HUMANITARIAN INTERVENTION POST KOSOVO: DOES A RIGHT TO HUMANITARIAN INTERVENTION EXIST IN CUSTOMARY INTERNATIONAL LAW AFTER KOSOVO? IF NOT, IS THERE A TREND TOWARDS THE CREATION OF A RIGHT TO HUMANITARIAN INTERVENTION IN CUSTOMARY INTERNATIONAL LAW?

KERRY TETZLAFF [1]

ABSTRACT: This article examines two questions of major importance for the international community. The first question is whether a right to humanitarian intervention developed in customary international law after the NATO air strikes against the Federal Republic of Yugoslavia in Kosovo in 1999. The second question is whether, if such a right has not developed in customary international law, the international community is moving towards the creation of such a right. To answer these two questions, this article does four things. Firstly, it examines the elements of customary international law. Secondly, it sets outs the relevant facts regarding the events in Kosovo. Thirdly, it analyses states' responses to NATO's intervention in Kosovo and considers whether a right to humanitarian intervention now exists in customary international law. Fourthly this article provides a reflection on whether the international community is moving towards the creation of a right to humanitarian intervention in customary international law.

> [T]here are times when use of force may be legitimate in the pursuit of peace. In helping to maintain international peace and security, Chapter VIII of the United Nations Charter assigns an important role to regional organizations …. [U]nder the Charter the Security Council has primary responsibility for maintaining international peace and security ….
>
> Kofi Annan[2]

I INTRODUCTION

In an increasingly globalised and interconnected world linked through the media, we are almost instantly aware of atrocities happening to people in other countries. As the feeling of interconnectedness increases between peoples of different states and the awareness of the existence and importance of human rights grows, there is an increasing feeling among the international community that we must "do something" to help those people at the mercy of failed, dysfunctional or rogue governments.

This paper will examine whether a right to humanitarian intervention developed in customary international law after the NATO air strikes against the Federal Republic of Yugoslavia ("FRY") in Kosovo in 1999, and, if such a right has not developed in

[1] PhD Candidate in Law, University of Cambridge, United Kingdom, BA/LLB (Auck), LLM (Auck), Barrister and Solicitor of the High Court of New Zealand.
[2] Kofi Annan "UN Press Release SG/SM/6938" (Media Release, 24 March 1999).

customary international law, whether the international community is moving towards the creation of the right to humanitarian intervention in customary international law.[3]

To answer these questions, this paper does four things. Firstly, it examines the elements of customary international law. Secondly, it sets out the relevant facts regarding the events in Kosovo. Thirdly, it analyses states' responses to NATO's intervention in Kosovo and considers whether there now exists a right to humanitarian intervention in customary international law. Fourthly this paper provides a reflection on whether we, as an international community, appear to be moving towards the creation of a right to humanitarian intervention in customary international law.

In this paper, the right to humanitarian intervention means military intervention by one or more states in the affairs of another state on humanitarian grounds taken in order to prevent, avert or stop gross violations of human rights.[4] This paper will not examine other pacific forms of humanitarian assistance.

The phrase "right to humanitarian intervention" will be used throughout this paper, as it is the phrase most widely used and understood when discussing the notion of military or forcible intervention by one or more states in the affairs of another state on humanitarian grounds. However, other more appropriate descriptions such as the "responsibility to protect"[5] exist which convey a better emphasis on those who need assistance, rather than on the "right" of one state to intervene in another state's affairs.

This paper will not examine the use of collective security measures under Chapter VII of the Charter of the United Nations for humanitarian intervention. It is generally recognised that the collective use of force for a humanitarian intervention under Chapter VII is the preferred course of action over a unilateral right to humanitarian intervention in customary international law. This paper examines the concept of a right to humanitarian intervention in customary international law for those situations where the United Nations Security Council is either unable or unwilling to act.

II CUSTOMARY INTERNATIONAL LAW

Customary international law is created by state practice and accompanying opinio juris and is recognised as a source of international law by Article 38(1)(b) of the Statute of the International Court of Justice, which describes it as "international custom, as evidence of a general practice accepted as law".[6]

State practice can include "any act or statements by a state from which views about customary law may be inferred".[7] When considering state practice, it is usual to examine the "duration, consistency, repetition and generality"[8] of the practice by states.[9]

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[3] This paper is developed on the premise that there was no right to humanitarian intervention in customary international law prior to the events in Kosovo.
[4] Timothy LH McCormack "The Use of Force" in Blay, Piotrowicz and Tsamenyi (eds) *Public International Law: An Australian Perspective* (Oxford University Press, New York, 1997) 132.
[5] International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (2001).
[6] Statute of the International Court of Justice, art 38(1)(b), in Malcolm Shaw *International Law* (5th ed, Cambridge University Press, Cambridge, 2003) 66.
[7] Malcolm Shaw *International Law* (5th ed, Cambridge University Press, Cambridge, 2003) 80.
[8] Ibid 72.

If an alleged rule affects a large number of states, then that rule would need to be accepted by the states concerned. In *Nicaragua v United States*, the International Court of Justice stated that:[10]

> In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.

Shaw argues that "for a custom to be accepted and recognised it must have the concurrence of the major powers in that particular field".[11] He states that "it is inescapable that some states are more influential and powerful than others and that their activities should be regarded as of greater significance".[12] If a state action arouses a lot of opposition, however, it could not be considered a rule of customary international law.[13] Shaw also states that one must consider the strength of the existing rule that is being challenged by the alleged new rule.[14]

Opinio juris is required to distinguish between the actions of a state which may be motivated by courtesy, diplomatic or other reasons, and those actions of a state conducted due to the belief that the action is founded in a rule of international law or "legally obligatory"[15].[16] In discerning opinio juris, one must allow states some room, as a restrictive approach would deny the development of customary international law.[17] There are differing opinions in academia regarding the importance or even necessity of opinio juris in the creation of customary international law.[18] However, this paper will follow the conservative approach to the creation of customary international law, which requires both sufficient state practice as well as opinio juris.

De Visscher evokes a compelling picture by likening the development of customary international law to the creation of a path across unused land.[19] De Visscher states that each person makes his or her own way across the unused land.[20] Several people may

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[9] Ibid 72.
[10] [1986] ICJ Rep 98 in Malcolm Shaw *International Law* (5th ed, Cambridge University Press, Cambridge, 2003) 74.
[11] Malcolm Shaw *International Law* (5th ed, Cambridge University Press, Cambridge, 2003) 76.
[12] Ibid 75.
[13] Ibid 74.
[14] Ibid 74.
[15] Ibid 80.
[16] Ibid.
[17] Ibid 83.
[18] See Anthea E Roberts "Traditional and Modern Approaches to Customary International Law: A Reconciliation" (2001) 95 AJIL 757; Shaw, ibid 71.
[19] Charles de Visscher, *Theory and Reality in Public International Law* (tr PE Corbett, Princeton University Press, Princeton, 1957) in Malcolm Shaw *International Law* (5th ed, Cambridge University Press, Cambridge, 2003) 75.
[20] Charles de Visscher, *Theory and Reality in Public International Law* (tr PE Corbett, Princeton University Press, Princeton, 1957) in Malcolm Shaw *International Law* (5th ed, Cambridge University Press, Cambridge, 2003) 75.

walk a similar way and before long, a path starts to be worn.[21] Gradually, the path becomes established and other people use the path to cross the unused land.[22] After a while, the path becomes the normal, usual and accepted way for people to cross the land and the path becomes a developed road.[23] Interestingly, de Visscher points out that it is only natural that some people will make bigger footprints and contribute more to the creation of the path than others, and likewise in customary international law, some states will be more influential in creating customary international law than others.[24]

III KOSOVO

A. Facts

At the time of the conflict in Kosovo during the 1980s and 1990s, Kosovo was a province within Serbia, a constituent part of the Federal Republic of Yugoslavia. Conflicts within this region can be traced back many hundreds of years. Kosovo has a history that includes being a part of the Serbian territory as well as being independent of Serbia. In 1389, Ottoman Turks defeated the Serbian Prince Lazar and subsequently controlled the area until 1912 when the Balkan states ousted the Turks.[25] World War One saw the Serbian forces pushed out of Kosovo but in 1918 Kosovo became part of Serbia again.[26] During World War Two, what was then Yugoslavia was partitioned again.[27] At the end of the Second World War, the Balkan states were reconstituted as the "People's Federal Republic of Yugoslavia" and included Serbia, Montenegro, Croatia, Slovenia, Bosnia and Herzegovina, and Macedonia, and two autonomous areas within Serbia, one of which was Kosovo.[28] In addition, Kosovo became fully autonomous in 1974 "giving it status approaching that of a constituent republic"[29].[30]

After the death of Tito, Albanian Kosovars began to experience oppression by Serbs from 1981 onwards.[31] As the state of Yugoslavia began to decline so the oppression against the Albanian Kosovars increased.[32] Kosovo's autonomy was revoked in 1989

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[21] Charles de Visscher, *Theory and Reality in Public International Law* (tr PE Corbett, Princeton University Press, Princeton, 1957) in Malcolm Shaw *International Law* (5th ed, Cambridge University Press, Cambridge, 2003) 75.
[22] Charles de Visscher, *Theory and Reality in Public International Law* (tr PE Corbett, Princeton University Press, Princeton, 1957) in Malcolm Shaw *International Law* (5th ed, Cambridge University Press, Cambridge, 2003) 75.
[23] Charles de Visscher, *Theory and Reality in Public International Law* (tr PE Corbett, Princeton University Press, Princeton, 1957) in Malcolm Shaw *International Law* (5th ed, Cambridge University Press, Cambridge, 2003) 75.
[24] Charles de Visscher, *Theory and Reality in Public International Law* (tr PE Corbett, Princeton University Press, Princeton, 1957) in Malcolm Shaw *International Law* (5th ed, Cambridge University Press, Cambridge, 2003) 75.
[25] Simon Chesterman *Just War or Just Peace?* (Oxford University Press, New York, 2001) 207.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] See Misha Glenny *The Fall of Yugoslavia: The Third Balkan War* (3rd ed, Penguin, London, 1996) in Chesterman, above n 25, 207.
[30] Chesterman, above n 25, 207.
[31] Peter Hilpold "Humanitarian Intervention: Is There a Need for a Legal Reappraisal?" (2001) 12 EJIL 437, 438.
[32] Ibid.

and its parliament was dissolved in 1990.[33] Albanian Kosovar politicians declared their independence and established their own parliament and institutions, which Serbia in turn did not acknowledge.[34] Systematic discrimination against the Albanian Kosovars continued to grow throughout the 1990s.[35] In February and March 1998, Serb police and Albanian activists clashed and numerous people on both sides were killed.[36] Police persecution continued to increase and hundreds of thousands of Albanian Kosovars were forced from their homes.[37] Meanwhile Serbs were being actively encouraged to move to Kosovo.[38] Albanian Kosovars reacted with armed resistance.[39] Serb forces then committed atrocities against the Albanian Kosovar population as part of a Serbian government sponsored programme of "ethnic cleansing".[40]

The United Nations Security Council adopted Resolution 1160 (1998) in March 1998, which deplored the violence by both the Kosovo separatists and the Serb forces and encouraged a resolution that both respected the territorial integrity of the FRY and gave a greater degree of autonomy and self-administration to Kosovo.[41] A second resolution was adopted by the Security Council in September 1998 "affirming that the deterioration of the situation in Kosovo, Federal Republic of Yugoslavia, constitutes a threat to peace and security in the region".[42] Resolution 1199 (1998) also demanded a ceasefire under Chapter VII and for both the FRY and Kosovar Albanian leadership to take steps to improve the humanitarian situation and avert a humanitarian catastrophe.[43] Finally, Resolution 1199 (1998) asseverated that "should the concrete measures demanded in this resolution and resolution 1160 (1998) not be taken, [the Security Council will] consider further action and additional measures to maintain or restore peace and stability in the region."[44]

Shortly after Resolution 1160 (1998) was adopted, Serb police forces killed approximately thirty Kosovar Albanians.[45] NATO felt compelled to act. It threatened the use of force against Serbia and Serbia dutifully agreed to comply with both Security Council resolutions and allow a NATO air verification mission over Kosovo.[46]

The Security Council then adopted a third resolution, Resolution 1203 (1998) welcoming the agreement between NATO and Serbia.[47] The Resolution noted that the Organisation for Security and Cooperation in Europe ("OSCE") was "considering arrangements to be implemented in cooperation with other organizations"[48] and "action

[33] Ibid.
[34] Chesterman, above n 25, 207.
[35] Hilpold, above n 31, 438.
[36] Chesterman, above n 25, 207.
[37] Hilpold, above n 31, 438.
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] SC Res 1160, 3868th mtg, UN Doc S/Res/1160 (1998).
[42] SC Res 1199, 3930th mtg, UN Doc S/Res/1199 (1998).
[43] Ibid.
[44] Ibid.
[45] Chesterman, above n 25, 208.
[46] Ibid 209.
[47] SC Res 1203, 3937th mtg, UN Doc S/Res/1203 (1998).
[48] Ibid.

may be needed to ensure their safety and freedom of movement".[49] Both Russia and China stated after Resolution 1203 (1998) was adopted (both countries abstained from voting) that they did not consider that the Resolution authorised military intervention in the FRY.[50] The United States representative, on the other hand, stated that "[t]he NATO allies, in agreeing on 13 October to the use of force, made it clear that they had the authority, the will and the means to resolve this issue. We retain that authority."[51]

The situation in Kosovo continued to deteriorate with hundreds of thousands of Kosovar Albanians being forced from their homes by Serb forces.[52] No further Security Council resolution was adopted and NATO conducted air strikes against the FRY from 23 March to 10 June 1999 in what was called Operation Allied Force.[53] Operation Allied Force was conducted without United Nations Security Council authorisation.

This paper will now examine the response of states to the NATO air strikes against the FRY in 1999, and analyse whether a right to humanitarian intervention now exists in customary international law.

B. Analysis of State Practice and Opinio Juris With Regard to the Concept of the Right to Humanitarian Intervention

When considering the response of states to the NATO air strikes in order to discover whether a right to humanitarian intervention now exists in customary international law, one must examine both state practice and opinio juris as discussed above in Chapter II. In considering state practice and opinio juris, this paper will first consider NATO's reasoning and justification for the air strikes against the FRY. Next, this paper will examine statements given by various members of NATO, some of whom were members of the United Nations Security Council at the time of the air strikes. Then, this paper will analyse statements given by other members of the Security Council, eight of whom were Group of 77 members. This paper will also look at statements by other states who participated in Security Council discussions as non-voting visitors to the Security Council, then consider Australia's position, and lastly examine a statement by the Group of 77, which represents 134 states, regarding the right of humanitarian intervention. A short summary will then follow outlining the findings of the above investigation into the state practice and opinio juris of the wide variety of states concerning the question of whether the right to humanitarian intervention has become a part of customary international law since Kosovo.

1 State practice and opinio juris of NATO and its members

The North Atlantic Treaty Organisation ("NATO") is a regional organisation founded shortly after World War II between Western European states and the United States and Canada for the primary purpose of ensuring regional security and freedom of its

[49] Ibid.
[50] UN SCOR, 3937th mtg, UN Doc S/PV. 3937 (1998).
[51] Ibid.
[52] Hilpold, above n 31, 438.
[53] Chesterman, above n 25, 211.

members through political and military means.[54] NATO has 26 members.[55] NATO's stated objectives in relation to the conflict in Kosovo were:[56]

> a verifiable stop to all military action and the immediate ending of violence and repression; the withdrawal from Kosovo of the military, police and paramilitary forces; the stationing in Kosovo of an international military presence; the unconditional and safe return of all refugees and displaced persons and unhindered access to them by humanitarian aid organisations; the establishment of a political framework agreement for Kosovo on the basis of the Rambouillet Accords, in conformity with international law and the Charter of the United Nations.

It could be argued that at least the first four of these five objectives were directly or indirectly linked to humanitarian concerns.

In a press statement given on the day that he ordered the air strikes against the FRY, Dr Javier Solana, Secretary General of NATO, stated that NATO would take "whatever measures were necessary to avert a humanitarian catastrophe".[57] He further stated that:[58]

> [The military action] will be directed towards disrupting the violent attacks being committed by the Serb Army and Special Police Forces and weakening their ability to cause further humanitarian catastrophe ….Our objective is to prevent more human suffering and more repression and violence against the civilian population of Kosovo ….We must halt the violence and bring an end to the humanitarian catastrophe now unfolding in Kosovo … We have a moral duty to do so.

Dr Solana also emphasised however that NATO "must also act to prevent instability spreading in the region"[59] and that "the military action is intended to support the political aims of the international community".[60]

Thus, NATO's intentions appear to have been to avert a humanitarian catastrophe and also prevent instability spreading throughout that region. Interestingly, Dr Solana does not attempt to justify NATO's actions from a legal perspective but rather finishes the press statement with reference to NATO's moral obligation to the oppressed people of Kosovo: "[w]e have a moral duty …. The responsibility is on our shoulders and we will fulfil it."[61]

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[54] *The Origins of the Alliance* (8 October 2002) NATO <http://www.nato.int/docu/handbook/2001/hb0101.htm> (at 28 February 2005). See also *Fundamental Security Tasks* (8 October 2002) NATO <http://www.nato.int/docu/handbook/2001/hb0102.htm> (at 28 February 2005).

[55] *NATO Member Countries* (29 November 2004) NATO <http://www.nato.int/structur/countries.htm> (at 23 February 2005). The 26 member states of NATO are: Belgium, Bulgaria, Canada, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom, United States.

[56] *Nato's Role in Relation to the Conflict in Kosovo* (15 July 1999) NATO <http://www.nato.int/kosovvo/history.htm#A> (at 23 February 2005).

[57] Dr Javier Solana, Secretary General of NATO "Press Statement" (Media Release, 23 March 1999) <http://www.nato.int/docu/pr/1999/p99-040e.htm> (at 23 February 2005).

[58] Ibid.

[59] Ibid.

[60] Ibid.

[61] Ibid.

Dr Solana makes no reference to NATO utilising a right to humanitarian intervention but rather refers to NATO helping to prevent a "humanitarian catastrophe". The phrase "humanitarian catastrophe" is used by many of the NATO states in their statements supporting the air strikes. It is possible that NATO did not try to rely on a right to humanitarian intervention for two reasons. Firstly, it appears that NATO is not confident that such a right exists in customary international law, and secondly, it is not necessarily in NATO's interests that such a right exists, as it would then mean that other states could attack NATO states under the guise of a right to humanitarian intervention thereby leading to a destabilisation of the world order. As a result, NATO went to considerable effort to underline that this intervention was on humanitarian grounds and was an exception to the existing rule of prohibition of the use of force[62] rather than an assertion of any new right or law in customary international law.[63]

The day after the air strikes, the United States, a NATO member, stressed the need to prevent the possibility of a wider war if action were not taken and humanitarian concerns.[64] On the same day, the United States stated in an emergency session of the United Nations Security Council:[65]

> [W]e believe that such action is necessary to respond to Belgrade's brutal persecution of Kosovar Albanians, violations of international law, excessive and indiscriminate use of force, refusal to negotiate to resolve the issue peacefully and recent military build-up in Kosovo – all of which foreshadow a humanitarian catastrophe of immense proportions …. We have begun today's action to avert this humanitarian catastrophe and to deter further aggression and repression in Kosovo …. [W]e believe that action by NATO is justified and necessary to stop the violence and prevent an even greater humanitarian disaster.

The United States, Canada and France all emphasised that the FRY had not adhered to the first two resolutions of the Security Council, namely, Resolution 1199 (1998) and Resolution 1203 (1998).[66]

Germany, as President of the European Union, stated:[67]

> On the threshold of the 21st century, Europe cannot tolerate a humanitarian catastrophe in its midst. It cannot be permitted that, in the middle of Europe, the predominant population of Kosovo is collectively deprived of its rights and subjected to grave human rights abuses. We, the countries of the European Union, are under a moral obligation to ensure that indiscriminate behaviour and violence, which became tangible in the massacre of Racak in January 1999, are not repeated. We have a duty to ensure the return to their homes of the hundreds of thousands of refugees and displaced persons. Aggression must not be rewarded. An aggressor must know that he will have to pay a high price. This is the lesson to be learned from the 20th century.

At the same emergency session of the United Nations Security Council, the United Kingdom underlined the need to protect Kosovar Albanians:[68]

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[62] Charter of the United Nations, art 2(4).
[63] Chesterman, above n 25, 215.
[64] American President Clinton's Address on Airstrikes Against Yugoslavia, New York Times (New York, United States of America, 24 March 1999) in Simon Chesterman *Just War or Just Peace?* (Oxford University Press, New York, 2001) 211.
[65] UN SCOR, 3988th mtg, UN Doc S/PV. 3988 (1999).
[66] Ibid.
[67] Ibid.

> We are taking this action for one very simple reason; to damage the Serb forces sufficiently to prevent Milosevic from continuing to perpetuate his vile oppression against innocent Kosovar Albanian civilians.

The United Kingdom and Netherlands were the only two states at the emergency session of the Security Council which argued that the NATO action was a legal action, however, neither state specifically relied upon the assertion of a right to humanitarian intervention in customary international law. The United Kingdom and the Netherlands are both NATO members. The United Kingdom's representative stated:[69]

> The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. Under present circumstances in Kosovo, there is convincing evidence that such a catastrophe is imminent …. Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable. The force now proposed is directed exclusively to averting a humanitarian catastrophe, and is the minimum judged necessary for that purpose.

The Netherlands asserted that a right to use force existed in customary international law:[70]

> The Secretary-General is right when he observes in his press statement that the Council should be involved in any decision to resort to the use of force. If, however, due to one or two permanent members' rigid interpretation of the concept of domestic jurisdiction, such a resolution is not attainable, we cannot sit back and simply let the humanitarian catastrophe occur. In such a situation we will act on the legal basis we have available, and what we have available in this case is more than adequate …. As stated by the Secretary-General, diplomacy has failed, but there are times when the use of force may be legitimate in the pursuit of peace. The Netherlands feels that this is such a time.

In the proceedings before the International Court of Justice brought by the FRY against the NATO members, only Belgium gave the doctrine of humanitarian intervention (under Article 2(4) of the United Nations Charter or historical precedent) as one of its justifications for the air strikes.[71] The United States pointed to the Security Council resolutions and "humanitarian catastrophe".[72] The United Kingdom,[73] Spain,[74]

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[68] British Prime Minister Tony Blair's Statement on Kosovo Bombing, New York Times (New York, United States of America, 24 March 1999) in Simon Chesterman *Just War or Just Peace?* (Oxford University Press, New York, 2001) 211.
[69] UN SCOR, 3988th mtg, UN Doc S/PV. 3988 (1999).
[70] Ibid.
[71] *Legality of Use of Force Case (Provisional Measures)* [1999] ICJ Rep, pleadings of Belgium, 10 May 1999, CR 99/15 (uncorrected translation) in Simon Chesterman *Just War or Just Peace?* (Oxford University Press, New York, 2001) 213. See also Jonathan I Charney "Anticipatory Humanitarian Intervention in Kosovo" (1999) 32 Vand J Transnat'l L 1231 and (1999) 93 AJIL 834, 836.
[72] *Legality of Use of Force Case (Provisional Measures)* [1999] ICJ Rep, pleadings of the United States, 11 May 1999, CR 99/24, para 1.7 in Simon Chesterman *Just War or Just Peace?* (Oxford University Press, New York, 2001) 213.
[73] *Legality of Use of Force Case (Provisional Measures)* [1999] ICJ Rep, pleadings of the United Kingdom, 11 May 1999, CR 99/23, paras 17-18 in Simon Chesterman *Just War or Just Peace?* (Oxford University Press, New York, 2001) 213.
[74] *Legality of Use of Force Case (Provisional Measures)* [1999] ICJ Rep, pleadings of Spain, 11 May 1999, CR 99/22, para 1 in Simon Chesterman *Just War or Just Peace?* (Oxford University Press, New York, 2001) 213.

Germany[75] and the Netherlands[76] emphasised the "humanitarian catastrophe". Chesterman states that:[77]

> Though this phrase recalls the doctrine of humanitarian intervention, some care appears to have been taken to avoid invoking that doctrine by name. The formulation derives from UK justifications for the no-fly zones over Iraq, although no legal pedigree was ever established for this.

France, Portugal, Italy and Canada did not give legal justifications for the NATO action at the FRY proceedings.[78]

In summary, it is significant that the NATO countries themselves did not rely on the assertion of a legal right to humanitarian intervention as a justification for NATO's military intervention. Only the United Kingdom and the Netherlands asserted the day after the air strikes that the NATO action was legal, albeit without elaborating on the legal basis. Neither of the two states relied upon this assertion in the FRY proceedings against NATO members. Only Belgium relied upon the assertion that there was an existing right to humanitarian intervention based on historical precedent at the FRY proceedings against NATO member states. All other NATO states referred only to the "humanitarian catastrophe" and often the moral duty to act but either did not recognise the intervention as a humanitarian intervention or were not confident enough in the existence of such a right to humanitarian intervention to rely on that justification. As a result, it can be concluded that there is no opinio juris among NATO countries, with the exception of Belgium, that a right to humanitarian intervention exists in customary international law.

2 State practice and opinio juris of United Nations Security Council non-NATO members

At the time of the NATO air strikes, the United Nations Security Council ("Security Council") consisted of six NATO members,[79] three of whom are Permanent Members,[80] eight Group of 77 member states and the Russian Federation. The eight Group of 77 members were China, Argentina, Bahrain, Brazil, Gabon, Gambia, Malaysia and Namibia. China and the Russian Federation are Permanent Members of the Security Council.[81] The Security Council was deeply divided on the question of the NATO air strikes against the FRY. The Russian Federation and China were strongly opposed to

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[75] *Legality of Use of Force Case (Provisional Measures)* [1999] ICJ Rep, pleadings of Germany, 11 May 1999, CR 99/18, para 1.3.1 in Simon Chesterman *Just War or Just Peace?* (Oxford University Press, New York, 2001) 213.
[76] *Legality of Use of Force Case (Provisional Measures)* [1999] ICJ Rep, pleadings of the Netherlands, 11 May 1999, CR 99/20, para 40 in Simon Chesterman *Just War or Just Peace?* (Oxford University Press, New York, 2001) 213.
[77] Simon Chesterman *Just War or Just Peace?* (Oxford University Press, New York, 2001) 214.
[78] Ibid 213.
[79] The following states are NATO members and were also Security Council members at the time of the air strikes: Canada, France, Netherlands, Slovenia, United Kingdom, and the United States of America: UN SCOR, 3988th mtg, UN Doc S/PV. 3988 (1999).
[80] The Permanent Members in NATO are the United Kingdom, the United States of America and France.
[81] All Permanent Members have a veto power which means that they are able to veto any proposed resolution concerning non-procedural matters: Charter of the United Nations, art 27(3).

the air strikes, the NATO members were in favour of the air strikes and the other Group of 77 states gave statements of varying degrees of vagueness and ambiguity.

The Security Council met at the request of the Russian Federation on 24 March 1999, the day after the NATO Secretary-General gave the order to begin the air strikes. The Russian Federation representative stated at the emergency meeting of the Security Council on 24 March 1999 that:[82]

> The Russian Federation is profoundly outraged at the use by the North Atlantic Treaty Organization (NATO) of military force against the Federal Republic of Yugoslavia …. The members of NATO are not entitled to decide the fate of other sovereign and independent States …. Attempts to justify the NATO strikes with arguments about preventing a humanitarian catastrophe in Kosovo are completely untenable. Not only are these attempts in no way based on the Charter or other generally recognized rules of international law, but the unilateral use of force will lead precisely to a situation with truly devastating humanitarian consequences. Moreover, by the terms of the definition of aggression adopted by the General Assembly in 1974,
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> "No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression". (*General Assembly resolution 3314 (XXIX), annex, article 5, para. I*)
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> ….It would be unthinkable for a national court in a civilized democratic country to uphold illegal methods to combat crime. Attempts to apply a different standard to international law and to disregard its basic norms and principles create a dangerous precedent that could cause acute destabilization and chaos on the regional and global level. If we do not put an end to this very dangerous trend, the virus of illegal unilateral approaches could spread not merely to other geographical regions but to spheres of international relations other than questions of peace and security.

China also strongly opposed the NATO air strikes. It declared that:[83]

> [The NATO military action] amounts to a blatant violation of the United Nations Charter and of the accepted norms of international law. The Chinese Government strongly opposes this act. The question of Kosovo, as an internal matter of the Federal Republic of Yugoslavia, should be resolved among the parties concerned in the Federal Republic of Yugoslavia themselves. Settlement of the Kosovo issue should be based on respect for the sovereignty and territorial integrity of the Federal Republic of Yugoslavia …. We oppose interference in the internal affairs of other States, under whatever pretext or in whatever form …. The Chinese Government vigorously calls for an immediate cessation of the military attacks by NATO against the Federal Republic of Yugoslavia.

Thus, both China and the Russian Federation emphasised the traditionally unassailable notions in international law of absolute state sovereignty and territorial integrity over the concept of human rights. Both China and the Russian Federation strongly rejected any idea of the right to intervene in another state's affairs and underlined that NATO's actions were not based in any rule of international law, thereby firmly rejecting any right to intervene on humanitarian grounds.

Statements from the remaining members of the United Nations Security Council, all of whom are Group of 77 members range from requesting a cessation of NATO military action to outright ambiguity (which could be interpreted as a hedging of bets) to

[82] UN SCOR, 3988th mtg, UN Doc S/PV. 3988 (1999).
[83] Ibid.

statements that the NATO military strikes had to happen as the United Nations Security Council had not fulfilled its responsibility.

Namibia called for "the immediate cessation of the ongoing military action and for the exhausting of all possible avenues for a peaceful resolution of the conflict".[84]

Bahrain "regret[ted] the recent developments in Kosovo, which have finally led to the use of military force against the forces of the Federal Republic of Yugoslavia".[85]

Gabon articulated that it was "in principle opposed to the use of force to settle local or international disputes".[86]

Brazil asseverated that it "regret[ted] that the escalation of tensions has resulted in recourse to military action".[87]

Argentina called the NATO military action an attack against the FRY, but went on to state that "the responsibility lies with the Belgrade Government, since the objective of the military action is to avert a humanitarian catastrophe in Kosovo"[88].[89]

Gambia stated that:[90]

> We cannot remain indifferent to the plight of the murdered people of Kosovo …. It is the responsibility of any Government to protect its citizens. We speak with great regret of the fact that the international community had to take the action it took today. Of course, regional arrangements have responsibility for the maintenance of peace and security in their areas. The Security Council, however, has the primary responsibility for the maintenance of international peace and security, as clearly stated in the Charter of the United Nations.

Malaysia professed that it was[91]

> not in favour of the use or threat of use of force to resolve any conflict situation, regardless of where it occurs. If the use of force is at all necessary, it should be a recourse of last resort, to be sanctioned by the Security Council …. [T]he international community cannot afford to stand idly by, given the dimension of the violence on the ground and the worsening humanitarian conditions in Kosovo …. It is regrettable that in the absence of a consensus in the council – thanks, or rather, no thanks, to the irreconcilable differences among permanent members – the Council has been denied the opportunity to firmly and decisively pronounce on this issue, as expected of it by the international community. We regret that in the absence of Council action on this issue it has been necessary for action to be taken outside of the Council.

After NATO militarily intervened in Kosovo, the Russian Federation, India and Belarus sponsored a draft resolution to the Security Council which described the NATO air strikes as a "flagrant violation of the United Nations Charter, in particular Articles 2(4)

[84] Ibid.
[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Ibid.

…",[92] a threat to international peace and security, and called for their immediate cessation.[93] This was supported by China and Namibia.[94] China, the Russian Federation and Namibia voted, as members of the Security Council, for the draft resolution.[95]

The draft resolution condemning the NATO air strikes and, calling for a cessation, was defeated by twelve votes to three. The twelve states that voted against the draft resolution were: the United States, the United Kingdom, France, Canada, the Netherlands and Slovenia (all NATO members), Malaysia, Bahrain, Argentina, Gabon, Brazil and Gambia (all Group of 77 members).[96] What is immediately striking is that all the Group of 77 states on the Security Council, except for China and Namibia, voted against denouncing the NATO air strikes and calling for their cessation. Although their earlier statements, given the day after the air strikes commenced, were, for the most part, quite vague, it is submitted that by this action, those six Group of 77 states effectively supported the air strikes.

Chesterman notes that "[f]ew states opposing the resolution advanced any legal basis for the action",[97] however, the same states also refused to condemn the NATO air strikes against the FRY. Chesterman comments that states generally did not consider the draft resolution an appropriate response to the situation.[98] It is submitted that this is because of the changing attitudes of states towards state sovereignty and human rights, that is, the decrease in esteem for the concept of absolute state sovereignty and the increase in priority of human rights.

Although one cannot build a case for the right to humanitarian intervention in customary international law based on what states did not do or by mere interpretations of vague phrases, it is at least worthy to note states' reactions to the draft resolution as one of many possible signposts as to a state's standpoint vis-à-vis the right of humanitarian intervention without United Nations Security Council approval, that is, in customary international law.

In summary, the Russian Federation and China were consistently vehemently opposed to the NATO air strikes, calling them illegal and not based on any rule of international law. Namibia also denounced the air strikes, demanded an immediate end to the strikes and voted for the draft resolution calling for an end to the air strikes. Other Group of 77 states on the Security Council gave statements of varying degrees of ambiguity, some almost with an air of resignation that the NATO strikes "had to" happen. However, when it came to laying their cards clearly on the table, all six remaining Group of 77 states voted not to denounce the air strikes and not to call for their cessation in a proposed Security Council resolution. While these six states have not declared that the

[92] UN SCOR, UN Doc S/1999/328 (1999).
[93] Ibid.
[94] Chesterman, above n 25, 213.
[95] As both Russia and China have a veto vote on the Security Council, it would seem that no resolution authorising a military intervention in Kosovo would have been forthcoming from the Security Council: Louis Henkin "Kosovo and the Law of 'Humanitarian Intervention'" (1999) 93 AJIL 824, 825.
[96] United Nations "Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia" (Media Release SC/6659, 26 March 1999).
[97] Chesterman, above n 25, 213.
[98] Ibid.

NATO strikes were legal, or founded in customary international law, they did effectively support the air strikes through their actions.

3 State practice and opinio juris of other states

Several other states who were not members of the Security Council at the time of the air strikes also gave statements at the same emergency Security Council meeting detailed above. These states were Belarus, India, Albania, Bosnia and Herzegovina, and Germany (which has already been considered above). Statements from these countries will now be examined together with statements from Australia, the Group of 77, the Group of Rio, and the Non-Aligned States.

Belarus strongly denounced the NATO military action and was one of the three states that requested the emergency meeting.[99] Belarus declared that the NATO military action was "an act of aggression"[100] and that "[u]nder these circumstances, no rationale, no reasoning presented by NATO can justify the unlawful use of military force and be deemed acceptable."[101] Belarus is not a member of the Group of 77 but it does share close bilateral ties with Serbia.

India expressed a similar opinion. It stated that:[102]

> No country, group of countries or regional arrangement, no matter how powerful, can arrogate to itself the right to take arbitrary and unilateral military action against others. That would be a return to anarchy, where might is right …. What is particularly disturbing is that both international law and the authority of the Security Council are being flouted by countries that claim to be champions of the rule of law and which contain within their number permanent members of the Council, whose principal interest should surely be to enhance rather than undermine the paramountcy of the Security Council in the maintenance of international peace and security …. [T]his arbitrary, unauthorized and illegal military action should be stopped immediately.

Both India and Belarus emphasised that they considered NATO's actions to have no basis in international law and indeed were contrary to international law and an act of aggression.

In contrast, Albania and Bosnia-Herzegovina, both states that have recently experienced internal conflicts and in close proximity to Kosovo, were grateful to NATO for intervening on humanitarian grounds.

Albania firstly emphasised the humanitarian crisis in Kosovo. The Albanian representative then continued by declaring that:[103]

> The Republic of Albania totally supports the military action by the North Atlantic Treaty Organization, and we consider it an action in support of peace and stability in the region. My country strongly supports today's action …. No country that tried to bury the basic Charter

[99] UN SCOR, 3988th mtg, UN Doc S/PV. 3988 (1999).
[100] Ibid.
[101] Ibid.
[102] Ibid.
[103] Ibid.

> principles of peace, security and cooperation, and that committed genocide and crimes against humanity, can expect to receive the protection of the United Nations and the Security Council.

Bosnia and Herzegovina stated that:[104]

> Military force is never a welcome option, but it is sometimes the best, the only alternative among many bad options. It may be the only option available to save innocent lives …. A country that has unleashed its brutal war machine against its own civilian population cannot now cry victim when the international community steps in to prevent further ethnic cleansing and genocide.

It is important also to consider Australia's view as a close ally of the United States and NATO. McCormack outlines Australia's position on the right to humanitarian intervention. He states that Australia has never recognised a unilateral right of humanitarian intervention independent of the United Nations process and system.[105] In the case of Kosovo, McCormack states that Australia condemned the massive human rights violations committed by the FRY against Kosovar Albanians but did not declare that the NATO bombings were legal.[106] He concludes:[107]

> Australia's position has consistently been that a decision to use force in response to the threat to, or breach of, international peace and security is a decision for the collective-security mechanisms and processes of the UN and not for individual states.

At the first ever Group of 77[108] South Summit held in Havana, Cuba in April 2000, the Group of 77 delivered a declaration that stated "we uphold the principles of sovereignty and sovereign equality of States, territorial integrity and non intervention in the internal affairs of any State".[109]

Furthermore, the Group of 77 specifically stated that:[110]

> We stress the need to maintain a clear distinction between humanitarian assistance and other activities of the United Nations. We reject the so-called "right" of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law …. Furthermore, we stress that humanitarian assistance should be conducted in full respect of the sovereignty territorial integrity, and political independence of host countries, and should be initiated in response to a request or with the approval of these States.

Thus, the Group of 77, which comprises 134 states and includes China, India, and South Africa, as well as large parts of Africa, Latin America and the Middle East, has firmly rejected the notion of the right of humanitarian intervention in international law. In addition, those same states have reaffirmed the need for respect for territorial integrity,

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[104] Ibid.
[105] Timothy LH McCormack "The Use of Force" in Blay, Piotrowicz and Tsamenyi (eds) *Public International Law: An Australian Perspective* (Oxford University Press, New York, 1997) 134.
[106] Ibid 135.
[107] Ibid.
[108] The Group of 77 was established on June 15, 1964 at the United Nations Conference on Trade and Development in Geneva. It was created to strengthen the economic bargaining power and promote the collective interests of its members. Originally made up of 77 countries, the Group has grown to 134 member states: *A Guide to Committees, Groups, and Clubs* (August 2004) IMF <http://www.imf.org/external/np/exr/facts/groups.htm#G77> (at 23 February 2005).
[109] Group of 77 *Declaration of the South Summit* (2000) Group of 77 at <http://www.g77.org/Docs/Declaration_G77Summit.htm> (at 15 February 2005) para 4.
[110] Ibid para 54.

the concept of sovereignty and political independence of states. This is in contrast to the actions of six of its members in the days after the NATO air strikes first began. This may either reflect a change in position by those states, or that they were simply outnumbered in a group of 134 states, many of whom are more powerful than they are, or that they too considered the NATO air strikes necessary but unfortunate and not legal.

The Group of Rio, which includes 29 Latin American countries and whose decision-making process is by consensus, issued a declaration the day after NATO's action which "expressed their anxiety" about the air strikes and called for a resumption of talks with the goal of a peaceful settlement.[111] The declaration also expressed concern that NATO's actions were without Security Council authorisation.[112] Argentina and Brazil, both mentioned above and part of the Group of 77, are also members of the Group of Rio. Argentina's and Brazil's statements at the emergency session of the Security Council were vague and ambiguous. The Group of Rio statement was a little more strongly opposed to the NATO air strikes. The Group of 77 statement was very strongly opposed to the air strikes and included statements referring to the illegality of the air strikes. Thus, Argentina and Brazil's positions need to be clarified with further state practice and opinio juris.

Finally, the Movement of Non-Aligned Countries[113] ("Non-Aligned Movement") issued a statement on 9 April 1999 regarding the situation in Kosovo, reaffirming its commitment to the "sovereignty, territorial integrity and political independence of all States",[114] emphasising that "the primary responsibility for the maintenance of international peace and security rests with the United Nations Security Council"[115] and that diplomatic efforts "constitute the only basis for a peaceful, just and equitable solution to the conflict".[116] Although at first this could be read to suggest that the Non-Aligned Movement is more aligned with the Group of 77 than with NATO states, one must question the use of the phrase "primary responsibility … rests with the United Nations Security Council". One wonders whether this might be a tacit endorsement of sorts that other organisations might also play a role in the maintenance of international peace and security.

In conclusion, Belarus and India strongly denounced the NATO air strikes calling them illegal and not based on any rule of international law. By contrast, Albania and Bosnia-Herzegovina supported NATO's actions. Australia proffered a position held by many states, that is, it deplored the violation of human rights by the FRY in Kosovo but would not declare the NATO air strikes legal. The Group of 77 published a joint statement in

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[111] UN SCOR, 54th sess, UN Doc S/1999/347 (1999) in Hernan Vales "The Latin American View on the Doctrine of Humanitarian Intervention" (12 February 2001) The Journal of Humanitarian Assistance <http://www.jha.ac/articles/a064.htm> (at 3 March 2005).
[112] Ibid.
[113] The Movement of Non-Aligned Countries has 113 members consisting mainly of African, Asian and Latin American states but also oil-producing states: See Non-Aligned Movement *Background* Non Aligned Movement <http://www.nam.gov.za/background/background.htm#4.1> (at 8 March 2005); Tiscali *Non-Aligned Movement* Tiscali Encyclopaedia <http://www.tiscali.co.uk/reference/encyclopaedia/hutchinson/m0005012.html> (at 8 March 2005).
[114] UN SCOR, UN Doc S/1999/451 (1999).
[115] Ibid.
[116] Ibid.

2000 declaring that state sovereignty and territorial integrity of a state were the paramount considerations and explicitly rejected the right to humanitarian intervention both in the United Nations Charter and customary international law. The Group of Rio followed the main Latin American idea that intervention without Security Council authorisation is undesirable, while the Non-Aligned Movement's declaration is decidedly vague.

4 Conclusion

So where does this analysis leave the question of whether there is a right to humanitarian intervention in customary international law? At one end of the spectrum, Belgium, the Netherlands and the United Kingdom have declared, at various times, that they recognise a right to humanitarian intervention in international law. At the other end of the spectrum, the Russian Federation, China, Belarus, India and Namibia individually and the Group of 77 collectively have strongly rejected any notion of a right to humanitarian intervention in customary international law and denounced the NATO air strikes against the FRY as illegal. On the continuum, other NATO states participated in and supported a military intervention in Kosovo on humanitarian grounds but for the most part based their support on the idea of a moral duty rather than a legal duty to assist oppressed Kosovar Albanians. Other states accepted the NATO air strikes as unfortunately necessary but undesirable.

The proposed right to humanitarian intervention would potentially affect every state and thus it is only right that a wide range of states be surveyed for state practice and opinio juris. It would seem then that of the 193[117] states in the world, at least 136 states, including the Russian Federation, China and India not to mention most of Africa and Latin America and parts of Asia, have specifically stated that they reject a right to humanitarian intervention in customary international law. Only three states declared that NATO's actions were legal. Two of those states did not elaborate on what basis they considered NATO's actions legal and did not refer to a right to humanitarian intervention in customary international law. Only Belgium specifically referred to a right to humanitarian intervention based on historical precedent as a legal basis for NATO action. Major states such as China, the Russian Federation, and India have categorically rejected such a right in international law and denounced NATO's actions as inconsistent with the rule of non-intervention in another state's internal affairs. Even accepting that some states wield more influence in creating international law than others, it is submitted that there is clearly insufficient state practice and virtually no opinio juris to support a claim that there is a right to humanitarian intervention in customary international law.

IV IS THERE A TREND TOWARDS THE CREATION OF A RIGHT TO HUMANITARIAN INTERVENTION IN CUSTOMARY INTERNATIONAL LAW?

Given that the notion of a right to humanitarian intervention does not currently meet the threshold required in order for it to be accepted as customary international law, the

[117] About.Com *Number of Countries* About.Com <http://geography.about.com/os/countries/a/numbercountries.htm> (at 3 March 2005). The figure of 193 includes the 191 United Nations member states, the Vatican City and Taiwan.

second question to be examined in this paper is whether there is any trend at all towards the creation of a right to humanitarian intervention in customary international law.

A. General

It will be immediately obvious from the above analysis in Chapter III that there is a divide between the developed, rich, industrialised states, which often have histories as imperialistic states and the poorer, developing states, many of whom have only recently won independence from the richer more developed states. This divide is sometimes referred to as the divide between North and South.

The North are more open to the concept of intervening in the affairs of another state which is committing mass violations of human rights against its own people and have the military, financial and technological means to do so. The North do not generally contend that the right to humanitarian intervention is possible on legal grounds but interestingly refer to their moral duty to act to stop mass violations of human rights. The South know that the intervention will only ever be carried out by those that have the means to do so, that is, the North, and therefore see the right of humanitarian intervention as a new form of imperialism by the North.[118]

In the case of Kosovo, there is an additional factor that needs to be addressed. It is noteworthy that Kosovo lies in the heart of Europe, a region that has experienced two devastating world wars in the last century, and whose people, the elderly at least, can still remember the havoc that was wreaked upon their lands during World War II. For many Europeans and in the European psyche, World War II was not a long time ago. The countries of Europe, it is submitted, acted as they did, in part due to the fact that they would have done almost anything to avoid regional instability potentially leading to a third European-wide war within one century. European countries have a fundamental self-interest in maintaining peace, stability and security within their region at all costs. Recent European history and a fear of history repeating itself could well lead to an acceptance among European states of the right to humanitarian intervention, particularly within their own region.[119] It remains to be seen whether European states and America and Canada would act in the same manner outside of the European context.

One can see then that the history of a state will often influence how a state interprets the present notion of a right to humanitarian intervention, which in turn impacts upon the development of future law. Developing states, which are often former colonies of the developed states, generally interpret the right to humanitarian intervention as a new form of imperialism and as a result place greater importance on concepts such as state sovereignty and territorial integrity to protect themselves from a repeat of their colonial history. European and other Western states may respond towards events in Europe in ways they would not do so elsewhere in the world due to the legacy of the wars waged last century in Europe. It remains to be seen whether the sense of moral duty to intervene felt by many developed states extends to the international community in general or is confined to their specific region.

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[118] For a discussion of humanitarian intervention as the new imperialism, see Anne Orford *Reading Humanitarian Intervention* (Cambridge University Press, Cambridge, 2003).
[119] See text accompanying n 67 above.

B. Legal Scholars

International legal scholars are divided on whether there is a trend towards the creation of a right to humanitarian intervention in customary international law. At one end of the spectrum, there are some scholars who state that the NATO intervention in Kosovo was illegal and that there is no emerging right of humanitarian intervention. Others argue that the NATO intervention in Kosovo represents an emerging new doctrine of humanitarian intervention in customary international law. Further along this end of the continuum, there are several writers who suggest that a right to humanitarian intervention already exists in customary international law.

Hilpold considers that the traditional rule of non-intervention has been overturned far too quickly.[120] He states that the notion of unilateral intervention on humanitarian grounds should remain an "extra-legal principle deeply rooted in the moral conscience of mankind – mainly because of the danger of abuse"[121] and that it should never become a part of international law.[122]

In Joyner's opinion, NATO's intervention in Kosovo was illegal and ill-advised.[123] Joyner points out that the view that the NATO intervention in Kosovo was an exception[124] to the rule of non-intervention is also troubling as "[t]here is a fundamental difference between recognizing an exception to one rule of law based upon another rule of law and recognizing an exception to the law itself … The latter completely undermines the system of law …."[125]

Henkin too considers any unilateral intervention on humanitarian grounds illegal, including the NATO air strikes.[126]

Simma agrees that the NATO action was illegal but also states that "only a thin red line separates NATO's action from international legality".[127] Simma states that "hard cases make bad law"[128] and advises that the international community should not set new standards in customary international law based on a single event.[129]

Moving along the spectrum of legal scholars, Charney suggests that the events of Kosovo may herald the emergence of a new doctrine of humanitarian intervention by regional organisations without Security Council authorisation and observes that "support for a doctrine of humanitarian intervention may be growing"[130].[131] Charney

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[120] Peter Hilpold "Humanitarian Intervention: Is There a Need for a Legal Reappraisal?" (2001) 12 EJIL 437.
[121] Ibid 463.
[122] Ibid.
[123] Daniel H Joyner "The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm" (2002) 13 EJIL 597.
[124] See, for example, the statement made by the United Kingdom's representative at the emergency meeting of the Security Council: UN SCOR, 3988th mtg, UN Doc S/PV. 3988 (1999).
[125] Joyner, above n 123, 609.
[126] Louis Henkin "Kosovo and the Law of 'Humanitarian Intervention'" (1999) 93 AJIL 824.
[127] Bruno Simma "NATO, the UN and The Use of Force: Legal Aspects" (1999) 10 EJIL 1.
[128] Ibid 14.
[129] Ibid.
[130] Jonathan I Charney "Anticipatory Humanitarian Intervention in Kosovo" (1999) 93 AJIL 834, 837.
[131] Ibid 841.

rightly points out that customary international law develops through breach of the current law and development of state practice and opinio juris which supports the change.[132] However, he also points out that a change to current international law would need to overcome the hurdle of the general prohibition on the use of force under Article 2(4) of the United Nations Charter, which he describes as a jus cogens norm.[133]

Cassese agrees with Simma that the NATO action was illegal but suggests that the NATO air strikes could be evidence of an emerging doctrine of the right to humanitarian intervention in circumstances where the Security Council is unable to respond adequately to the situation.[134] Cassese even sets out six conditions under which, in his opinion, the emerging doctrine of the right to humanitarian intervention would be justified.[135]

Wedgwood opines that the events of Kosovo may signify the emergence of a right of humanitarian intervention[136] and includes in her analysis statements by the United Nations Secretary-General and decisions by states not to act as state practice and opinio juris.[137]

Joyner and Arend argue that there is an emerging rule of customary international law premised upon human rights law that permits humanitarian intervention by states without Security Council authorisation in special cases.[138] Joyner and Arend state that interventions by states even before killings begin should be allowed in international law and that "[i]nterventions to protect the rights of innocent persons can be legitimised as operations not directed at the territorial integrity or political independence of a target state"[139].[140] Furthermore, they argue that:[141]

> Norms are not static. They must evolve with the society in which they hold moral sway. When the values and priorities of a society change, so too will change the norms that guide that society. Accordingly, the nonintervention principle must not apply when military action is required to remedy situations where human rights are being massively violated, particularly in cases of genocide and crimes against humanity …. International law must change to accommodate these new needs and authorize as lawful the possibility to protect all peoples in all states, even if it requires penetrating the traditional shield of national sovereignty.

Still further along the spectrum, Reisman has argued for the right to humanitarian intervention since 1973.[142] Regarding the NATO air strikes in Kosovo, Reisman argues

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[132] Ibid 835.
[133] Ibid 836.
[134] Antonio Cassese "Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" (1999) 10 EJIL 23.
[135] Ibid 27.
[136] Ruth Wedgwood "NATO's Campaign in Yugoslavia" (1999) 93 AJIL 828.
[137] Ibid 829.
[138] Christopher C Joyner and Anthony Clark Arend "Anticipatory Humanitarian Intervention: An Emerging Legal Norm?" (2000) 10 USAFA J Leg Stud 27.
[139] Ibid 50.
[140] Ibid.
[141] Ibid.
[142] W Michael Reisman and Myres S McDougal "Humanitarian Intervention to protect the Ibos" in Richard B Lillich (ed) *Humanitarian Intervention and the United Nations* (Charlottesville, University Press of Virginia, 1973) 167 in Chesterman, above n 25, 215.

that "the legal requirement continues to be to save lives, however one can and as quickly as one can"[143].

Finally, Greenwood specifically states that there is an existing right of humanitarian intervention in customary international law:[144]

> International law is not static. In recent years, States have come, perhaps reluctantly, to accept that there is a right of humanitarian intervention when a government – or the factions in a civil war – create a human tragedy of such magnitude that it constitutes a threat to international peace. In such a case, if the Security Council does not take military action, then other states have a right to do so.

Thus, legal community opinion is very divided over whether there is a trend towards the creation of a right to humanitarian intervention in international law. Various well-respected legal scholars deny the emergence of a doctrine while others affirm the burgeoning of an embryonic right to humanitarian intervention in customary international law.

C. The Charter of the United Nations

The Charter of the United Nations sets out a general prohibition on the use of force under Article 2(4) which states:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

There are two exceptions to this prohibition on the use of force: the right of self-defence under Article 51 of the Charter and collective security measures authorised by the Security Council under Chapter VII of the Charter.

In the case where the Security Council is either unable[145] or unwilling to pass a resolution authorising the use of collective force against a state (or states) which is committing mass violations against people within its borders, states have not traditionally been able to legally use force on a unilateral basis outside of the Charter. This has sometimes meant that many thousands of innocent people have been killed and mass violations of human rights have occurred inside state borders. While there are many positive aspects to the Security Council process, this has come to be seen as a limitation of the United Nations system. It is submitted that, in the age of human rights, the doctrine of the right to humanitarian intervention in customary international law will increasingly be used as a means of overcoming this limitation, and meeting the needs of those threatened by rogue, failed or dysfunctional states, to the extent that the Security Council does not take decisive action on such matters.

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[143] W Michael Reisman "Kosovo's Antinomies" (1999) 93 AJIL 860, 862.
[144] Christopher Greenwood "Yes, But is the War Legal?" *Observer* (United Kingdom, 28 March 1999) in Chesterman, above n 25, 215.
[145] The Security Council consists of fifteen members, five of whom are permanent members. For a draft resolution on a matter of substance to be passed, all five permanent members must vote for the resolution: Charter of the United Nations, art 27(3). This means that each permanent member in effect has a veto vote and can block the passing of a resolution.

D. The Rise of Human Rights

The world is a different place to the one in which the Charter of the United Nations was drafted. Over the last fifty years, a plethora of human rights treaties has come into effect and the state-centric concepts of absolute state sovereignty and territorial integrity in international law are rapidly giving way to an increased focus on the protection, promotion and realisation of human rights. Scholars such as Reisman argue that it is legal to save lives any way one can and it is increasingly unacceptable for states to hide behind the shield of state sovereignty and territorial integrity while abusing people within their borders.[146] Increasingly, there is a perception that states exist for the good of their people, and concepts such as state sovereignty and territorial integrity are bona fide doctrines only for states that are fulfilling their roles as protectors of the people within their borders. Many scholars also point to the United Nations Charter itself which begins "[w]e the peoples of the United Nations" and follows one clause later with "[we] reaffirm faith in fundamental human rights" as being a document focused on people and human rights before states and concepts of state sovereignty and territorial integrity. It is submitted that the international community is likely to see the Charter of the United Nations and international concepts increasingly interpreted through the human rights paradigm with a resulting shift in focus to outcomes that meet the needs of people first rather than states.

E. A Desire to Help

Within Western democratic societies, at least, it is submitted that there is a growing desire, an "internationalization of the human conscience",[147] and an increased expectation to provide assistance to those subjected to mass human rights violations within their own countries. It is submitted that mass media, globalisation, increased travel resulting in increased awareness of other cultures and countries, together with the rise of human rights, are largely responsible for this growing desire to help in whatever way possible. As Orford points out, Australians were marching in the streets demanding that the Australian government intervene in East Timor and provide relief and protection to the East Timorese.[148] State practice is founded upon values and beliefs. As those values and beliefs change in a democratic country, the government is forced to change its state practice to conform to the will and values and beliefs of its citizens. As people become more aware of and place importance on human rights, there will be an increased expectation on democratic states to intervene to stop mass violation of human rights.

F. Report on the Responsibility to Protect

The Report on the Responsibility to Protect ("Report") was published in 2001 by the International Commission on Intervention and State Sovereignty ("ICISS").[149] The ICISS was established by Canada together with a group of international foundations in order to consider the concepts of intervention and state sovereignty from legal, moral,

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[146] W Michael Reisman "Kosovo's Antinomies" (1999) 93 AJIL 860.
[147] International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (2001) vii.
[148] Anne Orford *Reading Humanitarian Intervention* (Cambridge University Press, Cambridge, 2003) 1.
[149] International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (2001).

political and operational perspectives.[150] The central thesis of the Report is that states have a responsibility to protect their own citizens from "avoidable catastrophes"[151] such as mass human rights violations but that where states are "unwilling or unable to do so, that responsibility must be borne by the broader community of states"[152].[153] The Report suggests that the Security Council is the most appropriate body to authorise humanitarian intervention. However, where the Security Council is unwilling or unable to deal with a situation, the Report suggests that regional organisations may militarily intervene within their region under Chapter VIII of the United Nations Charter and seek subsequent authorisation from the Security Council.[154] The ICISS travelled the world consulting with various groups, however, while the outcome appears to be a useful forward thinking document, it does not appear to reflect the views of the majority of developing states.

G. Conclusion

In summary, there is an embryonic trend mainly among western, developed states to want to prevent or stop failed, rogue or dysfunctional states from committing mass human rights violations against people within their own borders. This trend may be based on a genuine desire to assist the people within the borders of the dysfunctional state but is also likely to be based on the self-interest of developed states that includes the regional stability needed for prosperity. It is also likely to be a result of the dramatic increase in importance of human rights internationally through the many international human rights treaties and associated mechanisms. Although the trend is found mostly in Western developed states, many of these states have a lot of influence in the creation and development of international law; whether these states have enough influence and power, and indeed desire, to create a new rule of humanitarian intervention in customary international law remains to be seen.

V CONCLUSION

In summary, it is submitted that there does not currently exist a right to humanitarian intervention in customary international law. While there are several states that suggest that such a right may exist, these states are too few in number to actually bring about the state practice and opinio juris required in order for the right to humanitarian intervention to become a part of customary international law. Although these states may influence world affairs and the creation or amendment of general customary international law to a greater degree than some other states, customary international law is not made unilaterally by one state or even jointly by several states. The appropriate state practice and opinio juris of the majority of states is required in order for a concept to become part of customary international law and this is simply lacking in regard to the notion of

[150] Ibid vii.
[151] Ibid viii.
[152] Ibid.
[153] Ibid. For a review of the Report, see Jeremy I Levitt "The Responsibility to Protect: A Beaver Without a Dam?: International Commission on Intervention and State Sovereignty, The Responsibility to Protect" (2003) 25 Mich J Int'l L 153 (book review).
[154] International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (2001) xiii.

the right to humanitarian intervention. There are strongly diverging views between the North and South regarding the notion of the right to humanitarian intervention.

However, it must also be noted that there is a growing acceptance by some, predominantly Western, states and their citizens that they have a moral or ethical duty, where they are financially, militarily and technologically able, to help prevent or stop mass killings or human rights violations by another state of the people within its own borders. This feeling of responsibility has developed parallel to the rise in the importance of human rights and their protection and the decrease in esteem for the concept of absolute state sovereignty.

As a result, it is possible that, where United Nations Security Council action to stop mass killings and human rights violations within a country is blocked by a permanent member, some regional organisations will increasingly step in with their own actions to prevent the killings and mass violations of human rights. It is submitted that the keys to the international community's acceptance of these actions will be whether a group of states intervenes (as opposed to the unilateral action of one state), the conduct of the intervening states during the military intervention, whether the intervening states withdraw once the crisis has finished, whether their actions were proportional to the crisis and effective and with minimal loss of civilian life. Over time, once other states have had an opportunity to view and assess such military interventions and their outcomes, this practice may evolve into a right to humanitarian intervention in customary international law once there is sufficient state practice and supporting opinio juris.

Further research must now be conducted into the possible criteria for a right to humanitarian intervention. The public and inter-governmental debate of such criteria would be helpful to build integrity surrounding this concept and to build confidence in the workability of the concept. The single greatest factor preventing the emergence of the right to humanitarian intervention as a rule in customary international law is the rife cynicism and scepticism of an intervenor's real motives for the military intervention. If strict criteria were agreed upon by the world community and it was seen to work well over several instances with mass violations of human rights prevented, or stopped, then it is submitted that many states would accept a right to humanitarian intervention in customary international law as an exception to the state sovereignty and non-intervention rules in extreme cases where the Security Council was prevented from acting.