention norm only casts a duty which will be performed on voluntary basis. According to J. L. Holzgrefe, unauthorized humanitarian intervention is a permissive norm, meaning that it allows the members of the international community to act, but it is not a mandatory norm obliging them to act on humanitarian crisis. He argues that unauthorized humanitarian intervention can hardly be considered as customary law, and the selectivity problem renders that even more difficult. The problem of not being accepted as customary law can be clearly seen in the UN General Assembly Resolutions, which denies such an unauthorized right to intervene.³⁰⁹

Another reason for the occurrence of selectivity is tied to the scarce resources of the interveners. It is argued that while there is a continuous rise in the human rights violations, the states capable of intervening remain the same in number and with the same resource availability. Then these states will have to pick out from among the cases as it is impossible to intervene in all cases with limited resources. Selection is inevitable.³¹⁰ Alex J. Bellamy and Paul D. Williams also comment that for an immediate reply to stop human violations more states can be found in terms of a military intervention. However, since the peace-building and the restructuring of economic and social facilities will require more resources after the emergency phase of the crisis is over, less states will remain as available donors of intervention.³¹¹ Even the UN, which is the legal overseer of any intervention and forceful non-

³⁰⁹ Holzgrefe, pp. 46-47.

³¹⁰ Coady, p.262.

³¹¹ Alex J. Bellamy and Paul D. Williams, "Who's Keeping the Peace? Regionalization and Contemporary Peace Operations", **International Security**, Vol. 29, No. 4, 2005, p. 184.

military intervention around the world, receives “a little fraction of the total military spending” of the world, and its budget is limited.³¹²

Other than the limited resources, the outcome of intervention, which is also a criterion of just war, is considered to be a reason for selective intervention. Accordingly, states may not intervene in the conflicts where more harm than more good is likely to result. This is called moderate instrumentalist approach.³¹³ Therefore, the West does not prefer to engage in conflicts in the third world where its intervention will cause reactions especially in its former colonies, or where there is religious militancy against the West as in the Darfur case, or where regional actors were granted some mandate and expected to end the suffering of people with limited military and economic resources.³¹⁴ The Western states also try to avoid intervening in a country which holds nuclear power out of fear of retaliation and the outbreak of a nuclear war.³¹⁵

An additional point should also be made regarding the outcome oriented view. As well as the envisioned success, the intervention should also be ‘internally effective’. ‘Internal effectiveness’ means that an intervention should not excessively decrease the appropriate level of security and enjoyment of human rights. The soldiers and aid workers of the intervening state may naturally give some losses. However, if these are likely to be excessive, a state may choose not to intervene. Thus the state which has the internal legitimacy will have a strong hand at home to intervene in case of a human rights violation.³¹⁶ The lack of internal legitimacy may lead to non-intervention or limited contribution of the state to a conflict. For example, the appearance on the media of the killed US soldiers in Somalia created “a reverse CNN effect” on the US public, which had previously supported the intervention. This was an important cause of US non-intervention in Rwanda³¹⁷.

³¹² Schmidt, p. 496.

³¹³ Pattison, *Humanitarian Intervention and the Responsibility to Protect*, p. 170.

³¹⁴ Pattison, *Legitimacy and Humanitarian Intervention*, p. 409.

³¹⁵ Pattison, *Humanitarian Intervention and the Responsibility to Protect*, p. 171.

³¹⁶ Pattison, *Legitimacy and Humanitarian Intervention*, p. 400.

³¹⁷ Albrecht Schnabel and Ramesh Thakur, “Kosovo, the Changing Contours of World Politics, and the Challenge of World Order”, **Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship**, The United Nations University Press, Tokyo, 2000, p.2.

Apart from the humanitarian intervention, even the procurement of aid has become selective. For instance, in Bosnia when Milosevic was in power, the EU aid and development programs were provided on a selective basis. The programs excluded the Serbian populated areas from receiving the aids. This selectiveness in aid provision causes a schism in the international relations. While a group of scholars, NGOs and IGO branches strictly criticize the selectivity, another group supports it as a tool of justice.³¹⁸ For Chandler, this shows the change in humanitarianism, from the old one based on the principles of universality and impartiality to the new one based on the partial and selective action.³¹⁹

In conclusion, selectivity, both in intervention and aid programs, is undeniably an existing problem, which is believed to be caused by the reasons cited above. It is related both with the motives and interests, and internal legitimacy problem. They are interwoven and cannot be solved separately. Selectivity problem is a good example describing the ‘Gordian Knot’ of humanitarian intervention.

G. Who Decides?

As mentioned previously, one of the Just War criteria, which mainly drive the humanitarian intervention doctrine, is the existence of a right authority to evaluate the legitimacy of an intervention and to have the final say on the matter.³²⁰ The requirement of the right or legitimate authority to decide on intervention is also one of the subjects of the legal debate. The ‘right authority’ debate was selected as the last topic of this section as a means of transition to the legal debate.

The realist point of view rejects the existence of such a criterion as it entirely rejects the possibility of a legitimate humanitarian intervention. In the realist view, states are the only authority to decide and judge their own actions. International law

³¹⁸ Chandler, *From Kosovo to Kabul*, pp. 46-47.

³¹⁹ Chandler, *From Kosovo to Kabul*, p. 38.

³²⁰ J. E Linter, “Humanitarian Intervention: Legitimising the Illegal?”, *Defence Studies*, Vol. 5, No. 2, 2005, p.273.

cannot be applicable, since there is no authority higher than states in the anarchic international system.³²¹

The requirement for the right authority as today's international body has its roots in the classical Just War thinking provision that the princes of the old, taking their reign from God, had the authority to wage war. Thus, only the wars which were waged to establish the rule of God on earth could be legitimate and just.

At present this authority is regarded as being presented by an international institution, which represents the will of all people in the world. Wheeler and Bellamy think that such an authority is currently the UN. And they argue that UN Security Council resolution should be sought before intervening in a humanitarian emergency. However, they argue that the Permanent Five should leave their veto rights and their national interest concerns aside in cases of humanitarian intervention.³²²

Michael Walzer also points to the UN, as the most suitable international and multilateral decision-maker on humanitarian intervention. This is because, he argues, the UN represents the common will of the largest group of people on earth. However, Walzer also points to the deficiency of the slow bureaucracy in the UN mechanism. This is one of the causes of the delayed reaction or inaction of the UN toward the humanitarian tragedies as well as the veto obstacle of the P-5.³²³ Here the point is that the UN decision making system cannot have a swift, efficient operation in terms of taking a resolution to authorize intervention. Even if the call for the Security Council's meeting is announced on the same day of the conflict's eruption, the resolution can only be obtained after the civilians and/or innocents were injured or killed. On the other hand, the meeting of the Security Council does not provide a guarantee of intervention, given the different security concerns of its members. Among them Russia and China have been historically wary of the possible abuse of humanitarian discourse by the Western powers to intervene into their domestic affairs.

³²¹ Wheeler, *Saving Strangers*, p.2.

³²² Bellamy and Wheeler, *Humanitarian Intervention in World Politics*.

³²³ Walzer, pp. 77-78.

The International Commission on Intervention and State Sovereignty (ICISS) also views the UN as the right authority. However, it states that if the UN fails to act, it is the regional organizations which hold the responsibility to act under Chapter VII of the UN Charter.³²⁴

This view is also shared by Kofi Annan in his report of ‘the UN High-level Panel on Threats, Challenges and Change’ published in 2004:

*We identify a set of guidelines – five criteria of legitimacy – which we believe that the Security Council (and anyone else involved in these decisions) should always address in considering whether to authorize or apply military force.*³²⁵

Those states like Russia and China as well as the non-Aligned Movement, which doubt the humanitarian intervention as a tool for the global dominance of the West, deem the UN as the sole authority to decide on intervention. They oppose any approach which tries to find alternatives to the UN authority. These states accept that the UN system is problematic, and instead of finding or forming an alternative institution, they suggest increasing the political will to intervene. They claim that the main problem is not the lack of authority but the lack of political will when necessary.³²⁶ What these non-Western states mean is that the West should intervene into every humanitarian emergency without discrimination, if it is sincere in its will to help. The problem with this argument is that these states critical of the Western selectiveness ignore the question of scarce resources. The existing resources are simply not enough to intervene in every conflict.

Though there are different views in the literature on the subject of right authority, the problem can be better reflected when two cases are compared. In Rwanda case France was authorized to intervene by the UN Security Council Resolution 929. And prior to the resolution France had declared its decision not to intervene without a resolution. And there is no need to mention the reluctance of the international society to intervene. On the other hand, in Kosovo case where NATO

³²⁴ Linter, *Humanitarian Intervention: Legitimising the Illegal*, p. 274.

³²⁵ Linter, *Humanitarian Intervention: Legitimising the Illegal*, p. 273.

³²⁶ Bellamy, *Whither the Responsibility to Protect?*, pp.151-152.

used force against the Federal Republic of Yugoslavia, the NATO as a regional organization did not seek for a UN resolution due to the fact that Russia and China would use veto if the matter was brought before the Security Council.³²⁷

When combined with the selectivity debate, the problem of intervention without an authorizing UN Resolution bears two views on the reforms. On the one side, there is the view that the humanitarian intervention should be subject to the UN authority, not a regional security institution like the NATO, because regional institutions can act with national interest considerations of their members. On the other side, the belief that the UN is not sufficient to act as an authority is further divided into different sub-views. These views range from the advocacy of the reforming of the UN structure to the one supporting those regional organizations like the EU and the NATO should have the authority to decide. But the main debate between those arguing that the UN or the regional organizations should authorize interventions and those realists claiming that the international system is deprived of an international judge to authorize them still remains.

III. LEGALITY ASSERTIONS

This part will look into the debate on the legality of humanitarian intervention. The historical evolution of the international law was briefly reviewed in the previous chapter. This part shall present the conflicting views of the legality of humanitarian intervention.

The core of the legal debate on humanitarian intervention lies in the gap between the positivist view, which upholds state sovereignty over other things and the naturalist view, which defends a gradual development and change in norms as per the requirements to meet the use of force for humanitarian purposes, as Jennifer M. Welsh states.³²⁸ In other words, the tension is between those who support the positive

³²⁷ Wheeler, *Saving Strangers*, p. 16.

³²⁸ Welsh, p. 503.

law at one side, and those support the natural law on the other.³²⁹ Then, there are two ends of this debate: the rule of sovereignty which is supported by the legal positivist approach and the rule of morality over sovereignty considerations which are supported by the moralist approach.

A) Legal Positivist Approach

According to the strict positivist approach, which takes the UN Charter as the sole source of present day international order along with other binding agreements signed in line with it, the humanitarian intervention is not applicable since the Charter bans intervention into the domestic affairs of other states. This inapplicability begins with the assumption of the international law that all states are equal sovereigns as depicted in Article 2 (1) of the UN Charter.³³⁰ This feature does not suit the rationale behind the humanitarian intervention, because according to the moralist approach intervention can be held upon the decision of those states capable of intervening even if there is no UN authorization. Then the moralist view is not different than the approach which did not respect the sovereignty of the colonial areas in the age of colonialism. Legalist approach strictly criticizes such an attempt to classify the sovereigns and to decide on the sovereign rights of a state. Mohammed Ayoob emphasizes this issue, underlining the illegitimacy as well as the illegality of humanitarian intervention. He maintains that such an approach of delineating the qualities for sovereignty resembles the ‘European Civilizations Standards’ of the 19th century which were deemed a guide for the conferral of sovereign rights.³³¹

As mentioned in the previous chapter, the legalist approach’s focal point is the principle of non-intervention. And the conflict arises between the positivist and the moralist approach when the latter seeks to change the international law from its existing form into what it should be. Such a normative approach is completely against the separatist view of the positivism which differentiates *lex lata* (the existing

³²⁹ Hehir, *Humanitarian Intervention: An Introduction*, p. 83.

³³⁰ Hehir, *NATO’s Humanitarian Intervention in Kosovo*, p. 15.

³³¹ Ayoob, *Humanitarian Intervention and International Society*.

law) and *lex ferenda* (the law as it should be).³³² Accordingly, the international law is what states consent to abide by and posit themselves accordingly. At this point, the view converges with the realist understanding that though state sovereignty derives from the common will of people, domestic law flows top-down, not vice versa. The situation is the same in international law, as states mould the law according to their own will and interest, not that of humanity or the international citizen.³³³ The international law is generated through either treaties or state practice (customary law).³³⁴

The central claims about the illegality of humanitarian intervention is caused by Article 2 (4) of the UN Charter, which forbids the use or threat of force among states except for Article 51, which allows to use force for self defense against an imminent attack, and the Chapter VII provisions, according to which UN Security Council may authorize the use of force when international security is at stake.³³⁵

On the other hand, some scholars who are critical of the humanitarian intervention argue that interventions to humanitarian emergencies should be excluded from the Chapter VII authorization, because they are intra-state conflicts, not international conflicts causing insecurity at the international level.³³⁶

Since the unauthorized intervention, which is supported by the moralist view, is not regarded as an exception to the prohibition to use force, humanitarian intervention is illegal in the positivist view. They support their illegality claim by referring to the following sections of the international law: Article 2 (4) of the UN Charter as mentioned before; Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties, which accept Article 2 (4) of the UN Charter as an inviolable international principle (i.e. *jus cogens*) along with Article 2 (7) of the UN Charter, which block authorization of the UN intervention to states' domestic affairs; and the 1970 General Assembly Resolution Declaration on Principles of International Law

³³² Pattison, *Humanitarian Intervention and the Responsibility to Protect*, p. 45.

³³³ Macklem, pp. 383-384.

³³⁴ Pattison, *Humanitarian Intervention and the Responsibility to Protect*, pp. 45-46.

³³⁵ Pattison, *Humanitarian Intervention and the Responsibility to Protect*, p. 47.

³³⁶ Ayooob, *Humanitarian Intervention and International Society*.

Concerning Friendly Relations and Co-Operation Among States (2625-XXV), which prohibits the use or threat of force by states in their relations with one another.³³⁷

It should be noted that the positivist approach does criticize the attempts to legalize humanitarian intervention but it does not totally ignore the humanitarian interventions against states committing gross human rights violations. In this regard, A. O. Enabulele introduces a constructive study. In his article “Humanitarian intervention and territorial sovereignty: the dilemma of two strange bedfellows”, he refers to the moralist claims of legality on the basis of the international treaties and the customary law as the sources of international law.

To begin with customary international law, it consists of state practice and *opinio juris*. A law can be regarded as customary only if it meets the requirements of both of these components. Firstly, the moralist approach gives many accounts of unilateral and multilateral intervention in history without the authorization of an international institution, such as the 1827-1830 interventions of the UK, Russia and France to Greece to stop the suppression of the rioting Greek people under the Ottoman rule, Russian intervention in Bulgaria between 1876-1878 with similar reasons, Indian intervention in Pakistan in 1971 and the NATO intervention in Kosovo in 1999. The claim of the moralist approach is that the behaviour of states during the course of history against similar events has constituted a pattern, which should form the basis of state practice to compose customary law.³³⁸ Enabulele points to two points as preventing the humanitarian intervention from being counted as state practice. Firstly, he states that throughout all the interventions cited in the historical account, there is no consistent reaction or behavior even by a smallest portion of the states, as they have chosen not to act in the same manner against every similar situation. Secondly, no humanitarian justification can circumvent the basic principle that states have inviolable sovereignty within their territory and states’ practice have been in a way to support and strengthen this norm.³³⁹

³³⁷ Hehir, Humanitarian intervention after Kosovo, pp. 15-16.

³³⁸ A. O. Enabulele, “Humanitarian Intervention and Territorial Sovereignty : the Dilemma of Two Strange Bedfellows”, **The International Journal of Human Rights**, Vol.14 , No. 3, 2010, pp.413-414.

³³⁹ Enabulele, p. 414.

The *opinio juris* too cannot be achieved due to the selective or reluctant intervention of states. For instance, although the Vietnam War is not a case of humanitarian intervention, but an example for third party intervention, the US sacrificed about 58.000 soldiers in Vietnam and continued to fight until the end of the war. However, the US withdrew its military when only a very small number of its soldiers were killed in Somalia. This comparison shows that states do not consider it an obligation to join or maintain a humanitarian intervention.³⁴⁰ The point is that while the US had vested interest in Vietnam, it did not have the same in Somalia. And the US chose to withdraw from Somalia where it intervened for humanitarian cause.

Enabulele says that there is a common understanding that there are no international legal treaties, which allow unauthorized intervention. However, he adds that in the face of a humanitarian emergency, the clash between the international law and the morality of human conscience is inevitable.³⁴¹ Then, in such a situation the quest should be to have sincere motives to help those in need instead of finding legal excuses for intervention or establishing a legal body to authorize and commence humanitarian intervention. Such a clash can only be overcome through sincere and consistent action against humanitarian emergencies.³⁴²

In short, the positivist side mainly holds that humanitarian intervention cannot be undertaken at the expense of state sovereignty and principle of non-intervention. Such a trade off only eases the abuse of humanitarianism for strategic and national interest concerns of greater powers over weak states.

B) Legal Moralism Approach

While the legal positivist approach defends state sovereignty and its corollary principle of non-intervention, the moralist approach argues for a different type of

³⁴⁰ Enabulele, p. 416.

³⁴¹ Enabulele, p. 418

³⁴² Enabulele, p. 419.

sovereignty, which is embodied in the ‘Responsibility to Protect’ doctrine. Although many moralist concerns are legitimate from the perspective of human rights, they are generally rendered futile by the international law, since the issue of humanitarian intervention is not openly covered in that law. Then a legitimization is required and the international law should be reformed accordingly.³⁴³

At the core of the primary objection to the existing international legal norms stands the inviolability of state sovereignty. The theorists of moralist fashion claim that the inviolable sovereignty is not an ultimate fact but only a historical concept deriving from the necessities of the 16th and 17th centuries to set a peaceful international order.³⁴⁴ However, that order has not excluded non-intervention. In terms of ‘distributive conception’, states are granted the right to govern their autonomous territories through recognition by the international society of their sovereign rights. Then, if sovereignty is granted by the international society, this society may also intervene to that autonomy, and such intervention would not be against the law as it would be actually not an intervention but only a redistribution of sovereignty.³⁴⁵

According to some moralists, humanitarian intervention actually does not violate sovereign rights of the target state. Julie Mertus addresses these moralist claims in her article. The first moralist argument is that humanitarian intervention does not violate territorial sovereignty. They claim that humanitarian intervention does not target the territorial integrity of the violating state, or limit or deprive the state authority from its sovereign rights. However, Mertus states that the present concept of sovereignty is not only related with the territoriality but also with the state’s ability to rule its subjects directly. Where and whenever this ability is limited or totally blocked, it means there is violation of sovereignty. She gives the Federal Republic of Yugoslavia as an example where Kosovo was territorially and administratively bound. The intervention did not target a territorial division but it ended the Belgrade’s rule on Prishtina, which culminated in turn in the secession of Kosovo. Though the intervention did not initially target the territorial break of

³⁴³ Chandler, *From Kosovo to Kabul*, p.128.

³⁴⁴ Chandler, *From Kosovo to Kabul*, p.128.

³⁴⁵ Macklem, pp. 384-385.

Kosovo from the FRY, it ceased Belgrade's rule over Kosovo, violating its sovereignty.³⁴⁶

Secondly, moralist view argues that some cases require humanitarian intervention with an alternative reading of the UN Charter provisions. For instance, Article 2 (4) prohibits states to act in ways against the purposes of the UN to ensure the international peace and security. Then, humanitarian intervention, as in Kosovo, may be regarded as not violating UN Charter in line with that purpose. There might be some cases where the principles and purposes of UN may only be protected through a military intervention.³⁴⁷

In connection with Kosovo intervention, another claim of the moralist view should be addressed. In Kosovo the intervention was held by the NATO without any UN authorization. The moralist view justifies the intervention held by a regional security organization by referring to the UN Chapter VII, which holds that the regional security organizations may intervene to the humanitarian emergencies which disturb and jeopardize the international security. However, humanitarian intervention through a regional security organization still remains illegal without the UN authorization in terms of the existing legal setting.³⁴⁸

Another alternative reading covers Articles 55 and 56 of the UN charter. According to these provisions, all members are mandated to take joint action by the UN for the protection and observance of respect of the human rights for all. Then every state is actually authorized to intervene where human rights are under attack.³⁴⁹

Finally, Mertus criticizes that the UN system is not properly operating in the face of human suffering, though one of the original intentions behind the UN idea was to eliminate and stop suffering after the miserable experience of the Second World War. Therefore, regional organizations or group of states should be able to

³⁴⁶ Julie A. Mertus, "Beyond Borders: The Human Rights Imperative for Intervention in Kosovo", **Human Rights Review**, Vol. 1, 2000, p.81.

³⁴⁷ Mertus, p.82.

³⁴⁸ Hehir, Humanitarian intervention after Kosovo, p. 17.

³⁴⁹ Mertus, p.82.

operate where the UN is unable to operate due to the procedural obstacles like the P-5 veto.³⁵⁰

All these criticisms and claims contributed to the formation of the 'Responsibility to Protect' doctrine, which seeks to transform state sovereignty from an absolute to a conditional concept. The doctrine advocates that granting of sovereignty to a state should be conditional upon the fulfillment by that state of the security needs of its subjects.³⁵¹ In other words, the principle of 'sovereignty as responsibility' foresees the existence of a higher international entity to supervise the operation of responsible sovereignty and to intervene where the related requirements are not met.³⁵²

The provisions of the 'Responsibility to Protect' doctrine have caused much debate between the positivists and the moralists, who request a reform in the existing legal system. The positivists fiercely support the twin principles of state sovereignty and non-intervention, arguing that there are no provisions in the main sources of international law allowing humanitarian intervention as an exception to the principle of non-intervention. On the other hand, the moralists argue that humanitarian intervention is actually not excluded from the existing legal system. Rather, what is needed, they argue, is to re-interpret the law explicitly and broadly with a view to laying down the necessary criteria for humanitarian intervention.

³⁵⁰ Mertus, p.84.

³⁵¹ Bruce Falconer, "Armed and Humanitarian", **Human Rights and Human Welfare**, 19.09.2008, <http://www.du.edu/gsis/hrhw/roundtable/2008/panel-b/07-2008/humanitarian.html> (21.08.2010).

³⁵² Michael Newman, "Revisiting the 'Responsibility to Protect'", **The Political Quarterly**, Vol. 80, No. 1, 2009, p. 93.

THIRD CHAPTER

AN EVALUATION OF POSSIBLE SOLUTION AND IMPLEMENTATION

I. ANY PROSPECTS FOR A SOLUTION?

In the previous chapters, the problems and contentious points regarding the humanitarian intervention were presented. This chapter seeks to put forward some humble suggestions with a view their solution. Surely, these suggestions are not absolute truths or they have already been refuted by those that are not known to the author of this study or they might be called into question by the esteemed readers. And as all the ideas in social sciences are conglomerates as well as a deduction of the previous assumptions, these solutions shall be highlighted through various pre-suggested views, either by supporting or criticizing them.

The problems examined so far arose after the Cold War when a long-standing understanding came to surface following attempts to incorporate it into the universal humanitarian values. This new humanitarian doctrine, which has come to be known as ‘sovereignty as responsibility’ or ‘responsibility to protect’ has caused much debate in the scholarly and political circles.

After the end of the Cold War and the bipolar world, the new international structure enabled the Western states to change their security perceptions from the requirements of the bi-polar adversaries into a new perception which regarded almost every conflict as a threat to international society. Such a change in the global security perception increasingly induced interventions into those conflicts. Those interventions, even the ones undertaken out of legitimate motives and in legitimate manner, conflicted with the international law. The prevalent international legal setting, which contradicts the moral standing, is a remnant of the post-World War II regulations. The idea after World War II was to regulate the use of force by states

within the confines of the international law. The new UN system, generally paying lip service to human security, upheld the state over the individual, who was effectively left to the mercy of the former. With the end of the Cold War and super power rivalry, states have become more interested in human security which offended state sovereignty. The humanitarian intervention has increasingly become a widely accepted norm in the Western world.³⁵³ The demand to establish a right and maybe a duty to intervene in other states conflicted with the basic premises of state sovereignty and non-intervention of the existing international law, which are regarded as shields against the Western domination around the world.

The swift change of the status quo in the post-Cold War era has required new regulations and/or solutions based on new ideas and points of view to reconcile the conflicting issues.³⁵⁴ These solutions might be arranged under three topics: decision to intervene; the conduct of intervention; and the aftermath of intervention, which is currently known as the peace-building phase. These topics are directly related with the problems explained in the previous chapter regarding the morality, legality and legitimacy of humanitarian intervention.

The first topic concerns the decision-making process. However, this issue can be divided into two: the question of authority, and the question of ‘who should intervene?’

The prevalent international legal system regards the UN Security Council as the sole office to authorize the use of force. And this is the cause of the conflicting views, which were observed after the unilateral NATO intervention in Kosovo without the authorization of the Security Council. On the one hand, there are those who fear the abuse of humanitarian reasons to expand the Western interests around the world. And there are those Western states that approach humanitarian emergencies on the basis of various concerns, including the internal pressure of their constituents, prestige, international security, self-defense and the like. One should

³⁵³ Sarka Metejkova, “Establishing the Norm of Humanitarian Intervention in International Relations”, **Central European Journal of International and Security Studies**, Vol. 2, No. 2, 2008, p. 81.

³⁵⁴ Edward Perkins, “An International Agenda for Change”, **Journal of Public Administration Research and Theory: J-PART**, Vol. 4, No. 3, 1994, p. 377.

seek reconciliation between these two views, since they are representative of the existing views on the UN authority concerning the humanitarian intervention.

One way of rendering the humanitarian intervention legitimate in the eyes of those states, which consider the humanitarian intervention as abusing the humanitarian cause, might be through adjusting the views on the norms of human security and humanitarian intervention.

Before clarifying that suggestion, a very important and maybe the most assertive statement of the study should be presented. As it was depicted at the beginning of the study through 'Melian Dialogue', the stronger has always found a way to establish its will since the beginning of human history, though there has been much modification on its *modus operandi*. As for today, the strong seems to have found the way to realize its will, the unilateral action (the one unauthorized by the UN), by cooperating with other states, which are of similar economic, political and cultural roots as it is seen in the Western World, notwithstanding that some deep gaps appear between Europe and the US.

This study suggests that total ignorance or denial of the Western *modus operandi* on intervention will not be of benefit for those states that are criticizing or doubtful of the Western interventionism. However, it should be clearly emphasized that this does not mean that these states should adhere to the Western policies in the international arena. Rather, a norm or set of rules should be established with the consent of both sides. It may be argued that the 'Responsibility to Protect' doctrine was also composed so as to define some set of rules to wage humanitarian war, but the point is that it has ignored the consent of states that are against the humanitarian intervention.

For bringing about a mutual consent among those against the intervention and that support the necessity of intervention, the norm-making process is a good starting point.

The existing international norms were not readily given to the international society; instead they were molded by the interactions of states over time. Similarly a new norm of intervention can be established and agreed on. Such a norm should have

the necessary provisions to satisfy the considerations of both camps. This satisfaction will be the safeguard of maintenance, since a norm lives as long as it is obeyed.³⁵⁵ In order to provide this obedience both sides should have an interest in the implementation of the norm. This might be achieved when parties consider the possible outcomes of establishing a norm with a view to their interests. This is a constructivist view as Martha Finnemore claims that states define their interests in relation to the prevalent norms.³⁵⁶ Accordingly, if two camps can agree on a norm concerning the use of force against humanitarian emergencies, both can see their interests within this set of rules.

Such a norm should allay the fears or concerns of both camps. The non-Western party, which is critical of intervention, should be assured that there is no possibility of abuse. One way of providing such assurance might be to involve a legal body within the process. When the non-Western states become suspicious of an abuse, they will take the issue before this body. This legal body which resembles the International Court of Justice (ICJ) may be assigned by the Security Council with the necessary authority to pass verdict on the issue of abuse. This court may have two sub-bodies, both being formed of judges. One of the bodies can be the ruling one with members from almost all states represented in the General Assembly. The reason for such a large number is to have the possible highest representation of states. That body is the one which shall pass a verdict on the submitted case. The second body shall be chosen from the first one and it may have 5 to 8 members. These members shall regularly rotate. The second body shall have a symbolic role as an announcer of the judgments and explanations of the first. If the two third of the members of the first body gives verdict of abuse, the defendant state will be found guilty of abusing humanitarianism and shall be imposed heavy sanctions. However, it should be noted that since great or super powers are strong candidates of potential abusers, how sanctions will be imposed on them remains an open and serious question. However, even though a coercive sanction cannot be imposed on, for instance, the US, it will have the label of abuser and this will greatly undermine its

³⁵⁵ Robert L. Rothstein, "Inequality, Exploitation, and Justice in the International System: Reconciling Divergent Expectations", *International Studies Quarterly*, Vol. 21, No. 2, 1977, p. 353.

³⁵⁶ Martha Finnemore, *National Interests in International Society*, Cornell University Press, Ithaca, 1996, pp. 2-3.

credibility and moral authority within the international society. Its allies or partners may even try to avoid cooperating with the US out of similar image concerns or the possibility of being subjected to similar verdicts.

With the establishment of the above body, the Western party can also be assured that the humanitarian intervention commenced in line with the agreed conditions will be accepted within the international society without opposition. Because, in order to apply to the court for the existence of abuse the claimant state or states will have to wait for realization of intervention. And since the intervening state will be acting on the conditions formerly accepted within the international society according to the scenario of this thesis, the intervention will have happened. If there is an abuse, the claimants will take the issue before the court. These will constitute two ends of the gains by intervention.³⁵⁷ With such an understanding both sides will be content with an arrangement whereby the non-Western states shall have the opportunity to check and have a word on the application of the norm, and the West will be able to get other states incorporated into the process of intervention, which will add to the legitimacy of the intervention. An important feature of such a norm should be that the legitimacy criterion to be applied has secondary importance to the sincerity of states while applying the norm.³⁵⁸

In addition to these interests that are parts of both parties' considerations, an additional interest which is to be taken into consideration may be found in Eric A. Heinze's argument, which regards human security as a justification to wage a humanitarian war.³⁵⁹ Heinze distinguishes human rights and human security. He states:

*Human rights are a set of legal processes that entitle individuals access to certain goods that are necessary for human well-being, whereas human security is a measure of human well-being or the extent to which these goods are universally enjoyed.*³⁶⁰

³⁵⁷ Rothstein, p. 355.

³⁵⁸ Enabulele, p. 419

³⁵⁹ Heinze, Maximizing Human Security, p. 284.

³⁶⁰ Heinze, Maximizing Human Security, p. 286.

In other words, the human security precedes human rights as human security refers to the physical well being. A person can physically be well and be deprived of human rights. But a person cannot enjoy human rights without having physical security first. The security of the state which is related to the international security is realized by the armed forces through deterrence and self-defense. The main consideration of states' self-defense is actually the protection of their citizens. However, when the state cannot protect its citizens, or worse, when the citizens are targeted by their own state, the protection of human security becomes an international issue.³⁶¹ Viewing the violation of human security as the necessary reason to engage in war can help considerably in deciding whether to intervene or not. The protection of human security can serve both camps.

On the one hand, with regard to the basic assumptions of economics, people who suffer from a humanitarian disaster, will not be able to spend on consumption and this will lead to the decrease of domestic production and finally to the collapse of the economy. This is not something desirable for the West, which has been advocating for some time the neo-liberal economic policies around the world that require the opening of world markets to the global trade. Secondly, since such humanitarian emergencies create huge refugee flows into neighboring countries, as it was seen after the first Gulf War, Rwanda, Bosnia, Kosovo and many more cases, the refugee problem may threaten the regional and eventually the global security. Since many non-Western states cannot overcome all the problems about the refugees and related security problems around them, these states need international intervention to avoid the suffering before people move to take refuge in them. As seen, both parties might seek for their own interests a norm which allows intervention under a supervision of both parties.

Having established the necessity and applicability of a norm recognizing the humanitarian intervention as a necessary tool for all parties, a regime should also be established to manage those interventions. And at the core of such a regime lies the definition of the decision making authority.

³⁶¹ Heinze, *Maximizing Human Security*, pp. 285-286.

It is now common knowledge that the UN system has weaknesses in regulating inter-state relations, and the necessity for a change has been a common concern in the scholarly and political circles.³⁶² The main reason of this weakness has been the division between the Security Council's P-5 members in their response to the crises. While the Western members have been generally in the interventionist camp, Russia and China have vetoed or at least abstained from any resolution authorizing intervention with a selfish concern that someday that interventionist weapon might point at them seeking to change their regimes.

There are different views on reform ranging from the establishment of a new international governmental organization (IGO) to the reform of the UN system. Firstly, it needs to be stated that this study finds the suggestion related to the reform of the UN system more favorable to the one that advocates a new IGO. The reason for this preference has two dimensions. Firstly, as mentioned previously, the legitimacy of a new organization should be based on the general acceptance of the international society, and the representativeness of organization shall be instrumental to its legitimacy. Secondly, while there is such an organization with established organs (i.e. the UN), it is unnecessary to establish a new organization, since; above all, such an effort is likely to be very costly.

For these reasons this study shall look at the possibilities of reforming the existing UN system. One of the noteworthy suggestions was made by Mohammed Ayooob in his "Humanitarian Intervention and International Society" and "Humanitarian Intervention and State Sovereignty". He recommends that the UN Charter be amended to define and standardize humanitarian intervention so as to exclude the incident of selective action and prevent the abuse of such an intervention.³⁶³

Ayooob states that the authorization of the humanitarian intervention under Chapter VII of the UN Charter is not appropriate because Chapter VII was formed to avoid inter-state conflict. However, today's humanitarian emergencies are intra-state conflicts which are not dealt with in the provisions of Chapter VII. Ayooob states that

³⁶² Mary Ellen O'Connell, "The UN, NATO, and International Law after Kosovo", **Human Rights Quarterly**, Vol. 22, No. 1, 2000, p. 85.

³⁶³ Ayooob, *Humanitarian Intervention and International Society*.

new articles should be added to the Charter, clearly defining the conditions under which the humanitarian intervention will be permitted.³⁶⁴ He makes two recommendations for the reform of the UN body. First of all, he suggests that the veto power of the P-5 be cancelled in cases of humanitarian emergencies. And secondly, the membership of the Security Council should be expanded and have geographic equality in terms of membership distribution. More significantly, he suggests the establishment of a new council called “Humanitarian Council” to authorize and supervise humanitarian intervention lest the Security Council fails to act due to the lack of political will.³⁶⁵ According to him, this new body shall have 50 members and be capable of authorizing and overseeing the intervention if a two-thirds majority is achieved, which is currently the number required of the UN General Assembly.³⁶⁶ Any intervention realized without this body’s authorization will be illegal.³⁶⁷ He also criticizes the scholars who may regard his suggestion “unrealistic” and “not adequately sensitive to the realpolitik considerations driving the policies of major powers”.³⁶⁸ He argues that the existence of realpolitik concerns diminishes the humanitarian character of the intervention.³⁶⁹

On the other hand, Nicholas Wheeler criticizes Ayoob’s suggestions in his article, “Decision-making Rules and Procedures for Humanitarian Intervention”, marking the flaws therein. Firstly, he states that Ayoob’s expectation that states will leave aside their interests with regards to Realpolitik is unrealistic. He claims that no state will risk its soldiers’ lives for the sake of another state’s citizens out of pure humanitarian concerns. The motives of the intervening states are generally a combination of different elements, which include both self-interest and humanitarian concerns.³⁷⁰

Wheeler also criticizes Ayoob’s suggestion for non-selective interventionism as it is not clear. Wheeler asks whether non-selectiveness means that the Western powers will never be authorized to intervene in the emergency areas due to their

³⁶⁴ Ayoob, *Humanitarian Intervention and State Sovereignty*, p. 95.

³⁶⁵ Ayoob, *Humanitarian Intervention and State Sovereignty*, p. 96.

³⁶⁶ Ayoob, *Humanitarian Intervention and International Society*.

³⁶⁷ Ayoob, *Humanitarian Intervention and International Society*.

³⁶⁸ Ayoob, *Humanitarian Intervention and State Sovereignty*, p. 96.

³⁶⁹ Ayoob, *Humanitarian Intervention and State Sovereignty*, p. 96

³⁷⁰ Wheeler, *Decision-making Rules*, p. 133.

prior selective action or it means the whole UN body will act in every situation, which is not realistic due to the scarce resources. The expanded decision making body suggested by Ayoob in his article “Humanitarian Intervention and International Society” will not handle the selectivity problem as it will only change the representation. Moreover, since whether the intervention will bring more harm or good will never be known, there will always be a question of success and doubt, which will hinder intervention every time.³⁷¹

A reconceptualization of humanitarian intervention, as suggested by Oliver Ramsbotham, can be employed to overcome the selective action problem. Ramsbotham classifies humanitarian intervention as:

“Coercive governmental humanitarian intervention

- (a) Coercive military (forcible) humanitarian intervention*
- (b) Coercive non-military humanitarian intervention*

Non-coercive governmental humanitarian intervention

- (c) Non-coercive military (non-forcible) humanitarian intervention (e.g., UN peace-keeping)*
- (d) Non-coercive, non-military humanitarian intervention”³⁷²*

Accordingly, humanitarian intervention concept consists of a range of actions, which are non-coercive, non-military, like condemning a state or providing food and aid; non-coercive military, like police missions; coercive, non-military, like economic sanctions; or coercive, military, like military sanctions and military humanitarian intervention.³⁷³ Oliver Ramsbotham states that since every humanitarian crisis has been and will be responded through one of those means, the claim to inaction does not have any ground.

The expansion in the Security Council formation as suggested by Ayoob in his article “Humanitarian Intervention and International Society” is not believed to cause any change for the better unless the veto power of the P-5 is eliminated. After

³⁷¹ Wheeler, *Decision-making Rules*, p. 134.

³⁷² Oliver Ramsbotham, “Humanitarian intervention 1990–5: a need to reconceptualize?”, **Review of International Studies**, Vol. 23, 1997, p. 457.

³⁷³ Ramsbotham, p. 457.

such elimination, the existing council may act to intervene effectively. With the elimination of the veto impediment, the representativeness should also be expanded as suggested by Ayoob. Wheeler agrees with the requirement of expansion, but he asks why a minority of liberal democratic states should accept the decisions of the non-democratic ones in an institution which decides upon the majority vote.³⁷⁴

It is clear that none of the P-5 would give up its veto right. Then a regulation might be introduced requiring the vetoing state to explain its reasons. This may eliminate vetoes not justifiable from the perspective of common good and solely based on self-interest concerns. On the other hand, if a vetoing state openly asserts its security concerns, the pro-intervention party(ies) may be able to act with a view to allaying these concerns.

There should also be permanent fact-finding committees on sites in addition to the ad hoc committees. These permanent committees should directly report to the Security Council. One of the P-5 members should be charged with the management of these committees subject to periodical shifts. This will shorten the response time as normally these committees are bound to the Secretary General, General Assembly or sub-bodies within the organization. The duty of these committees will not end with the decision of the humanitarian intervention. These committees will continue to work on site and report the progress of intervention and the facts about the humanitarian emergency. Surely, there is the possibility of pursuing national interests through these committees. The members of the committees may try to affect the committee reports to cause or to prevent humanitarian intervention. If some of the committee members try to induce an intervention by their own state out of considerations other than humanitarianism, since there are also members from other states in the committee, the latter will report the abuse. And this state will be taken before the above mentioned court which will investigate the claims of abuse. On the other hand, if some members of the committee try to block humanitarian intervention to a country where there are imminent and grave violations of human security like systematic, massive killings, tortures, rapes or deportations for a political end, the other members of the committee will similarly report the abuse. If such a system

³⁷⁴ Wheeler, *Decision-making Rules*, p. 135.

works out, it will eliminate some questions of legitimacy regarding the right authority criteria.

As pointed out at the beginning of this chapter, the decision to intervene brings about the question of ‘who should intervene?’ The UN does not have armed forces of its own and operates through the donations of the members, which are not sufficient to finance UN operations in such wide range around the world. Randolph C. Kent also points to the problems of the UN to hold its operational role in the humanitarian assistance. He suggests a normative role in the humanitarian action for the UN, which will not force it to generate financial resources while there are plenty of organizations around the world to provide the necessary aid.³⁷⁵ The financial problem is valid for the peace and enforcement operations as well. This point was accepted by the UN itself, as Boutros-Gali acknowledges in one of his addresses. He states that the use of force is not favored and needs to be eliminated within such a scarcely financed organization with wide authorities and responsibilities.³⁷⁶

While there are many IGOs and NGOs to hold humanitarian assistance operations, the operation of humanitarian interventions might be born by the regional organizations like the NATO, the AU, ECOWAS or ASEAN.

However, one important point should be clearly defined before continuing. As it was told previously, the main criticism with the legitimacy and legality of the NATO’s Kosovo intervention was that it was not held with a prior Security Council authorization, and it was generally deemed as a legitimate but illegal intervention. Since it is presumed that the issue of decision-making process has been more or less settled in this study in the sense that a council, either the Security Council or a new one, is proposed as the right authority to decide on the humanitarian intervention, the problem of intervening agency might be overcome through the implementation of the UN Charter, even though any amendments are not made to the UN Charter. Chapter VII of the UN Charter states that the Security Council is the authority to define any conflict as a threat to global peace and every UN member is obliged to provide the

³⁷⁵ Kent, p. 866.

³⁷⁶ Farer, p. 14.

available means to respond to the threat.³⁷⁷ On the other hand, Chapter VIII of the UN Charter requires that with the necessary Security Council authorization, regional organizations can intervene to the conflicts when necessary.³⁷⁸ Then, when there is the Council authority and call of duty, regional organizations, being composed of the UN members, have the legitimacy to intervene as long as the humanitarian crises are regarded as threats against international peace.

The NATO is the first organization to consider, as it can hold operations with its military and logistics capacity as a truly military organization.³⁷⁹ The EU may also be regarded as a regional IGO, but lacks the necessary military capabilities as it does not have effective military arrangements. On the other hand, the NATO's original response area already covers the EU region and almost all the EU members are members of the NATO.

Africa, especially its Central and South Eastern parts, is one of the most conflictual regions. The regional organizations possibly to operate there are African Union and ECOWAS. However, since these two organizations lack the necessary financial resources for sufficient action, they are not likely to be effective. On the other hand, although these organizations lack the necessary physical capabilities, their intervention is likely to be superior in certain respects to the intervention of the Western states. With their geographical and cultural proximity to the conflict sites, the members of these organizations are more likely to be successful in understanding the crises and responding to them.³⁸⁰ On the other hand, as it is seen in Darfur, the Western intervention is not welcome in such places as it reminds local peoples of the colonization period as well as the religious conflicts in these countries, especially Muslim populated ones. The solution might be the financing of these regional organizations by the willing Western states. Surely, the possibility of misuse of that financial aid in these organizations is a real one and should be taken into consideration by the donor states. Then, the UN, as still the legal and legitimate arbiter, may allocate some inspectors to oversee the use of resources. However, the

³⁷⁷ The United Nations, p. 9.

³⁷⁸ The United Nations, p. 11.

³⁷⁹ Pattison, Responsibility, p. 408.

³⁸⁰ Pattison, Humanitarian Intervention and the Responsibility to Protect, p. 409.

UN, while performing this task, should be careful not to be perceived by the local people as a colonial governor. Therefore, these inspectors should be very careful to keep a low profile both indoors and during onsite inspection. Lastly but not the least, these organizations should operate as tools of multilateral intervention and not as tools for domination in the neighborhood of a state or group of states.³⁸¹ The two proposed bodies, the permanent fact-finding committees and the court, can be of great help in preventing or evaluating also regional attempts to abuse humanitarian intervention, if there are any.

Another point regarding the legitimacy problem is that states do not want to risk their soldiers' lives to save non-citizens. The most highlighted case for this point is Kosovo and the NATO's high altitude bombing. As it was mentioned earlier, the NATO command line was highly criticized for not employing ground forces not to risk soldiers. There are two reasons for such a strategy of the states. Firstly, there is the basic social contract, according to which these soldiers are the citizens who serve their country by defending it. Since humanitarian intervention cannot be publicly justified with a view to national interests, it does not have the internal legitimacy to risk soldiers' lives. Secondly, according to the proportionality requirement, a legitimate intervention is one which is undertaken on the premise that more good than harm will come out of it. The loss of soldiers is absolute harm when it is not clear to achieve success. This might be another reason for why states are reluctant to deploy soldiers in humanitarian wars.

If the second reason is ignored as a natural mechanism of the legitimization of humanitarian intervention, there is a possible way for states to circumvent the problem. As it is known, whether it is on voluntary basis or not, military service is one of the basic features of the nation state, as serving for the national army is both a basic right and duty depending on the conscription model. However, either as a right or as a duty, it has its own limits of obligation in terms of the social contract as explained above. Since deployment of those soldiers is problematic, another type of soldiers might be sourced. A possible solution might be the introduction of private

³⁸¹ O'Connell, p. 86.

companies to provide mercenaries.³⁸² However, this suggestion has its own serious problems. During the last decade or so the private mercenary companies have stepped onto the stage and they have already been accused of serious human rights violations.³⁸³ Such companies, though they are highly controversial, might be the solution for risking soldiers' lives, since mercenaries are not bound by any social contract. Rather they act on their own profit and personal interests. They trade their martial skills for money. These mercenary groups might be employed by the intervening organizations as deployment forces to act in the most dangerous conflict areas under the strict command of these organizations. By means of that the conventional military forces can remain clear of dangerous missions and be deployed in aid distribution or less dangerous police missions.

While suggesting a model for military humanitarian intervention to cease human suffering, a very important point should be stated. Humanitarianism should not be mistaken for warmongering against the oppressive regimes. The humanitarian intervention is a tool to stop human suffering, and along with the peace building actions it also includes the restructuring of social, political, economic and cultural institutions of the target state. The humanitarian intervention holds moral considerations but these considerations should not lead to the moralist inclination for a partisan war against those states which has oppressive regimes.

Another point is that the obligation of the international society and the responsible international institutions is to alleviate problems which result in the outbreak of humanitarian emergencies. For instance, the humanitarian crises in Somalia and Darfur were caused by nothing but the misallocation of the resources and the aid. Accordingly, institutions like the World Bank, which is originally mandated to fight against the poverty around the world, can play a global banker role. If these conflict-prone regions are provided with the necessary economic support to maintain the structures of states, the latter can improve their economic

³⁸² Pattison, *Humanitarian Intervention and the Responsibility to Protect*, p. 410.

³⁸³ Kim Sengupta, "Blackwater guards surrender over massacre", **The Independent**, 08.12.2008, <http://www.independent.co.uk/news/world/americas/blackwater-guards-surrender-over-massacre-1057760.html>, (15.01.2011).

functions, developmental activities and employment levels.³⁸⁴ Through such economic support and indirect administrative contributions, state leaders might be encouraged to take action on their own as people who know their area better than the Westerners, and this might be a cure for the so-called 'Nirvana Fallacy'.

The next important point regarding the provision of states' basic functions in terms of economic capabilities is economic sanctions, which are coercive non-military actions in terms of Ramsbotham's definition.³⁸⁵ When compared to the idea of war, economic sanctions seem to be more attractive in terms of saving soldiers' lives and avoiding physical damage on the target state. However, in some situations, the final analysis shows that sanctions take heavier toll on civilian life than a possible military operation, as it was seen in Iraq conflict from 1991 to the present day.³⁸⁶

Even though one day it may be possible to resolve the complex problems concerning the humanitarian intervention, the duty of the international society does not stop there. Though the immediate post-intervention situation may seem better in comparison to the pre-intervention situation, there is always a possibility of the re-emergence of the same or similar humanitarian crisis in the conflict regions. For this reason, the definition of humanitarian mission should not be limited to halting the atrocities but also include the re-establishment of the state, social and economic life. Peace-building and conflict resolution should necessarily be included into the definition and provision of humanitarian intervention as people who survive the massacres but have no hope for the future will inevitably fall into desperate situations and much suffering.

Although the issue of conflict resolution is outside the scope of this thesis, a few words might be meaningful concerning the post-conflict structuring of the target state. In the ethnically divided societies, there is always the possibility of recurrence of ethnic conflicts, if those ethnic groups are not reconciled in a system which pays attention to the governmental, social and economic relations within the society. No matter which solution is proposed, it should essentially advocate inclusive and

³⁸⁴ Allan Gerson, "Peace Building: The Private Sector's Role", **The American Journal of International Law**, Vol. 95, No. 1, 2001, p. 102-103.

³⁸⁵ Ramsbotham, p. 457.

³⁸⁶ Souad N. Al-Azzawi, *Violations of Iraqi Children's Rights*.

representative institutions that enable and encourage the cooperation and peaceful coexistence of those groups. Otherwise, hostilities among parties will endure and atrocities may be witnessed one more time.

CONCLUSION

This thesis attempted to historically analyze the concept of humanitarian intervention with regard to its different but related dimensions (legitimacy, morality and legality) and to suggest some solutions towards the resolution of chronic problems related to it.

First of all, there is not even a solid definition of humanitarian intervention on which there is wide international consensus. Since making such a definition is too important a task to be left to the discretion of the interventionists, a commonly accepted body like the UN should hold this duty. However, the UN seems to be inefficient to fulfill this and the related duties in its current setting. If this problem can be solved, the problem of right authority will also be solved since a reformed UN with the widest available representation can be regarded as the right authority to decide on intervention. This will be a major step towards the resolution of the conflict between the legality and legitimacy of humanitarian intervention.

The problems regarding the legitimacy may also be lessened if not totally overcome. As to the motives-outcomes debate, the problem is that the claims in question, i.e. motives matter and outcomes matter, cannot be easily reconciled. If motives are taken as a basis for legitimacy, the outcome is bound to be ignored if it involves greater harm. On the other hand, if outcome is taken as a basis, any state acting with motives other than humanitarianism and bringing about some good unintentionally can claim to have acted on humanitarian motives. Thomas Aquinas's 'double effect doctrine' can help to solve this problem as he states that good motives should result in good outcomes and good outcomes should be obtained through intentional, good motives. However, the evaluation of any action should be made after it fully comes to an end and the results are obtained.

As for the problem of proportionality, the good and harm which are likely to come out of intervention cannot be totally predicted. Related to the motives-outcomes debate, while results cannot be known in advance, the debate over proportionality can be overcome if all states are keen to act. On the other hand, as for

the other dimension of proportionality, the use of appropriate force can materialize through the choice of effective and available means. In contrast to Kosovo, if states can deploy ground troops as a means of their intervention, intervening states will avoid much criticism and generate more good than harm. Given the fact that states are reluctant to risk their own soldiers for the sake of foreign civilians, private mercenary companies, with the condition of placing them under a strict international command and inspection, may prove to be a solution.

While some problems can be considered and solved separately, some others are connected in a complicated manner like selective action. The issue of selective action has several dimensions which need to be handled together. Selective action results from several factors or considerations: the uncertainty of obtaining a greater good; insufficient funds to intervene in every conflict; considering humanitarian intervention as a voluntary act, not a duty; and acting with a view to promoting one's own material interests rather than humanitarianism. The previous chapter tried to address all those issues directly or indirectly. However, generally speaking inaction cannot be defended or suggested as an alternative course of action since there is a long continuum of possible actions, ranging from non-military non-coercive to military coercive, to deal with humanitarian conflicts.

The possibility of Western aid to the suffering societies has created a situation in which the governments of those societies do little or nothing to improve the situation on the ground. This is called 'Nirvana Fallacy'. However, these governments should not wait for the Westerners to establish and maintain order without doing anything themselves, since the same or similar conflicts may erupt again after the withdrawal of the Western forces and personnel from their regions. Moreover, states neighboring the conflict area (if they are not part of the conflict themselves) can diagnose and evaluate the situation better than the Western powers. In such situations the West should provide the necessary financial support to the neighboring local countries to intervene.

While the main debate over humanitarian intervention is on the decision and conduct of the intervention, the aftermath is generally ignored. First of all, the economic structure of the target state should be reinforced in order, among others, to

create employment. This can play an important role in preventing the conflict from recurring. International actors and particularly the financial institutions should assume important roles and duties in this respect.

Stopping atrocities and suffering does not always prove that the humanitarian intervention is successful. The causes of conflict should be addressed in order to prevent the re-emergence of the same crisis. This study does not include the options of possible conflict resolution mechanisms. However it notes the necessity of including peace-building into the humanitarian intervention mission. If the causes of conflict are not addressed, the recurrence of atrocities is only a matter of time.

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