REGIONAL ORGANISATIONS AND 'HUMANITARIAN INTERVENTION': TOWARDS UNILATERAL ENFORCEMENT RIGHTS?

Thesis submitted for the degree of

Doctor of Philosophy

at the University of Leicester

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August 2020

Abstract

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The normative consequences of the legitimate concern for the scarcity of human rights upon the legal regime of the use of force, constitute a significant challenge for both the positivist and the policy driven international law scholars. This thesis inquires whether in the midst of increased states' unilateralism regional humanitarian intervention constitutes an emerging legal norm, by addressing the corollary question of whether this claim finds support in the endeavours of regional organisations. It envisages to provide a systematic analysis of both actual and verbal practice of regional organisations and of the necessary opinio juris, with a view to ascertaining whether this attests the alleged rise of a new CIL rule. The analysis revolves around foundational cases of regional unilateral interventions in humanitarian crises and the constitutive instruments of regional organisations. Whilst recognising that humanitarian intervention- general and regional- encapsulates some genuine concerns, the analysis of regional endeavours allegedly informing the debate on normative legal change demonstrates not only that it has not attained the status of a binding doctrine but reveals the weak legal premises of the proposition that it is currently an emerging rule under CIL.

One of the key contributions of this work is that it revisits the current state of the influence of regional organisations vis-à-vis humanitarian intervention by considering not only their actual practice or constitutive undertakings, but both. Essentially, this thesis seeks to enhance the view that the practice of regional organisations towards the development of a new rule under CIL, has to be assessed in a principled manner. Notwithstanding the growing role of regional organisations in collective security and their growing concern over humanitarian crises, the analysis revolves around the proposition that their rights and responsibilities remain congruent to the international legal system and its making; while contesting the existence of an emerging rule for humanitarian intervention by regional organisations on the basis of the assessment of the merits of their potential contribution.

Acknowledgments

Through these few lines I would like to thank all those who have supported me in the long academic journey of studying for and actually writing this thesis. I am grateful to my supervisors, Professor Malcolm Shaw, Dr Eki Omorogbe, Dr Rossana Deplano and Dr Yassin Brunger for their advice, feedback and guidance throughout these years. My arguments and conclusions have benefited immensely from their remarks and the fact that they constantly challenged my work throughout this process. I would like to thank them all for their valuable assistance; for reading, commending tirelessly, making corrections and suggesting improvements on this entire work. Additionally, and for this I am equally grateful, they have helped me to comprehend this academic journey, full of moments of anxiety and difficulties but also of joy and satisfaction, as a life enduring experience which matters as much as the cause it serves.

I am also grateful to the staff of the Law Faculty at the University of Leicester, Mrs Jane Sowler and Mrs Teresa Rowe in particular, for facilitating all my requests and being ready to help counter all the difficulties that I faced during my PhD studies.

I would also like to thank my colleague at work Dr Toumazos Tselepis for always being available to discuss various legal aspects of my thesis. Significant has also been the support of my dear friend Aristoteles Constantinides, Associate Professor of International Law and Human Rights, Chairperson of the Law Department of the University of Cyprus.

I remain at all times grateful to my parents, whose life- time sacrifices have allowed me to study, progress and learn to always strive to improve. Special thanks are owed to my husband, Aristos Damianou. Without his enthusiasm and support, neither the commencement nor the completion of this work would be possible. I would like to thank him for believing in me, both as a legal expert and as my partner in life; at difficult personal times, he reminded me of how important it was to keep pursuing my goals and provided me with the necessary encouragement to bring this project to print.

Eventually, I would like to thank my eight years old son Aris; first of all, for putting up with me at the difficult times of reading and writing this thesis instead of spoiling him with the extra attention he deserved. Secondly, I would like to thank him for reminding me every day through his very existence that we all have some share in the making of our world; each one through the bastions we choose.

Table of Contents

Table of Cases

Effect of Awards of Compensation made by the United Nations Administrative Tribunal [1954] ICJ Rep 53

Eritrea/ Ethiopia Claims Commission Award on Ethiopia's Ius ad Bellum Claims 1- 8 (Ethiopia v Eritrea) 45 ILM (2006) 430

Fisheries Case [1951] ICJ Rep 116

International Association of Independent Tanker Oweners (Intertanko) and Others v. Secretary of State for Transport (C- 308/06) [2008] ECR I-4057

International Fruit Company NV and Others v Produktschap voor Groenten en Fruit, Joined Cases 21- 24/72 [1972] ECR 1219

Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening) (Judgement) [2012] ICJ Rep 99

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 16

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226

Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion) [1996] ICJ Rep 66

Legality of Use of Force (Serbia and Montenegro v. Belgium) Oral Proceedings for Provisional Measures (10 May 1999) CR1999/15

Legality of Use of Force (Yugoslavia v. United States of America) Oral Proceedings for Provisional Measures (11 May 1999) CR1999/24

Legality of the Use of Force (Yugoslavia v. United States of America) (Provisional Measures) (1999) ICJ Rep 922

Legality of the Use of Force (Yugoslavia v. Germany) (5 July 2000) Preliminary Objections of the Federal Republic of Germany <http://www.icj-cij.org/docket/files/108/10875.pdf> accessed 10 July 2019

Legal Status of Eastern Greenland (Denmark v Norway) (Judgement) PCIJ Rep Series A/B No 53 at 49

Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) (Judgment) [2001] ICJ Rep 40

North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) [1969] ICJ Rep 3

P Yassin Abdulah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, Joined Cases C-402/05 and C-415/05 [2008] ECR I–6351

Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) (Judgement) [2012] ICJ Rep 422

Racke GmbH & Co v Hauptzollamt mainz (C- 162/96) [1998] ECR I-3655

Reparation for injuries suffered in the service of the United Nations (Advisory Opinion) [1949] ICJ Rep 174

Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [1951] ICJ Rep 25

Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) [2008] ICJ Rep 12

Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras) (Judgement) [2007] ICJ Rep 659

Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (Advisory Opinion) [1932] PCIJ Series A/B no 44

Van Duyn v Home Office (C- 41/74) [1974] ECR I- 1337

Table of Treaties, UN and Regional Documents

International Treaties

Additional Protocol II to the 1949 Geneva Conventions Relating to the Protection of Victims of Non- International Armed Conflicts (signed on 8 June 1977 and entered into force on 7 December 1978) 1125 UNTS 609

Charter of the United Nations (signed on 26 June 1945 and entered into force on 24 October 1945) 1 UNTS XVI

Covenant of the League of Nations (signed on 28 June 1919 and entered into force on 10 January 1920) 225 CTS 195

General Act for the Pacific Settlement of International Disputes (signed on 26 September 1928 and entered into force on 16 August 1929) 93 LNTS 343

General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact, signed on 27 August 1928 and entered into force on 24 July 1929) 94 LNTS 57

Statute of the International Court of Justice (signed on 26 June 1945 and entered into force on 24 October 1945) 33 UNTS 933

Vienna Convention on the Law of Treaties (signed on 23 May 1969 and entered into force on 27 January 1980) 1155 UNTS 331

UN Documents

Letter from the Secretary-General addressed to the President of the Security Council (7 December 2007) UN Doc S/2007/721

Presidential Statement of the Security Council (19 January 1999) UN Doc S/PRST/1999/2

Report of the Secretary-General, 'An Agenda for Peace' (31 January 1992) UN Doc A/47/277-S/24111

Report of the Secretary-General, ‘The Observer Mission in Liberia’ (13 December 1993) UN Doc S/26868

Report of the Secretary-General, ‘Renewing the United Nations: A Programme for Reform’ (14 July 1997) UN Doc A/51/950

Report of the Secretary-General (3 October 1998) UN Doc S/1998/912

Report of the Secretary-General, ‘On the work of the Organization’ (31 August 1999) UN Doc A/54/1 Supplement No1

Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change, ‘A more secure world: Our shared responsibility’ (2 December 2004) UN Doc. A/59/565

Report of the Secretary-General, ‘In larger freedom: towards development, security and human rights for all’ (21 March 2005) UN Doc A/59/2005

Report of the Secretary-General, ‘Implementing the Responsibility to Protect’ (12 January 2009) UN Doc A/63/677

Report of the Secretary-General, ‘Early Warning, Assessment and the Responsibility to Protect’ (14 July 2010) UN Doc A/64/864

Report of the Secretary-General, ‘The role of regional and sub-regional arrangements in implementing the responsibility to protect’ (27 June 2011) UN Doc A/65/877- S2011/393

Report of the Secretary-General, ‘UN Interim Administration Mission in Kosovo’ (12 August 2011) UN Doc S/2011/514

Report of the Secretary-General, ‘Responsibility to Protect: timely and decisive response’ (25 July 2012) UN Doc A/66/874- S/2012/578

Report of the Secretary-General, ‘A vital and enduring commitment: implementing the responsibility to protect’ (13 July 2015) UN Doc A/69/981- S/2015/500

Secretary-General, ‘A Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations’ (3 January 1995) UN Doc A/50/60- S/1995/1

Secretary-General, '"Responsibility to Protect" Came of Age in 2011 Secretary-General Tells Conference, Stressing Need to Prevent Conflict Before it Breaks Out' (18 January 2012) UN Doc SG/SM/14068

Statement by the President of the Security Council (22 January 1991) UN Doc S/22133

Statement by the President of the Security Council (7 May 1992) UN Doc S/23886

Statement of the President of the Security Council (19 January 1999) UN Doc S/PRST/1999/2

Statement of the President of the Security Council (29 January 1999) UN Doc S/PRST/1999/5

United Nations Documents of the Conference on International Organisation 18 Volumes (Vol XVIII) 1945- 1952, San Francisco

UN, 'Cooperation between the United Nations and Regional Organisations/ Arrangements in a Peacekeeping environment: Suggested Principles and Mechanisms' (March 1999) <https://www.globalpolicy.org/security-council/peacekeeping/regional-organizations-and-un-peacekeeping.html> accessed 22 July 2019

UNGA, Note [transmitting report of the High- Level Panel on Threats, Challenges and Change entitled 'A more secure world: our shared responsibility] (2 December 2004) UN Doc A/59/565

UNGA Res 375 (6 December 1949) UN Doc A/RES/375

UNGA Res 2131 (21 December 1965) UN Doc A/RES/20/2131

UNGA Res 2625 (24 October 1970) A/RES/25/2625

UNGA Res 36/27 (13 November 1981) UN Doc A/RES/36/27

UNGA Res 38/7 (2 November 1983) UN Doc A/RES/38/7

UNGA Res 44/240 (29 December 1989) UN Doc A/RES/44/240

UNGA Res 49/57 (9 December 1994) UN Doc A/RES/49/57

UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1

UNGA Res 63/308 (14 September 2009) UN Doc A/RES/63/308

UNGA Res 65/276 (3 May 2011) UN Doc A/RES/65/276

UNGA 54th session (20 September 1999) UN Doc A/54/PV.4

UNGA 54th session (21 September 1999) UN Doc A/54/PV.6

UNGA 54th session (21 September 1999) UN Doc A/54/PV.7

UNGA 54th session (22 September 1999) UN Doc A/54/PV.8

UNGA 54th session (23 September 1999) A/54/PV.10

UNGA 54th session (25 September 1999) A/54/PV.14

UNGA 54th session (7 October 1999) UN Doc A/54/PV.29

UNGA 54th session (8 October 1999) UN Doc A/54/PV.32

UNGA 60th session (16 September 2005) UN Doc A/60/PV.8

UN Press Release (24 March 1999) UN Doc SG/SM/6938

UNSC Press Release (17 March 2011) UN Doc SC/10200

UNSC Draft Res Belarus, India and Russian Federation (26 March 1999) UN Doc S/1999/328

UNSC 'Letter Dated 9 August 1990 from the Permanent Representative of Nigeria to the United Nations Addressed to the Secretary-General' (10 August 1990) UN Doc S/21485 Annex 3

UNSC 'Letter dated 6 August from the Charge d' Affaires A.I. of the permanent mission of Benin to the United Nations addressed to the Secretary-General' (Cotonou Agreement signed on 25 July 1993) (9 August 1993) UNSC Doc S/26272 Annex

UNSC 'Letter dated 27 August 2003 from the Permanent Representative of Ghana to the United Nations addressed to the President of the Security Council' (Accra Comprehensive Peace Agreement signed on 18 August 2003) (29 August 2003) UN Doc S/2003/850 Annex

UNSC ‘Letter dated 14 March 2011 from the Permanent Observer of the League of Arab States to the UN addressed to the President of the SC’ (League of Arab States Res No 7360, 12 March 2011) (14 March 2011) UN Doc S/2011/137

UNSC Report, ‘The Security Council and regional organisations: facing the new challenges to international peace and security’ (11 April 2003) UN Doc S/PV.4739

UNSC Res 221 (9 April 1966) UN Doc S/RES/221

UNSC Res 678 (29 November 1990) UN Doc S/RES/678

UNSC Res 688 (5 April 1991) UN Doc S/ RES/ 688

UNSC Res 770 (13 August 1992) UN Doc S/RES/770

UNSC Res 788 (19 November 1992) UN Doc S/RES/788

UNSC Res 794 (3 December 1992) UN Doc S/RES/794

UNSC Res 816 (31 March 1993) UN Doc S/RES/816

UNSC Res 866 (22 September 1993) UN Doc S/RES/866

UNSC Res 940 (31 July 1994) UN Doc S/RES/940

UNSC Res 1160 (31 March 1998) UN Doc S/RES/1160

UNSC Res 1199 (23 September 1998) UN Doc S/RES/1199

UNSC Res 1203 (24 October 1998) UN Doc S/RES/1203

UNSC Res 1207 (17 November 1998) UN Doc S/RES/1207

UNSC Res 1239 (14 May 1999) UN Doc S/RES/1239

UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244

UNSC Res 1386 (20 December 2001) UN Doc S/RES/1386

UNSC Res 1484 (30 May 2003) UN Doc S/RES/1484

UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970

UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973

UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975

UNSC Res 2085 (20 December 2012) UN Doc S/RES/2085

UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249

UNSC Res 2337 (19 January 2017) UN Doc S/RES/2337

UNSC 1022th meeting (23 October 1962) UN Doc S/PV.1022

UNSC 1198th meeting (4 May 1965) UN Doc S/PV.1198

UNSC 1346th meeting (3 June 1967) UN Doc S/PV.1346

UNSC 2280th meeting (12 June 1981) UN Doc S/PV.2280

UNSC 2288th (19 June 1981) UN Doc S/PV.2288

UNSC 2974th meeting (22 January 1991) UN Doc S/PV.2974

UNSC 3138th meeting (19 November 1992) UN Doc S/PV. 3138

UNSC 3988th meeting (24 March 1999) UN Doc S/PV.3988

UNSC 4008th meeting (21 May 1999) UN Doc S/PV.4008

UNSC 4084th meeting (17 December 1999) UN Doc S/PV.4084

UNSC 7402nd meeting (9 March 2015) UN Doc S/PV.7402

UNYB ‘Middle East: Situation between individual Arab States and Israel’ (1981) 275

Regional Treaties and Documents

African Union

AU Assembly, 'Decision on the Peaceful Resolution of the Libyan crisis' (25 May 2011) AU Doc EXT/ASSEMBLY/AU/DEC/(01.2011)

AU PSC Communiqué of 265th meeting (10 March 2011) AU Doc PSC/PR/Comm.2(CCLXV)

AU PSC Communiqué of 268th meeting (23 March 2011) AU Doc PSC/PR/BR.1(CCLXVIII)

Constitutive Act of the African Union (signed on 11 July 2000 and entered into force 26 May 2001) OAU Doc CAB/LEG/23.15

The Ezulwini Consensus, AU Doc Ext/EX.CL/2(VII) (7-8 March 2005)

Economic Community of West African States

ECOWAS Authority of Heads of State and Government Dec A/DEC. 9/5/90 (30 May 1990) OJ of the ECOWAS vol 21 (1992) 5

ECOWAS Authority of Heads of State and Government, 'Final Communiqué of the Extraordinary Session of the Authority of Heads of State and Government on Cote d'Ivoire' (Abuja 24 December 2010) <https://www.ecowas.int/wp-content/uploads/2015/02/2010-24-december-Extra.pdf> accessed 18 June 2019

ECOWAS Authority of Heads of State and Government, 'Final Communiqué of the 50th Ordinary Summit of the Authority of Heads of State and Government' (Abuja 17 December 2016) <https://www.ecowas.int/wp-content/uploads/2016/12/Communiqu%c3%a9-Final_50th-Summit_Abuja_Dec-16_Eng.pdf> accessed 18 June 2019

ECOWAS Protocol on Non- Aggression (signed on 22 April 1978 and entered into force on 4 August 1982) <http://documentation.ecowas.int/legal-documents/protocols/> accessed 22 June 2019

ECOWAS Protocol A/SP.3/5/81 on Mutual Assistance and Defence (signed on 29 May 1981 and entered into force 30 September 1986) <http://documentation.ecowas.int/legal-documents/protocols/> accessed 22 June 2019

ECOWAS Protocol A/P.1/12/99 relating to the Mechanism for conflict prevention, management, resolution, peace-keeping and security (10 December 1999) <http://documentation.ecowas.int/legal-documents/protocols/> accessed 22 June 2019

ECOWAS Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (signed on 21 December 2001 and entered into force on 20 February 2008) <http://documentation.ecowas.int/legal-documents/protocols/> accessed 22 June 2019

ECOWAS Regulation MSC/REG.1/01/08, The ECOWAS Conflict Prevention Framework (8 January 2008) <https://old.ecowas.int/publications/en/framework/ECPF_final.pdf> accessed 22 June 2019

Revised Treaty of the Economic Community of West African States (ECOWAS) (signed on 24 July 1993 and entered into force on 23 August 1995) 35 ILM 660

ECOWAS Standing Mediation Committee Decision A/DEC.1/8/90 (7 August 1990) OJ of the ECOWAS vol 21 (1992) 6

ECOWAS Standing Mediation Committee Decision A/DEC.2/8/90 (7 August 1990) OJ of the ECOWAS vol 21 (1992) 8

ECOWAS Standing Mediation Committee Decision A/DEC.3/8/90 (7 August 1990) OJ of the ECOWAS vol 21 (1992) 9

ECOWAS Standing Mediation Committee Decision A/DEC.4/8/90 (7 August 1990) OJ of the ECOWAS vol 21 (1992) 9

ECOWAS Standing Mediation Committee, ‘Final Communique of the First Session’ (6-7 August 1990) OJ of the ECOWAS vol 21 (1992) 41

Joint Statement by the ECOWAS Executive Secretary Dr Abass Bundu and the leader of the National Patriotic Front of Liberia Mr Charles Taylor (1 July 1990) OJ of the ECOWAS vol 21 (1992) 5

Treaty of the Economic Community of West African States (ECOWAS) (28 May 1975) 1010 UNTS 17

European Union

Brussels Treaty (Merger Treaty) (signed on 8 April 1965 and entered into force on 1 July 1967) OJ 152 of 13.7.1967

Charter of Fundamental Rights of the European Union (signed on 12 December 2007 and entered into force on 1 December 2009) OJ C 326 of 26.10.2012

Council Decision 2011/210/CFSP (1 April 2011) on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya) [2011] OJ L 89/17 (Corrigendum [2011] OJ L 203/36)

Council Decision 2018/856/CFSP (8 June 2018) amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo (EULEX Kosovo) [2018] OJ L146/5

Council Joint Action 2003/423/CFSP (5 June 2003) on the European Union military operation in the Democratic Republic of Congo [2003] OJ L 143/50

Council of the EU (15 June 2004), 'EU-UN cooperation in Military Crisis Management Operations Elements of Implementation of the EU-UN Joint Declaration', Annex II to the ESDP Presidency Report Doc 10547/04

Council of the EU (7 June 2007), 'Joint UN- EU Statement on Cooperation in Crisis Management' (Press) <https://www.consilium.europa.eu/uedocs/cmsUpload/EU-UNstatmntoncrsmngmnt.pdf> accessed 19 June 2019

Council of the EU (17 November 2009), 'Ministerial Declaration: ESDP Ten Years – Challenges and Opportunities' <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/gena/111253.pdf > accessed 19 June 2019

Council of the EU (24 February 2019), 'Declaration by the High Representative on behalf of the EU on the latest events in Venezuela' (Press) (2019) <https://www.consilium.europa.eu/en/press/press-releases/2019/02/24/declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-latest-events-in-venezuela/pdf> accessed 19 June 2019

European Commission (10 September 2003), 'The European Union and the United Nations: The Choice of Multilateralism' COM(2003)526

European Commission (13 June 2018), 'EU budget: Stepping up the EU's role as a security and defence provider' <https://europa.eu/rapid/press-release_IP-18-4121_en.htm> accessed 20 January 2019.

European Council (12 December 2003), 'A Secure Europe in a Better World: A European Security Strategy' <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf> accessed 20 June 2019

European Council (11 March 2011), Remarks by President Herman Van Rompuy at the press conference following the extraordinary European Council on EU Southern Neighbourhood and Libya (2011) PCE 065/11 <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/119779.pdf> accessed on 20 July 2019

European Council, Presidency Conclusions, Berlin European Council (24- 25 March 1999) 'Statement by the European Council concerning Kosovo' No 6886/99 <http://www.consilium.europa.eu/en/european-council/conclusions/1993-2003/> accessed 20 June 2019

European Council, Presidency Conclusions, Cologne European Council (3- 4 June 1999) SN 150/99 REV 1

European Council, Presidency Conclusions, Helsinki European Council (10-11 December 1999) SN 300/99

European Council, Presidency Conclusions, Göteborg European Council (15- 16 June 2001) SN 200/1/01 REV 1

European Council, Presidency Conclusions, Laeken European Council (14- 15 December 2001) SN 300/1/01 REV 1

European Parliament Recommendation to the Council (18 April 2013), 'UN Principle of the "Responsibility to Protect" (R2P)' Doc 2012/2143(INI) <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0180&language=EN> accessed 20 January 2019

European Parliament Resolution (24 November 2015), 'The role of the EU within the UN' Doc P8_TA (2015)0403 <http://www.europarl.europa.eu/doceo/document/TA-8-2015-0403_EN.html> accessed 18 June 2019

European Parliament Resolution (20 April 1994), 'Resolution on the right of humanitarian intervention' OJ C 128/225

European Parliament Resolution (10 March 2011), 'Southern Neighbourhood, and Libya in particular, including humanitarian aspects' Doc P7_TA(2011)0095 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0095+0+DOC+XML+V0//EN> accessed 20 July 2019

European Parliament Resolution (28 March 2019), 'Emergency situation in Venezuela' Doc P8_TA-PROV(2019)0327 <http://www.europarl.europa.eu/doceo/document/TA-8-2019-0327_EN.pdf> accessed 19 June 2019

EU Statement (25 October 2018), 'EU Statement – United Nations 6th Committee: Identification of customary international law' <https://eeas.europa.eu/delegations/un-new-york/54119/eu-statement-%E2%80%93-united-nations-6th-committee-identification-customary-international-law_en> accessed 20 January 2019

Treaty establishing the European Coal and Steel Community (signed on 18 April 1951, entered into force on 23 July 1952 and expired on 23 July 2002) 261 UNTS 140

Treaty establishing the European Atomic Energy Community (signed on 25 March 1957 and entered into force on 1 January 1958) 298 UNTS 167

Treaty establishing the European Economic Community (signed on 25 March 1957 and entered into force on 1 January 1958) 298 UNTS 3

Single European Act (signed February 1986 and entered into force on 1 July 1987) OJ L 169 of 29.6.1987

Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts (signed on 2 October 1997 and entered into force on 1 May 1999) OJ C 340/1 of 10.11.1997

Treaty of Nice Treaty of Nice amending the Treaty on the European Union, the Treaties Establishing the European Communities and Certain Related Acts (signed on 26 February 2001 and entered into force on 1 February 2003) OJ C 80/1 of 10.3.2001

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (signed on 13 December 2007 and entered into force on 1 December 2009) OJ C 306 of 17.12.2007

Treaty on European Union (Maastricht Treaty) (signed on 7 February 1992 and entered into force on 1 November 1993) OJ C 191/1 of 29.7.1992

Treaty on European Union (consolidated version 2012) OJ C 326 of 26.10.2012

Treaty on the Functioning of the European Union (consolidated version 2012) OJ C 326 of 26.10.2012

Franco- British Agreements

Franco- British Summit, Joint Declaration on European Defense, Saint- Malo (4 December 1998) <https://www.cvce.eu/obj/franco_british_st_malo_declaration_4_december_1998-en-f3cd16fb-fc37-4d52-936f-c8e9bc80f24f.html> accessed 22 July 2019

Treaty of Alliance and Mutual Assistance between the United Kingdom and France (Treaty of Dunkirk) (signed on 4 March 1947 and entered into force on 8 September 1947) UK Treaty Series 73 (1947)

Inter- American Conference on War and Peace

Resolution on the Reciprocal Assistance and Solidarity (Act of Chapultepec, Inter-American) (signed on 6 March 1945 and entered into force on 8 March 1945) TIAS 1543

North Atlantic Treaty Organization

NATO, 'London Declaration on a Transformed North Atlantic Alliance Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council' (6 July 1990) <http://www.nato.int/docu/comm/49-95/c900706a.htm> accessed 10 July 2019

NATO, 'Alliance's New Strategic Concept' (7 November 1991) <http://www.nato.int/cps/en/natohq/official_texts_23847.htm> accessed 10 July 2019

NATO, Alliance's New Strategic Concept (24 April 1999) <http://www.nato.int/cps/en/natolive/official_texts_27433.htm> accessed 10 July 2019

NATO, 'Lisbon Summit Declaration' (20 November 2010) <http://www.nato.int/cps/en/natohq/official_texts_68828.htm> accessed 10 July 2019

North Atlantic Treaty (Washington Treaty) (signed on 4 April 1949 and entered into force on 24 August 1949) 34 UNTS 243

Organisation for Security and Cooperation in Europe

Helsinki Final Act of Conference on Security and Co-operation in Europe (CSCE) (signed on 1 August 1975) 14 ILM 1292

Western European Union

Petersberg Declaration, Ministerial Council of the Western European Union (WEU) (19 June 1992) <http://www.weu.int/documents/920619peten.pdf> accessed 19 June 2019

Protocols to the 1948 Brussels Treaty establishing the Western European Union (Paris Agreements signed on 23 October 1954 and entered into force on 6 May 1955, all WEU activities ceased on 30 June 2011) UK Treaty Series 39 (1955)

Treaty for Collaboration in Economic, Social, and Cultural Matters, and for Collective Self-Defense (Treaty of Brussels signed on 17 March 1948, entered into force on 25 August 1948 and terminated on 31 March 2010) 19 UNTS 51

Reports

International Committee of the Red Cross (ICRC), 'Assessment of Customary International Law' <https://www.icrc.org/customary-ihl/eng/print/vl_rul_in_asofcuin> accessed 18 December 2018

International Committee of the Red Cross (ICRC), 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> accessed 20 July 2019

International Commission on Intervention and State Sovereignty (ICISS) *The Responsibility to Protect* (International Development Research Centre- Canada 2001) <https://www.idrc.ca/en/book/responsibility-protect-report-international-commission-intervention-and-state-sovereignty> accessed 16 December 2018

International Law Association, 69th Conference, Final Report of the Committee on the Formation of Customary (General) International Law, 'Statement of Principles Applicable to the Formation of General Customary International Law' (London 2000) 69 ILA Conf Rep 712

International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) (Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi) UN Doc A/CN.4/L.682

International Law Commission, 'First Report on Formation and Evidence of Customary International Law' (17 May 2013) UN Doc A/CN.4/663 (prepared by Sir Michael Wood, Special Rapporteur)

International Law Commission, 'Second Report of the ILC on Identification of Customary International Law' (22 May 2014) UN Doc A/CN.4/672 (prepared by Sir Michael Wood, Special Rapporteur)

International Law Commission, 'Third Report of the ILC on Identification of Customary International Law' (27 March 2015) UN Doc A/CN.4/682 (prepared by Sir Michael Wood, Special Rapporteur)

International Law Commission, ‘Fourth Report of the ILC on Identification of Customary International Law’ (8 March 2016) UN Doc A/CN.4/695 (prepared by Sir Michael Wood, Special Rapporteur)

International Law Commission, ‘Identification of Customary International Law, comments and observations received from Governments’ (14 February 2018) UN Doc A/CN.4/716

International Law Commission, ‘Report of the International Law Commission covering its second session’ (5 June—29 July 1950) UN Doc A/1316

International Law Commission, ‘Report of the International Law Commission on the work of its eighteenth session’ vol II (4 May- 19 July 1966) UN Doc A/CN.4/191

International Law Commission, ‘Report of the International Law Commission on the work of its sixty-seventh session (4 May-5 June and 6 July-7 August 2015) UN Doc A/70/10

International Law Commission, ‘Report of the International Law Commission on the work of its sixty-eighth session’ (2 May-10 June and 4 July-12 August 2016) UN Doc A/71/10

International Law Commission, ‘Report of the International Law Commission on the work of its seventieth session’ (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10

List of Abbreviations

AFJICL	African Journal of International and Comparative Law
AfricanSQ	African Studies Quarterly
AJCR	African Journal on Conflict Resolution
AJIL	American Journal of International Law
AmPolSciRev	American Political Science Review
ASIL PROC	American Society of International Law Proceedings
AustYBIL	Australian Yearbook of International Law
BaltYIL	Baltic Yearbook of International Law
BCIntl&CompLRev	Boston College International and Comparative Law Review
BYIL	British Yearbook of International Law
CaseWResJIL	Case Western Reserve Journal of International Law
ChiJIntlL	Chicago Journal of International Law
Chinese JIL	Chinese Journal of International Law
ColumJTransnatlL	Columbia Journal of Transnational Law
DenvJIntlL&Pol	Denver Journal of International Law and Policy
EJIL	European Journal of International Law
EPIL	Encyclopaedia of Public International Law (Bernhardt edn)
Fletcher FWldAff	Fletcher Forum of World Affairs
FYBIL	Finnish Yearbook of International Law

GoJIL	Gottingen Journal of International Law
GYBIL	German Yearbook of International Law
ICLQ	International Comparative and Law Quarterly
IJHR	International Journal of Human Rights
ILA Rep Conf	International Law Association Conference Report
ILM	International Legal Materials
IowaLRev	Iowa Law Review
IsLR	Israel Law Review
JCS	The Journal of Conflict Studies
JCSL	Journal of Conflict and Security Law
JHA	The Journal of Humanitarian Assistance
JPR	Journal of Peace Research
JUFIL	Journal on the Use of Force and International Law
LIJ	Legal Issues Journal
LiverpoolLRev	Liverpool Law Review
LJIL	Leiden Journal of International Law
LQR	Law Quarterly Review
MaxPlanckUNYB	Max Planck Yearbook of United Nations
MichJIntlL	Michigan Journal of International Law

MPEPIL	Max Planck Encyclopedia of Public International Law (Rüdiger Wolfrum edn)
NELR	North East Law Review
NILR	Netherlands International Law Review
NordicJIL	Nordic Journal of International Law
OsgoodeHallLJ	Osgoode Hall Law Journal
PCIJ	Permanent Court of International Justice
RADIC	African Journal of International and Comparative Law
RdC	Recueil des Cours de l'Académie de Droit International de la Haye
RGDIP	Revue Générale de Droit International Public
TempleIntlCompLJ	Temple International and Comparative Law Journal
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNYB	Yearbook of the United Nations
VAJIntlL	Virginia Journal of International Law
VandJTransatlL	Vanderbilt Journal of Transnational Law
WestPolQ	Western Political Quarterly
WisIntlLJ	Wisconsin International Law Journal
WVaLRev	West Virginia Law Review
YaleJL&Human	Yale Journal of Law and the Humanities

ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht = Heidelberg Journal of International Law

1. Introduction

1.1. Background to the study

This thesis inquires whether regional humanitarian intervention constitutes an emerging legal norm, by addressing the corollary question of whether this claim finds support in the practice of regional organisations. The inquiry of this work originates from an antithetic observation: whereas the support for an allegedly emerging legal status of humanitarian intervention in general and by regional organisations (ROs) under custom is being presented as reminiscent, the legal reasoning advanced to support this argument is largely founded on presuppositions of what the law should be rather than on a systematic analysis of the contours of the identification of customary international law (CIL) and of the contemporary relevance of articulations supportive of a nascent CIL rule.[1] The phenomenon of such argumentative deficiencies explains the resurfaced interest of the International Law Commission (ILC) in the discussion of the 'Identification of Customary International Law' and the adoption of a set of Conclusions in 2018 endeavouring to address the practice and opinio juris of both states and international organisations (universal or regional).[2] Notwithstanding that the potential contribution of ROs to the rise or crystallization of new CIL rules is uncontested, the ILC's effort to prescribe how it shall be determined is relevant to the discussion of humanitarian intervention considering that the CIL argument for an emerging legal rule of humanitarian intervention has been presented more profoundly against the backdrop of regional interventions.

[1] Adam Rowe accepts that the discussion of humanitarian intervention represents a scholarly quest to circumvent the criticism against humanitarian intervention whilst asserting that principles and values might be capable of suggesting that it should be lawful but not that it is or that it is emerging; see Adam Rowe, 'Soft Sovereignty: A possible basis for the legality of humanitarian intervention' (2018) 6 NELR 90. The 'illegal but justified' approach is also pertinent on what the law should be rather than providing justification for a claim of emerging transformation; see Anthea Roberts, 'Legality vs. Legitimacy: Can Uses of Force Be Illegal But Justified?' in Philip Alston and Euan Macdonald (eds), *Human Rights, Intervention and the Use of Force* (OUP 2008) 204.

[2] Official Records of the General Assembly, Report of the International Law Commission Covering its Second Session (5 June—29 July 1950) UN Doc A/1316 at 367- 374; International Law Association, Committee on the Formation of Rules of Customary (General) International Law, *Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law* (2000) 69 ILA Conf Rep 712 [ILA Report 2000]; Official Records of the General Assembly, Report of the International Law Commission on the Work of its Seventieth Session (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10 paras 53–66 [ILC Report 2018]. For a recent recognition of the probative value of the ILC Conclusions see *Argentine Necessity Case* (Case No 2 BvM 1-5/03, 1, 2/06) [2007] 138 ILR 1, para 2.

It has been suggested that 'the Kosovo case may be seen as an initial point impelling states to express themselves formally in favour of forcible humanitarian action as a matter of law'.[3] As this thesis illustrates, during the 1999 Kosovo intervention and its aftermath, the legality of humanitarian intervention, general and regional, was a matter of constant debate; but not necessarily 'in favour' of it 'as a matter of law'. Accepting that at the time humanitarian intervention, particularly by ROs, could have been emerging, a legal rule (specific for ROs or general) has never taken off.[4] Following Kosovo, ROs have relentlessly refrained from undertaking actual unilateral interventions and where they have, humanitarian reasons have been invoked to supplement other justifications such as self- defence and protracted enforcement of prior UNSC mandates.[5] The discontinuity in actual practice for almost 20 years, following the wide appeal for an emerging norm at the beginning of 2000s, warrants a critical assessment of Weller's more recent proposition that 'at least it is difficult to deny that there is an emerging rule, based on this practice and opinio juris'.[6]

In general, scholars continue to advocate for a legal doctrine of humanitarian intervention[7] and take to discuss possibilities in the middle of precise rules and elastic standards.[8] Arguments supportive of a reinterpretation of the UN Charter[9] or of a CIL change of the general prohibition to use force[10] are also central to the debate surrounding the (il)legality

[3] Marc Weller, 'Forcible Humanitarian Action in International Law- part I' (2017) EJIL: Talk! <https://www.ejiltalk.org/forcible-humanitarian-action-in-international-law-part-i/> accessed 16 December 2018.
[4] Sir Nigel Rodley, 'Humanitarian Intervention' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015).
[5] Vaughn Lowe and Antonios Tzanakopoulos, 'Humanitarian Intervention' in Rüdiger Wolfrum (ed), *MPEPIL* (OUP 2011) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e306?prd=EPIL> accessed 16 December 2018.
[6] Weller (n 3).
[7] The discussion is not abandoned; Michael Scharf, 'Striking a Grotian Moment: How the Syria Airstrikes Changed International Law Relating to Humanitarian Intervention' (2018) 19 ChiJIntlL (2019 Forthcoming) Case Legal Studies Research Paper No 2018-11 available at <https://ssrn.com/abstract=3249158> accessed 16 December 2018. He suggests that in light of the Syria airstrikes of April 2018 something is changing as to the conventionally perceived illegality of humanitarian intervention through customary international law.
[8] Monica Hakimi, 'The Jus Ad Bellum's Regulatory Form' (2018) 112 AJIL 151; she argues that some form of legal regulation is embodied in the decisions of the UNSC which do not formally authorize specific military operations but still condone them.
[9] Ademola Abass, *Regional Organisations and the development of Collective Security, Beyond Chapter VIII of the UN Charter* (Hart Publishing 2004) 190.
[10] Scharf (n 7); Daniel Bethlehem, 'Stepping Back a Moment-The Legal Basis in Favour of a Principle of Humanitarian Intervention' (2013) EJIL: Talk! <http://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/> accessed 22 June 2020; Harold Hongju Koh, 'Remarks by Harold Hongju Koh' (2017) 111 ASIL PROC 114, 115.

of interventions and allegedly reflect the need to stand up to contemporary challenges.[11] A major contemporary challenge for international law is the increasing number of unilateral hegemonic states' military action. The cases of Yemen, Syria and the 2019 foreign military re-engagement in Libya, implore the re-assessment of regional action as a possible lawful alternative and compromising response when the UN proves unable to resolve humanitarian crises. Along these lines, the development of the theory of regional responsibility to protect by means of humanitarian interventions has been claimed despite the 2005 World Summit Outcome on a multilateral 'Responsibility to Protect' (R2P);[12] and arguments for the establishment of regional arrangements as authorising mechanisms alternative to the UN Security Council are being presented.[13] Additionally, it has been purported that a regional right to use force unilaterally in humanitarian crises shall be assessed in light of modifications resembling a change in custom.[14] Nevertheless, this claim has not been examined vis-à-vis the general practice of (at least the most representative and involved) ROs but has rather been used only in the African context.

The analysis of case studies which are foundational in this debate, informs current developments by examining the legal status of regional unilateral humanitarian action under the rubric of CIL as an alleged alternative to hegemonic states' unilateralism. In the course of the aforementioned analysis, the thesis reveals that the replacement of the executive authority of the UNSC in determining when military intervention is warranted has not been recognised in the practice and opinio juris of international actors even through multilateral bodies, such as regional organisations. Although this begs additional questions such as why international actors have resisted this development, why the executive authority remains vested to the UN and who is acting in the case of regional humanitarian intervention and whether this could be conceptualised as multilateral action rather than unilateral, those are issues for future research and relevant remarks are made only corollary to the examination of CIL development.

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[11] Eric Heinze, 'The Evolution of International Law in Light of the Global War on Terror' (2011) 37 Review of International Studies 1069, 1094.

[12] John-Mark Iyi, *Humanitarian Intervention and the AU-ECOWAS Intervention Treaties Under International Law: Towards a Theory of Regional Responsibility to Protect* (Springer 2016) 202.

[13] Bolarina Adediran, 'Implementing R2P: Towards a Regional Solution?' (2017) 9 Global Responsibility to Protect 459; Paul R Williams and Sophie Pearlman, 'Use of Force in Humanitarian Crises: Addressing the Limitations of UN Security Council Authorization' (2019) 51 CaseWResJIL 211.

[14] Suyash Paliwal, 'The Primacy of Regional Organisations in International Peacekeeping: the African Example' (2010) 51 VaJIntlL 185.

In the words of Franck, 'Any prognosis regarding the future of world order must begin by addressing the question whether recent events have indeed had a transformative effect on the law of the international system, and if so, what that transformation portends'.[15] That inquiry is equally relevant for the interpretation of treaties and the transformation or development of new rules under customary international law.[16] With regards to the latter, the immense institutionalization of the international legal order and the ever-growing involvement of ROs in the area of international peace and security, renders the examination of their acclaimed contribution to the legal normative construction of the use of force through custom essential. Against the backdrop of the ILC's recent work which calls for the systematic examination of CIL, the thesis considers the legal value of regional contribution towards the development of humanitarian intervention through a stocktaking analysis. This seeks to examine the extent to which ROs inform the two constituent elements required for the development of a new customary international law rule, *usus* and *opinio juris*. The accepted *jus cogens* nature of the general prohibition sets a priori a high threshold for the development of a rule for humanitarian intervention, general or regional.[17] In order to analyse the effect of institutional undertakings with regards to the normative status of regional humanitarian intervention under CIL it is necessary to portray first the theoretical underpinnings of the notion of humanitarian intervention and the merits of regional engagement.

The notion of humanitarian use of force and regional engagement

The alleged right of unilateral use of force originates from a preceding general theory for the humanitarian use of force, which dates back to 'the emergence of a substantive

[15] Thomas Franck, 'What Happens Now? The United Nations after Iraq' (2003) 97 AJIL 607, 610.
[16] Article 31(3)(b) of the 1969 VCLT.
[17] In the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14, para 190, it was submitted that the prohibition of the use of force also constitutes jus cogens; according to article 53 of the Vienna Convention on the Law of Treaties, derogations to a rule of jus cogens are not permissible, and can only be modified by a subsequent norm of general international law having the same character. See Alexander Orakhelashvilli, 'Changing Jus Cogens through State Practice? The Case of the Prohibition of the Use of Force and its Exceptions' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 165- 175. The analysis at hand does not revolve around the construction and replacement of norms jus cogens per se, since the ascertainment of rules as having the abovementioned status is an issue that the ILC has kept distinct to the identification of custom; additionally, this is currently debated by the Commission. Considering that further discussion of this is warranted the ILC decided at its 3257th meeting (27 May 2015) to include the topic 'Jus cogens' in its programme of work; see 'Chapter XII, Other decisions and conclusions of the Commission' in the Official Records of the General Assembly, Report of the International Law Commission on the Work of its Sixty-seventh Session (4 May-5 June and 6 July-7 August 2015) UN Doc A/70/10 at 138, para 286.

doctrine of the just war in the Middle Ages'.[18] Nevertheless, according to Stowell, the first attempt to find a juridical basis for intervention including explicitly humanitarian intervention is attributed to Von Rotteck in 1845.[19] Although he considered humanitarian intervention as unlawful, he held that on moral grounds it may be excused and applauded.[20] Several formulations of the theory have been attempted since then by the proponents of its legality, in trying to explain its use and scope. During the pre- Charter era, the theory of humanitarian use of force underwent a significant contextualization through the definitions provided by different writers. Yet, as Murphy underlines, they described 'a right of states'.[21] In 1910, Rougier proclaimed that when a state acts contrary to the laws of humanity, another state acquires the right to scrutinize such actions irrespective of the former state's internal sovereignty.[22] Stowell, in 1921, asserted that force shall be used for 'the justifiable purpose of protecting the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice'.[23]

Following the adoption of the UN Charter, the theory of interventions to avert humanitarian catastrophes was not abandoned by scholars. As discussed by Brownlie, the eighth edition of Oppenheim of 1955 refers to a legal right of foreign states, which is generated 'when a state renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind'.[24] Similarly, Moore mentions that humanitarian intervention is legally permissible when a given situation constitutes an 'immediate and extensive threat to fundamental human rights, particularly a threat of widespread loss of human life'.[25] Lillich states that humanitarian intervention is the means for opposing conditions of

[18] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (OUP 2003) 8.
[19] Ellery C Stowell, *Intervention in International Law* (Washington DC John Byrne & Co 1921) 469.
[20] Ibid 525.
[21] Sean D Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*, vol 21 (Procedural Aspects of International Law Series PENN 1996) 11.
[22] Antoine Rougier, 'La Thèorie de l' Intervention d' Humanitè' [1910] RGDIP 468, 472 in Murphy ibid.
[23] Stowell (n 19) 53.
[24] Lassa F Oppenheim, *International Law: A Treatise: Vol. I- Peace* 8th in Hersch Lauterpacht (ed) (New York: David McKay 1955) 312 cited by Ian Brownlie, *International Law and The Use of Force by States* (OUP 1963) 341.
[25] John N Moore, 'The control of Foreign Intervention in Internal Conflict' (1969) 9 VaJIntlL 205, 264. For a more recent discussion of permissible regional action see Jordan J Paust, 'R2P and Protective Intervention' (2017) 31 TempleIntlCompLJ 109, 113- 115.

'imminent danger' and instances of substantial deprivation of human rights.[26] Tesón considers that forcible help falls within the proportionate transboundary help 'provided by governments to individuals in another state who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government'.[27] By recognising that most of the definitions already expressed through several works have not settled definitively the academic debate due to vagueness, Sean Murphy provides a more accurate definition of humanitarian intervention.[28] His definition refers to 'the threat or the use of force by a state, group of states, or *international organisation* primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognised human rights'.[29] This definition depicts the core tenets of unilateral use of force to avert humanitarian crises put forth by the proponents of the alleged doctrine either by individual states or ROs.

Notwithstanding that multilateralism and the general prohibition to use force of article 2(4) of the UN Charter are founding pillars of the UN collective security system equally sustained under customary international law,[30] in the post-Cold War era the debates on the legality of the practice were not abandoned. Such debates flourished in the midst of NATO's intervention in Kosovo in 1999. Amidst ongoing debates and the strong contestation of the alleged doctrine, a 2001 report from the International Commission on Intervention and State Sovereignty (ICISS) marked the genesis of the concept and textual formulation of the 'Responsibility to Protect'.[31] Up until 2005, there has been a noteworthy lack of consistency in R2P stipulations, including its appraisal as another conceptualisation for the unilateral use of force to avert humanitarian crises. Nevertheless, the contextualisation of R2P at the 2005 UN World Summit marked a break from the pre-

[26] Richard B Lillich, 'Forcible Self-Help by States to Protect Human Rights' (1967) 53 IowaLRev 325, 347-51.
[27] Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (2nd edn, Irvington-on-Hudson, NY: Transnational Publishers 1997) 5.
[28] Murphy (n 21) 11 (emphasis added).
[29] Ibid 11-12.
[30] *Nicaragua* case (n 17) at para 181 holds that 'The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations'. In the same paragraph, it is asserted that the 'Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it'.
[31] ICISS, *The Responsibility to Protect* (International Development Research Centre- Canada 2001) <https://www.idrc.ca/en/book/responsibility-protect-report-international-commission-intervention-and-state-sovereignty> accessed 16 December 2018.

asserted concept of humanitarian intervention.[32] Whereas it has been asserted that the 2005 Outcome Document implies the acceptance of a context within which unilateralism is exercisable,[33] in fact the text adopted 'came to the very striking conclusion that no reform of the Charter provisions on collective security was needed'.[34] It provided that R2P is a toolbox for prevention and multilateral response to humanitarian urgencies.

Within that context, ROs were also not armoured with any novel rights to respond unilaterally to humanitarian urgencies. The relevant R2P articulations fall short of indicating that the R2P's military aspect provides adequate evidence for a changed or a changing scope of regional rights in using force, beyond Chapter VIII of the UN Charter. Despite claims to the contrary, according to the standing R2P formulations the protection of civilians against the perpetration of international crimes is vested to the UNSC. This approach received wide theoretical appeal among governments, as was illustrated primarily during the 2005 World Summit debate and the respective Outcome Document,[35] and subsequent support by United Nations resolutions[36] and reports.[37]

Nevertheless, the aforementioned development has not constrained the claims for humanitarian unilateralism at large or by ROs in particular.[38] According to Bannon, in carrying out unilateral interventions in response to mass atrocities 'states [*and regional organisations*] would be acting in a legal void opened by UN inaction and with the purpose of addressing an institutional failure'.[39] As Orford describes, the UN has been attacked 'for failing to make decisions efficiently, failing to protect populations at risk effectively and failing to conduct itself in conformity with fundamental human rights

[32] Weiss characterized the 2005 Outcome Document as RtoP 'lite'; Thomas G Weiss, 'R2P after 9/11 and the World Summit' (2006) 24 WisIntlLJ 741, 750. Graham Melling, 'Beyond rhetoric? Evaluating the Responsibility to Protect as a norm of humanitarian intervention' (2018) 5 JUFIL 78, 79.
[33] Alicia L Bannon, 'The Responsibility to Protect: The U.N. World Summit and the Questions of Unilateralism (2006) 115 YaleJL&Human 1157, 1163.
[34] Christine Gray, 'The Charter Limitations on the Use of Force: Theory and Practice' in Vaughan Lowe, Adam Roberts, Jeniffer Welsh and Dominik Zaum (eds), *The United Nations Security Council and War: the Evolution of Thought and Practice since 1945* (OUP 2008) 91.
[35] Lou Pingeot and Wolfgang Obenland, *In whose name? A critical view on the Responsibility to Protect* (Global Policy Forum and Rosa Luxemburg Stiftung- NY Office 2014) 25.
[36] UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.
[37] Secretary-General, UNSC 7402nd meeting, 'Cooperation between the United Nations and regional and sub-regional organizations in maintaining international peace and security' (9 March 2015) UN Doc S/PV.7402 at 1-26.
[38] Adediran (n 13). Paul R Williams and Sophie Pearlman (n 13).
[39] Bannon (n 33) 1162- 1163; '*and regional organisations'* added.

values'.[40] For the proponents of unilateral humanitarian intervention this calls for other actors 'taking its place as the executive agent of the world community'.[41]

More precisely, the UNSC has been criticised for failing to authorise the use of force in Liberia in 1990, to respond timely to the Rwandan genocide in 1994, to prevent the massacre in Srebrenica in 1995 and to take adequate action to protect the civilians in the conflict in Kosovo in 1999. In the case of Somalia in 1992, although the UNSC inferred that the provision of a secure environment for humanitarian relief operations was imperative for international peace and security, it refrained from suggesting that the protection of human rights is a cause in itself for using force.[42] Inevitably, the said criticism has been raised also in the backdrop of the UNSC's Chapter VII endorsement in other deteriorating humanitarian situations, namely in Bosnia-Herzegovina in 1992 and Haiti in 1994.[43]

More recently, the alleged institutional failure of the UNSC to address consistently humanitarian catastrophes, has been asserted by the proponents of humanitarian unilateralism in the context of the Syrian conflict. More specific, the UN have been accused of refraining to authorise military action to protect the civilian population in Syria despite the ongoing humanitarian crisis of immense dimensions that was triggered by the uprising of March 2011. Even more so, because the atrocities intensified after the UNSC had adopted Resolution 1973 for Libya, with which it endorsed the use of force under Chapter VII, the absence of a similar endorsement in the case of Syria led to further claims by the proponents of humanitarian unilateralism. For example, if in Libya the UNSC had recognised explicitly that atrocities against the civilians pose a direct threat to international peace and security and for the first time it acted upon the inferred doctrine of the R2P under Chapter VII,[44] then why in the absence of a similar endorsement with regards to Syria, other international actors should not intervene militarily albeit unilaterally? Yet, although the US, France and the UK actually launched unilateral airstrikes in Syria culminating to the operations of April 2018, again the humanitarian

[40] Anne Orford, *International Authority and the Responsibility to Protect* (CUP 2011) 177.
[41] Ibid.
[42] UNSC Res 794 (3 December 1992) UN Doc S/RES/794.
[43] UNSC Res 770 (13 August 1992) UN Doc S/RES/770; UNSC Res 940 (31 July 1994) UN Doc S/RES/940.
[44] UNSC Res 1973 (n 36).

intervention justification as such was only put forth in the legal position of the UK.[45] Similarly, despite the unprecedented humanitarian situation in Yemen, the UNSC has refrained from adopting any resolution along the lines of Resolution 1973 and the 2015 military intervention of the Saudi Arabian-led coalition, advocated primarily on grounds of government invitation but in preserving the humanitarian rhetoric, has been eagerly condemned as illegal.[46]

Notwithstanding that following the devastating humanitarian consequences of the R2P intervention in Libya 2011[47] there is a decline in the pro-humanitarian justification for unilateral military interventions,[48] still its appraisal has not been abundantly abandoned. Although the humanitarian intervention claim was not set afront other justifications it was among the justifications offered for the 2015 Saudi Arabian-led intervention in Yemen, alleging to save inter alia 'the Yemeni people from the Houthi aggression',[49] and was strongly propagated by the UK, though this was not shared by its allies, as the main justification for intervening in Syria in 2018. Additionally, support for unilateral humanitarian intervention in general or by regional organisations in particular, is advocated in recent scholarly works.

The claim for unilateral humanitarian intervention by regional organisations is mainly rooted on a factual acknowledgement that regional actors know better and appreciate better the sensitivities, complexities and particularities of local conflicts. Whether their practice and opinio juris reveals substantial support for a change in CIL to accommodate a new right for unilateral intervention to avert mass atrocities, is pertinent upon the

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[45] 'Syria action: UK Government Legal Position' (14 April 2018) <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position> accessed 12 June 2020; On its discussion see Richard Ware, 'The Legal basis for Air Strikes Against Syrian Government Targets' (16 April 2018) House of Commons Library, Briefing Paper No 8287 <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8287#fullreport> accessed 12 June 2020.

[46] Elinor Buys and Andrew Garwood-Gowers, 'The (Ir)Relevance of Human Suffering: Humanitarian Intervention and Saudi Arabia's Operation Decisive Storm in Yemen' (2019) 24 JCSL 1.

[47] Michael Neu and Robin Dunford, 'Libya: ongoing atrocities reveal the trouble with international military intervention' (16 August 2019) *The Conversation* <https://theconversation.com/libya-ongoing-atrocities-reveal-the-trouble-with-international-military-intervention-119918> accessed 12 June 2020.

[48] Kevin Jon Heller, '"Genuine" Unilateral Humanitarian Intervention- Another Ticking Time-Bomb Scenario' (2019) Amsterdam Law School Research Paper No 2019-48 at 13 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3492412> accessed 12 June 2020.

[49] 'Saudi and Arab allies bomb Houthi positions in Yemen' *Al Jazeera News* (26 March 2015) <https://www.aljazeera.com/news/middleeast/2015/03/saudi-ambassador-announces-military-operation-yemen-150325234138956.html> accessed 12 June 2020.

assessment of evidence drawn through their undertakings, past and recent. In principle, regional unilateralism is expressed through the physical undertakings of ROs. Nonetheless, the verbal acts of ROs are also accepted as potential forms of practice for the development of customary international law.[50] Hence, both physical and verbal undertakings are considered as forming potential evidence of the regional practice regarding the customary nature of unilateral humanitarian use of force; and for which the requisite evidence of opinio juris is explored.

The analysis of the allegedly doctrine- generating unilateral interventions of ECOWAS and NATO in Liberia and Kosovo respectively, of the regional decline in undertaking unilateral interventions justified as humanitarian in their follow-up and of the evidence of standing verbal practice particularly through the constitutive constructions of ECOWAS, NATO and the EU in subsequent chapters aims at examining whether they provide support for ascertaining that a new CIL rule for regional humanitarian intervention is emerging. This course of analysis facilitates a more inclusive and contemporary understanding of the regional (including sub-regional) impact on the purported normative transformation.

The analysis of the cases of Liberia and Kosovo is central to the thesis because they provide the context within which the post-Cold War discussion on the legal status of humanitarian intervention and its CIL development has been shaped. Nevertheless, for assessing the claim for a still emerging right it is also important to indicate that in the aftermath of those cases the respective organisations refrained from using force unilaterally on grounds of humanitarian necessity. Unilateral military intervention by ECOWAS has rather been sought for the restoration of constitutional order, also included within the objectives of the 1999 Protocol adopted following Liberia; a most prominent example is the recent unauthorised enforcement action in Gambia (2017).[51] Regarding NATO- following Kosovo- its only military intervention on humanitarian grounds, in Libya (2011), followed a UNSC decision. Two ROs of which the verbal practice is being

[50] ILA Report 2000 (n 2) 725- 726; ILC Report 2018 (n 2) Conclusion 6(1).
[51] The UNSC had not authorised the use of force; UNSC Res 2337 (19 January 2017) UN Doc S/RES/2337. For ECOWAS decision to 'enforce the results of the election' see Ulf Laessing and Paul Carsten, 'West Africa bloc to take "necessary actions" to uphold Gambia vote result' *Reuters* (17 December 2016) at <https://www.reuters.com/article/us-gambia-politics-idUSKBN1460H6> accessed 18 December 2018.

examined are ECOWAS and NATO, since they are the two intervening organisations in Liberia and Kosovo respectively. The verbal practice of the European Union (EU) is also examined. Despite the fact that up to the time this thesis is being completed the EU has not proceeded unilaterally with any alleged humanitarian use of force, inquiring into its verbal practice is not of peripheral significance since the EU constitutes a major global actor in the field of international peace and security constantly engaging in developing its military capabilities.[52] The EU has also explicitly embraced the ILC Conclusions' affirmation of the possible contribution of international organisations to the development of CIL rules.[53]

1.2. Contribution in the context of existing literature

The principles governing the use of force under the UN Charter and general international law are one of the most debated issues among international lawyers. The prohibition of the use of force is seen as the cornerstone of the UN Charter's regime; additionally, it has been repeatedly declared as part of the corpus of customary international law rules.[54] Notwithstanding the status of the general prohibition of the use of force, the practice of unilateral military interventions has been the object of much debate. The academic debate on the contours of the unilateral use of force has revolved extensively around the alleged lawfulness of humanitarian interventions.[55]

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[52] EU Commission Press Release, 'EU budget: Stepping up the EU's role as a security and defence provider' (13 June 2018) announced the Commission's suggestion for a €13 billion European Defence Fund at <https://europa.eu/rapid/press-release_IP-18-4121_en.htm> accessed 20 January 2019.

[53] EU Statement at the 73rd Session of the United Nations General Assembly Sixth Committee (25 October 2018) welcoming the ILC Conclusions <https://eeas.europa.eu/delegations/un-new-york/54119/eu-statement-%E2%80%93-united-nations-6th-committee-identification-customary-international-law_en> accessed 20 January 2019. There was no objection by other EU member states to the submissions of Austria, Netherlands and Denmark regarding the contribution of IOs in the development and identification of customary international law; ILC, 'Identification of customary international law, Comments and observations received from Governments' (14 February 2018) UN Doc A/CN.4/716.

[54] *Nicaragua* (n 17) paras 187- 201; ILC, 'Report of the International Law Commission on the work of its eighteenth session' (4 May- 19 July 1966) UN Doc A/CN.4/191, at 247: 'the great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force'.

[55] Richard B Lillich, *Humanitarian Intervention and the United Nations* (UP Virginia 1973); Tesón (n 27); Murphy (n 21); Thomas Franck, *Recourse to Force, State Action Against Threats and Armed Attacks* (CUP 2002); United Kingdom Foreign Office, Policy Document No 148, reprinted (1986) 57 BYIL 614; Nigel White, 'The Legality of Bombing in the name of Humanity' (2000) 5 JCSL 27; Simon Chesterman, 'Legality versus Legitimacy: Humanitarian Intervention, the Security Council and the Rule of Law' (2002) 33 Security Dialogue 293; Stefan Talmon, 'Changing views on the use of force: The German Position' (2005) 5 BaltYIL 41; Roberts (n 1); Allen Buchanan, *Human Rights, Legitimacy and the Use of Force* (OUP 2009); Ciarán Burke, 'Replacing the Responsibility to Protect: the Equitable Theory of Humanitarian Intervention' (2009) 1(2) Amsterdam Law Forum 61 <http://amsterdamlawforum.org/article/view/64/122>

The amount of diverse scholarly literature on the issues of legality and legitimacy of past unilateral military interventions[56] by regional and collective security organisations could simply be a revelation of the continuity of an old tension in international relations between pro-interventionists and pacifists. Transposed into the hermeneutics of international law, this could simply be another expression of the long-standing debate between the strict adherents of the UN Charter rules and academics who perceive international law as a policy process.[57] Yet, it is something more than that. The changed worldwide preoccupation and legitimate concern for the protection of human rights, espoused inter alia by several regional, sub-regional and other groups of states sets an equally challenging question for both the traditionalist and the policy driven international lawyer: has the changed global environment rendered their unilateral military attainment lawful? Eventually and beyond one's theoretical affiliation, it has to be admitted that the said preoccupation of the international law scholarly community emanates from the genuine concern of how to preserve the innate value of international legal order, how to make it more transparent and preserve its relevance against the chaotic disorderly future that its bankruptcy would portend; whether that means change, accommodation of new rules or a reaffirmation of their legal normative value.

As the literature reveals, the allocation of competences between the United Nations and other international organisations in attaining international peace and security is not a new issue for international lawyers.[58] Support for unilateral regional military initiatives

accessed 20 December 2018; Lowe and Tzanakopoulos (n 5); Rodley (n 4); Weller (n 3); Ware (n 45); Scharf (n 7); Hakimi (n 8); Rowe (n 1).

[56] David Wippman, 'Enforcing Restraint: Collective Intervention in Internal Conflicts and Enforcing the Peace: ECOWAS and the Liberian Civil War' in Lori F Damrosch (ed), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (Council on Foreign Relations Press- NY 1993); Marc Weller, *Regional Peace-Keeping and International Enforcement: The Liberian Crisis*, vol 6 Cambridge International Documents Series (CUP 1994); 'Editorial Comments: NATO's Kosovo Intervention' (1999) 93 AJIL 824-862 [separate articles by Louis Henkin, Ruth Wedgwood, Jonathan J Charney, Christine Chinkin, Richard A Falk, Thomas Franck, Michael W Reisman]; Christopher Greenwood, 'International Law and the NATO intervention in Kosovo' (2000) 49 ICLQ 926; Dino Kritsiotis, 'The Kosovo crisis and the NATO's application of armed force against the Federal Republic of Yugoslavia' (2000) 49 ICLQ 330; Marten Zwanenburg, 'Regional Organisations and the Maintenance of International Peace and Security: Three Recent Regional African Peace Operations' (2006) 11 JCSL 483.

[57] Brownlie (n 24) adopts a restrictive approach on the exceptions to use force. The 'New Haven School' founded by Myres McDougal and Harold Lasswel in early 1950s, interprets the law according to social factors. For their views see Michael W Reisman, 'The View from the New Haven School of International' (1992) Faculty Scholarship Series Paper 867 <http://digitalcommons.law.yale.edu/fss_papers/867> accessed 20 December 2018.

[58] John N Moore, 'The Role of Regional Arrangements in the Maintenance of World Order' in Cyril E Black and Richard A Falk (eds), *The Future of the International Legal Order, Volume 3 Conflict Management* (Princeton UP 1971) 159; Joachim Wolf, 'Regional Arrangements and the UN Charter'

derives from two variant forms of legal argumentation. On the one hand, regional unilateralism has been approached as a general exception to the UN Charter through the reinterpretation of its text.[59] On the other hand, it has been alleged that a regional right to use force unilaterally shall be assessed in light of modifications resembling a change in custom.[60] The absence of an explicitly stated prohibition on the use of force by ROs, the timing of the Security Council's authorisation and the discussions during the drafting of the UN Charter, had been in the immediate aftermath of its adoption the mostly cited alleged justifications for unilateral regional military action. Revolving around the idea of acquiescence, Chayes had argued that the consideration of the case of the Dominican Republic in 1960, was evidence of the UN Security Council's widespread readiness to conclude that the requirement of 'authorisation' does not import prior approval, but would be satisfied by subsequent action of the Council, even by a mere 'taking note' of the acts of the ROs.[61]

A similar approach was undertaken by Meeker, in proclaiming that 'authorisation may be said to have been granted by the course which the Council adopted'.[62] Those arguments are considered to be the forerunners of a more refined rhetoric in support of implicit authorisation, as that of Villani, who suggests that a widened understanding of the authorisation criterion is admissible, for as long as implicit authorisation is 'deduced with absolute certainty by the behaviour of the Security Council'.[63] In justifying the intervention of NATO in Kosovo, Henkin argued that ex post facto authorisation is possible.[64] Those arguments have received immense criticism.[65]

The support of regional unilateral military interventions has also been sought through the expansive interpretation of the UN Charter's Chapter VIII, particularly of article 53.

(1983) 6 EPIL 289; Zsuzsanna Deen-Racsmány, 'A Redistribution of Authority between the UN and Regional Organisations in the Field of the Maintenance of Peace and Security' (2000) 13 LJIL 297; Ugo Villani, 'The Security Council's Authorization of Enforcement Action by Regional Organisations' (2002) 6 MaxPlanckUNYB 535; Adediran (n 13); Paul R Williams and Sophie Pearlman (n 13).

[59] Abass (n 9).

[60] Paliwal (n 14).

[61] Abram Chayes, 'Law and the Quarantine of Cuba' *Foreign Affairs* 41 (1963) 550, 556.

[62] Leonard C Meeker, 'Defensive Quarantine and the Law' (1963) 57 AJIL 515, 522.

[63] Villani (n 58) 543.

[64] Henkin (n 56) 828; at 826 it is suggested that 'on June 10, the Security Council, in Resolution 1244 approving the Kosovo settlement, effectively ratified the NATO action and gave it the Council's support'.

[65] Wolf (n 58) 293; Christine Chinkin, 'The Legality of NATO intervention in the Former Republic of Yugoslavia (FRY) under International Law' (2000) 49 ICLQ 910, 912.

Akehurst for example appeals for 'an extensive interpretation of the powers which they derive from Chapter VIII of the United Nations Charter'.[66] Although he does not pose a direct challenge to the prior authorisation requirement,[67] he adopts a narrow interpretation of enforcement action, limiting it to military intervention. Moreover, his analysis implies that the use of force against members of the organisation may be lawful provided that such action complies with the organisation's internal rules.[68] In her analysis Deen-Racsmány, suggests that 'there has been a move towards a more liberal interpretation of the provisions of the UN Charter dealing with regional enforcement action'.[69] Although she refrains from declaring 'legal' unauthorised regional enforcement actions, she considers consent as legitimation and suggests that past practice has altered the scope of article 53.[70] She also suggests that at times a tacit or ex post facto authorisation to regional enforcement action is sufficient.[71] Abass's argument in support of regional unilateral military interventions is also based on his support for an expansive interpretation of the UN Charter; he embarks upon the analysis of claimed residual powers of ROs found in the UN Charter. More specific, he asserts that consensual intervention, 'empowered by an enabling treaty, and acting in respect of a conflict affecting a member state (…) may constitute permissible derogation from Article 2(4)'.[72] Nolte, had explicitly suggested that consent revokes the element of enforcement, thus being a way to sidestep the UN Security Council's authorisation.[73]

Evidently, those arguments are central to the debate on regional unilateral military interventions aiming at averting humanitarian crises; since, a member state's consent to use force might have as its object the protection of the civilian population. Notwithstanding the link between those alleged legal bases for unilateral regional intervention and the humanitarian nature of a number of crises, it has been argued that unilateral humanitarian intervention is legally justifiable as a right in itself both for states

[66] Michael Akehurst, 'Enforcement Action by Regional Agencies, with Special Reference to the Organisation of American States' (1967) 42 BYIL 175, 227.
[67] Ibid 214.
[68] Ibid 227.
[69] Deen-Racsmány (n 58) 329.
[70] Ibid.
[71] Ibid 330.
[72] Abass (n 9).
[73] Georg Nolte, 'Restoring Peace by Regional Action: International Legal Aspects of the Liberian Conflict' (1993) 53 ZaöRV 603.

and collective actors[74] and that it is legitimate enough to be condoned.[75] Within this debate, the potential role of ROs and other collective actors has also been specifically raised. Walter suggests that 'the option of filling a possible lacuna created by Security Council inaction by collective regional humanitarian action should be taken into serious consideration as an alternative'.[76] Walter's understanding of unilateral regional humanitarian intervention as the new right to self-defence, has more recently been advocated by Steven Rose, in light of the R2P.[77] Both works constitute an appeal for change, rather than its proof. This explains why instead of providing evidence on the specificity of this alleged right, they simply project arguments put forward in the context of the wider debate on general humanitarian intervention. An interesting view in the direction of upholding the legality of unilateral humanitarian intervention, to which regional action could fit in, is the 'equitable theory' of Burke.[78] Nevertheless, the author admits both the limited enforceability and the prospective practical implementation of humanitarian interventions justified through a third source of international law.[79]

In parallel to the general debate on humanitarian intervention, the ECOWAS intervention in Liberia that was perceived as having attained the 'guarded approval' of international community,[80] provided the ground for re-shaping the debate on the regional use of force.[81] Levitt and Jenkins have argued for the development of a specific right of regional humanitarian intervention, albeit both analyses are limited due to their revolving mainly around the Liberian conflict.[82] In a more recent work, in which Paliwal analyses both past

[74] Greenwood (n 56); he suggests that humanitarian intervention is lawful under modern customary law.
[75] Monica Hakimi, 'To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization' (2007) 40 VandJTransnatlL 643; although she does not argue for the creation of a new right under the UN Charter or general international law, Hakimi suggests that the coexistence of the UN Charter regime and the regime of regional organisations at the operational level has led to the condoning of unilateral regional enforcement action. In her 2018 article (n 3) she argues that there is some space for procedural regulation.
[76] Christian Walter, 'Security Council Control over Regional Action' (1997) 1 MaxPlanckUNYB 129, 193.
[77] Steven J Rose, 'Moving Forward with the Responsibility to Protect: Using Political Inertia to Protect Civilians' (2014) 37 BCIntl&CompLRev 209.
[78] Burke (n 55).
[79] Ibid 86- 87.
[80] Under article 53 of the VCLT that is the 'international community of States as a whole'. However, taking note of the growing recognition of other institutions as also being legal subjects of international law the wider notion adopted in more recent Treaties (ie ICC Statute) excluding the explicit reference to States is preferred. Hence, the term 'international community' includes States, the UN and international organisations. The contributions of the civil society and scholars being considered, they are not treated as representing the international community at large.
[81] Wippman (n 56) 175.
[82] Jeremy Levitt, 'Humanitarian Intervention by Regional Actors in International Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone' (1998) 12 TempleIntlCompLJ 333; Peter A Jenkins, 'The

practices and constitutional developments to support that we are in the process of customary change specifically tailored for ROs, again his conclusions result solely from the examination of the African paradigm.[83]

Orakhelashvilli on the other hand, considers that according to article 53 of the UN Charter and Chapter VII provisions, regional enforcement operations shall not be carried out unilaterally.[84] His endorsement of the critique of various states revolves primarily against NATO's intervention in Kosovo, which indicates his disagreement regarding the existence of a right of regional unilateral intervention in customary law. In her 2000 work, Deen-Racsmány was claiming that regional humanitarian intervention as a customary right in the Euro-Atlantic or any other region was beyond reach.[85] In light of the development of the 'R2P' concept and related practices, Stahn expresses some doubt regarding the potential operationalization of the new concept by ROs and other collective actors if the UN Security Council fails to exercise its responsibility, whilst claiming that the door for regional unilateralism was not fully closed.[86] Omorogbe's analysis on the African Union' embrace of the R2P, reveals uneasiness regarding the limited rights of decision-making under the concept, even more so as she analyses how the AU treaties' provisions on military powers correspond with its scope.[87]

Interestingly, even more recent works defending the gradual development of a regional customary unilateral use of force in response to large-scale human rights violations, abstain from discussing in detail the respective impact of non-African undertakings.[88] The

Economic Community of West African States and the Regional Use of Force' (2007) 35 DenvJIntlL&Pol 333.

[83] Paliwal (n 14).

[84] Alexander Orakhelashvilli, *Collective Security* (OUP 2011) 259- 276.

[85] Deen-Racsmány (n 58) 329.

[86] Carsten Stahn, 'Notes and Comments, Responsibility to Protect: Political rhetoric or Emerging Legal Norm?' (2007) 101 AJIL 99, 120.

[87] Eki Yemisi Omorogbe, 'The African Union, Responsibility to Protect and the Libyan Crisis' (2012) 59 NILR 141, 162.

[88] Paliwal (n 14); Isaac Terwase Sampson, 'The Responsibility to Protect and ECOWAS Mechanisms on Peace and Security: Assessing their Convergence and Divergence on Intervention' (2011) 16 JCSL 507; Omorogbe ibid 141; Tom Kabau, 'The Responsibility to Protect and the Role of Regional Organisations: an Appraisal of the African Union's Interventions' (2012) 4 GoJIL 49; Iyi (n 12). They do not anticipate the constitutive capacity of non- African regional organisations to use force in humanitarian crises, nor the appeal of non- African cases.

thesis responds to this gap.[89] It embarks upon the discussion of the development of a new customary law exception to use force to avert humanitarian crises, through the examination of impact of international organisations of different regions and of distinct nature, that have pursued unilateral military interventions on humanitarian grounds or whose attitude is potentially influential in shaping international law on the field.

Whereas the literature review reveals the central role of the unilateral interventions of ECOWAS and NATO in shaping the debate, the parallel examination of those paradigms and of the EU in discussing the cumulative impact of various undertakings, past and present, is considered to be an original contribution to the academic debate. Unsurprisingly, the constitutional framework of the Lisbon Treaty for advancing its common foreign and security policy[90] and the EU's attitude in the case of Libya, the first UN mandated R2P military action, have already been discussed.[91] This is also the case with the AU's Charter and the organisations stance in Libya.[92] Nevertheless, their examination in view of evaluating their impact on shaping a customary rule accepting that regional and sub-regional organisations 'can be both legitimisers and operational agents for the implementation of R2P [*thus of humanitarian intervention]*'- not always constricted to multilateralism- is in itself a contribution to the literature.[93]

Given the growing number of non-UN international organisations, a limitation of this work is that it cannot consider all possibly relevant constitutional instruments or all instances of unilateral regional enforcement. The only peripheral discussion of the practice of AU in Chapter Four is such an example. Nonetheless, its limited discussion is justified by the main objective of the thesis which is to address the existence of general

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[89] In his work *The Changing rules on the use of force in international law* (Manchester UP 2005) Tarcisio Gazzini discusses the activities of NATO and ECOWAS and the establishment of the African Union (to conclude against the formation of new custom up until then), albeit briefly.

[90] Panos Koutrakos, *EU International Relations Law* (2nd edn, Hart Publishing 2015); Steven Blockmans and Ramses A Wessel, 'The European Union and Crisis Management: will the Lisbon Treaty Make the EU more effective?' (2009) 14 JCSL 265.

[91] Madelene Lindstrom and Kristina Zetterlund, 'Setting the Stage for the Military Intervention in Libya- Decisions Made and their Implications for the EU and NATO' (2012) Swedish Defence Research Agency- FOI 1- 94 <http://www.foi.se/rapport?rNo=FOI-R--3498--SE> accessed 18 February 2019.

[92] Iyi (n 12); Omorogbe (n 87) 158.

[93] European Parliament Recommendation to the Council (18 April 2013), 'UN Principle of the "Responsibility to Protect" (R2P)' Doc 2012/2143(INI) para K (emphasis added) <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0180&language=EN> accessed 20 January 2019.

practice and opinio juris. This would not be served by focusing on the least contested regional constitutive practice for humanitarian intervention; notwithstanding that up until today it has also refrained from proceeding unilaterally with any alleged humanitarian use of force.[94] Overall, this thesis seeks to contribute to the limited body of literature that considers more globally the practice of regional organisations, actual and verbal, past and present, vis-à-vis the purported claim for an emerging CIL rule. In seeking to establish whether the argument for an emerging right of regional humanitarian intervention is supported by the undertakings of ROs, the chronological focus of the thesis is the post-Cold War period during which the claim for a nascent right for humanitarian intervention against the backdrop of regional unilateral interventions has been largely debated.

1.3. The research question

This thesis envisions to contribute to the academic dialogue regarding the normative status of unilateral regional intervention to avert mass atrocities. More particularly, it addresses the following question: whether the claim for an emerging rule under CIL, finds support in the practice of ROs. Yet, this assessment is incumbent upon the analysis of the current state of their contribution through a stocktaking exercise of practices undertaken by them and a search of the requisite opinio juris. Are we moving towards an era of enhanced regional humanitarian unilateralism under CIL? Can the emerging normative status of such an alleged right be determined? Is its gradual development indeed in the pipeline or at the end of the day, regional practice asserts that the legal normative value of multilateral use of force under CIL stands firm next to the conventional rules of the UN Charter?

Since the early 1990s, the international community has witnessed the increased active participation of international organisations other than the UN in the collective security system. The undertakings of ROs, including actual conduct and verbal practice, might be seen as evidence in the direction of gradually legalising regional humanitarian interventionism under CIL if coupled with opinio juris. It is argued that the discussion of

[94] Orakhelashvilli (n 84) 271, underlines that the provisions of ECOWAS and AU on forcible intervention are yet to be implemented; see also Omorogbe (n 87) 154 and Paliwal (n 14) 226. 'African Union decides against peacekeepers for Burundi' *Al Jazeera News* (1 February 2016) <http://www.aljazeera.com/news/2016/01/african-union-decides-peacekeepers-burundi160131102052278.html> accessed 20 January 2019.

the above-mentioned developments could provide the requisite evidence for assessing the current normative framework of CIL on the right to intervene unilaterally when the UNSC is irresponsive or if they consider regional initiative more adequate to avert a humanitarian crisis. Manifestations of regional unilateralism, dating from first incidents of unilateral humanitarian interventions to more recent debates under the rubric of a wide R2P, are valuable in the context of customary law development. The adherence of ROs to the conventional standards of the UN Charter is a significant parameter in the said assessment. The scholarly discussion of the legal tenets of regional undertakings is also important, as part of the discursive communication which affects the choices of ROs and states, as well as a shaping agent of the political struggle within the international legal parameters between the proponents of responsible interventionism[95] and the critics of its 'dark side'.[96]

Humanitarian responses in general, encapsulated also through the tripartite structure of the R2P in the 2005 Outcome Document, describe a wide spectrum of activities to protect civilians in humanitarian crises. If humanitarian responses were to be typified, we could categorize them in pacific and coercive measures. This work does not revolve around the adoption of coercive measures falling short of the threat or use of force. It rather employs the term 'intervention' to describe the threat or use of military force, including in the name of peacekeeping operations, but not any means of economic or political coercion.

1.4. Objectives of the thesis

The main challenge of this thesis, as illustrated above, is to examine whether existing evidence suffices to establish that regional practice manifests that humanitarian concerns prevail over the established limits to unilateral use of force, thus gradually curtailing it. According to what is aforementioned, this research is neither intended to provide praise for the military capabilities of international organisations to resolve humanitarian crises, nor to claim the re-construction of the collective security system into autonomous spheres of action. Reversely, it seeks to ascertain the limits of regional use of force under CIL considering the contribution of ROs in its development but within a coherent and comprehensive system of international legal order.

[95] Nicholas J Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2002).
[96] David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton UP 2004).

Within this context, the first objective of the thesis is to examine the limitations of humanitarian unilateralism, general and by ROs, under the UN Charter's collective security system which provides the conventional and traditionally accepted CIL background against which it is pondered. This objective is twofold, as it relates both to the analysis of the alleged right of unilateral initiative and of the limited legal normative context within which the humanitarian use of force is accepted.

Secondly, it seeks to ascertain the legal status of regional unilateral undertakings; whether they signal a departure from the general prohibitive standards on the unilateral humanitarian use of force under CIL, namely if a new rule is in the pipeline or whether their endeavours are not seeds for a change in the law. To meet this objective, it is imperative to inquire into regional practices claimed to constitute the founding basis towards the development of a new rule and then examine whether there is evidence of recent and current practice substantiating such allegations. Although this is not at the focus of the current work, the thesis seeks to enhance the view that despite the growing initiatives of ROs in collective security their rights and responsibilities are congruent to the international legal system.

Essentially, this thesis seeks to enhance the view that the practice of ROs in the development of humanitarian intervention under CIL, is not self-evident but has to be assessed in a principled manner. ROs are not as of themselves a distinct source of international law, and the consequences of their undertakings in the sphere of international peace and security can contribute to the enhancement or change of CIL rules if the practice is general and accepted as law.

1.5. Methodology

This thesis sits within the remit of doctrinal legal research inquiring into the legal status of an alleged doctrine and approaches the international law process through the prism of legal positivism. It revolves around the proposition that positivism is not a thesis for statist international law,[97] but recognises that change in rules is dependent upon 'its social source

[97] Bruno Simma and Andreas L Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 AJIL 302, 307.

regardless of its merits'.[98] By distinguishing the 'is' from the 'ought', Kelsen argues that legal norms exist because they are posited.[99] As discussed in following chapters, the identification of new rules, existent or in the making, the successful transformation of any alleged 'ought' to 'is', are pertinent upon law-ascertainment criteria (evidence that they are posited or developing as legal norms through valid rules on law-creation) and not upon ethical, moral or policy driven considerations,[100] which can be utterly misleading as to their universal purposefulness. The significance of CIL's universal purposefulness is particularly emphasised in the writings of Chimni who, from a third world perspective, criticises CIL for absence of 'deliberative reason' rooted in 'a decolonized, self-determined, and plural cultural and political international order'.[101] To accept that the modification or generation of international law rules could be the result of some policy-oriented process or of the ethical and moral considerations of those in a better position to enforce them would validly exacerbate rather than address such criticism; since this would not serve the continuity of the international legal system and could at times eliminate law to merely a tool for serving the motives of individual states or groups of states. On the contrary, international law is a sophisticated system developing 'a logic of its own which acts to impose some autonomous normativity on the international legal order',[102] including facilitating change in an orderly and representative manner.

The research methodology adopted is normative and doctrinal with a view to ascertaining whether the practice of regional organisations supports the claim for an emerging rule on humanitarian intervention under CIL.[103] Although the ICJ has upheld that evidence for the formation of CIL 'is to be looked for *primarily* in the actual practice and opinio juris

[98] David Lefkowitz, 'Sources in Legal- Positivist Theories: Law as Necessarily Posited and the Challenge of Customary Law Creation' in Jean D'Aspremont and Samantha Besson (eds), *The Oxford Handbook on the Sources of International Law* (OUP 2017) 324.
[99] Hans Kelsen, *The Pure Theory of Law*, translated by Max Knight (2nd ed, Lawbook Exchange 2009).
[100] See Christian J Tams and Antonios Tzanakopoulos, 'Use of Force' in Jean D'Aspremont and Jörg Kammerhofer (eds), *International Legal Positivism in a Post- Modern World* (CUP 2014).
[101] Bhupinder S Chimni, 'Customary International Law: A Third World Perspective' (2018) 112 AJIL 1, 46.
[102] Gerry Simpson, 'The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power' (2000) 11 EJIL 439, 456.
[103] CIL is prescribed as a source of international law in article 38 of the ICJ; for a thorough discussion of the academic debate pertaining to the origins and following development of article 38 of the ICJ Statute see Malgosia Fitzmaurice, 'The History of Article 38 of the Statute of the International Court of Justice: The Journey from the Past to the Present' in Jean D'Aspremont and Samantha Besson (eds), *The Oxford Handbook on the Sources of International Law* (OUP 2017) 179; she concludes at 198 that the role of CIL 'has been, and is, more modest, but immensely important'.

of *States*',[104] this is not restrictive of the contribution of IOs (universal and regional).[105] More precisely, the practice of IOs in international relations 'may count as practice that *gives rise* or *attests* to rules of customary international law' by specifying, albeit in a parenthesis, that this is so 'when accompanied by opinio juris'.[106]

Acknowledging that 'it seems difficult to deny that the ascertainment of customary international law within the mainstream scholarship has always rested on informal criteria'[107] this thesis seeks to consider the contribution of ROs in a more systematic manner. This step is needed to lessen the amorphous and at times predisposed assertions on the 'dance floor' of CIL,[108] among other steps which Fitzmaurice suggests are required.[109]

Notwithstanding some disagreement in positivist scholarship as to the exact mechanism through which CIL rules come to exist, the recognition of the orthodox approach on the constitutive relevance of both *usus* and *opinio juris* in the development of CIL responds to the challenge of it being an 'unintentional, undirected, and unwilled human activity'.[110] CIL is the exact result of the existence of the close tie between practice and opinio juris; which distinguishes it from habitual conduct and comity. By failing to recognise the

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[104] *Continental Shelf case (Libyan Arab Jamahiriya v. Malta)* (Judgement) [1985] ICJ Rep 13, para 27 (emphasis added).

[105] For a discussion on the subjects of international law see Hersch Lauterpacht, 'The Subjects of the Law of Nations' (1947) 63 LQR 438, 444. In the *Reparation for Injuries* Advisory Opinion the ICJ accepted that international organisations can participate in the making of the international legal order, in result of the intentions of the UN creators and the implied powers necessary for the fulfilment of its functions; *Reparation for injuries suffered in the service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 185 (emphasis added); *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] 25 <http://www.icjcij.org/docket/index.php?p1=3&p2=4&case=12&code=ppcg&p3=4> accessed 18 January 2019. The plurality of participants involved in international law- making is affirmatively discussed, albeit within the confines of global legal pluralism, by Robert McCorquodale, 'Sources and the Subjects of International Law: A Plurality of Law- Making Participants' in Jean D'Aspremont and Samantha Besson (eds), *The Oxford Handbook on the Sources of International Law* (OUP 2017) 749. The ILC recognises that international organisations contribute to the development of CIL; ILC Report 2018 (n 2).

[106] ILC Report 2018 (n 2) 131. Conclusion 4 sets out the requirement of practice and Conclusion 9 the requirement of opinion juris; see Commentary (5) on Conclusion 4(2).

[107] Jean D'Aspremont, 'Sources in Legal-Formalist Theories' in Jean D'Aspremont and Samantha Besson (eds), *The Oxford Handbook on the Sources of International Law* (OUP 2017) 379.

[108] Jean D'Aspremont, 'Customary International Law as a Dance Floor: Part I' (2014) EJIL: Talk! <http://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-i/ > and 'Customary International Law as a Dance Floor: Part II' (2014) EJIL: Talk! <http://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-ii/ > accessed 15 December 2018.

[109] Fitzmaurice (n 103) 191.

[110] Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge 2012) 82.

distinctive value of the cognition of normative obligation which drives relevant practice, the risk is to recognise as law mere usages or, in order to safeguard the normative value of international law, reject custom as a source altogether. The distinction between mere usages and customary international law was upheld by the ICJ in the *North Sea Continental Shelf* cases (NSCS). In the NSCS cases the ICJ recognised that 'There are many international acts, e.g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition and not by any sense of legal duty', to reiterate in the 2001 case of *Qatar v. Bahrain* that 'a uniform and widespread State practice (…) *might* have given rise to a customary rule'.[111]

Beyond conceptual difficulties, pertaining to the nature of opinio juris, this work does not concede to the proposition that the second element is a secondary factor or even that it is fully redundant solely because it is difficult to understand how or at which exact moment it carries out its constitutive function. As Yee stresses 'the issue of proof is different from the issue of existence'.[112] Even D'Amato, who went as far as to propound that 'there is no reason to call for any such subjective and wholly indeterminate test of belief when one is attempting to describe how international law works and how its content can be proved' concedes to the conclusion that 'in so far as the identification of existing customary law is concerned (…) opinio juris is at its worst a tautology'.[113] This is also reflected in the analysis of the ILC's Special Rapporteur in his second report on the 'Identification of Customary International Law' which effectively embraces ICJ's continuing emphasis on the concurrent constitutive importance of both 'a widespread international practice and on the opinio juris of States'.[114] Meguro, who adopts a more critical position suggests that

[111] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 3, para 77; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)(Judgement)* [2001] ICJ Rep 40, para 205 (emphasis added) which was repeated in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras) (Judgement)* [2007] ICJ Rep 659, para 141.

[112] Sienho Yee, 'The News That Opinio Juris Is Not a Necessary Element of Customary [International] Law is Greatly Exaggerated' (2000) 43 GYBIL 227, 235.

[113] Anthony D'Amato, 'Custom and Treaty: A Response to Professor Weisburd' (1988) 21 VandJTransnatlL 459, 471; Anthony D' Amato, *Concept of Custom in International Law* (Cornell UP 1971) 73.

[114] Second Report of the ILC on Identification of Customary International Law by Michael Wood, Special Rapporteur (22 May 2014) UN Doc A/CN.4/672 para 66; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) (Judgement)* [2012] ICJ Rep 422, para 99. The requirement of settled practice and opinio juris was also reaffirmed in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening) (Judgement)* [2012] ICJ Rep 99, para 55.

'Abandoning the two-element variant of the doctrine (…) would be unrealistic let alone desirable'.[115]

The academic debate following the adoption of article 38(1)(b) of the ICJ Statute which refers to practice 'accepted as law', was exacerbated by declarations of the ICJ. The already vague notion of 'accepted as law' in article 38 was blurred further through the NSCS Cases pronouncement equating it with 'a belief that this practice is rendered obligatory of the *existence of a law* requiring it'.[116] If a rule pre-exists then why is the legal conviction for the formation (and identification) of a rule of CIL needed at all? The function of legal conviction, in the context of the belief theory as pronounced by the ICJ reflected a declaratory function for the second element and nothing beyond that.

The conceptualisation of opinio juris as consent on the other hand offers more rigour to the existence of the legal conviction as an agreement to be bound by a CIL rule. Although this is also problematised, by the factual situation in which the consent of non-participating states and international organisations is largely inferred,[117] compelling evidence of conviction that a certain behaviour is obligatory or permissible among the actors particularly involved or probably concerned with the development of a customary international law rule,[118] accompanying a substantially uniform,[119] sufficiently widespread and representative practice of States,[120] suffices. Despite the fact that 'the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law' as proclaimed in the NSCS judgment by the ICJ, the ILC righteously reaffirmed that 'there is no such thing as "instant custom"'.[121]

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[115] Maiko Meguro, 'Customary International Law and Non-State Actors: Between Anthropomorphism and Artificial Unity' (2017) forthcoming in Iain Scobbie and Sufyan Droubi (eds), *Non-State Actors and the Formation of Customary International Law* (Melland Schill Perspectives on International Law MUP 2018) <https://ssrn.com/abstract=3071305> accessed 15 December 2018 at 8.

[116] *North Sea Continental Shelf* cases (n 111) para 77. Also in *Nicaragua* (n 17) para 207 (emphasis added).

[117] On consent theory see Gennady Danilenko, 'The Theory of International Customary Law' (1988) 31 GYBIL 9; Olufemi Elias, 'The Nature of the Subjective Element in Customary International Law' (1995) 44 ICLQ 501.

[118] *North Sea Continental Shelf* cases (n 111) para 74.

[119] *Nicaragua* case (n 17) para 186.

[120] ILC Report 2018 (n 2) Commentary (3) to Conclusion 8 stipulates that 'sufficiently' means that 'universal participation is not required', but still the relevant 'number and distribution of States… cannot be identified in the abstract' and 'in light of all the circumstances, including the various interests at stake and/or the various geographical regions'.

[121] *North Sea Continental Shelf* cases (n 111) para 74; ILC Report 2018 (n 2) Conclusion 8(2) and Commentary (9) thereto.

It is within the above context that the ascertainment of the normative value of regional undertakings in the context of humanitarian intervention is examined. The two-element approach 'applies to the identification of the existence and content of rules of customary international law in all fields of international law' and this 'is consistent with the unity and coherence of international law, which is a single legal system and is not divided into separate branches, each with its own approach to sources'.[122] Yet, the identification of opinio juris might vary depending on the phase of the alleged rule- depending on whether it is supported that it is in the making or it already exists-[123] or on the nature of the corresponding practice. Whereas the identification of practice is *conditio sine qua non* to support that there is evidence even for an emerging rule,[124] in the absence of respective practice, expressions of conviction will remain appeals for a future change in the law.[125] The exact tenets for the identification of practice and opinio juris are illustrated separately in the following section of the Introduction.

In an effort to provide a qualitative assessment of the normative impact of regional undertakings on the purportedly emerging new norm, the conducts of ROs, the singular approaches of member states of the organisations, the response of non-member states, UN General Assembly Resolutions,[126] UN Security Council resolutions and debates and decisions of tribunals[127] will be looked into in discussing the existence or not of the

[122] Sir Michael Wood, 'The Evolution and Identification of the Customary International Law of Armed Conflict' (2018) 51 VandJTransnatlL 727, 729; ILC Report on the Work of its Sixty-Eighth Session (2 May-10 June and 4 July-12 August 2016) UN Doc A/71/10 at 84.

[123] The rigidity of the requirement of opinio juris may vary. Rossana Deplano, 'Assessing the Role of Resolutions in the ILC Draft Conclusions on Identification of Customary International Law: Substantive and Methodological Issues' (2017) University of Leicester School of Law Research Paper No 17-05 <https://ssrn.com/abstract=2987931> accessed 17 February 2019 at 6; James Crawford and Thomas Viles, 'International Law on a Given Day', reproduced in James Crawford, *International Law as an Open System* (Cameron May 2002) 69- 94.

[124] The ILC refrained from making a distinction between the relevant practices at the stage of an alleged formation of a customary rule and in cases of claiming that a rule is already in place; on this see Deplano ibid.

[125] Compare Tasioulas 'disjunctive theory of opinio juris' which holds that opinio juris involves 'the judgment that a norm (…) *should be* established as law through the process of general state practice and opinio juris' (emphasis added); see John Tasioulas, 'Custom and Consent' at 3 <https://law.duke.edu/cicl/pdf/opiniojuris/panel_5-tasioulas_custom_and_consent.pdf> accessed 15 December 2018.

[126] Voting for UNGA resolutions is indicative of the collective attitude of states (collective state practice and collective opinio juris). The voting and issuing of statements on a resolution shall provide evidence for the separate state practice and convictions of the member States. UNGA resolutions are often categorised as law-declaring and law-developing. Whereas no consensus exists among scholars as to their law creating capacity, their contribution towards the formation of custom is generally accepted.

[127] They do not amount to state practice. Nonetheless, their pronouncements and findings are evidence for the existence of custom.

requisite evidence of practice and legal conviction on customary change. Albeit of lesser evidential strength, the Security Council Presidential Statements, the pronouncements of the UN Secretary- General and policy statements of the ROs are also considered. Whether, individual paradigms, such as the African one, are adhered to as appeals for local custom[128] or as indicative of a general change in CIL, this work submits that they cannot inform epistemically the debate. Only through a globally representative consideration of relevant regional undertakings their true impact on a new development can be assessed.

Although the interpretation of the UN Charter *per se* is not at the centre of the thesis, the determination of the content of relevant provisions is necessary since they constitute the conventional standards in parallel to which CIL is said to exist. All the more, the ICJ in Nicaragua equated CIL rules on the use of force with the regime of the UN Charter.[129] The examination of humanitarian intervention and the use of force, as well as of regional unilateralism under the UN Charter (in Chapter Two) is sought through the analysis of the words used, by ascertaining the intention of its drafters and through an evaluation of the object and purposes of the UN Charter. It is argued that in interpreting a treaty it is impossible 'to exclude completely any one of these components'.[130] While the understanding of the context within which the drafters of a treaty have adopted specific words is indispensable, it is equally important to use evidence drawn from later UN resolutions and judicial decisions, with a view to examining whether the content of the initial intent of the drafters remains unchanged. Chapter Two includes also a normative account of humanitarian intervention, to distinguish the legal from the moral or ethical (contested) considerations of the alleged doctrine.

Throughout the thesis special account is given to the works of 'highly qualified publicists',[131] their contribution being to 'elucidate what the rules to be applied by the

[128] *North Sea Continental Shelf* cases (n 111) para 73.
[129] *Nicaragua* case (n 17).
[130] Malcolm Shaw, *International Law* (6th edn, CUP 2008) 933 (fn 142 in particular); he submits that VCLT considers them all three as possible interpretative tools and explains that these reflect customary international law.
[131] Article 38(1)(d) of the ICJ Statute accepts that the teachings of the most highly qualified publicists of the various nations are a subsidiary means for the determination of rules of law.

Court were (are)' but 'not to create them'.[132] D'Aspremont is correct in identifying that to hold that 'scholarship makes new law and no longer the law makes scholarship' constitutes a strong vein of hubris.[133] In this sense, their role is important but supplementary. The ICJ has largely refrained from contributing to the discussion of who are the most highly qualified publicists, though it has not excluded 'all or nearly all writers' and the contribution of institutions such as the ILA.[134] By virtue of its specific nature, the content of the works of ILC cannot be excluded from such 'teachings'.[135] The ILC Conclusions of 2018 on the 'Identification of Customary International Law' in particular are of distinct relevance to the thesis. Yet, as with all teachings they must not be read as creating the law, not even as always stating the law as it is; as Wood explains some works are 'explicitly *lex ferenda*—as with certain proposals on State responsibility; some may be more in the nature of individual academic studies, such as the work on fragmentation; and on occasion the ILC's product may simply be wrong'.[136]

The primary sources used in light of this research include both treaty and non- treaty texts; the UN Charter, resolutions and declarations of both the Security Council and the General Assembly, reports of the Secretary-General of the UN, the Repertory of Practice of the UN and state positions communicated through diplomatic correspondence, the press or in ROs meetings by their leaders, case law, ROs constitutive instruments and Protocols, their relevant decisions and declarations. As already indicated, the analysis will be complemented with an in-depth discussion of secondary sources, notably with the views of scholars as found in books, journals' articles and research papers; relevant news reports and press releases are also considered.

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[132] Allen Pellet, 'Article 38' in Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat, Christian Tams (eds), *The Statute of the International Court of Justice: A Commentary* (2nd ed, OUP 2012) 853.

[133] Jean D'Aspremont, 'Softness in International Law: A Self- Serving Quest for New Legal Materials' (2008) 19 EJIL 1075, 1083.

[134] Michael Wood, 'Teachings of the Most Highly Qualified Publicists (Art. 38 (1) ICJ Statute)' in Rüdiger Wolfrum (ed), *MPEPIL* (OUP 2017) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1480> accessed at 15 December 2018.

[135] This statement reflects the tendency of the ICJ as evidenced is a series of judgements and advisory opinions; for example in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43 the ICJ referred extensively to the Articles on State Responsibility.

[136] Wood (n 134) para 13.

1.6. Identification of regional organisations' practice and opinio juris

The contribution of ROs to the development of CIL 'will not be relevant to the identification of all rules of customary international law' but it is not rigidly limited to rules 'whose subject matter falls within the mandate of the organizations' and/or which 'are addressed specifically to them'.[137] Practice may also arise 'where member States have not transferred exclusive competences, but have conferred competences upon the international organization that are functionally equivalent to powers exercised by States'.[138] ROs are not only agents of States but institutions able to 'exercise a certain independent will and function on the international level'.[139] Their independent will and function, contributing to the rise or expression of rules of CIL, is manifested when they conclude treaties (as already illustrated), when they administer territories, when they take positions on the scope of the privileges and immunities of the organisation and its officials, but it also extents to the deployment of military forces.[140] Yet, an important factor in weighing their practice is, 'whether the conduct is ultra vires the organization or organ'.[141] A direct consequence of ultra vires conducts is their invalidity, though invalid acts should not be conflated with unlawful acts under international law.[142] Important for making this distinction are the constitutive provisions of the organisations. It is suggested that the most straightforward appeal to conclude that an IO's conduct is invalid is when it contravenes explicit internal decision-making procedures.[143] Whether, on a different note, 'the conduct is consonant with that of the member States of the organization'[144] is not a qualitative criterion for establishing the existence of one instance of IO's practice, but part of the overall assessment to establish the existence or not of general practice.

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[137] ILC Report 2018 (n 2) Commentary (5) to Conclusion 4 at 131 (emphasis added).
[138] Ibid Commentary (6) to Conclusion 4 at 131. See also the analysis of Jed Odermatt, 'The Development of Customary International Law by International Organizations' (2017) 66 ICLQ 491, 501- 502.
[139] Ibid Odermatt 502.
[140] ILC Report 2018 (n 2) Commentary (6) to Conclusion 4 at 131; a prominent example is the territorial administration of Kosovo by UNMIK pursuant to UNSC Resolution 1244, as well as the exercise of elements of governmental authority by EULEX, a mission mandated but not operationally devised or controlled by the EU member states.
[141] Ibid Commentary (7).
[142] Enzo Cannizzaro and Paolo Palchetti, 'Ultra vires acts of international organizations' in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2012) 370.
[143] Ibid; it is argued that as far as it concerns the competence of IOs the enlargement of powers in their wider field of activity does not automatically invalidate additional conduct; and that it is difficult to conclude against valid action every time IOs conducts violate constitutive provisions requiring them to comply with international law rules. Although they infer that a possible limitation is jus cogens, the VCLT does not discharge its potential change; unless IOs were excluded from contributing to its development.
[144] ILC Report 2018(n 2) Commentary (7) to Conclusion 4 at 131.

Evidence of practice

The practice relevant for the identification of CIL rules includes both actual and verbal acts. Inaction is also included in accepted forms of practice[145] and abstaining from the use of force is an example,[146] without any predetermined hierarchy among them.[147] Despite traditional controversy pertaining to the acceptance of verbal acts as practice,[148] it would be 'artificial to distinguish between what a State (or IO) does and what it says'.[149] This holds true both of states and international organisations.[150] What matters is whether through the assessment of the alleged verbal conducts we can establish something more than their factual occurrence, namely a manifestation of normative purposefulness.[151] This is the case with treaties, decisions and resolutions which hold the largest part of IOs normative interaction with States and other IOs. The acceptance of verbal acts as practice is anyway not bound to collapse on 'counting the same act as an instance of both the subjective and the objective element';[152] neither is it necessary to be artificially implied. On the contrary, we cannot exclude that a verbal act stating a position (of IOs or States) 'together with a rationale for it, in relation to a concrete fact or situation (…) may constitute State (or IOs) practice and the rationale for that position i.e., an expression of opinio juris'.[153] For as long as both elements are convincingly identified, 'Whether we classify a particular verbal act as an instance of the subjective or of the objective element may depend on circumstances'.[154]

The constitutive instruments of ROs, in particular, are discussed in Chapter Five as a special form of practice of international organisations. According to Brölmann their constitutive treaties are 'law-making treaties' as opposed to contractual and thus

[145] Ibid Conclusion 6(1).
[146] Ibid Commentary (3) to Conclusion 6.
[147] Ibid Conclusion 6(3); the respective Commentary (8) at 134 stresses that 'no form of practice has a higher probative value than others in the abstract' and that only in specific cases 'as explained in the commentaries to draft conclusions 3 and 7 above, it may be that different forms (or instances) of practice ought to be given different weight when they are assessed in context'.
[148] Verbal acts were accepted as a form of practice by ILA Report 2000 (n 2) 725- 726.
[149] Michael Akehurst, 'Custom as a Source of International Law' (1977) 47 BYIL 1, 3; D' Amato, *Concept of Custom in International Law* (n 106) at 88 states that they 'cannot constitute the material component of custom'.
[150] ILC Report 2018 (n 2) Conclusion 6(1).
[151] See the discussion of Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and some of its Problems' (2004) 15 EJIL 523, at 525- 530 on the nature of state practice.
[152] Maurice Mendelson, 'The Formation of Customary International Law' (1999) 272 RdC 155, 206.
[153] Yee (n 112).
[154] Mendelson (n 152).

synallagmatic treaties, and amount to 'a special category of their own right'.[155] Her analysis being more relevant to the identification of the content of an alleged CIL rule since it revolves around treaty interpretation and the proposition that constitutive treaties warrant specialised rules of interpretation best seen as a diversified version of the VCLT framework,[156] facilitates the proposition that constitutive instruments shall be approached as specialised forms of IOs practice also in view of customary international law-ascertaining. Because the constitutive treaties 'combine a multilateral treaty with a self-contained or institutional aspect' legally binding its member States to a series of IOs competences, functions and objectives, they can be detached from the practice of the original treaty parties, especially with regards to the IOs accepted forms of practice for the development of CIL.[157] By distinguishing the constitutive treaties from other multilateral treaties, it is argued that following negotiation, their conclusion and implementation can be ascribed both to IOs and member States. This is of particular importance when trying to establish the existence of the accompanying legal conviction as to the status of an alleged customary international law rule.

Regarding the consultation of the text of constitutive treaties in the process of determining the existence and content of rules of CIL 'in recording and defining rules deriving from custom or indeed in developing them', their treatment remains the same with that of other multilateral treaties to the extent that in each case the existence of the rule must be confirmed by general practice and acceptance as law.[158] Regarding the content of the rules found in constitutive treaties, it is alleged that in the absence of express prescriptions, the interpretative investigation cannot involve only the respective travaux préparatoires; and this not only because as a material source they can only be attributed to the IOs member States. The suggested approach follows the tendency of the ICJ which in examining constitutive instruments to decide on the competences and implied powers mainly of the UN,[159] has chosen to 'proceed to an interpretation of the constitutive instrument as it

[155] Catherine Brölmann, 'Specialized Rules of Treaty Interpretation: International Organizations' (2012) Amsterdam Law School Research Paper No 2012-12 <https://ssrn.com/abstract=1988147> at 2 accessed 15 December 2018.
[156] Ibid 2- 3.
[157] Ibid 4- 5.
[158] *Continental Shelf* case (n 104); ILC Report 2018 (n 2) Commentary (4) to Conclusion 11 at 144.
[159] *Reparation* Advisory Opinion (n 105); *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* [1954] ICJ Rep 53 (regarding the competence of UNGA to establish the

stands at the time of the interpretation'.[160] Additionally, in determining the content of a rule in a constitutive treaty which allegedly provides evidence for the identification of a customary international law rule, its interpretation cannot ignore the 'practice followed by the Organization' itself,[161] which is distinct to the 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' envisaged in article 31(3)(b) of both 1969 and 1986 VCLTs.[162] Within this context, and following the ICJ's example, the practice of an IO organ may be equated with that of the organisation.[163]

Despite calls to the contrary, resolutions constitute another form of practice including 'acts related to the negotiation, adoption and implementation of resolutions, decisions and other acts adopted within international organizations'.[164] To equate the said conduct solely with the requirement of legal conviction would lead to the wrong assumption that the only type of written text representing an accepted form of practice are treaties (including constitutive instruments).[165] Whereas in reality, resolutions and decisions, legally binding or politically informing, constitute a widely exercised form of practice of IOs with external orientation, involving and affecting their relationships with other IOs and States.[166] Against this, one should refrain from conflating resolutions adopted by IOs and resolutions adopted at intergovernmental conferences.[167] Being far from a theoretical problem, to follow a restrictive position with regards to resolutions and decisions adopted

Administrative Tribunal); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa)* (Advisory Opinion) [1971] ICJ Rep 16.

[160] Shabtai Rosenne, *Developments in the Law of Treaties (1945-1986)* (CUP 1989) 234.

[161] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, para 21.

[162] See Brölmann (n 155) 9-11.

[163] *Namibia* (n 159) 22.

[164] Fourth Report of the ILC on Identification of Customary International Law by Michael Wood, Special Rapporteur (8 March 2016) UN Doc A/CN.4/695 para 34.

[165] See The Institute of International Law, 'The Elaboration of General Multilateral Conventions and of Non- Contractual Instruments having a Normative Function or Objective' (Cairo Conference 1987) Res II, conclusion 22 <http://www.idi-iil.org/en/sessions/cairo-1987/?post_type=publication> accessed 17 February 2019. It is suggested that resolutions 'may influence State practice, or initiate a new practice that constitutes an ingredient of new customary law' or 'contribute to the consolidation of State practice, or to the formation of the opinion juris communis'.

[166] Third Report of the ILC Special Rapporteur on Identification of Customary International Law by Michael Wood, Special Rapporteur (27 March 2015) UN Doc A/CN.4/682 para 72.

[167] ILC Report 2018 (n 2) Commentary (3) to Conclusion 12 at 147 treats resolutions adopted by IOs as source of evidence for the collective opinion of the IOs member States rather than endorsing its ascription to IOs as another possibility.

by IOs,[168] would harvest a subsequent paradox: to ignore resolutions and decision that can only be attributed to IOs organs, such examples being the Resolutions of the Security Council or of the European Parliament, Statements of the Council of the EU or of the EU Commission. On the contrary, it is hereby suggested that conduct in connection with even not legally binding resolutions and decisions of IOs, should be considered as an accepted form of practice contributing to the development of customary rules, 'the assessment of which must be conducted on a case-by- case basis'.[169] Without prejudice to the fact that not all resolutions are of the same nature or binding effect, they can provide evidence important in determining the existence and content of a rule of CIL or of determining an emerging rule or of contributing to its development. Though such text or a series of such texts on its own account 'cannot be a substitute for the task of ascertaining whether there is in fact a general practice that is accepted as law'.[170] Additionally, resolutions are not approached as unitary texts accounting for a single alleged rule and the potential value of distinct alleged rules in resolutions is recognised.[171] Concerning the interpretation of the text of IOs resolutions, when aiming to determine the status and content of an alleged rule of CIL, beyond the text of the resolution one should also look at 'the debates and negotiations leading up to the adoption of the resolution and especially explanations of vote [position] and similar statements given immediately before or after adoption'.[172]

Beyond the above, least contested forms of practice by analogy to that of states include, but are not limited to other legislative and administrative acts, diplomatic acts and correspondence; executive conduct, including operational conduct 'on the ground'; and decisions of national courts.[173] For example the diplomatic acts may account for acts of the EU High Commissioner for External Action and the decisions of national courts for procedures of the EU and AU courts on issues under their jurisdiction.

[168] According to Deplano (n 123) at 14 this is 'based on the unstated assumption that resolutions are non-conclusive acts of the state'; See Third Report (n 166) para 51.
[169] Deplano (n 123) 19.
[170] ILC Report 2018 (n 2) Commentaries (3) and (4) to Conclusion 12.
[171] Ibid Commentary (6) provides that the attitude of States might concern a particular rule set forth in a resolution; this applies equally to IOs.
[172] Ibid.
[173] Ibid paragraph 2 of Conclusion 6.

Evidence of opinio juris

Opinio juris is not limited to affirmative convictions but extents to expressions about the prohibition of certain actions under CIL, and in a similar manner it can take the form both of acceptance and objection.[174] Little objection, is however, not an absolute obstacle to the formation of CIL; provided that there exists and can be identified broad and representative acceptance of the alleged rule by those who engage in the alleged practice and those in a position to react to it.[175] Important is that the inaction does not derive from causes unrelated to the legality of the practice in question, to avoid any arbitrary conclusions. This was addressed by the ICJ in the seminal NSCS cases to conclude that,

> in the present case, any such inference would immediately be nullified by the fact that, as soon as concrete delimitations of North Sea continental shelf areas began to be carried out, the Federal Republic, as described earlier (paragraphs 9 and 12), at once reserved its position with regard to those delimitations.[176]

Without excluding the possibility that certain practices may be of concern for all or virtually all, those in a position to react are the actors who must have had factual knowledge or were expected to have it because the practice was widely acknowledged, but still the concerned actors must 'have had sufficient time and ability to act'.[177] Reaction or its absence, might be equally important 'if the conduct of the other State (or IO) calls for a response'.[178] The reaction might involve either denial or acceptance of 'the existence of a right arising from the practice'.[179] Along same lines of compromise between a strict criterion of universality and a more relaxed evidence of generality, the principle of the

[174] Ibid Commentaries (2) and (5) to Conclusion 9.
[175] Ibid Commentary (5) provides that not all states (and IOs) have to recognize the alleged rule as one of CIL. According to the *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 at 254, para 67 if the members of the international community are divided, it is not possible to establish that acceptance as law exists.
[176] See *North Sea Continental Shelf* cases (n 111) para 33.
[177] ILC Report 2018 (n 2) Conclusion 10(3) and Commentary (8) thereto. The ICJ in the *Fisheries Case* [1951] ICJ Rep 116 at 139 asserted that failure by States to react to a method consolidated by constant and sufficiently long practice (thus within reasonable time), indicates that 'they did not consider it to be contrary to international law'.
[178] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* [2008] ICJ Rep 12 at 50–51, para 121.
[179] See the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* [2009] ICJ Rep 213 at 265–266, para 141 where the ICJ emphasised Nicaragua's failure to deny the undisturbed and unquestioned exercise of a right over a very long period.

persistent objector is endorsed, equated with a right of explicit denial.[180] A state member of an IO contributing to the development of a rule maintains the option of denying its binding force even when the rule concerned falls within the scope of exclusive competences conferred to the organisation. Otherwise, the sovereign capacity of States to act as international law- makers beyond the institutional plane they have created, would be nullified.

In practice, evidence of opinio juris of IOs is to be found in a wide range of evidentiary sources. These include both statements and physical actions (and inaction) concerning an alleged practice.[181] By analogy to the opinio juris of states, as the ILC records, these shall include public statements on behalf of the organisations; official publications; legal opinions of an institution's or institutional organ's legal service; officials' correspondence; decisions of courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.[182] Additionally, in as much as treaties, resolutions and decisions, can provide the material source for IOs practice, they can also provide for IOs opinio juris.[183]

In reality, when the practice relates to actual conduct things are more straightforward since its very existence prompts us to look for the requisite opinio juris in verbalised evidence, such as statements, diplomatic correspondence, legal opinion, cast votes and expressed positions or reservations. When the conduct for which the respective opinio juris is inquired is not actual but verbal, such as the conclusion of treaties or the adoption of resolutions (and decisions) it is not always possible to discern the opinio juris from other material sources. Whereas this could constitute a ground to support the mutualisation of opinio juris and practice, it would ignore that the most considerable value of opinio juris as a constitutive element of CIL is to distinguish bold policy motivations from an expressed sense of legal obligation accompanying the practice in question.[184]

[180] ILC Report 2018 (n 2) Conclusion 15 and Commentary thereto.
[181] ILC Report 2018 (n 2) Commentary (2) to Conclusion 10.
[182] Ibid.
[183] Ibid Commentary (3).
[184] Kammerhofer (n 151) 536 maintains that the veracity of the belief is not important for as long as it is expressed.

When the material source of practice and opinio juris is the same, both elements are distinctively established. For example, when the adoption of a treaty, resolution or of a provision therein is the conduct concerned, another provision in the same text could be informative of opinio juris. Still, their identification is separately exercised in each case.[185] In the distinct scenario of practice discerned through the adoption of a treaty or resolution by unanimity, the satisfaction of opinio juris through the votes cast for its adoption would amount to duplication. Nevertheless, 'the effect of practice in line with the supposed rule may be nullified by contemporaneous statements that no such rule exists'.[186] Moreover, compliance with a treaty obligation by virtue of its conventional binding force cannot count as acceptance as law for the purpose of identifying CIL, even though this is equally the result of a customary international law rule, of *pacta sunt servanda*. Possible exceptions to this exist though, namely when States and IOs are implementing treaty obligations of no binding force upon them or when certain provisions are upheld in relations with non-members without any counter-effective explanation.[187]

1.7. Outline of the thesis

The thesis is divided into six Chapters. Overall, the structure followed is based on a thematic approach, comprising of different types of evidence enabling the author to examine whether ROs provide substantial evidence that a new CIL rule on regional humanitarian intervention is emerging. Following the Introduction, Chapter Two sets the conventional and customary international law pillars against which humanitarian intervention and the respective loosening of regional limits to use force have been anticipated. It provides the backdrop against which the claim for an emerging right supported through ROs is examined in Chapters Three, Four, and Five. It seeks to illustrate the predominant understanding of the general prohibition to use force- including the non-embrace of humanitarian interventions as a unilateral action- and the scope of rights enjoyed by ROs under the UN Charter. It recalls that the discussion of the general prohibition to use force under the UN Charter constitutes a reflection of CIL rules and that the prohibition constitutes a peremptory norm (*jus cogens*). Chapter two is divided

[185] ILC Report 2018 (n 2) Commentary (3) to Conclusion 10.
[186] Ibid Commentary (4); other examples of statements mentioned are those in debates in multilateral settings; when introducing draft legislation before the legislature; as assertions made in written and oral pleadings before courts and tribunals; in protests characterizing the conduct of other States as unlawful; and in response to proposals for codification.
[187] Ibid Commentary (4) to Conclusion 9.

in respective parts. After providing an account of the UN Charter's general prohibition to use force and its narrow scope on humanitarian coercion, it discusses the limits of regional use of force in light of Chapter VIII of the UN Charter and the reciprocal effect of other provisions, as well as the exception of self-defence. Overall, Chapter Two seeks to underline that the examination of regional undertakings in view of contributing to an emerging new CIL rule for humanitarian intervention, is assessed within a rigorous legal normative framework the change of which requires strong evidence; whilst the formation of a regional *lex specialis* is discounted unless there is strong evidence for general practice and universal acceptance of its legal bindingness.[188]

The Third and Fourth Chapters discuss occurrences of unilateral regional interventions claimed to have shaped the debate on humanitarian intervention and relevant developments in their aftermath. Both Chapters focus on the unilateral actions of the intervening organisations in the absence of: a) an explicit authorisation by the UN Security Council (implicit and ex post facto authorisation are at stake) for the relevant incidents of use of force and b) a formal invitation or consent to intervene (by reference both to the UN Charter and their respective constitutive order).

More specific, the Third Chapter discusses the intervention of ECOWAS in Liberia alleging that it constituted an amorphous anticipation of humanitarian intervention. It examines the operational conduct of ECOWAS and the varying rationales provided for the intervention, to establish the defective assertion of ECOWAS practice as evidence for the rise of a new CIL rule and the inadequate opinio juris. It then illustrates that in its actual practice following Liberia, ECOWAS has refrained from proliferating a right of humanitarian intervention.

[188] ILC Report on the 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) (Finalized by Martti Koskenniemi) UN Doc A/CN.4/L.682. See para 120 stating that 'No rule, treaty, or custom, however special its subject-matter or limited the number of the States concerned by it, applies in a vacuum. Its normative environment includes (…) not only whatever general law there may be on that very topic, but also principles that determine the relevant legal subjects, their basic rights and duties, and the forms through which those rights and duties may be supplemented, modified or extinguished. Principles such as "sovereignty", "non-intervention", "self-determination", "sovereign equality", "non-use of force", audiatur et altera pars, "no one may prohibit from his wrong", and so on, as well as interpretative maxims such as lex specialis and lex posterior, together with a host of other techniques of legal reasoning all are part of this framework'.

Chapter Four focuses on the unilateral intervention of NATO in Kosovo and its military engagement in Libya twelve years later following a UNSC mandate. The first part discusses the humanitarian intervention argument in Kosovo. It examines NATO's case for humanitarian intervention against the backdrop of 'traditional' unlawfulness and as potential evidence of practice towards the development of a CIL rule. It then proceeds with the discussion of the requisite affirmative opinio juris to establish that it was absent, though the growing acceptance of the alleged doctrine was indicative of the beginning of an emerging change. This is reinforced through the discussion of the academic debate in the midst of Kosovo which follows. The military engagement of NATO in Libya discussed in the second part of the chapter, serves as evidence of discontinuity of NATO's Kosovo unilateralist practice since it followed the explicit implementation of the notion of R2P by the UN to use force; claims for NATO's illegalities are founded on the violation of the scope of the UNSC's mandate. Against the backdrop of the factual merits of the interventions both in Kosovo and Libya, the chapter proceeds with setting out the disparity between real practice and the allegedly humanitarian justification for the enforcement action of NATO. It is maintained that the established disparity even in authorised uses of force explains further the lack of opinio juris in support of a new CIL rule on regional humanitarian intervention.

The Fifth Chapter proceeds with the analysis of verbal acts of ROs relevant to the initiation of enforcement action on humanitarian grounds. It examines the constitutive treaties, as well as other decisions, of ECOWAS, NATO and the EU and the extent to which they incorporate provisions that could be identified as practice and opinio juris contributing towards the emergence of a new general practice accepted as law. The next section of the Chapter analyses the relationship of regional constitutive arrangements with international law. In this regard, it analyses the relevant principles of international law, as well as the way international law, with particular emphasis on the use of force, is perceived within ROs and whether against this background the discussed organisations are contributing to CIL change or not.

The final Sixth Chapter focuses on reaching conclusions from the analysis conducted in the preceding chapters. It endeavours to provide a cumulative assessment of the findings in separate chapters in order to conclude on whether regional undertakings inform the

allegedly emerging rule of humanitarian intervention; whether we are in the advent of such development or whether by virtue of their own actions ROs reinforce the predominant thesis on the use of force. Resulting from the analysis of prior chapters, the concluding Chapter provides that the resulting effect of regional contribution to the debate on a CIL humanitarian intervention is currently disproving claims for an emerging new rule.

2. Humanitarian intervention and regional unilateralism: legal constraints

2.1. Introduction

The claim for an emerging rule of CIL on humanitarian intervention, the inquiry into the legal relevance of regional practice and opinio juris for this allegation, cannot be discussed *in abstractum*. This chapter analyses the scope and content of the conventional and customary norms of the international legal framework on the use of force, unilateral in particular, the change of which has been anticipated through claims for CIL humanitarian intervention and relevant conduct of regional organisations in particular. The general prohibition of the use of force, has consistently been accepted as a legal norm regulated by the UN Charter, a universal treaty, and customary international law.[189] Although the UN Charter is a distinct legal basis and provides for the conventional legal norm on the prohibition of the use of force, the ICJ has repeatedly affirmed that 'the principles as to the use of force incorporated in the Charter reflect customary international law'.[190]

Notwithstanding that since its adoption the UN Charter has provided a firm yardstick of international law for the legality of the attitude of regional organisations (and of states), the developments which followed gave rise to such claims.[191] More specific, in exiting from a world of international relations that were highly perceived through the hegemonic spheres of influence of USA and USSR,[192] the idea of regional unilateral enforcement

[189] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14, paras 187- 190.
[190] Ibid; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, para 87. See Yorhum Dinstein, *War, Aggression and Self-defence* (5th edn, CUP 2012) paras 269- 270.
[191] Christian Tams, 'League of Nations' in Rüdiger Wolfrum (ed), *MPEPIL* (OUP 2006) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e519> accessed 19 June 2019.
[192] Although unilateral operations during the Cold War era had been the object of scholarly debate, their weight in terms of clarifying the international law rules on the role and confines of regional action is anticipated. The OAS action against Cuba (1962) and the Dominican Republic (1965), the action of Arab League in Lebanon (1976- 83), the OECS action in Grenada, were not irrelevant to the bipolar system that had marginalized the UN. On their legality see Michael Akehurst, 'Enforcement Action by Regional Agencies, with Special Reference to the Organisation of American States' (1967) 42 BYIL 175; Gino J Naldi, 'Peace-keeping attempts by the Organisation of African Unity' (1985) 34 ICLQ 593; Istvan Pogany, 'The Arab League and Regional Peacekeeping' (1987) 34 NILR 54; Joseph Weiler, 'Armed Intervention in a Dichotomized World: the case of Grenada' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (Dordrecht: Martinus Nijhoff 1986).

action has revived.[193] Whereas during the Cold- War era the UN were marginalised, at its aftermath the international organisation proved ill-equipped to deal effectively with the increased number and diversified nature of conflicts.[194] Quite predictably, in the post-Cold War era, expectations regarding a proactive role for the UNSC increased, as well as its practical burdens both in capabilities and finances.[195] The pitfalls of the UN's unaccomplished goal of maintaining international peace and security since the early 1990s have most profoundly been manifested in the rise of incidents of unilateral military action by other international organisations and coalitions.[196] Moreover, the divergent response of the UNSC to conflicts with profound humanitarian predicaments facilitated the increase of assertions backing military intervention regardless of prior authorisation by the UNSC.[197]

Pro-interventionist assertions have consequently found their place in constitutional arrangements, statements and operational initiatives of regional, sub-regional and collective security organisations.[198] Such undertakings constitute in principle indeed potential evidence for the development of a new CIL rule to address a lacunae in the law[199] or change it by accommodating an exception to the general prohibition of the use of force; provided though that it is general and uniform enough with a clear sense of obligation to produce legal effect vis-à-vis the general prohibition to use force. The universal endorsement of the UN Charter along with the acceptance of its restrictive scope regarding diverging provisions in other international agreements under article 103 and the provision of specific amending procedures of its content in articles 108 and 109,

[193] Bolarina Adediran, 'Implementing R2P: Towards a Regional Solution?' (2017) 9 Global Responsibility to Protect 459; Paul R Williams and Sophie Pearlman, 'Use of Force in Humanitarian Crises: Addressing the Limitations of UN Security Council Authorization' (2019) 51 CaseWResJIL 211.
[194] For an appraisal of armed conflicts in the post-Cold War era see Lotta Harbom and Peter Wallensteen, 'Armed Conflict 1989- 2006' (2007) 44 JPR 623.
[195] Gary Wilson, 'Regional Arrangements as Agents of the UN Security Council: Some African and European Organisations Contrasted' (2008) 29 LiverpoolLRev 183.
[196] ECOWAS action in Liberia (1990) and Sierra Leone (1998), NATO intervention in Kosovo (1999), 'Coalition of the Willing' in Iraq (2003), Airstrikes against Syria (2018) by states.
[197] Marc Weller, 'Introduction: International Law and the Problem of War' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 34 underlines that 'The international system relating to war and peace often finds itself accused of double standards' and provides such examples.
[198] For example the constitutive instruments of AU and ECOWAS contain direct interventionist clauses; NATO has engaged in military deployment beyond self-defence; the Treaty of Lisbon provides the legal basis for military action, both separately or using the assets and capabilities of NATO under the Berlin Plus Agreement of 17 March 2003.
[199] ILC First Report on Formation and Evidence of Customary International Law (17 May 2013) UN Doc A/CN.4/663 at 35, para 15.

render the development of divergent rules a difficult task. The difficulty encountered in re-interpreting its limits on the use of force, including by regional organisations, is also relevant to the nexus between the general prohibition and the UN Charter's stated aims and purposes.[200] Additionally, by virtue of the *jus cogens* nature of the prohibition, a change would probably require more than to 'lay down a novel exception, but that it should qualify such an exception as jus cogens'.[201]

Within this context, the first section of the chapter considers what amounts to enforcement action requiring the authorisation of the UNSC and then proceeds to discuss whether an inherent right for humanitarian intervention can find its place within the Charter's textual regime, on the grounds of the justifications offered by its proponents. The next section discusses the strict limits of regional unilateralism provided through the reciprocal effect of the general principles of the Charter on the use of force and articles 52- 54 of Chapter VIII of the UN Charter concerning directly regional organisations. By illustrating that humanitarian intervention is not prescribed within the UN Charter and that regional unilateralism is strictly confined, it maintains that the undertakings of regional organisations are of relevance solely in providing evidence for a new or emerging CIL rule which is what the following chapters examine.

2.2. The UN Charter's general prohibition and humanitarian intervention

Over the years and despite general agreement as to the mere fact that the general prohibition on the use of force in article 2(4) is *jus cogens,*[202] states and commentators have disagreed on whether the unilateral humanitarian use of force- both by states and regional actors- constitutes a permissible exception under article 2(4).[203] The development of the general concept of humanitarian use of force in response to the exploitation of human dignity and justice has been anticipated by governments, scholars

[200] Article 31(4) of the VCLT; see *Legal Status of Eastern Greenland (Denmark v Norway)* (Judgement) (1933) PCIJ Rep Series A/B No 53, 49.
[201] André de Hoogh, 'Jus Cogens and the Use of Force' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 1171.
[202] *Nicaragua* (n 189) para 190. See also Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 24; Alexander Orakhelashvilli, 'Changing Jus Cogens through State Practice? The Case of the Prohibition of the Use of Force and its Exceptions' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 165- 175.
[203] Ibid *Nicaragua*, para 182.

and practitioners of public international law. The main dilemma is well- illustrated in a 1999 article of Kofi Annan, at the midst of NATO's intervention in Kosovo,

> On the one hand, is it legitimate for a regional organisation to use force without a UN mandate? On the other, is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked? The inability of the international community to reconcile these two compelling interests in the case of Kosovo can be viewed only as a tragedy.[204]

Caught between the rock and the hard place of doctrinal legality and moral dilemmas, the venture of humanitarian intervention has never been abandoned. The alleged contribution of practices towards the gradual development of a new rule in CIL being discussed in the following chapters of the thesis, this section discusses the general prohibition of force by the UN Charter and the main justifications proclaimed in support of humanitarian intervention.

2.2.1. Enforcement action requiring a UNSC authorisation

The text of the UN Charter on the use of force was not the result of an instant inspiration, but the outcome of preceding failures to attain an effective collective security system and of lessons drawn.[205] The outbreak of the World War I marked a major shift in states' perceptions concerning the attainment of their security since 'the old system of individual security by each state had broken down'.[206] The modern inception of the nature of collective security was already reflected in the Covenant of the League of Nations in 1919 though it was not projected in any express form;[207] only after 1919 the development of working definitions on collective security disengaging from the use of force took place.[208] As the Covenant did not seek to outlaw war in general, it stated that war should be a

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[204] Kofi Annan, 'Two Concepts of Sovereignty' *The Economist* (18 September 1999) <https://www.economist.com/international/1999/09/16/two-concepts-of-sovereignty> accessed 19 June 2019.

[205] Tams (n 191).

[206] Josef L Kunz, 'The Idea of Collective Security in Pan- American Developments' (1953) 6 WestPolQ 658, 658- 659.

[207] Ernst Haas, 'Types of Collective Security: An Examination of Operational Concepts' (1955) 49 AmPolSciRev 40. Leeland M Goodrich, 'From League of Nations to United Nations' (1947) 1 International Organization 3- 21.

[208] Maurice Borquin, 'General Report on the Preparatory Memoranda Submitted on the General Study Conference' in Maurice Borquin (ed), *Collective Security, A record of the Seventh and Eighth International Studies Conferences, Paris 1934- London 1935* (International Institute of Intellectual Co-operation 1936).

measure of last resort only.[209] The later Kellogg- Briand Pact of 1928, attempted to prohibit war and compel states to settle their disputes peacefully. Yet, its relevant article 1, though it condemns recourse to war and renounces it, could not be interpreted as a complete prohibition. Despite the significant reach of this treaty and its significance as the forerunner to the UN Charter's prohibition thus a source of customary international law also, as the Italian conquest of Ethiopia and the World War II reveal the practice of the parties was not consistent.[210] The fact that pre- UN efforts to institutionalise collective security run short of prohibiting the use of force, that none of them provided State parties with the right of self-defence and that there were no sanctions against violators undermined them significantly.[211]

The general prohibition of the threat or use of force in article 2(4) of the UN Charter elucidates the drafters' agreement on the status of the threat or use of violence.[212] It was agreed that 'the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations' would no longer be permissible as an instrument of national policy in international relations.

The first crucial qualification of non-use of force, is set out in Chapter VII, article 42, and stresses that, if the Security Council considers that measures not involving the use of armed force 'would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security', including 'demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations' [or of delegated groupings of States].

[209] It is worth noting that USA did not join the League although signed the Covenant and the USSR never signed the Kellogg- Briand Pact. In the absence of the simultaneous participation of these two powerful states, the project of a truly collective security system was logically rendered unattainable.
[210] Tams (n 191) 9.
[211] Erika de Wet and Sir Michael Wood, 'Collective Security' in Rüdiger Wolfrum (ed), *MPEPIL* (OUP 2013) para 2 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e270> accessed 19 June 2019.
[212] On the scope of 'force' and economic boycott see Dinstein (n 190) para 236. On 'threat' see the analysis of François Dubuisson and Anne Lagerwall, 'The threat of the use of force and ultimata' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015).

Simultaneously, this provision and Chapter VII stand as the exceptions to the non-intervention principle of article 2(7) of the UN Charter,[213] which reads as follows:

> Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

In other words, whereas at first glance the UN has no right to intervene in matters within the domestic jurisdiction of a state, intervention is effectively permitted if it is carried out for the purposes provided for under Chapter VII. Whereas the initial intention at San Francisco had been to condemn 'any States acting on its own authority to intervene in the internal affairs of another State', the resultant article 2(7) concerned the attitude of the UN themselves, albeit in a not truly restrictive manner.[214]

Under the UN Charter, enforcement action entails various means of coercion. Since article 2(7) states that respect for the domestic jurisdiction of any state, shall not prejudice the application of enforcement measures under Chapter Vll, enforcement action under Chapter VII could involve a series of actions impinging the domestic jurisdiction of a state; and those are not limited to the military use of force. According to articles 41 and 42 of the Charter, these may include 'complete or partial interruption of economic relations, rail, sea, air, postal, telegraphic, radio and other means of communication and the severance of diplomatic relations', as well as demonstrations and blockades.[215] This is also inferred by article 50, which raises the severe character of economic problems resulting from enforcement action. Whereas the UNSC decisions regarding any coercive measures under Chapter VII are binding, the enforcement measures requiring a UNSC authorisation are solely those involving the use (or threat) of armed force.[216] As Villani asserts measures of a different nature are not prohibited under the Charter.[217]

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[213] The third exception of action against enemy States in articles 53 and 107 is now obsolete.
[214] Thomas Franck, *Recourse to Force, State Action Against Threats and Armed Attacks* (CUP 2002) 68.
[215] See on that Asbjorn Eide, 'Peace- Keeping and Enforcement by Regional Organisations: Its Place in the United Nations System' (1966) 3 JPR 125, 140 and 143.
[216] Ugo Villani, 'The Security Council's Authorization of Enforcement Action by Regional Organisations' (2002) 6 MaxPlanckUNYB 535, 539- 540.
[217] Ibid.

Nevertheless, a very narrow interpretation of enforcement action in the case of regional organisations would be misleading not only as to the nature, but especially as to the impact of some measures even if they are short of military action. Taking into account that individual states are allowed to take individual measures to establish or break off diplomatic and economic relations with any given state, one cannot conclude with ease that this is the same with the implementation i.e. of a grouped blockade. In the words of Eide, 'a complete boycott (…) could imply a very high intensity of coercion',[218] as well as their continuous implementation in the absence of a UNSC mandate or following its official termination.

Another problem in defining enforcement action that requires a prior UNSC authorisation has been the concept of non-UN peacekeeping operations. More precisely, on certain occasions such missions may enjoy mixed mandates allowing the development of coercive elements in order to become effective during the course of their operation. Varying views were portrayed during the UNSC discussion on the establishment of the OAS force in the Dominican Republic in 1965.[219] One of the core issues debated in that occasion was the value of consent by the state receiving the force. As far as it concerns what is described as 'traditional peacekeeping', it is accepted that if action includes no enforcement elements then no prior UNSC authorisation is required.[220]

A widely quoted case to provide some further insights as to what constitutes enforcement action, has been the Advisory Opinion of the ICJ on the *Certain Expenses Case*. The ICJ recognised that the UNGA can make recommendations in relation to enforcement action but implied that such recommendations do not amount to enforcement action that the UNGA can undertake by itself.[221] In light of his analysis of the OAS action in the case of the Cuban quarantine of 1962, Meeker argued that in the *Certain Expenses Case* the ICJ implied that what distinguishes recommendations from enforcement action is that they lack the element of obligation. Having said that, and beyond proclaiming that the incident marked 'an assumption of increased responsibility by a regional organisation',[222] he

[218] Eide (n 215) 140.
[219] UNSC 1198th meeting (4 May 1965) UN Doc S/PV.1198 1- 33.
[220] Malcolm Shaw, *International Law* (6th edn, CUP 2008) 1155.
[221] *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 151, 163- 166.
[222] Leonard C Meeker, 'Defensive Quarantine and the Law' (1963) 57 AJIL 515, 519- 520.

suggested that in order to amount to enforcement requiring the authorisation of the UNSC, the said action should be the result of an obligation and not of a recommendation.[223] In his view, since the member states of OAS were not obliged to implement the OAS's recommendation for the quarantine, regional action did not constitute enforcement action requiring the authorisation of the UNSC.[224] Nonetheless, his analysis disregards first of all that in the *Certain Expenses Case* the ICJ explains that the recommendations of the UNGA on enforcement action 'shall be referred to the Security Council';[225] thus, the UNGA cannot 'undertake enforcement action on its own'.[226] According to the ICJ, even when the UNGA proceeds to implement recommendations to set up commissions and other bodies in relation to the maintenance of international peace and security, their utilisation is dependent upon the consent of the State or States concerned.[227]

Whether the consent of the target state, can nullify the prohibition of external military intervention, has been largely discussed by the UNGA and the ICJ. With its resolution 375 (1949) on the Rights and Duties of States,[228] resolution 2131 (1965) on the Inadmissibility of Intervention[229] and the 1970 Friendly Relations resolution,[230] the UNGA provides that every state has, inter alia, the duty to refrain from instigating civil strife in the territory of another state and to prevent the organisation within its territory of activities calculated to foment such civil strife. By analogy, the same applies for regional organisations. Nonetheless, the *Nicaragua* judgement points out that it is lawful for a government to invite a third state to come to its aid and use force,[231] though concerns remain when a situation has reached the level of civil war.[232] In general, the contestation of the legality of external involvement in situations classified as civil wars originates from the principle of state sovereignty. Which dictates that only a state's population may determine the political and socio- economic system in their country. That is best reflected

[223] Ibid 521- 522; for OAS Res see UNSC 1022th meeting (23 October 1962) UN Doc S/PV.1022, para 81.
[224] Ibid Meeker.
[225] *Certain Expenses* (n 221) 164- 165.
[226] Sean D Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*, vol 21 (Procedural Aspects of International Law Series PENN 1996) 301.
[227] *Certain Expenses* (n 221) 165.
[228] UNGA Res 375 (6 December 1949) UN Doc A/RES/375.
[229] UNGA Res 2131 (21 December 1965) UN Doc A/RES/20/2131.
[230] UNGA Res 2625 (24 October 1970) A/RES/25/2625.
[231] *Nicaragua* (n 189) para 246.
[232] Shaw (n 220) 1151- 1152.

in the prohibition of a government using external help to suppress a self- determination struggle.[233]

In practice, a major problem in such cases, remains the absence of concrete and straightforward criteria for deciding the character of an internal conflict; including, the extent of the loss of a government's effective control over significant parts of the territory by an opposition force or its lack of public support, before talking of civil war.[234] Additionally, it is disputable that the opinion of a government in exile that lacks effective control will qualify either as an invitation or consent for intervention. Ultimately, the involvement of external actors, of both states and regional organisations, implies that the situation ceases to be a purely internal conflict.[235] In light of the above, as Gray describes, the proponents of intervention claiming invitation allege that, 'their intervention was lawful because they were merely dealing with limited internal unrest or, at the other end of the spectrum, because they were helping the government respond to prior intervention by other states'.[236]

2.2.2. Any inherent right for humanitarian intervention?

As mentioned in the Introduction the protracted efforts to discuss a change in international law with regards to the use of force have been sought through both the CIL and the text of the UN Charter.[237] A primary argument set forth by the proponents of military intervention as a means to avert a humanitarian crisis, is that violations of human dignity and justice constitute actions inconsistent with the Purposes of the UN Charter. This claim which derives from the last sentence of article 2(4) is prima facie a valid argument. More specific, it is argued that, to react and try to prevent human rights' violations from occurring or to protect people who already suffer as a result of atrocities, cannot be seen as an action inconsistent with the purposes of the Charter; hence, neither the international

[233] Gray (n 202) 62; Shaw ibid 1151.
[234] Additional Protocol II to the 1949 Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts (1977) article 1.
[235] United Kingdom Foreign Office, Policy Document No 148, reprinted (1986) 57 BYIL 614.
[236] Gray (n 202) 60.
[237] Ademola Abass, *Regional Organisations and the development of Collective Security, Beyond Chapter VIII of the UN Charter* (Hart Publishing 2004); Monica Hakimi, 'The Jus Ad Bellum's Regulatory Form' (2018) 112 AJIL 151; Richard Ware, 'The Legal basis for Air Strikes Against Syrian Government Targets' (2018) House of Commons Library, Briefing Paper No 8287 <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8287#fullreport> accessed 12 June 2020.

community nor the individual states should be prohibited from using force, but in contrary they can resort to it for humanitarian reasons.[238] Although 'a limited notion of aggression' is not to be found in the Charter,[239] Hannikainen asserts that humanitarian intervention, when limited in duration and the means employed, does not affect the status of the prohibition as *jus cogens*.[240]

Indeed, the San Francisco conference of September 1945, declared for the solution of 'humanitarian problems' and the promotion of 'respect for human rights and fundamental freedoms'.[241] However, as the contestants of humanitarian use of force advocate this is not supported by the broad scope of the general prohibition in article 2(4), unilateral and authorised. That is particularly armoured by the choice of the prohibition of the use of force, a concept broader than war; of armed conflicts in general, and not only of formal wars. If the Charter drafters' intention was different, they would not have reconsidered and replaced the term war in the Kellogg- Briand Pact with the use of force phrase at the Dumbarton Oaks and San Francisco conferences. Simma proclaims that the reference to the purposes of the UN Charter was not intended to 'allow room for any exceptions from the ban, but rather to make the prohibition watertight'.[242] Brownlie takes the view that the words 'in any other manner' were intended to uphold the general character of the prohibition,[243] envisaged in the travaux préparatoires.[244]

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[238] Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (2nd edn, Irvington-on-Hudson, NY: Transnational Publishers 1997) 151; Petr Valek, 'Is Unilateral Humanitarian Intervention Compatible with the UN Charter?' 26 MichJIntlL (2005) 1223, 1238- 1240.
[239] De Hoogh (n 201) 1174.
[240] Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (Finnish Lawyers' Pub. Co. 1988) 336- 337.
[241] It is important to be noted that this provision was the result of a compromise between the USA, UK and USSR. In more detail, the USA proposed that the UNGA should be able to make recommendations for the observance and promotion of basic human rights. The other two powers disagreed because they believed that UN involvement would be in violation of the doctrine of national sovereignty. Even more significant for the purposes of this work though, is that the USA, although they wished to have some provision in the Charter referring to the human rights, they recognised that this issue was an internal one. Thus, they suggested including in the provision for the promotion of human rights the obligation of the states to refrain from intervention in the internal affairs of any state towards that end (this proposal was rejected). At the end, the compromise reached provided only for the promotion and respect for human rights and fundamental freedoms through the ECOSOC. For more details see Murphy (n 226) 65- 82.
[242] Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 EJIL 1, 3.
[243] Ian Brownlie, *International Law and The Use of Force by States* (OUP 1963) 268.
[244] 6 UNCIO 334- 5 the response of the USA to the assertions of Brazil; 342, 557 (Australia); 558 (Bolivia and Brazil); 560 (Costa Rica); 561 (Ecuador); 563 (Iran); 564 (Norway).

It has also been argued that the exceptional situations in which the use of force was allowed or provided for though by the UN Charter, excluded humanitarian crises. Military interventions in light of humanitarian necessities, unilateral or authorised, were not envisioned by the drafters of the UN Charter. By its very nature military intervention is a severe form of action and even in a most genuine humanitarian form, if this could ever exist,[245] it would be impossible to leave intact human lives.[246] It is therefore contested whether such an inferred exception could be justified as being consistent with the purposes of the organisation. Moreover, human rights were approached as internal issues, to which the rigid exception of lawful international enforcement action should not extent. This is best summarized by Brownlie:

> It must be admitted that humanitarian intervention has not been expressly condemned by either the League Covenant, the Kellogg- Briand Pact, or the United Nations Charter. Indeed, such intervention would not constitute resort to force as an instrument of national policy. It is necessary nevertheless to have regard to the general effect and the underlying assumptions of the juridical developments of the period since 1920. In particular it is extremely doubtful if this form of intervention has survived the express condemnations of intervention which have occurred in recent times or the general prohibition to resort to force to be found in the United Nations Charter.[247]

Schachter also inferred that human rights were not a legally valid justification for the use of force. He provided three main justifications. He contended that this is not consistent with the UN Charter as it was originally understood and that his view complies with the interpretation of the Charter adopted by the great majority of States. He added that until 1991, the time he was writing, 'when governments have resorted to force, they have almost invariably relied on self-defence as their legal justification'.[248]

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[245] Kevin Jon Heller, '"Genuine" Unilateral Humanitarian Intervention- Another Ticking Time-Bomb Scenario' (2019) Amsterdam Law School Research Paper No 2019-48 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3492412> accessed 12 June 2020.
[246] Anne Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism' (1999) 10 EJIL 679, 680-681.
[247] Brownlie (n 243) 342.
[248] Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff 1991) 128.

The effort to construct through a narrow interpretation some inherent residual exceptions to the general prohibition of article 2(4) is not limited to the above.[249] Franck writes that this was the unintentional consequence of the unanimous affirmation of the significance of state sovereignty,[250] through the adoption of the terms 'territorial integrity' and 'political independence of states'.[251] A comprehensive explanation on that has been put forward by Tesón. He states that,

> Since a humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the State involved and is not only not inconsistent with the purposes of the United Nations but is rather in conformity with the most fundamental peremptory norms of the Charter, it is a distortion to argue that it is precluded by Article 2(4).[252]

Higgins has suggested that if the territorial integrity of the target states is not endangered by the enforcement action, we should 'feel confident that no other prohibition in article 2(4) is being violated'.[253] This view, reflects profoundly the very specific argument of the proponents of humanitarian intervention, that the phrase 'against the territorial integrity or political independence of any state' should be read to limit the prohibition of use of force only to those stated situations. In other words, any use of force of a lesser effect should be legally acceptable. According to this interpretation, which was provided by Belgium during its submissions at the Legality of the Use of Force Case, since the use of force in humanitarian crises aims at saving peoples' lives and protecting their human rights, it does not affect the explicit limitations of article 2(4).[254]

Regarding the interpretation of the general prohibition rule the adversaries of humanitarian use of force propound that the words 'territorial integrity or political independence' do not constitute a narrow set of qualifications for the prohibition, but 'reflect an effort to clarify the comprehensive nature of the prohibition'.[255] Namely, that

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[249] See Anthony D'Amato, *International Law: Process and Prospect* (Dobbs Ferry, NY: Transnational Publishers 1987) 58- 59.
[250] Franck (n 214) 12.
[251] 3 UNCIO Restricted Doc 2 G/7 (c) (23 April 1945) 65.
[252] Tesón (n 238).
[253] Rosalyn Higgins, *Problems & Processes: International Law and How We Use It* (OUP 1994, reprinted 2000) 245- 246.
[254] *Legality of Use of Force (Serbia and Montenegro v. Belgium)* Oral Proceedings for Provisional Measures (10 May 1999) CR1999/15 at 16.
[255] Murphy (n 226) 71.

this phrase was inserted during the San Francisco discussions because of the insistence of weak states, which wanted to ensure that powerful states would not interfere with their domestic issues or exercise any forceful actions against them; in conformity with the general non-interventionist atmosphere that prevailed at the San Francisco meeting. Indeed, it would be problematic to recognise that the prohibition concerns only force ultimately violating the territorial integrity or the political independence of States. This would disregard any violent act falling short of eventually inflicting the territorial integrity or political independence of the victim- State.[256] Even if what the pro-interventionists argue in relation to the narrow scope of the general prohibition was accepted, how could any humanitarian use of force not be violating the territorial integrity and political independence of the target state? Either the crossing of the state's boarders or the uses of external to the state means in order to achieve its humanitarian aims affront the territorial integrity of the target state. Moreover, the deployment of military forces, albeit on humanitarian grounds never leave unaffected the target state's political structures. And in the absence of UN authorisation, a non- requested and non- consented to intervention is certainly an act interfering with the target state's independence. Since the time Lauterpacht was writing a prevailing argument in support of humanitarian enforcement has been the severe violation by a domestic administration of the human rights of its nationals.[257] For the intervening forces though to help and protect those people amounts, at least to a certain extent, to becoming involved in a conflict with that domestic administration. Indisputably, in such situations, the action undertaken would cross the threshold of not interfering with the political independence of the target state.[258] Therefore, the intervening forces become themselves involved in situations that may entrench the humanitarian crises and endanger the international peace and security.

Furthermore, it has been argued that traces of the non-interventionist approach proving the sustaining importance of state sovereignty can be found through the examination of the history of negotiations at the Dumbarton Oaks meeting. All the participants had

[256] Franck (n 214).
[257] Lassa F Oppenheim, *International Law: A Treatise: Vol. I- Peace* by Hans Lauterpacht (7th edn, London: Longmans, Green and Co 1948) 279 in Luis Kutner, 'World Habeas Corpus and Humanitarian Intervention' 19 Valparaiso University Law Review (1985) 593, 597- 598.
[258] Oscar Schachter, 'The Legality of Pro-Democratic Invasion' 78 AJIL (1984) 645, 649; Eric Heinze, 'Law, Force, and Human Rights: The Search for a Sufficiently Principled Legal Basis for Humanitarian Intervention' 24 JCS (2004) 5.

indisputably supported the general idea that the principle of state sovereignty should not be curtailed against any state.[259] According to Brownlie, the travaux préparatoires confirm that 'the phrase under discussion was not intended to be restrictive but, on the contrary, to give more specific guarantees to small states and that it cannot be interpreted as having a qualifying effect'.[260] It has been argued that in general, the preparatory works of the UN Charter prove that 'the phrases "territorial integrity" and "inconsistent with the purposes of the Charter" were added to article 2(4) to close all potential loopholes in its prohibition on the use of force, rather than to open up new ones'.[261] A supportive argument has been the decision of the ICJ in the *Corfu Channel* case; namely, that the narrow interpretation on the prohibition to use of force raised by the United Kingdom, was refuted 'as the manifestation of a policy of force'.[262] Although the argument for interventions in the context of human rights is stronger than that in the *Corfu Channel* case,[263] the decision of the ICJ corroborated that the intention of the UN Charter's drafters was the rigorous prohibition of interventions.

Moreover, except for quivering the otherwise straightforward principle of non-intervention, another justification by the advents of humanitarian (and pro- democratic interventions) has been the UNSC's practice and capacity for an open- ended identification of threats to the international peace and security under article 39, with which they have 'stretched the literal text of Chapter VII'.[264] The increase of powers exercised by the UN inspired an expansive pattern regarding claims of authority by other actors.[265] The determination of the internal human suffering in the case of Southern Rhodesia as a threat to international peace was a first indicator for the aforesaid UNSC

[259] This is evident at the discussions concerning the proposal of the USA, that UNGA should be able to make recommendations for the promotion of the observance of basic human rights. This was met with resistance by Great Britain and the USSR since they had considered that such interference would constitute a breach of the doctrine of state sovereignty.
[260] Brownlie (n 243) 265- 268.
[261] Jonathan I Charney, 'Editorial Comments: NATO's Kosovo Intervention: Anticipatory Humanitarian Intervention in Kosovo' (1999) 93 AJIL 834, 835.
[262] *Corfu Channel Case (United Kingdom v. Albania)* [1949] ICJ Rep 4, 35.
[263] Ibid; the UK was sweeping the Corfu Channel for mines. They argued that this was done solely for collecting evidence of the existence of mines and in order to protect the navigation generally. Thus, as they asserted, they had not acted against the territorial integrity or the political independence of Albania. However, the court was not convinced that article 2(4) affords such a restrictive interpretation.
[264] Franck (n 214) 14, 137.
[265] On the expansion of powers exercised by the UN see Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (OUP 2019) 113-198.

practice,[266] followed by the instances of Somalia, Haiti[267] and in a most explicit manner in Libya. Nevertheless, article 39 is telling as to the broadening of the Charter's scope to embrace unilateral initiatives for humanitarian determinations. It provides that the organ ascribed with the responsibility of determining the 'existence of any threat to the peace, breach of the peace, or act of aggression' and has to give 'recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security' is the UNSC. Whereas one could argue that since Chapter VII does not provide for a right of the UNSC to authorise military measures in respect of human suffering but it has done it, this provides a leeway for unilateral initiatives, the practice of the UNSC proves the opposite. According to the report of the Danish Institute of International Affairs with regards to humanitarian intervention, the UNSC's practice indicates that the corresponding minimum requirement for implementing a military intervention to address a humanitarian necessity, is the determination of a set of circumstances as a 'threat' to international peace and security.[268] Therefore, within this context, self-determined and self-initiated humanitarian interventions cannot be justified.

More recently and despite the culmination of a multilateral concept for R2P, Stahn suggests that the 2005 Outcome Document of the World Summit 'leaves the door open to unilateral responses', through its "case- by- case" vision of collective security and a qualified commitment to act in cooperation with regional organisations'.[269] Regarding the legal soundness of the claim for R2P unilateral interventionism, this has largely been discounted even by prominent humanitarians.[270] The argument for an admissible humanitarian intervention by virtue of the R2P Outcome Document's call to consider action on a 'case- by case' basis disregards that the same provision stipulates that collective action with the cooperation of regional organisations shall be taken 'through

[266] UNSC Res 221 (9 April 1966) UN Doc S/RES/221.
[267] Although in those occasions it specifically declared that the situation constituted a threat or breach to the international peace and security, the main pillar for that finding was a humanitarian necessity internally. Danish Institute of International Affairs, *Humanitarian Intervention, Legal and Political Aspects*, (Copenhagen 1999) <http://www.diis.dk/files/media/publications/import/extra/humanitarian_intervention_1999.pdf> 62, accessed 19 June 2019. Franck (n 214) 137, para 1.
[268] Ibid Danish Institute 61.
[269] Carsten Stahn, 'Notes and Comments, Responsibility to Protect: Political rhetoric or Emerging Legal Norm?' (2007) 101 AJIL 99, 109.
[270] Alex Bellamy, 'The changing face of Humanitarian Intervention' (2015) 11 St Antony's International Review 15-43.

the Security Council'.[271] Similarly, the separate section of the Outcome Document on regional organisations, affirms that the call for a stronger relationship between the UN and regional organisations, is made 'pursuant to Chapter VIII of the UN Charter' only.[272] Another widespread argument, which is at the focus of this thesis, is the support for an emerging rule of humanitarian intervention under CIL. Weller's analysis is telling as to the enduring nature of this claim.[273] Koh projects the respective humanitarian crisis in Syria as 'a lawmaking moment' calling for a discussion and definition of 'a narrow "affirmative defense" to article 2(4) that would clarify the contours of an emerging lawful exception to a rigid rule.[274] Similarly, Scharf claims that in light of the Syria airstrikes of April 2018 something is changing as to the conventionally perceived illegality of humanitarian intervention through customary international law.[275] However, he claims that evidence for the practice of humanitarian intervention is found since the 1999 NATO intervention in Kosovo, whereas it is the ambiguity of opinio juris accompanying the intervention which prevented it 'from actually ripening into a norm of customary international law' which is what now is changing.[276] The legal normative impact of regional conduct to an alleged emerging rule under CIL, including NATO's in Kosovo, is what this thesis examines in the following chapters. However, before examining relevant instances of regional conduct within the context of CIL development, it is important to illustrate that the UN Charter provides no leeway for a regional exception to the general prohibition and the authoritative role of the UNSC in determining when enforcement action to avert humanitarian crises is to be initiated.

2.3. The UN Charter's watertight prohibition of regional unilateralism

This section seeks to portray that Chapter VIII regional enforcement action falls under the primary control of the UNSC as it is contextualised in Chapter VII. It examines the reciprocal effect of the Charter's general principles on the prohibition of the use of force

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[271] UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, para 139.
[272] Ibid para 170.
[273] Marc Weller, 'Forcible Humanitarian Action in International Law- part I' (2017) EJIL:Talk! <https://www.ejiltalk.org/forcible-humanitarian-action-in-international-law-part-i/> accessed 16 December 2018.
[274] Harold Hongju Koh, 'Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward' (2013) EJIL: Talk! <https://www.ejiltalk.org/syria-and-the-law-of-humanitarian-intervention-part-ii-international-law-and-the-way-forward/> accessed 16 December 2018.
[275] Michael Scharf, 'Striking a Grotian Moment: How the Syria Airstrikes Changed International Law Relating to Humanitarian Intervention' (2018) 19 ChiJIntlL (2019 Forthcoming) Case Legal Studies Research Paper No 2018-11 available at <https://ssrn.com/abstract=3249158> accessed 16 December 2018.
[276] Ibid 17.

and of the specific provisions of Chapter VIII. The UN Charter devoted Chapter VIII to 'Regional Arrangements'. Whereas this addresses both for the pacific settlement of disputes and the pursuing of enforcement action by regional organisations, the role of regional organisations is not exhaustively prescribed therein. The contribution of regional groupings to the maintenance of international peace and security through either pacific means or enforcement action transcends Chapter VIII.[277] Self- defence remains the only exception for unauthorised use of force by regional organisations.

2.3.1. The prescribed limits for 'Regional Arrangements'

2.3.1.1.Article 52

On three significant issues article 52 is particularly informative. Firstly, what can be inferred through the provisions of article 52 is that its drafters considered regional organisations as suitable for Chapter VIII actions. Secondly, it provides the sole context within which regional organisations can act autonomously to contain local disputes, albeit peacefully. Thirdly, the inclusion of a consent requirement for the lesser intrusive pacific settlement of disputes is indicative of the intention to set strict limitations regarding regional use of force. Article 52, reads as follows:

> (1) Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.
>
> (2) The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.
>
> (3) The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.
>
> (4) This Article in no way impairs the application of Articles 34 and 35.

[277] The 'Pacific Settlement of Disputes' is dealt with in Chapter VI.

Chapter VIII is different to the logic encompassed throughout the text of the UN Charter. The Charter is mainly built around the role and capacities of the United Nations themselves and more particularly, in the field of international peace and security around the competences of the UNSC. In the absence of a solid description of the state groupings which shall qualify as regional arrangements or agencies for the purposes of Chapter VIII, we shall resort to a contextual analysis of article 52 in order to exhaust the reach of its application; which remains contested.

The word 'regional' being repeatedly used by the Charter's drafters in article 52(1), cannot be understood differently to its precise scope. Since the first discussions on the creation of the UN, the intention of the Charter's drafters was to provide the organisation with the teeth to remain a working universal organisation.[278] Therefore, it would not make any sense to assign an enlarged meaning to the word 'regional' and prescribe for the existence of replicate collective actors with universal reach. Instead, regional action under the Charter, and that is different to collective self-defence, is appropriate only within member states of geographically organised groupings. All the more, the legitimacy of unilateral forceful initiatives of actors outside the region concerned is disputed.

The 'locality' proviso in article 52(2), though attributed to the pacific settlement of disputes, enhances the rigid understanding of 'regional' groupings and action in general. A plausible extension of the said scope of 'regional action', in Akehurst's analysis will occur 'if a non- regional State disturbs the peace within the region';[279] that is within the regional organisation's local environment. Since according to Chapter VI, article 33(1) peaceful means for settling disputes are negotiation, inquiry, mediation, conciliation, arbitration and judicial settlement, his analysis is persuasive. Nevertheless, the efforts of regional arrangements or agencies for the pacific settlement of disputes according to article 52(3) shall be 'either on the initiative of the states concerned or by reference from the Security Council'. Hence, even when regional action is of the nature prescribed for under article 52(2) it shall not be contrary to the will of the states concerned. Even though some scholars have argued in favour of the prerogative of regional organisations to

[278] Franck (n 214) 157- 158.
[279] Akehurst (n 192) 221.

intervene in an internal conflict of one of its member states,[280] what must be emphasized is that such an action cannot bypass the invitation of the official authorities or/and a prior determination by the UNSC.[281]

Whereas Hummer and Schweitzer claim that 'internal conflicts can also be subsumed under the notion of "local dispute", but only in so far as these conflicts are capable of representing a threat to international peace',[282] their argument fails to counter arguments pointing to its potential misuse on the part of the leading powers of a regional organisation at the expense of the less strong ones. In the absence of invitation by the internationally recognised authorities of the member state, and of an international mandate, any kind of interference on the part of a regional organisation in an internal conflict would seem to be less guaranteed as to its objectivity. Additionally, it runs counter to the spirit of the UN Charter, that the power given to regional organisations constitutes a compromise for regional aspirations which should remain confined to a set limited context; if an internal dispute is not so severe and threatening to warrant the involvement of the UNSC either under article 53 or Chapter VII, a regional organisation could not be on its own initiative acting in contravention to the principle of state sovereignty. This proposition also finds support in the provision included in article 52 (1) which mentions that all relevant activities should be according to the Purposes and Principles of the UN.[283]

Although this was inserted in article 52, the provision of article 52(1) has a further reaching effect in sketching the general context for regional action. While recognising that regional organisations or agencies may have a role to play in the maintenance of international peace and security, it forbids their involvement in matters not 'appropriate for regional action'. This tells us that the internal constitutionality[284] of measures adopted by regional organisations to further peace and security shall be tested against the

[280] This argument is based on the reference of articles 34 and 35 in article 52(4) and the comparison of the use of the word 'situation'.
[281] Zsuzsanna Deen-Racsmány, 'A Redistribution of Authority between the UN and Regional Organisations in the Field of the Maintenance of Peace and Security' (2000) 13 LJIL 297, 308.
[282] Waldemar Hummer and Michael Schweitzer, 'Article 52' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (OUP 1994) 825; they infer that, from articles 34 and 35 and the continuity of a dispute (fn 119).
[283] Although in a literary context the 'Purposes and Principles of the UN' could be understood as referring solely to articles 1 and 2 of the UN Charter, in fact they represent the spirit of the entire Charter. Therefore, when regional organisations are asked to abide by the 'Purposes and Principles of the UN', this does not mean only the words of the two articles but their spirit also which cuts across the Charter.
[284] Abass (n 237) 63; Wilson (n 195) 189.

backcloth of Chapter VIII as this is compromised by the UN Charter in its entirety.[285] Article 52(1) underlines that to be 'appropriate', regional action shall be nonetheless 'consistent with the Purposes and Principles of the United Nations'.

Another continuing tension in the scholar community in relation to the actual application of article 52 remains the issue of procedure where a local dispute is at stake. Would it be that the first option belongs to the regional organisation, or is there a concurrent right for the UNSC to take measures? Article 52(2) seems to grant priority to the regional organisation (before referring them to the UNSC) and the following article 52(3) provides that the UNSC shall encourage the pacific settlement of disputes 'either on the initiative of the states concerned or by reference from the Security Council'. The selectively explicit reference in article 52(4) of articles 34 and 35 makes clear that the UNSC was not given any explicit priority to decide on and take measures- this would imply a reference to articles 36 and 37. Accordingly, the UNSC may investigate a dispute and determine whether its continuation is likely to endanger the international peace and security. Action on the merits of a case by the UNSC becomes inevitable if the efforts by the regional organisation have proved ineffective and the dispute is likely to become a threat for international peace and security.

The notion of responsibility, on the part of the regional organisation, to exhaust all possible means to settle the dispute before this is referred to the UNSC is evidenced in the wording of article 52(2); regional organisations 'shall make every effort' in that direction 'before referring them to the Security Council'. It is therefore the case, that if a dispute is referred to the UNSC without complying first with the 52(2) obligation for exhaustion of efforts by the regional organisation, then this should be referred back to the regional organisation, if it remains a purely local dispute. According to article 52(3) it is clear that the action expected to be undertaken by the UNSC is towards the development of dispute settlement by regional organisations and not for exercise of its jurisdiction on the merits of the dispute (at least until all measures at the disposal of the regional organisation have been applied ineffectively). The right of investigation of the UNSC as to whether it should refer the case to a regional organisation and encourage the

[285] Hummer and Schweitzer (n 282) 824.

deployment of measures for the pacific settlement of local disputes, stems from the invoking of article 34 through article 52(4).[286]

2.3.1.2. Article 53

Article 53 reads as follows:

> (1) The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council, with the exception of measures against any enemy State, as defined in paragraph 2 of this article, provided for pursuant to article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such State, until such time as the Organisation may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a State.
> (2) The term 'enemy State' as used in paragraph 1 of this Article applies to any State which during the Second World War has been an enemy of any signatory of the present Charter.

Before examining the hierarchy, interrelation and procedure adopted for the enforcement action of a regional organisation and the control exercised over that by the UNSC, a point must be made to explain that the 'enemy state' clauses bear no value for the purposes of this research and therefore will not be discussed. The reasons for their initial insertion are out of date and have been rendered obsolete.

The text of article 53 indicates that this is the provision that was primarily intended to regulate the enforcement action of regional organisations. With the exception of article 51, discussed below, the UN Charter contains no other explicit provision for such a course of action to be undertaken by a regional formation. In more recent literature, some authors concede that there is also an inherent right for regional humanitarian intervention, even though this has until now not gained much support.[287]

[286] Ibid 840- 841.
[287] Christian Walter, 'Security Council Control over Regional Action' (1997) 1 MaxPlanckUNYB 129, 154- 171.

The maintenance of international peace and security is seen as one of the most significant tasks for the UN Charter and the UN organs. The preamble of the Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security, which was adopted by the UNGA in 1994, emphasizes 'the primary responsibility of the Security Council, under article 24 of the Charter, for the maintenance of international peace and security' and underlines that regional organisations 'can usefully complement the work of the Organisation'.[288] In essence, it provides that article 53 places regional organisations 'in complementary and subordinate position with respect to the Security Council in that they may operate only if they are utilized or authorised by the Security Council'.[289]

The utilisation of a regional organisation for enforcement action by the UNSC seems to be rather straightforward and warrants no further explanation than what is provided by the text as such. The legitimacy and legality of such an action is drawn directly by the organ entrusted with the primary responsibility to control the maintenance of international peace and security. It is mostly possible that in such a case the discussions would be concerned with the existence of enforcement mechanisms within the given regional formation, or whether it is a regional organisation within the meaning of Chapter VIII.

A major issue regarding the implications of article 53 on regional enforcement action, is whether the authorisation of the UNSC shall always be given prior to the use of force. It has been alleged that regional organisations may initiate enforcement actions and then inform the UNSC, thus proceeding in the absence of a prior explicit authorisation.[290] It has also been submitted that in the absence of a following UNSC resolution to condemn or hold illegal a prior action, authorisation could be provided tacitly.[291] The idea of silent or tacit approval of an enforcement action has received less support, even by proponents of ex post facto authorisation.[292] Additionally, as Gray exposes, it has been claimed that

[288] UNGA Res 49/57 (9 December 1994) UN Doc A/RES/49/57. Article 24(1) of the UN Charter stipulates that: 'In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf'.
[289] Villani (n 216) 537.
[290] Walter (n 287) 177; Simma (n 242) 4.
[291] See Frederic L Kirgis, 'Security Council Resolution 1483 on the Rebuilding of Iraq' ASIL Insights (2003) <https://www.asil.org/insights/volume/8/issue/13/security-council-resolution-1483-rebuilding-iraq> accessed 19 June 2019.
[292] Simma (n 242).

inadequate compliance with previous UNSC resolutions or their material breach by the target state, may give rise to a lawful military intervention without a specific UNSC mandate being necessary.[293] Indeed, among other justifications, Belgium and the USA relied on Security Council resolutions 1160 (31 March 1998), 1199 (23 September 1998) and 1203 (24 October 1998) to justify the intervention of NATO in Kosovo.[294]

The text of the UN Charter as well as the spirit of its drafters, do not seem to provide much room for supporting the existence of a principle of implicit authorisation of the UNSC. The issue then, is whether the international community can either infer the existence of this kind of authorisation from the text despite the absence of a clear provision or account for the evolution and establishment of a relevant customary rule. Considering that the text reflects the choice of the Charter's authors, the first option would seem quite arbitrary. Regarding the second possibility, again, neither the state practice nor the opinio juris support that the international community has accepted the validity of an implicit authorisation. For example, despite the endorsement of its admissibility by the proponents of intervention in cases such as Liberia and Kosovo discussed in following chapters, the legality of the enforcement action remained contested.

To amount to an authorisation, a declaration of the UNSC must explicitly provide for the adoption of the measures and be in absolute compliance with Chapter VII. Furthermore, an implicit authorisation cannot be considered as a valid substitute for an explicit authorisation because in certain occasions there is always a reason why the UNSC has not authorised directly the military intervention; with which one might agree or not.

However, except for the principle of non- interpretation of a legislative text to permit retroactive decisions in the detriment of a target state,[295] to support that argument would amount to a loss of control by the UNSC over the exercise of enforcement action by

[293] Christine Gray, 'The Charter Limitations on the Use of Force: Theory and Practice' in Vaughan Lowe, Adam Roberts, Jeniffer Welsh and Dominik Zaum (eds), *The United Nations Security Council and War: the Evolution of Thought and Practice since 1945* (OUP 2008) 91.
[294] *Legality of Use of Force* (n 254) 7- 9; *Legality of Use of Force (Yugoslavia v. United States of America)* Oral Proceedings for Provisional Measures (11 May 1999) CR1999/24 at 10 ; UNSC Res 1160 (31 March 1998) UN Doc S/RES/1160; UNSC Res 1199 (23 September 1998) UN Doc S/RES/1199; UNSC Res 1203 (24 October 1998) UN Doc S/RES/1203.
[295] Georg Ress, 'Article 53' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (OUP 1994) 734; Akehurst (n 192) 214.

regional organisations (possibility to prevent an illegal act). Bearing in mind the relevance of politics in various regional organisations, to open up the possibilities of enforcement action would be equal to opening the Pandora's Box. There is no much reason to believe that they would not be tempted to proceed with illegal actions, hoping that these will not receive condemnation by the UNSC; especially if one of the controlling states in the regional organisation is also a permanent member of the UNSC. Ex post facto authorisation would also 'allow the United Nations to send peace- keeping forces only at a time when the more risky and dangerous groundwork had already been laid by a regional organisation'.[296]

Arguments for the acceptance of ex- post facto authorisation are also not inexistent. They date back to 1960 when the USSR had requested the ex- post facto UNSC authorisation of the OAS sanctions against the Dominican Republic.[297] The said argument was also amongst the justifications raised by the proponents of the NATO bombardments against Serbia. The acceptance of a given situation though or of facts that cannot be undone cannot provide restitution for the illegality at the moment when forceful actions were conducted. In other words, what remains essential for the purpose of a legal analysis is that at the time of the intervention the UNSC had not provided its authorisation. According to Cassese, who accepts that from an ethical point of view the use of force was justified, 'as a legal scholar' he 'cannot avoid observing in the same breath that this moral action is contrary to current international law'.[298]

As already mentioned within the context of supporting views for the legality of humanitarian intervention, a purported justification has been that to require the authorisation of the UNSC, enforcement action should be the result of an obligation and not of a recommendation by a regional organisation. Effectively, the UNSC element being absent, the recommendations of regional organisations directed towards their member states might equally be considered as 'threats' of aggression, which are also prohibited. If, on the contrary, the caveat of recommendation towards an organisation's member

[296] Erika de Wet, 'The Relationship between the Security Council and Regional Organisations during Enforcement Action under Chapter II of the United Nations Charter' (2002) 71 NordicJIL 1, 17.
[297] Meeker (n 222) 520.
[298] Antonio Cassese, 'Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 EJIL 23, 25.

states was accepted, as Meeker suggested against the background of the OAS intervention in the Dominican Republic, this would provide regional organisations with a wide scope of discretion regarding enforcement action and the obligation for a prior UNSC authorisation, against the explicit provisions of article 53.[299]

In order to avoid the requirement of UNSC authorisation and justify regional enforcement following a non- mandatory recommendation, the target state should provide its consent. In the absence of consent, it is irrelevant if a consortium of other states acts on the basis of its obligatory decision or of a recommendation towards its member states.[300] Notwithstanding this, the form of a state's consent within the context of membership in regional organisations has also been debated. The interpretation, or better the re-interpretation of the UN Charter through a more contextual approach, taking into account following practice and propounding its reflection of modern challenges, has been used in order to endorse the exception of unilateral interventions, including regional, as opposed to more rigid textual interpretations.[301] A representative example of a contextual interpretation of the UN Charter,[302] is offered by Abass who reads into the text the idea of 'consensual military intervention by regional organisations' by virtue of prior and continuing consent to action as an attribute of membership of the regional organization, to conclude that this 'does not violate any peremptory norm under Article 2(4)'.[303] Yet, it is suggested that the inclusion of a consent requirement even for the lesser intrusive pacific settlement of disputes in article 53(3) is indicative of the intention to set strict limitations regarding regional use of force; contrary to claims for a prior and continuing consent which can be misused for the promotion of policy choices contrary to the will of a member-state, thus inhibiting its territorial integrity and political independence. Even if the level of such military action is low,[304] considering that it amounts to action that an individual state could not adopt on its own under general international law then this

[299] Walter (n 287) 135- 136; Eide (n 215) 140.
[300] Ress (n 295) 733.
[301] According to Brölmann constitutive treaties merit different interpretation than other multilateral treaties; Catherine Brölmann, 'Specialized Rules of Treaty Interpretation: International Organizations' (2012) Amsterdam Law School Research Paper No 2012-12 <https://ssrn.com/abstract=1988147> at 2 accessed 15 December 2018.
[302] See the opinion of US Ambassador Kirkpatrick following the US intervention in Grenada see Higgins (n 253) 244.
[303] Abass (n 237) xxvii; Hannikainen (n 240) also argues that the jus cogens nature of the general prohibition is not affected by humanitarian intervention when limited in duration and the means employed.
[304] Eide (n 215) 142.

should require a prior authorisation by the UNSC even when undertaken by regional organisations.[305]

2.3.1.3. Article 54

Article 54 constitutes the most straightforward provision of Chapter VIII. In fact, it asks for compliance on the part of regional organisations with the obligation to keep the UNSC informed, at all times, of their actions. It clearly refers to both actions under article 52 and 53. Nevertheless, as Abass states non-compliance of regional organisations with article 54 is the norm.[306] Indeed, the practical value of this provision is dispensed by the fact that regional organisations do not seem willing to report at all times the activities they carry out; in any case, the lack of prior authorisation for regional activities circumvents its implementation.[307] Nevertheless, article 54 remains significant in that it underlines the role of the UNSC in the collective security system established through the UN Charter. By prescribing that the UNSC 'shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security'.

2.3.2. The exception of self-defence

This section deals with the scope of legally permissible use of force in the form of self-defence by regional organisations, which does not extend beyond the limitations that apply for individual states. Self-defence is the second explicit exception to the general prohibition to use force, granted by article 51 of the UN Charter. It gives rise to the inherent right[308] for individual and collective self-defence if an armed attack occurs against a Member of the United Nations, until the UNSC has adopted measures which are deemed necessary for re-stablishing and maintaining the international peace and security. Self-defence is considered to be a significant parameter of state sovereignty;[309] hence its inclusion in the UN Charter as such has not been challenged. Yet, even though its construction fits well into the structure of the UN Charter as another expression of the

[305] Ress (n 295); Deen-Racsmány (n 281) 297; Marten Zwanenburg, 'Regional Organisations and the Maintenance of International Peace and Security: Three Recent Regional African Peace Operations' (2006) 11 JCSL 483.
[306] Abass (n 237) 64.
[307] Ibid 55.
[308] Dinstein (n 190) paras 508- 509.
[309] Ibid para 508.

drafters' intent to delimit aggression, it was not included in the first set of the Dumbarton Oaks proposals. As the summary report of Subcommittee III (4) A, responsible for considering and making proposals on the role of the UNSC, of the San Francisco Conference reveals, it was 'recommended by the Committee for insertion as a new Section D to Chapter VIII' on Regional Arrangements.[310]

Having concluded the Act of Chapultepec on the defence of the Western Hemisphere, several Latin American States, were concerned with the prevalence of universalistic views expressed through the persisting central role assigned to the UNSC both at Dumbarton Oaks and San Francisco.[311] They were afraid that those could hamper the functioning of their regional defence pact. Given the restrictions for regional enforcement action and the absence of a right to unilateral collective self-defence, they were sceptical about the potential results of the exercise of the permanent UNSC members' veto powers.[312]

Even though similar concerns had already been voiced on previous occasions,[313] no adherence to them was achieved before the San Francisco Conference. The views of Latin American and Arab states were largely shared by other delegations and are best illustrated in the submission of the French delegation which maintained that,

> It is incompatible with the conditions of security of some States, which demand immediate action, to defer, until such time as the Council has reached a decision, emergency measures for which provision is made, in the case of contingencies, by treaties of assistance concluded between Members of the Organisation and filed with Security Council.[314]

Eventually, in order to provide for the application of a right to self-defence both for regional organisations and individual states, article 51 was inserted at the very end of Chapter VII. Since the limitations of Chapter VIII would anyway not apply as such to its

[310] 12 UNCIO Subcommittee III(4)A 858.
[311] Resolution on the Reciprocal Assistance and Solidarity (Act of Chapultepec) (signed on 6 March 1945 and became effective on 8 March 1945).
[312] In this context 'unilateral' means without a UNSC authorisation.
[313] See Gerard Berb, 'Regional Organisations: A United Nations Problem' (1955) 49 AJIL 166, 171.
[314] 12 UNCIO (n 310) 777.

implementation and the scope of article 51 was farther- reaching, its separate construction appeared more appropriate.[315]

> The view was expressed that no doubt could be entertained that the additional paragraph, relating to the individual or collective right to self-defense against armed attack, (...) was all embracing and that its application was by no means restricted to regional arrangements.[316]

The explicit permitting of collective self-defence 'if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security', was the result of the persisting views of the pro- regionalist camp at the San Francisco Conference. As emphasised by the delegate of Colombia following the unanimous adoption of article 51, 'the origin of the term "collective self-defence" is identified with the necessity of preserving regional systems like the Inter-American one'.[317] Furthermore, the said inscription of article 51 legitimised the establishment of international organisations with the objective of collective self-defence, such as NATO.

Inevitably, the unanimous insertion of article 51 in the Charter reflects the general agreement of the participants on the significance of preserving a right already enshrined within customary international law. As the ICJ stressed in the case of *Nicaragua* years after, the right to collective self-defence is regulated also by customary law and the 'inherent' nature of the right mentioned within the UN Charter (article 51) 'refers to pre-existing customary international law'.[318] While the yardstick for ascertaining the existence of a potential right for collective self-defence is the legality of individual self-defence for the state in whose favour it is being exercised, its lawfulness is incumbent upon a prior statement and the issuing of a related request for assistance by the state attacked.[319] In its famous pronouncement, the ICJ in *Nicaragua* declared that there 'is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation'.[320]

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[315] Berb (n 313) 172.
[316] Ibid.
[317] 12 UNCIO (n 310) 680.
[318] *Nicaragua* (n 189) para 176.
[319] Alexander Orakhelashvilli, *Collective Security* (OUP 2011) 280- 281.
[320] *Nicaragua* (n 189) para 195.

The text of article 51 is rather specific in providing that the dispersal of unlimited enforcement powers in the name of self-defence, including to regional bodies, was refused by its drafters. A similar approach has been maintained through the subsequent interpretations of the elements expressly required for instituting a lawful article 51 exercise of self-defence, notwithstanding the gravity of the attack that was narrowly defined in the case of Nicaragua,[321] as well as the requirements of necessity and proportionality which despite the absence of 'any specific rule' in article 51 are 'well established in customary international law'.[322] Despite the fact that the non- static nature of the UN Charter has been corroborated in numerous occasions, including through the exposition of divergent allegations by states and scholars, the textual interpretation of article 51 remains for the time being unchanged.[323] This concerns the definition of armed attack, the nexus required between the aggressor and the state against which self-defence is being exercised and the central role provisioned for the UNSC in the second sentence of article 51 which stipulates that measures of self-defence 'shall be immediately reported to the Security Council' and shall not impair its 'authority and responsibility' under the UN Charter 'to take at any time such action as it deems necessary in order to maintain or restore international peace and security'. As to what constitutes an armed attack, this has been severely challenged in the past by the proponents of a right to forcibly protect nationals abroad and more recently, by the advocates of anticipatory or pre-emptive self-defence. The major advents of practices, albeit non-identical, that extend beyond the textual interpretation of article 51 include inter alia the USA, the UK and Israel.[324] Their views result from a non- stringent interpretation of what constitutes an armed attack, and this has been the subject of much academic debate. As argued below, the lack of agreement on the said allegations compromises in itself their current legal status.

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[321] Ibid para 191; see *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* [2003] ICJ Rep 161 paras 51, 62; Eritrea/ Ethiopia Claims Commission Award on *Ethiopia's Jus ad Bellum Claims 1- 8 (Ethiopia v. Eritrea)* (2006) 45 ILM 430.

[322] Ibid *Nicaragua* para 176; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 41. See Gray, *International law and the Use of Force* (n 202) 148- 156.

[323] Jean Allain, 'The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union' (2004) 8 MaxPlanckUNYB 237, 241.

[324] Gray, *International law and the Use of Force* (n 202) 117; Christopher Greenwood, 'Self-defence' in Rüdiger Wolfrum (ed), *MPEPIL* (OUP 2011) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e401?prd=EPIL> para 47 accessed 20 June 2019.

The former assertion is based on an understanding of forcible protection as extending beyond the victim's territory to include its nationals abroad.[325] Yet the majority of states have not been receptive to such propositions and respective practices. As Gray portrays, 'the legal arguments (...) in favour of such a wide right to self-defence have attracted few adherents' and debates both at the UNSC and UNGA, particularly in response to the US interventions in Grenada and Panama, indicate a severe lack of consensus on its permissibility under the UN Charter.[326] Moreover, the duration of those interventions and the submission of additional justifications in the occasions when states raised the forcible protection of their nationals abroad, discredit the self-defence argument and count more as a pretext for intervention.[327] Forcible interventions including the rescue of nationals abroad following the purportedly direct or implied consent by the government, is an issue discussed in detail below.

The advocates of anticipatory self-defence, directed on averting a threat of an imminent attack, rely upon two main propositions. Firstly, they rely on the presumption that article 51 preserves a right which exists in customary law. They thus allege that it is in the light of custom that the overall legal context of the right of self-defence should be referred to. They contemplate that the customary law concerned the sufficiency of 'imminence' derives from the nineteenth century Caroline case and is the result of the correspondence exchanged by the US and Britain in the period between 1838 and 1842 which did not dispute the US claims for self-defence in light of imminent attack.[328] Secondly, they propagate for the continuing effect of a wider customary rule drawn through state practice. Although Israel had not explicitly relied on anticipatory self-defence to justify its recourse to force and the outbreak of the Six Day War, its action and rhetoric were tantamount to its assertion, albeit implied.[329] Thus, the absence of any express condemnation by the UNSC of Israel's forcible reaction to the blocking by Egypt of the Straits of Tiran in advance of an actual armed attack has been put forward to support a

[325] United Kingdom Foreign Office, Policy Document No 148 (n 235) 617- 618.
[326] UNGA Res 38/7 (2 November 1983) UN Doc A/RES/38/7 on Grenada was adopted by more than 100 states and was similar to the UNSC draft vetoed by the US. The USA's veto against a draft UNSC resolution on Panama (1989) was joined by UK and France; nonetheless it received the support of 11 members of the Council and UNGA adopted Res 44/240 (29 December 1989) UN Doc A/RES/44/240 with 75 affirmative votes, 20 against, 40 abstentions.
[327] Dinstein (n 190) paras 575- 577.
[328] Greenwood (n 324).
[329] For Israel's position see UNSC 1346th meeting (3 June 1967) UN Doc S/PV.1346 at paras 20, 51- 52.

wider interpretation of what constitutes an armed attack.[330] Another example sought to justify a widened perception of armed attack is the Cuban missile crisis.[331] On that occasion, the USA imposed a naval quarantine on Cuba to prevent the import of Soviet missiles. Again, the USA forcible action was not condemned by the then western world, despite the absence of previous actual armed attack.

Nonetheless, the essential choice of both the USA[332] and later of Israel was to exclude reliance on the alleged doctrine of anticipatory self-defence from their official justification. This, as evidence of their belief's breadth on the legal status of anticipatory self-defence cannot be ignored.[333] Moreover, to accept the legality of anticipatory self-defence as a continuous right of self-defence originating from Caroline, as Brownlie suggests, would be 'anachronistic and indefensible'.[334] We must rather evaluate what constitutes an armed attack in the current context. This means that both the intention of the UN Charter's drafters and evidence drawn through state practice that is subsequent to it are extremely important in defining the reach of righteous self-defence. Contrary to the views of Greenwood, Dinstein's argument that the critical limitations in article 51 would not make any sense if we accepted the parallel co-existence of an unconstrained right of preventive self-defence, is more convincing.[335] The unanimous condemnation of the Israeli attack on an Iraqi nuclear reactor in 1981 through the UNSC resolution 487 in 1981, one of the scarce examples when anticipatory self-defence was expressly claimed, albeit without Israel being able to rely on substantial supportive state practice,[336] resolved much of the uncertainty caused by the UN organ's past silence. Although a respective vote in the UNGA aiming at Israel's condemnation resulted in many abstentions, many of the abstaining states explained that this was due to their belief that it was only the UNSC that should have been seized of the matter.[337]

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[330] Christopher Greenwood, 'International Law and the United States' Air operation Against Libya' (1986-1987) 89 WVaLRev 933, 943; For an overall discussion of challenging practices see Anthony C Arend and Robert J Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (Routledge 1993) pt III.
[331] Myres McDougal, 'The Soviet-Cuban Quarantine and Self-Defense' (1963) 57 AJIL 597, 603.
[332] Abram Chayes, 'Law and the Quarantine of Cuba' *Foreign Affairs* 41 (1963) 550; the USA relied on a Chapter VIII justification.
[333] Gray, *International Law and the Use of Force* (n 202) 160- 165.
[334] Ian Brownlie, 'International Law and the Use of Force by States Revisited' (2000) 21 AustYBIL 21, 24.
[335] Dinstein (n 190) para 523.
[336] (1981) UNYB 275; UNSC 2280th meeting (12 June 1981) UN Doc S/PV.2280 paras 98- 100; UNSC 2288th (19 June 1981) S/PV.2288 para 38.
[337] UNGA Res 36/27 (13 November 1981) UN Doc A/RES/36/27.

In similar vein with the allegations on anticipatory self-defence, some efforts have been made to push further the limit of what has been called 'imminence' to include future threats. This alleged principle of pre-emptive self-defence suggesting invocation against states that are seen as potential adversaries, is commonly referred to as the 'Bush doctrine'. Published in the US National Strategy of 2002, there is no clear indication as to how early on an action in pre-emptive self-defence should be taken. According to Brownlie, a historical parallel to pre-emptive self-defence is to be found in the attack of Serbia by Austria- Hungary in 1914.[338] In general, as Greenwood acknowledges criticism against this alleged principle has been much stronger than that against anticipatory self-defence.[339]

According to Wilmhurst in a 2005 paper, to the extent that the doctrine of pre-emption encompassed a right to respond to threats that have not even crystallized, such a doctrine has no basis in international law.[340] This view finds much support in the academic literature. Reisman and Armstrong argue that,

> As one moves from an actual armed attack as the threshold of self-defence, to the palpable and imminent threat of attack, which is the threshold of anticipatory self-defence, and from there to the 'conjectural and contingent' threat of the mere possibility of an armed attack at some future time, which is the threshold of pre-emptive self-defence, the nature and quantum of evidence that can satisfy the burden of proof resting on the unilateralist becomes less and less defined, and is often 'extrapolative and speculative'.[341]

Greenwood illustrates that 'The United Kingdom, for example, which has long supported the existence of a right of anticipatory self-defence in the face of imminent armed attacks, rejected the notion of pre-emptive action unless an armed attack was imminent'.[342] Brownlie also suggests that such claims lack a sound legal basis.[343] In state practice, the

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[338] Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 734.
[339] Greenwood, 'Self-defence' (n 324) para 47.
[340] Elizabeth Wilmhurst, 'Principles of International Law on the Use of Force by States in Self-defence' (October 2005) <https://www.chathamhouse.org/publications/papers/view/108106> accessed 20 June 2019.
[341] Michael W Reisman and Andrea Armstrong, 'The Past and Future of the Claim of Preemptive Self-Defense' (2006) 100 AJIL 526.
[342] Greenwood, 'Self-defence' (n 324) para 47.
[343] Brownlie, *Principles of Public International Law* (n 338) 733- 734.

argument for pre-emptive self-defence has also not been substantiated; even the US military operations against Iraq in 2003 (following the USA National Security Strategy of 2002) was not based upon such a right, but rather relied upon UNSC resolutions as the presumed legal basis for action. It is evident that such a claim has no substantial basis in international law; but that it rather remains an expression of bare policy orientations.

Significantly, the consideration of what constitutes an armed attack by the ICJ, in a series of cases, confirms the pronouncements of those espousing a more reserved approach concerning its interpretation and the views inferred through the practice of the UN's political organs. In the case of *Nicaragua*, the ICJ had confirmed that a textual reading of article 51 is warranted. Whereas the Court, was inclined to accept a widening of the scope concerning the agents of aggression it insisted in the actual occurrence of the incident; what was dismissed was its virtual construction. The Court referred to the definition of armed attack contained in article 3, paragraph (g) of the Definition of Aggression annexed to the UNGA resolution 3314 (XXIX), asserting that it reflects customary international law. While the law- making value adhered to UNGA resolutions is challenged,[344] their significance in examining state practice is indisputable. More specifically, it was stated that,

> The *sending* by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which *carry out acts* of armed forces against another State of such gravity as to amount to (inter alia) an actual armed attack conducted by regular forces, or its substantial involvement therein.[345]

More recently, in 2005, the requirement of an 'actual' armed attack was again reaffirmed by the ICJ. In the *Armed Activities* case, the Court stated plainly that,

> Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters.[346]

[344] See Judge Ago in his Separate Opinion in *Nicaragua* (n 189) para 7.
[345] Ibid *Nicaragua* para 195 (emphasis added); it was stated that it was resembling customary international law.
[346] *Case Concerning Armed Activities on the Territory of the Congo (Congo v. Uganda)* [2005] ICJ Rep 168, para 148.

Not only this is a negative answer to allegations favouring a widened understanding of armed attack, but it is also instructive as to the Court's general cautious approach on self-defence. Although the Court abstained from responding 'to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large- scale attacks by irregular forces',[347] it could be assumed that the restrictive scope of its general pronouncement on self-defence shall equally apply. Provided that the Separate Opinions of Judge Simma and Judge Kooijmans, within which they argue that following the 9/11 the law on self-defence against non- state actors has changed, were not upheld by the Court, the presumption of *Nicaragua* survives. This entails the substantial involvement of the state in the armed attack by the non- state actors. It is suggested that only after a strong nexus is established, the legality of self-defence against non- state actors could be inferred. Given the violation of a State's territorial integrity and the victimisation of its people, under those circumstances, the existence of that strong nexus is considered to be a substantial requirement.

The division in states' perceptions on preventive self-defence is also reflected through the absence of detailed provisions on the nature of armed attack from UNGA resolutions, notably the Declaration on Friendly Relations, the Definition of Aggression and the Declaration on the Non- Use of Force. The ILC Articles on State Responsibility and the Articles on the Responsibility of International Organisations remain silent on the existence of a right of preventive self-defence.

All the above, are to suggest that the express delineations of self-defence, equally applicable to the individual and collective right, reflect that the generic approach envisaged by the UN founders has passed the test of time. That is, the exclusion of non-UN- controlled use of force; admitting that except for safeguarding the holistic denunciation of force, it was also intended to contain the potential uncontrolled rise of regional spheres of interest able to elude international security against the balance obtainable through the UN context. It is along those same lines that the second sentence of article 51 must be understood. Except for the self- explanatory requirement of reporting

[347] Ibid para 147.

to the UNSC by the state acting in self-defence,[348] Article 51 provides for the UNSC's involvement with self-defence but not its prior authorisation. But for the fact that self-defence 'may be treated as an action of the organisation'[349] since it is prescribed by the Charter, it is in fact an exception for decentralized use of force. If the right to self-defence was fully subordinate to the hierarchical construction of the UN Charter, this would amount to an absolute erosion of its nature.

Indeed, the UNSC can get involved in an otherwise self-defence incident following a determination describing the said situation as a threat to international peace and security according to article 39. A notable example of collective self-defence interrupted by such a determination and a subsequent authorisation to use force was the UNSC's Resolution 678 of 1990 against Iraq.[350] It is submitted that the prior collective self-defence action, exercised by the USA and the UK following the request of Kuwait in response to the armed attack of Iraq on 2 August 1990, was terminated with the adoption of the said resolution. As it is underlined that 'such dictates do not vitiate a state's "inherent right" of self-defence if the Council does not act effectively',[351] neither resolution 660 nor resolution 661 had a similar effect. On the contrary, the collective enforcement action mandated under resolution 678 addressed effectively the implications of Iraq's aggression.[352] Of course, this presupposes that in their exercise of collective self-defence, the coalition forces had to comply with the threshold of necessity and proportionality. Moreover, this analysis implies that the coalition's involvement in Iraq following the suspension of hostilities, claiming support for the implementation of Resolution 688, raises serious questions as to the legality of their presence, the establishment of the 'safe heavens' and forcible measures undertaken to preserve their security.[353]

[348] Despite Judge Schwebel's claims as to the procedural nature of this requirement, the ICJ in *Nicaragua* held that this is a substantive right; see *Nicaragua* (n 189) paras 377- 378 and 121-122 respectively. Orakhelashvilli (n 319) 280 is correct in indicating that no matter which view is right, failure to comply with this requirement undermines the evidential value of the respective claim for self-defence.
[349] Hans Kelsen, Collective Security and Collective Self-defence under the Charter of the United Nations (1948) 41 AJIL 794.
[350] UNSC Res 678 (29 November 1990) UN Doc S/RES/678.
[351] Allain (n 323).
[352] Orakhelashvilli (n 319) 280; Donald W Greig, 'Self-defence and the Security Council: What does Article 51 require?' (1991) 40 ICLQ 366, 389; Nigel White, *Keeping the Peace* (2nd edn, Manchester UP 1997) 56.
[353] The illegality of those actions was fiercely raised by Russia, China and Iraq; UNSC 4084th meeting (17 December 1999) UN Doc S/PV.4084.

2.4. Conclusion

The analysis above sets the legal framework for the discussion which follows in the next part of this work, inquiring into the law-making contribution of undertakings of regional organisations towards an emerging new CIL rule for regional humanitarian intervention. Against the backdrop of supportive claims, the analysis provides that the existent conventional norm and the identical customary international law on the general prohibition on the use of force found in article 2(4), the explicit provision of exceptions to the general rule, namely when the use of force is authorised by the UNSC (Chapter VII) and in cases of self-defence (article 51), dismiss humanitarian intervention in a rigorous manner.

Furthermore, it discounts any unilateral regional enforcement action, as being clearly prohibited under article 53. According to the analysis above, regional organisations are entitled to use force unilaterally, only when the provisions of article 51 on self-defence are adequately satisfied. Having said that, the Charter provides that the military participation of regional organisations in a conflict or humanitarian situation shall follow their inscription as delegates of the UN following a UNSC authorisation under the procedure provided in Chapter VII.[354] That the 'primary' responsibility for the maintenance of international peace and security in article 24 doesn't mean exclusive amounts to a recognition of the required and potentially beneficial complementary engagement of regional and sub-regional organisations. Yet, according to the UN Charter their contribution shall be in compliance with the delineated context provided by Chapter VIII and through the reciprocal effect of other Charter's provisions. To borrow the words of Tom J. Farer, the 'allocation of coercive jurisdiction'[355] by the UN Charter drafters, was clearly made in a manner invigorating the authority of the UNSC. That the authority of the UNSC has in practice been extended- through the regulatory framework on the identification of threats (article 39)- to respond to threats generated by humanitarian crises, undermines the anticipation of regional unilateralism. Along the same lines, equally important is the official text of the 2005 World Summit on the R2P; which

[354] Whereas the UNSC 'authorises' the use of force, in fact regional organisations act as its delegates, albeit specific reference to regional organisations in UNSC is not the normal practice; see de Wet (n 296) 5- 7.
[355] Tom J Farer, 'An Inquiry into the Legitimacy of Humanitarian Intervention' in Lori F Damrosch and David J Scheffer (eds), *Law and Force in the New International Order* (Westview 1991) 190.

effectively asserts that 'the proper representative of the international community and the only legitimate guarantor of international peace' is the UN.[356]

The gradual ripening of a new rule for humanitarian intervention under CIL is examined in the following chapters. Importantly, as the discussion above indicates, the analysis of regional undertakings in view of assessing their respective contribution requires a high standard of proof. Notwithstanding that this is alleged on grounds of meeting the 'global consciousness of the importance of human freedom and the link between the repression of human rights and threats to the peace' which has become pivotal for all international actors,[357] the *jus cogens* nature of the general prohibition enhances in a stringent manner the necessary requirements for establishing the developing nature of a new exception under CIL. Within this context, and to avoid the arbitrary insinuations which constrain CIL overall, the next chapters attempt to provide a systematic and representative examination of alleged regional and sub-regional practices along the parameters discussed in the Introduction.

This becomes even more important in light of sound criticisms as to the actual limitations regarding the role of third world states and organisations in the formative process of CIL,[358] and particularly with regards to the normative status of an alleged rule, of regional unilateralism in humanitarian crises, that is inextricably linked to state sovereignty. The analysis in the following chapters proceeds upon the assumption that a more orderly ascertainment of new CIL rules, as suggested by the ILC, seeks to address them. Trying, inert alia, to overcome criticism as to the 'unequal weight' of the third world compared to powerful states during the formative process of CIL 'explained by the different degree of publicity of their acts and opinions, the costs of action and the dominion over technological resources', the ILC has rightly maintained and clarified the significance of specific rules.[359] Firstly, the reaffirmation of the traditional two-element approach in combination with the repudiation of instant custom, eliminates the possibility of instant enforcement of new CIL rules by powerful states and organisations seeking to avoid

[356] Anne Orford, *International Authority and the Responsibility to Protect* (CUP 2011) 207.
[357] Franck (n 214) 4.
[358] Bhupinder S Chimni, 'Customary International Law: A Third World Perspective' (2018) 112 AJIL 1.
[359] George Rodrigo Bandeira Galindo and César Yip, 'Customary International Law and the Third World: Do Not Step on the Grass' (2017) Chinese JIL 251, 269.

ensuing objections. Secondly, the ILC rightly recognised that in order for a practice to be considered general, it is not sufficient to be only widespread but that it must be also representative.[360] It was further explained that to be representative practice 'needs to be assessed in light of all the circumstances, including the various interests at stake and/or the various geographical regions'.[361] Thirdly, it clarified that inaction may constitute practice for states and organisations falling within the category of concerned actors when in a position to react, thus protecting weaker states and organisations against the arbitrary imposition of new CIL rules which they have never intended to endorse. Fourthly, by upholding the principle of persistent objector they are protected against norms which are incompatible with their interests. Lastly, by recognising the significance of resolutions, the ILC reinforces its support for the centrality of all states and organisations involved in the relevant process with regards to the existence or formation of relevant CIL rules.

The contribution of the alleged regional and sub-regional practices in following Chapters is examined beyond 'the political, sociological, economic, moral or religious origins' of the alleged rule which may drive the protracted practice and respective claims discussed.[362] As the Special Rapporteur of the ILC on the 'Identification of Customary International Law' elucidates in his Fourth Report, 'it is not the aim of the topic to explain the myriad of influences and processes involved in the development of rules of customary international law over time' but whether the alleged rule is becoming legally relevant.[363]

In general, the negotiating history of the UN Charter, indicates that article 2(4) cannot be read narrowly, or bear any exception for a humanitarian use of force through its own wording- as some of its proponents have tried to indicate. Nevertheless, in practice unilateral actions and the humanitarian use of force authorised by the UNSC have been set to follow a distinct path. Despite the fact that the UN Charter and more specifically Chapter VII does not provide for a right of the UNSC to authorise military measures in

[360] Official Records of the General Assembly, Report of the International Law Commission on the Work of its Seventieth Session (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10 paras 53–66 [ILC Report 2018] Conclusion 8(1).
[361] Ibid Commentary (3) to Conclusion 8(1).
[362] ILC First Report 2013 (n 199) at 12, n 56 (Allen Pellet); also International Law Association, Committee on the Formation of Rules of Customary (General) International Law, *Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law* (2000) 69 ILA Conf Rep 712 at 12.
[363] Fourth Report of the ILC on Identification of Customary International Law by Michael Wood, Special Rapporteur (2016) UN Doc A/CN.4/695 para 15.

respect of humanitarian necessities, on certain occasions, the UNSC has done so. For example, in the case of Somalia in 1992 and Haiti in 1994, the UNSC invoked article 39 in order to authorise the use of coercive measures.[364]

However, and despite the fact that the UNSC took serious note of the respective humanitarian situation, the actual justification it put forward in the above-mentioned cases was that of a threat or breach to the international peace and security. Indisputably, this amounted to a stretching of the literal text of Chapter VII, to incorporate through practice the protection of human rights. Thomas Franck, in an effort to explain those practices, argued that, all the situations in which the UNSC has 'used, or authorised coalitions of the willing to use collective measures in situations of civil war or against regimes engaged in egregious human rights violations can be fitted into Charter text'.[365] Additionally, whilst recognising that article 2(7) prohibits UN intervention within the domestic jurisdiction of states, he suggested that that constraint does not apply regarding Chapter VII military action.[366] Through his comments, Franck rightly admits that the official justification put forward by the UNSC has remained the finding of a threat or breach of the international peace and security; that is the traditional trait of application of article 39.

With the exception of the UNSC's authorisation to use force within the context of the R2P in the case of Libya, the UN's practice has not led to any express relaxation of the general prohibition to use force in order to protect civilians *per se*.[367] Inevitably, if the UNSC itself remains reluctant in explicitly authorising the use of force on the sole basis of averting a humanitarian crisis, it would be farfetched to sustain that humanitarian unilateralism, including by regional organisations, fits into the UN Charter's text. Without dismissing the potential development of a new rule under customary law discussed in the following chapters, the UN reluctance refutes the claim that there is strong evidence

[364] UNSC Res 794 (3 December 1992) UN Doc S/RES/794; UNSC Res 940 (31 July 1994) UN Doc S/RES/940.
[365] Franck (n 214) 137.
[366] Ibid.
[367] Contrary to the present analysis, some scholars had put forward arguments in favour of humanitarian intervention before the intervention in Kosovo took place; See Murphy (n 219) chapter eight; Nico Krisch, 'Review Essay: Legality, Morality and the Dilemma of Humanitarian Intervention after Kosovo' (2002) 13 EJIL 323; Michael W Reisman and Myres McDougal, 'Humanitarian Intervention to Protect the Ibos' in Richard B Lillich (ed), *Humanitarian Intervention and the United Nations* (UP Virginia 1973).

supportive of a different interpretation of the UN Charter which 'recognises an exception to the Charter prohibition when force is required to prevent mass slaughter'.[368]

[368] Daniel Wolf, 'Humanitarian Intervention' (1988) 9 MichJIntlL 333, 339.

3. ECOWAS: amorphous anticipation of 'humanitarian intervention' in Liberia

3.1. Introduction

Taken individually or collectively by a consortium of states, coercive initiatives in the absence of UN mandate or formal invitation and consent, remain unilateral actions of questionable legal soundness according to the letter and spirit of the UN Charter. Yet, unilateral use of force has not been absent from the practice of regional organisations, and this raises significant questions as to their impact on the development of CIL. At a period of time when the debate on the legal breadth of unilateral interventionism is ongoing, the practice of regional organisations is anything but immaterial for the purpose of examining the development of new law through custom. Despite the absence of humanitarian intervention and regional unilateral rights in the most authoritative textual formulations, as this was discussed in the previous chapter, the undertakings of regional organisations themselves, the justifications presented and the reaction of international actors and scholars inform the mosaic of customary legal development through the contribution of regional organisations.

The Liberian experience, is one of the most apparent examples of unilateral regional intervention though it does not set a solid example of an evolving trend to initiate regional enforcement action unilaterally.[369] ECOWAS action was not declared illegal by the UNSC, despite its disputed legality under the UN Charter's collective security system.[370] Notwithstanding the different opinions in the literature as to whether the facts of the case justify the claim of humanitarian use of force or the intervention was a blunt assertion of unilateral interventionist rights in a civil war, still it was a departure from 'traditional' international law. As already mentioned in the introduction of the thesis, some scholars saw the case of Liberia as a breakthrough, both regarding the scope of regional use of force and the development of humanitarian intervention.[371] According to Iyi, Liberia marked 'the *beginning* of an evolving normative regime of humanitarian intervention by regional organisations'.[372] That is mainly due to the merits of the conflict, the active role

[369] According to article 53 of the UN Charter, discussed in chapter two, regional enforcement action requires a prior UNSC authorisation.
[370] UNSC Res 788 (19 November 1992) UN Doc S/RES/788.
[371] See Introduction.
[372] John-Mark Iyi, 'The AU/ECOWAS Unilateral Humanitarian Intervention Legal regimes and the UN Charter' (2013) 21 AFJICL 489, 510 (emphasis added).

of the sub-regional organisation of the Economic Community of West African States (ECOWAS) in the absence of a prior UNSC authorisation, the tacit response of the UN and the reaction of other international actors. Conversely, Brockman criticises the Liberian precedent as dangerous, and submits that by refraining to condemn ECOWAS practice 'the UN created a precedent for regional action, by which regional organisations may intervene in internal conflicts without prior approval of the Security Council'.[373] Acknowledging that Brockman is correct on the diverse potential results of a regional right to intervene unilaterally, her comment depicts the general scepticism surrounding the legality of humanitarian intervention by the international community. In effect the case of Liberia was a significant instance of erosion of the UN Charter's system, though it marked the approval neither of a general claim for unilateral regional intervention nor of a specifically humanitarian one.

Seemingly it was for the first time, during the Liberian conflict, that the UN not only appeared so reluctant to adopt a clear stance but it also transferred tacitly its powers and responsibilities to a regional actor.[374] Without disregarding the influence of the UN impasse on the decision of ECOWAS to intervene and in view of assessing the impact of the intervention on the normative development of a new customary rule, the regional initiative to tackle the conflict outside the scope of the UN is examined vis-à-vis possible legal justifications and the CIL humanitarian intervention argument. The conflict in Liberia serves also as a lesson for the potential counter-effects of biased or unprincipled regional action.[375] More specifically, ECOWAS was blamed for the prolongation of the conflict, which not only drained financially the country and the sub-region, but caused further uncertainty, suffering, an increase to the flow of refugees and the severe raising of the death toll.[376] Olonisakin and Aning, suggest that the contradictions pertaining to the actions of ECOMOG led to incidents which are fairly described as human rights' violations.[377] Furthermore, according to a recent account of war crimes in Liberia 'an estimated 250,000 people were killed during the civil war that lasted nearly 15 unbroken

[373] Joanne Brockman, 'Liberia: The case for changing UN processes for humanitarian intervention' (2004) 22 WisIntlLJ 711, 718.
[374] Funmi Olonisakin and Emmanuel Kwesi Aning, 'Humanitarian Intervention and Human Rights: The Contradictions in ECOMOG' (1999) 3 IJHR 16, 16- 17.
[375] For a discussion on the problems of ECOWAS' unilateral intervention see Brockman (n 359) 723- 724.
[376] Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 370- 428.
[377] Olonisakin and Aning (n 374) 22.

years' and started in 1989.[378] Nevertheless, it is argued that it is mainly the Liberian experience which led ECOWAS to the later adoption of relevant constitutive changes and operational developments, potentially contributing to relevant developments under CIL.

Considering that the factual circumstances of the conflict are pertinent in discussing the justifications raised for the legality of the regional action and the debate surrounding the humanitarian argument under CIL, the first section of the chapter examines the facts which gave rise to the military intervention of ECOWAS in Liberia. Whilst acknowledging that 'Any attempt to narrate history will always be based on assumptions and choices that are far from mechanical',[379] and that selectivity is a crucial and unavoidable feature of it, this attempt is necessary to understand the events confined to the conflicts discussed and examine their normative consequences. Acknowledging that any historiography of events is compared to different historical positions and susceptible to criticism for constructing a narrative based on social, political or even ideological predispositions,[380] the attempt to narrate history in relation to the case studies discussed by the thesis is the result of an effort 'to distinguish between good and bad historiography on the basis of criteria';[381] how a judgement really deserving of confidence has come about.[382] The criteria relating to the epistemic value of the multiple historiographies on the conflicts discussed are therefore, their 'responsibility to the rules of evidence, fidelity to the factual record, logical consistency, coherence of argumentation, and depth of narrative detail'.[383] Additionally, in discussing the events relating to the conflicts, the thesis refrains from considering as authoritative historical records any sources which reveal profound intentional biases in their communication of those events, for example through the language adopted; as opposed to merely offering a corroborated perspective.

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[378] 'Liberia: 'War Crimes List' - Culture of Impunity Unlikely to Continue' *Front Page Africa* (5 March 2015) at <http://allafrica.com/stories/201503051419.html> accessed 3 July 2019.
[379] Barrie Sander, 'History on Trial: Historical Narrative Pluralism within and Beyond International Criminal Courts' (2018) 67 ICLQ 547, 573; see also Thomas Skouteris, 'Engaging History in International Law' in José María Beneyto and David Kennedy (eds), *New Approaches to International Law* (TMC Asser Press 2012) 99, 104.
[380] Shiri Krebs, 'Facts, Alternative Facts, and International Law' (2017) EJIL: Talk! <https://www.ejiltalk.org/facts-alternative-facts-and-international-law/> accessed 5 July 2020.
[381] Sander (n 379) 574.
[382] John S Mill, *On Liberty* (The Liberal Arts Press 1956) 25.
[383] Sander (n 379) 574.

The next section of the chapter proceeds with the discussion of the legal merits of the operational conduct of ECOWAS which gave rise to the discussion of humanitarian intervention and the essential elements of the respective academic debate. It first examines the justifications offered within the 'traditional' array of UN Charter rules and accepted norms of international law; namely, the right of collective self-defence by regional organisations, and the rules on regional action under Chapter VIII of the UN Charter. Forcible intervention by consent is also addressed. What is then discussed, against the weak soundness of 'traditional' justifications for the intervention's legality and the factual background of the case, is ECOWAS conduct as potential practice for the development of a rule for humanitarian intervention under CIL. The following section examines the varying views of ECOWAS and states in the region regarding the legal basis for the intervention, as well as the reaction of the UN. It provides that at the time the claim for humanitarian intervention lacked any normative purposefulness; though it served as a precedent for unilateral regional action in a conflict with humanitarian implications which paved the way for further academic discussion and articulation of the claim for humanitarian intervention, particularly in the case of Kosovo.[384] The next section deals with developments attributed to the Liberian conflict, notably changes to the constitution of ECOWAS in 1999 instituting a more elaborate regional security mechanism which is seen as an attempt to promote a more autonomous system for enforcement action. Its relevance in the context of CIL development is discussed in Chapter Five, along other regional examples of verbal practice.

Eventually, in the concluding remarks of the chapter it is attempted to underline some significant lessons which have been drawn from the Liberian conflict and which could be instructive as to the marking of new developments, to become legally accommodated within the framework of CIL.

3.2. Background to the conflict

In 1980 Samuel Doe led a coup that ousted the government and brought him to power. With the coup d'état he overthrew the nominally democratic descendants of freed American slaves who ruled Liberia since its 1847 foundation.[385] Doe's reign effected not

[384] Christopher Greenwood, 'Humanitarian Intervention: The case of Kosovo' (1999) 10 FYBIL 167.
[385] On the history and facts of the conflict see Georg Nolte, 'Restoring Peace by Regional Action: International Legal Aspects of the Liberian Conflict' (1993) 53 ZaöRV 603; Anthony Chukwuka Ofodile,

much change in the events of discrimination and inequalities which had continued to take place, whereas this time they were conducted to the benefit of his Krahn tribesmen.[386] In contrast, with his policies Doe enhanced ethnic hostilities among Liberians and led the country to an economic downturn.[387] Additionally he was criticized that despite the convening of the 1985 elections, he had failed to keep his promises of holding free and fair, democratic elections.[388] Following years of atrocities and abuse of power which led to public discontent, almost a decade in power, Samuel Doe's government was confronted by the National Patriotic Front of Liberia formed and ruled by Charles Taylor's, an Americo-Liberian descendent.[389]

Investing in the public outcry against Doe's regime, Taylor built alliances with several oppressed ethnic groups which facilitated his taking of control of most of Liberia. He invaded Liberia in December 1989 through the neighbouring Ivory Coast.[390] By mid-1990 the death toll in Liberia had escalated to 20,000 people, whereas half of the population had been displaced.[391] To a significant extent the displaced people fled to neighbouring countries.[392] Doe's power, towards the end of 1990 had shrunk to the territory surrounding the presidential palace in the capital of Liberia, Monrovia.[393] His forces were persecuted not only by Taylor's National Patriotic Front of Liberia (NPFL), but also by the 'Independent National Patriotic Front of Liberia' (INPFL), formed by Prince Johnson a Taylor's ex commander hoping for a share through Doe's potential defeat. INPFL's

'The Legality of ECOWAS Intervention in Liberia' (1994- 1995) 32 ColumJTransnatlL 381; Peter A Jenkins, 'The Economic Community of West African States and the Regional Use of Force' (2007) 35 DenvJIntlL&Pol 333; Antoine-Didier Mindua, 'Intervention Armèe de la CEDEAO au Liberia: Illégalité ou avancée juridique?' (1995) 7 RADIC 257.

[386] Edward Banka Gariba, 'Post-conflict development in Liberia: Governance, security, capacity building and a developmental approach' (2011) 2 AJCR <http://www.accord.org.za/ajcr-issues/post-conflict-development-in-liberia> accessed 3 July 2019.

[387] Herbert Howe, 'Lessons of Liberia: ECOMOG and Regional Peacekeeping' (winter 1996/97) 21(3) International Security 145, 148.

[388] Sheila Rule, 'Liberians Get Sinking Feeling about Democracy' *New York Times* (5 June 1985) at <http://www.nytimes.com/1985/06/05/world/liberians-get-sinking-feeling-about-democracy.html> accessed 3 July 2019.

[389] Mindua (n 385) 257.

[390] Howe (n 387) 148- 149.

[391] For estimated death toll and refugees see Nolte (n 385) 607- 608 and Mindua (n 385) 258. For a detailed discussion of death estimates during the first year of the conflict see Stephen Ellis, *The Mask of Anarchy: The Destruction of Liberia and the Religious Dimension of an African Civil War* (2nd ed, NY UP 2006) 312- 313.

[392] 'Border bother (conflicts on the border between Liberia and Sierra Leone)' *Economist* (6 April 1991) 43; 'Building a New Liberia' *Washington Post* (23 March 1991).

[393] Guy Garcia, 'Liberia Death of a President' *Time* (24 September 1990).

involvement, complicated the internal strife yet more.[394] Once the weakness of Doe controlled forces became evident, Prince Johnson, unwilling to let Taylor enjoy a possible victory and gain power over the country, decided to form his rivalry force. It is quoted that he even reached a truce with Doe.[395] Many of the adherents of Prince Johnson's faction belonged to an Islamist tribe. It is Prince Johnson who by hoping to get foreign powers involved threatened to kill USA citizens and led to the USA exercising their right of protecting nationals abroad; though they expressed no interest in getting involved in the conflict any further than that.

No doubt that the ECOWAS intervention in Liberia marked the initiation of regional unilateralism in Africa in a rather obscure way. Firstly, the reaction of the international community was vague and secondly the justifications put forward by ECOWAS and its individual member states varied. Regarding the former point, Hakimi is correct in stating that 'the Security Council, simply overlooked ECOWAS deviation from Article 53' whereas states considered the issue publicly.[396] It was not until the Operation Liberty of ECOWAS reached its second year, that the UN decided to move from simply taking note or commending 'the efforts to promote peace and normalcy in Liberia'[397] and the 'untiring efforts to bring the Liberian conflict to a speedy conclusion' of ECOWAS,[398] to welcoming its commitment to the resolution of the Liberian conflict. Additionally, Resolution 788 referred to a peaceful resolution and a peaceful implementation of the Yamoussoukro IV Agreement and not to any enforcement measures, other than the Chapter VII embargo on all deliveries of weapons and military equipment to Liberia.[399] To the understanding of regional actors, the UN stance rendered permissible or even necessitated their proactive response to the Liberian crisis.[400]

[394] Nolte (n 385) 605- 606.
[395] Ofodile (n 385) 383.
[396] Monica Hakimi, 'To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization' (2007) 40 VandJTransnatlL 643, 671; See Hakimi's fn 158 for a detailed account of the views of states.
[397] Statement by the President of the Security Council (22 January 1991) UN Doc S/22133.
[398] Statement by the President of the Security Council (7 May 1992) UN Doc S/23886.
[399] UNSC Res 788 (n 370).
[400] Jeremy Levitt, 'The Evolving Intervention Regime in Africa: From Basket Case to Market Place?' (2002) 96 ASIL PROC 136, 138.

3.3. ECOWAS operational practice

The situation in Liberia during the months preceding ECOWAS' intervention reveal that a humanitarian crisis was unfolding. The rising number of deaths, the persecution of citizens and the spill- over effect of insecurity and human rights abuses that led to vast refugee flows in neighbouring countries, all present in Liberia, were evidence of an ongoing humanitarian catastrophe.[401] At the same time, those conditions set the alarm for the initiative of the regional coalition. However, the legal constraints that constituted at least at that time the body of international law on the use of force led many of the intervention's proponents to rely on a wide array of justifications; and not only on humanitarian grounds.

The analysis below seeks to examine the legal merits of the operational conduct of ECOWAS, including the grounds for alleging that it provided evidence for humanitarian intervention practice. The difficulty encountered to argue convincingly for the regional intervention's legality on within the 'traditional array' of legal justifications, discussed below, explicates *inter alia* the propagation of humanitarian intervention. The discussion of ECOWAS conduct as potential practice for the development of a rule for humanitarian intervention under CIL follows.

3.3.1. The unilateral nature of the intervention

According to Mgbeoji's views representing the mainstream approach, the toolbox for justifying ECOWAS' intervention had to be found within the framework of 'traditional' international law on the use of force. Despite recognising that the Liberian conflict 'constituted, prima facie, a legitimate subject of concern to neighbouring states', Mgbeoji pointed that this 'does not mean that neighbouring states could have joined the fray or intervened militarily in the character of knights errant' and addressed it specifically as civil war.[402]

[401] Gray (n 376); Front Page Africa (n 364); Human Rights Watch, 'Liberia: Waging War to Keep the Peace: The ECOMOG Intervention and Human Rights' Africa vol 5 (1 June 1993) <https://www.hrw.org/report/1993/06/01/liberia-waging-war-keep-peace/ecomog-intervention-and-human-rights> accessed 15 July 2019.

[402] Ikechi Mgbeoji, *Collective Insecurity: The Liberian Crisis, Unilateralism, and the Global Order* (UBC Press- Vancouver 2003) 59.

The view of Levitt who considers that the UNSC offered a retroactive de jure seal to ECOWAS' intervention and accepted that 'a broad right of humanitarian intervention exists' was not shared by the majority of scholars.[403] A wide and flexible application of the right to intervene on humanitarian grounds- in the absence of any formed guiding rules- left for decision to the regional stake holders, could lead to a perversion of their tenuous humanitarian motive due to the inclination to safeguard one's own self- interests. The fact that regional forces became very soon part of the conflict whilst 'peace creation, was a prominent feature of the ECOMOG operation' substantiates that concern.[404] Indeed, the justifications posed for intervening in Liberia either collectively by the organisation or individually by the different governments of the region, have been charged for being transpired by self- motivated political, security and financial causes.[405] According to Renda, it was the existence of national motivations which steered the involvement of ECOWAS in the conflict.[406]

3.3.1.1. The weak argument of collective self-defence

Mgbeoji stresses that the actions undertaken by the West- African arrangement were legally sound for the purposes of article 51 of the UN Charter as they qualify for collective self-defence.[407] However, he concludes that if that intervention was to be justified solely under the Chapter VIII mechanism of the UN Charter, it would probably fail the test of legality.[408] On the other hand Kufuor and Ofodile allege that the case of Liberia presents the humanity with an occasion of absolute unilateralism.[409]

As already indicated in chapter two of this work, article 51 provides that when an armed attack occurs against a member state of the UN, and before the UNSC adopts any

[403] Levitt (n 400).
[404] Olonisakin and Aning (n 374) 21.
[405] The various justifications for the intervention advanced by the member states of ECOWAS provide a mixed picture regarding their motivations. On this see Comfort Ero, 'ECOWAS and the Subregional Peacekeeping in Liberia' (1995) JHA <http://sites.tufts.edu/jha/archives/66> accessed 4 July 2019. See also Brockman (n 373) 723 who refers, inter alia, to the suspected motives of Nigeria for reinforcing through the conflict its hegemonic role in the region. The national interests of Côte d' Ivoire, Nigeria, Ghana, Sierra Leone and Guinea are discussed in Byron Tarr, 'The ECOMOG Initiative in Liberia: A Liberian Perspective' (1993) 21(1- 2) Journal of Opinion 74, 78- 81.
[406] Luca Renda, 'Ending Civil Wars: The case of Liberia' (1999) 23 Fletcher FWldAff 59, 66.
[407] Mgbeoji (n 402) 97.
[408] Ibid 136- 142.
[409] Kofi Oteng Kufuor, 'The Legality of the Intervention in the Liberian Civil War by the Economic Community of West African States' (1993) 5 RADIC 525, 528; Ofodile (n 385).

measures to combat this, the states against which the attack is inflicted retain their inherent right to resort to individual or collective self-defence. Of course, they are required to report their measures to the UNSC immediately after they are taken. Their action may continue until the UNSC undertakes the measures it deems necessary for restoring international peace and security. Those rules, reaffirmed as they are by customary international law, provide one of the fundamental legal grounds projected by regional arrangements in acting as collective security organisations; such as NATO or the previously existing Warsaw Pact.

The rulings of the ICJ both in *Nicaragua* case and the *Oil Platforms* case, and state practice in general, confirm that recourse to the use of force under article 51 is constructed narrowly within the 'inter- state context'.[410] More precisely what they prescribe as self-defence is the reaction directed against the armed attack of another state or of a state-harboured armed attack as it was alleged in the case of Afghanistan in 2001.[411] Nevertheless, regarding the situations when armed attack does not emanate directly from a state, Nicaragua sets a strict test of attribution. That is one of 'effective control [over] the military or paramilitary operations' allegedly amounting to an armed attack.[412] Compared to the traditional understanding of self-defence, as being directed against the aggressor state, the collective self-defence arguments in the case of Liberia were quite novel. They provided that except for responding militarily to interstate armed attacks threatening the regional security, ECOWAS could also proceed with an intra-state intervention. Thus, whereas the collective engagement of ECOWAS, military or through economic sanctions was not targeted against any third state, the arguments in support of self-defence aimed at offering a legal justification for ECOWAS to intervene in the civil war that was taking place in Liberia. Could the uprising in Liberia be interpreted as an armed attack for the purposes of international law? Was ECOWAS an appropriate organisation to act in self-defence?

[410] Christian Tams, 'The Use of Force Against Terrorists' (2009) 20 EJIL 359, 369.
[411] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14, para 195; *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* [2003] ICJ Rep 161 para 51.
[412] Ibid *Nicaragua* paras 109 and 115. On self-defence with regards to the extraterritorial use of force against terrorists and present challenges see Tams (n 410) 359-397.

According to the definition of armed attack, compatible with the propositions of the ICJ in paragraph 195 of its *Nicaragua* judgement and the Definition of Aggression contained in the UNGA Resolution 3314 of December 1974, article 3(g), armed attack includes 'the sending by or on behalf of a state of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to (…) armed attack'.[413] In the case of Liberia, the first attack of Taylor's militants, NPFL, against the north- east Nimba County was launched from the neighbouring Ivory Coast.[414] Additionally, it has been reported that Taylor's militias were initially trained in Libya and Burkina Faso.[415] Moreover, the Final Report of the Truth and Reconciliation Commission (TRC) of the Republic of Liberia issued in 2009, reports that Taylor's 1989 invasion received wide support from Libya, the Ivory Coast and Burkina Faso.[416] It also submits that Burkina Faso helped facilitate arms transfers to Taylor by serving as a transfer site for weapons en route to Liberia.[417] Inevitably, the involvement of external actors provided some leverage for Taylor's offensive. Still, on the basis of the aforementioned actions none of those countries could be easily accused of carrying out acts of armed force against Liberia of such gravity as to amount to armed attack in themselves or to concrete participation in the armed attack of Taylor against Liberia. Quite differently though, it is suggested that following the actual sending of 400 troops from Burkina Faso to Liberia to fight alongside Taylor's forces, as this was admitted by the Burkinabe President Blaise Compaoré himself, the right for self-defence could be triggered; be it individual or collective.[418]

Even when the right to self-defence against a third state could be established, Liberia took no action against Burkina Faso, and neither did ECOWAS. All action concerned the situation within Liberia. As Murphy puts it,

> the NPFL may have been receiving financial and military support from other West African states. Article 4(b) [1981 Protocol], however,

[413] *Nicaragua* (n 411) para 195 (emphasis added).
[414] Veronica Nmoma, 'The Civil War and the Refugee Crisis in Liberia' (1997) 17 JCS <https://journals.lib.unb.ca/index.php/jcs/article/view/11734/12489#a34> accessed 8 July 2019.
[415] Ruby Ofori, 'A Decade of Doe' *West Africa Magazine* 3790 (16-22 April 1990) 610; *Encyclopedia of African History* by Kevin Shillington (ed), (Routledge 2004) 1558.
[416] Consolidated Final Report Vol 2 of the Truth and Reconciliation Commission, Republic of Liberia (30 June 2009) para 10.1.5. See Tyler Dickovic, 'Africa 2012' *World Today Series* (47th edn, Stryker Post 2012) 104.
[417] Ibid.
[418] Ofodile (n 385) 384; Mgbeoji (n 402) 95.

> expressly contemplates as a response the 'collaboration' of ECOWAS states with the authority of the relevant member state, which in this case would mean collaboration with (not replacement of) President Doe (…).[419]

Even though the ICJ in the *Nicaragua* case had categorised armed attacks by separating 'the most grave forms of the use of force from other less grave forms of the use of force (those constituting an armed attack) from other less grave forms' to later repeat it in the *Oil Platforms* case,[420] there is not one single test to evaluate the weight of the armed attack in the case of Liberia; some could argue that the nature and severity of the actions of the parties involved, as well as their lack of proportionality, suffice to prove that the use of force in general was substantially grave. As to the burden of proof which rests with the party alleging the need for self-defence, and the requirement of proving that it was intentionally attacked, these again go hand in hand with the events that emerged; as well as the relevance of the moment of the armed attack and of the response. According to Murphy, 'It was after the ECOMOG intervention that the Government of Burkina Faso (…) reportedly began supporting the NPFL'.[421] Although in Liberia the controversial issue of the right to anticipatory or pre-emptive self-defence is of no relevance, the questions of proportionality and necessity of the reaction are relevant and are considered.[422]

Despite the lack of substantial evidence that ECOWAS intervention constituted a collective self-defence operation under the scope of article 51 of the UN Charter, it is interesting to examine whether ECOWAS' constitutive framework at the time provided at least some internal justification. More essentially, it is inquired whether the West African organisation's military involvement in self-defence could extend beyond instances of occurred armed attacks in the meaning of article 51 of the UN Charter and relevant custom. The inevitable is that, in as much as in all article 51 collective self-defence operations by regional organisations, ECOWAS had to have in place a regional

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[419] Sean D Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*, vol 21 (Procedural Aspects of International Law Series PENN 1996) 161.
[420] *Nicaragua* (n 411) para 191; *Case concerning Oil Platforms* (n 411) para 51.
[421] Murphy (n 419).
[422] The Report of the Secretary- General's High-Level Panel on Threats, Challenges and Change, 'A more secure world: Our shared responsibility' (29 November 2004) UN Doc A/59/565 at paragraph 188 mentions: 'a threatened state, according to long established international law, can take military action as long as the threatened attack is imminent, no other means can deflect it and the action is proportionate'.

structure for collective self-defence. Additionally, ECOWAS use of force in self-defence- notwithstanding that this should be the same if it was the response to an armed attack according to article 51 of the UN Charter- had to comply with the respective procedural mechanisms of its internal instruments. Ultimately, the responsibility of ECOWAS' to act in self-defence should be admitted by Liberia.

Starting from the latter point, one could possibly argue, that if Liberia had signed an applicable and legitimate constitution providing for regional security cooperation and collective self-defence this would amount to a continuous invitation. On a similar note, Abass's main argument is that the UN Charter contains a residual right of consensual intervention by regional organisations stemming from their members' consent.[423] However, this proposition contravenes the ICJ's observation in *Nicaragua* that,

> in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack.[424]

The effect of the ICJ's ruling in Nicaragua is that when a state is attacked, preserving its sovereignty, it enjoys the right to decide judging on the different merits of each occasion as to whether it would like to be assisted by any other entity.

The former three issues, namely, the existence of a regional collective self-defence structure, the scope of collective self-defence and compliance with the respective procedural mechanisms of ECOWAS' internal instruments in the case of Liberia, relate to the very existence of the Protocol on Mutual Assistance on Defence (PMAD).[425] PMAD, is the agreement that extended the affinity of the ECOWAS member states from mere economic relations to cover the interdependency of their security. The letter of the PMAD indicates that this is an instrument on collective self-defence. Article 2 of the Protocol asserts that 'Member States declare and accept that any armed threat or aggression directed against any Member State shall constitute a threat or aggression

[423] Ademola Abass, *Regional Organisations and the Development of Collective Security, Beyond Chapter VIII of the UN Charter* (Hart Publishing 2004).
[424] *Nicaragua* (n 411) para 199.
[425] Protocol relating to Mutual Assistance on Defence (20 May 1981); it entered into force on 30 September 1986.

against the entire Community'. In addition to recognising that the security of the region's member states is interconnected, article 3 explicitly resolves for a common defence regime. Both articles suggest that ECOWAS should come to its member states' assistance not only following the occurrence of an armed attack, but also when an armed incident of lesser gravity poses a threat of aggression. In fact, according to the definition of 'aggression' in article 1, the member states of ECOWAS' undertake a positive responsibility to act in protection of the sovereignty, the territorial integrity and the political independence of other fellow member states. Article 4 of the 1981 Protocol, extents the potential use of military means to support member states in two additional circumstances. In the case of armed conflict between two or several member states and in cases of internal armed conflict. However, with regards to the expediency of military action in case of an internal armed conflict within a member state, this must be 'engineered and supported actively from outside likely to endanger the security and peace in the entire Community'. Article 4(b) also asserts that 'In this case the Authority shall appreciate and decide on this situation in full collaboration with the Authority of the Member State or States concerned'. According to article 18 of PMAD supplementing article 4(b), the expediency of military action by ECOWAS is prohibited 'if the conflict remains purely internal'.[426]

As illustrated above, there was indeed an element of foreign involvement present in the Liberian conflict. Against this background, it has been suggested by some scholars that the material support from outside Liberia to the NPFL suffices for concluding that this was not a purely internal affair.[427] Nevertheless, it is far from clear whether at the time of ECOMOG's intervention, ECOWAS had enough material evidence that the armed conflict was 'actively maintained and sustained' from outside. In any case, such claims were not established through the Final Communique of the Standing Mediation Committee which took the decision for military involvement.[428] Even if it is accepted that articles 4(b) and 18(1) of PMAD are applicable, and thus the ECOWAS military activity

[426] When France intervened in at the request of the government of Gabon to protect it against an army mutiny in 1964, it invoked a defence treaty which allowed force not only against external attack but also against domestic unrest, and sent extra troops to supplement those French forces already in Gabon.
[427] Mgbeoji (n 402) 97.
[428] ECOWAS Standing Mediation Committee, 'Final Communiqué of the First Session' (Banjul Republic of Gambia 7 August 1990) in Marc Weller, *Regional Peace-Keeping and International Enforcement: The Liberian Crisis*, vol 6 Cambridge International Documents Series (CUP 1994) 73.

in Liberia could be justified under PMAD, the adequate enforcement of its procedural mechanisms, would still need to be examined.

According to article 18 of PMAD, where the internal armed conflict is actively maintained and sustained from outside, the provisions of articles 6, 9 and 16 shall apply. Those articles maintain that decision-making is vested to the Authority, which is comprised of the Heads of States and Governments; thus it is not shared with bodies of lesser political authority. For example, article 6(3) states that 'the Authority shall *decide* on the expediency of military action'.[429] However, the decision to intervene militarily was adopted by the Standing Mediation Committee, a delegate of the ECOWAS Authority that was not representative of the different views that existed at the time of the decision**.** The mere fact that the Standing Mediation Committee was established following a decision of the Heads of States and Governments, at a meeting held in Gambia on 30 May 1990 does not fill in any procedural gaps, neither does it validate its later decision. Since, when it was aspired, its mandate (to which the consortium of states comprising the 'Authority' had agreed) provided that it would decide for amicable ways of settling disputes in the sub-region (and report to the full Authority) and not for a military intervention.

However, soon after its setting up, approximately in three months' time, it became apparent that its diplomatic efforts in resolving the conflict had no substantial result. In more detail, the 'Standing Mediation Committee' comprising of Gambia, Ghana, Tongo, Mali and Nigeria tried to work out various proposals that would be acceptable by Taylor as well. On 7 August 1990, it upheld that, 'There was to be an immediate cease-fire followed by the deployment of an ECOWAS peacekeeping force and the immediate formation of an interim administration'.[430] Even though Taylor had not conceded to these

[429] Emphasis added.

[430] Kufuor (n 409) 527. For the decisions adopted at Banjul (7 August 1990) see ECOWAS Standing Mediation Committee Decisions A/DEC.1/8/90, A/DEC.2/8/90, A/DEC.3/8/90, A/DEC.4/8/90 and Final Communiqué of the First Session in Weller (n 428) 67- 75. On 27 August 1990, ECOMOG was dispatched to Liberia and at the Banjul Conference (Gambia, 21 December 1990) under the auspices of ECOWAS, Amos Saywer was elected President of the interim administration. Meanwhile, the ongoing diplomatic efforts led to the Yamassoukro IV agreement providing for a cease-fire, disarmament and encampment of the parties under the supervision of ECOMOG. Unfortunately it remained unimplemented and under the pretext of pushing for its implementation the fighting escalated. For the Cotonou Agreement signed on 25 July 1993 see UNSC 'Letter dated 6 August from the Charge d' Affaires A.I. of the permanent mission of Benin to the United Nations addressed to the Secretary-General' (9 August 1993) UNSC Doc S/26272

proposals,[431] and the conclusive stance of Doe remained unclarified,[432] ECOWAS' Cease-Fire Monitoring Group (ECOMOG) was launched. Overall, it is highly disputable whether the delegation of the responsibility for decision-making to the Standing Mediation Committee, in so severe cases, such as the Liberian conflict, is permissible under the Protocol of the ECOWAS. Furthermore, the ratification of the decision to intervene with troops by the Authority of Heads of State and Government, came ex post facto, at the Bamako conference, Mali, on the 27- 28 November 1990, long after the initiation of its implementation had taken place.

Article 6(3) further provides that the execution of military action is entrusted 'to the Force Commander of the Allied Armed Forces of the Community', that is composed of national units and are at the constant disposal of ECOWAS.[433] The Protocol nowhere provides that forceful measures may be undertaken on behalf of the Community by any other institution. Again, that procedural caveat, imperative for regional intervention in a civil conflict allegedly engineered by external but also regional actors, was not observed. In effect, the intervention was carried out by an ad hoc force. In commenting essentially the compliance of ECOWAS action with the procedural mechanisms in place, Aning's comments were correct: 'The decision to intervene undermined the principle of unanimity that governed ECOWAS decision making. What occurred in Liberia was the establishment of ad hoc institutions'.[434]

Additional evidence indicating that ECOWAS' intervention did not comply with various provisions of PMAD, relates to the application of article 16. That provision requires that before the Authority decides for military action, it shall be duly notified through a written request for assistance by the Head of State of the country concerned. It is unclear whether Doe had accepted the dispatch of ECOMOG in Liberia. Although he requested the sending of a peacekeeping force through a letter dated 14 July 1990, his reference to a constitutional solution implies that he had no intention of accepting any operation aiming,

Annex. Sawyer was replaced by a transitional government and the United Nations Observer Mission in Liberia (UNOMIL) was formed.

[431] 'ECOWAS Peace- Keeping Force to be Sent to Liberia; Foreigners Released by INPFL' BBC Monitoring Report (9 August 1990) in Weller (n 428) 66.

[432] Murphy (n 419).

[433] PMAD, article 13.

[434] Emmanuel Kwesi Aning, 'Towards the new millennium: ECOWAS's evolving conflict management system' (2000) 9(5-6) African Security Review 50, 55.

inter alia, at his replacement.[435] Acting upon his letter, ECOWAS worked on a peace plan according to which Doe would have had to resign and be replaced by an interim administration.[436] It is therefore disputed whether Doe conceded to that and whether his letter could be considered as a valid invitation for ECOMOG. This view is reinforced further by the fact that contrary to the provision of article 9 of the Protocol, there is no evidence of contact between ECOMOG's Force Commander and Doe after the force landed in Monrovia.

Ultimately, the argument of collective self-defence in the case of Liberia was unsustainable. That was primarily due to the limited scope of the alleged armed attack under article 51 of the UN Charter and relevant custom. Moreover, even within the broad and legally questionable scope of PMAD, the internal justification of ECOWAS' military action in Liberia is disputed. The existence of evidence at the time of ECOMOG's intervention that the internal armed conflict was maintained and sustained from outside is questioned and the implementation of military activity did not follow the procedural provisions of PMAD. Nonetheless, self-defence was only one of the plausible justifications in support of the intervention's legality.

3.3.1.2. ECOMOG mission in breach of Chapter VIII

An additional ground to support the legality of the regional action under examination could be its compliance with the provisions of Chapter VIII of the UN Charter. As follows from the analysis of Chapter VIII of the UN Charter in the previous chapter of this work, a first issue to be clarified is whether the initiative of ECOWAS amounted to enforcement action, thus requiring the authorisation of the UNSC. Furthermore, it is important to examine whether the latter ascription of ECOMOG by the UNSC, in an ex post facto manner, suffices to accept that it was lawful.

To be more precise, Chapter VIII provides for the pacific settlement of local disputes by regional organisations taken 'on the initiative of the States concerned or by reference to the Security Council'[437] and for the recourse to enforcement action following

[435] For the full text of Doe's letter see Marc Weller (n 428) 60; Mgbeoji (n 402) 77- 78.
[436] ECOWAS Standing Mediation Committee Decision A/DEC.2/8/90 in Weller (n 428) 69.
[437] Article 52, Chapter VIII of the UN Charter.

authorisation by the UNSC.[438] As derives from the UN Charter structure and provisions as a whole, the UNSC will only abridge the sovereignty of states where it is facing a threat to international peace and security.[439] In article 54, it is clearly stated that the UNSC 'shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security'.

According to article 52 (3) the pacific settlement of disputes although needs not to be initiated after a decision of the UNSC, it has to be initiated 'either on the initiative of the States concerned or by reference to the Security Council'. Disputable as it is, whether ECOWAS was entitled to intervene in the civil strife in Liberia, if it is assumed that there were elements warranting external interference, one should examine the compliance of ECOMOG's action to the given frame for legality. Whereas Doe addressed ECOWAS in respect of this matter,[440] 'there was considerable uncertainty on the consent issue as far as the initial deployment of ECOMOG was concerned'.[441] The most significant reasons for that uncertainty were that the government 'was no longer effective'[442] and the unclear content and purpose of Doe's addressing of the ECOWAS.[443] It is also relevant to note that the agreement on the status and operations of ECOMOG was reached with the interim administration of Sawyer, after the deployment had been initiated; and with its capacity to represent the Liberian population being enormously disputed.[444] Moreover, ECOWAS only referred the case to the UNSC, informing the UN of the deployment of ECOMOG, in its second communication on the Liberian conflict, three months after it had actually occurred.

Having already indicated that even if the ECOMOG mission was of a purely peacekeeping nature it would not easily succeed the test of legality under Chapter VIII analysis, article 52, it seems that in fact ECOWAS portrayed its action as falling under

[438] Article 53(1), Chapter VIII of the UN Charter.
[439] Although initially the Charter was intended to deal with inter- state relations, situations such as extreme human rights abuses and violence, genocide and crimes against humanity, civil wars, and denial of the right to self- determination have been approached as threats against international peace and security.
[440] Letter of Doe in Weller (n 428) 60; Mgbeoji (n 402) 77- 78.
[441] Gray (n 376) 402.
[442] Ibid.
[443] Whether the internal unrest amounted to a civil war or not is discussed in further detail below.
[444] This was an administration established by and totally dependent upon ECOWAS.

that categorization. It could be argued that ECOWAS refrained from requiring a UNSC authorisation endorsing the deployment of ECOMOG, under article 53 of the UN Charter, because it anyway considered its action as purely pacific. However, this cannot be reconciled with the reality on the ground; that merely since day one of its deployment ECOMOG had stepped forcefully in the conflict and that the character of its operations extended well beyond peacekeeping.

The first reference on the part of the UNSC to a situation threatening the peace and security of the region and the first commending of the ECOWAS involvement on the ground, only came in November 1992. That was included in the resolution 788 of the UNSC of the UN, two years after the deployment of ECOMOG. Even then, resolution 788 remained silent on the issue of military mission and explicit decision was made only with respect to the imposition of an arms embargo under Chapter VII. 'Even at this point, the Security Council did not authorise ECOMOG to "use all necessary means" to implement the Yamassoukro IV Accord or otherwise restore peace and security to Liberia'.[445] Furthermore, the determination made therein regarding the violence in Liberia as a threat to international peace, was not enough even at that time to provide ECOMOG with substantial legality; even where there has been a prior declaration of threat to the international peace and security by the UNSC, regional actors can by no means replace its role in deciding themselves for the adoption of coercive action against the territorial integrity and sovereignty of a state. The first time when the Security Council expressly referred to the ECOMOG mission was in 1993, in its resolution 866.[446] Still, under the Cotonou Peace Agreement endorsed by that same resolution,[447] ECOMOG was described as a neutral peacekeeping force as opposed to an explicit right for coercive action.[448] Although it could be suggested that in the absence of an express prohibition of peace enforcement by ECOMOG and due to the cautious approach on UNOMIL's mandate ECOMOG was conferred- albeit silently- such tasks, is an argument susceptible to much criticism.[449] Assertions favouring this as an implicit authorisation granting legality to the

[445] Murphy (n 419) 162- 163.
[446] UNSC Res 866 (22 September 1993) UN Doc S/RES/866.
[447] Ibid.
[448] Article 3(1) of the Cotonou Agreement states inter alia that 'The Parties hereby expressly recognise the neutrality and authority of the Economic Community of West Africa States (ECOWAS) Military Observer Group (ECOMOG) and the United Nations observer Mission in respect of the foregoing'.
[449] UNSC Res 866 (n 446) paras 2-3.

ECOMOG's action are nonetheless quite far-reaching and thus not substantially persuasive. Had it wanted to authorise ECOWAS to use force, the UNSC could have done so.

Nevertheless, even if delayed purported legality was cast in this implicit manner, still the initial deployment of ECOMOG and its forceful intervention should be considered illegal. The notion of tacit authorisation drawn through the silence of the UNSC over a situation remains contested in international law. This is also the case as to the arguments raised in support of the legal validity of the ex post facto authorisation of enforcement action.[450] To quote Mgbeoji,

> the short point here is that the ECOWAS action in Liberia, being a clear use of military force, albeit for the ostensible good of the region and Liberia, was an enforcement action requiring that prior authorisation of the Security Council first be sought and obtained.[451]

3.3.1.3. Factual defying of forcible intervention by invitation

It has already been stated that in the case of Liberia, the involvement of foreign states pre-existed the ECOWAS/ ECOMOG action. Was it though of such nature and substance as to trigger off a legal right to request foreign assistance on the part of Doe? The only proven interference to subvert the government of Liberia was the 400 troops of Burkina Faso, as admitted by its President. Still, it is difficult to support that a large- scale forcible intervention, as the one of ECOMOG, was warranted to tackle that. Therefore, not only the necessity of the intervention as such but even more so its proportionality, as criteria for the nature of the intervention, are disputed.[452] Nevertheless, in addressing the ECOWAS, Doe never actually referred to that foreign interference. Additionally, it could be alleged that the involvement of Ivory Coast, the territory which was used for Taylor's offensive, was no more than a pretext for Doe who believed that by inviting the Nigerian-led force of ECOWAS he would be assisted in fighting against Taylor's NPFL. Doe's

[450] Similar claims were raised in the case of Kosovo, but also failed to receive the substantial agreement of the international community.
[451] Mgbeoji (n 402) 111.
[452] Christine Chinkin, 'The Legality of NATO intervention in the Former Republic of Yugoslavia (FRY) under International Law' (2000) 49 ICLQ 910, 920- 921.

letter to ECOWAS and his request for a peace-keeping force 'to forestall the increasing terror' reveals that.[453]

It is possible that in trying to establish the legality of his invitation and of the right of ECOWAS to intervene, the situation in Liberia could be classified as falling short of a civil war. By the time that Doe addressed his invitation and ECOWAS entered Liberia, the NPFL had taken control over a large part of the state's territory. Noting the complications resulting by the absence of a straightforward rule as to what constitutes a civil war, but taking into account the facts on the ground, the extent of the unrest and of the loss of control by Doe it is hard to align with those purporting to suggest that the invitation of Doe confers the reasoning required to register the legality of the ECOMOG's forcible response. Again, even if this was nothing more than an incident of 'domestic unrest' allowing for a lawful external forceful assistance upon invitation, as the international law provides, in fact what Doe explicitly asked for through his letter was a purely peacekeeping force. On the contrary, the action of ECOMOG extended further than that.

Another possible argument could be that ECOWAS action was the response to some peacekeeping agreement of the parties in the civil war. Yet this does not correspond to the facts of the conflict as neither Taylor nor his faction NPFL ever committed to abide by any agreement granting ECOWAS any rights to intervene militarily in Liberia. Quite the opposite, due to the lack of Taylor's support for the intervention, ECOMOG found itself to be combatant in the conflict as soon as it stepped foot in the country.[454]

3.3.2. The defective assertion of ECOWAS practice as evidence for 'humanitarian intervention'

The analysis above indicates that within the remit of traditional legal justifications the intervention of ECOWAS was not lawful. Simultaneously though, it does not anticipate that the situation in Liberia had culminated to a humanitarian crisis; and it does not refuse

[453] Weller (n 428) 60; Mgbeoji (n 402) 77- 78.
[454] United States Bureau of Citizenship and Immigration Services, 'Liberia. Events Since 1990' (1 November 1993) <http://www.refworld.org/docid/3ae6a6088.html> accessed 3 July 2019. See Allison Boyer, 'West Africans' Controversial Role: Rebels, Regional States Concerned Over Nigerian Control of Force' *The Christian Science Monitor* (1 November 1990) <http://www.csmonitor.com/layout/set/print/1990/1101/olib.html> accessed 4 July 2019.

the ‘spill over effect’ of the tremendous human rights abuses in the neighbourhood that also prompted the initiative of the regional coalition. The recognition of the alarming situation on the ground by the ECOWAS collectively and member states of the organisation, as well as by the UNSC stimulated the discussion of regional unilateralism in humanitarian crises among scholars. For example, Wippman argues that the intervention of ECOWAS in Liberia received the ‘guarded approval’ of the international community.[455]

Particular emphasis was given on customary law formation. Levitt suggested that the Liberian case amounted to an instant establishment of a specific right of regional humanitarian intervention.[456] Jenkin’s analysis also supports that Liberia constituted a break from the Charter’s regime.[457] Levitt’s argument regarding the establishment of instant custom through the case of Liberia is not convincing as to the existence of a more general exception to the prohibition of the use of force for regional organisations.[458] Although Conclusion 8(2) of the ILC Report regarding the identification of CIL admits that ‘no particular duration is required’ echoing the ICJ in NSCS cases, Commentary 9 thereto provides that ‘there is no such thing as “instant custom”’.[459] Moreover, sufficient evidence according to D’ Amato includes both an articulation of the rule and a consistent act.[460] It is far from clear that, in the specific circumstances of the intervention in Liberia, the actual operation was consisted with the claim of humanitarian action or amounted to practice for the purpose of CIL development.

ECOMOG’s actions were not all of a purely humanitarian nature. As relevant commentaries report, the involved ‘peacekeepers allegedly committed abuses against a number of civilians and suspected rebels and provided arms support to factions opposed to Charles Taylor, thereby aiding the proliferation of rebel groups’.[461] The humanitarian

[455] David Wippman, ‘Enforcing Restraint: Collective Intervention in Internal Conflicts and Enforcing the Peace: ECOWAS and the Liberian Civil War’ in Lori F Damrosch (ed), Enforcing Restraint: Collective Intervention in Internal Conflicts (Council on Foreign Relations Press- NY 1993) 175.
[456] Jeremy Levitt, ‘Humanitarian Intervention by Regional Actors in International Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone’ (1998) 12 TempleIntlCompLJ 333.
[457] Jenkins (n 385).
[458] Levitt, ‘Humanitarian Intervention’ (n 456) 351.
[459] *North Sea Continental Shelf* cases *(Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 3, para 74.
[460] Anthony D’Amato, *Concept of Custom in International Law* (Cornell UP 1971) 74.
[461] *Human Rights Watch*/ Africa report (n 401); James Pattison, *Humanitarian Intervention & The Responsibility to Protect, Who should intervene?* (OUP 2010) 206.

motives for the military mission of ECOWAS are also questioned because of the stance of the authorising body itself, which remained silent in front of the reported non impartial and non-humanitarian actions of the ECOMOG troops.[462] In essence, what becomes inevitable regarding the nature of the intervention, is that the operation of ECOMOG fell short of being purely humanitarian. Therefore, even if the legal validity of humanitarian interventions in general was accepted, the legality of ECOWAS intervention would still be disputed under the rubric of such doctrine. Whereas the debate on the qualitative criteria of humanitarian intervention gained momentum in light of NATO's intervention in Kosovo, in retrospectively examining ECOWAS intervention they cannot be dismissed. Nevertheless, their articulation is addressed in the respective next chapter.

In addition to the ambiguous nature of the intervention, it is also contested whether at that time ECOWAS operational conduct could amount to evidence of practice for the purpose of CIL development. Although the independent will and function of regional organisations contributing to the development of CIL rules extent to the deployment of military forces,[463] an important factor in weighing their practice remains 'whether the conduct is ultra vires the organization or organ'.[464]

Beyond considering that humanitarian intervention was not among the stated purposes of the organisation,[465] it was clear at the time of the intervention that ECOWAS was an economic organisation without the institutional structure and aptitude to carry out such missions on its own. As already discussed, the institutional structure of ECOWAS military force, albeit along PMAD's article 13, was not set up at the time of the intervention. It is therefore questionable whether ECOWAS had any established operational capacity to either avert the humanitarian catastrophe or guard the viability of peace.[466] In the absence of sufficient institutional competence to perform such missions,

[462] Ibid *Human Rights Watch*/ Africa report.
[463] Official Records of the General Assembly, Report of the International Law Commission on the Work of its Seventieth Session (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10 paras 53–66 [ILC Report 2018] Commentary (6) to Conclusion 4; a prominent example is the territorial administration of Kosovo by UNMIK pursuant to UNSC Resolution 1244, as well as the exercise of elements of governmental authority by EULEX, a mission mandated but not operationally devised or controlled by the EU member states.
[464] Ibid ILC Report 2018 Commentary (7) to Conclusion 4.
[465] *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Rep 151, 168.
[466] Ero (n 405); it is underlined that ECOMOG 'found itself pursuing a peace-enforcement strategy without the necessary equipment or mandate in place'.

even if the unilateral use of force by regional organisations was legal, the explicit support of the UN would be warranted; both in terms of a prior finding that the situation fell under Charter VII of the UN Charter and of the actual implementation of the mission. The latter point on the participation of economic organisations in conflicts forms also part of a wider debate 'since the end of the Cold War over the financing, control, and impartiality of regional forces'.[467]

Notwithstanding the above, of utmost importance for the submission of ECOWAS operation as practice for the development of a new CIL rule (and its identification), is the character of the decision-making procedure followed by ECOWAS for the intervention. In light of the procedure devised concerning the use of force for collective self-defence, since provisions for other forms of military deployment were absent, the decision-making procedure for the deployment of ECOMOG was plausibly ultra vires the organisation.[468] As already discussed within the context of PMAD, the principle of unanimity that governed ECOWAS decision making was not followed in deciding for the intervention in Liberia and ECOMOG appeared to be an ad hoc institution.

3.4. Inadequate opinio juris for a 'humanitarian intervention'

Notwithstanding the above reservations as to whether ECOWAS enforcement action could amount to practice relevant to the development of a new CIL rule on humanitarian intervention, it is worth illustrating that at the time there was no general consensus that this was indeed a humanitarian intervention. When there is more than little objection among those who engage in the practice and those in a position to react to it, as indicated below, then it is impossible to establish that acceptance as law exists. In the *Legality of Nuclear Weapons*, the ICJ advised that since 'the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an opinio juris' it 'does not consider itself able to find that there is such an opinio juris.[469]

Undoubtedly, the whole situation, including the numbers of civilian deaths, the threat directed against the lives of others, the overall devastation and hampering of normality

[467] Gray (n 376) 402.
[468] ILC Report 2018 (n 463) Commentary (7) to Conclusion 4.
[469] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 at 254, para 67.

causing the increase of migration flows, illustrated a true humanitarian crisis.[470] However, whereas the official documentation of ECOWAS reveals that the sub-regional organisation was considerably concerned with the deteriorating humanitarian situation in Liberia, the humanitarian argument was not presented as the legal justification for the intervention.[471]

The official stance of ECOWAS as to the reasoning for the intervention is summarized in a Final Communique, the outcome of the First Session of the Standing Mediation Committee which took place on 6 and 7 August 1990. In more detail, it stated:

> 6. The failure of the warring parties to cease hostilities… led to the massive destruction of property and the massacre by all the parties of thousands of innocent civilians including foreign nationals, women and children, some of whom had sought sanctuary in churches, hospitals, diplomatic missions and under the Red Cross protection, contrary to all recognised standards of civilized behaviours. Worse still, there are corpses lying unburied in the cities and towns, which could lead to a serious outbreak of an epidemic (…).
>
> 7. The result of all this is a state of anarchy and the total break- down of law and order in Liberia. Presently, there is a government in Liberia which cannot govern and contending factions which are holding the entire population at hostage, depriving them of food, health facilities and other basic necessities of life.[472]

Additionally, in his statement, during the same meeting, the Chairman of the ECOWAS Standing Mediation Committee declared that,

> the ECOWAS Monitoring Group (ECOMOG) is going to Liberia first and foremost to stop the senseless killing of innocent civilian nationals and foreigners, and to help the Liberian people to restore their democratic

[470] *Human Rights Watch*/ Africa report (n 401).
[471] Official Journal of ECOWAS, vol 21 (1992) 5- 9; UNSC 'Letter Dated 9 August 1990 From the Permanent Representative of Nigeria to the United Nations Addressed to the Secretary- General' (10 August 1990) UN Doc S/21485 Annex 3.
[472] Final Communiqué of the First Session (n 428).

> institutions. ECOWAS intervention is in no way designed to save one part or punish another.[473]

On another occasion the Secretary General of ECOWAS mentioned that there was in Liberia a complete breakdown of effective government.[474]

Furthermore, despite the analysis above and the emphasis given on the tragic situation on the ground, there is no evidence to suggest that the proponents of the ECOWAS mission considered an explicit appeal based solely on humanitarian grounds as a sufficient legal basis for the intervention.[475] In their reported statements, ECOWAS member states provide a wide array of justifications for the intervention. Moreover, some of them objected to the intervention. Considering that they were engaged in ECOWAS intervention, their adherence (or not) to humanitarian intervention constitutes relevant evidence.

Indisputably, some reported statements may as well be understood as claims for intervention on humanitarian grounds.[476] However, those statements echo a moral rather than a legal responsibility.[477] The ECOWAS member states which referred to the humanitarian crisis, put forth other grounds for the legal justification of the intervention.

Particularly indicative is the stance of Nigeria. In his statement, referred to in the West Africa Magazine, the Nigerian Head of State repeating most of what was included in paragraph 6 of the Final Communique. The Nigerian President, Ibrahim Babangida spoke of the responsibility of ECOWAS to react and not 'stand by and watch while the citizens of that country decimate themselves and other West African citizen's resident there in an orgy of mutual antagonism and self-extermination'.[478] However, his major claim was the destabilising effect of the conflict in the West African sub-region; in other words the main

[473] Letter from the Permanent Representative of Nigeria (n 471).
[474] *West Africa Magazine* 3911 (31 August- 6 September 1992) 1470, 1471.
[475] Letter from the Permanent Representative of Nigeria (n 471).
[476] Gilbert da Costa, 'Fresh Impetus for Peace' *West Africa Magazine* 3922 (16- 22 November 1992) 1968.
[477] Ibid.
[478] Address by President Ibrahim Babangida on the occasion of the Chief of Army Staff Annual Conference (21st January 1991) <http://ibbpresidentiallibrary.org/overview/speeches-made-between-1989-1990/the-military-the-state-and-security/preparing-the-military-for-the-third-republic/> accessed 15 September 2016.

concern was the security of the sub-region.[479] This included as well the influx of refugee flows into the neighbouring countries. According to the Human Rights Watch, within weeks of Taylor's invasion 'over 160,000 people fled into neighbouring Guinea and Ivory Coast, beginning a refugee exodus from Liberia that escalated to over 700,000- one third of the population- by late 1990'.[480] As Kufuor mentions, Babaginda

> highlighted the fact that ECOMOG fell in line with Nigeria's foreign policy over the past three decades. This he stated was essentially the defence and protection of our territorial integrity and encouraging peaceful coexistence with our neighbours and the entire sub- region. Thus when certain events occur, depending on their intensity and magnitude, which are bound to affect Nigeria's politico- military and socio- economic environment, Nigeria should not stand by as helpless and hapless spectators.[481]

Also relevant was the explanation provided by the Gambian President, that ECOMOG was not an invasion force but rather a strictly humanitarian mission to help people caught in the crossfire get food and medical supplies.[482] At the same time though, Sir Dauda Jawara, the President of the Gambia, made allegations for protecting Liberia's sovereign integrity, recalling as a legal basis the Protocol on Mutual Assistance and Defence, article 18 in particular.[483] Beyond humanitarian concerns for Liberia, self-defence was also asserted as the legal basis for the intervention by Nigeria and the President of Benin.[484]

Contrary to allegations for the legality of the intervention, others professed their absolute objection to the enforcement action of ECOWAS. For instance, Burkina Faso's reaction to the Banjul Agreement merits attention. Its President Blaise Compaoré stated that the Agreement grants no competence for intervention in the internal affairs of states, without

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[479] Ibrahim Gambari, the then Nigerian representative to the UN reported that ECOWAS was acting in conformity with the goals of the Community to prevent the deterioration of the situation in what could become a threat to the international peace and security; see UNSC 2974th meeting (22 January 1991) UN Doc S/PV.2974 8.
[480] *Human Rights Watch*/ Africa (n 401).
[481] Kufuor (n 409).
[482] Peter da Costa, 'Intervention Time: ECOWAS Imposes Peace' *West Africa Magazine* 3807 (13- 19 August 1990) 2280, 2289.
[483] Kaye Whiteman, 'Towards Peace in Liberia' *West Africa Magazine* 3822 (26 November- 2 December 1990) 2895.
[484] Mindua (n 385) 258.

considering any humanitarian grounds for the intervention.[485] Similar was the approach adopted by Libya's Colonel Gaddafi who had declared his opposition to the intervention. It is suggested that their position was not irrelevant to their support of Taylor.[486] Indeed, if an objection derives from causes unrelated to the legality of a practice this would not constitute decisive evidence.[487] Nevertheless, the same has been argued for the motives of the intervention's proponents.

It is debatable whether the motives of the interveners were genuinely humanitarian and even if they were, still the 'Divisions at the strategic political level eroded the decision-making capability of ECOWAS and led to an inability to decide which objectives to pursue at any given time'.[488] For example, in as much as Babangida's statement echoes humanitarian considerations, for Nigeria the intervention was also a political choice to pre-empt an external non-African intervention.[489] Additionally, from the very beginning of the mission NPFL, a major party in the civil war, had made well known, through its leader Charles Taylor, his opposition to the ECOMOG intervention for being a partisan to the conflict.[490] Taylor's mistrust against the Nigerian-led ECOMOG lasted long and according to the UN Secretary-General's report in 1993 NPFL accepted to commence voluntary disarmament only to UN military observers.[491]

Regarding the reaction of the UN, it has already been mentioned that the first commending of the ECOWAS involvement on the ground by the UNSC only came in November 1992 in resolution 788, and the first time when the UNSC expressly referred to the ECOMOG mission was in 1993 in resolution 866.[492]. Although inaction can provide evidence for opinio juris, in the absence of an explicit endorsement of humanitarian

[485] Mindua (n 385) 259.
[486] Ibid.
[487] *North Sea Continental Shelf* cases (n 459) para 33.
[488] Christopher Tuck, '"Every Car or Moving Object Gone." The ECOMOG Intervention in Liberia' (2000) 4 AfricanSQ 6 <http://asq.africa.ufl.edu/files/ASQ-Vol-4-Issue-1-Tuck.pdf> accessed 3 July 2019.
[489] Ibid.
[490] 'Banjul Talks Begin; ECOMOG Again Delayed; Taylor Warns He Will Fight' BBC Monitoring Report (23 August 1990) in Weller (n 428) 86. See also *Human Rights Watch*/ Africa report (n 401) fn 23 'Taylor Discusses ECOMOG, UN Security Council', Gbarnga Radio ELBC (26 March 1993) reprinted in *Foreign Broadcast Information Service* on 31 March 1993.
[491] Report of the Secretary-General, 'The Observer Mission in Liberia' (13 December 1993) UN Doc S/26868, para 19 in Weller (n 428) 440. See also Report, 'Interim President Sawyer Meets NPFL Delegation; Discusses Disarming Factions' (6 December 1993) in Weller (n 428) 439.
[492] UNSC Res 866 (n 446).

intervention by ECOWAS itself it would be farfetched to assume that the UNSC was tacitly expressing an affirmative conviction for its legality. Whilst the UNSC referred to a situation threatening the peace and security of the region in endorsing the Cotonou Peace Agreement,[493] it restrained itself from authorising ECOWAS to use force and rather described it as a neutral peacekeeping force.[494]

The identification of relevant practice is necessary to support that there is evidence even for an emerging rule under CIL.[495] Indeed, ECOWAS intervention was not of a purely humanitarian nature and the respective competence of the organisation at the time is disputed. In the absence of the requisite practice, expressions of conviction cannot constitute convictions for an emerging new rule but as to what the law should be.[496] In the case of ECOWAS intervention in Liberia, the humanitarian crisis was considered at large as a complementary legitimising factor for the intervention and not as a legal ground.[497] Therefore, Murphy's contention that Liberia is among the cases which have been used as evidence of unilateral humanitarian intervention, despite the fact that the interveners had not sought to justify their interventions by claiming that they have a right to act without a UNSC authorisation only, seems arbitrary.[498] This is the same with a considerably recent work in which Paliwal praises the contribution of the Liberian example in what he sees as a process of customary change specifically tailored for regional organisations.[499]

What follows from the analysis above is that the erosion of the Charter's regime in the case of Liberia opened the floodgates for a more consistent discussion of a new unilateral right of humanitarian use of force by regional organisations to justify what would

[493] Ibid.
[494] Article 3(1) of the Cotonou Agreement states inter alia that 'The Parties hereby expressly recognise the neutrality and authority of the Economic Community of West Africa States (ECOWAS) Military Observer Group (ECOMOG) and the United Nations observer Mission in respect of the foregoing'.
[495] The ILC refrained from making a distinction between the relevant practices at the stage of an alleged formation of a customary rule and in cases of claiming that a rule is already in place; on this see Rossana Deplano, 'Assessing the Role of Resolutions in the ILC Draft Conclusions on Identification of Customary International Law: Substantive and Methodological Issues' (2017) University of Leicester School of Law Research Paper No 17-05 <https://ssrn.com/abstract=2987931> accessed 17 February 2019.
[496] See the Introduction.
[497] Official Journal of ECOWAS (n 471).
[498] Murphy (n 419) 363.
[499] Suyash Paliwal, 'The Primacy of Regional Organisations in International Peacekeeping: The African Example' (2010) 51 VaJIntlL 185.

otherwise amount to illegal enforcement action and maybe involvement in civil wars. The fact that Liberia was a notable challenge to the UN Charter's system of collective security through the more proactive attitude of a regional organisation, also shaped the arguments for a new customary law rule in light of NATO's actions in Kosovo.[500]

During the period between 1990- 1992, since the initiation of the ECOMOG forceful mission and until the renewal of the conflict, when ECOWAS decided to impose an embargo upon Liberia and thus addressed the issue to the United Nations, it had not asked for any prior authorisation of the UNSC. It is therefore suggested that the action was unilateral. The silence of the UNSC could not be seen as an implicit acceptance and approval of its forceful mission, not even for humanitarian reasons. And taking into account that there was no recognised legal right for unilateral humanitarian intervention, it is quite obvious that the ECOMOG action could not be classified as legal solely on that ground, in as much as it could not fall within the explicit exceptions of the UN Charter on the use of force. Nonetheless, although the involvement of ECOMOG in the conflict and the abuses conducted by its soldiers cannot sustain the conclusion that the military operation could ever be classified as purely humanitarian, that incident manifested an embryonic appeal for regional unilateralism.

3.5. Developments following the Liberian conflict

Moving beyond the discussion of Liberia as such, the only normative effect of the invocation of 'humanitarian intervention' amidst the discussed unilateral deployment of ECOWAS was the contemplation of averting human suffering among the objectives of the constitutive instruments adopted following it. The extent to which the new ECOWAS' security context contributes to the discussion of an emerging new CIL rule on regional humanitarian intervention and thus amounts to a possible 'solution' for the legality problems which arose during the 1990 intervention, by transposing unilateralism in legal practice at the aftermath of the conflict, is further discussed in Chapter Five. Notwithstanding the consideration of humanitarian concerns within the constitutive developments following Liberia, in the aftermath the real practice ECOWAS' unilateral interventionism has not been directed at countering humanitarian suffering per se.

[500] Greenwood (n 384). See Statement of UK, UNSC 3988th meeting (24 March 1999) UN Doc S/PV.3988, 12.

3.5.1. Towards constitutive advancement of regional military interventionism

The revised version of the Abuja Agreement reached by the leaders of the Liberian factions in August 1996 marked the beginning of the end of the violent past. Cease-fire, disarmament and demobilisation of the factions was agreed to lead to free and fair general elections and the formation of a new government by the summer of 1997. Charles Taylor was the winner of the presidential elections. Whereas UNOMIL was terminated in September 1997, ECOMOG stayed in Liberia to assist the Liberian government in providing security and stability to its population; as well as to restructure the police and army of Liberia. A full-scale conflict erupted again in 2000 and by 2003 the control of Taylor reduced to the one third of the country. Amid several charges of war crimes against him, Taylor decided to resign from the presidency of Liberia on August 11, 2003. What followed was the signing of the Accra (Ghana) Peace Agreement during that same month between the Government of Liberia, the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties.[501] The Accra Peace Agreement provided, inter alia, for the establishment of a National Transitional Government set to expire in January 2006 following the holding of elections no later than October 2005.[502]

The Liberian conflict, is considered to be the turning point with regards to reshaping ECOWAS' role in regional security. Already in 1991, ECOWAS issued a declaration on Political Principles to underline the significance of peace, security and stability in the region. The respect and promotion of human rights and fundamental freedoms were given particular weight. Although it did not represent a legal and obligatory commitment, agreement on the principles of the 1991 Declaration earmarked a new phase for ECOWAS. Indeed, 'it was the first of any such declaration by ECOWAS with emphasis on the promotion of fundamental rights of the people'.[503] The extent to which those principles have been upheld in ECOWAS' later instruments is discussed in Chapter Five of the thesis at hand.

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[501] UNSC 'Letter dated 27 August 2003 from the Permanent Representative of Ghana to the United Nations addressed to the President of the Security Council' (Accra Comprehensive Peace Agreement signed on 18 August 2003) (29 August 2003) UN Doc S/2003/850 Annex.
[502] Ibid article XXII(2)(d).
[503] Emmanuel Kwesi Aning and Samuel Atuobi, 'The Economic Community of West African States and the Responsibility to Protect' in W Andy Knight and Frazer Egerton (eds), *The Routledge Handbook of the Responsibility to Protect* (Routledge 2012) 219.

In 1993, the ECOWAS Treaty was revised through the inclusion of a separate chapter on 'Regional Security' which paved the way for the adoption of more specific binding instruments. Those are the ECOWAS Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (the Mechanism),[504] the ECOWAS Protocol on Democracy and Good Governance (EPDGG)[505] and the ECOWAS Conflict Prevention Framework (ECPF)[506] which provide the regional security framework for both military operations and non- military measures. Whether the further elaboration of ECOWAS' rules and the adoption of constitutional changes provided evidence for a new CIL rule through, inter alia, the enhancement of the organisation's security structures, provisions for unilateral military action in general or to avert atrocities and protect civilians, is discussed in Chapter Five. Although the detailed analysis of those new regional security instruments and provisions relevant to the humanitarian use of force is carried out in the chapter on regional verbal practices, a preliminary remark is that the new security construct revealed anew ECOWAS' incline towards regional unilateralism.

3.5.2. The fading colours of 'humanitarian intervention' in recent actual practice

Following military intervention in Liberia, ECOWAS did not refrain from undertaking unilateral initiatives either by threatening to use force or by actually doing so. In the course of the years following intervention in Liberia (and Sierra Leone which was largely framed as consent of the host state), in none of those cases has ECOWAS invoked humanitarian concerns as a legal justification for acting contrary to the general prohibition enshrined in the UN Charter which represents a rule *jus cogens*. It is notable that the justifications offered are anyway placed to a great extent at the edges if not fully outside the array of traditional legality.[507] Therefore it is not convincing to argue that their non-invocation of humanitarian intervention is the symptom of being 'strongly disincentivized to engage' in humanitarian crises to avoid criticism on the legality of interventions.[508] As a matter of fact, that ECOWAS has not refrained fully from unilateralist endeavours

[504] Adopted on 10 December 1999.
[505] Adopted on 21 December 2001.
[506] Adopted on 16 January 2008.
[507] For example the treaty-based consent argument; provide critical source.
[508] Peter Tzeng, 'Humanitarian Intervention at the Margins: An Examination of Recent Incidents' (2017) 50 VandJTransnatlL 415, 428.

but has abstained from deploying forces to address crises for their humanitarian calamities 'undermines arguments that the law has changed'.[509]

The primary justification offered for the unilateral threat or use of force has been the restoration of constitutional order, either to implement the result of democratic elections or to combat a coup d'état targeting an official government; another consideration provided within the constitutive arrangements following Liberia.[510] In the case of Ivory Coast, though actual intervention followed the adoption of UNSC Resolution 1975 (2011), ECOWAS can be charged of acting unilaterally by threatening to use force beforehand in a rather explicit manner. What matters for the current analysis is that the threatening ultimatum given to the ex-president Gbagbo- to step down to install the elected president Ouattara- in 2010 was justified as a decision 'to achieve the goals of the Ivorian people' in presidential elections and not to redress humanitarian suffering.[511] Most recently, ECOWAS actually used force unilaterally in the case of Gambia (2017). The UNSC Resolution 2337 (2017) provided no express authorisation for ECOWAS to use force in Gambia. Support to ECOWAS to resolve the crisis was restricted solely to peaceful means.[512]Compared to the official pronouncements of ECOWAS regarding Ivory Coast, they underline that intervention was sought for the restoration of

[509] Simon Chesterman, 'R2P and Humanitarian Intervention: From Apology to Utopia and Back Again' forthcoming in Robin Geib and Nils Melzer (eds), The Oxford Handbook on the International Law of Global Security (OUP) <https://ssrn.com/abstract=3224116> accessed 18 June 2019 at 5.

[510] According to article 25 of the 1999 ECOWAS Protocol intervention is also possible 'in the event of an overthrow of a democratically elected government'.

[511] ECOWAS Authority of Heads of State and Government, 'Final Communiqué of the Extraordinary Session of the Authority of Heads of State and Government on Cote d'Ivoire' (Abuja 24 December 2010) <https://www.ecowas.int/wp-content/uploads/2015/02/2010-24-december-Extra.pdf> accessed 18 June 2019. On the illegality of threats when the intention to use force is signaled or declared see François Dubuisson and Anne Lagerwall, 'The threat of the use of force and ultimata' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 912- 917.

[512] UNSC Res 2337 (19 January 2017) UN Doc S/RES/2337. For ECOWAS decision to 'enforce the results of the election' see Ulf Laessing and Paul Carsten, 'West Africa bloc to take "necessary actions" to uphold Gambia vote result' *Reuters* (17 December 2016) at <https://www.reuters.com/article/us-gambia-politics-idUSKBN1460H6> accessed 18 December 2018; also Michelle Nichols, 'UN Backs West African Efforts to Install New Gambia President' *Reuters* (19 January 2017) <https://reuters.com/article/us-gambia-un-vote-idUSKBN1532T8> accessed 18 June 2019.

constitutional order[513] and following invitation by the internationally recognised President of the Gambia, Barrow.[514]

Notwithstanding that humanitarian concerns never diffused in the region under discussion, the straightforward appeal of variant concerns informs the debate on the normative status of 'humanitarian intervention' under CIL. It is clear that it has certainly not provided additional evidence of practice to inform positively an 'extensive and virtually uniform' practice 'occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved'.[515] On the same ground, it would be largely biased to infer that ECOWAS has provided through its actual practice evidence supportive of a newly developing rule under CIL; considering that its practice in the aftermath of Liberia cannot be assimilated with relevant practice. Put simply, there is no actual conduct to identify as relevant due to the non- invocation of the humanitarian intervention justification by the regional organisation itself to account for its unilateral interventionist practice. Beyond scholarly discussion of the alleged doctrine against the backdrop of such interventions, even as a possible justification for intervention by ECOWAS, the organisation has not purported to contextualise its conduct along the lines of humanitarian intervention.

3.6. Conclusion

Iyi suggests that Liberia marked the *beginning* of a gradual normative change for humanitarian intervention by regional organisations.[516] Conversely, according to the analysis above and irrespective of the alleged legitimacy of the ECOWAS intervention, the actual practice and its accompanying rational do not support Iyi's claim. The argument for a unilateral regional intervention to avert a humanitarian crisis was rather a moral imperative for an otherwise illegal enforcement action.

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[513] ECOWAS Authority of Heads of State and Government, 'Final Communiqué of the 50th Ordinary Summit of the Authority of Heads of State and Government' (Abuja 17 December 2016) <https://www.ecowas.int/wp-content/uploads/2016/12/Communiqu%c3%a9-Final_50th-Summit_Abuja_Dec-16_Eng.pdf> accessed 18 June 2019 at para 38.
[514] Mohamed Helal, 'The ECOWAS Intervention in the Gambia' in Tom Ruys and Oliver Corten (eds), *International Law on the Use of Force: A Case Based Approach* (OUP 2018).
[515] *North Sea Continental Shelf* cases (n 459).
[516] Iyi (n 372).

Despite Wippman's suggestion that 'the ECOWAS intervention in Liberia satisfies virtually every proposed test, and in many respects constitutes an excellent model',[517] and irrespective of the alleged legitimacy of the ECOWAS response, the 'traditional' justifications offered lacked a concrete legal basis. First and foremost, the launching of the ECOMOG mission was stigmatised by the innovative and unsubstantiated nature of the ECOWAS decisions, which fell out of the context of the Protocol of Mutual Assistance and Defence. Moreover, arguments related to the application of the provisions of the UN Charter, namely the justification of self-defence and that of regional action under article 52 of Chapter VIII, as indicated above, cannot be established. The argument for forcible action upon invitation, is also weak in light of the facts of the conflict.

Reiterating that the legality of the intervention on humanitarian grounds in the absence of a formed rule under international law through the formation of instant custom is strongly contested,[518] the nature of ECOWAS intervention is important in discussing its contribution to the ripening of a new rule. First of all, what was disputed was the 'humanitarian' character of the intervention. Even if one accepts that there is change regarding the stance of international law towards the significance of human rights violations vis–à–vis state sovereignty, enforcement action carried out in the name of human rights that is disproportionate and facilitates the escalation of the conflict cannot easily be reconciled with claims for a humanitarian intervention. Most importantly, it is questionable whether ECOWAS had the competence to carry out such missions, and even if it had, the ad hoc character of the procedure followed to decide the initiation of ECOMOG constituted an *ultra vires* departure from the internal decision- making process in place at the time of the intervention thus challenging ECOMOG's status as an ad hoc institution.

The discussion of the arguments raised by ECOWAS and the proponents of its intervention in Liberia, reinforces the proposition that its contribution did not mark the gradual development of a CIL rule on humanitarian intervention. The significantly inconsistent submission of alleged justifications proves the lack of belief that the humanitarian use of force was an adequate justification for the intervention. Although

[517] Wippman (n 455) 179.
[518] *North Sea Continental Shelf* cases (n 459); ILC Report 2018 (n 463) Conclusion 8(2) and Commentary (9) thereto.

practice implies that the member-states of ECOWAS knowingly disregarded to refer the case to the international organisation when it was first decided and before ECOMOG was initiated, no argument was ever made officially to support the view that there was no need for the authorisation of the UNSC by virtue of a humanitarian intervention.

Acknowledging the difficulties to reconcile legality under international law with the decision to intervene in the Liberian conflict, it seems that ECOWAS had purported to raise all possible arguments in search for a societal, at least, legitimation. What an early statement from the Nigerian side declared, is rather true; that the collective self- help undertaken by ECOWAS 'is an important building- block in the new world order of shared responsibility for the maintenance of international peace and security which we seek to establish'.[519] As much as it is true that, the 'many failed peace interventions including one in Liberia'[520] during the 1990s, reveal how necessary is the enhancement of cooperation among regional organisations and the UN.

Having said that, the Liberian conflict presents a case of failed collaboration among the regional organisation and the UN, featuring a unilateral regional initiative and a delayed explicit response by the UNSC. Moreover, the actual circumstances of ECOWAS' intervention in Liberia reveal that the regional initiative on that specific occasion was not a panacea to the inability of the UN to avert the crisis. In fact, regional unilateralism in Liberia offered no more guarantees of impartiality than the practice of the UNSC's permanent five members that was and remains inconsistent. Therefore, a lesson learned is that at times the effectiveness of regional responses is compromised by self- interests; due to which the risk of creating more complexities than the problems they solve is real.

The Liberian case is not in itself a regional practice which could serve as practice for the development of a new CIL rule; neither the physical conduct of ECOWAS nor the accompanying rational for the intervention satisfies such a presumption. Nevertheless, the Liberian case led, *inter alia*, to the constitutional advancement of ECOWAS mechanisms which reflect an existing and undeniable tendency for decentralisation of the collective security system especially in light of mass and grave human rights violations.

[519] UNSC 3138th meeting (19 November 1992) UN Doc S/PV.3138.
[520] Brockman (n 373) 740.

This is an additional reason for not disregarding the impact of ECOWAS' unilateral intervention in the discussion of humanitarian intervention under international law.

In recent practice ECOWAS has refrained from invoking humanitarian concerns as a legal justification for unilateral interventionist endeavours within its region. Alleging that this constitutes supportive evidence for the proposition that the actual practice of ECOWAS could not amount to substantial evidence for the rise of a rule of humanitarian intervention under CIL, its earliest albeit secondary consideration in Liberia has contributed to the general articulation of pro-humanitarian intervention claims which flourished amidst the debate on Kosovo discussed in the next chapter.

4. NATO: the 'humanitarian intervention' in Kosovo and engagement in Libya

4.1. Introduction

The intervention of ECOWAS in Liberia discussed in the previous chapter, though criticised for being unlawful at the time it took place and offers no evidence for the rise of a new CIL rule, was a significant questioning of the narrow scope of international law on regional initiatives to intervene militarily in conflicts of grave humanitarian concern. The current chapter purports to discuss the use of force by NATO in Kosovo and Libya, by examining the effect of the said practices with regards to the claims for regional humanitarian unilateralism under CIL. The analysis builds on the discussion of the regional intervention in Liberia by discussing the cases of Kosovo and Libya in the chronological order they have occurred. The said order of analysis facilitates a better contextualization of the alleged claims for regional humanitarian unilateralism in view of examining their impact on development of new custom.

Indisputably, the discussion of humanitarian intervention gained its strongest momentum in light of the unilateral intervention of NATO in Kosovo, which has alternatively been portrayed by its proponents either as a confirmation of an existent new CIL rule or as the marking of its legal normative commencement. Therefore, the first section on Kosovo, seeks to provide the historical context and the factual framework within which NATO's unilateral use of force took place. That is important in understanding the circumstances which led to NATO's actual intervention, whether the justifications for the intervention correspond to them and the debate on the legality of NATO's action, including on the basis of the purported doctrine of humanitarian intervention. Notwithstanding that the previous chapter on Liberia is informative of the state of custom up until the intervention of ECOWAS, it is important to establish whether other instances of regional unilateralism in its aftermath and before Kosovo had been perceived as humanitarian. The views of scholars on whether those instances provided additional evidence for the alleged regional practice are thus helpful. Against the background of alleged prior regional practice, this section discusses the views of states with regards to the existence or not of a right to intervene unilaterally on humanitarian grounds up until Kosovo. Prior state practice is discussed in the second section of the part on Kosovo.

What follows is the analysis of NATO's case for humanitarian intervention against the backdrop of unlawfulness within the context of traditional legality. Notwithstanding that NATO's intervention in Kosovo was an example of operational conduct which could serve as practice for the development of a CIL rule,[521] the requisite affirmative opinio juris was absent. This is reinforced through the discussion of the academic debate in the midst of Kosovo which follows.

The second part of the chapter examines NATO's use of force in the case of Libya. NATO's use of force followed resolution 1973 of the UNSC under Chapter VII in the name of R2P.[522] Therefore, the Libyan case in 2011 could be considered as an interlude- up until today- to NATO's unilateralist approach envisaged rather profoundly in Kosovo. Its discussion facilitates a better contextualization of the alleged arguments on regional humanitarian unilateralism in view of examining the current status of the alleged doctrine. The Libyan conflict set the ground for the military engagement of regional organisations in the spirit of the R2P concept following an R2P decision by the UNSC.[523]

The analysis proceeds first with the discussion of the UNSC resolution 1973 (2011) aiming at establishing the multilateral engagement of NATO. The stance of other regional organisations is indicative of their interpretation of resolution 1973 with regards to the use of force and regional roles. Despite allegations that the appraisal of civilian protection in Libya by the UN was a 'game-changer' for the R2P future, it seeks to underline that the actual practice of NATO has not enhanced the development of any regional right for unilateral humanitarianism.[524] The next section seeks to illustrate that although NATO's engagement is understood as a multilateral response, it remains questionable whether the nature of its operations correspond to the humanitarian impetus of the UNSC mandate.[525]

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[521] Official Records of the General Assembly, Report of the International Law Commission on the Work of its Seventieth Session (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10 paras 53–66 [ILC Report 2018] Conclusion 6(2).
[522] UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 (2011); it was endorsed with 10 votes in favour and 5 abstentions; see Press Release SC/10200 (17 March 2011) at <http://www.un.org/press/en/2011/sc10200.doc.htm> accessed 20 June 2019.
[523] Cf Mark Kersten, 'The Responsibility to Protect doctrine is faltering. Here's why' *Washington Post* (8 December 2015) <https://www.washingtonpost.com/news/monkey-cage/wp/2015/12/08/the-responsibility-to-protect-doctrine-is-failinh-heres-why/> accessed 20 June 2019.
[524] Ramesh Thakour, 'UN breathes life into "responsibility to protect"' *The Star* (21 March 2011) <http://www.thestar.com/opinion/editorialopinion/2011/03/21/un_breathes_life_intoresponsibility_to_protect.html> accessed 20 June 2019.
[525] UNSC Res 1973 (n 522).

Considering that the gravity of the humanitarian crisis and of the respective necessity to act under Chapter VII was endorsed by the UNSC, it is unnecessary to discuss the timeline of tensions that led to the Libyan crisis.

Against the backdrop of the factual merits of the interventions both in Kosovo and Libya, the chapter proceeds with setting out the discrepancy between real practice and the allegedly humanitarian justification for the military engagement of NATO. The assessment of the actual character of the intervention takes place according to the criteria of humanitarian intervention that were put forward by Chinkin and were later reflected in the 2001 ICISS report.[526] Although the articulation of such criteria- largely prescribed in the aftermath of Kosovo- could be indicative of some nascent change at early 2000s, in fact both cases reveal that such criteria fall within a zone of discretion inhibiting the establishment of opinio juris in support of a new CIL rule on regional humanitarian intervention.[527]

4.2. The 'humanitarian intervention' argument in Kosovo

According to the UNSC Resolution 1244 which is effective until today, at the time of NATO's intervention Kosovo was officially part of the territory of the Republic of Serbia.[528] The military intervention was carried out in the absence of any explicit invitation or formal consent and did not respond to any prior UNSC authorisation to use force under Chapter VII. As a matter of fact, this gave rise to an immense debate on the legality of the intervention. At the centre of this debate was the development of a broad spectrum of possible justifications by the supporters of NATO's military intervention. A major argument proclaimed to justify NATO's intervention, which is examined below, was that it was addressing a deteriorating humanitarian crisis. Nevertheless, before analysing the fundamental parameters of the legality's debate, namely prior regional practice, the alleged humanitarian justification of NATO and the views of states and scholars on the legal status of the said claim, it is important to understand the historic and factual framework of the conflict.

[526] Christine Chinkin, 'The Legality of NATO intervention in the Former Republic of Yugoslavia (FRY) under International Law' (2000) 49 ICLQ 910.
[527] David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton UP 2004) 290.
[528] UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244.

4.2.1. Timeline of tensions

The claims for Kosovo's autonomy and tensions between ethnic Albanians and Serbs in the region were not a 1990s' phenomenon. To understand the 'contemporary relations between Serbs and Albanians requires an appreciation of history' but bearing on the deep ethnic divisions and 'the political struggle over memory' biases in its presentation are not scarce in the relevant historiography.[529] This explains why in trying to set the historical background within which the 1999 intervention took place, this section adheres to the portrayal of relevant landmark events, whilst avoiding 'bad historiography' as explained in the previous chapter. The 'First Conference of the National Liberation Council for Kosovo and Dukagjin Plateau'[530] in northern Albania, took place in December 1943 and January 1944 and demonstrations to respect the human rights of Albanians in Yugoslavia in 1968.[531] Throughout the 1980s the province suffered from escalating atrocities including clandestine operations by Kosovo Albanian movements such as the People's Movement of Kosovo (LPK). From the Serbian perspective, to abandon Kosovo would lead to change of borders contrary to the rules of the Helsinki Final Act and the shrinking of its territorial integrity, but even more to national defeat since landmark incidents in Serbian history are associated with Kosovo.[532]

Following the First Balkan War of 1912, Kosovo was internationally recognised as part of Serbia. The status of Kosovo remained unaffected also after the formation of a larger kingdom with the signing of the 1919- 1920 Peace Treaties. At the end of the Second World War, Tito's government, decided to grant Kosovo the status of an autonomous region in 1946, though it remained a Serbian province. That status remained unchanged also with the entering into force of the Yugoslavian constitution in 1974 but in 1989, Kosovo's 'autonomous province' powers were reduced, following the 1989 Serbian-wide referendum. Unfortunately, Belgrade's elevating of the differences between nationalist Serbs and ethnic Albanians in Kosovo to an issue of survival for the nation and the country during Milosevic's era, that culminated to the referendum, rendered the

[529] David L Phillips, *Liberating Kosovo: Coercive Diplomacy and U.S. Intervention* (MIT Press 2012) 3.
[530] Is commonly known as the 'Bujan Conference'.
[531] For the intensification of the conflict and the culmination of the armed struggle of ethnic Albanians in Kosovo see Armend R Bekaj, 'The KLA and the Kosovo War, From Intra- State Conflict to Independent Country' (2010) 8 Berghof Transition Series, Resistance/ Liberation Movements and Transition to Politics <http://www.berghof-foundation.org/publications/transitions-series/> accessed 21 June 2019.
[532] John A Vasquez, 'Review: the Kosovo War: Causes and Justification' (2002) 24 The International History Review 103, 108; Lily F Waring, 'Kosovo' (1923) 2 The Slavonic Review 56, 70.

Albanian protests 'manifestations of separatism which, in turn, could justify even fiercer oppression'.[533]

Nevertheless, the result of the 1989 constitutional referendum led to an unprecedented intensification of Kosovo Albanian reactions; to the formation of the political party 'Democratic League of Kosovo' (LDK), the September 1990 declaration and September 1991 referendum on the unilateral declaration of a 'Republic of Kosovo'. In April 1992, Ibrahim Rugova became the 'president' of the self-declared Republic of Kosovo. Considering the LDK's civil resistance agenda as naively pacifistic, other ethnic Albanian groups paved the way for the establishment of Kosovo Liberation Army (KLA).[534]

The 1995 Dayton Accords did not tackle the claims of ethnic Albanians and the issue of Kosovo, leaving it aside as an internal issue of Serbia. Right after, inter- communal relations were worsened by the settlement in Kosovo of thousands of Serb refugees from Croatia. Having considered the Dayton 'failure' as a blunt hit against their aspirations for international involvement, ethnic Albanians prompted for the rise of armed insurgency, the formation of the KLA in mid 1990s and a quiet approval of its activities from then on. Of course, those were accompanied by intensified popular uprisings and riots.[535] Belgrade, knowing of KLA's preparations and respective activities and suspecting that it was financed by the West, persisted with oppressive policies. For example, 'The fund Homeland Calling was opened in Switzerland in 1993 and its assets were to be dedicated to the war for the liberation of Albanian territories under yoke'.[536] The retaliation of KLA at the villages of Qirez and Likoshan in February 1998 and the massacre at Perkaz on 5 March 1998 marked the growing support and volunteering to KLA forces.[537] The ferocious situation on the ground and Rugova's 'administration' lobbying triggered the immense reactions of several human rights organisations.[538]

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[533] Marc Weller, *The Crisis in Kosovo, 1989–1999: From the Dissolution of Yugoslavia to Rambouillet and the Outbreak of Hostilities* (Cambridge: Documents and Analysis Publishing 1999) 26.
[534] The LKCK (National Movement for the Liberation of Kosovo) was founded in 1993 by a faction of the LPK (nationalist Marxist- Leninist organisation active since the 1980s) and paved the way for establishment of the Kosovo Liberation Army (KLA).
[535] Kosovo had already had a tradition in student movements and manifestations opposing the sovereignty of Yugoslavia over Kosovo (1968, 1981).
[536] Bekaj (n 531).
[537] At the end of that year, Hashim Thaci was designated as the political representative of KLA.
[538] Before then, concern was expressed on the part of the USA (1992) and the Conference for Security and Cooperation in Europe (CSCE in 1993). Weller (n 533) provides a thorough illustration of relevant events.

NATO's first involvement to the conflict came in May 1998, through the decision of its Foreign Ministers to assist in the resolution of the crisis and promote stability and security in the region.[539] This was followed up by the Defence Ministers' meeting on 12 June 1998, to consider 'possible military options'.[540] In October 1998, following intensified efforts to negotiate a peace agreement, carried out under the explicit threat of a NATO intervention, Belgrade agreed to a ceasefire and the setting up of a Kosovo Verification Mission under the auspices of the OSCE.[541] Its role was to monitor and report on the compliance of the UNSC Resolution 1199(1998). In the following months and whilst armed operations went on contrary to the ceasefire agreement,[542] additional peacemaking initiatives were undertaken- including the formation of an ad hoc Contact Group (USA, UK, France, Germany, Italy and Russia), the Rambouliet Conference and the Paris Peace Accord talks; and the adoption of numerous UNSC Resolutions.[543]

NATO's threats against Serbia in the meantime, caused much debate as to the nature of the Alliance's motives. Additionally, international reactions in support of Kosovo Albanians, ignoring Serbian claims over Kosovo, fuelled further the internal conflict. To a great extent these explain Serbia's mistrust and the breakdown of the last negotiating efforts to reach a peace agreement, before NATO's unauthorised intervention on March 23, 1999. Following the termination of NATO's air strikes, which lasted for 78 days, and the brokering of the Kumanovo Agreement which reaffirmed the territorial sovereignty of Serbia in the region and provided for the setting up and deployment of an international peacekeeping force and civil administration, the UNSC adopted Resolution 1244 specifying the institutional arrangements for Kosovo from then onwards. This remains effective and Kosovo constitutes an autonomous part of Serbia under UN administration. Resolution 1244 provided thus the establishment of an interim civilian administration (the UN Mission in Kosovo- UNMIK) and since 2008 it has almost been replaced by the EU

[539] NATO, 'NATO's role in relation to the conflict in Kosovo' <http://www.nato.int/kosovo/history.htm#B> accessed 10 July 2019.
[540] Ibid.
[541] Ibid.
[542] UNSC Presidential Statement (19 January 1999) UN Doc S/PRST/1999/2; Dino Kritsiotis, 'The Kosovo Crisis and NATO's application of armed force against the Federal Republic of Yugoslavia' (2000) 49 ICLQ 330.
[543] UNSC Res 1160 (31 March 1998) UN Doc S/RES/1160; UNSC Res 1199 (23 September 1998) UN Doc S/RES/1199; UNSC Res 1203 (24 October 1998) UN Doc S/RES/1203; UNSC Res 1207 (17 November 1998) UN Doc S/RES/1207; after the initiation of the military campaign UNSC Res 1239 (14 May 1999) UN Doc S/RES/1239; and after the cease of the NATO use of force (Operation Allied Force), the UNSC Res 1244 (n 528).

Rule of Law Mission in Kosovo (EULEX) which 'is operating under the overall authority and within the status-neutral framework of the United Nations',[544] with the most recent renewal of its mandate covering the period until 14 June 2020.[545]

4.2.2. Prior regional practice and humanitarian unilateralism

The unauthorised military interventions which were carried out in the name of humanitarian necessities before Kosovo are subcategorised in interventions of one individual state, of several states acting in concert and of regional or collective security organisations. Respectively, those are, India- Pakistan (1971), Tanzania- Uganda (1978-79), Vietnam- Kampuchea (1978- 79), France- Central African Empire (1979); France, UK, USA- Iraq (1991- 1993); and ECOWAS- Liberia (1989), ECOWAS- Sierra Leone (1991).[546] The most striking examples of unilateralism before Kosovo, by more than one states acting together, were the cases of Liberia and Iraq. As already discussed, the ECOWAS intervention in Liberia, was perceived overall as an unlawful exercise of unilateral interventionism. Nevertheless, it posed some challenge to the traditional scope of the UN Charter and revealed that regional organisations were becoming be more proactive than in the past with regards to humanitarian crises.

The intervention of the coalition forces[547] in Iraq in April 1991 was carried out following the issuing of the UNSC 688. However, resolution 688 underlined that it was 'the repression of the Iraqi civilian population (…) including most recently in Kurdish-populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross- border incursions, which threaten international peace and security'[548] and included no authorisation for the use of force by the coalition. It was rather a statement of findings and had not provided for the initiatives of the interventionist powers; the coalition intervened by declaring 'no-fly zones' and by trying to establish 'safe heavens', to which the Iraqi forces were not allowed to approach. As Gray correctly points out, the mere fact that they did not put forward as a legal justification in the UNSC

[544] Report of the Secretary-General, 'UN Interim Administration Mission in Kosovo' (12 August 2011) UN Doc S/2011/514.
[545] Council Decision 2018/856/CFSP (8 June 2018) amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo (EULEX Kosovo) [2018] OJ L146/5.
[546] Thomas Franck, *Recourse to Force, State Action Against Threats and Armed Attacks* (CUP 2002); the 'purely humanitarian' intervention at 139- 173.
[547] The coalition was comprised of the USA, UK and France.
[548] UNSC Res 688 (5 April 1991) UN Doc S/ RES/ 688.

the humanitarian intervention 'may be seen as an indication that there was no well-established doctrine of humanitarian intervention at that time'.[549] Reflecting the views of the pro- humanitarianists Greenwood stated that, 'the situation had already been internationalised before the interventions occurred'[550] and since humanitarian interventions had already been carried out in previous instances after an authorisation of the UNSC itself, it could be inferred that their unilateral act to avert a humanitarian crisis would also be permissible. Except for fully disregarding the essence of authorisation that was brought forward in the aftermath of the intervention to suggest that the coalition was acting in support of Resolution 688, the early 'humanitarianist' excuse raised by the UK[551] was not shared by the USA. Furthermore, despite the lack of condemnation of the no- fly zones both by the UNSC and the UNGA, but in light of the intensification of hostilities in 1999, the UNSC discussed the situation with Russia and China denouncing the legality of US and UK use of force.[552] In any case, the UK and USA justifications on the use of force in the no- fly zones in 1999 were mindful of revolving around humanitarian intervention. Overall, the course of the events on the ground is also seen as questioning the existence of a right to humanitarian intervention during the Iraqi interventions. The duration of the coalition forces' presence in Iraq, and the lengthy maintenance of the no-fly zones, assessed in retrospect, point to policy motivations instead of a legal obligation to avert a humanitarian crisis.

Despite the absence of substantial support for the legality of the unilateral interventions to avert humanitarian crises both in Liberia and Iraq, the proponents of unilateral humanitarian intervention in Kosovo had argued that through the aforementioned interventions by the time of NATO's air strikes, a new doctrine was formed.[553] As already noted, even the UK that had traditionally insisted most eloquently on the legality of unilateral humanitarian intervention, albeit not at the UNSC, was very cautious not to rely on it at all in light of the 1999 use of force in Iraq and the USA's official claims had not revolved around it at any stage since the early days of 1991. Whereas the assessment of the UK government that was provided by the Foreign Office in 1986 underlining that the

[549] Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 36.
[550] Christopher Greenwood, 'Humanitarian Intervention: The case of Kosovo' (1999) 10 FYBIL 141, 167.
[551] Christine Gray, 'After the Ceasefire: Iraq, the Security Council and the Use of Force' (1994) 65 BYIL 165.
[552] UNSC 4008th meeting (21 May 1999) UN Doc S/PV.4008.
[553] Greenwood (n 550) 164- 168.

'overwhelming majority of legal opinion comes down against the existence of a right of humanitarian intervention'[554] was indeed differentiated during the first Iraqi conflict,[555] the legality of humanitarian intervention had not been explicitly advocated by the UK in the UNSC before Kosovo. It could be alleged that the passage of a short period of time is not necessarily an obstacle to the formation of custom.[556] But, still it is doubtful whether this could be convincing in light of Kosovo if one considers the reactions of other states in the UNSC. In fact, they were very much reluctant to form any explicit legal arguments to support their choice or simply purported to find some balance through claims of legitimacy which 'is one vehicle for redefining legality, by appeal to *other* norms'.[557]

4.2.3. Unilateral intervention's illegality on 'traditional' grounds

Notwithstanding the normative status of humanitarian intervention in the aftermath of Kosovo, at its commencement and despite their support for the intervention, the majority of its proponents abstained from declaring that it was a lawful humanitarian intervention or that the intervention was legal on any other grounds. The most probable explanation for this is their inconsistent support of the alleged doctrine and uncertainty as to whether it had risen to the status of a legal obligation or right prior to the events. A commendable example is that of Germany. Despite its approval of NATO air strikes, Germany had not consistently supported the legality of unilateral humanitarian intervention; neither before as indicated above nor, as portrayed below, following its commencement. The varied approaches propounded by its officials, lead to the assumption that German support for the intervention was not the result of any thorough analysis of its legality and recognition of unilateral humanitarian interventions. On the one hand, on 19 June 1998, the Foreign Minister Klaus Kinkel declared in the Bundestag that, 'NATO is examining military options with direct effect on Kosovo and the whole Federal Republic of Yugoslavia [FRY]' and that 'such measures require a solid legal basis. Considering the present circumstances this can only be a mandate by the Security Council'.[558] On the other hand and only a few days earlier, the Minister of Defence, Volker Rühe, had suggested that the

[554] UK Foreign Office, Policy Document No 148, reprinted (1986) 57 BYIL 614, 619.
[555] Geoffrey Marston, 'UK Materials on International Law 1992' (1992) 63 BYIL 615, 824.
[556] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 3, para 74.
[557] Ian Clark, 'Legitimacy and Norms' in Ian Clark (ed), *Legitimacy in International Society* (OUP 2005) 211; the relationship between legitimacy and legality at large and within the context of Kosovo is addressed within the chapter.
[558] Stefan Talmon, 'Changing views on the use of force: The German Position' (2005) 5 BaltYIL 41.

expediency of NATO's mission without a new United Nations UNSC resolution was possible.[559]

Undeniably, the humanitarian concerns on the deteriorating situation in the region were espoused unanimously during the 24th March 1999 meeting of the UNSC. But whereas the UK representative suggested that 'on grounds of overwhelming humanitarian necessity, military intervention is *legally* justifiable',[560] and the Netherlands submitted that the legal basis 'available in this case is more than adequate',[561] the USA representative did not go further than mentioning 'that action by NATO is justified and necessary'.[562] A similar approach was adopted by Canada.[563] France, on the other hand suggested that NATO's actions stem from the authority of relevant UNSC resolutions adopted under Chapter VII.[564] The German representative in communicating the statement of the Presidency of the EU spoke of crimes against humanity that will not be tolerated by the international community; however, he didn't argue about the legality of the alleged doctrine or of the intervention. Russia,[565] among other states,[566] refused that NATO's operation complied in any possible way with international law.

Addressed against the backdrop of non-humanitarian intervention justifications hereby discussed, NATO's intervention in Kosovo constitutes a unilateral regional enforcement action. Article 51 of the UN Charter could not have been triggered under the circumstances of the Kosovo case. In essence, Serbia, the sovereign state concerned had not initiated any act of aggression against any member of the Alliance, which could have provoked its lawful armed response. Additionally, suggestions that self-defence could be supported because neighbouring NATO states were endangered due to the hostilities in Kosovo were farfetched. Even with regards to the refugees' influx, according to UNHCR, until early October 1998 around 80,000 Kosovo Albanian refugees had fled to neighbouring non- NATO countries and other parts of SFRY.[567] Whereas some refugees

[559] 'RAF in Kosovo show of force' *The Times* (15 June 1998) 14.
[560] Statement of UK, UNSC 3988th meeting (24 March 1999) UN Doc S/PV.3988, 12.
[561] Ibid 8.
[562] Ibid 5.
[563] Ibid 6.
[564] Ibid 9.
[565] Ibid 3.
[566] Ibid 12-13 (China), 15 (Belarus, India).
[567] Report of the Secretary- General (3 October 1998) UN Doc S/1998/912, paras 11- 15.

sought asylum in other European countries, including NATO countries such as Germany, that was not even a legitimate reason for justifying the intervention.[568] Additionally, whereas the situation in Kosovo had been described by the UNSC Resolution 1199 of 23 September 1998 as a threat to the peace and security of the region, this wasn't a lawful ground for self-defence, nor for military countermeasures in the absence of an authorising UNSC resolution.[569] According to Resolution 1199, measures additional to those prescribed by it and Resolution 1160 (merely arms embargo) would only be considered at a later stage.[570] NATO's intervention had commenced before the UN issued the said resolution; and in the absence of any concrete evidence of its intention to adopt an authorising resolution. With regards to the circumstances of Kosovo and in the absence of substantial grounds for self-defence, the UN Secretary-General, is also reported to have stated that to use force under such circumstances, '*normally* a UN Security Council Resolution is required'.[571] Since he did not explicitly provide for any change as to the legality of the intervention, his use of the word 'normally' is only seen as a political manoeuvre; to reconcile claims of illegality on the one hand and the outcry for the humanitarian crisis on the other hand.

According to Matheson's summary of the US decision to intervene in Kosovo during the proceedings of the Annual Meeting of the American Society of International Law, 'The failure of the FRY to comply with Security Council demands under Chapter VII (…) [and] the inability of the Council to make a clear decision adequate to deal with that disaster' were among the main factors.[572] However, none of these two arguments are purely legal but they rather speak up for some policy reasons to facilitate the intervention. Only if the previous UNSC resolutions had explicitly prescribed for the use of force on the occasion that Serbia would not comply with stated demands, the international community could lawfully proceed with the intervention. Additionally, the justification of 'curing' the inability of the UNSC to reach consensus by unilaterally reacting to the

[568] Amnesty International, 'A Human Rights Crisis in Kosovo Province: The protection of Kosovo's displaced and refugees' (30 September 1998) AI Index EUR 70/073/1998 <https://www.amnesty.org/download/Documents/156000/eur700731998en.pdf> accessed 10 July 2019 at 12- 19.
[569] UNSC Res 1199 (n 543).
[570] Ibid para 16.
[571] Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 EJIL 1, 8.
[572] Michael J Matheson, 'Justification for the NATO Air Campaign in Kosovo, Proceedings of the Annual Meeting' (2000) 94 ASIL PROC 301.

atrocities was certainly not available under the UN Charter; unless customary law prescribed differently in recognising a doctrinal status for unilateral interventions. However, according to Simma a major concern in discussing the unilateral use of force, albeit for humanitarian purposes, was that 'the genie of NATO "self- authorisation" must not be let out of the bottle'.[573] This view exposes the dangers inherent to a possible abandonment of the UN's authoritative role on military initiatives and the loosening of recognised exceptions, with particular emphasis on the potential political manipulation of a new norm by NATO. In different words, if the executive authority of the UN is shared among other actors, then it will be difficult to impose constraints over who is a 'proper representative of the international community and a legitimate guarantor of international peace' and who is not.[574]

In the absence of a declared right for unilateral humanitarian interventions, support for the intervention was also sought through the argument that after all, it was not unilateral. Since none of the binding UNSC resolutions prior to the intervention explicitly backed up NATO's air strikes, it was argued that a tacit or an ex post facto authorisation had actually been provided for by the UN that was legally satisfactory. Indeed, by relying on the provisions of UNSC Resolutions 1160 of 31 March 1998, 1199 of 23 September 1998 and 1203 of 24 October 1998,

> Certain states tried to claim Security Council authority for their use of force: they argued that material breach of previous resolutions could justify the use of force by states to implement the will of the international community, even without an express Security Council authorisation.[575]

Taking into account the facts on Kosovo, it is not truly persuasive to speak of a non- stated but decided authorisation, whilst the UNSC explicitly authorised various other measures in the numerous resolutions adopted before the intervention.[576] Resolutions 912 and 1160 had condemned the use of excessive force by the Serb forces and imposed an arms embargo against Yugoslavia. Resolution 1199, following Serb refusal to comply with

[573] Simma (n 571) 20.
[574] Anne Orford, *International Authority and the Responsibility to Protect* (CUP 2011) 207.
[575] Christine Gray, 'The Charter Limitations on the Use of Force: Theory and Practice' in Vaughan Lowe, Adam Roberts, Jeniffer Welsh and Dominik Zaum (eds), *The United Nations Security Council and War: the Evolution of Thought and Practice since 1945* (OUP 2008) 91.
[576] Statement of France, UNSC 3988th meeting (n 560) 8-9.

prior resolutions, only warned Serbia that the UNSC would 'consider further action and additional measures to maintain or restore peace and stability in the region'.[577] Similarly, Resolution 1203 did not extend beyond expressing the UNSC's deep concern and stopped short of providing any explicit authorisation for military action. Additionally, neither the statements of the UN Secretary-General,[578] nor the Presidential Statements of the UNSC[579] spoke of any authorised intervention or could anyway replace the requirement of a UNSC resolution to that effect. In any case, the Dutch statement during the UNSC's meeting of the 23rd March 1999, differently to the views of the French representative, asserted that at the time NATO was ready to act in Kosovo despite the absence of a resolution authorising the intervention;[580] thus, even for some proponents of the intervention the argument for a tacit or ex post facto authorisation was unimportant.

As a result of the Russian failed attempt to issue a UNSC condemning the intervention as illegal, of the content of following resolutions and of the setting up of a peacekeeping force by the UN to cooperate with NATO in Kosovo, ex- post facto authorisation was also raised as having a legalising effect. If the strict UN Charter's framework on authorisations was ignored and their validity recognised, still why wasn't the intervention explicitly commended by the UNSC in its follow up resolutions? Resolution 1239 focused primarily on the refugees' issue.[581] Its mentioning of the G-8 general principles of 6th May concerning a political solution to the crisis, by no means legalises NATO's intervention.[582] Not only the air strikes are not commended therein, but it was specifically provided that the deployment of security forces should be 'endorsed and adopted by the United Nations'.[583] Similarly, the resolution 1244, with which the UN interim administration of Kosovo was set up, endorsed in annex 2 principles for the solution which provided that deployments must take place under UN auspices to be decided under

[577] UNSC Res 1199 (n 543) preamble and para 16.
[578] UN Press Release (24 March 1999) UN Doc SG/SM/6938 <http://www.un.org/press/en/1999/sgsm6938.doc.htm> accessed 10 July 2019; Whilst stating that 'there are times when the use of force may be legitimate in the pursuit of peace', Annan went further to clarify that 'under the Charter the Security Council has primary responsibility for maintaining international peace and security... Therefore the Council should be involved in any decision to resort to the use of force'.
[579] UNSC Presidential Statement (n 542); UNSC Presidential Statement (29 January 1999) UN Doc S/PRST/1999/5.
[580] Statement of Netherlands, UNSC 3988th meeting (n 560) 8.
[581] UNSC Res 1239 (n 543).
[582] Ibid para 5.
[583] UNSC Res 1244 (n 528) Annex 1, 3rd intent.

Chapter VII of the UN Charter.[584] Additionally, the participation of NATO was set under the unified command and control of the UN and its mandate was to 'establish a safe environment for all people in Kosovo'.[585] This UN 'guideline' towards NATO is said to include some seeds of criticism regarding its bombings of March 1999. Overall, instead of providing explicitly or implicitly a shield of legality for NATO's intervention, the resolutions of the UNSC sketched the context as to when the reaction would be lawful. Equally, the adoption by Russia, an opponent of NATO's intervention, of the G-8 declaration and of the UNSC Resolutions 1239 and 1244 renders weak both the argument for the retrospective legitimising effect of ex- post facto authorisation, but even more so the argument for the implicit ex- post facto authorisation.

4.2.4. Intervention to avert a humanitarian crisis but not by virtue of legal right

The intervention of NATO in Kosovo is an example of operational conduct attributable to an organisation whose practice may contribute to the development of CIL rules.[586] Acknowledging the institutional competence of NATO to deploy military forces and the firm procedures followed in initiating the intervention, it is difficult to challenge the relevance of its practice within the context of CIL development and identification, despite the negative consequences it yielded in human casualties and environmental destruction. On the other hand, as noted above, the expressions concomitant to the intervention do not reveal a widespread and straightforward affirmative conviction on the legality of the alleged humanitarian intervention.

Notwithstanding that causes are not always identical to the arguments raised, the justifications put forward by NATO (the organisation engaged in the alleged practice) and the reaction of states in a position to react (virtually all states had factual knowledge of it and not only NATO's member states) constitute a valuable source for analysing NATO's intervention under the prism of CIL development and addressing the element of opinion juris. 'The chief justification US and NATO officials gave for the intervention was that it was necessary to prevent a humanitarian disaster'.[587] Indeed, the circumstances

[584] Ibid annex 2, para 3.
[585] Ibid para 4.
[586] ILC Report 2018 (n 521).
[587] Allen Buchanan, 'From Nuremburg to Kosovo: The Morality of Illegal International Legal Reform' (2011) 111 Ethics 673, 674.

under which NATO decided to intervene rendered as the only plausible justification the humanitarian catastrophe in Kosovo and its impact in the region. To further support their claims, the proponents of NATO's humanitarian intervention asserted that the policies adopted by Milosevic and the Serbian military and paramilitary forces against Kosovo Albanians, amounted to ethnic cleansing and genocide; reportedly this was the view of both the US President and the UK Prime Minister.[588] Nevertheless, at that time neither the official statements of the Alliance, nor the separate views of significant NATO state actors manifest a uniform conviction on the legality of unilateral humanitarian interventions.

In his letter of 9 October 1998 addressing the permanent representatives of the North Atlantic Council, Solana, NATO's General- Secretary, stated:

> -The FRY has not yet complied with the urgent demands of the International Community, despite UNSC Resolution 1160 of 31 March 1998 followed by UNSC Resolution 1199 of 23 September 1998, both acting under Chapter VII of the UN Charter.
>
> -The very stringent report of the Secretary-General of the United Nations pursuant to both resolutions warned inter alia of the danger of a humanitarian disaster in Kosovo.
>
> -The continuation of a humanitarian catastrophe, because no concrete action with regard to Kosovo cannot be expected in the foreseeable future.
>
> -The deterioration of the situation in Kosovo and its magnitude constitute a serious threat to the peace and security in the region as explicitly referred to in the UNSC Resolution 1199.
>
> On the basis of this discussion, I conclude that the Allies believe that in the particular circumstances with respect to the present crisis in Kosovo as described in UNSC Resolution 1199, there are *legitimate* grounds for the Alliance to threaten, and if necessary, to use force.[589]

[588] 'Excerpts of President Clinton's Address on NATO Attacks on Yugoslav Military Forces' *Washington Post* (25 March 1999) A34; See speech of Prime Minister Tony Blair in Martin McLaughlin,'Further doubt cast on US claims of genocide in Kosovo' (18 May 1999) <http://www.phdn.org/archives/www.ess.uwe.ac.uk/Kosovo/Kosovo-controversies53.html> accessed 20 July 2019.

[589] Simma (n 571) 7 (emphasis added).

As Matheson rightly sums up, the official explanation for NATO's intervention was,

> the failure of the FRY to comply with Security Council demands under Chapter VII; the danger of a humanitarian disaster in Kosovo; the inability of the Council to make a clear decision adequate to deal with that disaster; and the serious threat to peace and security in the region posed by Serb actions.[590]

What is thus observed, most profoundly, is NATO's hesitation to portray explicitly the legality of its use of force. This was also true of individual NATO states. According to Buchanan the USA Secretary of State, Madeleine Albright, spoke of NATO's use of force in Kosovo as a *first* important step towards establishing a new customary law, according to which humanitarian intervention can be permissible without a UNSC authorisation.[591] Yet, the USA officials and legal advisors had avoided all along any strong references to the legality of the use of force against Serbia, including on the grounds of a new doctrine.[592] Of course, this is not to suggest that the US allegations for unilateral humanitarian intervention had not pre- dated the Kosovo intervention.[593] But it is important that at the critical moment of the commencement of the air strikes, Clinton's statement concentrated on the targets of the intervention rather than arguing to justify its legality; namely, 'to save innocent lives and preserve peace, freedom, and stability in Europe' and stick by NATO's promises towards the Kosovo Albanians.[594] In the words of Wedgwood, 'In its explanation of the Kosovo military intervention, the United States has emphasized the goals of the NATO action, rather than the basis in international law for authorisation of the use of force'.[595] This attitude was repeated during the oral proceedings before the International Court of Justice, where the USA representatives opted for a rather general portrayal of their justifications; and abstained from adopting 'specific legal language or principles'.[596]

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[590] Matheson (n 572).
[591] Allen Buchanan, *Human Rights, Legitimacy and the Use of Force* (OUP 2009) 299.
[592] Matheson (n 572); Heike Krieger, *The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999* (Cambridge International Documents Series 2012) 413- 423.
[593] Jon Western. 'Sources of Humanitarian Intervention: Beliefs, Information, and Advocacy in the U.S. Decisions on Somalia and Bosnia' (2002) 26(4) International Security 112.
[594] President Clinton, 'Address to the Nation on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro)' (24 March 1999) <http://edition.cnn.com/ALLPOLITICS/stories/1999/03/25/clinton.transcript/> accessed 10 July 2019.
[595] Ruth Wedgwood, 'NATO's Campaign in Yugoslavia, Editorial Comments: NATO's Kosovo Intervention' (1999) 93 AJIL 828, 829.
[596] Kritsiotis (n 542) 343.

Germany on the other hand, through Foreign Minister Kinkel acknowledged that the interventions' legality matters, but he sought to justify NATO's action by suggesting that it was in conformity with the spirit and not the letter of the relevant UNSC resolutions. At first glance, there was a division amongst the German authorities as to the use of force in the case of Kosovo that was vastly portrayed in discussions at the German Parliament;[597] however, following NATO's decision to commence the air strikes, the German Chancellor Schröder stated:

> Tonight NATO has started air strikes against military targets in Yugoslavia. The Alliance wishes to put a stop to grave and systematic violations of human rights and prevent a humanitarian catastrophe (…).The international community of States cannot stand idly by while the human tragedy in that part of Europe is occurring. We do not wage a war, but we are called upon to enforce a peaceful solution in Kosovo and this includes using military means.[598]

In effect, the German government yielded a concept of 'emergency assistance in exceptional circumstances'. Yet, this justification was not based on any claim for an existing right of humanitarian intervention.[599]

The UK approach was similar to Germany's in that they also put emphasis on justifying the intervention's legality. In substance though, the UK observations on the humanitarian crisis and on the international community's responsibility to react differed. UK officials supported that there was in place 'legal authority for action to prevent humanitarian catastrophe'[600] and that according to the 'accepted principle that force may be used in extreme circumstances to avert a humanitarian disaster'[601] NATO's actions corresponded to current international law. Not only it was the first time that the alleged legality of humanitarian wars without any prior authorisation by the UNSC had been so articulately put forward in the UNSC by the government of a state involved in the intervention, but a same rhetoric was avoided by the rest of the Council's members.

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[597] Talmon (n 558); Simma (n 571) 1.
[598] See *Case Concerning the Legality of the Use of Force (Yugoslavia* v. *Germany)* (Preliminary Objections) (5 July 2000) para 2.26 <http://www.icj-cij.org/docket/files/108/10875.pdf> accessed 10 July 2019.
[599] Talmon (n 558) 71.
[600] Statement of Robin Cook, Foreign Secretary for the State, 1 February 1999 in Mark Littman, 'Opinion: Our illegal bombing in the Balkans' *The Times* (16 November 1999).
[601] Ibid Littman, Statement of George Robertson, Secretary of Defense for the State, 25 March 1999.

The disparity between the views of major NATO state actors points to the absence of a shared belief on the legality of unilateral humanitarian interventions at the time of Kosovo. Not all the States concerned felt that they were 'conforming to what amounts to a legal obligation'.[602] Moreover, the urge of both the UK and Germany to justify the intervention on legal grounds indicates that they were concerned with the potential doctrinalisation of the totally unrestrained use of force in international relations; that could be reversely used against their interests in the future.

Before NATO's intervention, its opponents' had attempted to raise public awareness as to the illegality of use of force in the given context and claimed that recognition of unilateral humanitarian intervention as a legal doctrine would amount to the opening of Pandora's box worldwide. The same arguments persisted following the commencement of the air strikes also. The Russian President, Boris Yeltsin had fully dismissed the legality of the military campaign, purporting it was open aggression.[603] For China it amounted to a 'flagrant violation of international law'.[604] Those views were reflected in the draft UNSC resolution of 25 March 1999 submitted by the Russian Federation, Belarus and India that was demanding the immediate cessation of the use of force against the Federal Republic of Yugoslavia.[605] The draft resolution met the intransigence of twelve member states (except the Russian Federation, China and Namibia). Still, the refusal of the cessation of the use of force could not be considered in itself substantial evidence of a belief that either the unilateral military operation of NATO or unilateral humanitarian interventions in general were legal.

Furthermore, the lengthy discussions on the alleged legality of humanitarian intervention during the 54th session of the UNGA, a few months after NATO's intervention in Kosovo, reveal that this was far from recognised at the time. In his report to the UNGA in light of its 54th session, though underlining that the response to humanitarian crises is a challenge, the Secretary-General of the UN declared that military actions in the absence of UNSC authorisation 'threaten the very core of the international security system founded on the

[602] *North Sea Continental Shelf* cases (n 556) para 77.
[603] 'Russia Condemns NATO at UN' *BBC News* (25 March 1999) <http://news.bbc.co.uk/2/hi/europe/303127.stm> accessed 12 July 2019.
[604] Michael Binyon, 'Strikes condemned by third world' *The Times* (26 March 1999) 6.
[605] UNSC Draft Res Belarus, India and Russian Federation (26 March 1999) UN Doc S/1999/328.

Charter of the United Nations'.[606] He stressed that 'Only the Charter provides a universally accepted legal basis for the use of force'.[607] To add, that the then recent practice of peace enforcement, except for the active role of regional organisations, disclosed how crucial it is that regional security operations be authorised by the UNSC 'if the legal basis of the international security system is to be maintained'.[608] In his later interventions during the same session, he insisted on declining from suggesting the potential legality of unilateral military interventions, whilst leaving open the issue of re-defining 'threats' against the international peace and security to include the protection of civilians 'from wholesale slaughter'.[609]

Throughout the session, States' lacked consensus, to a lesser extent on the right of humanitarian intervention following a UNSC authorisation, but much more on the legality of unauthorised humanitarian interventions. Their divergent views reveal that no customary law could have been in place at the time it was raised neither in the immediate aftermath of NATO's intervention. Some states raised concerns as to whether humanitarian intervention was lawful even if mandated by the UNSC. China's rhetoric against 'human rights taking precedence over sovereignty'[610] or over the principle of non-interference in the internal affairs of states,[611] can only be interpreted as a position against humanitarian intervention overall. Iraq,[612] Egypt[613] and Algeria[614] rejected the lawfulness of humanitarian intervention overall quite articulately. Russia underlined the unlawfulness of unilateral humanitarian interventions,[615] whilst acknowledging that the criteria and legal framework for military measures pursuant to the Charter, 'including in cases of humanitarian emergencies' should be jointly determined.[616] Canada also suggested that humanitarian intervention by the UNSC should be regulated through the setting of criteria[617] and Belgium claimed that article 42 is the legal basis 'to deal with

[606] Report of the Secretary- General, 'On the work of the Organisation' (31 August 1999) UN Doc A/54/1 Supplement No1, para 66.
[607] Ibid.
[608] Ibid para 112.
[609] UNGA 54th session (20 September 1999) UN Doc A/54/PV.4, 4.
[610] UNGA 54th session (22 September 1999) UN Doc A/54/PV.8, 16.
[611] Ibid.
[612] UNGA 54th session (7 October 1999) UN Doc A/54/PV.29, 15- 16.
[613] Ibid 16- 17.
[614] UNGA 54th session (8 October 1999) UN Doc A/54/PV.32, 16.
[615] UNGA 54th session (21 September 1999) UN Doc A/54/PV.6, 14.
[616] UNGA 54th Session (n 612) 1- 2.
[617] UNGA 54th session (23 September 1999) A/54/PV.10, 17- 18.

massive violations of human rights'[618] but not without the Council's approval. Burkina Faso underlined the imperative requirement of the UN's mandate for any military intervention[619] and Malaysia,[620] Moldova[621] and Pakistan[622] voiced their consideration of authorised humanitarian intervention whilst declaring the unilateral humanitarian intervention as unacceptable. Germany opted to justify the humanitarian intervention in Kosovo, whilst noting that in general its practice outside the UN system could prove problematic.[623] Sweden stepped beyond that, by supporting the assessment of the unilateral humanitarian intervention on a case- by- case basis when the UNSC is paralysed due to a veto or its threat.[624] South Africa was among the states which underlined the need of discussing more the doctrine of humanitarian intervention- without distinguishing the authorised from the unilateral one though.[625] Despite its lengthy discussion, the absence of any mentioning of humanitarian intervention- either unilateral or mandated- in the resolutions adopted following the 54th session of the UNGA, was another indication of the unsettled status of the alleged doctrine at the time.

The ICJ was equally hesitant in pronouncing that NATO's intervention was justified under international law, including as humanitarian intervention. Despite its rejection of the Yugoslavian request for the indication of provisional measures submitted on 29 April 1999, in the *Legality of Use of Force* cases, the ICJ declared itself overwhelmingly alarmed by the use of force in Yugoslavia since 'under the present circumstances such use raises very serious issues of international law'.[626]Additionally, the Court's pointing to the special responsibilities of the UNSC under Chapter VII of the UN Charter regarding disputes giving rise to threats to the peace, its breaches or acts of aggression is understood not only as a reminder of the Council's responsibilities but also as a reiteration of the recognised legal framework for their settlement.[627]

[618] UNGA 54th session (25 September 1999) A/54/PV.14, 17.
[619] Ibid 13.
[620] UNGA 54th session (n 614) 10- 11.
[621] Ibid 17.
[622] Ibid 18.
[623] UNGA 54th session (n 612) 12.
[624] UNGA 54th session (21 September 1999) UN Doc A/54/PV.7, 32.
[625] UNGA 54th session (n 612) 20- 21.
[626] *Case Concerning the Legality of the Use of Force (Yugoslavia v. United States of America)* (Provisional Measures) (1999) ICJ Rep 922, para 16.
[627] Ibid para 33.

4.3. The academic debate in the midst of Kosovo

Whether generality of state practice and widespread belief in the legality of humanitarian intervention were present at the time of NATO's intervention, thus suggesting the existence of a new norm has been the object of academic debate. Whereas academic writings are portrayed among the sources of international law,[628] Greenwood is correct that their significance lies in that, they

> may also be a persuasive guide to the content of international law but they are not themselves creative of law and there is a danger in taking an isolated passage from a book or article and assuming without more that it accurately reflects the content of international law.[629]

Concerning the legality of the Kosovo intervention, its legitimacy or the necessity and proportionality of the use of force by NATO, the convictions of scholars vary. Irrespective of their conclusions though, they all consider the intervention in Kosovo as the most significant exercise of unilateralism during the post-Charter era.

The major traits of scholarly opinion on NATO's enforcement action in Kosovo could be categorised to five main propositions. More specifically to (a) that this was a totally illegal operation and its perpetrators had not made any serious attempts to justify it, or even if they had offered some excuses those were legally void; (b) that the UN themselves had tacitly authorised the intervention, or legalised it ex post facto; (c) that a norm of unilateral humanitarian intervention had already found its place in the corpus of customary international law and henceforth the use of force by NATO was legal; (d) that claims of legality are rejected but the intervention's legitimacy is upheld since the humanitarian circumstances in that particular occasion justified the intervention as an exception; and (e) that Kosovo marked the beginning for the actual development of a new rule.

The last proposition, explained through the growing universal concern for the respect of human rights as opposed to arguments for state sovereignty finds support in the work of Cassese. In referring to Kosovo, he suggests that despite the mere fact that the intervention was a grave illegality, it constitutes an important precedent. As he explains, following some strict preconditions 'a customary rule may emerge which would

[628] ICJ Statute, article 38(1)(d).
[629] Christopher Greenwood, 'Sources of International Law: An Introduction' (2008) <http://legal.un.org/avl/pdf/ls/Greenwood_outline.pdf> accessed 12 July 2019.

legitimise the use of force by a group of states in the absence of prior authorisation by the Security Council'.[630] Similarly Louis Henkin, considers that what happened in Kosovo could open the way for some 'change in the law, part of the quest for developing "a form of collective intervention" beyond a veto-bound Security Council'.[631]

Another leading work, published soon after the use of force in Kosovo and which has already been quoted, of Bruno Simma, seems to propagate in favour of the rightfulness of the NATO action whilst recognising that it does fail the test of legality.[632] Thomas Franck, whilst exposing some arguments in support of the finding that in strict legal terms the intervention on this occasion was unlawful, suggests that the option of helping whenever possible should be put to the microscope; 'put in lawyers' terms, it is important not to confuse what the law in some limited circumstances may condone or excuse with what is required by law in every circumstance'.[633]

Christopher Greenwood's views on the other hand, representing the minority of the scholarly opinion favour the actual legality of humanitarian intervention under modern customary international law during NATO's intervention.[634] More specifically, he argues that the use of force in Kosovo was 'a legitimate exercise of the right of humanitarian intervention (…) consistent with the relevant Security Council resolutions', thus pointing to the presence of a tacit authorisation also.[635]

In the Memorandum on the International Law Aspects concerning the Kosovo Crisis Inquiry, prepared after the request of the UK Foreign Affairs Committee in July 1999, Ian Brownlie and CJ Apperley,[636] provide a thorough analysis which concludes that 'the legal basis of the action, as presented by the United Kingdom and other NATO States, was at no stage adequately articulated'.[637] Additionally, although historically the UK

[630] Antonio Cassese, 'Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 EJIL 23.
[631] Louis Henkin, 'Kosovo and the Law of "Humanitarian Intervention"' (1999) 93 AJIL 824, 828.
[632] Simma (n 571) 7.
[633] Franck (n 546) 173.
[634] Christopher Greenwood, 'International Law and the NATO intervention in Kosovo' (2000) 49 ICLQ 926.
[635] Ibid 934.
[636] Ian Brownlie and CJ Apperley, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects' (2000) 49 ICLQ 878.
[637] Ibid 904.

government has been the most firm advocate of humanitarian intervention, other international actors- as already discussed- refrained from adopting the same stance. Brownlie and Apperley support that humanitarian intervention 'has no place either in the United Nations Charter or in customary international law'.[638] Brownlie's opinion in the Memorandum reflects his prior analyses of humanitarian intervention. Concerning unilateral humanitarian interventions, Brownlie has been among the strongest supporters of the view that the sources of international law, over a long period of time, have failed to provide it with a sufficient legal basis; and among the academics who underline that the majority of states and international lawyers are against it. Within the context of the Kosovo debate, Brownlie disagreed with the allegation that the state practice reveals that 'a modern customary law of humanitarian intervention is beginning to take form which may condone action to protect lives'.[639] According to Brownlie, Franck's opinion was 'a conditional opinion on the subject'[640] as he himself was recognising that the state practice and the opinio juris required in order to accept the establishment of unilateral humanitarian intervention as a legal right had to be more substantial than the existing ones. Undeniably, Franck was correct in noting that,

> the instances in which a state or a group of states has intervened for humanitarian purposes without incurring significant opposition from the international system may indicate a certain willingness on the part of that community to brook some violation of the law in instances of clearly demonstrated necessity.[641]

Yet, 'willingness' to tolerate the law in some instances is in itself insufficient to provide the required evidence for determining a change of customary law. Not to say, that in this statement Franck anyway admits that such practices are not in conformity with the general law. This view is also reflected in Joyner's analysis. As he stressed, regardless of claims supporting the legality of the alleged doctrine in various occasions, 'the lack in all these instances of clear reliance on a legal right of humanitarian intervention to legitimate the

[638] Ibid. The UK 1986 Policy Document No 148 (n 554) 619 had already invigorated that, albeit at its best, humanitarian intervention 'cannot be said to be unambiguously illegal'.
[639] Ibid 891.
[640] Ian Brownlie, 'Memorandum Submitted at the Request of the Foreign Affairs Committee' (letter dated 28 July 1999) para 73 <http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmfaff/28/28ap03.htm> accessed 12 July 2019.
[641] Franck (n 546) 72.

use of force against another state manifests a fatal deficiency of relevant opinio juris by the intervening states involved'.[642]

Murphy's analysis, prior to the Kosovo intervention, provides similar indications. He also notes that the states involved in the cases that are said to constitute evidence of unilateral humanitarian intervention, had not sought to justify their interventions by claiming that they have a right to act without a UNSC authorisation only.[643] An additional ground on which Murphy supported the view that unilateral humanitarian interventions had not risen to the status of customary law was that previous state practice followed implicit authorisations. He considered that since some of its proponents relied on prior findings of the UNSC regarding the existence of humanitarian necessities, to regard those cases as state practice supporting the existence of a new customary law of fully unauthorised humanitarian interventions, would anyway be incorrect.[644] Thus, in Murphy's view, if we accept that unilateralism cannot be assigned with a status of legality because the relevant state practice is related to implicit authorisations by the UNSC, the immediate conclusion would be that unilateralism cannot be founded upon the existing state practice. Still though, Murphy's argument is not convincing. The legal recognition of implicit authorisations of the UNSC, as already discussed in this work, remains in essence a non-authorisation. Chinkin's observations, during the discussion on Kosovo confirm this. Chinkin stated that 'the argument that omission is an implied authorisation is flawed'[645] and that an ex post facto authorisation was not a substitute for legality at the time of NATO's enforcement action.[646]

Inevitably, the factual phenomenon described by Franck[647] for some scholars has been perceived as sufficient state practice and shaped their arguments in the case of Kosovo.[648] Contrary to the analysis undertaken in the previous parts of this chapter, the Liberian and Iraqi 1991 interventions were seen as successful breaks from the original legality

[642] Daniel H Joyner, 'The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm' (2002) 13 EJIL 597.
[643] Sean D Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*, vol 21 (Procedural Aspects of International Law Series PENN 1996) 363.
[644] Ibid.
[645] Chinkin (n 526) 912.
[646] Ibid 913- 916.
[647] Thomas Franck, 'Lessons of Kosovo' (1999) 93 AJIL 857- 860.
[648] Greenwood, 'International Law and the NATO intervention in Kosovo' (n 634).

framework and evidence for the recognition of a new customary law rule; additional to the explicit exceptions of the UN Charter's general prohibition to use force. The other possible argument, that at the time of the incident and to serve this particular intervention a new doctrine was instantly created, is even less convincing; since the distinctive element of this approach is the acknowledgment of the absence of enduring state practice. This is reinforced by the ILC's 2018 Conclusions on the 'Identification of Customary International Law'. Despite the NSCS dictum that 'the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law' it rightly prescribed that 'there is no such thing as "instant custom"'.[649]

To a great extent the academic debate in light of NATO's unilateral intervention in Kosovo mirrors the variant convictions of NATO, its member states and of other actors on its legality and the normative status of humanitarian intervention under CIL. What the scholarly debate reinforces is not the lack of universal affirmation of a newly formed rule at Kosovo, but the absence of even a general acceptance of its legality. This becomes more obvious in the works of pro-humanitarian intervention scholars, whose arguments revolve around some limited circumstances within which the law must condone or excuse such practice.[650]

Furthermore, the views of the scholars cited above, support that it would be extremely farfetched to support the instant replacement of an existing customary rule of *jus cogens* by a new one. Since the justification of humanitarian necessity could not be accepted as sufficient legal ground in itself to have a UNSC mandate to use force, not even as part of the customary law current to the events, it would be unsubstantiated to allege that the unilateral humanitarian intervention was. Nevertheless, what was generally accepted in light of NATO's operational conduct and the steady proliferation of the humanitarian intervention rational discussed in previous sections-[651] especially when compared to prior

[649] *North Sea Continental Shelf* cases (n 556) para 74; ILC Report 2018 (n 521) Conclusion 8(2) and Commentary (9) thereto.
[650] Franck, *Recourse to Force* (n 546) 173.
[651] Inevitably, establishing that an emerging legal right does not require the highest possible degree of opinio juris. Rossana Deplano, 'Assessing the Role of Resolutions in the ILC Draft Conclusions on Identification of Customary International Law: Substantive and Methodological Issues' (2017) University of Leicester School of Law Research Paper No 17-05 <https://ssrn.com/abstract=2987931> accessed 17 February 2019 at 6; James Crawford and Thomas Viles, 'International Law on a Given Day', reproduced in James Crawford, International Law as an Open System (Cameron May 2002) 69- 94.

incidents- is that it marked the beginning of an emerging normative process the legal fate of which remained to be seen. Despite Chinkin's serious doubts as to whether NATO's actions in Kosovo would have satisfied them, even in light of a promising future for the forceful protection of human rights.[652]

4.4. NATO and multilateral engagement in Libya

The internal crisis which erupted in Libya in February 2011, followed revolts in other Arab countries. The violent clashes between Gaddafi's security forces and opposition forces which broke out in several cities of the country, led to mass violence that victimized the civilian population of the country.[653] The deteriorating humanitarian situation led to numerous international reactions reminding the Libyan government of its R2P its population. Following a relevant press statement issued on 22 February 2011 by the Special Advisers on the Prevention of Genocide and the Responsibility to Protect and resolution S-15/2 of the Human Rights Council, both underlining Libya's R2P, the UNSC on 26 February adopted Resolution 1970 and the UNGA on 1 March decided unanimously the suspension of Libya from the Human Rights Council. Resolution 1970 was adopted unanimously and in view of pressurizing Libya to implement its R2P its population, it adopted non- military measures.

With resolution 1973 which followed sixteen days later, the UNSC determined that the situation in Libya continued to constitute a threat to international peace and security.[654] Thus, with the aim of protecting civilians and civilian populated areas 'under threat of attack in the Libyan Arab Jamahiriya, including Benghazi', it proceeded with the adoption of measures under Chapter VII.[655] Resolution 1973 was approved by vote of 10 in favour and 5 abstentions.[656] The issuing of the aforesaid resolution is a first implementation of

[652] Chinkin (n 526) 924.
[653] 'Libya profile – Timeline' *BBC News* (10 August 2016) <http://www.bbc.com/news/world-africa-13755445> accessed 12 July 2019.
[654] UNSC Res 1973 (n 522) 2.
[655] Ibid para 4.
[656] Russia, China, Germany, India and Brazil abstained. For an account of the respective Security Council meeting see SC/10200 (n 522).

the R2P military aspect, with the profound involvement of regional organisations[657] and incorporated within a binding UNSC resolution under Chapter VII.[658]

4.4.1. UNSC Resolution 1973 (2011) and the use of force

The two main elements in the UNSC Resolution 1973 concerned the authorisation of use of force and the establishment of no- fly zones in Libya. Article 4 of the resolution, authorises the Member States,

> acting nationally or through regional organisations or arrangements, and acting in cooperation with the Secretary-General, to take *all necessary measures*, (…), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while *excluding a foreign occupation force of any form* on any part of Libyan territory (…).

In Libya, by 'words and actions' the international organisation demonstrated not only 'that human protection is a defining purpose of the United Nations in the twenty- first century',[659] but that it welcomed regional contribution towards its accomplishment. In the preamble of resolution 1973, the UNSC determined that the situation in Libya continued to constitute a threat to international peace and security. To this end, the resolution recalls the condemnations of serious human rights violations by the League of Arab States, the African Union and the Secretary General of the Organisation of the Islamic Conference; as well as respective communiques of the said organisations. Undoubtedly, regional organisations played a significant role in shaping the international response to what was happening in Libya, which culminated with the adoption of resolution 1973.

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[657] The UNSC had already adopted a series of measures in regards to the Libyan conflict through UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970.

[658] See the comment of Secretary-General in his report 'The role of regional and sub-regional arrangements in implementing the responsibility to protect' (27 June 2011) UN Doc A/65/877- S2011/393, para 30.

[659] Secretary-General, '"Responsibility to Protect" Came of Age in 2011 Secretary-General Tells Conference, Stressing Need to Prevent Conflict Before it Breaks Out' (18 January 2012) UN Doc SG/SM/14068. Simon Chesterman 'R2P and Humanitarian Intervention: From Apology to Utopia and Back Again' forthcoming in Robin Geib and Nils Melzer (eds), *The Oxford Handbook on the International Law of Global Security* (OUP) <https://ssrn.com/abstract=3224116> accessed 18 June 2019 at 8.

Before 17 March 2011, and after having suspended Libya from participation to its procedures, the League of Arab States issued initially a statement[660] and later on a unanimous resolution to condemn the atrocities in Libya and suggest the establishment of no- fly zones to protect civilians.[661] On a similar note, the EU condemned forcefully the perpetration of international crimes in Libya and declared its readiness to consider all necessary options, through working with partners such as the UN and other regional organisations.[662] Reports reveal that the imposition of no- fly zones was also contemplated at the European Council, particularly by France and the UK.[663] Needless to say, that the influence of the League of Arab States and the EU is reflected in the actual text of resolution 1973, both in relation to the imposition of a no- fly zone and the adoption of all necessary means to protect civilians.

Regarding the alleged contribution of the African Union, at first instance, one could maintain that whilst international responses for Libya were being crafted it was fully neglected. That is mainly because the political condemnation of the atrocities conducted and the establishment of an ad hoc committee on Libya,[664] were less proactive than the positions of the EU and the League of Arab States. However, the impact of the African Union's position on the UNSC's decision of 17 March 2011 is evident in two specific ways. Firstly, in the consideration of the atrocities conducted in Libya as falling within the R2P context and amounting to a threat for peace and security in the region. The communique of 10 March,

> Expresses AU's deep concern at the prevailing situation in Libya, which poses a serious *threat to peace and security* in that country and in the

[660] Sarah El Deeb, 'Arabs consider a no-fly zone over Libya' *Washington Post* (2 March 2011) <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/02/AR2011030202702.html> accessed 18 February 2016.
[661] League of Arab States Res No 7360 (12 March 2011) in UNSC 'Letter dated 14 March 2011 from the Permanent Observer of the League of Arab States to the UN addressed to the President of the SC' (14 March 2011) UN Doc S/2011/137; Richard Leiby and Scott Wilson, 'Arab League's backing of no-fly zone over Libya ramps up pressure on West' *Washington Post* (12 March 2011) <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/12/AR2011031200900.html> accessed 18 February 2016.
[662] European Council, Remarks by President Herman Van Rompuy at the press conference following the extraordinary European Council on EU Southern Neighbourhood and Libya (11 March 2011) PCE 065/11 <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/119779.pdf> accessed on 20 July 2019.
[663] 'Britain, France ramp up pressure at Libya crisis summit' *Euractiv* (11 March 2011) <http://www.eubusiness.com/news-eu/libya-unrest-nato.906> accessed 20 July 2019.
[664] AU PSC Communiqué of 265th meeting (10 March 2011) AU Doc PSC/PR/Comm.2(CCLXV) para 6.

> region as a whole, as well as to the *safety and dignity* of Libyans and of the migrant workers, notably the African ones, living in Libya. Council is equally deeply concerned with the resulting *humanitarian situation*;[665]

Secondly, despite the fact that resolution 1973 authorises the use of military force contrary to the AU's rejection of 'any foreign military intervention, whatever its form',[666] at the same time it expressly prohibits '*a foreign occupation force of any form* on any part of Libyan territory'.[667] This could be seen as an effort to mitigate the objections, albeit partly, of the opponents of military measures. Following the adoption of the resolution 1973, the AU provided its support to the UNSC decision concerning the no- fly zones (statement on 23 March),[668] but accused NATO of exceeding its mandate.[669] The stance of the AU is rather peculiar. Especially if one considers that its constitutive instruments prescribe that three of the four atrocity crimes corresponding to the R2P concept warrant the right of the Union to intervene in a Member State and resolution 1973 had recognised that the widespread and systematic attacks in Libya 'against the civilian population may amount to crimes against humanity'.[670] Yet, AU's attitude complies with the general practice of the regional organisation, according to which the said provision has never been implemented.[671]

4.4.2. NATO's operational practice following the UNSC mandate

Following the adoption of resolution 1973, on 31 March 2011 NATO took the lead in conducting airstrikes that have been criticised as overstepping the mandate of the UNSC.[672] The scope of the UNSC mandate, was broad at its genesis. Paragraph 4 specifically instructs regional organisations, among other international actors, to undertake the responsibility through all necessary means not only to protect civilians but

[665] Ibid para 3 (emphasis added).
[666] Ibid para 6.
[667] UNSC Res 1973 (n 522) article 4.
[668] AU PSC Communiqué of 268th meeting (23 March 2011) AU Doc PSC/PR/BR.1(CCLXVIII) 2.
[669] AU Assembly, 'Decision on the Peaceful Resolution of the Libyan crisis' (25 May 2011) AU Doc EXT/ASSEMBLY/AU/DEC/(01.2011) para 5.
[670] According to AU Constitutive Act, article 4(h) regional unilateral intervention may be decided in response to war crimes, genocide and crimes against humanity; Carsten Stahn, 'Notes and Comments, Responsibility to Protect: Political rhetoric or Emerging Legal Norm?' (2007) 101 AJIL 99, 114.
[671] Eki Yemisi Omorogbe, 'The African Union, Responsibility to Protect and the Libyan Crisis' (2012) 59 NILR 141, 158.
[672] Lou Pingeot and Wolfgang Obenland, *In whose name? A critical view on the Responsibility to Protect* (Global Policy Forum and Rosa Luxemburg Stiftung- NY Office 2014) 21.

also civilian populated areas under the threat of attack. Whereas this purpose goes beyond the accepted scope of R2P, nonetheless it is acknowledged that the UNSC authorised the use of force against military targets which could potentially threaten civilian areas.[673] The main question though is whether NATO's airstrikes served even the broad purpose of the UNSC's authorisation to use force or exceeded its mandate; and maybe assumed its own campaign.

Bearing in mind that prior unilateral regional efforts to contain crises with humanitarian consequences had not revealed until then any widespread acceptance of a regional 'right of authority' in using force, NATO's operations had to comply with the scope of resolution 1973. Through its mandate prescribed in article 4 of resolution 1973, the UNSC defined that what rendered the use of force necessary was the protection of civilians. Additionally, under the R2P context, the use of force is approached as a necessary measure of last resort. Therefore, when exercised, it must strictly adhere to the humanitarian causes it seeks to address. This is the framework within which the proportionality of NATO's operations and ultimately their legality are questioned.

In the absence of any authoritative definition, which has been characterised an elusive concept,[674] ICISS provided some benchmarks facilitating the assessment of proportionality in specific situations. It sets that,

> The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the humanitarian objective in question. The means have to be commensurate with the ends, and in line with the magnitude of the original provocation. The effect on the political system of the country targeted should be limited, again, to what is strictly necessary to accomplish the purpose of the intervention.[675]

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[673] Dapo Akande, 'What does UN Security Council Resolution 1973 permit?' (2011) EJIL: Talk! <http://www.ejiltalk.org/what-does-un-security-council-resolution-1973-permit/> accessed 10 July 2019.
[674] Theresa Reinold, 'Africa's Emerging Regional Security Culture and the Intervention in Libya' in Aidan Hehir and Robert W Murray (eds), *Libya, the Responsibility to Protect and the Future of Humanitarian Intervention* (Palgrave Macmillan 2013) 91.
[675] ICISS, *The Responsibility to Protect* (International Development Research Centre- Canada 2001) <https://www.idrc.ca/en/book/responsibility-protect-report-international-commission-intervention-and-state-sovereignty> at 37 accessed 16 December 2018.

It is further asserted, that 'since military intervention involves a form of military action significantly more narrowly focused and targeted than all out warfighting' the strict observance of all the rules of international humanitarian law is paramount; without excluding that even higher standards might be appropriate.[676]

As a matter of fact, the Alliance's air strikes were not limited to military targets allegedly posing a threat to the civilian population. In fact, NATO's bombardments led to the reported killing of Gaddafi's son Saif al-Arab and of three of his grandchildren and the destruction of television stations.[677] Additionally, the Human Rights Watch reported in 2012 that in its investigation of eight NATO air strikes hitting residential homes in which 28 men, 24 children, and 20 women lost their lives and dozens of other civilians were wounded, the indications of military presence where substantial with regards to only one incident.[678] The report therefore concludes that those incidents raise sufficient questions about the lawfulness of the strikes.[679] Nonetheless, resolution 1973 could not have provided any international actor with the right to ignore the Geneva Conventions under the pretext of 'civilian protection'. All the more, even when the use of force remains unjustified under international law 'The 1949 Geneva Red Cross Conventions and the First 1977 Protocol Additional to the Geneva Conventions that provide the legal regime for the conduct of international armed conflict are applicable'.[680] Overall, the scope of the NATO's air strikes cannot be justified as being commensurate with the ends of the R2P authorisation.

Moreover, NATO decided for the termination of its operations only following Gaddafi's death on 20 October 2011.[681] Whereas the duration of the air strikes might had been adequate, the timing of their termination reveals that the overthrow of the country's

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[676] Ibid.
[677] Alastair Jamieson, 'Col Gaddafi's youngest son "killed in Nato air strike"' *The Telegraph* (1 May 2011) <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8486158/Col-Gaddafis-youngest-son-killed-in-Nato-air-strike.html> accessed 20 July 2019; 'UN official deplores NATO attack on Libyan television station' UN News Center (8 August 2011) <http://www.un.org/apps/news/story.asp?NewsID=39255#.V-Nq9Pl96Uk> accessed 20 July 2019.
[678] Human Rights Watch, 'Unacknowledged Deaths Civilian Casualties in NATO's Air Campaign in Libya' (13 May 2012) <https://www.hrw.org/report/2012/05/13/unacknowledged-deaths/civilian-casualties-natos-air-campaign-libya> accessed 15 July 2019.
[679] Ibid.
[680] Chinkin (n 526) 921.
[681] 'NATO and Libya (Archived)' (last updated 9 November 2015) <http://www.nato.int/cps/en/natohq/topics_71652.htm> accessed 10 July 2019.

regime was another fundamental cause behind NATO's operations. That was anyway proclaimed in an earlier common statement of Obama, Cameron and Sarkozy, declaring that 'so long as Qaddafi is in power, NATO must maintain its operations so that civilians remain protected and the pressure on the regime builds'.[682] Hence, by using the R2P authorisation to use force not only to protect civilians but to also overthrow Gaddafi and effect a regime change, NATO overstepped in another way the 1973 mandate. Of course, even if regional unilateralism under the R2P was recognised, the aim of regime change would be incompatible with the cause of the R2P which is to end crimes stated to fall within its scope. Of course, one could argue that the only means for putting an end to international crimes in Libya, would be through the overthrowing of Gaddafi. But according to the UNSC Resolution and the R2P basis that was used, 'the ceasing of attacks on civilians'[683] should be the only objective and reports that rebel forces should also be held accountable for atrocities prohibited under the R2P umbrella and international criminal law should not had been ignored.[684] Instead, the rhetoric advanced reveals that the 'ultimate goal'[685] was to 'convince Gaddafi and his regime to step down from power'.[686]

Except for NATO, that was eventually criticised for overstepping the mandate of resolution 1973, other regional organisations with constitutional and tangible capabilities for a military response, namely the EU and AU, abstained from any practice which could impede the primacy of the UNSC in setting the parameters for military action under the R2P.

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[682] Barack Obama, David Cameron and Nicolas Sarkozy, 'Libya's Pathway to Peace' *New York Times* (14 April 2011) <http://www.nytimes.com/2011/04/15/opinion/15iht-edlibya15.html?_r=0> accessed 20 July 2019.
[683] Ben Smith and Arabella Thorp, 'Interpretation of Security Council Resolution 1973 on Libya' (6 April 2011) UK House of Commons International Affairs and Defence Section SN/IA/5916, 7.
[684] Ruth Sherlock, 'Libya, exodus from Sirte as thousands fell rebel offensive' *The Telegraph* (28 September 2011) <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8794617/Libya-exodus-from-Sirte-as-thousands-flee-rebel-offensive.html> accessed 20 July 2019.
[685] Patrick Wintour and Ewen MacAskill, 'Is Muammar Gaddafi a target? PM and military split over war aims' *The Guardian* International Edition (22 March 2011) <http://www.theguardian.com/world/2011/mar/21/muammar-gaddafi-david-cameron-libya> accessed 20 July 2019.
[686] Ibid.

The EU had considered the use of force in implementing a responsibility to protect civilians as an appropriate response to what was happening in Libya, but still on the pre-condition of a UN decision.[687] Even after resolution 1973 was adopted, the EU Council's decision to establish EUFOR Libya of 1 April 2011 provided that it would only deploy after a specific request of the UN's Office for the Coordination of Humanitarian Affairs.[688] The first reaction of the League of Arab States was also short of any military initiative. In response to the uprisings in Libya and atrocities committed by the Libyan security forces it imposed a suspension to Libya's participation.[689] Its following call for the imposition of a no- fly zone to protect civilians, was ultimately directed towards the UNSC.[690] The African Union, despite being the only regional organisation whose constitutive instruments provided explicitly for an R2P military intervention, was extremely reluctant to undertake such action and even to impose sanctions.[691] In fact, the implementation of an R2P military intervention 'whatever its form',[692] was not anticipated by the African Union. Considering that this was mainly due to political reasons- the ties of the Union with Gaddafi's regime- the AU's stance as regards the Libyan conflict is not truly informative of its overall perception of the potential unilateral regional use of force in R2P situations. On the one hand article 4(h) of the Constitutive Act sets the ground for such action, whereas 'In practice, the AU has not to date sought to act outside the UN framework'.[693]

4.5. Qualitative criteria: the effect of discrepancy between practice and 'rule'

The consideration of formulated criteria that could obstruct the politicisation of humanitarian intervention, in light of Kosovo's intervention, is an affirmative indication that at the time something was emerging and therefore had to be better articulated. Their

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[687] European Parliament Resolution (10 March 2011), 'Southern Neighbourhood, and Libya in particular, including humanitarian aspects' Doc P7_TA(2011)0095, para 10 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0095+0+DOC+XML+V0//EN> accessed 20 July 2019; 'Britain, France ramp up pressure at Libya crisis summit' *Euractiv* (n 642).

[688] Council Decision 2011/210/CFSP (1 April 2011) on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya) [2011] OJ L 89/17 (Corrigendum [2011] OJ L 203/36) para 5.

[689] 'Libya Barred from Arab League Meetings', *The Sydney Morning Herald* (23 February 2011) <http://www.smh.com.au/breaking-news-world/libya-barred-from-arab-league-meetings-20110223-1b4cr.html> accessed 20 July 2019.

[690] League of Arab States Res No 7360 (n 661).

[691] Omorogbe (n 671).

[692] AU PSC Communiqué of 265th meeting (n 664).

[693] Omorogbe (n 671).

submissive discussion as opposed to their categorical negation, even by opponents of an alleged new doctrine in light of Kosovo, implies that they themselves were uncertain about the legal potential of the alleged doctrine. At the same time, the satisfaction of specific qualitative criteria has been presented as one of the main justifications in support of military responses to resolve grave humanitarian catastrophes and as an effort to counter negative critic about biased interventions. This is evident in their formulation by ICISS in the aftermath of Kosovo.[694]

Nonetheless, the operational conduct of NATO in both Kosovo and Libya reveals that such criteria fall within a zone of discretion, and potentially of political bias. As it has been suggested standards such as 'proportionality, and necessity are so broad that they are routinely invoked to refer to the zone of *discretion* rather than limitation'.[695] The commensurate effect of this, is desist in the establishment of opinio juris in support of a new CIL rule on regional humanitarian intervention.[696] This is illustrated indeed in examining the most prominent criteria set forth: 'i) a gross violation of human rights occurring in a targeted State (…) ii) the UN is unable or unwilling to act (…) iii) an overwhelming necessity to act (…) iv) the intervention must be proportionate'.[697] Since the criterion (ii) concerning the stance of the UN has been discussed above, the other three remain to be examined.

Concerning the gross violation of human rights in Kosovo, it had been witnessed several years before the intervention. As the conflict was escalating, international interest on the worsening situation in Kosovo increased and this is reflected in the issuing of relevant statements and reports by the UN, the EU and NGOs. Admittedly, both sides to the conflict had been criticised for the conduct of grave hostilities. However, incidents such as the massacre at Račak (January 1999) and the publicity given to it, proved incremental for the steering of part of the public opinion in support of NATO's intentions that was already threatening to intervene militarily for some months.

[694] ICISS Report (n 675). For a more recent articulation of criteria for unauthorised humanitarian intervention by ROs see Paul R Williams and Sophie Pearlman, 'Use of Force in Humanitarian Crises: Addressing the Limitations of UN Security Council Authorization' (2019) 51 CaseWResJIL 211.
[695] Kennedy (n 527). Also Rajan Menon, *The conceit of Humanitarian Intervention* (OUP 2016) 178.
[696] Ibid.
[697] Chinkin (n 526) 920- 921.

Having said that, was the implementation of coercive measures by NATO against Serbia, one of those instances of proven necessity[698] meriting the immediate response of the international community in violation of the general rule to respect a state's sovereignty? Taking into account that military interventions shall be a choice of last resort, the early discussion of military alternatives and the carrying out of peace negotiations under the explicit threat of a NATO intervention, cast doubt on the genuine nature of the humanitarian necessity proclaimed.[699] This undermined the process but also led to scepticism as to the motivations of some of the international peace brokers. Orford for example is correct in problematising 'the extent to which the policies of international institutions themselves contribute to creating the conditions that lead to such crises' and Kaplan suggests that 'the goal in Kosovo was to limit Serbia's geographic influence and to ignite a chain of events that would lead to Milosevic's ouster'.[700] Moreover, it is reported that air strikes began with the intention to pressurize Milosevic in signing the peace agreement.[701] If NATO had abstained from fueling Serb mistrust the peace process prior to the intervention could have reached a positive outcome. On the contrary, Serb mistrust was enhanced both through NATO's threats for war and grave conditions in the peace accords providing for NATO's presence in Serbia.[702] The necessity of the intervention is also challenged due to the fact that the operations of NATO, in given situations such as the bombing of non- military targets had nothing to do with averting the suffering of Kosovo Albanians but rather imply different motivations.[703] Regarding the targeting of civilians and the question of necessity a comparison is easily drawn with the case of Libya. As already discussed, the air strikes were not limited to military targets allegedly posing a threat to the civilian population[704] and the overall necessity of the attacks which ultimately led to civilian casualties has strongly been challenged.[705]

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[698] Ibid.
[699] US Senate Republican Policy Committee, 'Bosnia II: The Clinton Administration Sets Course for NATO Intervention in Kosovo: Goals, Potential Costs, and Motives All Uncertain' (12 August 1999) <http://www.srpska-mreza.com/Kosovo/Bosnia-again.html> accessed 29 February 2016; also 'NATO's role in relation to the conflict in Kosovo' (n 539).
[700] Anne Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism' (1999) 10 EJIL 679, 681; Robert D Kaplan, 'Syria and the Limits of Comparison' *Stratfor* (28 August 2013) <https://www.stratfor.com/weekly/syria-and-limits-comparison> accessed 20 July 2019.
[701] David Rieff, 'What Bombs Can't Do' *New York Times* (25 March 1999) <http://www.nytimes.com/1999/03/25/opinion/what-bombs-can-t-do.html> accessed 20 July 2019.
[702] Ibid.
[703] '15 years on: Looking back at NATO's 'humanitarian' bombing of Yugoslavia' *Reuters* (24 March 2014) <https://www.rt.com/news/yugoslavia-kosovo-nato-bombing-705> accessed 18 December 2018.
[704] Jamieson (n 677); 'UN official deplores NATO attack on Libyan television station' (n 677).
[705] 'Unacknowledged Deaths Civilian Casualties in NATO's Air Campaign in Libya' (n 678).

Beyond necessity, another celebrated criterion is that of proportionality.[706] It is suggested that in light of testing their proportionality 'one cannot simply discount the value of human lives irrespective of their role in the conflict'.[707] That human rights concerns are at the centre of the notion of proportionality is the view adopted by the International Committee of Red Cross. It explicitly asserts that even where soldiers are concerned,

> It would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force. In such situation, the principles of military necessity and of humanity play an important role in determining the kind and degree of permissible force against legitimate military targets.[708]

Consequently, a high standard of caution with regards to the human rights of people in a conflict is at the centre of the proportionality's test. Thus, the interveners' actions in Kosovo would only be proportionate, if they were limited to the absolutely necessary measures for averting the humanitarian situation which formed the grounds for suggesting that the intervention was necessary. As Lowe emphasises the requirements of proportionality 'as a matter of international law constrain all uses of force'.[709] Furthermore, measures that defy the rules and principles of *jus in bello* cannot be justified as being absolutely necessary under any circumstances; as they are simply illegal.[710] This was also recognised by the ICISS report in 2001, according to which 'In the context of interventions undertaken for human protection purposes, the ROEs [*rules of engagement*] for a military intervention must reflect a stringent observance of international law, and international humanitarian law in particular'.[711]

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[706] Michael Newton and Larry May, *Proportionality in International Law* (OUP April 2014) 145.
[707] Ibid 148.
[708] ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> 82, accessed 20 July 2019.
[709] Vaughan Lowe, 'International Legal Issues Arising in the Kosovo Crisis' (2000) 49 ICLQ 934, 937.
[710] Chinkin (n 526) 921.
[711] ICISS Report (n 675) para 7.28 (explanation added).

The Human Rights Watch confirmed around 500 civilian deaths caused by NATO's operations,[712] whereas 'around 6,000 civilians were injured, including 2,700 children'.[713] Additionally, whereas according to the UNSC Resolution 1199, 230,000 people had been displaced prior to the intervention,[714] by the end of April 1999 'about 600,000 residents of Kosovo had become refugees; another 400,000 were displaced inside Kosovo'.[715] The bombardments' collateral damage consists of the destruction of approximately 300 schools, libraries and hospitals, of thousands of houses and of the ruining of about 90 historic and architectural monuments. Due to NATO's 'mistake' the Chinese embassy in Belgrade was also hit.[716] State television was also hit as well as bridges. Although the use of cluster bombs in Kosovo was not considered as a basis for holding NATO legally accountable, the same report of the ICTY and NGO research reveal that NATO's military practice has had severe and maybe long-lasting consequences to people's health and the environment.[717] All in all, apart from civilian casualties, there was mass destruction of Serbia's infrastructure.

Inevitably, the selection of targets was far beyond 'military' ones and the price of the intervention in 'collateral' human suffering excessive. Obviously, the result of this operation was to sink the region in more distress; and the international community in insurmountable debts. As anticipated, any kind of peaceful activity, as opposed to military interventions, to prevent or resolve the problem,

> would have had to be cheaper than the $46 billion the international community is estimated to have committed at the time of writing in

[712] Human Rights, Watch, 'Civilian Deaths in the NATO air campaigns' (February 2000) <www.hrw.org/sites/default/files/reports/natbm002.pdf> accessed 15 July 2019.
[713] 'Serbia marks 14th anniversary of NATO bombing' <http://www.b92.net/eng/news/society.php?yyyy=2013&mm=03&dd=24&nav_id=85330> accessed 20 July 2019.
[714] UNSC Res 1199 (n 543).
[715] 'Kosovar Refugees' *Migration News* (May 1999) <http://migration.ucdavis.edu/mn/more.php?id=1801> accessed 20 July 2019.
[716] '15 years on' (n 703).
[717] ICTY, 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia' (14 June 2000) paras 14- 27 <http://www.icty.org/x/file/Press/nato061300.pdf> accessed 20 July 2019; Amnesty International, '"Collateral damage" or unlawful killings? Violations of the Laws of War by NATO during Operation Allied Force' (5 June 2000) AI Index EUR 70/18/00 <https://www.amnesty.org/en/documents/EUR70/018/2000/en/> accessed 10 July 2019 at 21- 23.

> fighting the war [Kosovo- added] and following up with peacekeeping and reconstruction.[718]

Similar conclusions seem palpable regarding the activities of NATO in Libya. The proportionality of military enforcement is questioned in light of the numerous civilian losses[719] and by virtue of the conjuncture of circumstances at which the operation was eventually completed.[720] NATO was supposed to limit its operations in protecting the civilian population under attack. Nevertheless, the disproportionate use of force vis-à-vis the mandate of the UNSC is considered as the immediate consequence of its non-authorised goal to 'convince Gaddafi and his regime to step down from power'.[721] The rhetoric used indicates indeed that this was NATO's 'ultimate goal'[722] and that this was the primary objective NATO was determined to enforce.[723]

Whereas the disparity of NATO's operational conduct and of its consequences with the main criteria put forward regarding the humanitarian use of force does not rebut the assessment for an emerging new rule, the analysis above exposes some factual reservations regarding the resemblance of the alleged rule in real practice.[724] The discussion of Kosovo and Libya along the criteria envisioned for humanitarian intervention portends that the humanitarian causes are easily compromised; either because of pursuing the humanitarian causes irrespective of collateral casualties or because humanitarianism is the veil to achieve additional objectives and hence the humanitarian deterioration on the ground is neglected. Accepting 'the apparent necessity of trade-offs, of balancing harms, of accepting costs to achieve benefits, which now seems an inevitable part of getting anything done' effectively compromises the notion of 'humanitarian' use of force.[725] Learning from the violent excesses of power, as illustrated above, the institutionalisation of a fractured system of authority in averting humanitarian crises would easily become an instrument of manipulation in the hands of those who can take action; or, in the words of Brownlie as 'a general license to vigilantes and

[718] ICISS Report (n 675) para 8.14.
[719] 'Unacknowledged Deaths Civilian Casualties in NATO's Air Campaign in Libya' (n 678).
[720] 'NATO and Libya (Archived)' (n 681).
[721] Ibid.
[722] Patrick Wintour and Ewen MacAskill (n 685).
[723] Obama, Cameron and Sarkozy (n 682).
[724] Kennedy (n 527).
[725] Ibid 269.

opportunists to resort to hegemonial intervention'.[726] Such proven realities, explain the strong objection against the unilateral humanitarian use of force, including by regional organisations, as more susceptible to distortion and the lack of opinio juris amidst actual unilateral endeavours.

4.6. Conclusion

The justifications offered by the proponents of the Kosovo intervention, according to the analysis above, fell short of providing any solid grounds regarding the legality of NATO's operations. An explicit authorisation of the UNSC to use force, a *sine qua non* element for the legality of such actions, could not be inferred by a tacit or ex post facto mandate according to the textual interpretation of the UN Charter. Evidence of general support for the legal validity of such claims, was still absent at the time of the intervention. In any case, according to the International Court of Justice in *Nicaragua*, 'reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend toward a *modification* of customary international law'.[727] This is particularly true of the argumentation supporting the existence of a right of humanitarian intervention. This is ascertained through the deficiency of relevant conviction as to a respective legal obligation for humanitarian intervention by the intervening states involved and the prevalent objection of others.[728] The different analyses offered by states involved, exemplified in the variety of scholarly argumentation, prove that such a doctrine, at least at that time, had not yet been established. Notwithstanding that the civilian population was suffering from the deprivation of fundamental human rights, the regional response was not purely humanitarian in nature. What happened in Kosovo was not in line with the core criteria put forward by the proponents of humanitarian intervention; such as necessity and proportionality.

Whereas NATO's intervention in Kosovo could not be dismissed as potential evidence of practice at the same time it did not resemble a definite break from the traditional rules on the use force both because instant custom in the absence of prior evidence is not

[726] Ian Brownlie, 'Thoughts on Kind-Hearted Gunmen' in Richard B Lillich (ed), *Humanitarian Intervention and the United Nations* (UP Virginia 1973) 147-48.
[727] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14, para 207 (emphasis added).
[728] Joyner (n 642).

recognised and the variance of legal justifications put forth manifests a serious deficiency of opinio juris.[729] Simultaneously though, the increasing proliferation of the humanitarian intervention as an emerging legal doctrine in light of NATO's operational conduct reveals a changing attitude when compared to prior incidents. Arguably, it is sustained that this marked the beginning of an emerging normative process the legal fate of which remained to be seen.

The gradual development of a new right in light of Kosovo under CIL represented a growing conviction of international actors that 'the fact that one cannot do everything everywhere does not mean that one should not try to do anything anywhere'.[730] This finds support in the scholarly debate and the appeal for regional action to protect civilians. In Kosovo more than in ECOWAS in Liberia, regional intervention was officially presented by NATO as a humanitarian one. It was inferred that regional organisations do not consider themselves as neutral bystanders when gross violations of human rights occur. This remark also finds support to the wavering reaction of the UN and other international actors' vis-à-vis NATO's unilateral intervention.

Twelve years later the case of Libya marked a shift regarding NATO's practice, allegedly towards humanitarian multilateralism. This is illustrated by the initiation of its intervention, only following the adoption of resolution 1973. Nonetheless, the tangible drawbacks of NATO's activity even in a case of mandated intervention (and not only in unilateral Kosovo) reveal that the unrestrained delegation of military tasks to regional organisations by the UN can be used to serve diverse motivations. The criticism of NATO's activity and the cautious attitude of other regional organisations not to impede in any way the primacy of the UNSC in the case of Libya, echo that concern. The disparity of humanitarian causes and practice, unauthorised (Kosovo) or multilateral (Libya), points to shortcomings of 'humanitarian' interventionism on the ground. Such

[729] Ibid; Vaughn Lowe and Antonios Tzanakopoulos, 'Humanitarian Intervention' in Rüdiger Wolfrum (ed), *MPEPIL* (OUP 2011) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e306?prd=EPIL> accessed 16 December 2018; Peter Tzeng, 'Humanitarian Intervention at the Margins: An Examination of Recent Incidents' (2017) 50 VandJTransnatlL 415, 430; Janet Furness, 'How can the doctrine of humanitarian intervention be reconciled in international law' (2018) 6 LIJ 109, 113.

[730] Michael J Smith, 'Humanitarian Intervention: An Overview of the Ethical Issues' (1998) 12 Ethics & International Affairs 63, 78. This is echoed in Cecilia Jacob, 'Transending the Double- Bind of Humanitarian Intervention: The Costs of Action and Inaction' (2019) 21 Journal of Genocide Research 108.

observations, exacerbate the argument that unilateral humanitarian use of force can be distorted even more easily. It is suggested that this explains the lack of relevant opinio juris among international actors at least in the course of actual practices.

The next chapter seeks to examine whether the verbal practice of regional organisations provides any evidence of practice supportive of an emerging right for regional humanitarian intervention under CIL. The content of regional constitutions and institutional developments examined in the next chapter, are another source of practice on the normative status of regional humanitarian unilateralism. Henceforth, the next chapter seeks to establish whether the constitutive practice of ECOWAS, NATO and the EU provides any different evidence as to the rise of a new CIL rule for regional unilateral humanitarian intervention, compared to the findings of Chapters Three and Four; which on their own merit challenge the proposition that it currently constitutes an emerging legal norm after being vaguely anticipated in Liberia, not officially propagated by ECOWAS in the aftermath, and not having been repeated by NATO twenty years after its intervention in Kosovo.[731]

[731] Cf Marc Weller, 'Forcible Humanitarian Action in International Law- part I' (2017) EJIL:Talk! <https://www.ejiltalk.org/forcible-humanitarian-action-in-international-law-part-i/> accessed 16 December 2018.

5. Regional verbal practice and humanitarian intervention

5.1. Introduction

This chapter examines as possible practice for the identification of an emerging new rule on regional humanitarian intervention the constitutive instruments and other decisions of regional organisations.[732] A most recent affirmative proposal in support of verbal acts as potential practice by the ILC[733] recognises that what would be problematic is to count 'the same act as an instance of both the subjective and the objective element'.[734] Their potential constitutive significance towards a new CIL rule development remains pertinent to the accompanying establishment of normative purposefulness, the separate identification of opinio juris as described in the Introduction.[735]

The examining of the constitutive framework of regional organisations regarding unilateral interventions in humanitarian crises primarily, and of other regional decisions, complements the analysis of the two previous chapters, which examined the effect of actual instances of regional unilateralism on the development of a respective new rule in customary law. The unilateral humanitarian use of force was not raised by ECOWAS in Liberia, neither was propounded in following interventions. The most profound articulation of humanitarian intervention by NATO has been in the case of Kosovo, after which it withered away. Notwithstanding the enduring nature of arguments supportive of a respective emerging rule under CIL, this Chapter seeks to examine whether the contemporary verbal practice or regional organisations justifies such claims.

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[732] Verbal acts were accepted as a form of practice by ILA- International Law Association, Committee on the Formation of Rules of Customary (General) International Law, *Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law* (2000) 69 ILA Conf Rep 712, 725- 726 [ILA Report 2000]. Michael Akehurst, 'Custom as a Source of International Law' (1977) 47 BYIL 1, 3; he holds that it would be 'artificial to distinguish between what a State does and what it says' and by analogy the same applies to international organisations.

[733] Official Records of the General Assembly, Report of the International Law Commission on the Work of its Seventieth Session (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10 paras 53–66 [ILC Report 2018] Conclusion 6(1).

[734] Maurice Mendelson, 'The Formation of Customary International Law' (1999) 272 RdC 155, 206.

[735] Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and some of its Problems' (2004) 15 EJIL 523, at 525- 530 on the nature of state practice.

The majority of legal analyses on the constitutionality of the interventions of ECOWAS and NATO are carried out in light of relevant international law principles. They constitute exercises of compatibility between regional constitutional provisions and international law principles. Prominent examples are the legal analyses of ECOWAS intervention in Liberia by Kufuor[736] and Ofodile[737] who conclude that the mission of ECOWAS was unlawful. Of course, different ideas as to the value of the different justifications, the procedural steps, and the character of the action and the intentions of the initiators of ECOWAS and of the drafters of PMAD do appear in the literature. Regarding NATO's military actions, their nature and scope was discussed well before Kosovo.[738] However, following the unauthorised intervention in Kosovo, the discussion of NATO's military reach was again raised but only through the yardstick of international legality. Adding to this discussion, Gazzini and de Wet also deal with the character of NATO as a self-defence or collective security organisation.[739] Nevertheless, the above-mentioned analyses do not explore the verbal undertakings of regional organisations like another source of practice for the formation of custom, as this chapter does.

The regional verbal practices discussed are primarily the constitutive foundations and relevant decisions of ECOWAS, NATO- the two organisations that have carried out unilateral humanitarian interventions- and the EU. Despite the fact that the EU has not carried out any unilateral intervention, the examining of its verbal practice is essential due to its advanced collective security framework and the wide endorsement of its treaties by twenty eight member states, including two permanent members of the UNSC, France and until recently the UK.[740] In the cases of ECOWAS and NATO at the time of Liberia and Kosovo respectively- beyond findings as to the evidence of

[736] Kofi Oteng Kufuor, 'The Legality of the Intervention in the Liberian Civil War by the Economic Community of West African States' (1993) 5 RADIC 525.
[737] Anthony Chukwuka Ofodile, 'The Legality of ECOWAS Intervention in Liberia' (1994- 1995) 32 ColumJTransnatlL 381.
[738] Ige F Dekker and Eric PJ Myjer, 'Air Strikes on Bosnian Positions: Is NATO also Legally the Proper Instrument of the UN?' (1996) 9 LJIL 411.
[739] Tarcisio Gazzini, *The Changing rules on the use of force in international law* (Manchester UP 2005); Tarcisio Gazzini, 'NATO's role in the collective security system' (2003) 8 JCSL 231; Erika de Wet, 'The Relationship between the Security Council and Regional Organisations during Enforcement Action under Chapter II of the United Nations Charter' (2002) 71 NordicJIL 1.
[740] EU, 'Brexit: UK's withdrawal from the EU' (last updated 3 July 2020) <https://eur-lex.europa.eu/content/news/Brexit-UK-withdrawal-from-the-eu.html> accessed 22 July 2020.

practice through their actual conduct discussed in previous chapters- the deconstruction of their constitutive framework demonstrates that these could not count as verbal practice for unilateral humanitarian use of force; additionally in the case of ECOWAS, as discussed in chapter three, the prescribed decision-making route was not followed. The lack of internal legality is in itself evidence against the formation of new customary law rules, notwithstanding the absence of strong belief for the legal basis of a claim. With regards to the current normative state of all three organisations, the analysis of their constitutions demonstrates that their verbal undertakings are not evidence of uniform and generally accepted practice for regional humanitarian unilateralism. Whereas currently ECOWAS rules embrace a right of forcible interventions on humanitarian grounds, the verbal undertakings of NATO and the EU do not.

The first section of the chapter discusses the verbal practice of ECOWAS. This entails ascertaining that at the time of ECOMOG's intervention there was no evidence of verbal practice in support of humanitarian intervention through the internal constitutive arrangements of ECOWAS and then proceeds with the discussion of post-intervention constitutive developments, to examine the internal advancement of regional enforcement action. The second section on NATO, analyses the restricted scope of NATO's constitutive foundations regarding military enforcement. It first examines the provisions for coercive action up until Kosovo and then proceeds with illustrating that its restrictive scope has remained unaltered even in the aftermath of the said intervention; thus providing no substantial evidence of verbal practice which could contribute to a new emerging rule under CIL. Operation Unified Protector in Libya is not specifically discussed under this section, since NATO assumed its role following the adoption of UNSC resolution 1973 under Chapter VII and not through some form of 'self- authorisation' to intervene in a humanitarian crisis.

The third section analyses the EU's constitutive framework on regional military enforcement. It considers first the development of the EU as the background for the formation of the Common Foreign and Security Policy (CFSP) and its operational pillar, the Common Security and Defence Policy (CSDP- previously European Security and Defence Policy). The analysis of their contextual scope as developed through time and the discussion of the current constitutional order of the EU on military operations

in the third sub-section, as sources of practice, infer that the EU has not embraced unilateral action, not even on humanitarian grounds. Specific reference is made to relevant provisions governing possible EU action in different regions.

Following the analysis of the constitutive delimitations of ECOWAS, NATO and the EU concerning rights and restraints to use force, the last section explores the relationship between international law and regional legal orders. Competence allocation and the existence of a hierarchical relationship between the UN and regional organisations are therefore discussed. It then examines how regional constitutions apprehend their position vis-à-vis international law, to acknowledge that they do not claim the establishment of a parallel legal universe and their contribution to the rise of CIL rules is apprehended as part and parcel of their functioning within the international law system.[741]

5.2. Unilateral regional action under ECOWAS' legal instruments

At the time of ECOWAS' intervention in Liberia the existence of a right for humanitarian intervention outside the auspices of the UN was not recognised.[742] The internal procedure followed by ECOWAS for resorting to the establishment of its ECOMOG and the use of force in Liberia, in conjunction with the difficult to classify warring situation on the ground, formed a complicated equation as to the satisfaction of internal constitutionality. The use, by an economic-oriented organisation, of collective security practices normally was an extraordinary event.

Following Liberia, ECOWAS adopted specialised policies and instruments to enhance regional peace and security. In order to examine whether its current constitutive framework offer evidence supportive of an emerging right for humanitarian intervention, the gradual development of its security framework and the alleged impact of its intervention in Liberia shall be discussed first. As formed, the current legal

[741] Jed Odermatt, 'The Development of Customary International Law by International Organizations' (2017) 66 ICLQ 491. In discussing the constitutive instruments of IOs Shpakovych and Vladyka recognise that IOs remain bound by general international law; Olha Shpakovych and Svitlana Vladyka, 'Constituent Instruments of International Organizations as a Special Sources of the Law of International Organizations' (2018) <https://academic.oup.com/slr/advance-article/doi/10.1093/slr/hmy006/4967746> accessed 19 June 2019.
[742] Ofodile (n 737) 395.

instruments of ECOWAS provide some leverage for the legal justification of humanitarian use of force within the organisation.

5.2.1. Gradual securitisation and the constitutive deficit in Liberia

ECOWAS, was founded in 1975, following an interim agreement in 1967, by fifteen members of the West- African sub-region[743] with the purpose of forming a Community to promote co-operation and development in all fields of economic activity and thus raise the standard of living of its people, increasing and maintain economic stability, foster closer relations among its members and contribute to the progress and development of the African continent.[744] Up until the revision of its Treaty in 1993,[745] ECOWAS was an inter-governmental organisation with no supranational powers conferred upon its institutions. This was reflected in the powers vested on the Authority of Heads of State and Government, the principal executive organ; namely, to provide the general direction and control on the implementation of the agreed aims and policies of the organisation by its institutions.[746] It was also entrusted with establishing commissions additional to the pre-defined ones whenever it 'deems necessary'; they 'shall consist of representatives designated one each by the Members States'.[747] The establishment of defence common structures and the use force, even for maintaining its core objective, were not provided.

The Protocol on Non- Aggression, signed in Lagos on 22 April 1978 to supplement the founding Treaty, recognised that ECOWAS 'cannot attain its objectives save in an atmosphere of peace and harmonious understanding among the Member States of the Community'.[748] Article 5 of the Protocol prescribes that intra-regional disputes shall be settled peacefully. If such disputes persist, they shall be referred to a Committee of the Authority (its composition and mandate to be decided by the Authority). If they are again not settled, they shall finally be referred to the Authority itself.

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[743] Cape Verde joined ECOWAS in 1976. Currently, the member states of ECOWAS are: Benin, Burkina Faso, Cape Verde, Ivory Coast, Gambia, Ghana, Guinea, Guinea- Bissau. Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo. Mauritania withdrew in 2000.
[744] Treaty of ECOWAS (28 May 1975) article 2(1).
[745] Revised Treaty of ECOWAS (24 July 1993) article 58(2).
[746] Other organs under the 1975 Treaty are the Council of Ministers, the Executive Secretariat, a Tribunal and technical and specialized commissions dealing economic and commercial issues.
[747] Treaty of ECOWAS (n 744); also article 9(2).
[748] Protocol on Non- Aggression (22 April 1978) preamble.

In 1981, ECOWAS' members acknowledged that peace and economic progress required the safeguarding of regional security. Thus, they agreed on a new Protocol, relating to Mutual Assistance on Defence (PMAD), to further their collective security and enable their common defence collaboration in cases of armed threat or aggression against a Member State.[749] PMAD was intended to deal both with aggression initiated from outside the region, as well as aggression waved from within. As discussed in chapter three, article 4 of PMAD provides for military action in conflicts between two or more states of the region and in internal armed conflicts engineered and sustained from outside. The expediency though of military action to safeguard the civilians against gross violations of human rights, was not set forth. On the one hand, aggression, according to article 1 concerned armed threat or force by any State against the sovereignty and territorial integrity or political independence of another State. On the other hand, intervention in internal armed conflicts was prescribed only if it was engineered and actively supported by external actors.[750] All other intra- state conflicts were considered as being purely internal and thus military action was explicitly prohibited.

Despite providing for some leeway for interventions in civil conflicts, in essence PMAD did not reflect any radical divergence from the traditional scope of the principle of sovereign integrity. That is also indicated in the Protocol's Preamble which invigorates the significance of article 2 of the UN Charter and article 3 of the Charter of the Organisation of African Unity (OAU); they both include sovereign integrity among their guiding principles. According to Selassie, African states could not agree on reducing their sovereignty in 1963 since the main concerns for the establishment of OAU were the de-colonisation, the condemnation of apartheid, and the protecting of the newly acquired statehoods.[751] Hence, the OAU Charter 'did not provide for any role of the Organisation (OAU) in the resolution of internal disputes'.[752]

[749] Protocol relating to Mutual Assistance on Defence (20 May 1981) [PMAD]; it entered into force before ECOWAS' action in Liberia, on 30 September 1986.
[750] Ibid article 4(b).
[751] Haile Selassie, 'Towards African Unity' (25 May 1963) <https://www.blackpast.org/african-american-history/1963-haile-selassie-towards-african-unity/> accessed 22 July 2019.
[752] Philippe Sands and Pierre Klein, *Bowett's: Law of International Institutions* (6th edn, Sweet & Maxwell 2009) para 10-003.

The non-departure of PMAD from the concept of sovereignty is also portrayed in article 16. It states that a prerequisite for the intervention of ECOWAS is that the Head of State of the country facing aggression, shall send a written request for assistance to the Chairman of the Authority; thus, a straightforward invitation to act. Furthermore, the Protocol prescribes that once notified of the request, it is then for the Authority to decide what measures to adopt. This is also the case under article 8(2). Although in cases of emergency, the Defence Council, consisting of the Ministers of Defence and Foreign Affairs of Members States, chaired by the current Chairman of the Authority, is empowered to 'examine the situation, the strategy to be adopted and the means of intervention to be used' article 15 provides that interventions 'shall be carried out in accordance with the mechanism prescribed in articles 16, 17 and 18'.[753]

Following its intervention in Liberia, ECOWAS took substantial steps to develop its constitutive security framework. Particularly, in 1993 by revising its Treaty and in 1999 by introducing a thorough regional collective security mechanism. This was prompted by the constitutional difficulties encountered in the case of Liberia, as indicated through the analysis of the separate legal justifications used for the intervention in chapter three. It is claimed that except for its non-compliance with the established norms of international law, the organisation's decision to intervene militarily is disputed also due to non-compliance with the regional legal order at the time. Nevertheless, some less mainstream arguments in the literature support the legality of ECOMOG's military involvement by surpassing essentially the internal constitutionality critic. For example, Nolte argues that ECOWAS' action was not to be seen as enforcement, because it was undertaken with Liberia's consent, in Doe's request for peacekeeping assistance.[754] Whereas on a first instance his view resolves the internal constitutionality issue, this is ultimately defeated due to the end nature of the operation. Reportedly, ECOMOG was not a neutral peacekeeping operation but a military combatant.[755] As already discussed in chapter four, Doe's invitation in his letter dated 14 July 1990 concerned the sending

[753] When an operation ends, under article 10 of PMAD (n 749), the Defence Council shall address a factual report to the Authority, confirming the primary responsibility of the Authority for any forceful measures to be adopted and carried out by the Community.

[754] Georg Nolte, 'Restoring Peace by Regional Action: International Legal Aspects of the Liberian Conflict' (1993) 53 ZaöRV 603, 621.

[755] On the nature of ECOWAS' operation see Ofodile (n 737); Monica Hakimi, 'To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization' (2007) 40 VandJTransnatlL 643; Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008).

of a peacekeeping force to the aid of his government and not enforcement action aiming, inter alia, to replace him and establish an interim administration.[756] The surpassing of the constitutionality issue also holds true of the humanitarian intervention justification. Nonetheless, even if regional humanitarian intervention could be a way out of the legality's labyrinth, the constitutional arrangements in place were not conferring any explicit right on ECOWAS members to undertake unilaterally militarily action in response to circumstances other than 'aggression' in the meaning of article 1. And even if ECOWAS' members were determined to exceed the prescribed scope of PMAD by carrying out a unilateral humanitarian mission, the internal procedural mechanisms provided that the consent of all warring factions would still be needed. Another manifestation of the internal constitutionality difficulties present in the case of Liberia, and which led to the development of subsequent instruments, was that intervention in civil war could only be justified if it was maintained and sustained from outside. According to the analysis in chapter three this was not the case.[757] And yet again, according to PMAD, as with international law, contrary to the facts of Liberia consensus for the intervention would still be necessary.[758]

5.2.2. Military action in post- Liberia constitutive developments

As already pointed out, in the aftermath of ECOWAS' intervention in Liberia, on 24 July 1993 the ECOWAS Treaty was revised. With the Treaty's revision, the adoption of more specific binding instruments became feasible. The ECOWAS Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (the Mechanism),[759] the ECOWAS Protocol on Democracy and Good Governance (EPDGG)[760] and the ECOWAS Conflict Prevention Framework (ECPF)[761] 'now define the basis for ECOWAS intervention for human protection purposes'.[762]

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[756] A few months following ECOMOG's dispatch Amos Saywer was elected to the position of the President of the interim administration. For the Letter of Doe to the Chairman and Members of the Ministerial Meeting of the ECOWAS Standing Mediation Committee (14 July 1990) see Marc Weller, *Regional Peace-Keeping and International Enforcement: The Liberian Crisis*, vol 6 Cambridge International Documents Series (CUP 1994) 60.

[757] See also Kufuor (n 736).

[758] Ofodile (n 737) 384.

[759] Adopted on 10 December 1999.

[760] Adopted on 21 December 2001.

[761] Adopted on 16 January 2008.

[762] Isaac Terwase Sampson, 'The Responsibility to Protect and ECOWAS Mechanisms on Peace and Security: Assessing their Convergence and Divergence on Intervention' (2011) 16 JCSL 507, 514.

The two latter instruments complement the former, the Mechanism, by introducing preventive and non- military measures; hence, they are not further discussed.

The 1993 treaty revision set the framework for enhancing the common functions of the Community's member states in general, including with regards to security and human protection. Whereas economic prosperity remains the underpinning factor for their partnership, article 4 recognises that in pursuit of the objectives stated in article 3 of the revised Treaty their adherence to a long catalogue of principles is sought. Consistent with the 1991 Declaration of Political Principles, ECOWAS' member states undertook to work for the 'recognition, promotion and protection of human and peoples' rights'.[763] The insertion of a new chapter on Regional Security is equally important. Article 58 reinforces the adherence of its member states to the safeguarding of peace, stability and security. To this end article 58(2)(f) provides for the establishment of 'a regional peace and security observation system and peace- keeping forces where appropriate' but without clarifying whose responsibility is to decide on the deployment of peacekeeping forces at specific instances. Additionally, article 58(3) provided the legal basis for the adoption of following Protocols. It designates that the detailed provisions regarding regional security 'shall be defined in the relevant Protocols'.

Within the new constitutive context the prior absence of any possible evidence of verbal practice in constitutive documents to support claims for regional unilateralism exceeding the scope of the UN Charter was reversed. Indeed, for the first time, the 1999 Mechanism, provides for regional military interventions other than for collective self-defence, and sets out relevant conditions and provisions. Article 3 of the Mechanism, is informative of the organisation's objectives, which include inter alia the resolving of 'internal and inter-State conflicts'[764] and the deploying of a 'military force to maintain or restore peace within the sub- region, whenever the need arises'.[765] As portrayed in article 27, military intervention by ECOMOG is one of various options for addressing the crises described in article 25,

[763] Revised Treaty (n 745) article 4(e) and 4(g).
[764] ECOWAS Mechanism (10 December 1999) article 3(a).
[765] Ibid article 3(h).

> The Mechanism shall be applied in any of the following circumstances: (...) in case of internal conflict that threatens to trigger a humanitarian disaster (...) , in the event of serious and massive violation of human rights and the rule of law (...) ; any other situation as may be decided by the Mediation and Security Council.

It is interesting that a single body, the Mediation and Security Council, enjoys the right of deciding for the implementation of the Mechanism on whichever occasion it deems necessary, even if this is not specifically listed in article 25. This and the wide catalogue of actors who can put the Mechanism into effect- the Authority of Heads of States and Governments, the Mediation and Security Council, a Member State at its request, upon the initiative of the Executive Secretary, or at the request of the AU and the UN- following the alternate procedures of article 27, are indicative of an implicit attribution to ECOWAS of some authoritative tasks. Furthermore, the Mechanism provides for a permanent structure of ECOMOG, which did not exist at the time of the Liberian conflict. According to article 21, ECOMOG is 'composed of several Stand- by multi-purpose modules (civilian and military) in their countries of origin and ready for immediate deployment'. The restoration of peace and humanitarian interventions are explicitly included among the missions with which ECOMOG may be charged.[766]

Irrespective of international legality, the explicit changes effected on the constitutive framework of ECOWAS regarding military interventions, are vast.[767] And had the Liberian conflict occurred after the Mechanism's adoption, neither the 'constitutionality' of ECOMOG's military intervention nor the existence of evidence, of verbal practice, towards an emerging rule for regional humanitarian intervention would easily be contested. Nonetheless, what remains susceptible to conflating inferences is the identification of a respective conviction that the said practice is lawful under international law.

[766] Ibid article 22(b) and 22(c).

[767] John-Mark Iyi, *Humanitarian Intervention and the AU-ECOWAS Intervention Treaties Under International Law: Towards a Theory of Regional Responsibility to Protect* (Springer 2016); he examines the theoretical basis of the ECOWAS intervention instruments and supports the regional operationalization of humanitarian intervention.

Paliwal for example accepts that by virtue of constitutional developments we are in the process of customary change.[768] To assert that the unanimous adoption of the 1999 Mechanism is indicative of an emerging change would be incompatible with the requirement of separate identification of both CIL constitutive elements; the counting of the votes cast as evidence of opinio juris in this instance, would amount to double counting of the same evidence as practice and opinio juris. Additionally, the Mechanism's provisions simply reflect the will of its drafters without any explicit indication that the rights embraced are obligated under international law or comply with it; as portrayed below. By analogy to its article 40 which states that ECOWAS 'shall intervene to alleviate the suffering of the populations…' the provisions of the Mechanism prescribe what ECOWAS should aim at through military intervention and for the organisation's unilateral decision-making authority. Regarding the normative conceptualisation of its newly asserted rights, there is no evidence of belief by the states involved in the 1999 Mechanism's drafting that the new security institution was lawful under international law; and there is also 'a lack of empirical date on the decision-making processes leading to the 1999 Protocol'.[769]

Whereas absence of reaction denying the right arising from the practice could be important, this would only be relevant if the adoption of the Mechanism called for a response. According to the ICJ in the *Pedra Branca* case 'silence may also speak, but only if the conduct of the other State calls for a response' and this explains why in the *Jurisdictional Immunities of the State* case in 2012 the ICJ suggested that 'the absence of any statements by States in connection with the work of the International Law Commission regarding State immunity and the adoption of the United Nations Convention or, (…) in any other context' was significant in concluding that customary international law requires immunity.[770] In reality it would be bizarre to expect that the signatories of the Protocol- the states in a position to react- would reject it.[771] At the

[768] Suyash Paliwal, 'The Primacy of Regional Organisations in International Peacekeeping: the African Example' (2010) 51 VaJIntlL 185.
[769] Christof Hartmann and Kai Striebinger, 'Writing the Script? ECOWAS' Military Intervention Mechanism' in Tanja A Börzel and Vera van Hüllen (eds), *Governance Transfer by Regional Organizations* (Palgrave Macmillan 2015) 85.
[770] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* [2008] ICJ Rep 12 at 50–51, para 121; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening) (Judgement)* [2012] ICJ Rep 99, para 77.
[771] Mauritania left ECOWAS a year later maybe due to disagreement with the wide interventionist system endorsed; however this was for political reasons.

same time though the statements of ECOWAS members at international conferences addressing the role of regional organisations, states and the UN in humanitarian crises make no reference to it. For example, in light of the adoption of the Outcome Document at the 2005 World Summit, the ECOWAS member states focused on the reform of the UN and the Nigerian President characterised as 'a success in that we reaffirmed our faith in the multilateral system'.[772] The Executive Council of the African Union had pledged that regional organisations might have different perceptions with respect to a given situation and the need to react than that of the UNGA and the UNSC, but recognised that the final determination of regional military action shall be made by the UNSC despite the existence of divergent constitutive arrangements in Africa.[773] On their part the UN have continued to mandate the use of force within the context of peacekeeping missions in the ECOWAS region[774] and in various statements reiterated that regional action remains dependent on the mandate of the UNSC,[775] and with due consideration to the special relationship between the Council and regional organisations prescribed by Chapter VIII.[776]

Beyond the fatal deficiency of opinio juris to accompany the prescription of unilateral interventionism by ECOWAS, especially in humanitarian crises, the provisions of the Mechanism generate additional reasons to doubt its legal pertinence in terms of contribution to the rise or crystallisation of CIL and compliance with regional principles. Article 7 of the Protocol relating to the Mechanism for conflict prevention, management, resolution, peace-keeping and security provides that the Mediation and Security Council is mandated to take on behalf of the Authority 'appropriate decisions for the implementation of the provisions of this Mechanism'. According to the Protocol, the Mediation and Security Committee shall comprise of nine members. In order to duly constitute a meeting, the two-thirds of the members need to be present. A two-thirds

[772] The Outcome Document was adopted by UNGA on 16 September 2005 through the resolution A/RES/60/1 without voting, despite some reservations expressed during the discussion; UNGA 60th session (16 September 2005) UN Doc A/60/PV.8 at 43.
[773] The Ezulwini Consensus, AU Doc Ext/EX.CL/2(VII) 7-8 March 2005, 6, para B(i).
[774] Ivory Coast UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975; Mali UNSC Res 2085 (20 December 2012) UN Doc S/RES/2085.
[775] UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, para 139; also Report of the Secretary-General, 'In Larger Freedom: towards development, security and human rights for all' (21 March 2005) UN Doc A/59/2005 para 135.
[776] Report of the Secretary-General, 'The role of regional and sub-regional arrangements in implementing the responsibility to protect' (27 June 2011) UN Doc A/65/877- S2011/393 para 43.

majority of those present is required for a decision to be valid; which means that it is possible to have a binding decision being taken only by four members of the ECOWAS which might not be representative of a consensual approach amongst the member- states of the organisation. Additionally, the spectrum of occasions on which the Committee might take decisions is extremely widened and involves issues that are still disputed under international law, thus enhancing the uncertainty surrounding the normative purposefulness of these provisions. Eventually, it is uncertain whether the invitation requirement for military interventions in cases of internal conflict is to be circumvented on a permanent basis due to membership in ECOWAS and the adoption of the discussed Protocol and Mechanism.

Notwithstanding the analysis above, from 1991 onwards regional unilateral intervention to avert humanitarian crises has been considered by ECOWAS. The legal instruments adopted following its 1991 political declaration treat atrocities as threats to the international peace and security. Convincingly, those changes, irrespective of their normative status under international law, constitute another unilateralist undertaking of ECOWAS.

5.3.The limited scope of the North Atlantic Treaty

The North Atlantic Treaty was signed in Washington DC on 4 April 1949.[777] Fifty years later, it was the internal constitutive framework within which NATO carried out its intervention in Kosovo. The aforesaid Treaty established a system of collective defence; an alliance whereby its member states agreed to positively provide for mutual defence measures in response to an attack by any external party. Its founding members, undersigned that 'They are determined to safeguard the freedom, common heritage and civilisation of *their* peoples, founded on the principles of democracy, individual liberty and the rule of law. They seek to promote stability and well- being in the North Atlantic area'.[778] And they declared to be 'resolved to unite their efforts for collective defence

[777] The founding members of NATO were Belgium, the Netherlands, Luxemburg, France, the United Kingdom, USA, Canada, Portugal, Italy, Norway, Denmark and Iceland. Its predecessor was the Treaty of Brussels, signed on March 17 1948 by Belgium, France, Luxembourg, the Netherlands and the United Kingdom; it constituted an expansion of the Dunkirk Treaty (signed the year before between Britain and France). The Treaty of Brussels was also followed by the establishment of the Western European Union (1954, Paris Conference).

[778] Preamble of the North Atlantic Treaty, Washington DC (4 April 1949) (emphasis added).

and for the preservation of peace and security'.[779] The political elements behind the decision to form the Alliance provided for the necessity to form a military alliance with the participation of the USA and the urge to counter the military power of the USSR. In 1999, despite the fact that some 'empirical' transformations and related political declarations had already started taking place- since the beginning of 1990's-[780] the UN declared that 'NATO does not consider itself a regional arrangement under Chapter VIII'.[781] Since the signing of its Treaty, NATO has proceeded to seven enlargements and currently has twenty eight member states.[782]

The decision-making power of the organisation is vested to the North Atlantic Council (NAC) which is responsible for the implementation of the North Atlantic Treaty and the safeguarding of its principles; though the political agenda and broad strategic goals of NATO are set by the Parliamentary Assembly. As a source of practice, the decisions of NAC are important. Not only because its key decisions are taken at the highest state level, Heads of Governments and Ministers (foreign affairs or defence), but also because they are adopted by unanimity/consensus. Which is indicative of the decisions' general appeal among the member states. Recommendations and advice for the Alliance's common defence are provided by the Military Committee, but again under the authority of NAC.

Over the years, the debate on the North Atlantic Treaty revolves- at its most- around the Alliance's competence to proceed with unilateral enforcement actions extending beyond self-defence and the geographic scope of its actions. Henceforth, this explores the current constitutive context of NATO for military action as potential evidence of verbal practice for the development of humanitarian intervention under custom. At first,

[779] Ibid.
[780] During the post- Cold war era, political declarations were made indicating a dynamic shift to the scope of action, and one might suggest to the character, of the Alliance. For evidence of NATO's transformation up until 1999 see Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 EJIL 1.
[781] UN, 'Cooperation between the United Nations and Regional Organisations/ Arrangements in a Peacekeeping environment: Suggested Principles and Mechanisms' (1999) <https://www.globalpolicy.org/security-council/peacekeeping/regional-organizations-and-un-peacekeeping.html> accessed 22 July 2019.
[782] In addition to its founding members Albania, Bulgaria, Croatia, Czech Republic, Estonia, Germany, Greece, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, Spain and Turkey have joined NATO.

it discusses the framework for military action from 1949 until Kosovo. Then, it challenges the existence of any verbal undertakings in Kosovo's aftermath, with particular emphasis on any legally binding changes to the North Atlantic Treaty, which could have manifested a CIL change. Although, the door for the future reviewing of the Washington Treaty was left wide open through article 12 'having regard for the factors then affecting peace and security in the North Atlantic area', this prospect remained theoretical.

5.3.1. Treaty provisions for coercive action until Kosovo

The framework for coercive action under the Alliance's Treaty is set forth in article 5:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area (…).

Article 5 defines the purpose, scope of action and occasions warranting the adoption of coercive measures by the Alliance and there is no additional provision in the Washington Treaty providing further grounds for using armed force.[783] Its wording indicates that the ultimate cause of the Washington Treaty was to react to armed attacks against its member states; self-defence shall be exercised individually or through collective action. As it is the case with the interpretation of armed attack within the context of the UN Charter, one might infer that the intention of the drafters of the Washington Treaty was to counter actual and not imminent or foreseeable armed attacks. If the intention was different, the purpose of article 5 actions would not be limited to restoring and maintaining security; but it would include responding to threats.

[783] NATO's first military operation took place in Bosnia and lasted from 1991 to 1995. It was followed by the military operation in Serbia in 1999. Article 5 of the NATO Treaty was invoked after September 2001; the 9/11 attacks were deemed to be an attack on all 19-then- NATO member states.

Article 5 is complemented by the provision of article 6, which prescribes the geographical scope of application of the former. More specifically article 6 provides that an armed attack against one or more of its Parties is considered to be any armed attack on their actual territories or against the forces, vessels, or aircraft of any of the Parties, when in or over these territories or any other area in Europe in which occupation forces of any of the Parties were stationed on the date when the Treaty entered into force or the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer. If the drafters of the Washington Treaty had the intention to provide its signatories with rights and responsibilities to use force beyond instances of self-defence, they could have done so expressly. Although they provided for the deterrence and protection from external aggression, the resolution of intra- NATO conflicts and the use of force in additional occasions, such as humanitarian crises, were not prescribed. Following the model of self-defence organisations, of which the 'extroverted' use of force is an intrinsic feature.[784] Gazzini concludes, and he is correct, that the 'contracting parties intended to establish a purely defensive alliance and the obligations they assumed were strictly limited to mutual defence'.[785] This was the opinion both of the USA and the UK at the time of the Treaty's drafting.[786] As a matter of fact, NATO is not a well-defined community of 'regional proximity'.[787] This reality, as well as some intention to avoid the scrutiny of the UNSC, may explain the limited self-defence scope adopted by the Treaty's drafters.

In 1990, NATO Heads of State and Governments issued the 'London Declaration' with which they underlined that vast changes were taking place, affecting the international system at large and the role of NATO. Thus, they declared that 'As a consequence, the Alliance must and will adapt'.[788] The following year, the Alliance took a step further

[784] Yorhum Dinstein, *War, Aggression and Self-defence* (5th edn, CUP 2012) 246; On the nature of NATO as a self-defence or collective security organisation and its relation to Chapter VIII of the UN Charter see de Wet (n 739) 7- 10.
[785] Gazzini, 'NATO's role in the collective security system' (n 739) 246.
[786] Regarding the USA see the Hearings before the Committee on Foreign Relations, United States Senate, 81st Congress, 1st Session (1949) 31; Richard Heindel, Thorsten Kalijarvi and Francis Wilcox, 'The North Atlantic Treaty in the United States Senate' (1949) AJIL 633, 637- 640. On UK position see *North Atlantic Treaty* HC Deb 12 May 1949, vol 464, cols 2018- 2019.
[787] Dekker and Myjer (n 738) 414- 415.
[788] 'London Declaration on a Transformed North Atlantic Alliance Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council' (6 July 1990) para 1 <http://www.nato.int/docu/comm/49-95/c900706a.htm> accessed 10 July 2019.

by issuing a new Strategic Concept revising to a certain extend its security tasks. It expressed 'the *likelihood* that the concept of *security* must be more broadly defined to deal with threats arising both from other regions and from different types of situations, such as terrorism'.[789] Eager to cope with the new challenges of the post- Cold War period, the New Strategic Concept underlined that,

> Risks to Allied security are less likely to result from calculated aggression against the territory of the Allies, but rather from the adverse consequences of instabilities that may arise from the serious economic, social and political difficulties, including ethnic rivalries and territorial disputes, which are faced by many countries in central and Eastern Europe (…). They could, however, lead to crises inimical to European stability and even to armed conflicts, which could involve outside powers or spill over into NATO countries, having a direct effect on the security of the Alliance.[790]

Despite the politically aspired wording adopted, the 1991 Strategic Concept states that '...member states confirm that the scope of the Alliance as well as their rights and obligations as provided for in the Washington Treaty remain unchanged'.[791] This reflects the unchanged position of NATO regarding the use force outside its territorial area and initial scope of action. In 1991, the idea of an expanded role for NATO, to extend the scope of enforcement actions beyond article 5, was not equally welcomed among the allies.[792] In fact, the 1991 Strategic Concept did not lead to legal transformations and the Washington Treaty remained unchanged. Therefore, the literal interpretation of the North Atlantic Treaty and especially of article 6, prescribing alias in geographic terms the cases meriting an article 5 response, leads to the conclusion that the Kosovo intervention fell well beyond its scope. Indisputably, no armed attack had ever occurred against any one of the allies or their vessels and forces that would justify its coercive action against Serbia. In any case, the official position of NATO is that

[789] Joyce P Kaufman, *NATO and the Former Yugoslavia: Crisis, Conflict, and the Atlantic Alliance* (Rowman & Littlefield 2002) 18 (emphasis added).
[790] Alliance's New Strategic Concept (1991), 07 November 1991, para 9 <http://www.nato.int/cps/en/natohq/official_texts_23847.htm> accessed 10 July 2019.
[791] Ibid para 22.
[792] Kaufman (n 789) 24.

article 5 was invoked for the first time in the Alliance's history, in the aftermath of the 9/11 attacks against the USA.[793]

5.3.2. Modification of the North Atlantic Treaty through Kosovo?

In discussing NATO, Erika de Wet argues that due to the non- static nature of law, the constitutions of international organisations must be approached as living instruments 'capable of adapting to changes occurring in practise'.[794] Her view challenges two legal facts. Firstly, the VCLT does not recognise the existence of such possibility. Secondly, the assumption for the modification of treaties through stated practice is based on limited precedents.[795] Even so, the transformation of NATO into an organisation not only for collective self-defence is generally accepted.[796] The decision to use force in Kosovo and the far-reaching text of the Strategic Concept, the increasing endorsement of NATO's activities beyond self-defence by the UN,[797] along with the growing recognition that regional organisations include any arrangements not 'globally inclusive in their membership' support this argument.[798]

What is not endorsed though is that the Washington Treaty, through the stated practice of its parties in Kosovo, was modified to incorporate the unilateral function of the humanitarian use of force. The uneasiness of NATO member states in providing a straightforward legal basis for the intervention and their hesitation at the eve of the intervention suggest that they could not have subscribed to their Treaty's adaptation to

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[793] See <http://www.nato.int/cps/en/natohq/topics_110496.htm#top> accessed 10 July 2019.
[794] De Wet (n 739) 8; Niels Blokker and Sam Muller, 'NATO as the UN Security Council's Instrument: Question Marks from the Perspective of International Law?' (1996) 9 LJIL 417, 419.
[795] Sean D Murphy, 'The Relevance of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties' in Georg Nolte (ed), Treaties and Subsequent Practice (OUP 2013) <http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2116&context=faculty_publications> accessed 22 July 2019.
[796] Gazzini, 'NATO's role in the collective security system' (n 739) 250.
[797] For example, the UNSC has authorised NATO's operations in Afghanistan [ISAF- UNSC Res 1386 (20 December 2001) UN Doc S/RES/1386] and Libya [OUP- UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973]. The UN also relied on NATO support for the African Union's UN-endorsed peacekeeping operations in Darfur, Sudan, and in Somalia; support for UN disaster-relief operations in Pakistan, following the massive earthquake in 2005; and escorting merchant ships carrying World Food Programme humanitarian supplies off the coast of Somalia. See NATO, 'Relations with the United Nations' <http://www.nato.int/cps/en/natohq/topics_50321.htm> accessed 10 July 2019.
[798] Ruth B Russel, *History of the United Nations Charter: the Role of the United States 1940- 1945* (Washington DC The Brookings Institution 1958) cited by Ademola Abass, *Regional Organisations and the development of Collective Security, Beyond Chapter VIII of the UN Charter* (Hart Publishing 2004) 8.

that effect.[799] All the more, even if in principle the unilateral humanitarian use of force was accepted by NATO's member states, the intervention in Kosovo could not represent a corresponding practice. By analogy to the geographic scope of collective self-defence provided by article 6, NATO was not responding to a humanitarian crisis within its region. Contrary, also to the rational of regional collective security, also resembled in Chapter VIII of the UN Charter, that regional organisations are expected to act within their regions.[800] To paraphrase de Wet, the military action of NATO in Kosovo 'can *neither* relate to the geographic region from which all the member states come, *nor* to the geographic area in which the organisation will operate, *nor* a combination of these factors'.[801]

In the aftermath of its intervention in Kosovo, amongst an effort to enhance international support for its contested action, NATO sought anew to refresh its political direction. On 24th April 1999, at the Washington Summit, NATO adopted a new Strategic Concept, placing more emphasis on conflict prevention and crisis management.[802] The declared changes, had no legal strength and they remained, yet again, declarations of political intent. Notwithstanding that the adoption of non-binding instruments cannot be excluded *ab initio* from forming potential evidence of practice, the lack of affirmative contemporaneous statements on their legal relevance reinforces their marginal relevance. This was maintained by the German Federal Constitutional Court, which in 2001 emphasized that the 1999 Strategic Concept was 'neither a treaty created formally nor a treaty created impliedly'.[803] It also reiterated that it 'mostly consists of descriptions and analysis of the present political situation and expresses declarations of intent that are too general to create obligation that would arise from a treaty'.[804] Another re-evaluation of the Alliance's Strategic Concept took place in 2010, through the Lisbon Declaration.[805] Nonetheless, as with previous documents, it did not

[799] For the different views see Chapter Four.
[800] See article 52(1) of the UN Charter.
[801] Ibid (emphasis added).
[802] Alliance's New Strategic Concept (24 April 1999) <http://www.nato.int/cps/en/natolive/official_texts_27433.htm> accessed 10 July 2019.
[803] BVerfG, Judgment of the Second Senate (22 November 2001) 2 BvE 6/99 <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2001/11/es20011122_2bve000699en.html> accessed 20 July 2019.
[804] Ibid.
[805] Lisbon Summit Declaration (2010) 20 November 2010 <http://www.nato.int/cps/en/natohq/official_texts_68828.htm> accessed 10 July 2019.

purport to amend the core constitutional tool of the Alliance, which is the original Washington Treaty.

Henceforth, as analysed above, there is no strong evidence that Kosovo yielded any concrete legal change as to the constitutional endorsement by NATO of unilateral humanitarian use of force. This is best indicated in the strategic declarations of NATO following the intervention. Consequently, Dekker and Myjer, were right in foreseeing- already in 1996- that implications will cease to exist, only when NATO's founding Treaty attains 'a clear legal basis'.[806]

5.4. The reserved constitutive practice of the EU

This section examines the existing and potential capabilities of the EU to use force unilaterally within the framework of its basic constitutive instruments. The statement of the European Parliament to accept the norm of humanitarian use of force in 1994 manifests an early inclination of the EU for new rules on the use of force.[807] Nevertheless, the analysis below suggests that the constitutive undertakings of the organisation reveal strong hesitation in introducing autonomous regional rights. That is equally established through the general constitutional parameters for EU military action and the obligations of the European Council when deciding for external military missions (i.e. UNSC authorisation, host state consent, invitation by a host regional organisation), added to the absence of unilateral conduct. Nonetheless, what also merits discussion is the reasoning behind EU's adherence to the traditional principles of international law; whether this is out of obligation or out of mere choice.[808] This issue, pertinent to the examination of the relationship between regional constitutions and international law, is developed in the last section of the chapter.

Like ECOWAS, the EU in its current structure has undergone various phases of transformation. The EU example verifies the growing tendency to regionalise the

[806] Dekker and Myjer (n 738) 416.
[807] European Parliament Resolution (20 April 1994), 'Resolution on the right of humanitarian intervention' OJ C 128/225.
[808] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdulah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I–6351.

collective security system in order to accommodate the use of means and methods normally designed by collective security formations.

5.4.1. Towards a Common Security and Defence Policy

The EU is an extensively elaborate, diverse and multifunctional regional organisation. Its inception was the result of the effort of western Europeans to capitalize on their win of World War II, secure peace and achieve prosperity by augmenting liberal socioeconomic policies across Europe. The conventional foundations for the realisation of the EU have been the creation of the European Coal and Steel Community (Treaty of Paris, 1951), the Treaties of Rome of 1957 along with their later amendment through the 1986 Single European Act, the Maastricht Treaty of 1992, the 1997 Treaty of Amsterdam, the Nice Treaty of 2001 and lastly the Lisbon Treaty, that was signed in 2007 and entered into force in 2009. The EU numbers today twenty eight member states and its enlargement took place in seven stages.[809] Yet, the enlargement process is ongoing; Albania, the Former Yugoslav Republic of Macedonia, Montenegro, Serbia and Turkey enjoy the status of candidate countries, whereas Bosnia-Herzegovina and Kosovo, as defined under UNSC Resolution 1244, are potential candidates.[810] Contrary to previous negotiations, in March 2015 Iceland requested that it should not be regarded as a candidate country for EU membership.[811] On 23 June 2016 Britain decided through a referendum that the UK should leave the EU.[812]

At its initial stages, cooperation among the then member states concerned the freedom of movement, goods, labour and services.[813] However, in the course of years the spectrum of issues coming under EU's responsibility has been enlarged; thus leading to a debate as to whether it is an intergovernmental or supranational union. In addition to putting affront the attainment of internal goals, the EU also claims a protagonist role internationally. In order to discharge its objectives its member states have opted for the

[809] Denmark, Ireland and the UK acceded in 1973; Greece in 1981; Spain and Portugal in 1986; in 1995 Austria, Finland and Sweden; in 2004 the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia; in 2007 Romania and Bulgaria; Croatia in 2013.
[810] See <http://ec.europa.eu/enlargement/countries/check-current-status/index_en.htm> accessed 22 July 2019.
[811] Ibid.
[812] 'Brexit: All you need to know about the UK leaving the EU' *BBC News* (1 September 2016) <http://www.bbc.com/news/uk-politics-32810887> accessed 22 July 2019.
[813] The European Coal and Steel Community of 1951 and the European Economic Community 1957 were formed by Belgium, France, Germany, Italy, Luxemburg and the Netherlands.

enhancement of its common policies and legal powers. Hence, within that context and in light of national interests within the EU, the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP) have been adopted.

The first effort to align the foreign policies of its member states dates back to the late 1960s. In 1969, at the Hague Summit, the foreign ministers of the member states decided the development of ideas on closer political cooperation. That led to the adoption of the Davignon report of 1970 and the European Political Cooperation (EPC). In practice, the EPC amounted to the forerunner of the CFSP in introducing, at least, some consultation procedures. However, it was not until 1992, that the CFSP was introduced with the Treaty of Maastricht.[814] The said Treaty put in place the single institutional framework of the EU, namely the pre- Lisbon pillars' structure, providing for the establishment of CFSP as its second pillar. This development was the cornerstone for the realisation of European integration. Its far- reaching goals included the establishment of a common defence policy and maybe in the long run the instituting of common defence.[815] Whereas this was a first concrete attempt by the EU to put forth that goal, 'the origins of the ESDP can be traced back to the 1954 amendment of the Brussels Treaty establishing the WEU'.[816] A few years after, in 1997, the establishment of the operational and military aspect of CFSP was progressively stepped up through article 17 of the Treaty of Amsterdam (TEU). It created closer links with the WEU and article 17(2) provided that the responsibilities 'shall include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking'.

However, the turning point for the creation and the later implementation of the ESDP as the operational aspect of CFSP, were the Balkan wars. The Declaration of St- Malo of 1998, a Franco – British initiative, sought for the bursting and speedy implementation of the Amsterdam provisions on CFSP, which

> includes the responsibility of the European Council to decide on the progressive framing of a common defence policy in the framework of

[814] Maastricht Treaty entered into force on 1 November 1993.
[815] Ibid Title V, article J.4(1).
[816] Alexander Orakhelashvilli, *Collective Security* (OUP 2011) 82.

> CFSP (…) [so that] the Union must have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them and a readiness to do so, in order to respond to international crises.[817]

The absolute Europeanisation of this alliance came after Kosovo. And the development of a previously civilian organisation, into 'a security- community (…) in which the use of force for resolving disputes has become obsolete'[818] has been the outcome of a series of European Council summits that followed;[819] the most notable being the 1999 Cologne summit which, in repeating aspects of the St- Malo Declaration, underlined the absolute necessity of the Union's 'capacity for autonomous action, backed by credible military forces, the means to decide to use them, and the readiness to do so, in order to respond to international crises without prejudice to actions by NATO'.[820] This was reaffirmed by the Ministerial Declaration, issued on the 17th November 2009, during the 2974th External Relations Council meeting in Brussels, marking the ten years from the establishment of ESDP. It was emphasized that,

> a decade ago, in the aftermath of the conflicts in the Western Balkans, the European Council took the historic decision at its Summit in Cologne in June 1999 to establish the European Security and Defence Policy (ESDP) as a part of the Common Foreign and Security Policy, thereby demonstrating a commitment to jointly enhance the European Union's contribution to international peace and security.[821]

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[817] Franco- British Summit, Joint Declaration on European Defense, Saint-Malo, 4 December 1998; see <https://www.cvce.eu/obj/franco_british_st_malo_declaration_4_december_1998-en-f3cd16fb-fc37-4d52-936f-c8e9bc80f24f.html> accessed 22 July 2019.

[818] Jean- Yves Haine, 'An historical perspective in EU Security and defence Policy, ESDP: The first five years' in Nicole Gnesotto (ed), *EU Security and Defence: The first five years 1999- 2004* (Institute for Security Studies EU Paris 2004) 35.

[819] The most pertinent examples are the Cologne European Council meeting of 1999, which set the ground for the realisation of the ESDP, the Helsinki European Council meeting of 1999 which introduced the 2003 Headline Goal, the Laeken European Council in December 2001 where the ESDP was declared operational.

[820] 'European Council Helsinki Annex 1' in Maartje Rutten (compiled), *From St- Malo to Nice. European Defence: core documents*, Chaillot papers 47 (Institute for Security Studies of WEU 2001) 91- 92.

[821] Council of the EU (17 November 2009), 'Ministerial Declaration: ESDP Ten Years – Challenges and Opportunities' <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/gena/111253.pdf> accessed 19 June 2019.

5.4.2. EU military enforcement

With the adoption of the Lisbon Treaty and the elimination of the previous pillar structure, the EU's CFSP attained 'greater coherence and visibility'.[822] Article 24 of the Treaty on the EU indicates that although, the EU may not adopt legislative acts in this area and the CJEU does not have competence to adjudicate, under the new structure the CFSP became a special competence. The current legal framework which provides the basis for the adoption of enforcement measures by the EU in the name of CSDP, is provided by the consolidated EU Treaty (as it has been changed after the entering into force of the Lisbon Treaty).[823] Changes to the CSDP (prior ESDP) are but one among several other significant developments that came within the Treaty of Lisbon and which affect the overall direction of the external relations' policies of the Union; such as the establishment of the permanent position of a High Representative of the Union for External Affairs and the Security Policy and the creation of the External Action Service. By rendering its structures more coherent, the decision-making process and actions more efficient, in the name of EU integration, the organisation serves simultaneously its objective for global influence.

The informative provisions on EU military operations under the Lisbon Treaty, have not really changed. Article 42(1) provides that,

> The common security and defence policy (...) shall provide the Union with an operational capacity drawing on civil and military assets. The Union may use them on missions outside the Union for peace- keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter.

The relevant pre- Lisbon provision stated that the CFSP shall contemplate with all aspects of the Union's security 'including progressive framing of a common defence policy, which might lead to a common defence, should the European Council so decide'.[824]

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[822] 'Division of competences within the European Union' <http://www.europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0020_en.htm> accessed 19 June 2019; the three pillars were the European Community, CFSP, Police and Judicial Cooperation in criminal matters.

[823] On Lisbon Treaty and external affairs see Steven Blockmans and Ramses A Wessel, 'The European Union and Crisis Management: will the Lisbon Treaty Make the EU more effective?' (2009) 14 JCSL 265.

[824] Article 17 TEU (Amsterdam).

What has changed though, and this should not be interpreted automatically as a development favouring autonomous action on the part of the EU outside the UN Charter Chapter VII framework, are the tasks of the EU in crisis situations. This finds support, in express textual provisions. Article 43 provides that CSDP operations include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace- keeping tasks, tasks of combat forces in crisis management, including peace- making and post- conflict stabilisation, thus contributing to the 'fight against terrorism, including by supporting third countries in combating terrorism in their territories'. Hence that complements the tasks previously spelled out in article 17 of the TEU. Which were formerly known, as Petersberg tasks.[825] As Naert rightly points out, the post- Lisbon article 43 simply 'spells out some of these tasks in greater detail'.[826]

As already mentioned, with the adoption of the Lisbon Treaty, the member states incorporated in the TEU article 42 (7) which reflects the prior article V of the Brussels Treaty.[827] It provides for a 'mutual defence clause' that remains an intergovernmental tool calling for the cooperation of EU member states in case of armed aggression against one of them. However, the 'obligation of aid and assistance' is not absolute as it shall take effect through the 'means in their power' and 'shall not prejudice the specific character of the security and defence policy of certain member states'. For as long as the activation of the said clause complies with article 51 of the UN Charter, a respective military intervention shall be considered as legal self-defence. If not, and in the absence of a UNSC authorisation it cannot serve as a sound legal basis.

For the first time, the mutual defence clause was activated by France following the Paris terrorist attacks of 13 November 2015. France called for the support of EU member states in the military expedition against ISIS in Syria in the form of collective self-defence. Whereas this is a claim for the legality of the bombardments in Syria in itself,

[825] Petersberg Declaration, Ministerial Council of the Western European Union (WEU) (19 June 1992) <http://www.weu.int/documents/920619peten.pdf> accessed 19 June 2019; the WEU member states declared their readiness to make available to the WEU, but also to NATO and the EU, military units from the whole spectrum of their conventional armed forces.
[826] Frederik Naert, 'The Application of Human Rights and International Humanitarian Law in Drafting EU Missions' Mandates and Rules of Engagement' (2011) Institute for International Law Working Paper No 151, 4 <https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp151e.pdf> accessed 19 June 2019.
[827] The Brussels Treaty ceased to exist on 30 June 2011.

some states have equally alleged the existence of a UNSC mandate.[828] However, UNSC resolution 2249(2015), whilst condemning the terrorist attacks and determining that ISIS is 'a global and unprecedented threat to international peace and security', it does not explicitly authorise the use of force or of all necessary measures against ISIS either in Syria or Iraq.[829] In a rather unusual manner, it calls upon states to take all necessary measures. Whereas its wording suggests that this resolution should be adopted under Chapter VII, this is nowhere spelled out. All the more, since particular emphasis is given on states taking measures 'in compliance with international law, in particular the United Nations Charter',[830] it seems that resolution 2249 serves for the endorsement of individual and collective self-defence, provided that their activation and implementation comply with the respective international law rules.

Contrary to the mutual defence clause, the solidarity clause enshrined in article 222 of the TFEU and operationalised through the Council Decision of 24 June 2014 (2014/415/EU) is not a constitutive tool for military interventions in third states. Its main scope pertains EU assistance- which might include military resources- towards a member state in its territory. If a CSDP mission is contemplated as being appropriate to respond to a crisis, this shall be decided and initiated according to the CSDP specific provisions.[831]

Whereas according to international law EU missions shall also comply with its principles, a potential argument could be that the EU's international legal personality provides evidence for some form of autonomy. Article 47 of the Treaty on European Union (TEU) explicitly recognises the legal personality of the EU.[832] Yet, the effects of the conferral of legal personality on the Union cannot be interpreted to suggest mutatis mutandis that it has the ability, henceforth, to overstep the international legal order of the given time. The concrete significance of the EU's international legal

[828] See 'Cameron hails UN backing for action against Islamic State' *BBC News* (21 November 2015) <http://www.bbc.co.uk/news/uk-34886574> accessed 20 July 2019.
[829] Dapo Akande and Marko Milanovic, 'The Constructive Ambiguity of the Security Council's ISIS resolution' (2015) EJIL: Talk! <http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/> accessed 10 July 2019.
[830] UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249.
[831] Article 42(4) TEU.
[832] See in particular <www.europa.eu/legislation_summaries/glossary/union_legal_personality_en.htm> accessed 19 June 2019; before the adoption of the Lisbon Treaty only the European Community (EC) and the European Atomic Energy Community (EAEC) had had legal personality.

personality, lies in its ability to conclude and negotiate international agreements in accordance with its external commitments, to become a member of international organisations (currently enjoys UN observer status) and to join international conventions, such as the European Convention on Human Rights (ECHR).[833]

That is also reflected in the *Kadi* case. Whereas the CJEU upheld 'the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it', at the same time it failed to provide a tangible definition for 'autonomy' and how it is to be translated in practice.[834] In its face, this assertion disregards the obligations of EU member states to act according to their UN Charter and international law obligations. The flaws of the above statement are reflected in paragraph 288 of that same appeal decision, where it is accepted that,

> any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order *would not entail any challenge to the primacy of that resolution in international law.*[835]

Despite its explicit pronouncement for the concurrent existence and operation of two legal orders, the Court showed considerable restraint in concluding that the content of legal obligations under those two legal orders is distinct. And did not overturn previous decisions, which declare that the Union must respect international law in the exercise of its power.[836] In the case of GATT it was said that it has a binding effect;[837] additionally, it has been indicated that certain rules of international law form an integral part of the European legal order, and this refers not only to international agreements but

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[833] On EU international legal personality see Raluca David, 'The European Union and its Legal Personality (1993-2010)' (25 January 2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1566492> accessed 19 June 2019.

[834] Joined Cases C-402/05 P and C-415/05 (n 808) para 282. See also Ramses A Wessel, 'Reconsidering the relationship between International and EU Law: Towards a Content- based Approach?' in Enzo Cannizzaro, Paolo Palchetti and Ramses A Wessel (eds), *International Law as law of the European Union* (Leiden/Boston: Martinus Nijhoff 2011).

[835] Ibid Joined Cases (n 808) para 288 (emphasis added).

[836] Refer to Case C- 286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp.* [1992] ECR I-6019, para 9; and Case C- 308/06 *International Association of Independent Tanker Oweners (Intertanko) and Others v. Secretary of State for Transport* [2008] ECR I-4057, para 51.

[837] See Joined Cases 21 to 24/72 *NV International Fruit Company and Others v Produktschap voor Groenten en Fruit* [1972] ECR 1219.

also to customary law.[838] Conclusively, the CJEU, has never walked the full road to EU autonomy claims, including a capacity to decide for military operations in the absence of a UNSC mandate. As discussed below, that is also reflected in landmark relevant EU documents.[839]

Contrary to other cases of regional action previously discussed, the EU experience does not serve as an apparent example of military unilateralism. Since the inception of the ESDP (CSDP post-Lisbon) the EU has engaged in twelve military operations abroad.[840] Yet, none of them was unilateral. The first and most profound EU-led military operation was Operation Artemis in the Democratic Republic of Congo in 2003, following adoption of the UNSC resolution 1484.[841] EU- led operations have also taken place under the framework of Berlin Plus, which is a comprehensive package of arrangements 'finalised in 2003 between the EU and the NATO that allows the EU to make use of NATO assets and capabilities for EU-led crisis management operations'.[842] Nevertheless, some seeds for unilateralist action were well- sowed with the decision to support the unilateral and allegedly humanitarian intervention of another organisation, NATO, in Kosovo. On the 25th March 1999, the European Council endorsed NATO's operations by underlining 'the efforts which the international community had made to avoid the need for military intervention' and justifying that NATO was 'taking action against military targets in the Federal Republic of Yugoslavia in order to put an end to the humanitarian catastrophe in Kosovo'.[843] Offering simultaneously the opportunity to the proponents of decentralized regional militarism to either interpret accordingly past

[838] Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337, para 22; Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 *A Ahlström Osakeyhtiö and others v Commission* [1993] ECR I- 1307; Case C-268/90 *Anklagemindigheden v Poulsen and Diva navigation* [1992] ECR I- 6019.

[839] Significant examples supportive of that position are, inter alia, the Council Joint Action 2003/423/CFSP (5 June 2003) on the European Union military operation in the Democratic Republic of Congo [2003] OJ L 143/50; Council of the EU (7 June 2007), 'Joint UN- EU Statement on Cooperation in Crisis Management' (Press) at <https://www.consilium.europa.eu/uedocs/cmsUpload/EU-UNstatmntoncrsmngmnt.pdf> accessed 19 June 2019.

[840] EEAS, 'Military and civilian missions and operations' <https://eeas.europa.eu/topics/common-security-and-defence-policy-csdp/430/military-and-civilian-missions-and-operations_en> accessed 20 June 2019.

[841] UNSC Res 1484 (30 May 2003) UN Doc S/RES/1484.

[842] EEAS, 'Shaping of a Common Security and Defence Policy' <http://eeas.europa.eu/csdp/about-csdp/berlin/index_en.htm> accessed 20 June 2019.

[843] European Council, Presidency Conclusions, Berlin European Council (24- 25 March 1999) 'Statement by the European Council concerning Kosovo' No 6886/99 <http://www.consilium.europa.eu/en/european-council/conclusions/1993-2003/> accessed 20 June 2019.

landmark provisions of relevant EU documents, further introduce- albeit vaguely- their ideas in future texts and adhere to a wide ranging rhetoric through declarations, resolutions and studies of EU institutions and academics.[844]

In the case of Libya, despite controversies regarding the undertaking of military action by the EU,[845] its proponents were looking for a UN legal basis.[846] Similar assertions to consider any 'option provided for in the UN Charter' but provided that it would be in 'compliance with a UN mandate', were present in a European Parliament resolution.[847] After all, the Council's Decision 2011/210/CFSP of 1st April 2011 to proceed with an EU military operation to support the humanitarian assistance operation in Libya, that would be headed 'EUFOR Libya', was issued only following the Resolution 1973 of the UNSC.[848] Hence, it might be argued that the eventual EU's reserved position, at least in its institutional capacity, affirmed that the EU considers the mandate of the UNSC a cornerstone and necessary pre-condition for enforcement action. The same position was recently advanced by the EU in light of the 2019 crisis in Venezuela. In its resolution on the 'Emergency situation in Venezuela' the European Parliament 'recalls the EU's commitment to effective multilateralism in the framework of the UN in order to avoid a humanitarian catastrophe with greater consequences'.[849] This followed the declaration of the High Representative on behalf of the EU that 'the

[844] Jan Wouters, Philip De Man and Marie Vincent, 'The Responsibility to protect and Regional Organisations: Where does the EU Stand?' (2011) Leuven Centre for Global Governance Studies Policy Brief No 18 <https://ghum.kuleuven.be/ggs/publications/policy_briefs/pb18.pdf> accessed 20 June 2019; Madelene Lindstrom and Kristina Zetterlund, 'Setting the Stage for the Military Intervention in Libya- Decisions Made and their Implications for the EU and NATO' (2012) Swedish Defence Research Agency- FOI 1 <http://www.foi.se/rapport?rNo=FOI-R--3498--SE> accessed 18 February 2019.

[845] Despite for the independent initiative of EU member states, of the UK and France in particular, to undertake military action, a conjoined EU military operation was never implemented.

[846] European Council (11 March 2011), Remarks by President Herman Van Rompuy at the press conference following the extraordinary European Council on EU Southern Neighbourhood and Libya (2011) PCE 065/11 <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/119779.pdf> accessed on 20 July 2019; 'Britain, France ramp up pressure at Libya crisis summit' *Euractiv* (11 March 2011) <http://www.eubusiness.com/news-eu/libya-unrest-nato.906> accessed 20 July 2019.

[847] European Parliament Resolution (10 March 2011), 'Southern Neighbourhood, and Libya in particular, including humanitarian aspects' Doc P7_TA(2011)0095, para 10 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0095+0+DOC+XML+V0//EN> accessed 20 July 2019.

[848] Council Decision 2011/210/CFSP (1 April 2011) on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya) [2011] OJ L 89/17 (Corrigendum [2011] OJ L 203/36).

[849] European Parliament Resolution (28 March 2019), 'Emergency situation in Venezuela' Doc P8_TA-PROV(2019)0327, para 15 <http://www.europarl.europa.eu/doceo/document/TA-8-2019-0327_EN.pdf> accessed 19 June 2019.

solution can only be a political one' underlining 'the rejection and condemnation of violence and of any initiatives that can further destabilise the region'.[850]

5.5. Regional constitutive arrangements and international law

> In practice, UN and regional attitudes can differ on whether the situation at hand involves a threat; whether the measures are proportionate or, on the contrary, insufficient; or whether the aim for which Chapter VII has been activated has been met and the measures should be terminated.[851]

Reality is that regional organisations – in particular those which have in place own collective security structures- at times might develop individual assessments on issues relevant to the international peace and security. Moreover, such assessments will not necessarily consider solely peace and security issues arising among member states or caused by them. White's remark that the security policy of the EU might be, 'principally external to its membership, relating to threats to or breaches of the peace within or by states that are not members of the EU'[852] is equally true of all regional organisations. Inevitably, the potential of own assessments by regional organisations explains why their rights and obligations regarding military action must be contextualised by reference to common standards and perceptions on legality, which has been the essence of international law so far. Are regional organisations in a position of freely initiating enforcement actions in the absence of a UNSC mandate, on the grounds of own evaluations?

In 1993, the German Constitutional Court in the case of Maastricht Urteil, declared that state sovereignty remained at the heart of international relations.[853] This meant inter alia that states, whilst forming organisations, remain sovereign member states of the UN and thus are bound primarily by the UN Charter; and in the field of international

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[850] Council of the EU (2019), 'Declaration by the High Representative on behalf of the EU on the latest events in Venezuela' (Press) (24 February 2019) at <https://www.consilium.europa.eu/en/press/press-releases/2019/02/24/declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-latest-events-in-venezuela/pdf> accessed 19 June 2019.
[851] Orakhelashvilli (n 816) 140.
[852] Nigel White, 'The EU as a Regional Security Actor within the International Legal Order' in Martin Trybus and Nigel White (eds), *European Security Law* (OUP 2007, Oxford Scholarship Online 2012) 333.
[853] BVerfG, Decision on the Maastricht Treaty Cases 2 BvR 2134/92, 2 BvR 2159/92 (12 October 1993), translation in 33 ILM 388 (March 1994).

peace and security by the authoritative powers of the UNSC. Again within the EU context, Rummel points out that, 'in Brussels, the choice of means is undertaken according to Member States' interests and their ability to push through these interests at the EU level'.[854] Such statements should be assessed in light of the UN's legitimacy crisis; as it has led de facto to a form of elevated regional advancement across the globe. Are such statements though reflective of a new legal reality? Namely, that the limits or the extent of regional autonomy, are nowadays set beyond the scope of the UNSC's primary responsibility and of traditional international law principles?

5.5.1. International law and internal legal orders

The indefinable theoretical debate on the supremacy of international or municipal law over the other provides the framework for considering the relationship between international law and regional legal orders. The essential queries remain the same; that is whether they co-exist as distinct legal orders and which shall prevail if they find themselves in conflict.

Regarding states, their adherence either to the monist or dualist theory of international law does not impair 'the self-evident principle of international law that a State cannot invoke its municipal law as the reason for the non-fulfilment of its international obligations'.[855] The arguments of prominent dualists such as Triepel and Anzilotti,[856] in support of the complete separateness of the internal and municipal law and the absolute primacy of the latter fade out through the practice of dualist states.[857] Despite the type of its incorporation within the internal legal order or the automatic adoption of international law domestically, even according to the dualist orientation of states, articles 26 and 27 of the Vienna Convention on the Law of Treaties provide that treaties shall be observed by the parties to them and that their internal law cannot be pledged to evade any international obligations. A similar provision was also included in article 13

[854] Reinhardt Rummel, 'The EU's involvement in Conflict Prevention' in Vincent Kronenberger and Jan Wouters (eds), *The European Union and Conflict Prevention- Policy and Legal Aspects* (TMC Asser Press 2004) 71.
[855] Hersch Lauterpacht, *The Development of International Law by the International Court* (CUP 1982) 262.
[856] Bruno Simma, 'The Contribution of Alfred Vedross to the Theory of International Law' (1995) 6 EJIL 33.
[857] Chukwuemeka A Okenwa, 'Has the Controversy between the Superiority of International Law and Municipal Law been Resolved in Theory and Practice' (2015) 35 Journal of Law, Policy and Globalization 116.

of the Declaration of Rights and Duties of States adopted in 1949 by the International Law Commission, prescribing that 'Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty'. This was also upheld by the PCIJ in the *Treatment of Polish Nationals in Danzig*.[858]

On similar grounds, it would be absurd to suggest that a different logic permeates the relationship between international law and the domestic legal order of organisations, which are nonetheless set up by states. This claim, is further supported through article 31(3)(c) of the VCLT. It underlines that whilst interpreting a treaty's provision, together with the context, 'any relevant rules of international law applicable in the relations between the parties' shall also be taken into account. According to its article 5, VCLT applies, inter alia, to the constitutional instruments of organisations which must be according to article 31(3)(c) interpreted in light of international law. The relevant debates during the San Francisco Conference also reveal an overall consensus on holding regional organisations or arrangements accountable to a universal system of collective security. What is therefore compared below is the respective attitude of ECOWAS, NATO and the EU.

5.5.2. Perceptions of international law in regional constitutive instruments

Whereas international law provides indeed a specific framework within which regional organisations shall act, it is important to examine whether this is reflected within their constitutive instruments as well. To the extent that some unilateralist enforcement practices (constitutional or actual) have been noted, they shall be considered as evidence of occurred or changing norms of international law or simply as unlawful practices. The discussions of whether their practices have had some impact on international law and whether changes have taken place or are in the pipeline, are considered in the conclusions of this work.

[858] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (Advisory Opinion) (1932) PCIJ Series A/B No 44, 24.

The ECOWAS Charter and the Revised Treaty of 1993 do not contain any express provision on international law and their respective relationship. Nevertheless, they do recognise specific principles of international law relevant to the maintenance of peace and security, reflected in article 4 of the Treaty. Points (d), (e), (f) and (g) of article 4 reflect, inter alia, the principles of non- aggression, of the maintenance of peace and security, of the peaceful settlement of disputes and the significance of human rights. The PMAD also avoids any specific mention to a hierarchical relationship between ECOWAS legal order and international law but reproduces some core principles of international law; for example, article 18(2) prohibits interventions within internal conflicts. It states that 'Community forces shall not intervene if the conflict remains purely internal'. Moreover, its Preamble recalls both article 2(4) of the UN Charter on the prohibition of use of force and article 3(3) of the Charter of the Organisation of African Unity which stipulates respect for the sovereignty and territorial integrity of each State. Having said this, ECOWAS' latest relevant constitutive instruments also make no explicit reference to the relationship of ECOWAS instruments and international law.

In its preamble the Mechanism- which among other things sets out the context within which regional military interventions should take place and relevant procedures- avoids adopting a strong language regarding the UN Charter; since it declares that ECOWAS is only mindful of it, particularly of its Chapters VI, VII and VIII. The commitment of ECOWAS to the principles of the UN Charter being reaffirmed in article 2, only some of its core principles found their way in the actual text and not always in an identical manner. For example, the 'territorial integrity and political independence of Member States' is not accompanied by the explicit prohibition to use force that would have reflected article 2(4) of the UN Charter fully. However, this paradox can only be perceived as intentional by the Mechanism's drafters. Additionally, the explicit recognition of the significance of international law in general is totally absent.

The UN Charter in article 52 allocates the responsibility for peaceful dispute resolution in the hands of regional organisations. Yet, as discussed in chapter two it is nowhere suggested that military action is possible upon their initiative and prior to a relevant UNSC authorisation. Therefore, ECOWAS' duty of informing the UN of all military

initiatives following their commencement – a prerogative vested to self-defence according to the UN Charter- that is prescribed in article 52 of the Mechanism, is incompatible with international law. It is enough to compare articles 51 and 52 of the UN Charter to understand the different intentions of the UN Charter's drafters regarding the right of first action. Whereas, in article 51 (self-defence) it is clearly stated that 'measures taken by Members in the exercise of this right of self-defence shall be immediately *reported* to the Security Council', article 52 describes that following failed regional efforts to achieve pacific settlement of disputes regional organisations shall only refer the disputes to the UNSC.

Another, potential incongruity between the Mechanism and the UN Charter relates to the international law preconditions for initiating the application of the Mechanism in the occasions enumerated in its article 25- which are anyway left wide- open on the discretion of the Mediation and Security Council. It is not expressly clarified whether those enjoying the authority to initiate its application (article 26) are bound by the preconditions of international law for each respective case. For example, it is not clarified whether in cases of internal conflict an invitation or consent by the official administration should pre-exist. Neither is anywhere mentioned that a humanitarian intervention shall not be decided unilaterally by the regional authorities. On the contrary, article 26 provides that the UN is only one among the many potential initiators of the Mechanism's application listed; namely the Authority, the Mediation and Security Council, a Member State, the Executive Secretary and the OAU. A sound counter-argument could be that the said articles of the Mechanism should be read together with its article 2; since it expresses ECOWAS commitment towards the UN Charter, the gaps noted above are filled in. However, a reminding of the principles emphasized in article 2 reveals the absence of explicit reference to the prohibition to use force and of interventions in matters within the domestic jurisdiction of States; and this inhibits the convincingness of the above counter- argument.

As a supplementary document of the Mechanism, the Protocol on Democracy and Good Governance (EPDGG), has not much to add on the relationship with international law. It explicitly declares as its first and foremost objective the enhancement of the Mechanism 'through the incorporation of provisions concerning (…) prevention of

internal crises, democracy and good governance, the rule of law, and human rights'.[859] That also explains why it does not say much on military interventions either. Except for sanctions, that could be nonetheless coercive, the only substantial reference to the use of military force at the regional level by ECOMOG is found in article 19 (3) which solely reminds of article 28 of the Mechanism's Protocol. Additionally, article 19(4) makes clear that armed forces shall be ready to participate in peacekeeping missions under UN auspices. Whereas the distinct formulation in which the two possibilities are presented could be perceived as another expression of regional intent to make unilateral decisions on military interventions, at the same time it is not an automatic discharge of ECOWAS' obligation to receive a UNSC authorisation before initiating an ECOMOG military intervention.

The Conflict Prevention Framework of 2008 was adopted to address the lack of a uniform regional strategic approach on conflict prevention by the institutions established through previous instruments, and provides for a distribution of roles among them.[860] Article 18 of the ECPF clarifies that its objective is to provide for operational and structural prevention measures that could halt the descent of conflicts into violence. That same article sets out that for the purposes of ECPF 'conflict prevention' refers to non- violent conflict transformation. Considering the constructive ambiguity of the Mechanism on the initiation of military interventions and its silence on relevant international law principles, it is rather interesting that article 117 of the ECPF deems ECOWAS prevention initiatives an 'integral part of the continental and global security architecture defined under the relevant provisions and derivative statutes of the Constitutive Act of AU and the UN Charter'. Additionally, whilst recognising that 'military intervention should constitute only a segment, and ideally a measure of last resort, within the broader peace and security architecture',[861] ECPF does not make any explicit reference to distinct regional rights of military interventions as a measure of

[859] ECOWAS Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, <http://documentation.ecowas.int/legal-documents/protocols/> accessed 22 June 2019.
[860] ECOWAS Regulation MSC/REG.1/01/08, The ECOWAS Conflict Prevention Framework (8 January 2008) <https://old.ecowas.int/publications/en/framework/ECPF_final.pdf> accessed 22 June 2019, Section II; Samuel Atuobi, 'Implementing the ECOWAS Conflict Prevention Framework: prospects and challenges' at <http://dspace.africaportal.org/jspui/bitstream/123456789/31659/1/KAIPTC-Policy-Brief-3-November-2010.pdf?1> accessed 22 June 2019.
[861] Ibid Conflict Prevention Framework article 26.

last resort. On the contrary, article 40 reminds the 'firm legal basis' which 'underpins the relationship between ECOWAS (…) and the United Nations on the cardinal issues of peace and security', emphasizing the 'principles of subsidiarity and complementarity in accordance with the provisions of Chapter VII of the UN Charter'. Similarly, whereas ECOWAS moral obligation to act, beyond legal instruments and guidelines, is declared in article 41, the supranational powers conferred to the organisation[862] are nonetheless limited to actions 'on behalf of and in conjunction with Member States, AU and UN'. And inevitably, to act on behalf or together with the UN, entails compliance with the UN Charter's principles.

The eagerness of ECOWAS to emphasize the lack of effective operational initiatives by the UN to address regional conflicts is profoundly present in the post- Liberian constitutive setting. In a comparatively recent work discussing the role of regional organisations in the collective security system, with references to the Liberian conflict and ECOWAS response, Monica Hakimi[863] approaches the legality of ECOMOG's intervention from a non- traditional perspective. Alongside to the literature discussing the legality of the unauthorised intervention of ECOWAS, the content of the international organisation's response, as well as the implications of the UN delayed reaction, she presents a new concept for legality under which the Liberian conflict could fall.[864] Hakimi argues for the existence of two different legal systems governing enforcement actions taken by regional organisations; the one reflected in the Charter text and publicly endorsed by major international actors and the other based on expectations and demands in the absence of UNSC authorisation, which she names 'the operational system'. She suggests that the international practice in the area (including both endorsement of the Charter rules and a number of deviations) reveals that the two different legal systems coexist.

The primary objective of Hakimi was not to allege that the ECOMOG intervention was not illegal under the Charter rules. She points out that international actors overlooked

[862] Revised Treaty of ECOWAS (n 745) article 58(2).
[863] Hakimi (n 755).
[864] Kufuor (n 736) analyses the legal implications of the UNSC Res 788 (19 November 1992) UN Doc S/RES/788, namely whether it vindicates all measures taken by ECOWAS in Liberia and the value of the sanctions imposition.

the deviation from the Charter and recalls that some of the ECOWAS member states went even further: 'The Guinean President stated that ECOWAS does not need the permission of any party involved in the conflict for ECOMOG to deploy and that with or without the agreement of any of the parties, ECOWAS troops will be in Liberia'.[865] By stressing those facts, she claims that the Liberian case, among others, is an indicator of the existence of a second legal system; though at odds with the Charter. Nevertheless, she concludes by suggesting that, 'The status quo- in which the operational system functions discreetly to permit deviations from Article 53- remains the best available option for managing the international community's varied interests'.[866]

Taking into account the time when Hakimi was writing, it could be alleged that she had in mind the changed constitutive framework of ECOWAS. Yet, her analysis cannot correspond to the Liberian conflict, since the 'second parallel legal regime' she describes was not in place. Furthermore, the question as to whether deviation from the Charter rules has signified the occurrence of a new legal regime is not thoroughly and convincingly answered. The fact that in all the occasions cited she is trying to justify the enforcement action by at least some reference to the Charter rules proves the opposite from what she suggests that is the coexistence of a second parallel legal regime. In any case politically motivated deviations are different from legal principles and rules, and they fail to provide evidence for the development of CIL rules.

On the 'other side of the river' stands the approach of Mgbeoji. He supports that adherence to the normative framework provided by the UN Charter is of paramount importance.[867] Whilst being critical of the procedures followed until now by the UN and the highly selective approach they have demonstrated during decision-making he advocates for the absolute nature of article 53 of the UN Charter. In his analysis on the emergence of regional initiatives in the African continent, and this followed the adoption of the Mechanism, he insisted that validation of military interventions after their occurrence can constitute a dangerous precedent. Richard Falk,[868] alleges that

[865] Weller (n 756) 66.
[866] Hakimi (n 755) 685.
[867] Ikechi Mgbeoji, *Collective Insecurity: The Liberian Crisis, Unilateralism, and the Global Order* (UBC Press- Vancouver 2003).
[868] Richard A Falk, 'Book Review: Collective Insecurity: The Liberian Crisis, Unilateralism, and the Global Order, by Ikechi Mgbeoji' (2005) 43 OsgoodeHallLJ 201.

despite some originality- support and criticism of international law and procedures authorising the use of force, at the same time- 'we need far more guidance as to how to construct a beneficial future for the peoples of Africa'[869] and wonders 'what is an optimal interim strategy with respect to these issues'?[870]

Like the ECOWAS Charter, the Washington Treaty does not contain any explicit provision on international law and their respective relationship. However, through various references to the UN Charter their relationship, albeit implicitly, is contextualised. The Washington Treaty's Preamble emphasizes that 'the Parties to this Treaty reaffirm their faith in the purposes and principles of the Charter of the United Nations'. Whereas that amounts to an all- catch declaration, its drafters deliberately chose to underline faith rather than the Charter's primacy. Inevitably, that could reflect some hesitation in fully adjoining the Alliance to the international law system prescribed by the UN Charter. Similarly, despite adopting articles 2(3) and 2(4) of the Charter, article 1 of the Washington Treaty refrains from including the explicit negation of the threat or use of force 'against the territorial integrity or political independence of any state' and reproduces only the general scope of the negation; that is the prohibition of the threat or use of force 'in any manner inconsistent with the purposes of the United Nations'.

Nonetheless, the most definitive provision on the extent to which the Parties to the Treaty considered themselves bound by the UN system of international law on peace and security is found in article 7. The said provision, irrespective of the organisation's practices, recognises the primacy of the UN Charter vis-à-vis the Washington Treaty, and reaffirms in the most explicit manner 'the primary responsibility of the Security Council for the maintenance of international peace and security'.

The EU's adherence to the principles of UN Charter and 'traditional' international law as opposed to some alleged right of unauthorised militarily intervention is underlined in the Lisbon Treaty. It stipulates, inter alia, the EU's obligation to support and promote the established principles of the UN Charter as well as customary international law; that

[869] Ibid 207.
[870] Ibid 206.

was also affirmed earlier by the CJEC (predecessor of CJEU) which underlined that the then European Community is 'required to comply with the rules of customary international law'.[871] In actual terms, article 3(5) of the Lisbon Treaty states that one of the responsibilities of the Union is to contribute to 'the strict observance and the development of international law, including respect for the principles of the United Nations Charter'. This position is strengthened by its article 21(1) which prescribes that the Union's action as a global actor shall be guided, inter alia, by 'respect for the principles of the United Nations Charter and international law'. And that in the course of its synergies it shall 'promote multilateral solutions to common problems, in particular in the framework of the United Nations'. Article 21(2)(c) adds that the Union shall 'preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter' whilst promoting according to 21(2)(h) an 'international system based on stronger multilateral cooperation'. Hence the position found at the heart of the EU's legal order, that is specifically related to the exercise of the regional organisation's external actions, is that international law must be respected at all times.

That the EU positions itself within the system of the UN is also prescribed in article 42 of the TEU on the CSDP. Whereas article 42(1) aspires to enlarge the scope of potential interventions by suggesting that the Union may use the CSDP structures outside its borders to prevent conflicts, at the same time it provides that actions must be in accordance with the principles of the UN Charter. Even the Mutual Defence Clause of 42(7) requires the strict observance of the respective UN framework, namely article 51 of the Charter.[872]

Except for the Treaties, other guiding and binding documents of the EU also recognise the UNSC's vital role in the field of international peace and security. In the European Commission's report of 2003, for example, on the relation between the EU and the UN, it is emphasized that,

[871] Case C- 162/96 *Racke GmbH & Co v Hauptzollamt mainz* [1998] ECR I-3655, para 45.
[872] For the first time this was invoked by France during the Foreign Affairs Council on 17 November 2015, following the terrorist attacks in Paris on 13/11/2015.

> with the creation of a European military capacity, (…) CFSP and ESDP are underpinned by the wish to act to uphold the principles and Charter of the UN, providing active and early support to UN- mandated or UN-led operations is a clear task for the progressive framing and deployment of the EU's security and defence policy and capabilities.[873]

On that same year, the European Security Strategy, adopted by the European Council, declared the Union's commitment 'to upholding and developing International Law' and recognised that 'the fundamental framework for international relations is the United Nations Charter'.[874]

Additionally, the 2004 declaration on EU- UN Cooperation in Military Crisis Management Operations (Elements of Implementation of the EU- UN Joint Declaration) again adopted by the European Council, underlined the EU's subsidiary role in relation to that of the UNSC. It reaffirmed the EU's stance in previously adopted documents, such as the conclusions of the 1999 Helsinki and the 2001 Göteborg summits.[875] According to the outcomes of the 1999 Helsinki Summit, except for recognising the 'primary responsibility' of the UN, the EU also expressed its readiness to 'contribute to international peace and security in accordance with the principles of the United Nations Charter'.[876] At Göteborg it was acknowledged that 'the development of the ESDP strengthens the Union's capacity to contribute to international peace and security in accordance with the principles of the UN Charter'.[877]

The 2004 declaration also stated that, 'The European Security Strategy underlined the importance of the United Nations in international relations, and recalled that the United Nations Security Council has the *primary responsibility* for the maintenance of international peace and security'. It further stipulated that the two main options for EU

[873] European Commission (10 September 2003), 'The European Union and the United Nations: The Choice of Multilateralism' COM(2003)526 final, 7.
[874] European Council (12 December 2003), 'A Secure Europe in a Better World: A European Security Strategy' para 9 <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf> accessed 20 June 2019.
[875] European Council, Presidency Conclusions, Helsinki European Council (10-11 December 1999) SN 300/99, para 26; European Council, Presidency Conclusions, Göteborg European Council (15- 16 June 2001) SN 200/1/01 REV 1, para 47.
[876] Ibid Helsinki.
[877] Göteborg European Council (n 875).

initiatives in the field of international peace and security, hitherto 'at this stage' are the 'provision of national military capabilities in the framework of a UN operation, or, an EU operation in answer to a request from the UN'.[878]

This view has also been seconded by in discussions held within the UNSC, by EU states where it was repeated that, 'the primary responsibility for the maintenance of international peace and security lies with the United Nations (…) No other universally accepted legal basis for constraining wanton acts of violence exists'.[879] This position, was more recently sustained in the European Parliament's report of 2015 on the role of the EU within the UN system; the EU is placed within the UN security system without suggesting any status of autonomy. In a rather specific manner, it recalls that 'Article 21 TEU expressly calls for respect for the principles of the UN Charter and international law'[880] and notes that the UNSC is 'primarily responsible for maintaining international peace and security'.[881]

5.6. Conclusion

As it has been stated in the introduction, the constitutive foundations of regional organisations constitute an additional form of regional practice. Therefore, the carrying out of unilateral enforcement actions by different regional organisations under humanitarian claims has prompted the assessment of their compliance with respective internal legal orders at the time. Additionally, this chapter sought to identify any evidence of constitutive provisions of ECOWAS, NATO and the EU currently in place for the unilateral initiation of regional military interventions.

The unilateral military interventions of ECOWAS in Liberia and of NATO in Kosovo, were carried out in contravention of their concurrent internal legal arrangements. The ECOWAS governing instrument of the time, PMAD, did not provide for regional

[878] Council of the EU (15 June 2004), 'EU-UN cooperation in Military Crisis Management Operations Elements of Implementation of the EU-UN Joint Declaration', Annex II to the ESDP Presidency Report, Doc 10547/04.
[879] UNSC Report (11 April 2003), 'The Security Council and regional organisations: facing the new challenges to international peace and security' UN Doc S/PV.4739 at 5.
[880] European Parliament Resolution (24 November 2015), 'The role of the EU within the UN' Doc P8_TA (2015)0403, intent B <http://www.europarl.europa.eu/doceo/document/TA-8-2015-0403_EN.html> accessed 18 June 2019.
[881] Ibid intent W.

unilateral interventions; including for humanitarian purposes. Similarly, the Washington Treaty, which remains restricted with regarding the humanitarian use of force up until today, is more conservative than the political aspirations that were put forward during its intervention in Kosovo. Whereas the interventions of both ECOWAS and NATO came with appeals of the respective organisations for change, concrete legal change only took place in relation to ECOWAS' instruments.

The constitutive developments following the Liberian conflict, provide some grounds for inferring that ECOWAS envisions an advanced role and regional input in the cases allegedly warranting military interventions. Whilst ECOWAS' revised founding Treaty and the distinct legal instruments adopted concern inter alia humanitarian interventions,[882] whether they shall be decided unilaterally is not specifically tackled. As already mentioned, the 'constitutionality' of ECOMOG's humanitarian interventions whilst being contested under international law, would not be easily contested in the internal context. Hence, it could be suggested that it forms indeed some evidence of verbal practice in support of forcible interventions on humanitarian grounds, though opinio juris has remained absent.

On the other hand, the decisions of NATO and the argumentation put forward, appealing for some wide rights of intervention, could by no means be supported by the 'constitutional' arrangement of the Alliance. Even through Kosovo the scope of NATO's internal legal order on interventions has not convincingly changed. Bearing on the difficult argument of treaty modification through practice and the absence of irrefutable evidence that unilateral humanitarian use of force is considered as a legal cause of action by the parties of the Washington Treaty, only its formal modification would provide certain evidence of different constitutive practice.[883]

Concerning the EU, but for the textual commitments and pronunciations discussed above, various claims in support of the existence of sui generis EU rights, to enhance the global collective security by undertaking military actions autonomously have been raised; particularly, in response to the incapacity of the UN to take action under Chapter

[882] ECOWAS Mechanism (n 764) articles 22(b) and 22(c).
[883] VCLT articles 39-41.

VII due to the politics of its five permanent members. However, the EU official and binding documents state the opposite. Or, at least that, the EU should become competent enough- ultimately self- sufficient- to carry out military missions abroad; to obtain the capacity for 'autonomous action', though in line with the UN Charter.[884] This refers, most profoundly, to the tasks that the EU might undertake in cases of conflict, in crisis management or conflict prevention; in other words to the Petersberg Tasks, the scope of which has been enlarged through the adoption of the Lisbon Treaty, as discussed above. Overall, the constitutional framework of the EU does not provide a sound legal basis for the capacity of the EU to proceed with 'autonomous decision-making' for enforcement actions, including in humanitarian crises.

As already noted, the 'autonomy' claim is not recent. And the extent to which the responsibility of regional arrangements in the field discussed should be limited, consisted an issue of concern among the drafters of the UN Charter. Yet, even before that, 'the earliest case relating to Latin America concerned the relationship between the Act of Chapultepec and the Dumbarton Oaks proposals'.[885] According to Orakhelashvilli,

> the autonomy thesis essentially aims to rearrange the allocation of competence under organisations' constituent instruments- including exclusive competence- and thus enable a regional organisation to undertake an action that otherwise needs UN authorisation.[886]

As he correctly points out, the autonomy of regional organisations is limited to the provisions of Chapter VIII and of article 103 of the UN Charter. In that sense, the Charter's system is binding on regional organisations also. Considering that regional organisations, as subjects of international law, remain bound by it at all times, changes to the spectrum of rights and obligations of regional organisations will follow mutatis mutandis any changes of international law. All the more, it is revealed that the regional organisations discussed above, confirm through specific constitutive provisions their adherence to international law, albeit in a varied manner.

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[884] Presidency Conclusions, Cologne European Council (3- 4 June 1999) SN 150/99 REV 1 ANNEXES CAB, Annex III, para 1.
[885] Orakhelashvilli (n 816) 141.
[886] Ibid 142.

Additionally, except for the constitutive developments of ECOWAS, and yet not conclusively, neither NATO nor the EU have legally met their rhetoric, thus undermining any claimed readiness to expand their rules and incorporate internally humanitarian intervention. Therefore, it cannot be established that there is general and consistent constitutive regional practice under the aegis of opinio juris to assert that a customary change from within regional organisations has been shaped; neither can it be inferred that regional organisations at large are contributing by virtue of their verbal practice to a gradually emerging new rule under CIL.

6. Conclusion

6.1. General remarks

The Introduction asserts, in the words of Franck, that 'Any prognosis regarding the future of world order must begin by addressing the question whether recent events have indeed had a transformative effect on the law of the international system, and if so, what that transformation portends'.[887] The examination by this thesis of the contribution of regional organisations to the allegedly normative construction of a humanitarian exception to the prohibition of using force under CIL, inquires exactly that. It examines the legal normative effect of regional undertakings on the law of the international system and approaches transformation not only as change of the law's content but also as enhancement of its normative appeal.

The thesis at hand does not provide an assessment of the alleged virtues of humanitarian use of force, neither seeks to emphasise its tangible moral shortcomings though these are encountered throughout the work. These have been extensively discussed in past literature by legal scholars, international relations specialists and moral philosophers. Acknowledging that social, cultural and ideological considerations on an alleged doctrine have a role to play in communicating different views which effectively affect the choice of states and international organisations, these are not in and by themselves evidence for the formation of legal norms. The evidence of an existing customary international law rule is to be found in the general practice and the opinio juris of states and international organisations.

The lack of certainty as to the exact scope of regional contribution to CIL in the Conclusions of the ILC regarding the identification of new customary rules, is beyond doubt a point of departure for scholarly engagement, including this work, towards trying to clarify the tenets of institutional contribution in the context of humanitarian intervention. Inevitably, that 'the ideas of constitutional growth and international administration worked to make the informal expansion of international organizations' powers seem natural and inevitable' as Sinclair analyses in problematising the

[887] Thomas Franck, 'What Happens Now? The United Nations after Iraq' (2003) 97 AJIL 607, 610.

expansion's direction, has steered also the aforementioned quest.[888] The work at hand endeavoured to examine whether the contribution of ROs portends an emerging right for regional humanitarian intervention, by addressing the specific features of their contribution and applying them vis-à-vis the comprehensive examination of relevant actual practices and verbal undertakings as potential evidence of a new CIL rule.

Notwithstanding the contentious legal nature of past regional activities at the time they occurred, this analysis takes place in the backdrop of increasing sophistication of regional and sub-regional organisations in relation to collective security and commitments for proactive engagement when human rights are systematically violated. The resurface of pro-unilateralist claims for regional organisations in contrast with the predominant understanding of the general prohibition of the use of force, is therefore a congruent result of ongoing humanitarian crises and divergent responses; and it possibly will be enhanced in light of the current overwhelming surge of military unilateralism by powerful states and non-institutional coalitions.

Contrary to past works supporting a CIL rule based primarily on the African experience of operational activities and respective constitutive developments, or arguing that Kosovo should be assessed as a norm-generating incident- all assessed on their own merits- this thesis sought to examine the aggregate of such incidents and verbal practices of regional organisations practically able to participate in regional humanitarian intervention. In an effort to provide a conclusive outcome on the normative impact of their contribution towards the rise or crystallisation of a new CIL rule, the thesis embarked upon the examination of regional undertakings in the aftermath of the Cold War, representative of the practice of different regional actors which are essentially comparable.

Acknowledging that the 'process for the identification of customary international law is not always susceptible to exact formulations' it attempts to provide a more systematic approach, taking into consideration the call of the 2018 Conclusions of the ILC on the 'Identification of Customary International Law'; and the urge of legal scholars who

[888] Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (OUP 2019) 294.

rightly criticise the predisposed manner in which CIL has been projected in literature, including in the case of humanitarian intervention. As the thesis suggests, a more methodical approach as to the identification of sufficient evidence of practice accepted as law (opinio juris) renders inescapable the conclusion that the normative legal impact of regional actual undertakings and verbal actions is short of sustaining the proposition that a new CIL rule is in the pipeline.

6.2. Research summary and findings

The Introduction of the thesis provides the framework for the inquiry at hand. It describes the extent to which the choice of unilateralism in general, and of regional unilateralism in particular, has been anticipated by a stark amount of scholarly work and proceeds from the assumption that the legal relevance of an alleged norm cannot escape a rigorous and methodical analysis regarding its genesis. It acknowledges that CIL remains a significant source for the development of new legal rules, but adheres to the proposition that within a perplexing pluralistic international legal order the articulation of the methods giving rise to new CIL rules is of paramount importance. The limited case-specific analysis provided by various past works regarding the legality of humanitarian intervention by States and regional organisations alike, as indicated in the Introduction, constitutes a factor for uncertainty, ambivalence and at times, for biased conclusions. Yet, past works provide a point of departure for this thesis which attempts to provide a more comprehensive and allegedly systematic analysis of evidence relevant to contribution of ROs towards the development of a CIL rule for regional humanitarian intervention. The methodological elements shaping the analysis of regional undertakings in following chapters are described in the Introduction, and revolve around the recent work of ILC on the 'Identification of Customary International Law'. The work endorses the view that verbal acts constitute an eligible form of practice, important in the context of IOs activity, despite the fact that physical conduct is by default easier to observe. Acknowledging that it is difficult to agree on the forming moment of a CIL rule, bearing to the conceptual uncertainties inherent in opinio juris, it contends that the assessment of the normative impact of ROs contribution to the

development of regional humanitarian intervention requires the identification of both relevant practice and opinio juris.[889]

Having set the theoretical background for the examination of instances presented in the literature as supportive of the proposition that a CIL rule is emerging, Chapter Two sets the legal framework within which the discussion of the alleged right is maintained. The alleged right stands in contrast to the conventional norms and the identical customary international law on the general prohibition on the use of force found in article 2(4), the exceptions' regime and the respective limitations to the regional unilateral use of force except when the provisions of article 51 on self-defence are adequately satisfied. It illustrates that the UN Charter provides that the military participation of regional organisations in a conflict or humanitarian situation shall follow their inscription as delegates of the UN following a UNSC authorisation under the procedure provided in Chapter VII.[890] Underlining the *jus cogens* nature of the general prohibition, Chapter Two holds that the necessary requirements for establishing a new exception under CIL, require a robust proof.

The analysis of the case-studies in the following Chapters, takes place within the methodological and normative scope presented in the Introduction and Chapter Two respectively. Chapters Three and Four embarked respectively upon the analysis of ECOWAS' intervention in Liberia, which was followed by constitutive developments but abstention from unilateral humanitarian interventionism, and NATO's use of force in Kosovo and Libya. The military action in Libya discussed in Chapter Four, serves as evidence of discontinuity of NATO's Kosovo unilateralist practice since it followed the explicit implementation of the notion of R2P by the UN to use force.

In Liberia the justification of using force to avert atrocities was presented in a rather amorphous manner, whereas NATO's intervention in Kosovo could amount to evidence of practice contributing to the rise of a new rule under CIL. In light of absent prior

[889] Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and some of its Problems' (2004) 15 EJIL 523, 536.
[890] Erika de Wet, 'The Relationship between the Security Council and Regional Organisations during Enforcement Action under Chapter II of the United Nations Charter' (2002) 71 NordicJIL 1, 5- 7.

practice and judged on their own merits none of the two cases attests to the formation of a new CIL right for regional humanitarian intervention. Although humanitarian intervention was clearly outside the ambit of the formal institutional activities of both ECOWAS and NATO at the time of Liberia and Kosovo respectively, a qualitative distinction in respect of CIL development is that the intervention of ECOWAS was also ultra vires the decision-making procedures of the organisation. The internal legality of ECOWAS intervention in Liberia was largely inhibited by the 'novel' decision-making route followed that provided for an ad hoc mission, thus questioning its ascription to the regional organisation.

Beyond the unlikely existence of opinio juris by the organisations themselves, various actors in the international community to which the undertakings were known, denounced as illegal the unilateralist undertakings. Even in the case of Kosovo, the characterisation of the intervention as 'legitimate' was short of providing any attestation for legal bindingness. Notwithstanding the post-factum resolutions of the UNSC, there was no element present condoning to the view that humanitarian intervention was considered as a sound legal justification for their initiatives. Nevertheless, it is argued that in the midst of Kosovo despite the absence of a clearly determined sense of legal obligation for humanitarian intervention, the assertion for an emerging new right could be sustained by virtue of its yet limited but growing enhancement of supportive acclamation. The military action of NATO in the case of Libya on the other hand, implemented only following the adoption of resolution 1973 by the UNSC, reinforces the argument that NATO's Kosovo intervention was motivated by political choice rather than out of a sense of legal bindingness. All the more, the case of Libya marked a shift regarding NATO's practice, allegedly towards humanitarian multilateralism. The analysis of the tangible drawbacks of NATO's activity even in a case of mandated intervention (and not only in unilateral Kosovo) at the end of Chapter Four reveal that the regional organisations can be abusive of UNSC mandates on the ground. This exacerbates the argument that unilateral humanitarian use of force can be distorted even more easily. It is suggested that this explains the lack of relevant opinio juris among international actors at least in the context of actual practices.

Chapter Five endeavoured to analyse the constitutive practices of ECOWAS, NATO and the EU in their current form, as another regional practice which can contribute in principle to the development of regional humanitarian intervention under CIL. Their analysis demonstrates that their constitutive undertakings are not evidence of generally accepted practice for regional humanitarian unilateralism; it is neither sufficiently widespread nor representative, nor consistent. Assessed on their own merits, except for ECOWAS, neither NATO nor the EU have ascribed to constitutive practice accommodating internally the unilateral humanitarian use of force. Indeed, ECOWAS revised founding Treaty and the distinct legal instruments adopted concern inter alia humanitarian interventions. However, there is not sufficient evidence to conclude that the relevant provisions amount to well-founded practice for unilateral interventions; whether humanitarian interventions shall be decided unilaterally or not, is not specifically addressed. Nonetheless, the possible 'constitutionality' of humanitarian interventions in the internal context of ECOWAS, which in the absence of near-universal acceptance cannot be seen as attesting the rise or crystallisation of a CIL rule, can plausibly give rise to relevant future practice.

NATO on the other hand, beyond political aspiration and relevant declarations which could hypothetically provide some grounds for alleging the re-interpretation of its provisions, has not engaged in practice substantiating concretely pro-humanitarian rhetoric. Overall, bearing on the difficult argument of treaty modification through practice and the absence of irrefutable evidence that unilateral humanitarian use of force is considered as a legal cause of action by the parties of the Washington Treaty, only its formal modification would provide certain evidence of different constitutive practice.[891] A similar finding pertains to the EU. The examination of verbal undertakings indicates that beyond circumstantial statements and declarations, the evidence drawn from the constitutional framework of the EU and other official and binding documents as well as declarations attributed to the organisation, does not attest to recognition, or even claim, of a CIL rule endorsing regional humanitarian intervention. On the contrary, without prejudice to its military enhancement for reasons of operational self- sufficiency, the EU undertakes to act in line with the UN Charter.

[891] VCLT articles 39-41.

Regarding the relationship of regional constitutions and international law, and thus the impact of regional legal autonomy claims on a potentially fragmented genesis of regional humanitarian use of force, only the EU provides expressly for the primacy of international law. Nevertheless, by referring to the UN Charter, the legal instruments of ECOWAS and NATO contextualise, albeit implicitly, a similar view.

6.3. An attempted 'prognosis' for the future

The thesis at hand recognises that in the post-Cold war era the vindication of a liberalized system of collective security has been profound.[892] As illustrated, both in practice and scholarly debate the engagement with the 'adaptation' of the general prohibition to use force to meet the claimed moral imperatives of universal humanitarianism has been notable. Nevertheless, 'such liberalization has not manifested itself in either the dislocation of the prohibition on the use of force or the invocation of new "limitations" to the prohibition'.[893] This is emphasized through the findings of this work which upholds, through the assessment of the merits of their respective potential contribution, that the existence even of an emerging rule for humanitarian intervention by ROs is strongly contested.

The overwhelming predicaments in the acceptance of humanitarian intervention as a legal rule, are not irrelevant to the incessant adherence of the vast majority of international actors to the omnipotence of peaceful protection. Notwithstanding the growing importance of the human rights protection and the general acceptance that they 'have now become a mainstream part of international law',[894] they challenge the subservient contribution of external military interventions, which often exceed the scope of humanitarian objectives. This is best echoed in the words of Kennedy who emphasises 'how easily ethical denunciation and outrage can get us into things on which we are not able to follow through – triggering intervention in Kosova, Afghanistan and

[892] Jean D'Aspremont, 'The Collective Security System and the Enforcement of International Law' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015).
[893] Ibid 154.
[894] ICISS, *The Responsibility to Protect* (International Development Research Centre- Canada 2001) <https://www.idrc.ca/en/book/responsibility-protect-report-international-commission-intervention-and-state-sovereignty> accessed 16 December 2018 at Chapter 1, The Policy Change, New Demands and Expectations, para 1.25.

even Iraq, with humanitarian promises on which we cannot deliver'.[895] Furthermore, states and regional organisations alike, have largely proven hesitant to recognise the legality of humanitarian intervention, in general and regional, also out of uneasiness for a doctrine that could equally be used against them.

For reasons irrelevant to the international legal system, one can only assume that the unilateralist initiatives will not disperse and that the proliferation of arguments supportive of an approving new exception to the general prohibition will continue; out of genuine humanitarian concern or policy-driven motivations. Nevertheless, what international lawyers must insist on in providing advice and informing the debates is an objective analysis of the law as it is at the given time. After all, even with regards to CIL, its inherent value remains not just change in legal norms, but also the safeguarding of a principled and representative international legal system beyond 'pressures for momentous and situational change'[896] through individual practices and self-claimed beliefs of powerful international actors.

[895] David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton UP 2004) 164.
[896] Alexander Orakhelashvilli, 'Changing Jus Cogens through State Practice? The Case of the Prohibition of the Use of Force and its Exceptions' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 175.

Bibliography

(A) Books; (B) Chapters in books; (C) Journal articles; (D) Online articles; (E) Conferences, Research, and Policy Papers; (F) Official Sites; (G) Blogs; (H) Online Media and Newspapers; (I) Other

(A) Books

Abass A, *Regional Organisations and the development of Collective Security, Beyond Chapter VIII of the UN Charter* (Hart Publishing 2004)

Arend A and Beck R, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (Routledge 1993)

Bellamy A, *The Responsibility to Protect* (Polity 2009)

Brownlie I, *International Law and The Use of Force by States* (OUP 1963)

-- *Principles of Public International Law* (7th edn, OUP 2008)

Allen Buchanan, *Human Rights, Legitimacy and the Use of Force* (OUP 2009)

Cassese A, *Realizing Utopia, The Future of International Law* (OUP 2012)

Chesterman S, *Just War or Just Peace? Humanitarian Intervention and International Law* (OUP 2003)

Claude I, *Swords into Plowshares: The Problems and Progress of International Organisation* (3rd edn, NY: Random House 1964

D'Amato A, *Concept of Custom in International Law* (Cornell UP 1971)

-- *International Law: Process and Prospect* (Dobbs Ferry, NY: Transnational Publishers 1987)

Deng F, Kimaro S, Lyons T, Rothchild D, Zartman W, *Sovereignty as Responsibility: Conflict Management in Africa* (Brookings Institution Washington DC 1996)

Dinstein Y, *War, Aggression and Self-defence* (5th edn, CUP 2012)

Ellis S, *The Mask of Anarchy: The Destruction of Liberia and the Religious Dimension of an African Civil War* (2nd ed, NY UP 2006)

Evans G, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institution Press 2009)

Franck T, *Recourse to Force, State Action Against Threats and Armed Attacks* (CUP 2002)

Gazzini T, *The Changing rules on the use of force in international law* (Manchester UP 2005)

Glanville L, *Sovereignty and the Responsibility to Protect: A New History Paperback* (The University of Chicago Press 2014)

Gray C, *International Law and the Use of Force* (3rd edn, OUP 2008)

Hannikainen L, *Peremptory Norms (Jus Cogens) in International Law* (Finnish Lawyers' Pub. Co. 1988)

Higgins R, *Problems & Processes: International Law and How We Use It* (OUP 1994, reprinted 2000)

-- *The Development of International Law through the Political Organs of the United Nations* (OUP 1963)

Howard M, *The Invention of Peace and the Reinvention of War: Reflections on War and International Order* (Profile Books 2001)

Iyi JM, *Humanitarian Intervention and the AU-ECOWAS Intervention Treaties Under International Law: Towards a Theory of Regional Responsibility to Protect* (Springer 2016)

Kammerhofer J, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge 2012)

Kaufman J, *NATO and the Former Yugoslavia: Crisis, Conflict, and the Atlantic Alliance* (Rowman & Littlefield 2002)

Kelsen H, *Collective Security under International Law* (The Lawbook Exchange, reprinted 2011)

-- *The Pure Theory of Law*, translated by Max Knight (2nd ed, The Lawbook Exchange 2009).

Kennedy D, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton UP 2004)

Koskenniemi M, *The Gentle Civilizer of Nations: The rise and fall of international law 1870- 1960*, vol 14 Hersch Lauterpacht Memorial Lectures (CUP 2002)

Koutrakos P, *EU International Relations Law* (2nd edn, Hart Publishing 2015)

Krieger H (ed), *The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999* (Cambridge International Documents Series 2012)

Lauterpacht H (ed), *The Development of International Law by the International Court* (CUP 1982)

Lillich R, *Humanitarian Intervention and the United Nations* (UP Virginia 1973)

Menon R, *The conceit of Humanitarian Intervention* (OUP 2016)

Mgbeoji I, *Collective Insecurity: The Liberian Crisis, Unilateralism, and the Global Order* (UBC Press- Vancouver 2003)

Mill JS, *On Liberty* (The Liberal Arts Press 1956)

Murphy S, *Humanitarian Intervention: The United Nations in an Evolving World Order*, vol 21 (Procedural Aspects of International Law Series PENN 1996)

Newton M and May M, *Proportionality in International Law* (OUP April 2014)

Nincic D, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (The Hague: Martinus Nijhoff 1970)

Oppenheim L, *International Law: A Treatise: Vol. I- Peace* (ed) Hans Lauterpacht (7th edn, London: Longmans, Green and Co 1948)

-- *International Law: A Treatise: Vol. I- Peace* (ed) Hans Lauterpacht (8th edn, New York: David McKay 1955)

Orakhelashvilli A, *Collective Security* (OUP 2011)

Orford A, *International Authority and the Responsibility to Protect* (CUP 2011)

Pattison J, *Humanitarian Intervention & The Responsibility to Protect, Who should intervene?* (OUP 2010)

Phillips DL, *Liberating Kosovo: Coercive Diplomacy and U.S. Intervention* (MIT Press 2012)

Rosenne S, *Developments in the Law of Treaties (1945-1986)* (CUP 1989)

Russel R, *History of the United Nations Charter: the Role of the United States 1940-1945* (Washington DC The Brookings Institution 1958)

Sands P and Klein P, *Bowett's: Law of International Institutions* (6th edn, Sweet & Maxwell 2009)

Schachter O, *International Law in Theory and Practice* (Martinus Nijhoff 1991)

Shaw M, International Law (6th edn, CUP 2008)

Sinclair GF, *To Reform the World: International Organizations and the Making of Modern States* (OUP 2019)

Stowell E, *Intervention in International Law* (Washington DC John Byrne & Co 1921)

Sun W and Zhang M, *The "New Culture": From a Modern Perspective* (Springer-Verlag Berlin Heidelberg 2015)

Tesón F, *Humanitarian Intervention: An Inquiry into Law and Morality* (2nd edn, Irvington-on-Hudson, NY: Transnational Publishers 1997)

Thakur R, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (CUP 2006)

Tsagourias N and White N, *Collective Security: Theory Law and Practice* (CUP 2013)

Weller M, *Regional Peace-Keeping and International Enforcement: The Liberian Crisis*, vol 6 Cambridge International Documents Series (CUP 1994)

-- *The Crisis in Kosovo, 1989–1999: From the Dissolution of Yugoslavia to Rambouillet and the Outbreak of Hostilities* (Cambridge: Documents and Analysis Publishing 1999)

Wheeler N, *Saving Strangers: Humanitarian Intervention in International Society* (OUP 2002)

White N, *Keeping the Peace* (2nd edn, Manchester UP 1997)

Zimmern A, *The League of Nations and the Rule of Law* (London: Macmillan 1936).

(B) Chapters in Books

Aning E and Atuobi S, 'The Economic Community of West African States and the Responsibility to Protect' in W Andy Knight and Frazer Egerton (eds), *The Routledge Handbook of the Responsibility to Protect* (Routledge 2012)

Borquin M, 'General Report on the Preparatory Memoranda Submitted on the General Study Conference' in Maurice Borquin (ed), *Collective Security, A record of the Seventh and Eighth International Studies Conferences, Paris 1934- London 1935* (International Institute of Intellectual Co-operation 1936)

Brownlie I, 'Thoughts on Kind-Hearted Gunmen' in Richard B Lillich (ed), *Humanitarian Intervention and the United Nations* (UP Virginia 1973)

Cannizzaro E and Palchetti P, 'Ultra vires acts of international organizations' in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2012)

Chesterman S, 'R2P and Humanitarian Intervention: From Apology to Utopia and Back Again' forthcoming in Robin Geib and Nils Melzer (eds), The Oxford Handbook on the International Law of Global Security (OUP) <https://ssrn.com/abstract=3224116> accessed 18 June 2019

Clark I, ‘Legitimacy and Norms’ in Ian Clark (ed), *Legitimacy in International Society* (OUP 2005)

Crawford J and Viles T, ‘International Law on a Given Day’, reproduced in James Crawford, *International Law as an Open System* (Cameron May 2002)

D’Aspremont J, ‘Sources in Legal-Formalist Theories’ in Jean D’Aspremont and Samantha Besson (eds), *The Oxford Handbook on the Sources of International Law* (OUP 2017)

-- ‘The Collective Security System and the Enforcement of International Law’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015)

De Hoogh A, ‘Jus Cogens and the Use of Force’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015)

Deng F et al, Sovereignty as Responsibility: Conflict Management in Africa (Brookings Institution Washington DC 1996)

Dubuisson F and Lagerwall A, ‘The threat of the use of force and ultimata’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015)

Farer T, ‘An Inquiry into the Legitimacy of Humanitarian Intervention’ in Lori F Damrosch and David J Scheffer (eds), *Law and Force in the New International Order* (Westview 1991)

Fawcett L, ‘Regionalism in Historical Perspective’ in Fawcett and Hurell (eds), *Regionalism in World Politics: Regional Organisation and International Order* (OUP 1995)

Fitzmaurice M, ‘The History of Article 38 of the Statute of the International Court of Justice: The Journey from the Past to the Present’ in Jean D’Aspremont and Samantha Besson (eds), *The Oxford Handbook on the Sources of International Law* (OUP 2017)

Gray C, ‘The Charter Limitations on the Use of Force: Theory and Practice’ in Vaughan Lowe, Adam Roberts, Jeniffer Welsh and Dominik Zaum (eds), *The United Nations*

Security Council and War: the Evolution of Thought and Practice since 1945 (OUP 2008)

Hartmann C and Striebinger K, 'Writing the Script? ECOWAS' Military Intervention Mechanism' in Tanja A Börzel and Vera van Hüllen (eds), *Governance Transfer by Regional Organizations* (Palgrave Macmillan 2015)

Helal M, 'The ECOWAS Intervention in the Gambia' in Tom Ruys and Oliver Corten (eds), *International Law on the Use of Force: A Case Based Approach* (OUP 2018)

Hummer W and Schweitzer M, 'Article 52' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (OUP 1994)

Lefkowitz D, 'Sources in Legal- Positivist Theories: Law as Necessarily Posited and the Challenge of Customary Law Creation' in Jean D'Aspremont and Samantha Besson (eds), *The Oxford Handbook on the Sources of International Law* (OUP 2017)

McCorquodale R, 'Sources and the Subjects of International Law: A Plurality of Law-Making Participants' in Jean D'Aspremont and Samantha Besson (eds), *The Oxford Handbook on the Sources of International Law* (OUP 2017)

McGoldrick D, 'The Principle of Non- intervention: Human Rights' in Vaughan Lowe and Colin Warbrick (eds), *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst* (Routledge 1994)

Moore J, 'The Role of Regional Arrangements in the Maintenance of World Order' in Cyril E. Black & Richard A Falk (eds), *The Future of the International Legal Order, Volume 3 Conflict Management* (Princeton UP 1971)

Orakhelashvilli A, 'Changing Jus Cogens through State Practice? The Case of the Prohibition of the Use of Force and its Exceptions' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015)

Pellet A, 'Article 38' in Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat, Christian Tams (eds), *The Statute of the International Court of Justice: A Commentary* (2nd ed, OUP 2012)

Reinold T, 'Africa's Emerging Regional Security Culture and the Intervention in Libya' in Aidan Hehir and Robert W Murray (eds) *Libya, the Responsibility to Protect and the Future of Humanitarian Intervention* (Palgrave Macmillan 2013)

Reisman M and McDougal M, 'Humanitarian Intervention to Protect the Ibos' in Richard B Lillich (ed), *Humanitarian Intervention and the United Nations* (UP Virginia 1973).

Ress G, 'Article 53' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (OUP 1994)

Roberts A, 'Legality vs. Legitimacy: Can Uses of Force Be Illegal But Justified?' in Philip Alston and Euan Macdonald (eds), *Human Rights, Intervention and the Use of Force* (OUP 2008)

Rodley N, 'Humanitarian Intervention' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015)

Rummel R, 'The EU's involvement in Conflict Prevention' in Vincent Kronenberger and Jan Wouters (eds), *The European Union and Conflict Prevention- Policy and Legal Aspects* (TMC Asser Press 2004)

Skouteris T, 'Engaging History in International Law' in José María Beneyto and David Kennedy (eds), *New Approaches to International Law* (TMC Asser Press 2012)

Tams C and Tzanakopoulos A, 'Use of Force' in Jean D'Aspremont and Jörg Kammerhofer (eds), *International Legal Positivism in a Post- Modern World* (CUP 2014)

Weiler J, 'Armed Intervention in a Dichotomized World: the case of Grenada' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (Dordrecht: Martinus Nijhoff 1986)

Weller M, 'Introduction: International Law and the Problem of War' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015)

Wessel R, 'Reconsidering the relationship between International and EU Law: Towards a Content- based Approach?' in Enzo Cannizzaro, Paolo Palchetti and Ramses A.

Wessel (eds), *International Law as law of the European Union* (Leiden/Boston: Martinus Nijhoff 2011)

White N, 'The EU as a Regional Security Actor within the International Legal Order' in Trybus M and White N (eds), European Security Law (OUP 2007 Oxford Scholarship Online 2012)

Wippman D, 'Enforcing Restraint: Collective Intervention in Internal Conflicts and Enforcing the Peace: ECOWAS and the Liberian Civil War' in Lori F Damrosch (ed), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (Council on Foreign Relations Press- NY 1993)

(C) Journal Articles

Adediran B, 'Implementing R2P: Towards a Regional Solution?' (2017) 9 Global Responsibility to Protect 459

Akehurst M, 'Custom as a Source of International Law' (1977) 47 BYIL 1

-- 'Enforcement Action by Regional Agencies, with Special Reference to the Organisation of American States' (1967) 42 BYIL 175

Akindele RA, 'From the Covenant to the Charter, Constitutional Relations Between Universal and Regional Organisations in the Promotion of Peace and Security' (1973) 8 IsLR 91

Allain J, 'The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union' (2004) 8 MaxPlanckUNYB 237

Alvarez J, 'José E Alvarez, 'International Organisations: Then and Now' (2006) 100 AJIL 324

Aning E, 'Towards the new millennium: ECOWAS's evolving conflict management system' (2000) 9(5-6) African Security Review 50

Bannon A, ‘The Responsibility to Protect: The U.N. World Summit and the Questions of Unilateralism (2006) 115 YaleJL&Human 1157

Bellamy A, ‘The Responsibility to Protect- Five Years On’ (2010) 24 Ethics & International Affairs 143

-- ‘The changing face of Humanitarian Intervention’ (2015) 11 St Antony's International Review 15

Berb G, ‘Regional Organisations: A United Nations Problem’ (1955) 49 AJIL 166

Blockmans S and Wessel R, ‘The European Union and Crisis Management: will the Lisbon Treaty Make the EU more effective?’ (2009) 14 JCSL 265

Blokker N and Muller S, ‘NATO as the UN Security Council’s Instrument: Question Marks from the Perspective of International Law?’ (1996) 9 LJIL 419

Brockman J, ‘Liberia: The case for changing UN processes for humanitarian intervention’ (2004) 22 WisIntlLJ 711

Brownlie I, ‘International Law and the Use of Force by States Revisited’ (2000) 21 AustYBIL 21

-- and Apperley CJ, ‘Kosovo Crisis Inquiry: Memorandum on the International Law Aspects’ (2000) 49 ICLQ 878

-- and Apperley CJ, ‘Kosovo Crisis Inquiry: Further Memorandum on the International Law Aspects’ (2000) 49 ICLQ 905

Buchanan A, ‘From Nuremburg to Kosovo: The Morality of Illegal International Legal Reform’ (2011) 111 Ethics 673

Buys E and Garwood-Gowers A, ‘The (Ir)Relevance of Human Suffering: Humanitarian Intervention and Saudi Arabia’s Operation Decisive Storm in Yemen’ (2019) 24 JCSL 1

Carr EH, ‘The League of Peace and Freedom- An Episode in the Quest for Collective Security’ (1935) 35 International Affairs 837

Cassese A, ‘Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?’ (1999) 10 EJIL 23

-- ‘A Follow- Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis’ (1999) 10 EJIL 791

Charlesworth H, ‘Feminist Methods in International Law’ (1999) 93 AJIL 379

Chesterman S, ‘Legality versus Legitimacy: Humanitarian Intervention, the Security Council and the Rule of Law’ (2002) 33 Security Dialogue 293

Charney J, 'Anticipatory Humanitarian Intervention in Kosovo’ (1999) 93 AJIL 834

Chayes A, ‘Law and the Quarantine of Cuba’ *Foreign Affairs* 41 (1963) 550

Chimni BS, ‘Customary International Law: A Third World Perspective’ (2018) 112 AJIL 1

Chinkin C, 'Kosovo: a “Good’ or “Bad’ war?’ (1999) 93 AJIL 841

-- ‘The Legality of NATO intervention in the Former republic of Yugoslavia (FRY) under International Law’ (2000) 49 ICLQ 910

Danilenko G, ‘The Theory of International Customary Law’ (1988) 31 GYBIL 9

D’Aspremont J, ‘Softness in International Law: A Self- Serving Quest for New Legal Materials’ (2008) 19 EJIL 1075

Deen-Racsmány Z, ‘A Redistribution of Authority between the UN and Regional Organisations in the Field of the Maintenance of Peace and Security’ (2000) 13 LJIL 297

Dekker I, ‘Illegality and Legitimacy of Humanitarian Intervention: Synopsis of and Comments on a Dutch Report’ (2001) 6 JCSL 115

-- and Myjer E, ‘Air Strikes on Bosnian Positions: Is NATO also Legally the Proper Instrument of the UN?’ (1996) 9 LJIL 411

Deng F, ‘Frontiers of Sovereignty: A Framework of Protection, Assistance and Development for the Internally Displaced’ (1995) 8 LJIL 249

De Wet E, ‘The Relationship between the Security Council and Regional Organisations during Enforcement Action under Chapter II of the United Nations Charter’ (2002) 71 NordicJIL 1

Eide A, ‘Peace- Keeping and Enforcement by Regional Organisations: Its Place in the United Nations System’ (1966) 3 JPR 125

Elias O, ‘The Nature of the Subjective Element in Customary International Law’ (1995) 44 ICLQ 501

Falk R, ‘Book Review: Collective Insecurity: The Liberian Crisis, Unilateralism, and the Global Order, by Ikechi Mgbeoji’ (2005) 43 OsgoodeHallLJ 201

Franck T, ‘Lessons of Kosovo’ (1999) 93 AJIL 857

-- ‘What Happens Now? The United Nations after Iraq’ (2003) 97 AJIL 607

Furness J, ‘How can the doctrine of humanitarian intervention be reconciled in international law’ (2018) 6 LIJ 109

Galindo GRB and Yip C, ‘Customary International Law and the Third World: Do Not Step on the Grass’ (2017) Chinese JIL 251

Gazzini T, ‘NATO’s role in the collective security system’ (2003) 8 JCSL 231

Goodrich L, ‘From League of Nations to United Nations’ (1947) 1 International Organization 3

Gowlland- Debbas V, ‘The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance’ (2000) 11 EJIL 361

Gray C, ‘After the Ceasefire: Iraq, the Security Council and the Use of Force’ (1994) 65 BYIL 165

Greenwood C, ‘International Law and the United States’ Air operation Against Libya’ (1986- 1987) 89 WVaLRev 933

-- ‘Is there a right of Humanitarian Intervention?’ (1993) 49 The World Today 34

-- ‘Humanitarian Intervention: The case of Kosovo’ (1999) 10 FYBIL 167

-- ‘International Law and the NATO intervention in Kosovo’ (2000) 49 ICLQ 926

Greig D, ‘Self-defence and the Security Council: What does Article 51 require?’ (1991) 40 ICLQ 366

Haas E, ‘Types of Collective Security: An Examination of Operational Concepts’ (1955) 49 AmPolSciRev 40

Hakimi M, ‘To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization’ (2007) 40 VandJTransnatlL 643

-- ‘The Jus Ad Bellum’s Regulatory Form’ (2018) 112 AJIL 151

Harbom L and Wallensteen P, ‘Armed Conflict 1989- 2006’ (2007) 44 JPR 623

Heindel R, Kalijarvi T and Wilcox F, ‘The North Atlantic Treaty in the United States Senate’ (1949) AJIL 633

Heinze E, ‘Law, Force, and Human Rights: The Search for a Sufficiently Principled Legal Basis for Humanitarian Intervention’ 24 JCS (2004) 5

-- ‘The Evolution of International Law in Light of the Global War on Terror’ (2011) 37 Review of International Studies 1069

Henkin L, ‘Kosovo and the Law of “Humanitarian Intervention”’ (1999) 93 AJIL 824

Howe H, ‘Lessons of Liberia: ECOMOG and Regional Peacekeeping’ (winter 1996/97) 21(3) International Security 145

Iyi JM, ‘The AU/ECOWAS Unilateral Humanitarian Intervention Legal regimes and the UN Charter’ (2013) 21 AFJICL 489

Jacob C, ‘Transending the Double- Bind of Humanitarian Intervention: The Costs of Action and Inaction’ (2019) 21 Journal of Genocide Research 108

Jenkins P, ‘The Economic Community of West African States and the Regional Use of Force’ (2007) 35 DenvJIntlL&Pol 333

Jessup P, ‘Should International law Recognize and Intermediate Status between Peace and War?’ (1954) 48 AJIL 98

Joyner D, ‘The Kosovo Intervention: Legal Aspects and a More Persuasive Paradigm’ (2002) 13 EJIL 597

Kabau T, ‘The Responsibility to Protect and the Role of Regional Organisations: an Appraisal of the African Union’s Interventions’ (2012) 4 GoJIL 49

Kammerhofer J, ‘Uncertainty in the Formal Sources of International Law: Customary International Law and some of its Problems’ (2004) 15 EJIL 523

Keene A, ‘Humanitarian Intervention’ (2001) 151 NLJ 1096

Kelsen H, Collective Security and Collective Self-defence under the Charter of the United Nations (1948) 41 AJIL 794

Kennedy D, ‘The Move to Institutions’ (1987) 8 Cardozo LRev 841

Koh HH, ‘Remarks by Harold Hongju Koh’ (2017) 111 ASIL PROC 114

Kolb R, ‘The Eternal Problem of Collective Security: From the League of Nations to the United Nations’ (2007) 26 RSQ 220

Koskenniemi M, ‘The Place of Law in Collective Security’ (1996) 17 Mich J Intl L 455

Krisch N, ‘Review Essay: Legality, Morality and the Dilemma of Humanitarian Intervention after Kosovo’ (2002) 13 EJIL 323

Kritsiotis D, ‘The Kosovo crisis and the NATO's application of armed force against the Federal Republic of Yugoslavia’ (2000) 49 ICLQ 330

Kufuor K, ‘The Legality of the Intervention in the Liberian Civil War by the Economic Community of West African States’ (1993) 5 RADIC 525

Kutner L, ‘World Habeas Corpus and Humanitarian Intervention’ (1985) 19 Valparaiso University Law Review

Kunz J, ‘The Idea of Collective Security in Pan- American Developments’ (1953) 6 WestPolQ 658

Lauterpacht H, ‘The Recognition of States in International Law’ (1944) 53(3) Yale LJ 385

-- ‘The Subjects of the Law of Nations’ (1947) 63 LQR 438

Levitt J, ‘Humanitarian Intervention by Regional Actors in International Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone’ (1998) 12 TempleIntlCompLJ 333

-- ‘The Evolving Intervention Regime in Africa: From Basket Case to Market Place?’ (2002) 96 ASIL PROC 136

Lillich R, ‘Forcible Self-Help by States to Protect Human Rights’ (1967) 53 IowaLRev 325

Lowe V, ‘International Legal Issues Arising in the Kosovo Crisis’ (2000) 49 ICLQ 934

Marston G, ‘UK Materials on International Law 1992’ (1992) 63 BYIL 615

Matheson M, Justification for the NATO Air Campaign in Kosovo, Proceedings of the Annual Meeting’ (2000) 94 ASIL PROC 301

McDougal M, ‘The Soviet-Cuban Quarantine and Self-Defense’ (1963) 57 AJIL 597

Mendelson M, ‘The Formation of Customary International Law’ (1999) 272 RdC 155

Meeker L, ‘Defensive Quarantine and the Law’ (1963) 57 AJIL 515

Melling G, ‘Beyond rhetoric? Evaluating the Responsibility to Protect as a norm of humanitarian intervention’ (2018) 5 JUFIL 78

Mindua AD, ‘Intervention Armèe de la CEDEAO au Liberia: Illégalité ou avancée juridique?’ (1995) 7 RADIC 257

Mohamed S, ‘Omissions, Acts, and the Security Council’s (in)Actions in Syria’ (2013) 31 Boston University Intl LJ 413

Moore J, ‘The control of Foreign Intervention in Internal Conflict’ (1969) 9 VaJIntlL 205

Morris J, ‘Libya and Syria: R2P and the spectre of the swinging pendulum’ (2013) 89 International Affairs 1265

Naldi G, ‘Peace-keeping attempts by the Organisation of African Unity’ (1985) 34 ICLQ 593

Nanda V, ‘The Future under international law of the responsibility to protect after Libya and Syria’ (2013) 21 MichStIntlLRev 1

Nolte G, ‘Restoring Peace by Regional Action: International Legal Aspects of the Liberian Conflict’ (1993) 53 ZaöRV 603

Odermatt J, ‘The Development of Customary International Law by International Organizations’ (2017) 66 ICLQ 491

Ofodile A, ‘The Legality of ECOWAS Intervention in Liberia’ (1994- 1995) 32 ColumJTransnatlL 381

Okenwa C, ‘Has the Controversy between the Superiority of International Law and Municipal Law been Resolved in Theory and Practice’ (2015) 35 Journal of Law, Policy and Globalization 116

Olonisakin F and Aning E, ‘Humanitarian Intervention and Human Rights: The Contradictions in ECOMOG’ (1999) 3 IJHR 16

Omorogbe E, ‘The African Union, Responsibility to Protect and the Libyan Crisis’ (2012) 59 NILR 141

Orford A, ‘Muscular Humanitarianism: Reading the Narratives of the New Interventionism’ (1999) 10 EJIL 679

Pellet A, ‘Brief Remarks on the Unilateral Use of Force’ (2000) 11 EJIL 385

Paliwal S, ‘The Primacy of Regional Organisations in International Peacekeeping: The African Example’ (2010) 51 VaJIntlL 185

Paust J, ‘R2P and Protective Intervention’ (2017) 31 TempleIntlCompLJ 109

Pogany I, ‘The Arab League and Regional Peacekeeping’ (1987) 34 NILR 54

Renda L, ‘Ending Civil Wars: The case of Liberia’ (1999) 23 Fletcher FWldAff 59

Reisman M, ‘Kosovo’s Antinomies’ (1999) 93 AJIL 860

-- ‘Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention’ (2000) 11 EJIL 3

-- and Armstrong A, ‘The Past and Future of the Claim of Preemptive Self-Defense’ (2006) 100 AJIL 526

Rose S, ‘Moving Forward with the Responsibility to Protect: Using Political Inertia to Protect Civilians’ (2014) 37 BCIntl&CompLRev 209

Rougier A, ‘La Thèorie de l’ Intervention d’ Humanitè’ [1910] RGDIP 468

Rowe A, ‘Soft Sovereignty: A possible basis for the legality of humanitarian intervention’ (2018) 6 NELR 90

Sampson I, ‘The Responsibility to Protect and ECOWAS Mechanisms on Peace and Security: Assessing their Convergence and Divergence on Intervention’ (2011) 16 JCSL 507

Sander B, ‘History on Trial: Historical Narrative Pluralism within and Beyond International Criminal Courts’ (2018) 67 ICLQ 547

Schachter O, ‘The Legality of Pro-Democratic Invasion’ 78 AJIL (1984) 645

Schreuer C, ‘Regionalism v. Universalism’ (1995) 6 EJIL 478.

Simma B, ‘The Contribution of Alfred Vedross to the Theory of International Law’ (1995) 6 EJIL 33

-- ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 EJIL 1

-- and Paulus A, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View’ (1999) 93 AJIL 302

Simpson G, ‘The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power’ (2000) 11 EJIL 439

Smith M, ‘Humanitarian Intervention: An Overview of the Ethical Issues’ (1998) 12 Ethics & International Affairs 63

Stahn C, ‘Notes and Comments, Responsibility to Protect: Political rhetoric or Emerging Legal Norm?’ (2007) 101 AJIL 99

Talmon S, ‘Changing views on the use of force: The German Position’ (2005) 5 BaltYIL 41

Tams C, ‘The Use of Force Against Terrorists’ (2009) 20 EJIL 359

Tarr B, ‘The ECOMOG Initiative in Liberia: A Liberian Perspective’ (1993) 21(1- 2) Journal of Opinion 74

Tzeng P, ‘Humanitarian Intervention at the Margins: An Examination of Recent Incidents’ (2017) 50 VandJTransnatlL 415

Valek P, ‘Is Unilateral Humanitarian Intervention Compatible with the UN Charter?’ (2005) 26 MichJIntlL 1223

Vasquez J, ‘Review: the Kosovo War: Causes and Justification’ (2002) 24 The International History Review 103

Villani U, ‘The Security Council’s Authorization of Enforcement Action by Regional Organisations’ (2002) 6 MaxPlanckUNYB 535

Walter C, ‘Security Council Control over Regional Action’ (1997) 1 MaxPlanckUNYB 129

Waring L, ‘Kosovo’ (1923) 2 The Slavonic Review 56

Wedgwood R, ‘NATO’s Campaign in Yugoslavia’ (1999) 93 AJIL 828

Weiss T, ‘R2P after 9/11 and the World Summit’ (2006) 24 WisIntlLJ 741

Western J, ‘Sources of Humanitarian Intervention: Beliefs, Information, and Advocacy in the U.S. Decisions on Somalia and Bosnia’ (2002) 26(4) International Security 112.

Wheatley S, ‘The Foreign Affairs Select Committee Report on Kosovo: NATO Action and Humanitarian Intervention’ (2000) 5 JCSL 261

White N, ‘The Legality of Bombing in the name of Humanity’ (2000) 5 JCSL 27

Wilcox F, ‘Regionalism and the United Nations’ (1965) 19 International Organisation 788

Williams P and Pearlman S, ‘Use of Force in Humanitarian Crises: Addressing the Limitations of UN Security Council Authorization’ (2019) 51 CaseWResJIL 211

Wilson G, ‘Regional Arrangements as Agents of the UN Security Council: Some African and European Organisations Contrasted’ (2008) 29 LiverpoolLRev 183

Wolf D, ‘Humanitarian Intervention’ (1988) 9 MichJIntlL 333

Wolf J, ‘Regional Arrangements and the UN Charter’ (1983) 6 EPIL 289

Wood M, ‘The Evolution and Identification of the Customary International Law of Armed Conflict’ (2018) 51 VandJTransnatlL 727

Worster WT, ‘The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches’ (2014) 45 GeoJIntlL 445

Yee S, ‘The News That Opinio Juris Is Not a Necessary Element of Customary [International] Law is Greatly Exaggerated’ (2000) 43 GYBIL 227

Zwanenburg M, ‘Regional Organisations and the Maintenance of International Peace and Security: Three Recent Regional African Peace Operations’ (2006) 11 JCSL 483

(D) Online Articles

Atuobi S, ‘Implementing the ECOWAS Conflict Prevention Framework: prospects and challenges’ at <http://dspace.africaportal.org/jspui/bitstream/123456789/31659/1/KAIPTC-Policy-Brief-3-November-2010.pdf?1> accessed 22 June 2019

Bellamy A, ‘The Responsibility to Protect and the Problem of Regime Change’ at *The Responsibility to Protect: challenges & opportunities in light of the Libyan intervention* (e-International Relations 2011) 20-23 <www.e-ir.info/wp-content/uploads/R2P.pdf> accessed 18 December 2018

Breakey H, 'The Responsibility to Protect: Game Change and regime change' <https://www.academia.edu/2212182/The_Responsibility_to_Protect_Game_Change_and_Regime_Change> accessed 18 December 2018

Brölmann C, 'Specialized Rules of Treaty Interpretation: International Organizations' (2012) Amsterdam Law School Research Paper No 2012-12 <https://ssrn.com/abstract=1988147> accessed 15 December 2018

Brownlie I, 'Memorandum Submitted at the Request of the Foreign Affairs Committee' (letter dated 28 July 1999) <http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmfaff/28/28ap03.htm> accessed 12 July 2019

Burke C, 'Replacing the Responsibility to Protect: the Equitable Theory of Humanitarian Intervention' (2009) 1(2) Amsterdam Law Forum 61 <http://amsterdamlawforum.org/article/view/64/122> accessed 20 December 2018

Chomsky N, 'A Review of NATO's war over Kosovo' Z Magazine (April- May 2001) 25 <https://chomsky.info/200005__/> accessed 20 June 2019

David R, 'The European Union and its Legal Personality (1993-2010)' (25 January 2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1566492> accessed 19 June 2019

Deplano R, 'Assessing the Role of Resolutions in the ILC Draft Conclusions on Identification of Customary International Law: Substantive and Methodological Issues' (2017) University of Leicester School of Law Research Paper No 17-05 <https://ssrn.com/abstract=2987931> accessed 17 February 2019

De Wet E and Wood M, 'Collective Security' in Rüdiger Wolfrum (ed), *MPEPIL* (OUP 2013) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e270> accessed 19 June 2019

Ero C, 'ECOWAS and the Subregional Peacekeeping in Liberia' (1995) JHA <http://sites.tufts.edu/jha/archives/66> accessed 4 July 2019

Gariba E, 'Post-conflict development in Liberia: Governance, security, capacity building and a developmental approach' (2011) 2 AJCR

<http://www.accord.org.za/ajcr-issues/post-conflict-development-in-liberia> accessed 3 July 2019

Greenwood C, 'Sources of International Law: An Introduction' (2008) <http://legal.un.org/avl/pdf/ls/Greenwood_outline.pdf> accessed 12 July 2019

-- 'Self-defence' in Rüdiger Wolfrum (ed), *MPEPIL* (OUP 2011) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e401?prd=EPIL> accessed 20 June 2019

Heller KJ, '"Genuine" Unilateral Humanitarian Intervention- Another Ticking Time-Bomb Scenario' (2019) Amsterdam Law School Research Paper No 2019-48 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3492412> accessed 12 June 2020

Kirgis F, 'Security Council Resolution 1483 on the Rebuilding of Iraq' ASIL Insights (2003) <https://www.asil.org/insights/volume/8/issue/13/security-council-resolution-1483-rebuilding-iraq> accessed 19 June 2019

Lowe V and Tzanakopoulos A, 'Humanitarian Intervention' in Rüdiger Wolfrum (ed), *MPEPIL* (OUP 2011) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e306?prd=EPIL> accessed 16 December 2018

Marks S and Cooper N, 'The Responsibility to Protect: Watershed or Old Wine in a New Bottle?' (2010) 2 JGLR 86 <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/580/2012/10/r2p_jglr_2010.pdf > accessed 1 February 2019

Meguro M, 'Customary International Law and Non-State Actors: Between Anthropomorphism and Artificial Unity' (2017) forthcoming in Iain Scobbie and Sufyan Droubi (eds), *Non-State Actors and the Formation of Customary International Law* (Melland Schill Perspectives on International Law MUP 2018) <https://ssrn.com/abstract=3071305> accessed 15 December 2018

Murphy S, 'The Relevance of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties' in Georg Nolte (ed), Treaties and Subsequent Practice (OUP 2013)

<http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2116&context=faculty_publications> accessed 22 July 2019

Nmoma V, 'The Civil War and the Refugee Crisis in Liberia' (1997) 17 JCS <https://journals.lib.unb.ca/index.php/jcs/article/view/11734/12489#a34> accessed 8 July 2019

Reisman M, 'International Law Making: A process of Communication' (1981) Faculty Scholarship Series Paper 713, 100- 120 <http://digitalcommons.law.yale.edu/fss_papers/713> accessed 20 December 2018

-- 'The View from the New Haven School of International' (1992) Faculty Scholarship Series Paper 867 <http://digitalcommons.law.yale.edu/fss_papers/867> accessed 20 December 2018

Scharf M, 'Striking a Grotian Moment: How the Syria Airstrikes Changed International Law Relating to Humanitarian Intervention' (2018) 19 ChiJIntlL (2019 Forthcoming) Case Legal Studies Research Paper No 2018-11 <https://ssrn.com/abstract=3249158> accessed 16 December 2018

Shpakovych O and Vladyka S, 'Constituent Instruments of International Organizations as a Special Sources of the Law of International Organizations' (2018) <https://academic.oup.com/slr/advance-article/doi/10.1093/slr/hmy006/4967746> accessed 19 June 2019.

Tams C, 'League of Nations' in Rüdiger Wolfrum (ed), *MPEPIL* (OUP 2006) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e519> accessed 19 June 2019

Tasioulas J, 'Custom and Consent' <https://law.duke.edu/cicl/pdf/opiniojuris/panel_5-tasioulas_custom_and_consent.pdf> accessed 15 December 2018

Tuck C, '"Every Car or Moving Object Gone." The ECOMOG Intervention in Liberia' (2000) 4 AfricanSQ 6 <http://asq.africa.ufl.edu/files/ASQ-Vol-4-Issue-1-Tuck.pdf> accessed 3 July 2019

Wilmhurst E, 'Principles of International Law on the Use of Force by States in Self-defence' (October 2005)

<https://www.chathamhouse.org/publications/papers/view/108106> accessed 20 June 2019

Wood M, 'Teachings of the Most Highly Qualified Publicists (Art. 38 (1) ICJ Statute)' in Rüdiger Wolfrum (ed), *MPEPIL* (OUP 2017) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1480> accessed at 15 December 2018

(E) Conference, Research and Policy Papers

Amnesty International, 'A Human Rights Crisis in Kosovo Province: The protection of Kosovo's displaced and refugees' (30 September 1998) AI Index EUR 70/073/1998 <https://www.amnesty.org/download/Documents/156000/eur700731998en.pdf> accessed 10 July 2019

Amnesty International, '"Collateral damage" or unlawful killings? Violations of the Laws of War by NATO during Operation Allied Force' (5 June 2000) AI Index EUR 70/18/00 <https://www.amnesty.org/en/documents/EUR70/018/2000/en/> accessed 10 July 2019

Annan K, Speech <http://www.nobelprize.org/nobel_prizes/peace/laureates/2001/annan-lecture.html> accessed 16 February 2019

Babangida I (President), Chief of Army Staff Annual Conference (21st January 1991) <http://ibbpresidentiallibrary.org/overview/speeches-made-between-1989-1990/the-military-the-state-and-security/preparing-the-military-for-the-third-republic/> accessed 15 September 2016

Bekaj A, 'The KLA and the Kosovo War, From Intra- State Conflict to Independent Country' (2010) Berghof Transition Series Resistance/ Liberation Movements and Transition to Politics <http://www.berghof-foundation.org/publications/transitions-series/> accessed 21 June 2019

Bergh A, 'The Legal Status of Humanitarian Intervention' (2007) University Study for Lunds Universitet, 18,

<http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1319977&fileOId=1319978> accessed 15 February 2019

Danish Institute of International Affairs, *Humanitarian Intervention, Legal and Political Aspects* (Copenhagen 1999) <http://www.diis.dk/files/media/publications/import/extra/humanitarian_intervention_1999.pdf> accessed 19 June 2019

Haine JY, 'An historical perspective in EU Security and defence Policy, ESDP: The first five years' in Nicole Gnesotto (ed), *EU Security and Defence: The first five years 1999- 2004* (Institute for Security Studies EU Paris 2004)

Human Rights Watch, 'Civilian Deaths in the NATO air campaigns' (February 2000) <www.hrw.org/sites/default/files/reports/natbm002.pdf> accessed 15 July 2019

Human Rights Watch, 'Liberia: Waging War to Keep the Peace: The ECOMOG Intervention and Human Rights' Africa vol 5 (1 June 1993) <https://www.hrw.org/report/1993/06/01/liberia-waging-war-keep-peace/ecomog-intervention-and-human-rights> accessed 15 July 2019

Human Rights Watch, 'Unacknowledged Deaths Civilian Casualties in NATO's Air Campaign in Libya' (13 May 2012) <https://www.hrw.org/report/2012/05/13/unacknowledged-deaths/civilian-casualties-natos-air-campaign-libya> accessed 15 July 2019

Institute for Security Studies of WEU, 'European Council Helsinki Annex 1' in Maartje Rutten (compiled), *From St- Malo to Nice. European Defence: core documents* (Chaillot Papers 47 2001)

Lindstrom M and Zetterlund K, 'Setting the Stage for the Military Intervention in Libya- Decisions Made and their Implications for the EU and NATO' (2012) Swedish Defence Research Agency- FOI 1- 94 <http://www.foi.se/rapport?rNo=FOI-R--3498--SE> accessed 18 February 2019

Naert F, 'The Application of Human Rights and International Humanitarian Law in Drafting EU Missions' Mandates and Rules of Engagement' (2011) Institute for International Law Working Paper No 151, 4

<https://www.law.kuleuven.be/iir/nl/onderzoek/wp/wp151e.pdf> accessed 19 June 2019

Pingeot L and Obenland W, *In whose name? A critical view on the Responsibility to Protect* (Global Policy Forum and Rosa Luxemburg Stiftung- NY Office 2014)

Smith B and Thorp A, 'Interpretation of Security Council Resolution 1973 on Libya' (6 April 2011) UK House of Commons International Affairs and Defence Section SN/IA/5916

The Institute of International Law, 'The Elaboration of General Multilateral Conventions and of Non- Contractual Instruments having a Normative Function or Objective' (Cairo Conference 1987) <http://www.idi-iil.org/en/sessions/cairo-1987/?post_type=publication> accessed on 17 February 2019

Ware R, 'The Legal basis for Air Strikes Against Syrian Government Targets' (2018) House of Commons Library, Briefing Paper No 8287 <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8287#fullreport> accessed 12 June 2020

Wouters J, De Man P and Vincent M, 'The Responsibility to protect and Regional Organisations: Where does the EU Stand?' (2011) Leuven Centre for Global Governance Studies Policy Brief No 18 <https://ghum.kuleuven.be/ggs/publications/policy_briefs/pb18.pdf> accessed 20 June 2019

United Kingdom Foreign Office, Policy Document No 148, reprinted (1986) 57 BYIL 614

(F) Official Sites

European Commission, 'European Neighbourhood Policy And Enlargement Negotiations' <http://ec.europa.eu/enlargement/countries/check-current-status/index_en.htm> accessed 22 July 2019

EEAS, 'Military and civilian missions and operations' <https://eeas.europa.eu/topics/common-security-and-defence-policy-csdp/430/military-and-civilian-missions-and-operations_en> accessed 20 June 2019

EEAS, 'Shaping of a Common Security and Defence Policy' <http://eeas.europa.eu/csdp/about-csdp/berlin/index_en.htm> accessed 20 June 2019

EU, 'Division of competences within the European Union' <http://www.europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0020_en.htm> accessed 19 June 2019

EU, 'Brexit: UK's withdrawal from the EU' (last updated 3 July 2020) <https://eur-lex.europa.eu/content/news/Brexit-UK-withdrawal-from-the-eu.html> accessed 22 July 2020

EU, Glossary of Summaries, 'Common Foreign and Security Policy' <http://europa.eu/legislation_summaries/glossary/foreign_security_policy_en.htm> accessed 19 June 2019

EU, Glossary of Summaries, 'Legal Personality of the Union' <www.europa.eu/legislation_summaries/glossary/union_legal_personality_en.htm> accessed 19 June 2019

ICTY, 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia' (14 June 2000) <http://www.icty.org/x/file/Press/nato061300.pdf> accessed 20 July 2019

NATO, 'Collective defence - Article 5', <http://www.nato.int/cps/en/natohq/topics_110496.htm#top> accessed 10 July 2019

NATO, 'Relations with the United Nations' <http://www.nato.int/cps/en/natohq/topics_50321.htm> accessed 10 July 2019

NATO, 'NATO and Libya (Archived)' (last updated 9 November 2015) <http://www.nato.int/cps/en/natohq/topics_71652.htm> accessed 10 July 2019

NATO, 'NATO's role in relation to the conflict in Kosovo' <http://www.nato.int/kosovo/history.htm#B> accessed 10 July 2019

UK, 'Syria action- UK Government Legal Position' (14 April 2018) <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position> accessed 12 June 2020

UN, Permanent Observers: Intergovernmental and Other Organizations <http://www.un.org/en/sections/member-states/intergovernmental-organizations/index.html> accessed 18 December 2018

UN, Regional Information Centre for Western Europe, 'R2P- a Short History' <http://www.unric.org/en/responsibility-to-protect/26981-r2p-a-short-history> accessed 19 December 2018

UN, Secretary-General-designate Antonio Guterres' remarks to the General Assembly on taking the oath of office (12 December 2016) <https://www.un.org/sg/en/content/sg/speeches/2016-12-12/secretary-general-designate-ant%C3%B3nio-guterres-oath-office-speech> accessed 18 December 2018

UN, 'UN official deplores NATO attack on Libyan television station' (8 August 2011) <http://www.un.org/apps/news/story.asp?NewsID=39255#.V-Nq9Pl96Uk> accessed 20 July 2019

(G) Blogs

Akande D, 'What does UN Security Council Resolution 1973 permit?' (2011) EJIL: Talk! <http://www.ejiltalk.org/what-does-un-security-council-resolution-1973-permit/> accessed 10 July 2019

-- and Milanovic M, 'The Constructive Ambiguity of the Security Council's ISIS resolution' (2015) EJIL: Talk! <http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/> accessed 10 July 2019

Bethlehem D, 'Stepping Back a Moment-The Legal Basis in Favour of a Principle of Humanitarian Intervention' (2013) EJIL: Talk! <http://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/> accessed 22 June 2020

D'Aspremont J, 'Customary International Law as a Dance Floor: Part I' (2014) EJIL: Talk! <http://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-i/> accessed 15 December 2018

-- 'Customary International Law as a Dance Floor: Part II' (2014) EJIL: Talk! <http://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-ii/> accessed 15 December 2018

Koh HH, 'Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward' (2013) EJIL: Talk! <https://www.ejiltalk.org/syria-and-the-law-of-humanitarian-intervention-part-ii-international-law-and-the-way-forward/> accessed 16 December 2018

Krebs S, 'Facts, Alternative Facts, and International Law' (2017) EJIL: Talk! <https://www.ejiltalk.org/facts-alternative-facts-and-international-law/> accessed 5 July 2020

Weller M, 'Forcible Humanitarian Action in International Law- part I' (2017) EJIL: Talk! <https://www.ejiltalk.org/forcible-humanitarian-action-in-international-law-part-i/> accessed 16 December 2018

(H) Online Media and Newspapers

Annan K, 'Two Concepts of Sovereignty' *Economist* (18 September 1999) <https://www.economist.com/international/1999/09/16/two-concepts-of-sovereignty> accessed 19 June 2019

'African Union decides against peacekeepers for Burundi' *Al Jazeera News* (1 February 2016) <http://www.aljazeera.com/news/2016/01/african-union-decides-peacekeepers-burundi-160131102052278.html> accessed 20 January 2019

Binyon M, ‘Strikes condemned by third world’ *The Times* (London) (26 March 1999)

‘Border bother (conflicts on the border between Liberia and Sierra Leone)’ *Economist* (6 April 1991) 43

Boyer A, ‘West Africans' Controversial Role: Rebels, Regional States Concerned Over Nigerian Control of Force’ *The Christian Science Monitor* (1 November 1990) <http://www.csmonitor.com/layout/set/print/1990/1101/olib.html> accessed 4 July 2019

‘Brexit: All you need to know about the UK leaving the EU’ *BBC News* (1 September 2016) <http://www.bbc.com/news/uk-politics-32810887> accessed 22 July 2019

‘Britain, France ramp up pressure at Libya crisis summit’ *Euractiv* (11 March 2011) <http://www.eubusiness.com/news-eu/libya-unrest-nato.906> accessed 20 July 2019

‘Building a New Liberia’ *Washington Post* (23 March 1991)

‘Cameron hails UN backing for action against Islamic State’ *BBC News* (21 November 2015) <http://www.bbc.co.uk/news/uk-34886574> accessed 20 July 2019

Da Costa G, ‘Fresh Impetus for Peace’ *West Africa Magazine* 3922 (16- 22 November 1992) 1968

Da Costa P, ‘Intervention Time: ECOWAS Imposes Peace’ *West Africa Magazine* 3807 (13- 19 August 1990) 2280

Dickovic T, ‘Africa 2012’ *World Today Series* (47th edn, Stryker Post 2012)

‘Excerpts of President Clinton’s Address on NATO Attacks on Yugoslav Military Forces’ *Washington Post* (25 March 1999) A34

El Deeb S, ‘Arabs consider a no-fly zone over Libya’ *Washington Post* (2 March 2011) <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/02/AR2011030202702.html> accessed 18 February 2016

Garcia G, ‘Liberia Death of a President’ *Time* (24 September 1990)

Jamieson A, ‘Col Gaddafi's youngest son “killed in Nato air strike”’ *The Telegraph* (1 May 2011)

<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8486158/Col-Gaddafis-youngest-son-killed-in-Nato-air-strike.html> accessed 20 July 2019

Kaplan R, 'Syria and the Limits of Comparison' *Stratfor* (28 August 2013) <https://www.stratfor.com/weekly/syria-and-limits-comparison> accessed 20 July 2019

Kersten M, 'The Responsibility to Protect doctrine is faltering. Here's why' *Washington Post* (8 December 2015) <https://www.washingtonpost.com/news/monkey-cage/wp/2015/12/08/the-responsibility-to-protect-doctrine-is-failinh-heres-why/> accessed 20 June 2019

Kirkpatrick D, 'Arab League Endorses International Action' *New York Times* (1 September 2013) <http://www.nytimes.com/2013/09/02/world/middleeast/saudi-arabia-syria-military-action.html> accessed 26 February 2016

'Kosovar Refugees' *Migration News* (May 1999) <http://migration.ucdavis.edu/mn/more.php?id=1801> accessed 20 July 2019

'Kosovo border violence on UN Security Council agenda' *BBC online news* (30 August 2011) <www.bbc.co.uk/news/world-europe-14715623> 27 January 2015

Laessing U and Carsten P, 'West Africa bloc to take "necessary actions" to uphold Gambia vote result' *Reuters* (17 December 2016) <https://www.reuters.com/article/us-gambia-politics-idUSKBN1460H6> accessed 18 December 2018

Leiby R and Wilson S, 'Arab League's backing of no-fly zone over Libya ramps up pressure on West' *Washington Post* (12 March 2011) <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/12/AR2011031200900.html> accessed 18 February 2016

'Liberia: 'War Crimes List' - Culture of Impunity Unlikely to Continue' *Front Page Africa* (5 March 2015) at <http://allafrica.com/stories/201503051419.html> accessed 3 July 2019

'Libya Barred from Arab League Meetings', *The Sydney Morning Herald* (23 February 2011) <http://www.smh.com.au/breaking-news-world/libya-barred-from-arab-league-meetings-20110223-1b4cr.html> accessed 20 July 2019

‘Libya profile – Timeline’ *BBC News* (10 August 2016) <http://www.bbc.com/news/world-africa-13755445> accessed 12 July 2019

Littman M, ‘Opinion: Our illegal bombing in the Balkans’ *The Times* (16 November 1999)

Neu M and Dunford R, ‘Libya: ongoing atrocities reveal the trouble with international military intervention’ (16 August 2019) *The Conversation* <https://theconversation.com/libya-ongoing-atrocities-reveal-the-trouble-with-international-military-intervention-119918> accessed 12 June 2020

Nichols M, ‘UN Backs West African Efforts to Install New Gambia President’ *Reuters* (19 January 2017) <https://reuters.com/article/us-gambia-un-vote-idUSKBN1532T8> accessed 18 June 2019

Obama B, Cameron D and Sarkozy N, ‘Libya’s Pathway to Peace’ *New York Times* (14 April 2011) <http://www.nytimes.com/2011/04/15/opinion/15iht-edlibya15.html?_r=0> accessed 20 July 2019

Ofori R, ‘A Decade of Doe’ *West Africa Magazine* 3790 (16-22 April 1990) 610

President Clinton, ‘Address to the Nation on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro)’ *CNN* (24 March 1999) <http://edition.cnn.com/ALLPOLITICS/stories/1999/03/25/clinton.transcript/> accessed 10 July 2019

‘RAF in Kosovo show of force’ *The Times* (15 June 1998)

Reiff D, ‘What Bombs Can’t Do’ *New York Times* (25 March 1999) <http://www.nytimes.com/1999/03/25/opinion/what-bombs-can-t-do.html> accessed 20 July 2019

-- ‘Humanitarianism in Crisis’ *Foreign Affairs* 81(6) (2002)

Rule S, ‘Liberians Get Sinking Feeling about Democracy’ *New York Times* (5 June 1985) at <http://www.nytimes.com/1985/06/05/world/liberians-get-sinking-feeling-about-democracy.html> accessed 3 July 2019

‘Russia Condemns NATO at UN’ *BBC News* (25 March 1999) <http://news.bbc.co.uk/2/hi/europe/303127.stm> accessed 12 July 2019

‘Saudi and Arab allies bomb Houthi positions in Yemen’ *Al Jazeera News* (26 March 2015) <https://www.aljazeera.com/news/middleeast/2015/03/saudi-ambassador-announces-military-operation-yemen-150325234138956.html> accessed 12 June 2020

‘Serbia marks 14th anniversary of NATO bombing’ <http://www.b92.net/eng/news/society.php?yyyy=2013&mm=03&dd=24&nav_id=85330> accessed 20 July 2019

Sherlock R, ‘Libya, exodus from Sirte as thousands fell rebel offensive’ *The Telegraph* (28 September 2011) <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8794617/Libya-exodus-from-Sirte-as-thousands-flee-rebel-offensive.html> accessed 20 July 2019

‘Taylor Discusses ECOMOG, UN Security Council’, Gbarnga Radio ELBC (26 March 1993) reprinted in *Foreign Broadcast Information Service* on 31 March 1993

Thakour R, ‘UN breathes life into “responsibility to protect”’ (21 March 2011) *The Star* <http://www.thestar.com/opinion/editorialopinion/2011/03/21/un_breathes_life_intoresponsibility_to_protect.html> accessed 20 June 2019

United States Bureau of Citizenship and Immigration Services, ‘Liberia. Events Since 1990’ *Refworld* (1 November 1993) <http://www.refworld.org/docid/3ae6a6088.html> accessed 3 July 2019

Weller M (interview), ‘Russia Says Its Airstrikes in Syria Are Perfectly Legal. Are They?’ *The World Post* (10 January 2015)

West Africa Magazine 3911 (31 August- 6 September 1992) 1470

Wintour P and MacAskill E, ‘Is Muammar Gaddafi a target? PM and military split over war aims’ *The Guardian* International Edition (22 March 2011) <http://www.theguardian.com/world/2011/mar/21/muammar-gaddafi-david-cameron-libya> accessed 20 July 2019

Whiteman K, ‘Towards Peace in Liberia’ *West Africa Magazine* 3822 (26 November-2 December 1990) 2895

‘15 years on: Looking back at NATO's ‘humanitarian’ bombing of Yugoslavia’ (24 March 2014) *Reuters* <https://www.rt.com/news/yugoslavia-kosovo-nato-bombing-705> accessed 18 December 2018

(I) Other

Consolidated Final Report Vol 2 of the Truth and Reconciliation Commission, Republic of Liberia (30 June 2009) para 10.1.5.

Encyclopedia of African History by Kevin Shillington (ed) (Routledge 2004)

McLaughlin M, ‘Further doubt cast on US claims of genocide in Kosovo’ (18 May 1999) <https://www.wsws.org/en/articles/1999/05/yugo-m18.html> accessed 20 July 2019

Selassie H, ‘Towards African Unity’ (25 May 1963) <https://www.blackpast.org/african-american-history/1963-haile-selassie-towards-african-unity/> accessed 22 July 2019

UK, *North Atlantic Treaty* HC Deb 12 May 1949, vol 464, cols 2018- 2019

USA, Hearings before the Committee on Foreign Relations, United States Senate, 81st Congress, 1st Session (1949) 31

US Senate Republican Policy Committee, ‘Bosnia II: The Clinton Administration Sets Course for NATO Intervention in Kosovo: Goals, Potential Costs, and Motives All Uncertain’ (12 August 1999) <http://www.srpska-mreza.com/Kosovo/Bosnia-again.html> accessed 29 February 2016

Wikipedia, ‘On NATO’ <https://en.wikipedia.org/wiki/NATO> accessed 20 January 2015