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The Legality of NATO Bombing, The Kosovo Declaration of Independence And The Development of International Law

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ABSTRACT

This thesis aims to investigate the implications of the North Atlantic Treaty Organization humanitarian intervention in Kosovo and the consequent declaration of independence of Kosovo in international law. It also seeks to analyze the legality of both cases; while considering the arguments of both proponents and critics of the concept of humanitarian intervention, and the current standing of the International Court of Justice on the declaration of Kosovo independence, with an attempt to illustrate that such international events like that of Kosovo effects changes or at least elements of change in international law. For this reason, The Process School theory of international law will be adopted as a theoretical framework of this thesis. Both the intervention by NATO in Kosovo and the declaration of independence by Kosovo cannot be discussed, one without the other. Surely we would see that NATO's actions and the declaration of independence by Kosovo came as a result of some process of authoritative decision-making. This thesis concludes that such events as the cases elaborated on prove that international law is indeed a process.

Keywords: humanitarian intervention, human rights, sovereignty, process school, authoritative decision-making.

ÖZ

Bu tez uluslararası hukuk içerisinde Kuzey Atlantik Antlaşması Örgütü'nün Kosova'daki insani müdahalesini ve bunun sonucunda Kosova'nın bağımsızlığı ilan etmesinin uluslararası hukuk'taki etkilerini araştırmayı amaçlamıştır. Ayrıca her iki durumunda yasaya uygunluğunu hem destekçilerin hem de insani müdahale kavramını eleştirenlerin argümanlarını ve Uluslararası Adalet Divanı'nın Kosova'nın bağımsızlık ilanındakı mevcut pozisyonunu göz önünde bulundurarak analiz etmeyi aramaktadır, ayrıca Kosova gibi uluslararası olayların uluslararası hukuk daki değişikliklerdeki etkisi veya en azindan değişim unsurları olduğu açıklanmaya çalışılmıştır. Bu nedenle uluslararası hukuk'un aşamalı Okul teorisi bu tezin teorik çerçevesi olarak kabul edilmiştir. NATO'nun Kosova'daki müdahalesi ve Kosova'nın bağımsızlığını ilan etmesi ayrı ayrı tartışılamaz. Şüphesiz NATO'nun eylemleri ve Kosova'nın bağımsızlık ilanının yetkili bir karar verme sürecinin sonucu olarak geldiğini görebiliriz. Bu tez detayları verilen olaylardaki kanıtlarla uluslararası hukuk'un gerçekten bir süreç olduğu sonucuna varmıştır.

Kilit sözcükler: insani müdahale, insan hakları, egemenlik, incelen, yetkili karar alma.

To my Elder Sister, Hon. Vivien Ere-Imananagha for giving me a better life and being a source of inspiration to me.

All my love,

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Chapter 1

INTRODUCTION

The International society is a dynamic entity subject to the ebb and flow of political life.[1] This would be responsible for the notable developments in international law since the middle of the last century as the complexities of life in the modern era have multiplied.[2] Conceivably the North Atlantic Treaty Organization initiative in Kosovo in defense of the oppressed Kosovar Albanians more than any recent international occurrence, has incited extremely conflicting perspectives of what was truly at stake, the prudence of actions undertaken, and the position of law and morality on this course of events.[3] The event of the North Atlantic Treaty Organization's forceful intervention in Kosovo in the spring of 1999 remains under heavy criticism even till present as with the case of the declaration of independence on February 17, 2008, by Kosovo. As of March 6, 2009, the count of states that had taken to the recognition of Kosovo's independence were fifty-six amidst a number of states maintaining that Kosovo's declaration of independence was and still is illegal. Yet there remains no specific resolution calling for non-recognition even in the wake of such highly disputed issue as the obligation of non-recognition stemming from the UN Security Council Resolution

[1] M. N. Shaw, 'International Law', Cambridge University Press, 6th edn. 2008, p. 444.
[2] Ibid., p. 43
[3] R. A. Falk, 'Kosovo, World Order and the Future of International Law', *The American Journal of International Law*, Vol. 93, No. 4, 999, p.847.

1244.[4] On July 22 2010, the International Court of Justice opined, by a vote of ten to four, "the declaration of independence of Kosovo on February17, 2008 did not violate general international law".[5] The Court ruling did not subject countries to recognize Kosovo as an independent state but inferred that the case of recognition by states was rather a political issue not legal. More importantly, the Court was not asked to comment on the legality or illegality of the recognition of Kosovo. Therefore the countries opposing the recognition of Kosovo consider that lending legitimacy to Kosovo will boost secessionist movements across the world.[6] The ongoing controversy then created by the two cases poses an entirely engaging debate.

The Kosovo independence and the humanitarian intervention by NATO in the course of the conflict pose a complex challenge to international relations and the rule of international law. One might argue that the two cases go hand in hand as one may not be mentioned without reference to the other. Perhaps the independence of Kosovo was only possible in the wake of the NATO intervention in Kosovo. Therefore some aspects of international law gained more popularity as the Kosovo case gave rise to new developments in international law, as with the Responsibility to Protect (R2P) which was endorsed at the UN World Summit of 2005.[7] This doctrine relates to the idea that sovereign states have a responsibility to protect their own citizens but in cases where they fail to do so the responsibility must be borne by the international community.[8] The

[4] V. Jure, 'International Legal Responses to Kosovo's Declaration of Independence', *Vanderbilt Journal of Transitional Law*, (May 1, 2009), p. 1.
[5] See the International Court of Justice Report, No. 2010/25, 22 July 2010.
[6] Ibid., See also <http://www.thedailystar.net/newDesign/news-details.php?nid=149254>
[7] See United Nations 2005 World Summit High Level Plenary Meeting, 14th-16th September 2005. <http://www.un.org/summit2005/presskit/fact_sheet.pdf> Viewed: 19th August 2011.
[8] UN, 'Lessons From Rwanda: The United Nations and the Prevention of Genocide', retrieved 7/29/11

principle underlying the R2P doctrine is a novel appreciation that attacks on civilians can constitute a threat to international peace and security.[9] "Humanitarian war", humanitarian intervention, collective security or military intervention, the theory and practice of subjecting a state to external interferences in a bid to restoring peace and order is one that has gained intense popularity in international relations. This concept of humanitarian intervention has in current times become a pressing and complex issue that has kept scholars on an unending table of debate. Humanitarian intervention aims to halt or curb the killings or sufferings of citizens of a state whose ongoing discord/violence could eventually lead to a distortion in the world's peace. It however involves the use of coercive action by intervening states. This concept of the use of military force to defend the human rights of oppressed groups or to prevent a humanitarian cataclysm- has attained immense regards and considerations in the study of international relations in the period since the end of the Cold War. The idea however, poses to be an extremely controversial one. Some scholars have argued that the rise of the idea of "humanitarian war" marks a positive development- even the creation of a new system of international relations, in which "power is used to do justice" replacing the old system, under which justice was always trumped by order.[10] Others, on the other hand remain skeptical. The argument herein is that the extremity and residing negative effects of every war justified or not, bring to mind a number of questions. Are such casualties of a military intervention absolutely void of the oppressed group? In the wake of the restoration of peace after a forceful intervention, would the extent of damage on

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See http://www.un.org/preventgenocide/rwanda/responsibility.shtml.

[9] Ibid

[10] M. Glennon, 'The New Interventionism: The Search for a Just International Law', *Foreign Affairs* Vol.78, No. 3 (May/Jun 1999), p.6.

life and property (state and private) be void of the oppressed group? The critics of humanitarian intervention argue that military force is too destructive and as a means too extreme to reach humanitarian ends. It appears then that "humanitarian war" simply serves to disguise the true intent of any such war and in the end legitimizes it. They argue further that imposed intervention by external factors never really solves internal conflict but only aggravates it; and that the concept can be used as a means of exploitation by powerful states to serve their national interest.

This thesis aims to provide a normative analysis on the theory of humanitarian intervention, testing it with regards to its own terms. The importance however, to make some preliminary remarks on the Kosovo encounter cannot be overemphasized as its peculiarities amongst such other encounters qualifies it to be most appropriate for use as a case study in a thesis such as this. The launching of air strikes by NATO against Serbia in March 1999 to curb the conflict and violence in the province of Kosovo was applauded by the proponents of humanitarian intervention, praising NATO for employing its noble values as was necessary by force, while oppositions argued that the intervention was not necessary as it only made the situation worse and rendered the province an unlivable wreck. The claim is that the intervening states had only succeeded in hiding the true intent of their engagement in Kosovo. A prominent supporter described the conflict as "the first war that has not been waged in the name of 'national interests' but rather in the name of principles and values"[11], while an opponent called it

[11]V. Havel, cit. in R. Falk, 'Kosovo, World Order and the Future of International Law', *American Journal of International Law* Vol.93/4 (1999), p.848.

"an epilogue to another 'Low and Dishonest Decade'".[12] The conflict in Kosovo is an important event in history which shows evidence of an embodiment of causes ranging political, religious and racial intolerance and disregard between the Albanians and the Serbs. The two cases investigated in this thesis have attained a significant degree of international awareness as the NATO intervention in Kosovo presents the first of such incident where a full scale military intervention has gained a renowned international support as "humanitarian war". It can be argued that NATO's action undermined the newly established optimism regarding the role of the Security Council as a peace enforcer following the 1990 Gulf War and gravely damaged relations between the various permanent members.[13] The proposition of a draft resolution by Russia to condemn the intervention, was defeated by 12 votes to three (China, Russia and Namibia were the only Council members to support the draft resolution).[14]

In all of the main previous cases that have been widely cited in international relations literature as examples of "humanitarian war", either the intervening power legitimately justified its actions on the grounds of self-defense rather than humanitarian concern (as with Vietnam's intervention of Cambodia in 1978, India's intervention of Pakistan in 1971, (although there have been suggestions that 'humanitarian intervention' was the bases of India's action) and Tanzania's intervention of Uganda in 1979), or the US and UK claim of humanitarian intervention for their maintenance of 'no fly' zones in Iraq.[15]

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[12]See K. Booth , 'The Kosovo Tragedy: the Human Rights Dimensions', Routledge, London, Frank Cass, 2001, p. 7.
[13]See J. wouters and T. ruys, 'security council reform: a new veto for a new century?', *royal institute for international relations,* 2005, p. 17.
[14]Ibid., See also Kristsiotis D, "The Kosovo crisis and NATO's Application of Armed force Against the Federal Republic of Yugoslavia", International & Comparative Law Quarterly; Vol.49, Issue 02, p. 347.
[15]See M. Dixon, ' International Law', Oxford University Press, 6th edn, 2007, p. 32.4

More significantly, the NATO intervention in Kosovo which is cited for humanitarian purpose as a means to justify their actions could lead to the development of state practice. Former British Prime Minister Tony Blair said of NATO's intervention that "we are fighting for a world where dictators are no longer able to visit horrific punishments on their own peoples.... We are fighting not for territory but for values".[16] President of the Czech Republic Vaclav Havel supports Blair's claim noting that no member nation in the alliance has any territorial demands on Kosovo and that the state directed violence by Milosevic did not threaten the territorial integrity of any member of the alliance; yet the alliance opted to intervene.[17] He noted that there were no oil fields in Kosovo to be coveted and that the campaign was merely out of concern for the well-being of others.[18] So if really there were some, who saw NATO's intervention in Kosovo as an honorable thing to do; fighting for a selfless course, then these cases are worth investigating as they contribute to the development of international law.

This thesis would focus on the events that ensued during the conflict era in Kosovo. It starts of building on The Process School of International Law amidst the three other theories (Positivist, Natural and Critical Legal School) of international Law. It then flows to throw some light on the concept of "humanitarian war" and goes on to investigate the history of the region, focusing on the genesis of the conflict. The political, racial and religious sparks in the region were seen to have eventually enjoined together to create an almost unquellable inferno. This thesis attempts to establish the

[16]T. Blair, 'A New Generation Draws the Line', *Newsweek* 19 April 1999. See also http://newimperialism.wordpress.com/2010/03/01/speech-tony-blair-a-new-generation-draws-the-line/ viewed: June 19th 2011.
[17]R. A. Falk, 'Kosovo, World Order and the Future of International Law', *The American Journal of International Law* Vol. 93, No. 4 (October 1999), p. 848.
[18]Ibid

facts that led to the declaration of independence in Kosovo. It also examines the legality of the NATO bombing; while considering the arguments of both proponents and critics of the concept of "humanitarian war". It will examine the theory in terms of its three aspects- the *jus ad bellum, jus in bello* and *jus post bellum.* Furthermore, the consequences of these events as regards international law and the current standing of the International Court of Justice to these events would be brought to light. This leads to the primary research question of the thesis: How has the Kosovo case influenced the development of international law? The secondary research questions include: (a) who were the major stakeholders of the Kosovo conflict? (b)What were the actions of the international community to solve the Kosovo conflict? (c) What are the possible consequences to international law after the independence of Kosovo; would the Kosovo case trigger other secessionist movement across the world or would there be more forceful interventions in the name of humanitarianism? We would then observe later in the following chapters of this thesis how these research questions reveal that both the intervention by NATO in Kosovo and the declaration of independence by Kosovo cannot be discussed, one without the other. Surely we would see that NATO's actions and the declaration of independence by Kosovo came as a result of some process of authoritative decision-making. It might have been the place of the Security Council to authorize NATO's actions or offer other plausible options to resolving the Kosovo crisis, but it decided otherwise also as a result of some authoritative decisions reached. Finally, after a careful research and selection of literature; the analysis of the implications of the Kosovo conflict on international law and the evaluation of the

legality of the bombings and independence, this thesis concludes that such events as the cases elaborated on prove that international law is indeed a process.

Methodology

The methodology employed during the course of this thesis relies heavily on the reviews of existing literature with significant contributions from relevant articles and documents. There was also textual analysis of documentations from the International Court of Justice and the United Nations Charter, to aid the understanding of the decisions taken by the international community as regards the cases of the NATO campaign and the subsequent independence of Kosovo. It was necessary to examine the different views of a number of scholars of international law during my research of the two cases to help establish a concrete framework for the entire thesis. This thesis relies mainly on existing literature on the cases, media reports and on documentary evidence provided by government sources and organizations such as the United Nations and the International Court of Justice for primary material. Secondary materials include texts and literature on International relations and international law. As expected, there must be limitations that come with every project. Some of the difficulties encountered in the course of completing this thesis include: (a) Verification of documents from non-governmental sources. (b) Very limited access to the online libraries. (c) The narrowing down of the very broad Kosovo literature was a hectic one, though very necessary to ensure that the literatures eventually used were very relevant to the scope of this thesis.

Structure

Chapter 1: The first chapter of this thesis focuses on International law as a process. It starts off giving definitions of international law and flows to explore some theories of international law. The emphasis is laid on the New Haven School on which the arguments of this thesis rest. To show that indeed there have been some developments in international law, the chapter delves into the history of international law briefly discussing the 1645 Peace of Westphalia while highlighting the major features of each era. The chapter comes to a close introducing the recent principle of 'Responsibility to Protect'.

Chapter II: This chapter gives a brief case history. The Kosovo conflict is introduced, as it provides the foundation for further analysis; leading to the consequent NATO bombing and the declaration of independence by Kosovo.

Chapter III: The third chapter analyses the NATO involvement in Kosovo based on the theory of "humanitarian war". The Just War theory is examined as part of the theory of "humanitarian war" while mentioning the principles of self-defense, response to aggression and humanitarian intervention. The chapter examines the *jus ad bellum, jus in bello* and *jus post bellum.* The ICTY (International Criminal Tribunal for the former -Yugoslavia) is brought into light as the chapter attempts to establish the legality of the campaign in Kosovo.

Chapter IV: The focus in chapter four is on the declaration of independence by Kosovo. In this chapter the International Court of Justice advisory opinion is considered and it further tests the legality of the independence status attained by Kosovo. The international recognition of Kosovo as an independent state is also discussed in addition to the European Union standing on the Kosovo independence issue. The chapter concludes with the present standing of international law on the Kosovo independence and the effects of the two cases as regards international law as a process.

Conclusion: The thesis comes to a close, highlighting the developments in international law, with a focus on the most recent "Responsibility to Protect" in a more detailed manner. A reference is made to the current war in Libya as an exercise of the R2P doctrine and finally, the significance of such events like that of Kosovo contributing to the development of international law is reiterated.

Literature Review

As mentioned earlier, this thesis is based on the review of existing literature on the Kosovo crisis. In the course of my research I could not help but notice the very common topics that featured in most of the texts I reviewed. The topics include: self-determination, sovereignty, humanitarian intervention, human rights, statehood and recognition, humanitarian and human rights law and coercion. However, with regards to the cases on which this thesis is developed I have narrowed down my choices amidst the vast literature to Charney, Falk, Reisman, Charlesworth, Weller, Cassese, Higgins

and Joyner.[19] This review attempts to illustrate that many writers are of the opinion that Kosovo cases have indeed influenced international law in different ways; for example, the new interpretations of sovereignty and humanitarian rights as with new norms like the R2P, not leaving out the considerations on new violations. In view of this I have developed this review based on my understanding of international law as a process; an argument inferred by Dixon and backed by Higgins. Sovereignty, human rights and self-determination are the main focus of this review. Issues like the limitedness of the UN Charter and the eagerness of international lawyers to accord the developments in international law to crises are also mentioned.

Dixon mentions that "international law is not an 'adversarial 'system of law".[20] He illustrates that it is an imperfect system with enough room for modifications.[21] He describes international law as flexible and having an open ended nature where "disputes are less likely to be seen as right versus wrong".[22] The events that led to the independence of Kosovo confirm that the international society today, is increasingly inter-reliant and the degree of interstate activity is growing continuously; therefore the

[19] Given the broadness of the literature I have narrowed my selection to a few writers. But, there are credible literatures on the Kosovo case, for example see A. J. Kupermean, 'The Moral Hazard of Humanitarian Intervention: Lessons From the Balkans', *International Studies Quarterly*, Vol. 52, 2008, pp. 49-80. See also, M. S Mcdougal, 'The Changing structure of International Law: Unchanging Theory for inquiry', *Faculty Scholarship series*, Paper 2605, 1965. See I. T Berend, 'Editorial: The Kosovo trap', European Review, Vol. 14, No. 4, 2006, pp. 413-414. See also D. Baer, 'The Ultimate Sacrifice and the Ethics of Humanitarian Intervention', *Review of international Studies,* Vol. 37, 2011, pp.301-326. See A. E. Wall, 'Legal and ethical lessons of NATO's Kosovo campaign', *International Law Studies*, Vol. 78, 2002, pp. 31-602. See also, R. Wilde, 'Kosovo: International Law and Recognition', Discussion Group Summary, (Chatham House) 2008, pp. 1-23. See also C. M. Chinkin, 'Kosovo: A "Good" or "Bad" War?', *The American Journal of International Law*, Vol. 93, No. 4 (Oct., 1999), pp. 841-847.
[20] M. Dixon, ' International Law', Oxford University Press, 6th edn, 2007, p. 10.
[21] Ibid
[22] Ibid., p. 11

need for international law to maintain a stable and orderly international society".[23] As a supporter of the Process School of International Law, I am able to note that the events in Kosovo and the declaration of Kosovo as a sovereign state were based on the process of authoritative decision making. Higgins tries "to show that there is an essential and unavoidable choice to be made between the perception of international law as a system of neutral rules, and international law as a system of decision-making directed towards the attainment of certain declared values,"[24] She goes further by showing "how the acceptance of international law as a process leads to certain preferred solutions so far as these great unresolved problems are concerned".[25] Weller's arguments in his book "Contested Statehood: Kosovo's Struggle for Independence" are based on the following questions: (a) "Was Kosovo the reflection of classical European power politics of the nineteenth century, where sovereign states acted on the basis of geo-political self-interest and even business interests, using all available tools (including force)"? Or (b) "was it the manifestation of a post-modern, post-Westphalian international constitutional system where people mattered more than states, allowing forcible intervention by the international community against sovereign states and even the secession of a community from a sovereign state under certain circumstances"? Or (c) "may Kosovo even point to the emergence of a third, worst, scenario: that of a complex and fragmented post-modern world which has lost the certainties of the, arguably sometimes brutal, organizing concepts of the traditional international order"? He

[23] Ibid., p. 12
[24] R. Higgins, 'Problems and Process: International Law and How We Use It', Oxford University Press, USA, 1995, pp. vi.
[25] Ibid.

concludes that Kosovo exhibits aspects of all three scenarios.[26] He argued that the humanitarian emergency was as a result of the failure of the international community to implement international human rights standards and an effective enforcement action.[27]

Charney agrees with Weller that the international community was not efficient in carrying out their responsibility to ensure that the gross violation of human rights in Kosovo was put to an end.[28] In his article "Anticipatory Humanitarian Intervention in Kosovo", he points out that the Kosovo crisis could create a possible avenue for modifications in international law. He argued, in his words, "Perhaps the Kosovo intervention sets a precedent for the development of new international law to protect human rights".[29] He continues in his words, "after all, general international law may change through breach of the current law and the development of new state practice and *opinio juris* supporting the change".[30] Then again, to him, the NATO intervention in Kosovo was an infringement to the Charter of the United Nations and international law.[31] Nonetheless, he notes that NATO's action in Kosovo could be morally justified. He also points out the limitation of the UN Charter and offers that it should be amended as international law may be enhanced and developed from the case of Kosovo in other to avoid such catastrophe and risks of human rights. Henkins and Reisman agree with Falk that although NATO's action is illegal, "to regard the textual barriers to humanitarian intervention as decisive in the face of genocidal behavior is politically and

[26] M. Weller, 'Contested Statehood: Kosovo's Struggle for Independence', Oxford University Press, 2009, pp.
[27] Ibid.
[28] J. I. Charney, ' Anticipatory Humanitarian Intervention in Kosovo', *American Journal of International Law*, Vol.93, 1999, pp 834-841.
[29] Ibid
[30] Ibid., p. 837
[31] Ibid., p. 834

morally unacceptable, especially in view of the qualifications imposed on unconditional claims of sovereignty by the expanded conception of international human rights".[32] Cassese also concurs that the NATO action is a violation to the UN Charter but is morally justified, and argues that "a certain type of breach of *lex lata* can itself give rise to *lex lata*".[33]

Hilary Charlesworth agrees with Cassese but disagrees with international lawyers that base the development of international law on crises such as Kosovo.[34] In her article "International Law: A Discipline of Crisis", she argues that the development of international law should not only be about crisis management but on more important issues such as structural justice. She illustrates, in her words, that most international lawyers regard 'crises' "as its bread and butter and the engine of progressive development of international law".[35] She differs with Reisman in his argument that crises or 'incidents' amongst international actors should be the "basic epistemic unit of international law".[36] For Charlesworth, the focus of crises for the development of international law means a limitation to explore essential matters, which she states in her writing that "this shackles international law to a static and unproductive rhetoric".[37] She uses Kosovo to exemplify the problems of international lawyers and how they pay less

[32] Richard Falk, 'Kosovo, World Order, and the Future of International Law' *American Journal of International Law* (1999) Vol. 93, No. 4, pp. 847,853.
[33] Antonio Cassese, 'Ex iniuria ius oritur: are we moving towards international legitimation of forcible countermeasures in the world community?' *European Journal of International Law*, Vol.10, Issue 1, 2000, p. 25.
[34] H. Charlesworth, 'International Law: A Discipline of Crisis', *The Modern Law Review*, Vol. 65, No. 3 (2002), pp. 377-392.
[35] Ibid., p. 391.
[36] Michael Reisman, Andrew Willard (eds), 'International Incidents: The law that counts in world politics', Princeton University Press, 1988, p.15.
[37] H. Charlesworth, 'International Law: A Discipline of Crisis', The Modern Law Review, Vol. 65, No. 3 (2002), pp. 377-392.

significance to bigger issues of the conflict, for example questions on sovereignty, self-determination, failed peace negotiations, grave human rights abuses and expulsions, the role of international criminal tribunals and so on. She notes that international lawyers fail to see the controversies in a crisis and assume that "the facts are ripe for picking by analysts".[38] In sum, Charlesworth's argument shows that international lawyers are engrossed with crises rather than the issues of structural justice that underpin everyday life. She argues that not only do international lawyers ignore vital facts in a crisis but they tend to portray a crisis without controversy thereby missing the larger picture of it. For her international lawyers should change the type of questions they ask and enlarge their inquiries on what international law has to offer.

I would re-iterate here that the justification of the NATO campaign in Kosovo and the issue of Kosovo's independence cannot be fragmented. The mention of Kosovo would always bring to mind the principle of self-determination. It is upon this principle that Kosovo became an independent state, yet the issue of self-determination in Rupert Emerson's words, "is one whose examination runs promptly into the difficulty that while the concept lends itself to simple formulation in words, when it comes to practice it turns out to be a complex matter hedged in limitations and caveats".[39] He points out the UN Charter's injunction to "All people have a right to self-determination", yet the United Nations stirred up such contradiction as regards the way the Nigerians government treated Biafra.[40] He illustrates that self-determination does not embrace secession as was implied by Secretary General U'Thant on January 4, 1970 that when a

[38] Ibid., pp. 382.
[39] R. Emerson, 'Self-Determination', *The American Journal of International Law*, Vol. 65, pp. 459-475.
[40] Ibid

state joins the United Nations, there is an implied acceptance by the entire membership of its territorial integrity and sovereignty. In his words, "so, far as the question of secession of a particular section of a Member State is concerned, the United Nations' attitude is unequivocal. As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State".[41]

Koskenniemi concurs with Rupert in the argument that self-determination is a complex matter. He argues that self-determination was born out of decolonization process and at the time international lawyers did not see the "potentially explosive nature of the principle".[42] For him, the twentieth century emerged a new meaning of self-determination. He argued that international lawyers were totally unprepared for the events that unfolded in the 90's, giving rise to Questions on the right to self-determination of South Ossetia in Georgia and "whether the Russian assistance to South Ossetia might be legitimate under the UN Friendly Relations Declaration of 1970".[43] Other questions of right to self-determination are still unanswered such as the breakup of the former Yugoslav Republics, Abkhazia, Moldova, and Kosovo etc. For Koskenniemi, the principle of self-determination leads to a "paradox that it both supports and challenges statehood and that it is impossible to establish a general preference between its patriotic and secessionist senses".[44] Furthermore, he argues that

[41] Ibid
[42] M. Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice', *The International and Comparative Law Quarterly,* Vol. 43, No. 2, 1994, pp. 241-269
[43] Ibid., p. 243
[44] Ibid., pp. 248-249

self-determination "allows a softer approach to international conflict",[45] making possible for the development of practical guidelines in other to maintain international legal order. In his view, the principle of self-determination can become applicable in an "abnormal situation" (for e.g the case of the Former Yugoslavia) if there is an ad hoc situation, but should not be seen as an actual solution. For Farer, self-determination should be administered within the framework of minority rights, since it draws claim from moral force in part from the qualified human right to free association, and cultural rights.[46] He argues that self-determination leads to secession which involves in most cases blood bath or ethnic cleansing. Thus, this could bring about foreign intervention as most states would want to use this as a means of pursuing their national interest claiming the use of force under the umbrella of humanitarian intervention. For him, the right to self-determination does not imply a right to secede.[47] Furthermore, Farer maintains that secession should be a last resort and if for any reason the international community should support secession it ought to be as a result of protecting peoples from serious and sustained violation of political, civil, and cultural rights.[48]

I could attempt to review literatures on all topics concerning the Kosovo cases, but this review is only a representation of the vast literature on the Kosovo crisis. It would be impossible to explore all existing literature on Kosovo. However I am confident that it would serve to give an insight to the arguments on which this thesis is built upon.

[45] Ibid., p. 266
[46] T. J. Farer, 'The Ethics of Intervention in Self-Determination Struggles', *Human Rights Quarterly*, Vol. 25, No. 2, 2003, pp. 382-406.
[47] Ibid., p. 404
[48] Ibid

Chapter 2

INTERNATIONAL LAW AS A PROCESS

The end of the Cold War heralded a new era and a significant increase in the influence of the United Nations.[49] The turn of the century brought with it a new order of integration, globalization and fragmentation in the international system. The international landscape today is very different from what it used to be some fifty, twenty, even ten, years ago.[50] It is changing to accommodate a network of actors of the emerging system.[51] Weiss states that "for more than three centuries, the international system has focused almost exclusively on sovereign, independent, theoretically equal states". She acknowledges that although "the system was based on equal relations between states, there was a clearly defined hierarchy within states: provinces, cities and other sub-national governmental units, with private actors clearly subordinate to States".[52] As the July 1999 United Nations Development Programme ("UNDP") Report suggests, we are living today in a new landscape characterized by shrinking space and time thereby affected by events happening across the globe and the current speed of goods and information flow via technology.[53] Little wonder then, why issues like

[49] M. Dixon, 'Textbook on International Law', 6th ed., *Oxford University Press*, 2007, p. 20.
[50] E. B. Weiss, 'The Robert L. Levine Distinguished Lecture Series: The Rise or the Fall of International Law?' *Fordham Law Review*, Vol.69, 2000, pp. 345-372.
[51] E. B. Weiss, 'The Emerging International System and Sustainable Development', *International Review for Environmental Strategies*, Vol.1, 2000, pp. 9 – 15.
[52] Ibid.,10.
[53] E. B. Weiss, 'The Robert L. Levine Distinguished Lecture Series: The Rise or the Fall of International Law?', *Fordham Law Review*, Vol.69, 2000, p. 346.

genocide, ethnic cleansing, human rights, self-determination and secession amongst others, within the confines of a nation would become of global concern. The world is changing and international law must change with it.[54] The traditional focus of international law as limited to sovereign states is shifting as the UNDP reports, because "national borders are breaking down, in part because of international trade, capital flows, culture flows, economic policies, environmental concerns, the rise of global communities and global civil society, and the spread of the internet".[55] Thus, in the emerging international system, both the actors and the mechanisms for making decisions and for resolving disputes are diversifying.[56] This goes to show that international law has a built in mechanism of change and harmonization of which customary law forms an important part.

Ultimately in the words of the French classical author and a leading exponent of the maxim - Francoise de la Rochefoucald - the only thing constant in life is change. This been said, the focus of this chapter rests on Higgins' argument of international law as a process. A claim we may readily agree with based on the evolving trend in the international system. The relevance of this chapter cannot be overemphasized as it describes the theoretical framework on which the rest of this thesis lies. Its significance is profound as far as the cases of NATO's campaign in Kosovo and Kosovo's declaration of independence are concerned. This chapter illustrates that such events in the international system (like that of Kosovo) bring about consequent developments in

[54] M. Dixon, 'Textbook on International Law', 6th ed., *Oxford University Press*, 2007, p. 20.
[55] E. B. Weiss, 'The Robert L. Levine Distinguished Lecture Series: The Rise or the Fall of International Law?', *Fordham Law Review*, Vol.69, 2000, p. 346.
[56] Ibid.

international law via exploring a brief history of international law in the section: "International Law through the Ages". The historical section of this chapter attempts to categorize these notable developments in international law according to major events in the international system, for example the 1645 Peace of Westphalia and the League of Nations. Furthermore, it would be noted that each of these developments are termed a "Grotian Moment" in international law. However, it is important to start of the chapter by first offering some definitions and theories of international law to enhance our appreciation of the focus of this chapter. Thus, the emphasis is laid on the New Haven School (the policy-oriented theory of international law); which is the theoretical background on which the arguments of this thesis rest. The chapter comes to a close introducing the recent principle of "Responsibility to Protect" as an element of the "Grotian Moment", while having set the foundation and bridge that hold the hypothesis of this thesis.

At this point it would be helpful to consider the questions: what is international law? And what defines a process before proceeding with the rest of the chapter. These two questions to me form the very fabric of Higgins' argument which sprouts from two themes: international law and process; bringing me to expand on the definition of international law from a couple of different sources. Anghie offers his definition of international law as the law that regulates relations amongst sovereign state[57] while Dixon gives the meaning of international law as "a system of rules and principles that govern the international relations between the sovereign states and other institutional

[57] A. Anghie, 'International law for international Relations', Oxford University Press, 2010, p. 52.

subjects of international law such as the United Nations and the African Union".[58] McKeever defines it as "the law of the political system of nation-states. To him, it is a distinct and self-contained system of law, independent of the national systems with which it interacts, and dealing with relations which they do not effectively govern".[59]And for Shaw, international law "consists of a series of rules regulating states behavior, and reflecting, to some extent, the ideas and preoccupations of the society within which it functions".[60] The Oxford, Longman and Webster dictionaries amongst others have defined the word Process to mean fairly the same thing. This disyllabic noun has been defined as a systematic series of actions directed to some end and also as a continuous action, operation, or series of changes taking place in a definite manner.[61] It has also been defined as an act or process through which something becomes different. The Oxford dictionary particularly describes it as a series of actions, changes, or functions bringing about a result in addition to its definition as a Progress; passage. A common ground nominated by these definitions is the word 'change' and in the context of this thesis, it would be most appropriate to anchor the arguments of this chapter upon the notable changes in international law through the centuries (here we could replace change with the word 'transition'). Furthermore, the argument international law as a process can be broken down (for easier comprehension) to mean "international law: the past, the present and the future".[62] Perhaps it would be suitable at this point to discuss some of the theories of international law seeing that these theories aim to set out a

[58] M. Dixon, 'Textbook on International Law', 6th ed., Oxford University Press, 2007, p. 3.
[59] K. McKeever, 'Researching Public International Law', Columbia University, 2006, p. 2 see also http://library.law.columbia.edu/guides/Researching_Public_International_Law Viewed : 08/08/2011.
[60] M. N. Shaw, 'International Law', 6th ed., *Cambridge University Press*, 2008, p. 1.
[61] *See* Webster dictionary definition on 'process', http://www.webters-online-dictionary.org/definitions/process? Viewed : 10/08/2011.
[62] B. Cali, 'International law for international Relations', Oxford University Press, 2010. p. 72.

coherent understanding on international law by laying its foundations at a fairly abstract level.[63]

2.1 Theories of International Law

Theories of international law are a dynamic collection of arguments that are modified constantly as a result to ongoing occurrences of global events and the problems of their time.[64] These theories engage in constant competition to be seen as the most conclusive theory to be employed in response to challenges of international law. They possess a long history and cross theories of international relations. Dominance is attached to the theory that serves the present interest of any country at different historic points in time. Hence, the popularity of the theories is based on their appeal in encapsulating the development of respective areas better. It is upon these theories that the supporting backbone of the practice of international law resides; thus, proving the importance of taking them into cognizance. Same could be said for any other discipline, as the structure for directing, interpreting and criticizing of the focus practice is situated on its theories. Theories of international law provide a structure with which to make sense of the international system and the legal significance and the meaning of the actions of different actors in the system.[65] With this we are liberated to imagine the future of international law and the ways it could be different from how we know it as today. This chapter considers four interpretations on international law and they are as follows: (a) the natural law theory of international law, (b) positivism, (c) international law as a process and lastly, (d) critical legal studies and international law. Let us keep in mind

[63] Ibid.
[64] Ibid.
[65] Ibid.

that the brief examination of the earlier mentioned theories aims to assist our understanding of our cases and is not the subject matter of this thesis. In this light, a summary of each of the theories would serve our purpose.

2.1.1 The Natural Law Theory of International Law

Shaw states that "the early theorists of international law were deeply involved with the ideas of natural law and used them as the basis of their philosophies. Included within that complex of natural law principles from which they constructed their theories was the significant merging of Christian and natural law ideas that occurred in the philosophy of St Thomas Aquinas".[66] Aquinas conceived that natural law formed part of Eternal law. For him, it was "the fount of moral behavior as well as of social and political institutions, and it led to a theory of conditional acceptance of authority with unjust laws being unacceptable".[67] The later interpretation of natural law however focused on natural rights and not Aquinas' views of the late thirteenth century.

Pufendorf to a certain degree identified international law with the law of nature. He conceived natural law to be a moralistic system. As Shaw pointed out that "he refused to acknowledge treaties as in a way relevant to the discussion of international law and misunderstood the direction of modern international law by denying the validity of rules about custom".[68] According to Cali, the natural law descriptions of international law are best understood in opposition to positivist theory theories of international law.[69] As Criddle notes that "Positivists argue that natural law theories artificially fuse law and

[66] M. Dixon, 'Textbook on International Law', 6th ed., Oxford University Press, 2007, p. 22.
[67] Ibid.
[68] M. N Shaw, 'International Law', Cambridge University Press, 6th ed., 2008, pp. 26, 27.
[69] B. Cali, 'International law for international Relations', Oxford University Press, 2010. p. 77.

morality thereby confusing parochial and relativistic ethical norms with objective principles of legal right and obligation".[70] Hence, the standard positivist view of naturalism for Brownsword is that "natural-law theory provides an inferior concept of law from a moral point of view".[71] Natural law theorists, on the other hand, maintain that the law is not simply a function of social practices but a moral element at its very core; thus, this theory places the moral force of the rule before the social practice and consequently the moral force of rule informs social practice.[72] Furthermore, Brownsword argues that these set of theorists chose to describe law in a "morally loaded way insisting on withholding the title 'law' from rules promulgated in the name of law unless these meet specified moral criteria".[73] They contend that the definition of true or valid law is interdependent of its ethical content.[74] As Drury puts it, "to be valid, law must have moral content".[75]

Naturalist writers such as Hugo Grotius, Aberico Gentili, Francisco de Vitoria and Francisco Suarez share a common view that the foundation of (both internal and international) law did not comprise deliberate human choices or decisions. From their respective standpoints, they all opined that law (internal/international) constituted already extant doctrines put in place by nature. That way, their shared understanding was that, law was to be discovered and not made. Thus, rules of law are derived from

[70] E. J. Criddle & E. Fox-Decent, ' A Fiduciary Theory of Jus Cogens', *The Yale Journal of International Law*, Vol. 34. No. 2 (2009), p. 343.
[71] D. Beyleveld and R. Brownsword, 'The Practical Difference between Natural-Law Theory and Legal Positivism', *Oxford Journal of Legal Studies*, Vol. 5, No. 1, 1985, p. 2.
[72] B. Cali, 'International law for international Relations', *Oxford University Press*, 2010. p. 77.
[73] D. Beyleveld and R. Brownsword, 'The Practical Difference between Natural-Law Theory and Legal Positivism', *Oxford Journal of Legal Studies*, Vol. 5, No. 1, 1985, p. 4.
[74] S. B. Drury, 'H.L.A. Hart's Minimum Content Theory of Natural Law', *Political Theory*, Vol. 9, No. 4, 1981, pp. 533-546.
[75] Ibid., p. 534.

the dictates of nature as a matter of human reason.[76] This approach to international law claims that law was always there despite having been found or not. This is based on the notion that certain natural rights exist for each individual and state. An example is the right to life, without which the society would not be preserved. Furthermore, Dixon points out those natural law concepts that are explanatory in the sources of international law. For instance, "equity, justice and reasonableness which have been incorporated in substantive rules of law, such as those dealing with the continental shelf, human rights, war crimes and rules of *jus cogens*".[77] The definition of international law from the naturalist view therefore, would mean a body of law composed of not only the actual will of states, but also of moral limits and goods which restrict what states can agree to make permissible and prohibitive.[78] This holds that the reason for states to abide by international law would be by moral compulsion. Nonetheless, Cali notes that natural law theories of international law conflict with international relations theory of realism.[79] They agree more readily with the social constructivist theory of international relations as they share the common basic hypothesis that norms have an independent effect on the behaviour of states.[80] A common ground for both natural theory and positivism as Criddle puts it is the struggle "to explain how peremptory norms can place substantive limits on state action without weakening the concept of state sovereignty".[81]

[76] M. Dixon, 'Textbook on International Law', 6th ed., *Oxford University Press*, 2007, p. 17.
[77] Ibid.
[78] B. Cali, 'International law for international Relations', Oxford University Press, 2010. p.78.
[79] Ibid.
[80] Ibid.
[81] E. J. Criddle & E. Fox-Decent, 'A Fiduciary Theory of Jus Cogens', *The Yale Journal of International Law*, Vol. 34, No. 2 (2009), pp. 311-387.

2.1.2 Positivism

According to Cali, some theories are well accepted than others because of their popularity and international legal positivism is one instance of such theories.[82] Positivism is the name accorded to a group of theories about international law that share common views.[83] Scholars such as Zouche concern positivist theory with analysis of international occurrences, thereby reinterpreting international law based on the happenings between states.[84] This as Shaw points out is "what states actually do is the key, not what states ought to do given basic rules of the law of nature".[85] Locke and Hume support this hypothesis arguing that "ideas were derived from experience and not the existence of natural principles".[86] Shaw notes that positivism was fully developed after the peace of Westphalia in 1648, stemming from the religious wars and became popular as the modern nation-state system emerged.[87] While Malone offers that positivism conceives law as a corpus of rules created largely by states and identified in accord with sources of law; unlike natural law, which exists without the affirmative consent of nations.[88]

The more recent theory of positivism describes international law as a body of law to which states have consented to be bound as opposed to its earlier form of classical legal

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[82] B. Cali, 'International law for international Relations', Oxford University Press, 2010. p.74.
[83] Ibid.,
[84] M. N. Shaw, 'International Law', Cambridge University Press, 6th ed., 2008, p. 25.
[85] Ibid.
[86] Ibid.
[87] M.N. Shaw,'International Law', Cambridge University Press, 6th ed., 2008, p. 25.*See also* L. Gross, ' The Peace of Westphalia 1648-1948', *American Journal of International Law,* Vol.42, 1948, p. 20; C. Harding & C. L. Lim, 'Renegotiating Westphalia' The Hague, 1999; S. Beaulac, 'The Westphalian Legal Orthodoxy: Myth or Reality?', *Journal of History of International Law,* Vol.2, 2000, p. 148.
[88] L. A. Malone, 'Emanuel law outlines: International Law' *Aspen Publishers/Wolters Kluwer* , 2008, p.1.

positivism where international law was described according to the individual will of states.[89] Cali points out that the classical legal positivism has been criticized by a number of positivists who believe that anchoring international law explicitly on the will of state portrays it as an unstable *modus operandi* between states that can be subject to withdrawing their support at any time for any previous agreement.[90] Yet a common thread holding the variant classes of positivism is that they all regard the actual behaviour (social practises) of states as the basis of law.[91] As Kar put it, "at the core of positivism is the perception that law as a body of rules identified as laws by reference to past decisions acknowledged as providing the rules with legal pedigree".[92] As stated by Kennedy that the binding force of international law from the standpoint of a positivist theorist is rooted in the consent of sovereigns themselves. It is found in the expressions of sovereign consent, either through a laborious search of state practice or a catalog of explicit agreements.[93] In addition, Dixon explains that this theory of international law recognizes that states may give their consent in different ways, either in form of treaties or compliance to customary law – but "essentially the system of international law is based on voluntary self-restriction".[94]

The procedural element of consent makes the laws created according to the consent theory further binding and contrary to the will theory of positivism; the consent theory

[89] B. Cali, 'International law for international Relations', Oxford University Press, 2010. pp. 74-75.
[90] Ibid., p. 74.
[91] Ibid.
[92] R. B. Kar, 'Hart's Response to exclusive Legal Positivism', *The Georgetown Law Journal*, Vol. 95, No. 2, 2007, pp. 394-447. *See also* <http://www.georgetownlawjournal.org/issues/pdf/95-2/kar%5B1%5D.pdf. Viewed: 21/08/2011.
[93] D. Kennedy, 'International Law and The Nineteenth Century: History of an Illusion', *Quinnipiac Law Review*, Vol. 17, (1997), p.113.
[94] M. Dixon, 'Textbook on International Law', 6th ed., Oxford University Press, 2007, p. 16.

has a more stable outlook to international law because consent is not something that a state can change whenever it pleases.[95] Perhaps it is because of its basic tenet that the binding quality of international law flows from the consent of states that Dixon has dubbed positivism the "consensual theory".[96] Nonetheless, there are a number of loopholes in this concept to international law, both in theory and in practice as Cali and Dixon have rightfully pointed out. Firstly, these drawbacks may be observed in the conflict on the correct way to express consent. The consent theorists disagree with each other about what counts as consent.[97] Secondly, if really there is a rule stating that laws may only be created by state consent, where then did that rule come from? Where is the legal authority for the *pacta sunt servanda*/consent rule?[98] Thirdly, on a more practical note, if consent is the basis of international law, how is it that these new states are bound by pre-existing rules of customary law?[99] Finally in the word of Dixon "if consent was the basis of international law, nothing would be unalterable by treaty. In general, then, the positivist theory is attractive but it does not describe accurately the reality of international law".[100] There are significant parallels between the vision of the consent theories of international law and the institutional theories of international relations as both recognize the multiplicity of sovereign states but there is a further emphasis on the condition of cooperation between sovereign states.[101] Natural lawyers dismiss the positivist perception to international law arguing that states cannot have such liberty as to choose to consent to any rule they please.

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[95] B. Cali, 'International law for international Relations', Oxford University Press, 2010. p.75.
[96] M. Dixon, 'Textbook on International Law', 6th ed., Oxford University Press, 2007, p. 16.
[97] B. Cali, 'International law for international Relations', Oxford University Press, 2010. p.76.
[98] M. Dixon, 'Textbook on International Law', 6th ed., Oxford University Press, 2007, p. 17.
[99] Ibid.
[100] Ibid.
[101] B. Cali, 'International law for international Relations', Oxford University Press, 2010. p.76.

2.1.3 International Law as a Process

Cali notes that the process theory of international law places itself between positivism and naturalism by laying emphasis on both the expression of state will and on principles that exist independently of that will and also one type of social constructivist theory of international relations, where the legal and political processes are seen as mutually interdependent.[102] McDougal appreciates Falk as a supporter of the process theory, as Falk points out the vast changes in the global social process and the global process of authoritative decision.[103] He notes the shift from the feudal system to the nation-state system, and how the world is shifting from a nation-state control to a more pluralistic institutional setting, "geographic and functional, with the individual human being playing an increasingly important role and with central guidance coming from an as yet unidentified source".[104] McDougal concurs with Falk arguing in his words, "It is almost equally common ground among observers today that there is little inevitability about the direction, benign or self-destructive, in which future world public order may move". In simpler words, the events and changes of the world is a principal factor to the development of international law, and as such, is a process where the future of world order is in the hands of the authoritative decision makers. For instance, the establishment of the League of Nations was as a result of WW1 although it later crumbled and gave way to the creation of the United Nations at the end of WWII. This visibly exemplifies that the global events give rise to the development of the international system as well as international law, making it a gradual process with the

[102] Ibid., p. 80.
[103] M. S. McDougal, 'International Law and the Future', *Faculty Scholarship Series*, Paper 2662. 1979, p. 259.
[104] Ibid., p. 264

individual becoming more "interdependence in the shaping and sharing of all values in a much higher degree than ever before" as stated by MacDougal.[105] Considering the increasing trend observed in international events (from the colonial system, to the Westphalia system, to establishing of the congress of Vienna and the later development of the League of Nations not leaving out the ongoing developments in the United Nations), I am opined to say that the processes of authoritative decision-makers are significant to the development of the international system, in the sense that a decision taken by an international actor can change the course of the world order. As such, one could argue that the authorization placed by Milosevic government (conceivably after a process of authoritative decision-making) in the 90's to carry on an ethnic cleansing on the Kosovar Albanians, bore to this day a new international norm known as the "responsibility to protect". It is in view of such transitions that the Swiss writer Emerich von Vattel attempted to explain the alteration in international law by combining naturalism and positivism.

This combination would later yield what we know today as the process school of international law. It is a theory that originates from the dissatisfaction incited by the positivist and the natural law descriptions of international law as rules stemming from state will or from moral reasoning.[106] Initially, this approach to law was simply identified as the policy-oriented approach when McDougal and Lasswell began working on it at Yale University over sixty years ago. According to the 'policy orientated' movement, law is regarded as a comprehensive process of authoritative decision

[105] Ibid.
[106] B. Cali, 'International law for international Relations', *Oxford University Press*, 2010. p. 79.

making,[107] rather than as a defined set of rules and obligations.[108] This policy oriented approach to law conceives of law as a global process of authoritative and controlling decision-making process to address international problems and to maximize human dignity.[109] In other words, this school sees international law as a constant flow of authoritative decision making in which various actors in the international system participate, as the structure of the international order is created upon the knowledge and insight of international actors. This theory sees international law as a dynamic system operating within a particular type of world order.[110] According to Cali, the process school argues that international law is not a set of rules that have been made in the past, but rather as a process which takes into account past decisions, current international affairs and the future.[111] He goes further to point out that the theory considers the relationship between law and policy in an international society that is continuously emerging. It holds then that the relationship between law and policy is totally unavoidable and compulsory for international law to serve the emerging needs of the international society.[112] It also portrays international actors to deal with policy factors openly and systematically, by so doing, strengthens the effectiveness of international law, and in turn, states' obedience to it.[113] The process school agrees with the natural law approach in the view that international law cannot be a platform were just about

[107] M. S. McDougal, 'International Law and the Future', *Faculty Scholarship Series,* Paper 2662. 1979, p. 259.
[108] M. N. Shaw, 'International Law', *Cambridge University Press*, 6th ed., 2008, p. 59.
[109] *See* Siegfried Wiessner & Andrew R. Williard, ' Policy-Oriented Jurisprudence & Human Rights Abuse in Internal Conflict: Towards a World Public Order of Human Dignity, *American Journal of International Law*, Vol. 93, No. 2 (1999), pp. 316-319.
[110] M. N. Shaw, 'International Law', *Cambridge University Press,* 6th ed., 2008, p. 59.
[111] B. Cali, 'International law for international Relations', *Oxford University Press,* 2010. p.79.
[112] Ibid.
[113] Ibid.

anything goes.[114] It alters the description of law as a set of rules made by states by viewing it as a decision making process undertaken by the relevant world actors while stating that the purpose and direction of international law is to 'realize human dignity'.[115] Osofsky speculates that some critics argue that the process school theory distorts law with politics while some others argue that it simply serves the United States foreign policy interests.[116] According to Koh, it was Reisman who fundamentally transformed the New Haven School of International Law and brought it into the 21st Century.[117] He observed that Reisman engaged in jurisprudential technique and offered that international law should be viewed as a "process of communication", through the process school. This process of communication sees the legal process as comprising three communicative streams: "policy content, authority signal and control intention".[118] His argument was that the communications model "frees the inquirer from the misleading model of positivism, which claims it is the legislature that makes the law", in favor of the belief that "any communication between elites and politically relevant groups which molds diverse expectations about appropriate future behavior must be considered as functional lawmaking".[119]

Higgins, however, argues that "international law is not just rules derived from past decisions but incorporates the whole decision making process, not just law in context,

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[114] Ibid.
[115] *See* Harold D. Lasswell & Myres S. McDougal, 'Legal Education and Public Policy: Professional Training in the Public Interest', *Yale Law Journal*, Vol. 52, No. 2 (1943), p. 550.
[116] H. M. Osofsky, ' A Law and Geography Perspective on the New Haven School', *Yale Journal of International Law*, Vol. 32, (2007), pp.421-424.
[117] H. H. Koh, 'Michael Reisman, Dean of the New Haven School of International Law', *Yale Law Sch. Legal Scholarship Repository*, Vol. 1, (2009), p. 3.
[118] *See* W. M. Reisman, 'International Lawmaking: A Process of Communication', *American Society of Int'l Law*, Vol. 75, (1981), p. 101.
[119] Ibid., p. 107.

but the context as part of the law".[120] She stresses in her words, that international law "is not the vindication of authority over power; it is decision-making by authorized decision makers, when authority and power coincide".[121] She clearly disagrees in her words, that law is "merely rules because it fails to take account of the non-judicial matters which impinge upon any decision".[122] In summary, the principal interest of the process school rests in guiding decision-makers about how to act in an international problem or situation and less interested in only identifying and applying rules that the world community might ordinarily term "laws".[123]

2.1.4 Critical Legal Studies of International Law

The critical legal studies (CLS) theories are a group of approaches to international law which share a common dissatisfaction with the other three theories discussed earlier. This school is represented by Duncan Kennedy and Martti Koskenniemi with earlier representatives: M. Weber, Robert W. Gordon, Morton J. Horwitz, and Katharine A. MacKinnon.[124] It is an approach to international law that grew out from legal realism in the 1920's and 1930's.[125] Unger depicts the critical legal studies as a "movement that has undermined the central ideas of modern legal thought and put another conception of

[120] R. Higgins, 'Problems and Process: International Law and How We Use It', (1994), p. vi.
[121] Ibid., p. 4.
[122] Ibid.
[123] M. N. Shaw, 'International Law', 5th ed., 2003, pp. 58 *see also*, E. Suzuki, ' The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence', *Yale Journal of World Public Order*, Vol. 1, (1974), pp. 1, 30.
[124] See <http://www.law.cornell.edu/wex/critical_legal_theory > Viewed: August 24, 2011.
[125] A. Hunt, 'The Theory of Critical Legal Studies', *Oxford Journal of Legal Studies*, Vol. 6, Issue 1, pp.1-45.

law in their place".[126] This conception perceives law as a dominant instrument for the powerful and informs a practice of politics.[127] Critics convey the CLS theory as an intricate and complex and often "inaccessible", and have "produced some of the most provocative and perplexing legal scholarship of the past several years".[128] Scholars like Shaw view the critical legal studies as a method that brings to light the many inconsistencies and incoherencies that persist within the international legal system.[129] The critical legal studies, notes the close relationship that exists between law and society, but emphasizes that conceptual analysis is also crucial since such concepts are not in themselves independent entities but reflect particular power relationships.[130] In other words, states derive their power through the law and as such use it to undermine the legitimacy of justice. Or as Shaw puts it, "the nexus between state power and international legal concepts needs to be taken into consideration as well as the way in which such concepts in themselves reflect political factors".[131] The significant mission of critical legal studies is to "find ways to override the contrast between the politics of personal relations and the politics of the large-scale institutional structure".[132] In addition, the critical legal studies coincide with the process school position on international law not just being a set of rules, but emphasize the "contradictory and

[126] D. Beyleveld and R. Brownsword, 'Review: Critical Legal Studies', *The Modern Law Review,* Vol. 47, No. 3. (May, 1984), pp. 359-369. See also, R. M. Unger, "The Critical Legal Studies Movement" Harvard Law Review, Vol. 96 (1983) p. 563.
[127] J. S. Russell, 'The Critical Legal Studies: Challenge to Contemporary Mainstream Legal Philosophy', *Ottawa Law Review*, Vol. 18, 1986, p. 1.
[128] Ibid., p. 3.
[129] M. N. Shaw, 'International Law', Cambridge University Press, 6th ed., 2008, p. 63.
[130] Ibid.
[131] Ibid., p. 64.
[132] D. Beyleveld and R. Brownsword, 'Review: Critical Legal Studies', *The Modern Law Review,* Vol. 47, No. 3 (May, 1984), pp. 359-369. See also, R. M. Unger, "The Critical Legal Studies Movement" *Harvard Law Review*, Vol. 96 (1983) p. 563.

indeterminate character of international law".[133] CLS opines that contradictory conclusions are drawn by actors from the same norms and find conflicting norms embedded in the same texts or behaviours.[134] A typical illustration of these contradictory conclusions is the long-standing debate on the lawfulness of humanitarian intervention, how some interpreters perceive that, unilateral intervention by individual states is not forbidden by the United Nations Charter while some others argue that self-defence is the only condition that permits the use of individual force by states and all other military force must be authorized by the UN Security Council.[135] Cali points out that to CLS scholars, "the arguments put forward by international lawyers are usually predictable and highly formal, yet the outcome yielded by such arguments is not determined by international law itself".[136] For this reason, Cali notes that defining international law as a "set of arguments delivered in a particular format constructed for multiple purposes and from multiple perspectives by the decision- makers of the world community will be most appropriate", stating that what differentiates perceptions of international law from the perspective of the decision-makers is politics.[137] CLS lawyers do not advocate that international law is a pointless enterprise. They do however register caution about the objectivity of international law as an enterprise. They argue that international law arguments are shaped by the political preferences of actors and not the other way around.[138] CLS deviates from the positivist and naturalist theories of international law as it does not consider international law as an independent entity. It

[133] B. Cali, 'International law for international Relations', Oxford University Press, 2010. p. 80.
[134] Ibid
[135] Ibid.
[136] Ibid., p. 81.
[137] Ibid.
[138] Ibid.

looks like it shares similarities with the process school at first glance because it views international law as having very close relationship with politics and the preferences of international actors. It does not however share the optimism of the process school about the process of international law yielding determinate outcomes about the content of international law.[139] The CLS theories thus, define international law as an indeterminate language game. They note that the traditional approach to international law essentially involves the transposition of 'liberal' principles of domestic systems onto the international scene, thereby leading to further problems.[140]

2.2 Grotian Moments in International Law

With a better understanding of international law after discussing the four theories of international law earlier in the chapter and establishing that the process school theory forms that theoretical framework of this thesis; the question of how the Kosovo cases influence the development of international law appears less cumbersome. Keeping in mind that the aim of this chapter is to illustrate that international law keeps evolving with new developments, the rest of this chapter would attempt to reveal the metamorphosis in international law since the 1648 Peace of Westphalia. What better way to show these transitions than to employ the "grotian moments" marked in the history of international law? According to Weiss, the international legal system is changing, as are the characteristics and problems of international law.[141] As Anghie rightly noted, international law now regulates a far more range of issues than was the

[139] Ibid
[140] M. N. Shaw, 'International Law', Cambridge University Press, 6th ed., 2008, p. 63.
[141] E. B. Weiss, 'The Robert L. Levine Distinguished Lecture Series: The Rise or the Fall of International Law?', *Fordham Law Review*, Vol.69, Issue 2, 2000, p. 346.

case even two decades ago, this progress is as a result of the "disciplines adaptation to a complex and rapidly changing international system".[142] Again, Weiss draws attention to the dynamic nature of international law as she gives the example on the growing consensus on human rights observed from the indictment of Milosevic, Karadzic, Mladic and others for international crimes by the International Criminal Tribunal for the Former Yugoslavia.[143] She argues that while some of these events gain acceptance others like the "protest against the World Trade Organization Ministerial in November 1999, and the World Bank and International Monetary Fund meetings in April 2000 may represent pronounced disagreements about the state of the international system and the norms it should uphold".[144] In this light, I dare observe based on my understanding of the principles of the process school of international law, that whether new norms evolve or existing principles (like the law on humanitarian intervention and the Security Council's veto rule) are being revised or even discarded, international law cannot be seen as a static discipline because of the unending activities international actors engage in. Jessup agrees with Weiss and Anghie stating that the nature of international law is such that it is entwined with the actualities of past centuries in which international

[142] A. Anghie, 'International law for international Relations', *Oxford University Press*, 2010, p. 47

[143] E. B. Weiss, 'The Robert L. Levine Distinguished Lecture Series: The Rise or the Fall of International Law?' *Fordham Law Review*, Vol.69, Issue 2, 2000, p. 345. *See* M. P. Scharf, 'The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribuna1', *Depaul Law Review*, Vol.49, 2000, p. 925. *See also* <htttp://vvw.un.orgicty/indictment/english/mil-ii99052Ye.htm>; <http/www.un.org/icty/indictment/englishikar-ii950724e.htm> (visited Aug. 21, 2011). *See* R. Wedgewood, 'International Criminal Law and Augusto Pinochet', *Virginia Journal of International Law*, Vol.40, 2000, p. 829(describing the efforts to extradite and to prosecute Pinochet, and analyzing the potential long-term impact on international criminal justice); Regina v. Bartle (Ex Parte Pinochet) and Regina v. Evans (Ex ParePinochet), U.K. *re* House of Lords, Mar. 24, 1999 (on appeal from the Divisional Court of the Queen's Bench Division and ruling in favor of extradition for a limited number of charges).

[144] E. B. Weiss, 'The Robert L. Levine Distinguished Lecture Series: The Rise or the Fall of International Law?', *Fordham Law Review*, Vol.69, Issue 2, 2000, p. 345.

relations were inter-state relations. The actualities have changed; the law is changing.[145] Like Anghie, I will explore the history of international law in phases: different periods of which are notably separated by a major European war. Perhaps the Kosovo case may not be dubbed a European war, but it was unsettling enough to create a ripple effect in the international community and consequently in international law. It would be observed then that each of these phases in history represents a "grotian moment" in international law: a response to a process of authoritative decision-making by the decision makers. This section hereby attempts to outline the key developments that occurred at each phase; and in turn showing that international law has shown a continuous trend in process from what it used to be to what it is now.

What then is a Grotian Moment? To answer the question, Scharf offers that it is a term that signifies the "paradigm-shifting development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance" and according to him, it was first coined by Falk in 1985.[146] In a plain language, "a Grotian Moment is an instance in which a fundamental change in the existing international system happens, thereby provoking the emergence of a new principle of international law with alacrity".[147] The term "Grotian" comes from the name of the Dutch scholar, Hugo Grotius (1583-1645), who hails as the father of modern international law.[148] Scharf also notes that other scholars may convey the idea of the Grotian moment

[145] P. C. Jessup, 'The Subjects of a Modern Law of Nations', *Michigan Law Review*, Vol. 45, 1947, pp. 383, 384; *see* also McDougal & Gertrude C. K. Leighton, 'The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action', *Yale Law Journal'* Vol. 59, 1949, pp. 60, 84.
[146] M. P. Scharf, 'Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Time of Fundamental Change', *Cornell International Law Journal*, Vol. 43, No. 3 (2010), pp. 439,440.
[147] Ibid.,
[148] B. P. Vermeulen, 'Grotius' Methodology and System of International Law', *Netherlands International Law Review,* Vol. 30, Issue 3, 1983. pp. 374-382.

concept with other terms; Fassbender and Martinez refer to the drafting of the U.N. Charter as a "Constitutional moment" in the history of international law.[149] Grotian or Constitutional moments, it has been established that the history of international law is laced with profound changes at notable instances and to reveal these changes I deem it appropriate to break the history of international law into subdivisions as Grotian moments. Shaw offers to trace his account of history as far back as 400BC[150], but for the purpose of this thesis it would serve to limit our scope of the history of international law to the sixteenth century till present. International law through the ages looks at the history of international law in sections starting with the Peace of Westphalia (noting the developments that came with the end of the three decade long war), then the Congress of Vienna (showing the developments after the end of the Napoleonic wars), the League of Nations (developments after the WWI) and lastly the United Nations till present (showing the developments after the WWII and beyond).

2.3 International Law through the Ages

It should not come as a surprise to state that the history of international law is a subject that continues to raise controversies each time it is discussed. According to Anghie, a history of international law written from the eyes of a powerful European state such as the United Kingdom would most likely be very different from the one written by the

[149] M. P. Scharf, 'Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Time of Fundamental Change', *Cornell International Law Journal*, Vol. 43, No. 3 (2010), pp. 439,440. *See* B. Fassbender, 'The United Nations Charter as Constitution of the International Community', *Colum. Journal of Transnational Law*, Vol. 36, No. 573, 1998, p. 529; J. S. Martinez, 'Towards an International Judicial System', Stanford Law Review, Vol. 56, Issue 2, 2003, pp. 429, 463.
[150] *See* M. N. Shaw, 'International Law', *Cambridge University Press*, 6th ed., 2008, pp. 13-23.

native people of the Americas.[151] He conceives that the birth of modern international law possibly started in the sixteenth century as he considers that interactions between empires or tribes from ancient times. These interactions as Anghie offers have always resulted in formulation of principles that facilitate and regularize such encounters.[152] This was the age of discovery for the explorers in Europe who ventured into other parts of the world like Asia, Africa and the Americas in search of gold and trade. As Shaw put it, "Europe's developing self-confidence manifested itself in a sustained drive overseas for wealth and luxury items.

2.3.1 The Peace of Westphalia

By the end of the fifteenth century, the Arabs had been ousted from the Iberian Peninsula and the Americas reached"[153] and the sixteenth century was ushered in with colonialism.[154] The rise of the nation-states of England, France and Spain in particular and their overtly pursuit of political power and supremacy resulted in a constant competition to expand the territories they had come to control.[155] Attempts were made by legal scholars at the time to articulate the dealings between Europeans and non-European indigenes[156] and the writings of scholars like Grotius, Zouche, Suarez, Gentilli and Vattel featured greatly during this period; setting the foundation for the first set of principles in international law.[157] Theology was inseparably intertwined with law at this period and the distinction between what is today known as 'domestic' and

[151] A. Anghie, 'International law for international Relations', *Oxford University Press,* 2010, p. 49.
[152] Ibid.
[153] M. N. Shaw, 'International Law', *Cambridge University Press*, 6th ed., 2008, p. 20.
[154] A. Anghie, 'International law for international Relations', *Oxford University Press,* 2010, p. 49.
[155] M. N. Shaw, 'International Law', *Cambridge University Press,* 6th ed., 2008, p. 21.
[156] A. Anghie, 'International law for international Relations', *Oxford University Press,* 2010, p. 49.
[157] L. Gross, 'The Peace of Westphalia, 1648-1948', *The American Journal of International Law,* Vol. 42, Issue 2, 1948, pp. 20-41.

'international' law was not well developed.[158] In addition, Shaw explains that this era stimulated a rebirth of Hellenic studies and ideas of Natural Law, in particular, became popular.[159] International law at this time became synonymous with natural law. Shaw points out that Grotius' work *De Jure Belli ac Pacis*, is an extensive work that includes rather more devotion to the exposition of private law notions than would seem appropriate today. One of his most enduring opinions consists in his proclamation of the freedom of the seas.[160] It would be noted then that the major development in international law at this time was the establishment of the first set of principle of international law by the scholars of that time.[161] However, these writings did not prevent the fierce clashes that characterized this period. Perhaps it is these European religious wars that led to the birth of modern international law.[162]

The Peace of Westphalia is the first 'Grotian moment' to the development of international law; marking the end of a three decade long war which according to Anghie, sprouted "from the splitting of the church following the Reformation in Europe".[163] In his words, the savagery of the wars fought during this period is almost inconceivable. He states further that these wars were not fought merely for territory; would they have been about territory alone then the severity wouldn't be so extreme.

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[158] A. Anghie, 'International law for international Relations', *Oxford University Press*, 2010, p. 51.
[159] M. N. Shaw, 'International Law', *Cambridge University Press*, 6th ed., 2008, p. 21.
[160] Ibid., p. 24.
[161] *See* L. Gross, 'The Peace of Westphalia, 1648-1948', *The American Journal of International Law*, Vol. 42, Issue 2, 1948, pp. 31-38.
[162] *See* L. Gross, 'The Peace of Westphalia, 1648-1948', *The American Journal of International Law*, Vol. 42, Issue 2, 1948, pp. 31-38. *See also*, M. N. Shaw, 'International Law', *Cambridge University Press*, 6th ed., 2008, pp. 22-24.
[163] A. Anghie, 'International law for international Relations', *Oxford University Press*, 2010, p. 52.

These were wars fought in the name of God; with a zest to convert every unbeliever.[164] The Peace of Westphalia consists of two treaties: the Osnabrück Treaty and the Münster Treaty signed on 15 May and 24 October of 1648 respectively. It has been inferred by a good number of scholars that the Peace of Westphalia in 1648, which declared the equality of sovereign states, saw the beginning of international law.[165] The international law literature of the time shares the idea that the Peace of Westphalia was an ordering instrument in the affairs of the international society. Writings from scholars and jurists like Treitschke, Lawrence, Westlake, Hershey, and Dunn share in this idea.[166] The war lasted thirty years from 1618 to 1648 and resulted in the devastation of most of Europe from Sweden to the Balkans.[167] One might infer that these wars were fought for misplaced loyalties; hence the quest to prevent such future wars informed the formulations of the doctrines of the Peace of Westphalia. It was during this ruckus that the renowned Dutch scholar Hugo Grotius (1583-1645) wrote his monumental piece, 'The Rights of War and Peace' published in 1625.[168] Consequently, Schmidt notes that Lawrence's book, 'Principles of International Law', argue that the Peace established an international order based on Grotius' account of natural law the "complete independence" of states.[169] To Gross "the Peace of Westphalia marked an epoch in the evolution of international law"[170] supporting Treitschke who stated that ''the Peace of

[164] Ibid.
[165] G.C. Marks, 'Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de las Casas', *Australian Year Book of International Law,* Vol. 13, 1992, p. 5
[166] S. Schmidt, 'To Order the Minds of Scholars: The Discourse of the Peace of Westphalia in International Relations Literature', *International Studies Quarterly,* Vol.55, Issue 2, 2011, pp. 1-23.
[167] A. Anghie, 'International law for international Relations', *Oxford University Press,* 2010, p. 52.
[168] Ibid.
[169] S. Schmidt, 'To Order the Minds of Scholars: The Discourse of the Peace of Westphalia in International Relations Literature', *International Studies Quarterly,* Vol.55, issue 2, 2011, p. 6.
[170]L. Gross, 'The Peace of Westphalia, 1648-1948', *The American Journal of International Law,* Vol. 42, Issue 2, 1948, p28.

Westphalia came to be looked upon like a *ratio scripta* of international law. Again, Schmidt points out that Hershey considered the Peace to mark the foundation of the international community, while noting that the international legal order established by the Peace of Westphalia continued to evolve and change through history.[171] Similarly, Morgenthau conceives that, "the core of rules of international law laying down the rights and duties of states in relation to each other developed in the fifteenth and sixteenth centuries". In addition he points out that these rules of international law were born with the 1648 treaty of Westphalia that "brought the religious wars to an end and made the territorial state the cornerstone of the modern state system".[172] Providing international law with this cornerstone, Anghie notes that the pair of treaties prescribed that each sovereign state had absolute power within its own territory and could adopt whatever religion and political system it thought fit, thus, no state had the right to attack another state simply because the other state had a different ideology or religion.[173] Gross points out that the Peace of Westphalia led to the theory and the practice of balance of powers (a development that would later serve as the backbone of the modern international legal system) and similarly the need for the reconstruction of Europe after the war led to the clauses inserted in the pair of treaties; "one aimed at restoring the freedom of commerce by abolishing barriers to trade which had developed in the course of the war and the other intended to provide a measure of free navigation on the Rhine"[174] Ku identifies that part of the development contributed by the Peace to

[171] S. Schmidt, 'To Order the Minds of Scholars: The Discourse of the Peace of Westphalia in International Relations Literature', *International Studies Quarterly*, Vol.55, issue2, 2011, p. 6.
[172] Ibid.
[173] A. Anghie, 'International law for international Relations', *Oxford University Press*, 2010, p. 52.
[174] L. Gross, 'The Peace of Westphalia, 1648-1948', *The American Journal of International Law*, Vol. 42, issue 2, 1948, pp. 25, 26, 27.

international law can be seen in articles CXIII and CCCIV of the Treaty of Münster providing for the peaceful settlement of disputes through forms of arbitration or mediation. In this article "obligated parties were allowed a cooling off period of three years prior to initiating hostilities in case of a dispute, and called for sanctions if these conditions were not fulfilled".[175] In the Westphalia system, the interests and goals of nation-states were widely assumed to transcend those of any individual citizen or even any ruler.[176]

At this point were sovereignty of states and the balance of power are being considered features of the Peace of Westphalia, I conceive that the emphasis laid by the process school of international law on the actions of decision makers in the international system manifests as the developments in international law in this period are recounted as a result of such activities by these international actors. Hence, the relevance of this section of this chapter to the Kosovo cases (a manifestation of the process authoritative decision making by international actors). Gross stresses that a very important aspect of the developments brought by the Peace was that it represented a portal that led from the old world to the new world; a world resting on "international law and the balance of power operating between rather than above states".[177] Thus the Peace of Westphalia became the cornerstone of contemporary international law as a result of the enduring relevance of the procedures it established.[178] The question now is: does the Peace of Westphalia satisfy the concept of "Grotian Moment"? My answer after careful

[175] C. Ku, 'Global Governance and the Changing Face of International Law', *ACUNS Reports & Paper*, No.2, 2001, pp. 1-49.
[176] A. Anghie, 'International law for international Relations', *Oxford University Press*, 2010, p. 52.
[177] L. Gross, 'The Peace of Westphalia, 1648-1948', *The American Journal of International Law*, Vol. 42, Issue 2, 1948, p. 29.
[178] Ibid.

considerations of the new principles provoked by the change in the existing international system of the period is yes it does. Furthermore, it is conceivable that the end of the Napoleonic wars constitute another Grotian moment in international law leading to the Congress of Vienna.

2.3.2 Congress of Vienna (1815-1914)

The Congress of Vienna was followed by the end of the Napoleonic wars. The principal idea of the Congress of Vienna in 1815, was to restore the 'balance of power' in Europe, [179] and as such brought a new light to international law. The purpose of this balance of power was to neutralize any state that threatened to acquire overwhelming and decisive power by collective security.[180] This however as Shaw notes, would be a great transition in international law as "international law became geographically internationalized through the expansion of the European empires, it became less Universalist in conception and more, theoretically as well as practically, a reflection of European values".[181] In the light of historical research, we must acknowledge that the Congress of Vienna contributed to the development of international law, as new establishments emerged. For instance, the law of free navigation with regards to international waterways was established, and also a Central Commission of the Rhine was set up to regulate its use.[182] In 1856 a committee for the Danube was formed and a number of other European rivers also became the focus of international arrangements

[179] See R. Rie, 'The Origins of Public Law and The Congress of Vienna', Transactions of the Grotius Society, Vol. 36, Problems of Public and Private international Law, Transactions for the Year 1950 (1950), pp. 209-227
[180] A. Anghie, 'International law for international Relations', Oxford University Press, 2010, p. 54.
[181] M. N. Shaw, 'International Law', Cambridge University Press, 6th ed., 2008, p. 27.
[182] Ibid., p. 28.

and agreements.[183] Furthermore, the upsurge in Europe conferences greatly influenced the rules developed in governing the conduct of war, (*jus ad bello* and *jus in bello*) which respectively deal with the question of the justification to go to war, and the question of laws to be observed once the war has begun.[184] The International Committee of the Red Cross was also set up in 1863. This institution aided the progression of the Geneva Conventions in 1864 that dealt with the 'humanization' "of conflict, and the Hague Conferences of 1899 and 1907 established the Permanent Court of Arbitration and dealt with the treatment of prisoners and the control of warfare".[185] In addition, the universal abolishment of slave trade was considered during this period, and was enforced in 1833.[186]

Finally, the Congress of Vienna succeeded in sustaining peace and stability in Europe until the Crimean war. For Rie, the greatest achievement of the Congress is that, "for the first time in international relations, it laid down the basis for a conception of "public law" for that "Concert of Europe" which was destined to guide the international relations of the Great Powers during the greater part of the nineteenth century".[187] After recounting the developments in international law brought by the end of the Napoleonic wars, one might infer that the Congress of Vienna translates as a Grotian moment in international law. Again we observe the process of decision making affecting the

[183] Ibid.
[184] B. Cali, 'International law for international Relations', Oxford University Press, 2010, p. 57.
[185] Ibid.
[186] See R. Rie, 'The Origins of Public Law and The Congress of Vienna', *Transactions of the Grotius Society*, Vol. 36; Problems of Public and Private international Law, Transactions for the Year 1950 (1950), p. 226.
[187] Ibid., p. 277.

international legal system which continues beyond the Vienna Congress to the League of Nations and on.

2.3.3 The League of Nations

The origin of the League of Nations has been traced to the failure of the old anarchic system, as international actors felt the necessity to establish a new institution to preserve and secure peace at the end of WWII. International relations scholars argue that the most important legacy of the 1919 Peace Treaty was the creation of the League of Nations.[188] As Friedmann puts it, "The principal legal result of the WWII was the establishment of the League of Nations as an organization for collective security".[189] This was the first major international institution that was established by sovereign states. However, the *modus operand*i of this new institution was to be directed by unanimity on any particular course of action, by the member states.[190] Collective security was a major feature of the League's attempt to promote peace and security in the international system. Also, the rise of nationalism was a developing theme at the time, and resulted in a lot of debacles from colonialism making state sovereignty top priority for the organization.[191] Critics of the League argue differently, to them the League portrays a false notion of international law, symbolizing a vision of international law far removed from power, the real interest of states, and their views appeared to be justified by the collapse of the League.[192] For Friedmann though, the collapse of the League was due to political and moral weaknesses, which according to

[188] M. N. Shaw, 'International Law', Cambridge University Press, 6th ed., 2008, p. 30.
[189] W. Friedmann, 'Half a Century of International Law', *Virginia Law Review*, Vol. 50, No. 8, 1964, pp. 1333-1358.
[190] B. Cali, 'International law for international Relations', Oxford University Press, 2010, p. 57.
[191] Ibid.
[192] Ibid., p. 58.

him are still present in the international society of today.[193] However, the achievements of the League are substantial. The League of Nations concluded about one hundred and twenty international instruments between 1920 and 1939. These instruments, variously designated as conventions, agreements, arrangements, protocols, acts, proees-verbaux or declarations, promoted the progressive development of international law in many fields of international relations.[194] For example, The Permanent Court of International Justice was set up at The Hague in 1921.[195] An equally important outcome was the establishment of the first major international functional organization for the pursuit of international social welfare, the International Labor Organization, which still exists today.[196] In addition, the League guaranteed the 'Minority Protection' system, but was unsuccessful in putting it into force, but gradually paved the way for later concern to secure human rights.[197] The system of mandates also began as part of international law during this period,[198] The Convention for the Prevention and Punishment of Terrorism and the Convention for the Creation of an International Criminal Court, was also concluded on 16 February 1937.[199] The collapse of the League of Nations made way for the present United Nations and the developments that have continued beyond the establishment of the United Nations.

[193] W. Friedmann, 'Half a Century of International Law', *Virginia Law Review,* Vol. 50, No. 8, 1964, p. 1336.
[194] See 'United Nations Document on the Development and Codification of International Law', *American Journal of International Law,* Vol. 41, No. 4, 1947, pp. 32-127.
[195] M. N. Shaw, 'International Law', *Cambridge University Press*, 6th ed., 2008, p. 31.
[196] W. Friedmann, 'Half a Century of International Law', *Virginia Law Review,* Vol. 50, No. 8, 1964, p. 1336
[197] M. N. Shaw, 'International Law', *Cambridge University Press*, 6th ed., 2008, p. 31.
[198] Ibid
[199] See 'United Nations Document on the Development and Codification of International Law', *American Journal of International Law,* Vol. 41, No. 4, 1947, pp. 32-127.

2.3.4 The United Nations (1945-Present)

Anghie observes that the foreword of the UN Charter begins with the powerful words "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind", and towards this end, it declares war illegal except in two circumstances: first, a state can go to war in the event of self-defense, which is narrowly defined; and second, war can be approved by the UN Security Council.[200] The League of Nations failed in preserving international peace with the advent of WWII and was replaced by the United Nations as the war came to an end. Shaw cites that a major setback for the League was the absence of the US and the exclusion of the Soviet Union.[201] Therefore, as Ghali offers that, the United Nations was "created to foster peaceful and cooperative relations between states; the basis of which rests on the recognition that collective security, shared values and cooperative problem solving could be in each state's own interest".[202] The conclusion of the Charter of the United Nations is one significant development in international law; one that would lead to many more developments at this present time and beyond.[203] Ghali goes ahead to add that the Charter of the United Nations was framed with such flexibility by the founders so as to accommodate changing circumstances and adopt new techniques whenever the need emerges.[204] I dare add from my observation that the architecture of the Charter follows in the trend of authoritative decision-making that which is the fundamental

[200] *See* United Nations Charter Article 51.
[201] M. N. Shaw, 'International Law', *Cambridge University Press*, 6th ed., 2008, p. 30
[202] B. B. Ghali, 'A Grotian Moment', *Fordham International Law Journal*, Vol. 18, No. 5, 1994-1995, pp. 1609-1617.
[203] Ibrahim J. Gassama, 'International Law at a Grotian Moment: The Invasion of Iraq in Context', *Emory International Law Review*, Vol. 18, No. 1, 2004. pp. 9, 33-34 (arguing that along with the Peace of Westphalia, the Nuremberg Charter and the U.N. Charter include more recent Grotian moments).
[204] B. B. Ghali, 'A Grotian Moment', *Fordham International Law Journal*, Vol. 18, No. 5, 1994-1995, p. 1615.

principle of the process school of international law; the theoretical framework on which the hypothesis of this thesis rests. One might say that it is with the changing circumstance of the "New World Order" (using Anghie's words) that the Organization through its Charter has continued to foster the developments in international law. This brings me to suggest like Anghie, that the events that occurred during the WWII prompted concerns from the international community.[205] The establishments of the International Court of Justice (replacing the Permanent Court of International Justice)[206] and the United Nations' Universal Declaration of Human Rights in 1948 are also notable contributions to international law.[207] In addition, one of the main UN contributions to the development of international law is its codification.[208]

The end of WWII also saw to the establishment of the Nuremberg Tribunal[209] and similarly the United Nations peace-keeping established to deal with the Suez crisis of 1956.[210] The period following the war was characterized by proxy wars that would later lead to decolonization and bloody civil wars which took place in Asia and Africa.[211]The United Nations was a major forum in this anti-colonial initiative, declaring the rights of people to self-determination that was passed by the UN General Assembly.[212] Several challenges were faced by the UN as it was confronted with the question of sovereignty

[205] A. Anghie, 'International law for international Relations', *Oxford University Press,* 2010, p. 51.
[206] *See* Leila Nadya Sadat & S. Richard Carden, 'The New International Criminal Court: An Uneasy Revolution', *Georgetown Law journal* Vol. 38, 2000. pp. 381-474.
[207] A. Anghie, 'International law for international Relations', *Oxford University Press*, 2010, p. 60.
[208] See UN Charter speaking of 'progressive development and codification of international law; Chapter VI, Article 13.
[209] Ibrahim J. Gassama, 'International Law at a Grotian Moment: The Invasion of Iraq in Context', *Emory International Law Review*, Vol. 18, No. 1, 2004. pp. 9, 33-34 (arguing that along with the Peace of Westphalia, the Nuremberg Charter and the U.N. Charter include more recent Grotian moments).
[210] B. G. Boutros, 'A Grotian Moment', *Fordham International Law Journal*, Vol. 18, No. 5, 1994-1995, p. 1615.
[211] A. Anghie, 'International law for international Relations', Oxford University Press, 2010, p. 61.
[212] See United Nations Charter Article 1 (2).

as a long suppressed political and ethnic rivalries erupted into violent conflicts in many newly independent states, as well as in many parts of Africa.[213] These international crises as the Security Council established (after considering reports of gross violations of human rights and crimes) constituted a threat to international peace and security and consequently as Ghali recounts, it sought to contain the situations created by the crises by adopting several Resolutions.[214] In turn these Resolutions led to the development of international law and international institution, such as the International Criminal Tribunal for the former Yugoslavia in February1993 and that of Rwanda in November 1994. Further developments came with the establishment of the World Trade Organization in 1994.[215] It was a particularly important development and a good example of how international law and institutions could coordinate the actions of state.[216] The WTO provides the basic rules that all member countries must observe in their trade relations with each other.

In more recent account of the developments in international law since the creation of the United Nations, I will proceed to include the Kosovo crisis and the September 2001 terrorist attack in the United States. NATO's intervention in Kosovo has drawn the attention of the international community to set to work to tackle the gross violations on humanitarian rights that was prominent feature in the 90s. The response of the international community was a new doctrine called "Responsibility to Protect,"[217]

[213] B. B. Ghali, 'A Grotian Moment', *Fordham International Law Journal*, Vol. 18, No. 5, 1994-1995, p. 1610.
[214] Ibid., p. 1614.
[215] A. Anghie, 'International law for international Relations', Oxford University Press, 2010, p. 65.
[216] Ibid.
[217] *See* The Conclusion of the thesis.

which authorizes humanitarian interventions in limited circumstances.[218] One might say that the debate on humanitarian intervention remained prominent throughout the 90s until the September 11, 2001 terrorist attack on the World Trade Center and the Pentagon brought about dire consequences on the international community's understanding of the laws of war.[219] Again, the United Nations absorbed this event with the 'Security Council's Resolution 1368', which confirmed "the right to use force in self-defense in Afghanistan, against al-Qaeda, thus solidifying the idea that under international law, states may use force in self-defense against non-state actors".[220]

This chapter has succeeded in illustrating that international law is a process. It started off with definitions of international law and next it discussed some theories of international law to help us establish the theoretical background of this thesis. The section on the 'Grotian Moments in International Law' delved into the history of international law to show the progressive trend in the developments in international law; each one of which is based on some major decision-making process by the actors responsible at the time. It is based on this process of authoritative decision-making that such cases as the genocide in Rwanda and Kosovo trigger a ripple reaction in the international system and consequently in international law. The next chapter continues in reemphasizing the principles of the process school by establishing the facts that led to the NATO intervention in Kosovo, enumerating the actors involved and her consequent declaration of independence. Finally, Chapter two serves as a platform for the analysis

[218] See the UN discussion guide, Lessons From Rwanda: The United Nations and the Prevention of Genocide http://www.un.org/preventgenocide/rwanda/responsibility.shtml viewed: 7th August 2011.
[219] M. Sterio, 'A Grotian Moment', Changes in Legal Theory of Statehood', *Denver Journal of International Law and Policy,* Vol. 39, Issue 2. 2011, p. 214.
[220] Ibid.

of the legality of the NATO campaign in Kosovo and the changes that it brought to international law.

Chapter 3

THE KOSOVO CRISIS: RAMBOUILLET ACCORD AND NATO'S INTERVENTION

Following the events in the Balkans and particularly after the secession of Croatia, Slovenia, Bosnia-Herzegovina and the Former Yugoslav Republic of Macedonia, it became quite obvious that Kosovo was a 'powder keg' waiting to explode. Long history of political tensions, between the Serbs and ethnic Albanians over the status of the province of Kosovo, boiled over into ethnic cleansing in 1998 and an intervention in mid 1999.[221] The events that unfolded in March 1998 would be a catastrophe featuring organised and violent ethnic cleansing that replaced an enduring struggle of ethnic Albanians towards obtaining an independent state of Kosovo. This conflict as Charlesworth argues, set a precedent to new future challenges of international law, contending that "NATO's intervention to end the crisis in Kosovo can be evident of state practice and *opinio juris* for a principle of custom that intervention is permissible where massive human rights violations take place".[222] However this thesis is not entirely on the development of the faction in Kosovo. In particular, this thesis shows that the Kosovo cases can be seen as a contribution to the development of international law, and aims to use the conflict in Kosovo as a dossier for evaluating and revealing the

[221] H. Charlesworth, 'International Law: A Discipline of Crisis', *The Modern Law Review*, Vol. 65, No. 3 (2002), pp. 377-392.
[222] Ibid., p. 379.

theory of humanitarian intervention, as the intervention influenced the development of international law.

The relevance of the conflict to this thesis cannot be overemphasized as it relates and influenced the decision taken by NATO to launch a "humanitarian war" and a declaration of independence by the Kosovo authorities. On March 31 1998, the UN Security Council issued its first definition of the internal Kosovo conflict as a threat to international peace and security by adopting 'Resolution 1160', which "condemned the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as acts of terrorism by the KLA".[223] Acting under Chapter VII, the Security Council placed an arms embargo on the Federal Republic of Yugoslavia, including Kosovo, establishing a Security Council Sanctions Committee.[224] Clearly, as Burg argues, both the international community as well as Slobodan Milosevic did not seem to have learned from the events that occurred in Bosnia.[225] Therefore, it is necessary to discuss the Kosovo crisis in a progressive manner, with respect to context establishing facts relevant for judicial implications.

At this point it is important to highlight the events that led to the NATO campaign in Kosovo. Perhaps the independence of Kosovo is anchored on the intervention by NATO; without which it might not have been possible for Kosovo to attain the independence status. Seeing the effect the two cases have brought upon the

[223] E. Milano, 'Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Territorial Status', *European Journal of International Law*, Vol. 14, No. 5, 2003, pp. 999-1022.
[224] See UN documents on resolution 1160. More on the website:www.un.org/Docs/sc/committees/1160Template.htm, retrieved on July 25, 2011.
[225] See Steven L. Burg, 'The war in Bosnia Herzegovina, Ethnic Conflict and International Intervention', M E Sharp Inc, 1999, p. 69.

development of international law it would only be proper to give an insight to the Kosovo conflict and the role each of the stakeholders played.

3.1 Civil War in Kosovo

According to Freedman, "Kosovo was a classic illustration of the dilemmas connected with the principle of self-determination".[226] Falk argues that the majority populations of Kosovo Albanians were placed in an uncompromising situation by actions authorized by Milosevic government in Belgrade during the 1990s.[227] Not only did the political leaders in Belgrade fail in obliging to the basic human rights of the Kosovo Albanians but also other important participants such as the Kosovo Liberation Army, (KLA). According to Charney, KLA also perpetrated vicious crimes against the FRY forces and the Yugoslav Serbs causing both the KLA and Belgrade government to violate their moral and legal obligations.[228] An attempt to achieve a total settlement of the Kosovo crisis was initiated in October 1991 when Kosovar Albanians demanded a restoration of self governance in Kosovo, through a peaceful demonstration led by Rugova but failed.[229] Weller argues that the August 1992 London conference on the former Yugoslavia which Kosovo was invited to, may have achieved overall settlement if the process was not left to languish into a silent death.[230] The fact that Kosovo was not included in the Dayton agreement diminished the desire for a settlement over Kosovo.

[226] L. Freedman, 'Victims and Victors: Reflections on the Kosovo War', *Review of International Studies*, Vol. 26, Issue 3, 2000, pp. 335-358.
[227] R. A. Falk, 'Kosovo, World Order, and the Future of International Law', *The American Journal of International Law*, Vol. 93, No. 4 (Oct., 1999), pp. 847-857.
[228] J. I. Charney, 'Anticipatory Humanitarian Intervention in Kosovo', *American journal of International Law,* Vol. 93, Issue 4, 1999, pp. 834-841.
[229] R. Caplan, 'International diplomacy and the crisis in Kosovo', *International Affairs*, Vol.74, No.4, 1998, pp.745-761.
[230] M. Weller, 'The Rambouillet Conference on Kosovo', *International Affairs (Royal Institute of International Affairs),* Vol. 75, No. 2, April 1999, pp. 211-251.

With the stripping of Kosovo autonomy and denial of basic human rights, such as the participation of ethnic Albanians in public office including the right to self-determination of a people incited the formation of the Kosovo Liberation Army (KLA). Determined to achieve an independent state, KLA waged an armed struggle of violent provocations that provided an ongoing motive and justification for cruel Serb security measures. For instance, in 1997 KLA was responsible for attacking police stations, raids on refugee camps, bombings and other violent incidents which led to the crushing of Albanian student demonstrations by the Serb force in October.[231] This move by the KLA was condemned by the United States, associating the group with terrorist organization, giving the Belgrade government a reason to carry on its measures on the ethnic Albanians.[232] Meanwhile, with all this atrocities committed on innocent civilian lives, no measures was taken by the international community. In essence, the reliability of the United Nations in accomplishing its goal in Kosovo was mistrusted due to its failed missions in Bosnia Herzegovina, partly because of interference in the Security Council as to a suitable course of action to be adopted.

In February to March 1998, the level of violence intensified in a course of raids, carried out by the Serbian police in Drenica region of Kosovo. Houses were burned, villages emptied, and dozens of ethnic Albanians killed.[233] Street clashes erupt as tens of thousands protest in the Kosovo capital of Pristina.[234] This led to an increasing number

[231] Foreign Policy Bulletin, 'Chronology: The Kosovo Conflict', *Cambridge Journal*, Vol. 10, 1999, pp. 283-287.
[232] L. Freedman, 'Victims and Victors: Reflections on the Kosovo War', *Review of International Studies*, Vol. 26, Issue 3, 2000, p. 347.
[233] Ibid.
[234] Ibid., p. 285.

of refugees and internally displaced persons.[235] The international community reaction to the situation was unusually precipitated when the European Union deployed 2,000 unarmed OSCE monitors in Kosovo. The UN Security Council adopted its first resolution 1160 under Chapter VII of the UN Charter. The resolution was recommended by the 'Contact Group', consisting of the foreign ministers of Germany, Italy, France, the United States, the Russian Federation and the United Kingdom, that a detailed arms embargo be adopted for the FRY, including the province of Kosovo. The Council also condemned the "use of excessive force by the FRY against civilians and peaceful demonstrators in Kosovo, as well as all acts of terrorism by the Kosovo Liberation Army".[236] In addition, the Resolution called upon the Kosovar Albanian leadership to "condemn all terrorist action and in a clear reference to the policies and activities of the KLA emphasized that all elements in the Kosovar Albanian community should pursue their goals by peaceful means noting the readiness of the Contact Group to foresee the dialogue for a peaceful settlement on political status issues".[237] The Council noted that the result of such dialogue should be based on the territorial integrity of the FRY, while embracing the standards of the OSCE the UN Charter. The dialogue was to make provision for an increase in Kosovo's status which would include a greater degree of autonomy and meaningful self-administration.[238] From this resolution, Kristsiotis

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[235] E. Milano, 'Security Council Action in the Balkans: *Reviewing the Legality of Kosovo's Territorial Status,* European Journal of International Law, Vol. 14, No. 5, pp. 999-1022, 2003.

[236] Security Council Resolution 1160 (1998), operative para.8 (where the Security Council decided that all States shall, for the purposes of fostering the peace and stability in Kosovo, prevent the sale or supply to the [FRY], including Kosovo, by their nationals or from their territories or using their flag vessels and aircraft, of arms and related *matiriel* of all types, tuch as weapons and ammunition, military vehicles and equipment and spare parts
for the aforementioned, and shall prevent arming and training for terrorist activities there").

[237] Ibid., Operative para.5.

[238] M. Weller, 'The Rambouillet Conference on Kosovo; International Affairs' *(Royal Institute of International Affairs),* Vol. 75, No. 2, April 1999, pp. 211-251.

pointed out that "the Security Council appeared as a facilitator of political dialogue between the parties, operating within the specific framework of human rights and humanitarian law standards, their respective procedures and institutional apparatus".[239] This process was hindered by the FRY insisting that the crisis was an internal problem in a referendum carried out in Serbia on April 1998.[240] In this light, both factions made an effort in having joint negotiations but were not successful, in part because of distrust between the Serbs and Albanians. In May 1998, the violence in Kosovo escalated degenerating into a war and atrocities of ethnic cleansing resulting the briefing on NATO by the UN Secretary General on the importance of seeking a mandate from the Security Council afore[i] any military intervention. In addition, the U.S special envoy Richard Holbrook acting on behalf of the Contact Group, urged Milosevic and ethnic Albanian leaders in the village of Junik to end the conflict. In response, Milosevic agreed in withdrawing a handsome fraction of his forces from Kosovo and insisted that only 1,800 unarmed international inspectors be sent into Kosovo, with overflying aircraft, to monitor the deal.[241] This agreement paved way for the arrangements made between NATO, OSCE and the FRY both of which provided for verification missions to guarantee compliance with the earlier resolutions of the Council. It was only a matter of days before Milosevic revealed his true intentions as he interpreted the agreement in the best way to suit him, violating the deal.[242] By September 1998, the UN Security Council declared in the Resolution 1199 the war in Kosovo as a "threat to international

[239] D. Kristsiotis, 'The Kosovo crisis and NATO's Application of Armed force Against the Federal Republic of Yugoslavia', *International & Comparative Law Quarterly*; Vol.49, Issue 2, pp. 330-359 .
[240] FRY press release, 'Serbian government proposes calling of a referendum', 2 April I998. 2I9.
[241] L. Freedman, 'Victims and Victors: Reflections on the Kosovo War', *Review of International Studies*, Vol. 26, Issue, 3. 2000, pp. 335-358.
[242] Ibid., p. 349.

peace and security". The Council's viewpoint was referenced to the normative context that it had articulated in its previous resolution, which is the provision of international law relating to human rights and humanitarian warfare.[243] Furthermore, the Council demanded for an immediate halt of hostilities as well as a ceasefire in Kosovo based on the need for a peaceful negotiation and to abate the risk of humanitarian disaster according to the principles of resolution 1160.

The extermination of several civilians in the Kosovo town of Racak by the Serbs was generally seen in Washington and Europe as the final warning bell. For Falk, "the dominant idea was that something had to be done, and quickly, or else the Bosnian ordeal would be tragically reproduced with deleterious consequences for the future of Europe and the credibility of the transatlantic alliance with the United States".[244] This occurrence was a major turning point in the Kosovo conflict because it brought to light the magnitude and methods of the crisis and its potential to disseminate. Simultaneously, the attack led to serious political strain in the region and further beyond, triggering a series of demanding diplomatic and political involvement which ended with the Rambouillet peace efforts in France, February 1999.[245]

[243] D. Kristsiotis, 'The Kosovo crisis and NATO's Application of Armed force Against the Federal Republic of Yugoslavia', *International & Comparative Law Quarterly*; Vol.49, Issue 2, pp. 330-359.
[244] R. A. Falk, 'Kosovo, World Order, and the Future of International Law', *The American Journal of International Law*, Vol. 93, No. 4. Oct 1999, p. 849.
[245] D. Kristsiotis, 'The Kosovo crisis and NATO's Application of Armed force Against the Federal Republic of Yugoslavia', *International & Comparative Law Quarterly*; Vol.49, Issue 2, p. 337.

3.2 Rambouillet

On February 1999, a peace conference was arranged in Paris, Rambouillet. A one page document was offered to the conflicting parties (FRY/Serbia and the Kosovar Albanian leaders) by the Contact Group with delegates from the OSCE, the EU presidency and the European Commission. The process was essentially led by Chris Hill, the US Ambassador to Macedonia, and Jim O'Brian of the US Department of State, who had exercised a leading role in drafting the Dayton agreement.[246] The document stated the principles for an agreement, with a plan by NATO to enforce the settlement with armed peacekeepers and a threat to bomb Serbia if it did not accept the terms of the agreement.[247] Although the official staging presented the agreement as an issue of Kosovo's autonomy, which would be protected by NATO's peacekeeping force in Kosovo, the accord comprised provisions which subjected the whole of Yugoslavia to a *de facto* NATO occupation by granting NATO elements unbridled movement all over Yugoslavia (Serbia and Montenegro and Kosovo). An article in the agreement ran thus: "NATO personnel shall enjoy, together with their vehicles, vessels, aircraft, and equipment, free and unrestricted passage and unimpeded access throughout the FRY (Federal Republic of Yugoslavia) including associated airspace and territorial waters. This shall include, but not be limited to, the right of bivouac, maneuver, billet, and utilization of any areas or facilities as required for support, training, and operations."[248] The threats behind NATO's demands proved futile in compelling Serbia to sign the agreements. Neither were they effective in dissuading the Serbian Police and Yugoslav

[246] Ibid., p. 338.
[247] T. G. Carpenter, 'NATO's Empty Victory: A Postmortem on the Balkan War', *Cato Institute*, 2000 pp. 15-16.
[248] Ibid., p. 17.

Army from launching an Operation Horseshoe on March 20, 1999 – a brutal offensive that displaced further hundreds of thousands of Kosovo Albanians and generating ugly atrocities. On 22 March, Richard Holbrooke tried again in an attempt to convince Milosevic to end the violence in Kosovo and to accept the Rambouilet accords but was futile. Instead, the next day, the parliament in Belgrade rejected the interim agreement in a voting session. Holbrook's failed negotiations with Milosevic resulted in NATO's military initiations against the FRY.[249] According to NATO's Secretary General:

> "I have just directed SACEUR, General Clark, to initiate air operations in the Federal Republic of Yugoslavia. I have taken this decision after extensive consultations in recent days with all the Allies, and after it became clear that the final diplomatic effort of Ambassador Holbrooke in Belgrade has not met with success. All efforts to achieve a negotiated, political solution to the Kosovo crisis having failed, no alternative is open but to take military action... As we warned on 30 January, failure to meet these demands would lead NATO to take whatever measures were necessary to avert a humanitarian catastrophe".[250]

Javier Solana also pointed out that the intention of NATO's action is to support the political aims of the international community and to this end:

> "It 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… It remains open to the Yugoslav Government to show at any time that it is ready to meet the demands of the international community".[251]

He also beseeched the Kosovar Albanians to continue the peaceful commitment that was agreed upon in Paris. "We urge in particular Kosovar armed elements to refrain from provocative military action".[252] He concluded by reiterating that the aim of

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[249] M. Weller, 'The Rambouillet Conference on Kosovo; International Affairs' *(Royal Institute of International Affairs)*, Vol. 75, No. 2, April 1999, pp. 211-251.

[250] Press Statement by Dr Javier Solana, Secretary-General of NATO, Press Release 1999/040, 23 March I999. For fuller accounts on the development of the Rambouillet talks, see Weller, "The Rambouillet Conference on Kosovo" (1999) 75 *Int. Affairs* 211.

[251] Press Statement by Dr Javier Solana, Secretary-General of NATO, Press Release 1999/040, 24 March I999.

[252] *See* NATO Press Statement by Dr. Javier Solana, Secretary General of NATO. March 23, 1999

NATO's intervention "is to prevent more human agony and more repression and violence against the civilian population of Kosovo".[253]

3.3 The North Atlantic Treaty Organization in Kosovo

There hadn't been such bombing campaign in a bid to quell the sufferings of a people as that of NATO in Kosovo before the Spring of 1999. Though bearing some similarities with interventions like the Gulf war, the NATO/Kosovo encounter bears many claims to uniqueness. It would be NATO's first sustained use of force in its 50 year existence (as at the time of the campaign). The controversial nature of NATO's actions stems from her claim of enforcing United Nations Security Council resolutions without the actual authorization from the Security Council. According to Kristsiotis, NATO member states argument at the time was that, "since the resolutions of the Security Council were not able to provide adequate legal cover for the application of military force against the FRY, an alternative rationale in international law would need to be found, and that this rationale was located in the right of humanitarian intervention in customary international law".[254]

This campaign would be the first of its kind aimed at rescuing a people displaced and greatly demoralized by crimes being committed by a repressed government in the name of an ethnic cleansing, within the state's borders. The armed intervention by NATO has

[253] Ibid
[254] D. Kristsiotis, 'The Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia', *International & Comparative Law Quarterly;* Vol.49, Issue 02, 2000, pp. 330-359.

been called a "humanitarian war" a lot of times.[255] This being because it actually brought an end to the killings and atrocities in the Serbian province of Kosovo. This, notwithstanding NATO leaders insist that their actions in Kosovo should not be called a war. To them it was a necessary humanitarian intervention that curbed a conflict that posed a threat to world peace.[256] Call it what you may, Operation Allied Force which was launched on March 24 attained an increase on emphasizing the issues of human rights and humanitarian intervention; a notable characteristic of international relations since the end of WWII.[257] There are those who did not fully support the decision taken by NATO but understood the essence and need for a humanitarian intervention.[258] Some like the international human rights movements, non-governmental organizations, inter-governmental bodies were deeply divided over the use of force in Kosovo.[259] To these NGOs, it was not enough for NATO or any other organizations to wage wars in the name of human rights and international humanitarian law. Questions were asked particularly about the NATO bombing, because it was perceived that the air campaign aggravated the violence in Kosovo.[260]

One would wonder why NATO decided to take a drastic measure as to the use of force in a sovereign state. Questions like what were the decision makers thinking? Does a humanitarian intervention justify NATO's action without the Security Council authorization? Was the NATO intervention in Kosovo worth the risk? The literature

[255] Adam Roberts, "NATO's 'Humanitarian War' Over Kosovo," *The International Institute for Strategic Studies*, Survival, Vol. 41, no. 3, 1999, pp. 102-123.
[256] Ibid.
[257] Ibid., p. 104.
[258] Ibid.
[259] Ibid., p.105.
[260] Ibid.

review for this thesis, has shown that the question of credibility as regards NATO's actions have many angles to it. For some, NATO supporters, it was not the credibility that was most important but to save millions of innocent people from horrors, suffering and death. In a series of public statements, Prime Minister Tony Blair indicates that the need for the action was firmly imbedded on humanitarian need. He pointed out that the aim of NATO's action was "to prevent President Milosevic from continuing to perpetuate his vile oppression against innocent civilians".[261] He also reiterated this position during his visit to Macedonia in 1999: "this is not a battle for NATO; this is not a battle for territory; this is a battle for humanity. This is a just cause, it is a rightful cause."[262] Evidently, NATO hoped to achieve its objectives with limited air strikes. Their strategic anticipation had been shaped by Operation Deliberate Force of September 1995, when air strikes had appeared to help bring Milosevic to the Dayton peace conference.[263] NATO hoped that a similar threat could persuade Milosevic into accepting a proper peacekeeping force in Kosovo to stabilize the situation. This tactics was in fact flawed, as the first air strike suddenly ignited endless massacres, forced expulsions and mass migration of Kosovo's Albanian refugees to neighboring countries. According to Robinson, the number of refugees increased to 600,000, with 800,000 displaced persons during the first four weeks of the bombing.[264] In addition, the

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[261] Bird, Black, Walker and Ellison, 'NATO Unleashes Massive Air and Missile Strikes across Defiant Yugoslavia: The Onslaught Begins', *The Guardian* (London), 25 Mar. 1999, p. 1. <http://www.guardian.co.uk/world/1999/mar/25/balkans>

[262] D. Kristsiotis, 'The Kosovo Crisis and NATO's Application of Armed Force against the Federal Republic of Yugoslavia', *International & Comparative Law Quarterly;* Vol.49, Issue 2, 2000, pp. 330-359.

[263] L. Freedman, 'Victims and Victors: Reflections on the Kosovo War', *Review of International Studies*, Vol. 26, Issue, 3. 2000, pp. 335-358.

[264] Mary Robinson, United Nations High Commissioner for Human Rights, *Situation of Human Rights in Kosovo, Federal Republic of Yugoslavia*, OHCHR/99/04/22/A, 22 April 1999. See also <htpp://www.ohchr.org/

intervention did not only cause a high collateral damage but inspired Milosevic in assaulting the ethnic Albanian Kosovar civilians in a process of ethnic cleansing. Scholars like Falk, argue that the air campaign was not the best strategy but would have been better if a ground strategy was in place.[265] This has brought a lot of criticism on NATO and raises doubt to the justification and legality of the bombing which will be fully analyzed in the next chapter. It is posited by most scholars that without the NATO campaign Kosovo will not be an independent state. While some scholars will disagree to this asserting that NATO's intervention is not as a result to the independence of Kosovo, neither was it aimed at ensuring it.[266] It is therefore relevant, to point out that some states refrain from recognizing the independence of Kosovo based on this argument.

Finally, one might argue that the significance of this chapter to this thesis lies in the results of the process of decisions made by all stakeholders in the Kosovo crisis. in simpler words, the authorization by the Milosevic government to carry out the dehumanizing acts of ethnic cleansing in Kosovo portray a typical New Haven concept of international law, where the international law is informed by the process of authoritative decisions made by the decision makers. In this instance, it should be observed that an authoritative decision made by the Milosevic government triggered the violent situation in Kosovo and in turn attracted the attention of the international community. The Kosovo cases discussed earlier, illustrated how actions by international

[265] R. A. Falk, 'Kosovo, World Order, and the Future of International Law', *The American Journal of International Law*, Vol. 93, No. 4. Oct 1999, p. 851.
[266] J. D. Aspremont, 'Regulating Statehood: The Kosovo Status Settlement', *Leiden Journal of International Law*, Vol. 20, 2007, pp. 649–668.

actors constantly instigate a ripple effect in the international system and consequently creating changes in international law to contain these shifts in the system. It should be seen from this chapter that the UN Security Council made efforts to stop the violence in Kosovo even though it appeared to have stalled in tackling the situation as an emergency. The Security Council's tactics were also, I presume, informed by a process of authoritative decision-making as was the similar case with NATO's intervention. In the next chapter we will see how these actions by the various stakeholders' influenced the development of international law while analyzing the legality of the campaign by NATO.

Chapter 4

THE LEGALITY OF NATO's CAMPAIGN

Like Joyner asked, "how should the United Nations or the international community successfully halt pervasively violent abuses of human rights and massive carnage"?[267] The air campaign carried out by NATO in the Spring of 1999 was in an attempt to contain the violence in Kosovo. Many lives were lost as gross violation of human rights prominently featured in the Kosovo violence as reported by NATO and other concerned bodies. It was paramount to NATO that peace and order be restored to Kosovo as the progressive exacerbation of violence would have eventually triggered other crisis within the Balkans. It was therefore, as Greenwood put it, a question of preserving international peace and security.[268] Would the NATO's action be justified under international law at the end of the war? This would remain a subject of debate amongst proponents and critics of humanitarian intervention. Can a state or group of states rise to the occasion of stopping gross violation of basic human rights committed by the authorities of one state against its citizenry or does the Westphalia sovereignty harbor such a state, protecting the violating authorities? These questions form part of the

[267] *See* C. Ku & P. F. Diehl, 'International Law: Classic and Contemporary Readings', *Boulder London*, 3rd Ed. 2009. see also C. C. Joyner 'The Responsibility to Protect: Humanitarian Concern and the Lawfulness of Armed Intervention', p. 321.

[268] C. Greenwood, 'International Law and the NATO Intervention in Kosovo', *The International and Comparative Law Quarterly*, Vol. 49, No. 4 (Oct., 2000), pp. 926-934. *See* Resolution 1244 adopted by the Security Council at its 4011th meeting, on 10 June 1999 < http://www.nato.int/kosovo/docu/u990610a.htm>. *See also* Security Council Resolution 1199, penultimate paragraph of the preambles; Security Council Resolution 1203, penultimate paragraph of the preamble and also Security Council resolution 1160.

research questions of this chapter. Then again, in the wake of the Spring of 1999 the debate on humanitarian intervention has become one prominent feature of international relations and international law. In the previous chapter, we discussed NATO's intervention in Kosovo while considering the attempts made by the international community to help resolve the conflict. The chapter identified the various actors that came to participate during the course of the crisis and the eventual air campaign by NATO that would mark the end of the violence and atrocities in Kosovo.

In this chapter the NATO involvement in Kosovo is analyzed based on the theory of "humanitarian war". The concept of humanitarian intervention is examined as part of the just war tradition while mentioning the principles of self-defense and response to aggression and giving a sketch of the just war tradition- the *jus ad bellum, jus in bello* and *jus post bellum.* The ICTY (International Criminal Tribunal for the former Yugoslavia) is brought into light as the chapter attempts to establish the legality of the campaign in Kosovo. In doing this, the chapter attempts to provide answers to two primary questions: (a) how has NATO's authoritative decision to intervene in Kosovo contributed to the development of international law? And (b) can the resort to force by NATO in Kosovo and the means employed by NATO, once the decision to resort to force had been reached, justifiable under international law? Faced with the atrocious crimes against humanity or genocide, what interest will tip the scale and lead to a decision to intervene using military force or not? Will the greater concern be Westphalia esteem for the political and territorial sovereignty of the state within which these international crimes unfold, or will the defense of individual human rights be

determinative?[269] Would humanitarian intervention be better defined after Kosovo? Would it become less or more controversial when the question of legality is considered? The decision to intervene raises a difficult set of moral, political, legal, and military operational issues; it is neither simple nor settled. One might infer from the literature addressing the Kosovo case that a good number of writers share the perspective that it has become synonymous with the concept of humanitarian intervention; whether in support of the NATO campaign or otherwise. Hence, the discussion of the events that occurred in the wake of the NATO's Kosovo campaign will be superficial without due considerations of the lexis of humanitarian intervention and international humanitarian law.

4.1 The Concept of Humanitarian Intervention

Before the shift of international attention to the war against terrorism following the 11 September 2001 attacks on the United States, it was the debate on the 'right of humanitarian intervention' that had dominated international relations for a decade.[270] Yet, humanitarian intervention has remained one of the primary international security problems of today.[271] Humanitarian intervention as Evan puts it comprises the "question of when, if ever, it is appropriate for states to take coercive action, and in particular coercive military action against another state for the purpose of protecting people at risk in that other state".[272] The subject of intervention is one laced with remarkable

[269] Simon de St Claire, 'Intervention vs sovereignty: Kosovo Conflict', *Saint Group*, Language and Culture, 2007, pp.1 See also http://www.saint-claire.org/InterventionvsSovereignty viewed: July 2nd 2011.
[270] M. Fixdal and D. Smith, 'Humanitarian Intervention and Just War', *Mershon International Studies Review,* Vol. 42, No. 2, 1998, pp. 283-312
[271] Ibid., 283.
[272] G. Evans, 'Banishing the Rwanda Nightmare: The Responsibility to Protect', (March 31, 2004)

controversies, though not all interventions involve the use of force.[273] For the purpose of this thesis however, the kind of intervention we are concerned with is that which entails the use of military force and may be used interchangeably with "humanitarian war". In this context Stowell defines humanitarian intervention as "reliance upon force 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 within reason and justice".[274] This term has gradually increased its features in international relations since after the Cold War. The idea however, did not arise with the conflict in Kosovo. Literature in international law reveals that it traces back to the sixteenth and seventeenth century classical writers on international law, particularly in their discussions on just wars[275]. Hugo Grotius in his works considered the reality of humanitarian intervention. His ' De Jure Belli ac Pacis' from 1625 provided an endorsement of what was in reality a right of humanitarian intervention. Grotius' works is evidence that the concept of humanitarian intervention is older than the writer. One prominent feature of the literature on humanitarian intervention is the reference to the just war theory.[276] In support of this view, Matheson takes our attention to Professor Elshtain's claim that "the most difficult question for contemporary international lawyers with respect to humanitarian

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See http://www.pbs.org/wgbh/pages/frontline/shows/ghosts/etc/protect.html.

[273] *See* M. N. Shaw, 'International Law', *Cambridge University Press*, 6th ed., 2008, p.1147.

[274] Stowell, Ellery C., 'Intervention in International Law'. Washington, D.C: John Bryne & Co. p. viii, 558.

[275] Şaban Kardaş, 'Humanitarian Intervention: The Evolution of the idea and Practice', *Journal of International Affairs* Vol. 6, No. 2, 2001, p. 2.

[276] *See* M. Dixon, 'Textbook on International Law', 6th ed., *Oxford University Press*, 2007, p.310,311; *See* J. B. Elshtain, 'Third Annual Grotius Lecture at The American Society of International Law and The International Legal Studies Program of the American University Washington College of Law', *American University International Law Review*, Vol.17, 2001, pp. 27-33. *see also* M. N Shaw, 'International Law', *Cambridge University Press*, 6th ed., 2008, pp. 1119-1122, 1167; *See* M. Fixdal and D. Smith, 'Humanitarian Intervention and Just War', *Mershon International Studies Review*, Vol. 2, No. 2, 1998, pp. 283-312;

intervention has been the question of who may authorize the use of force in pursuit of humanitarian aims; an issue that echoes the historical just war question of right authority".[277] Again the just war theory is referred to in a discourse of humanitarian intervention, leading to my understanding that it is indeed a relevant concept to consider in this section of this chapter.

4.1.1 Just War

According to Fixdal and Smith, "Just War is the name for a diverse literature on the morality of war and warfare that offers criteria for judging whether a war is just and whether it is fought by just means.[278] This tradition, thus, debates our moral obligations in relation to violence and the use of lethal force. The thrust of the tradition is not to argue against war as such, but to surround both the resort to war and its conduct with moral constraints and conditions".[279] "The just war tradition usually revolves around two crucial points: the justness of a war, and the justness of the way that war is fought. These two points - *jus ad bellum and jus in bello*, respectively define the debate over whether a war is moral."[280] The roots of the just war doctrine reach back to the writings of Saint Augustine and Grotius.[281] It was defined by St Augustine as retribution for "injuries suffered where the guilty party had refused to make amends. Aggression was

[277] M. J. Matheson, 'Just War and Humanitarian Intervention: Comment on the Grotius Lecture by Professor J. B. Elshtain', *American University International Law Review*, Vol.17, Issue 1, 2001, pp. 27-33.
[278] M. Fixdal and D. Smith, 'Humanitarian Intervention and Just War', *Mershon International Studies Review*, Vol. 2, No. 2, 1998, pp. 285.
[279] Ibid., pp. 285-286.
[280] G. J. Bass, 'Jus Post Bellum', *Philosophy and Public affairs*, Vol. 32, issue 4, 2004, pp. 384-412.
[281] *See* M. Dixon, 'Textbook on International Law', 6th ed., *Oxford University Press*, 2007, p. 310. For further reading, see M. Walzer, 'Just and Unjust Wars: A moral Argument with Historical Illustrations, 2nd edn., New York, 1992. *See* M. N Shaw, 'International Law', *Cambridge University Press*, 6th ed., 2008. See also M.Walzer, 'Arguing about War', Yale University Press, 2004.

unjust, hence war was to be embarked upon to punish wrongs and restore the peaceful status quo but no further". [282] Simply put in Shaw's words, the doctrine of the just war "arose with the increasing power of Christianity and declined with the outbreak of the inter-Christian religious wars and the establishment of an order of secular sovereign states".[283] By the eighteenth century the governing doctrine was the sovereign right to resort to war. Every state possessed the right to go to war at will and international law could only regulate the conduct in war without actually interfering with the will of states to pursue it.[284] Dixon states that the "sovereign right to resort to war, founded on state practice, governed international relations until the birth of the League of Nations in 1919.[285] The League however, did not intend to abolish war or prohibit the use of force, but to set limits that would reduce it to tolerable levels. The interwar years confronted the League with a constant challenge to achieve the total prohibition of war in international law and this ultimately led to the signing in 1928 of the General Treaty for the Renunciation of War (the Kellogg–Briand Pact).[286] This marked a significant development in the law of force.[287] Over time, the details of the just war theory have undergone some changes and controversies, but the basic principles of *jus ad bellum*

[282] *See* M. N Shaw, 'International Law', *Cambridge University Press*, 6th ed., 2008, P. 1119, giving the history of the just war tradition: "The concept of just war was revived in the twelfth century and became widely accepted during the Christianization of Europe and mirrored elements from the Roman and Greek Philosophy"… "It was revised by Saint Thomas Aquinas in the thirteenth century as punishment for the "subjective guilt of the wrongdoer rather than the objectively wrong activity"; he conceived that war could be justified provided it complied with divine will and was waged by the sovereign authority for a right cause"; *See also* M. Dixon, 'Textbook on International Law', 6th ed., *Oxford University Press*, 2007, p. 310, still on the discussion of the just war tradition: "Initially the just war doctrine was refined so that states would be acting legally if it believed it had a just cause, then as state practice came to be regarded as the ultimate source of international with the rise of European-nation states, the doctrine began to change. It eventually disappeared from international law with the advent of positivism and the establishment of the European balance of power system after the Peace of Westphalia".
[283] Ibid., p. 1121.
[284] M. Dixon, 'Textbook on International Law', 6th ed., *Oxford University Press*, 2007, P. 310.
[285] Ibid., p. 311.
[286] M. N Shaw, 'International Law', *Cambridge University Press*, 6th ed., 2008, P. 1122.
[287] M. Dixon, 'Textbook on International Law', 6th ed., *Oxford University Press*, 2007, P. 311.

and *jus in bello* have stayed very much the same.[288] "Theorists distinguish between the rules that govern the justice of war (*jus ad bellum*) from those that govern just and fair conduct in war (*jus In bello*) and the responsibility and accountability of warring parties after the war" (*jus post bellum*). [289]

4.1.1.1 Jus ad bellum

Jus ad bellum prescribes the laws governing the resort to war. It focuses on the conditions under which the use of military force is justified and recommends that the following conditions must be met for the resort to war to be justified.[290] (a) "Right authority: the resort to force can only be initiated by a legitimate authority.[291] (b)Just cause: there must be a just cause before the use of force can be permitted, usually in self-defense or act of aggression.[292] (c)Right intention: in war it is not enough to have a just cause and a set of goals, but also the motive for responding to the cause and taking up the goals must be checked too. (d)Last resort: war must only come as the last viable alternative.[293] (e)Proportionality: it must be established that resorting to war will do more good than harm. (f)Reasonable hope: there must be reasonable grounds for believing the cause can be achieved. (g)Relative justice: no state can act as if it

[288] M. Fixdal and D. Smith, 'Humanitarian Intervention and Just War', *Mershon International Studies Review,* Vol. 2, No. 2, 1998, pp. 286.
[289] Ibid.
[290] M. N Shaw, 'International Law', *Cambridge University Press*, 6th ed., 2008, P. 1167.
[291] *See* M. Fixdal and D. Smith, 'Humanitarian Intervention and Just War', *Mershon International Studies Review,* Vol. 2, No. 2, 1998, pp. 291; "This issue is, of course, crucial in humanitarian intervention because a decision to intervene may contravene a state's claim to sovereignty"…
[292] *See* M. Fixdal and D. Smith, 'Humanitarian Intervention and Just War', *Mershon International Studies Review,* Vol. 2, No. 2, 1998, pp. 286, 295.The right to self-defense is the most widely accepted reason for using military power... "The classical tradition approved of four reasons for resorting to the use of force: self-defense, defense of allies, taking back (or helping allies to take back) what was lost in a previous war; or punishing a transgression".
[293] Ibid. *See also* M. Walzer, 'Just and Unjust Wars: A moral Argument with Historical Illustrations, 2nd edn., New York, 1992.

possesses absolute justice".[294] (h)Open declaration: an explicit formal statement is required before resorting to force.[295] Walzer offers that the "responsibility to resort to war rests on the key members of the governing party most centrally involved in the decision to go to war".[296]

4.1.1.2 Jus in bello

Jus in bello seeks to regulate the conduct of hostilities.[297] . Elshtain describes *jus in bello* as the means by which force is used once the decision to use it is made.[298] It addresses such issues related with conduct during the war. In other words it is the justice in war. Kolb states that "*jus in bello* governs the conduct of belligerents during a war, and in a broader sense comprises the rights and obligations of neutral parties as well".[299] The following are the conditions that must be met for war to be justified on the grounds of *jus in bello*. (a) "Discrimination": noncombatant must be given immunity and protection. (b) "Proportionality": the use of force must do more good than harm.[300] The scope of *jus in bello* covers questions as methods to be employed during war. It provides the principle of noncombatant immunity, thereby forbidden to launch attacks

[294] Ibid.
[295] Ibid.
[296] B. Orend, 'Just and Lawful Conduct in War: Reflections on Michael Walzer', *Law and Philosophy*, Vol. 20, No. 1, 2001, pp. 1-30.
[297] M. N Shaw, 'International Law', *Cambridge University Press*, 6th ed., 2008, P. 1167.
[298] *See* J. B. Elshtain, 'Third Annual Grotius Lecture at The American Society of International Law and The International Legal Studies Program of the American University Washington College of Law', *American University International Law Review*, Vol.17, 2001, p. 30.
[299] R. Kolb, 'Origin of the twin terms jus ad bellum and jus in bello', International Review of The Red Cross, No. 320, 1997. See <http://www.icrc.org/eng/resources/documents/misc/57jnuu.htm> viewed: August 30, 2011.
[300] *See* M. Fixdal and D. Smith, 'Humanitarian Intervention and Just War', *Mershon International Studies Review*, Vol. 2, No. 2, 1998, pp. 286.

on a purely civilian target.[301] The degree to which this must be applied introduces another set of controversies as differing schools of thought argue from their very own perception. Critics continue to investigate the just war theory for reasons such as the insufficient nature of the noncombatant. They argue that the very idea of just war contradicts the concept of *jus in bello*, noting that Just wars are moral campaigns and as such must be won at any cost: thus they tend to be needlessly extended in the search for total victory. Again Walzer identifies that "the responsibility of the conduct in war rests on the states armed forces".[302] In other words anyone involved in formulating and executing military strategy during wartime bears responsibility for any violation of the rules of *jus in bello*.[303]

4.1.1.3 Jus post bellum

One might define *jus post bellum* as the justice after war. Bass claims that not much has been said about the aftermath of wars. He identifies that what happens after a war is over is very much important to the justice of the war itself. Thus it is important to "theorize postwar justice for a more complete theory of just war".[304] Walzer suggests that there must be an ethical exit from war while citing that more work is necessary in both the theory and practice of peacemaking, military occupation, and political reconstruction at the end of a war. For instance as with the postwar situations in Kosovo, East Timor and Iraq.[305]*Jus post bellum* is connected with *jus ad bellum*, in that

[301]*See* For more details on Jus in Bello: M. Walzer, 'Just and Unjust Wars: A moral Argument with Historical Illustrations, 4th edn., New York, 2006, p. 43.
[302] B. Orend, 'Just and Lawful Conduct in War: Reflections on Michael Walzer', *Law and Philosophy*, Vol. 20, No. 1, 2001, pp. 3.
[303] Ibid.
[304] G. J. Bass, 'Jus Post Bellum', *Philosophy and Public affairs*, Vol. 32, Issue 4, 2004, p. 384.
[305] M.Walzer, 'Arguing about War', Yale University Press, 2004, p. xiii.

the end of a war must bring about the desired outcome; whether in self-defense, prevention of aggression, stopping genocide or as the case may be.[306] Walzer suggests that it is not enough to win a war especially in the cases of humanitarian intervention. He points out that there are some responsibilities that must come with winning the war. As wars come with a great deal of collateral damage, it will be the responsibility of the winners to help or at least assist with the reconstruction and rehabilitation of the defeated nation. For example he cited the cases of Kosovo, saying that since the aim in Kosovo was a regime change then it was also the responsibility of NATO to ensure that Kosovo was reconstruction of the state and the provision of basic amenities.[307] In summary, the just war tradition cannot be complete without the considerations of *jus post bellum*. It is therefore important that the conditions of *jus post bellum* are met to certify that a war is truly just.[308]

The just war tradition has been criticized right from its early days.[309] Kant a prominent critic of the just war theory shares his view suggesting that "interpreting the concept of international right as the right to go to war would be meaningless, this would make it a right to determine what is lawful not by means of universally accepted external laws, but by biased maxims backed up by physical force."[310] For Kant, legitimizing war like the just war theory does should never arise. According to Annan, "the legal status of

[306] Ibid., p. 385.
[307] *See* M.Walzer, 'Arguing about War', Yale University Press, 2004, pp. 18-22.
[308] Michael Walzer has written extensively on wars, the just war tradition and humanitarian intervention. *See* 'Just and Unjust War', 'Arguing about War'.
[309] M.Walzer, 'Arguing about War', Yale University Press, 2004, p. xii.
[310] I. Kant, 'Perpetual Peace: A Philosophical Sketch', in *Political Writings*, ed. H. Reiss, Cambridge University Press, 1991, p.106.

humanitarian intervention poses a profound challenge to the future of global order".[311] "The central question is easy to formulate but notoriously difficult to answer: should international law permit states to intervene militarily to stop a genocide or comparable atrocity without Security Council authorization"?[312] The question has acquired even greater significance in the wake of military intervention in Kosovo and Iraq and nonintervention in the Sudan".[313] Humanitarian intervention usually aims to alleviate such sufferings and violation of human rights caused by the conflict in a troubled state, but with sovereignty at the center of international law, it is not quite an easy task to accomplish without inciting fierce debates amongst stakeholders in the international system. One might infer that the Kosovo case is one of such cases where the debate on humanitarian intervention has become a debate of humanitarian rights versus sovereignty of state.

4.2 Rights versus Sovereignty

The Kosovo crisis is an accurate illustration of how ethnic/internal state conflicts can progressively involve the international community. It has become common place that most cases of ethnic conflict translate into some form of human suffering. This is to say that most ethnic conflicts are like open grounds upon which fierce potentials of human rights violation breed. The world has witnessed so many of this kind of conflict, still some go unnoticed or ignored and we can only infer that some ethnic conflicts are more

[311] *See* UN Press Release SG/SM/7136, (Sept. 20, 1999) (Kofi Anan explaining that humanitarian intervention presents a "core challenge to the Security Council and the United Nations as a whole in the next century"); *see also* D. J. Bederman, 'National Security: Globalization, International Law and United States Foreign Policy, *Emory Law Journal*, Vol. 50, 2001, p. 717 (" humanitarian interventions have… become a central issue of the foreign policies of many nations, great powers and small nations alike").
[312] Ibid
[313] Ibid.

severe than the others; earning them a slot on the international agenda .[314] The case of Human Rights violation would not be a new subject in the Kosovo crisis. The displacement of ethnic Albanians from their homes, their exclusion to community services and the continuous repression of their fundamental human rights were reported upon extensively over some six years even by the United Nation Special Rapporteur on Human Rights in the Former Yugoslavia.[315] As a result the UN Commission on Human Rights, its Sub-Commission, the UN General Assembly and other bodies condemned the acts of the FRY; although no necessary actions were immediately considered to ensure a lasting solution to these breaches.[316] Thus, it will not be out of place to point out UN's failure to assume responsibility in curbing these infringements on human rights. The decision of NATO on 13 October 1998 to employ force in Yugoslavia and its actualization on 24 March 1999 has been termed a violation to international law.[317] NATO claimed that seeking the Security Council's authorization was not possible because a veto from Russia and China was rather obvious; which would have automatically negated a resolution authorizing the war.[318] They argued that U.N. approval (like the case in Iraq) was not necessary in the case of Kosovo, and that NATO support was sufficient to legitimize the military intervention claiming that the events in

[314] Şaban Kardaş, 'Humanitarian Intervention: The Evolution of the idea and Practice', *International Affairs* Vol. 6, No. 2, 2001, p.2.
[315] Marc Weller, 'The Rambouillet Conference on Kosovo', International Affairs (Royal Institute of International Affairs) Vol. 75, No. 2, 1999, pp. 211-251.
[316] *See* Walter Kälin Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Follow-up visit to the mission to Serbia and Montenegro (including Kosovo) in 2005. See also http://www2.ohchr.org/english/issues/idp/index.htm viewed: August 17th 2011
[317] *See* Jonathan I. Charney, 'Anticipatory Humanitarian Intervention in Kosovo', American Journal of International law, Vol. 93, Issue 4, 1999. Pp. 834-841. See also Richard A. Falk, 'Kosovo, world Order, and the Future of International Law', The American Journal of International Law, Vol. 93, No. 4, 1999. Pp. 847-857.
[318] See Daniel H. Joyner, 'The Kosovo Intervention: Legal Analysis and a More persuasive Paradigm', European Journal of International Law, Vol. 13, No. 3, 2002. Pp. 597-619.

Kosovo necessitated an "international humanitarian emergency".[319] The NATO campaign however, was a violation to the explicit terms of the United Nations Charter and Security Council practice and the terms of violation arise from the importance of state sovereignty outlined in the Charter of the United Nations where states are defined as being "supreme and sovereign within their own territory".[320] Schwabach concurs to this argument stating that "it is the absence of the Security Council's 'green light' (at best, the Security Council provided amber light) that casts doubt on the legality of NATO's war against Yugoslavia".[321] This is also agreed by O'Connell asserting that "NATO's subsequent use of force in Yugoslavia was inconsistent with both the explicit terms of the United Nations Charter and Security Council practice".[322] Furthermore, Article 2(4) of the UN Charter states the central principle of international law regarding the use of force which provides as follows:

> "All Members (of the United Nations) 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".[323]

Article 2(4) implies the context of the illegal use of force by states to another state as a breach to international peace and security, and can only be implemented by the United Nation Security Council's consent. However, Greenwood notes that Article 2(4) should be read in context, as the purpose of the UN Charter is also based on promoting human

[319] Christopher Greenwood, 'International Law and the NATO Intervention in Kosovo', *The International and Comparative Law Quarterly*, Vol. 49, No. 4 (Oct., 2000), pp. 926-934.
[320] See Chapter VII of the UN Charter, Article
[321] Aaron Schwabach, 'Kosovo: Virtual War and International Law', *Law and Literature*, Vol. 15, No. 1 (Spring, 2003), pp. 1-21.
[322] Mary Ellen O'Connell, 'The UN, NATO, and International Law after Kosovo', *Human Rights Quarterly*, Vol. 22, No. 1 (Feb., 2000), pp. 57- 89.
[323] SCR 1199,penultimate paragraph of the Preamble S; CR 1203,penultimate paragraph of the Preamble. A determination of a threat to international peace was also implicit in SCR 1160.

rights (Preamble to the Charter and Article 1).[324] Most of NATO's member states have argued that the situation in Kosovo was exceptional and should have no bearing on the future need for Security Council consent. A good number of the Clinton Administration's top officials have noted that "they do not recognize the necessity for Security Council authorization when NATO takes enforcement action".[325] NATO took the position that the infringement upon humanitarian rights outweighed the importance of state sovereignty. Other international critics opposed this viewpoint and stated NATO itself had committed illegal acts in violation of international laws of war.[326] It is obvious at this point that the main argument of the NATO campaign legality issue centers on sovereignty and humanitarian rights.

4.2.1 State Sovereignty

State sovereignty is the framework on which the United Nations was founded. It is a concept that endorses the idea that states are supreme within their own territory. It will be inferred from the UN Charter that States are prohibited to carry out acts of aggression against other states, but are free within their own borders to do what they liked. This means that "states are the protectorate of those within the state".[327] However, what if instead of protecting, the state promotes conflict against its own people – for example its ethnic minorities? Who do the people turn to then?[328] According to the UN Charter, the supremacy of a state in its own territory translates to a supreme law making

[324] Christopher Greenwood, 'International Law and the NATO Intervention in Kosovo', *The International and Comparative Law Quarterly*, Vol. 49, No. 4, 2000, p. 926.
[325] Mary Ellen O'Connell, 'The UN, NATO, and International Law after Kosovo', *Human Rights Quarterly*, Vol. 22, No. 1, 2000, p. 57.
[326] Humanitarian Intervention Post-Kosovo: Possibilities of Becoming a New Rule of Customary international Law. <http://www.a1thesis.com/humanitarian_intervention.htm.
[327] Ibid.
[328] Ibid.

body. It would be expected then that no external laws can be imposed on a state or external control by another state. Should this really be the case then, would the signing of treaties and adhering to custom by a state not mean giving up its sovereignty or simply put; is it just a compromise?[329] It is important that this issue is addressed in order to explore the legitimacy of humanitarian intervention. Yet, international law is binding on states even with their sovereign status that disallows for external laws to be imposed on them. For this reason then, I dare point out that in fact states may not be sovereign and the doctrine of state sovereignty is becoming of little relevance.[330] By agreeing to international laws therefore, are states voluntarily giving up their sovereignty? And by this, will NATO's emphasis on the protection of human rights while bypassing the United Nations' approval still pose a violation to international law?

4.3 Critics and Proponents of the NATO Campaign in Kosovo

The critics of the NATO/Kosovo campaign have come up with several other issues outside the NATO insubordination of the U.N. Security Council. The issues may be summarized thus; (a) the lack of evidence to certify the authenticity of the genocide claim by NATO, (b) NATO acted beyond its Charter when it decided to engage in the affairs of a non-member state, (c) the campaign showed the aggressive and imperialistic tendencies of the Americans.[331] New hypothesis come up every day and NATO keeps getting slammed about intervening in Kosovo. That notwithstanding, this event has caused great ripples in the status of international law focusing on the applicability of

[329] Ibid.
[330] Ibid.
[331] Humanitarian Intervention Post-Kosovo: Possibilities of Becoming a New Rule of Customary International Law http://www.a1thesis.com/humanitarian_intervention.htm.

humanitarian intervention outside the U.N. framework and the impact of massive human rights violations to international peace and security.[332] According to Teson, the legal literature on the Kosovo crisis features three broad trends; the first of which totally condemns the military intervention by NATO, dubbing it illegal- Henkin, Gowland-Debbas, O'Connell, Brownlie & Apperley, Joyner.[333] The second trend view it as legal on the doctrine of humanitarian intervention- Reisman, Mertus, Pellet, Chinkin, Wedgwood, while the last trend suggest that although NATO's actions in Kosovo was illegal, there is some agreement that it augurs of future legality Charney, Cassese, Lowe.[334]

According to Greenwood, "the resort to force by NATO was consistent with international law and was based upon a right of humanitarian intervention which is applicable in a case where there is an extreme and immediate threat of humanitarian disaster which the use of force is designed to avert".[335] International law has evolved

[332]Ibid.

[333]*See* F. R. Tesón, 'Kosovo: A Powerful Precedent for the Doctrine of Humanitarian Intervention', *Amsterdam Law Forum,* Vol. 1, No. 2, 2009. Available at: http://ojs.ubvu.vu.nl/alf/article/view/62/119. Viewed: September 3, 2011. *See also* Mary Ellen O'Connell, 'The UN, NATO, and International Law after Kosovo', *Human Rights Quarterly*, Vol. 22, No. 1, 2000 and Louis Henkin, 'Kosovo and the Law of Humanitarian Intervention', The American Journal of international law, Vol. 93, No. 4, 1999, pp. 824-828

[334] Ibid., See for example Reisman W. Michael, ' Kosovo's Antinomies', *Faculty Scholarship Series,* Paper 1017. 1999 <http://digitalcommons.law.yale.edu/fss_papers/1017> viewed: 17th August 2011. See also J. Mertus, 'Examining the Legality of the NATO Bombing of Yugoslavia', Vol. 41, No. 5, *William & Mary Law Review* 1743 (2000). See also Pellet, 'Brief remarks on the unilateral use of force', *European Journal of International law*, Vol. 11, Issue 2, 2000, pp. 385-392. See also Christine Chinkin, 'The Legality of NATO's Action in the Former Republic of Yugoslavia (FRY) under International Law', *The International and Comparative Law Quarterly*, Vol. 49, No. 4 (Oct., 2000), pp. 910-925. See for example A. Cassese, Ex iniuria ius oritur: are we moving towards international legitimation of forcible humanitarian countermeasures in the world community'? *European Journal of International law*, Vol. 10, Issue 1, 2000 pp. 23-30 see also, J. I. Charney, 'Anticipatory Humanitarian intervention in Kosovo', *American Journal of International Law*, Vol. 93, Issue 4, 1999 pp. 834-841 see also, Vaughan Lowe, 'International Legal Issues Arising in the Kosovo Crisis', *The International and Comparative Law Quarterly*, Vol. 49, No. 4 (Oct., 2000), pp. 934-943.

[335] C. Greenwood, 'International Law and the NATO Intervention in Kosovo', *The International and Comparative Law Quarterly*, Vol. 49, No. 4, 2000, pp. 926-934.

over the years and has reached the point where the internal affairs of a state concerning its own population stretch beyond its boundaries especially with matters concerning the violation of human rights. The Charter creates room for two conditions where the use of force is legal. First, Article 51 "preserves the inherent right of the individual or collective self-defense in the face of an armed attack against a State".[336] Secondly, "the Charter allows for the use of force by the Security Council or by a regional organization or group of States authorized to use force by the Security Council".[337] None of these conditions was applicable to the use of force in Kosovo. Kosovo however was not an independent State and the use of force by the FRY against the population in Kosovo was not an armed attack upon a State.[338]The NATO intervention continues to spring mixed reactions across various groups. Some like the former United States President Clinton stated that the aim of NATO's action was to prevent a humanitarian catastrophe and preserve stability in a key part of Europe.[339] He notes that to let Serbian aggression go unpunished will encourage leaders in other troubled areas to pursue dangerous policies.[340] In addition, Anne Orford, stated that the absence of such prior authorization by the United Nation Security Council, a state, collectively or unilaterally using force to put an end to atrocities when the necessity is evident and the humanitarian intention is clear is likely to have its action pardoned.[341] Others, like Charney, argue otherwise claiming that states or actors have their own agenda but expressly base their actions on

[336] See UN Charter Article 51
[337] Ibid.,
[338] C. Greenwood, International Law and the NATO Intervention in Kosovo', *The International and Comparative Law Quarterly*, Vol. 49, No. 4, 2000, p. 926 .
[339] R. Wedgewood, 'NATO's Campaign in Yugoslavia', *The American Journal of International Law*, Vol. 93, No. 4, 1999. Pp. 828-834.
[340] Ibid
[341] Anne Orford, 'Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law', *Cambridge University press*, 2003, pp. 42.

the right of humanitarian intervention. In the absence of such a linkage by the intervening states, the actions can hardly serve as *opinio juris* in support of such a right.[342] For example, the intervening of East Pakistan by India, claiming it was protecting its citizens while it was clearly condemned by a large majority in the UN General Assembly. For Robert Fisk, it was a criticism of NATO's action, asking how much longer we had to endure the folly of NATO's bombings in the Balkans.

> "In its first fifty days, the Atlantic alliance failed in everything it set out to do. It failed to protect the Kosovo Albanians from Serbian war crimes. It failed to cow Slobodan Milosevic. It failed to force the withdrawal of Serb troops from Kosovo. It broke international law in attacking a sovereign state without seeking a U.N. mandate. It killed hundreds of innocent Serb civilians-in our name, of course-while being too cowardly to risk a single NATO life in defense of the poor and weak for whom it meretriciously claimed to be fighting. NATO's war cannot even be regarded as a mistake; it is a criminal act"[343].

Hilpold differs with Fisk arguing that with the dissolution of Yugoslavia, the principles of *uti possidetis* was invoked which incidentally caused the internal boundaries to gain the status of external frontiers. This, he explained, meant that the autonomous nature of Kosovo could be discarded due to the events that occurred, leading up to the dissolution of Yugoslavia.[344] He also further explained that the intervention in Kosovo was thereby not only necessary but also legal, stating that Kosovo had no place invoking the interpretation of international law that condemns the intrusion and violation of state sovereignty as it was not a legal or independent state but simply had frontiers which were governed by international law in accordance with the principle of *uti possidetis.*[345]

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[342] Jonathan I. Charney, 'Anticipatory humanitarian intervention in Kosovo', *The American Journal of International Law*, Vol. 93, Issue 4, 1999, pp. 834-841

[343] Robert Fisk, 'Who Needs NATO? NAT O-Yugoslavia Conflict', The Progressive INC, July 22, 1999, see http://findarticles.com/p/articles/mi_m1295/is_7_63/ai_54968178/ Viewed: July 22nd 2011

[344] Peter Hilpold, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?' The *European Journal of International Law,* Vol. 12, Issue 3, 2001. Pp. 437-468.

[345] Ibid

Furthermore, he argues that the case of Kosovo qualifies the concept of humanitarian intervention and perhaps indicates new trends in international law, or more precisely, a development in international law.[346]

The critics dub the NATO campaign against Serbia an act of aggression according to the United Nations' Charter Article 2; paragraph 4. From their respective points of view, the ICJ's opinion on the US versus Nicaragua case which indicated that the restriction on the use of military force was not merely a treaty call but also of customary international law, reaffirmed that the use of force may only be permitted in cases of self-defense under Article 51 of Chapter VII.[347] Another point of argument for the critics is that NATO's campaign was carried out at a time when humanitarian considerations were not a popular feature. They claim that NATO took a humanitarian stand only to mask their true intention of procuring Yugoslavia's compliance to the Rambouillet Accords. Furthermore, they fear that the laws of war were actually violated as the means used by NATO during the campaign did not satisfy the proportionality requirements of *jus ad bellum and jus in bello*.[348] To them both the jus ad bellum and jus in bello had been violated. Charlesworth supports this claim arguing that

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[346] Ibid., p. 442

[347] *See* for example L. Henkin, 'Kosovo and the Law of Humanitarian Intervention', *The American Journal of international law*, Vol. 93, No. 4, 1999, pp. 824-828 *see also* I. Brownlie & C. J. Apperley, 'Kosovo Crisis Inquiry: Further Memorandum on the International Law Aspect', *International and Comparative Law Quarterly,* Vol. 49, Issue 4, 2000, pp. 905-910 see also Mary Ellen O'Connell, 'The UN, NATO, and International Law after Kosovo', *Human Rights Quarterly*, Vol. 22, No. 1 (Feb., 2000), pp. 57- 89.

[348] *See* C. Chinkin, 'The Legality of NATO's Action in the Former Republic of Yugoslavia (FRY) under International Law', *The International and Comparative Law Quarterly*, Vol. 49, No. 4 (Oct., 2000), pp. 910-925. *See also* Ian Brownlie & C. J. Apperley, 'Kosovo Crisis Inquiry: Further Memorandum on the International Law Aspect', *International and Comparative Law Quarterly,* Vol. 49, Issue 4, 2000, pp. 905-910. See also V. Gowlland-Debbas, 'The Limits of Unilateral Enforcements of Community Objectives in the Framework of UN Peace Maintenance', *European Journal of International Law*, Vol. 11, No. 2, 2000, pp. 361-383

international lawyers have not paid attention to the legality of the methods used in the NATO campaign.[349] She writes, "The NATO bombing campaign was conducted at high altitude to prevent NATO casualties. This led to considerable problems of accuracy, with many of the civilian deaths and injuries being caused by technical errors".[350] For her the eagerness to intervene at no cost to the intervenor undermines NATO's humanitarian credentials.[351] In other words, the laws of war were violated in the sense that NATO did not declare war before it went ahead with its air campaign, therefore rendering their target unprepared and defenseless. In the question of proportionality, not a single NATO casualty was recorded, so to these critics it was a matter of video game wars; where an entire territory is taken down strictly by air raid. Should NATO have considered the laws of war and the jus in bellum in particular, it should have at least included a ground strategy.

The proponents of NATO's intervention point out that the UN Charter of Article 2 (4) does not prohibit humanitarian intervention in a bid to advocate territorial integrity but in quest to protect and preserve a population.[352] In view of this, Mertus and Soafer contend that humanitarian intervention does not go against the underlying principle of the United Nations' Charter but upholds its primary purpose, which is to promote the preservation of human rights and fulfillment of fundamental freedoms.[353] In the midst

[349] H. Charlesworth, 'International Law: A Discipline of Crisis', *The Modern Law Review*, Vol. 65, No. 3, 2002, pp. 377-392.
[350] Ibid., p. 383.
[351] Ibid.
[352] See W. M. Reisman, 'Kosovo Antinomies', The American Journal of International Law, Vol. 93, No. 4, 1999. Pp. 860-862.
[353] See Abraham D. Sofaer, 'International Law and Kosovo', Stanford Journal of international Law, Vol. 36, 2000, pp. 1-21. See also Reisman W. Michael, 'Kosovo's Antinomies', *The American Journal of International Law*, Vol. 93, No. 4, 1999. Pp. 860-862.

of the arguments contending humanitarian intervention to be a threat to international peace and security, the critics of legality fail to consider the United Nations Security Council's procedural flaw which subjects the fate of an entire nation to the pronouncement of just one of five permanent members of the UN Security Council who for some unforeseen reasons, may move to veto a resolution permitting the use of coercive action.[354] Through the eyes of the pro-legality group, the crisis in Kosovo reminded the rest of the world of the tragedy in Bosnia. Though it has been stated time and again that NATO acted beyond its jurisdiction in attacking a non-member state, their action can and should be justified based on the confirmation of the gross violation of human rights in Kosovo by the Security Council that it constituted a threat to international peace and security.[355]

This section of this chapter has illustrated the variations in interpretations amongst different groups. These variations however, may be attributed to a range of factors; from discrepancies in perceptions, interpretations and expectations of the function and limits of international law and even law in general to the contravention in values as with sovereignty and human rights.[356] Nonetheless, it is contended that "the traditional balance between sovereignty and human rights is shifting in favor of Human

[354] See Reisman W. Michael, 'Kosovo's Antinomies', *The American Journal of International Law*, Vol. 93, No. 4, 1999, pp. 860-862. See also Ruth Wedgwood, 'Unilateral Action in the UN System', European Journal of International Law, Vol. 11, Issue 2, 2000, pp. 349-359. See also Abraham D. Sofaer, 'International Law and Kosovo', Stanford Journal of international Law, Vol. 36, 2000, pp. 1-21.
[355] See Pellet, 'Brief remarks on the unilateral use of force', *European Journal of International law*, Vol. 11, Issue 2, 2000, pp. 385-392. See also Ruth Wedgwood, 'Unilateral Action in the UN System', European Journal of International Law, Vol. 11, Issue 2, 2000, pp. 349-359. See also R. S. Kirchner, 'Human Rights and International Security: Humanitarian Intervention and International Law', 2008.
[356] N. S. Rodley & B. Cali, 'Kosovo Revisited: Humanitarian Intervention on the Fault Lines of international Law', Human Rights Law Review, Vol. 7, Issue 2, 2007, pp. 275-297.

Rights",[357] as a result of which the call for a reform in international law has been instituted in a bid to integrate potent procedures against dehumanizing acts and atrocities being committed under guise of national sovereignty[358]. For this reason, it will not be surprising for one to say that the time has come, for the concept of sovereignty to be revisited and redefined so atrocities committed under the umbrella of sovereignty will if not totally abolished, reduced to the very minimum.

4.4 Just Cause

To justify the use of force, Hehir claims that the three questions of why, when and how be answered.[359] Hehir suggests that a just war is fought for a just cause. Thus, massive human rights violations is certified a just cause for the use of force and he cites traditional criteria of the just war doctrine to answer the three questions.[360] Just war theorists have recognized a just cause in the Kosovo crisis. The Kosovo situation proved to be downright degrading and humiliating to the individuals who were subject to undue discrimination and cruelty. The violation of basic humanitarian rights led to the intervention by NATO and to just war theorist, the prevention of ethnic cleansing and genocide was indeed a just cause to wage war.[361]. Danner describes Milosevic's actions "as a planned rationality of killing". Hehir refers to this judgement: "If the product of this planned rationality does not constitute just cause, it is difficult to know what the

[357] J. V. Aartsen, (Former Foreign Minister to the Netherlands), Shifting Emphasis, Address to the 54th session of the General Assembly, 24th September 1999, p. 4.
[358] Ibid.,
[359] J. Bryan Hehir, 'Intervention: From Theories to Cases', *Ethics and International Affairs*, Vol. 9, Issue 1,1995, pp.1-13
[360] Ibid., pp.8-9
[361] T.J. Reese, 'Of Many Things, in: America', April 10,1999

category means".[362] So according to the *jus ad bellum*, why NATO decided to intervene was to prevent further violation of basic humanitarian rights and to enforce order in an already volatile region (whose further engagement in crisis could lead to distortion in international peace).

The decision of when to launch the humanitarian campaign was reached on the 13th of October 1998 and was to commence in March 1999. In the light of the theories of just war, enough time was given by NATO for the opposition to prepare. The *jus in bellum* answers the how question and the strategy employed during the entire operation. NATO had decided it would be an air raid. Elshtain is one of those that have argued that the proportionality of the methods applied by NATO was in violation of international law because of the high collateral damage that it involved.[363] The weaponry system of *jus in bellum* states that when weapons are targeted at non- military objective or when a weapon is used in an indiscriminate fashion it is a violation of the principles of distinction.[364] The condition of not taking war prisoners as prohibited by *jus in bellum* was not violated during the intervention. The third aspect of the just war theories the *jus post bellum* may be explored with respect to the aftermath of the war. Every war comes with a degree of collateral damage. The most important issue however, is the reconstruction that commences in all sectors once the war is over. The aim of the war was to prevent the ethnic cleansing and the restoration of order in Kosovo and this was

[362] J. B. Hehir, 'Intervention: From Theories to Cases', *Ethics and International Affairs*, Vol. 9, Issue 1,1995, pp.1-13.
[363] *See* J. B. Elshtain, 'Third Annual Grotius Lecture at The American Society of International Law and The International Legal Studies Program of the American University Washington College of Law', *American University International Law Review*, Vol.17, 2001, pp. 27-33.
[364] D.D. Jividen, 'Jus in bello in The Twenty First Century: Reaping The Benefits And Facing The Challenges of Modern Weaponry and Military Strategy', *Yearbook of International Humanitarian Law*, Vol. 7, 2004, pp. 113-152.

achieved. The UN, NATO, the EU and the Russian troops have since been providing their support and aid since the end of the war.

4.5 Evidence of Change Based on the NATO Intervention

It is true that a lot has been said and it is evident that some claims are factual while others are simply ridiculous. The basic claim of critics was that while NATO is maintaining its humanitarian grounds for its intervention, it is the call of a state to address its citizens however it deemed to as there exist no international consensus on the standards expected of states in dealing with their own subjects. I would certainly disagree with this claim based on the Universal Declaration of Human Rights that was adopted by the United Nations in 1948, which codifies the set of international norms on the internal conduct of states. If the former Yugoslavia remains a member state of the UN then it is expected that it also abides by the UDHR, therefore the infringement on the individual rights of the citizens of Kosovo was a violation of international law.

It is also an established fact that the Kosovo case has been a livewire case, waiting to arrest the slightest opportunity to claim innocent lives. In the words of the former of Papaconstantinou, the former Greek Minister of Foreign Affairs: "centuries in the Balkans do not follow one another; they co-exist', and 'old ideas never die, and if they are dead, they are never buried".[365] One thing that has remained consistent in all the literatures I came across upon my research for this thesis is that the Balkans has always been a troubled region. It appears the indigenes allow history repeat itself over and over

[365] Z. Jankuloski, 'The Kosovo Crisis', *University of Oxford Workshop at Green College,* May 1998, p. 28.

again as they refuse to learn while holding on to ancient tribal hostility. The nations that make up the Balkans remain prisoners of their memories and their unrealistic strategic goals, what they suffered they inflict on others.[366] For almost two decades Kosovo did remain a center of potential crisis in the southern Balkans, threatening to undermine the peace and stability of the region.[367] If it was obvious that Kosovo could trigger other crisis in the Balkans, what then was the delay by the international community for? Why was the rest of the world blind to the happenings before the intervention by NATO? If using force in Kosovo meant that international peace and security will be preserved, then it is obvious NATO saved the rest of the world from a potentially greater catastrophe. As the genocide counters contest the authenticity of NATO's reports on genocide; I dare say these spectators would be satisfied should the case of Kosovo have degenerated to a replica of the case in Rwanda in 1994. They point fingers at NATO asking why it did not intervene in Rwanda and all other areas with similar ethnic issues. I take the stand for NATO, stating that the Kosovo campaign occurred five years after the Rwandan genocide allowing enough time, for the international players truly concerned with international peace and security to go back to their drawing boards and map out ready strategies should a similar situation arise by happenstance.

The issue of NATO's methods during the intervention also became a topic for a heated debate. The critics claim that NATO violated the laws of war (*jus ad bellum, jus in bellum and jus post bellum* respectively) by not formally declaring war so to ensure that their target is ready and not taken unawares. They say that a real war is fought with a ground troop and not just by air raid. I beg to differ; NATO took it upon them to do

[366] Ibid.
[367] Ibid.

what other organizations could not do. Should they not ensure that their men are protected? In my candid opinion, I think a good number of people try to make case after case, trying in all ramification to stamp the Kosovo intervention as illegal. If a single NATO casualty is also considered reason to indict NATO, I dare say then than this argument is baseless. Were we not made to believe that the focus was protecting lives and preserving humanitarian rights? Why then should such issues as NATO casualties be a criterion for justification.

Critics have offered that NATO should be indicted for going against the rules of international law, while others like Charney argue that the intervention sets a precedent for the development of new international law to protect human rights.[368] Hilpold is a supporter of this belief, arguing that legal commentators have attributed the value of precedent to the NATO intervention in Kosovo, noting that it indicates new trend in international law or, more precisely, a new approach in defining international law.[369] The roles played by parties involved, once again reaffirms the conception of international law through the eyes of a process school theorist. The constant changes that events in the international system cause in international law certify McDougal and Lasswell's evolutionary concept of international law. The laws of war stemming from the just war tradition has transitioned to what we know today as the international humanitarian law.[370] In addition the Kosovo case has brought more prominence to areas like the human rights and possible a whole new interpretation of the concept of state

[368] *See* Jonathan I. Charney, 'Anticipatory humanitarian intervention in Kosovo', *The American Journal of International Law*, Vol. 93, Issue 4, 1999, p. 834.
[369] Peter Hilpold, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?' *The European Journal of International Law*, Vol. 12, Issue 3, 2001. P. 442
[370] *See* M. N Shaw, 'International Law', *Cambridge University Press*, 6th ed., 2008, P. 1167.

sovereignty.[371] It is necessary at this point to state that the Kosovo case in my own view has created a precedent to defining a legal support for humanitarian intervention, bringing about an element of the Grotian moment to the development of international law. We can see this in the case of Libya, with the involvement of the international community proceeding to engage Libya in a "humanitarian war" in a bid to disarm the Muammar Gaddafi government. This however was authorized by the UN Security Council. If the world is looking up to NATO to restore order in this region of the world, would NATO not be going beyond its constitution to engage in an attack against a non-member state? Surely, NATO did achieve a goal that we can't all deny. It put an end to the conflict in Kosovo. Little wonder then, that we all look up to it again to police the events in Libya. While the issue of legality keeps tugging at the minds of the legally inclined critics, I would conclude by saying that in a world where a lot of atrocities occur on a daily basis, NATO's defiance to obtain a UNSC authorization to save a suffering population cannot be dubbed illegal according to international law. I would say it was a commendable operation by NATO. Russia and China were going to veto the intervention anyways, so why give them the opportunity to do so? It is however time for the United Nations Security Council to revise its *modus operandi*, taking note of the procedural flaw which places the fates of nations on a veto of just one of five permanent members of the Council to a resolution that may save an entire population through coercive action.

Finally, former United Nations Secretary-General Kofi Annan registered his concern for the remarkable controversies that has trailed the "right of humanitarian intervention"

[371] *See* chapter 4.

both when it happened, as in Kosovo, and when it has failed to happen, as in Rwanda. In his report to the 2000 General Assembly, he "challenged the international community to try to forge consensus, once and for all, around the basic questions of principle and process involved: when should intervention occur, under whose authority, and how".[372] Hence, in response to the challenge, in September 2000 the Government of Canada established the independent International Commission on Intervention and State Sovereignty.[373] The debate on humanitarian intervention transitioned into what we know today as the "Responsibility to Protect" (R2P), another notable development in international law as a result of the authoritative decision making of international actors. The next chapter evaluates the legality of the declaration of the independence of Kosovo and as such answers such questions as the implications of the Kosovo independence on international law. Perhaps significant changes in international law may be observed when considering the case of the independence of Kosovo, for instance with the mention of branches like self-determination, state sovereignty and state recognition.

[372] K. Annan, General Assembly Report 2000, *See* http://www.iciss-ciise.gc.ca/menu-en.asp.
[373] Ibid.

Chapter 5

THE LEGALITY OF KOSOVO INDEPENDENCE

The North Atlantic Treaty Organization's campaign in Kosovo did come to a successful end with the return of order and tranquility to the area. As chapter three explores the legal grounds of NATO's actions in Kosovo; this chapter attempts to answer the question of the legality of Kosovo's independence. A brief recap of events is deemed appropriate at this point to keep fresh in our minds the activities that led to the declaration of Kosovo as an independent state. The earlier chapters have highlighted the issues that triggered the conflict with a stress on religious differences, the eventual outbreak of violence and Milosevic's refusal to surrender. Attempts by the international community notably the Contact Group to get Milosevic to reach a peaceful agreement proved futile and after another failed attempt in Rambouillet, NATO proceeded to put an end to the violence in Kosovo. One might argue that the declaration of independence by Kosovo after a decade can be accredited to the 1999 NATO Air Campaign; a development dubbed by other states as the last disintegration of the Federal Socialist Republic of Yugoslavia.[374] It should be noted, that Kosovo was declared an independent state in 1990 but was denied recognition by the international community because it was

[374] C.Warbrick & McGoldrick, 'Kosovo: The Declaration of Independence', *International and Comparative Law Quaterly*, Vol.57, No.3, 2008, pp.675-690.

not considered a republic in the Former Yugoslavia but a province within Serbia.[375] The more current independence status of Kosovo brings a question to mind; what condition/s did the 2008 declaration of independence by Kosovo satisfy that was not initially met in 1990? According to Article 1 of the Montevideo Convention of 1934, "The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states".[376] This leads to the primary research question of this chapter; (a) how has the Kosovo declaration of independence affected the development of international law?

The declaration of Kosovo's independence is clearly controversial, being recognized by some states and strongly opposed by others.[377] One could argue that the reason the international community did not recognize Kosovo's independence in the 90's was a logical one. According to Ivor, "the international community's support would or might have given rise to demands of other secessionist groups such as the Albanians in Macedonia, a situation which would dangerously threaten the stability of an already fragile region".[378] In addition, should the international community have accepted Kosovo's independence in the 90's, it would have meant the creation of a second Albanian state in Europe and maybe a third if the Albanians in Macedonia decided they

[375] E. Hasani, 'Self-determination, Territorial integrity and International Stability: The Case of Yugoslavia', National Defense Academy (*Institute for Peace Support and Conflict Management, Vienna; in Cooperation with: PfP-Consortium of Defense Academies and Security Study institutes)* 2003, p. 36.
[376] http://www.un.org/en/law/ [viewed 5 July 2011].
[377] See, the UN Security Council debate of 18 February 2008, for some of the differing responses of other states; UN Doc. S/PV.5839.
[378] See The Refugee Studies Programme, 'The Kosovo Crisis', *Green College, University of Oxford,* Paper No. 1, 1998, p.9.

deserved their independence too.[379] However, Kosovo today is an independent state recognized by 75 states, including the UK and 21 other EU Member States.[380] What suddenly became different in 2008 that certified Kosovo worthy of independence? It is from here the controversy of its legality rises. Not only is there an issue of its legality, other important issues arise such as recognition, self-determination and statehood. This chapter explores the current status of Kosovo's independence while it highlights the International Court of Justice advisory opinion on whether Kosovo's declaration of independence is in accordance with international law and the position of other states such as the US, Russia, Serbia, European Union on this issue, and the implications or effects of the Kosovo's declaration to the development of international law.

5.1 Statehood and Recognition

The concept of statehood and recognition are of great importance within international law. The internationally accepted criteria of statehood are laid out in the 1933 Montevideo Convention on Rights and Duties of States. It notes that the state as an international person should possess the following qualifications: "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states".[381] The key standard to appraise the statehood of an entity is the (internal as well as international) *effectivite´* of its government apparatus.[382] Without these it would only be a state in name and not in the true essence of it. Theoretically, the

[379] Ibid.
[380] See *Kosovo Thanks You* website < http://www.kosovothanksyou.com/> [viewed 6 July 2011].
[381] See 'The Montevideo Convention on Rights and Duties of a State', <http://www.cfr.org/publication/15897/montevideo_convention_on_the_rights_and_duties_of_states.html>, last visit: 15.07.2011.
[382] J. D'Aspremont, 'Regulating Statehood: The Kosovo Status Settlement', *Leiden Journal of International Law*, Vol. 20, Issue 3, 2007, pp. 649–668.

existence of a state ought to possess responsibilities and should be privileged to be a member of the international community of states. International lawyers would agree to this emphasizing the need for effective government in the state's ability to enter into relations with other states.[383] Kosovo is arguably a clear case of such instance. It is argued that although Kosovo meets the criteria of a state it is denied recognition by most UN member states. Most states do not recognize Kosovo basing their claim that it does not fully meet statehood criteria because it lacks its own army and its governmental mechanisms to operate effectively. They claim that it is dependent upon the involvement of international organizations such as the EU, UN and NATO, and these organizations are responsible for providing military leadership and a 'rule of law' mission respectively.[384] In other words, without the help of international organizations Kosovo's internal social and economic infrastructure lacks function. In this sense, there is the concern for Kosovo as regards enjoying an effective and sovereign government capable of entering into external relations. Even so, there are those states that have had external relations and became members of an international organization without independence. For example, as Dixon pointed out, in 1945 "India and the Philippines became members of the United Nations without having been recognized as states.[385] Namibia joined several international organizations before its independence, as Palestine which is not a state, represented by the Palestine Liberation Organization (PLO) – became a member of the League of Arab States, the Organization of the Islamic

[383] See J. Crawford, 'The Creation of States in International Law', 2nd ed., *Oxford, Clarendon Press*, 2006, pp. 62-89.
[384] These NATO and EU roles are expressly recognized by the Assembly of Kosovo, in its declaration of independence; *supra* n. 1, para. 5.
[385] J. D'Aspremont, 'Regulating Statehood: The Kosovo Status Settlement', *Leiden Journal of International Law*, Vol. 20, 2007, p. 654.

Conference, and some other Arab organizations".[386] Dugard points out that the need for an entity to be endowed with an operative government and independence to qualify for statehood appears to have been less strictly insisted upon in the recognition process, particularly where the principle of self-determination arises. He notes that the rise of new states after colonialism was arguably questionable, with most of the states not reaching the criteria of statehood.[387] Thus, it is to my understanding that Kosovo under its settlement status underpin a "remedial secession", which is a right to independence in situations resulting to grave violations of basic human rights or the right to internal self-determination. In addition, the European Commission claimed that the independence of Kosovo had no notable negative implications on Serbia even though it entailed secession from the mother state. However, Kosovo's declaration of independence requires legal and political elements of states recognition.

5.2 Recognition

Malanczuk identifies that the concept of state recognition is a complex one as it embraces political, economic and legal factors.[388] Dixon agrees with this claim stating, that the concept of recognition is "essentially political although it may well be based on legal criteria" while suggesting that the concept has remained a feature of the international society.[389] He offers that "it has been the practice of one state to recognize formally the existence of another state or government", whether by *de facto* (accepting

[386] Ibid., p. 655.
[387] J. Dugard, 'Recognition and the United Nations', *Cambridge, Grotius Publications Limited,* 1987, pp. 63-73, 78-79.
[388] P. Malanczuk, 'Akehurst's Modern Introduction to International Law', 7th ed., *Routledge, New York,* 1997, p.82.
[389] M. Dixon, 'Textbook on International Law', 6th ed., *Oxford University Press*, 2007, pp. 126,127.

the fact of) or *de jure* (as of right).[390] Thus, in simpler words, the decision of a state to recognize another state is based on political factors rather than legal factors.[391] As Shaw argues, "recognition is highly political and has been offered in a number of cases for purely political reasons".[392] He argues further that "the act of recognition by one state of another indicates that the former regards the latter as having conformed to the basic requirements of international law as to the creation of a state".[393]

Recognition for those scholars who argue in favor of the declaratory theory draws its argument from the criteria of the Montevideo Convention, which recommends the rights and duties of a state and the criteria to statehood. According to this theory, recognition of a state is nothing more than an acknowledgement of pre-existing legal capacity.[394] In other words, a state is in existence if it satisfies the conditions specified by the Montevideo convention and is a part of the international system which is conferred by rules of international law. But are these conditions enough to indicate if newly formed states are actually states? The answer will be no to a constitutive theorist. This theory posits that a newly formed state should possess effectiveness and legality of recognition to actualize its statehood. As in the words of Shaw, constitutive theory claims that "it is the act of recognition by other states that creates a new state and endows it with legal personality and not the process by which it actually obtained independence".[395] Their main point is that an unrecognized 'state' can have no rights or obligations in

[390] For more information, see M. Dixon, 'Textbook on International Law', 6th ed., *Oxford University Press*, 2007, pp. 126,127.
[391] M. N. Shaw, 'International Law', 6th ed., *Cambridge University Press*, 2008, p. 445.
[392] Ibid., p. 446
[393] Ibid.,
[394] M. Dixon, 'Textbook on International Law', 6th ed., *Oxford University Press*, 2007, p. 127.
[395] M. N. Shaw, 'International Law', 6th ed., *Cambridge University Press*, 2008, p. 445.

international law.[396] In other words, recognition is simply a fact that a state exists, a somewhat criteria to signal a state's participation in the international community, "making the state essential to international personality".[397] Shaw concurs that recognition is constitutive in a political sense in that, "it marks the new entity out as a state within the international community and is evidence of acceptance of its new political status by the society of nations".[398]

Declaratory theory differs to this approach which is more practical in international legal principle of state recognition. This theory asserts that, "the international legal personality of a state does not depend on its recognition as such by other states".[399] This is factual because Article 1 of the Montevideo Convention affirms that "a state exists or does not exist regardless of its recognition or non recognition by states".[400] That means a state is recognized by its compliance of the internationally accepted criteria of statehood, not by the consent of other states. Furthermore, Article 3 of the 1933 Montevideo Convention stated also that "the political existence of the state is independent of recognition by other States".[401] In this respect it is vital to note that declaratory theorists are more pragmatic in the accuracy of their assertion. For instance, the fact that certain Arab states at one time did not recognize Israel did not prevent the latter from making international claims against Israel.[402] Thus, "whether or not a state is

[396] Ibid., p.446.
[397] M. Dixon, 'Textbook on International Law', 6th ed., *Oxford University Press*, 2007, p. 128.
[398] M. N. Shaw, 'International Law', 6th ed., *Cambridge University Press*, 2008, p. 447.
[399] M. Dixon, 'Textbook on International Law', 6th ed., *Oxford University Press*, 2007, p. 127.
[400] Art. 1, Montevideo Convention on the Rights and Duties of States 1933. <http://www.cfr.org/publication/15897/montevideo_convention_on_the_rights_and_duties_of_states.html>, last v visit: 15.07.2011.
[401] ibid., Art. 3.
[402] M. Dixon, 'Textbook on International Law', 6th ed., *Oxford University Press*, 2007, p. 127.

actually recognized by other states, it is still entitled to the rights and subject to the general duties of the system".[403]

In sum over the years practice have shown that the declaratory theory is a better approach to the realities of modern international law.[404] Kosovo is fully entitled to all the privileges and responsibilities of statehood in the international community and within the legal systems of those states that recognize her independence. On the other hand, Kosovo will be restricted in exercising relations with those states that have not offered their recognition. For instance, the state and diplomatic agents of Kosovo will not be entitled to, diplomatic and state immunities, while the international status of Kosovo will be controversial and disputed.[405]

Looking at the recognition of the State of Kosovo as a process school theorist, the decision by some states to recognize Kosovo and others denying the validity of Kosovo as a state, I perceive a trend that is in agreement with the process school theory of international law. On either sides of the case, the stance by different states would be after careful considerations of the implications of recognition and non-recognition; which would ultimately be in the best interest of the states. The decisions therefore, convey strict evidence of an authoritative decision making process by the responsible authorities (usually the governments of the states) to recognize or not to recognize Kosovo. Whatever the case though, there would be consequences in international law as would be supported by the process school of international law, that international law

[403] Ibid., pp.128.
[404] M. N. Shaw, 'International Law', 6th ed., *Cambridge University Press*, 2008, p. 453.
[405] Ibid

keeps evolving to accommodate changes brought about by the decisions of international actors.

5.3 Self-Determination

The declaration of Kosovo independence is heavily built upon the principle of self-determination. But what really is self-determination? What rights does it grant and to whom? Cassese defines self-determination as "the key to entering desirable entities into the club of statehood, as well as the key to insure against the undesirable from within and outside the territory of existing states".[406] According to the Human Rights Committee definition, self-determination is defined "as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights".[407] It is placed "apart from and before all of the other rights" in the Covenants.[408] In addition, self-determination is defined as an inherent right of all peoples and imposes corresponding obligations, and "the rights and obligations concerning its implementation are interrelated with other provisions and rules of international law".[409] It also states in Article 3 that "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[410] The understanding of self-determination is quite a task, knowing it is frequently debated in different context within the international community. Although a number of treaties

[406] A. Cassese, 'Self-determination of People: A Legal Reappraisal', *Cambridge University Press,* 1999. p. 6.
[407] See the text of the General Comment in UN DOC. Para.1 CCPR/C/21/Add.3. Viewed on: 8th August 2011.
[408] Ibid
[409] Ibid., para. 2
[410] United Nations Declaration on the Rights of Indigenous Peoples, GA Resolution A/61/L.67 (2007). Viewed 8th August 2011.

concluded by the USSR in the period before the WWII noted the principle, the decade before the Second World War featured very little practice regarding self-determination in international law.[411] During the Aaland Islands case the principle was however accepted by the International Commission of Jurists and the Committee of Rapporteurs not as a legal rule of international law, but purely a political concept.[412] Another situation which involved the Swedish inhabitants of an island, supposedly part of Finland, was resolved by the League's recognition of Finnish sovereignty coupled with minority guarantees.[413] It was not until after WWII that self-determination was given a consideration to be articulated in the United Nations Charter. This was precisely mentioned for the first time in Article 1 (2) and 55 of the UN Charter. Article 1(2) affirms that one of the purposes of the UN is "to develop friendly relations among nations based on respect for the principle of equal rights and self determination of peoples".[414]

The evidence of the importance of the concept of self-determination can be seen by the amount of materials related to it in the UN and some of the more significant of this material will be briefly noted.[415]Article 55 deals with the promotion of better living standards, quenching of cultural and health problems and universal respect for human rights "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the

[411] M. N. Shaw, 'International Law', 6th ed., *Cambridge University Press*, 2008, p. 251.
[412] Ibid
[413] Ibid., p. 252.
[414] Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945, at art. 1(2) [hereinafter UN CHARTER]. Viewed: 7th July 2011.
[415] M. N. Shaw, 'International Law', 6th ed., *Cambridge University Press*, 2008, pp. 253.

principle of equal rights and self determination of peoples..."[416] It is obvious that the drafters of the Charter put a major spot on self-determination, noting that it is one of the reason the UN was formed. However, its effectiveness is questioned because it fails to revise and expand the principle of self-determination which does not grant it a real binding effect.

The completion of self-determination is complemented by Chapters XI and XII in the Charter, which deal with non-self governing territories, none containing an express reference to self-determination. Article 73 of Chapter XI of the UN Charter outlines the growth of self-government in non-self-governing territories as a "sacred trust". Article 76 of the Charter concerning the international trusteeship system presents a progressive development in the Trust territories towards "self government or independence". In practice, Article 73 falls so short of what is believed to be the present act of self-determination. Moreover, the provisions stipulated in Chapters XI and XII, notably Article 73, support the notion that Article 1(2) of the Charter represents a moderate version of self-determination.[417] Evidently, there exist a right to self-determination under international law but the Charter did little in developing the content in it. It only provides the foundation for equal rights of people among nations to a certain extent. Hence, self-determination is a factor to achieving "universal peace". It featured greatly during the decolonization era, making it possible for the then colonized African and Asian states to gain independence. The Resolution 1514 (XV), the Declaration on the

[416] See Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945, at art. 55. Viewed: 7th July 2011.
[417] See R. Higgins, 'Problems and Process: International Law and How We Use It', Clarendon Press, Oxford, 1994, pp. 112; See Self-Determination: A Legal Reappraisal, supra note 4, at 42.

Granting of Independence to Colonial Countries and peoples, set conditions for the self-determination debate in stressing upon the colonial context and its opposition to secession.[418] Although the self-determination of WWI peace settlements seems clearly to have involved secession, the traditional belief is that self-determination does not embrace secession.[419] This principle was stressed by Secretary General U'Thant in the January 4 1970 press conference where the issue of Biafra and Nigeria was addressed. He stated that the United Nations have never accepted and would never accept the principle of secession for part of its Member State.[420] Self-determination has gradually evolved into the international community from the colonization era to this present day, gaining relevance under the international human rights system. The concept gradually reinforced into the General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the charter of the United Nations,[421] making it acceptable in the international sphere and as a principle under international law. Therefore, it is established that self-determination is under treaty law as well as customary law. Other instances of self-determination can be seen in the case of Quebec in conjunction with the principle of territorial integrity[422] and the judicial discussion of the principle seen in the International Court's advisory opinions on the Namibia versus Western Sahara case.[423] Kosovo can be seen as a case of self-determination, the gross and systematic campaign of human rights violations by the Serbian authorities established the grounds for external self-determination. The

[418] M. N. Shaw, 'International Law', 6th ed., *Cambridge University Press*, 2008, p. 253.
[419] R. Emerson, 'Self-Determination', *American Journal of International Law,* Vol. 65, Issue 3, 1971, pp. 459-475.
[420] Ibid., p. 464.
[421] See the UN Charter General Assembly Resolution 2625 (XXV).
[422] M. N. Shaw, 'International Law', 6th ed., *Cambridge University Press*, 2008, p. 255.
[423] Ibid., p. 254 see also ICJ Reports, 1971, p. 16; 49 ILR, p. 3.

failure of the government to treat all the citizens of Serbia as equals led to the legitimizing of the right to secession on the part of the disaffected group. By this, the state of Serbia had fallen short of expectations of states in accordance with resolution 2625 under the Friendly Relations Declaration of states to its people.[424] According to some scholars, the government failed in its duty to represent the entire population without discrimination in turning a blind eye to the systematic campaign of oppression (entailing widespread discriminatory treatment and human rights abuses and atrocities) that the Kosovar Albanians were confronted with.[425] For them this gave Kosovo the right to secession based on the denial of Kosovar Albanian right to internal self determination. According to Shaw, "self-determination may result in independence, integration with a neighboring state, free association with an independent state or any other political status freely decided upon by the people concerned".[426]

The Kosovo case can be seen as a change to the understanding of secession in international law. Before now, the Security Council had refused to recognize the unilateral secession of a member state, disclaiming the legality of such a process in international law. Katanga's secession from the Republic of Congo and that of Biafra from Nigeria may be cited as examples.[427] However, one might infer that the unilateral secession of Kosovo from Serbia has altered the understanding of secession, in that, a good number of UN member states have recognized Kosovo as an independent and sovereign state regardless of its mother states being a UN member state. This to me

[424] See United Nations General Assembly Res. 2625 (XXV).
[425] G. Wilson, 'Self- Determination, Recognition and the Problem of Kosovo', *Netherlands International Law Review*, 2009 LVI: pp. 455-481.
[426] M. N. Shaw, 'International Law', 5th ed., *Cambridge University Press*, 2003, p. 231.
[427] See R. Emerson, 'Self-Determination', *American Journal of International Law*, Vol. 65, Issue 3, 1971, p. 464.

constitutes a notable change in international law and may be interpreted also as a gradual change in the concept of sovereignty (considering absolute power for sovereign states as in the case of Serbia[428]). Thus, the declaration of independence by Kosovo based on its right to self-determination is an illustration of the continuous development of international law.

5.4 The ICJ's Opinion on Kosovo Independence

The unilateral declaration of independence by Kosovo was not approved by Serbia because it was perceived as a violation to international law. As such, Serbia sought the opinion of the International Court of Justice in line with the UN General Assembly resolution 63/3 in order to decide if the declaration of independence was in conformity with international law. As the highest judicial body of the UN, this would be the first of such cases brought to the Court to deliver its opinion on the legality of a declaration of independence. Its opinion is credence to all UN member states and even the public, most especially the states confronted by secessionist campaigns.

The Court decided on 17 October 2008, that "the United Nations and its Member States are considered likely to be able to furnish information on the question submitted to the Court for an advisory opinion"[429] and gave a deadline for these statements to be presented to the court as 17 July 2009. The Court heard oral statements from 29 state representatives during the course of hearings and filed written statements from 37 states

[428] *See* chapter 1 on the westphalian concept of sovereignty (Serbia as a sovereign states would not have guessed that a regional organization would have such powers to intervene given the notion of non-intervention for sovereign states).
[429] See case concerning Kosovo, International Court of Justice Report, No. 2008/36, 21 October 2008.

including Kosovo (which was under the authors of the unilateral declaration of independence). The Court observed "whether there is any prohibition of declarations of independence in international law, either in general international law or in special rules such as the Security Council resolution 1244(1999). The Court then looked to general international law, and found that no such prohibition could be derived from state or Security Council practice".[430] It also found that the customary international law principle of territorial integrity in which such a prohibition may be implicit is applicable to states only.[431] The Court's opinion was not based on the legal consequences of the declaration of independence; it however offered that "whatever rules of international law might have prohibited a declaration of independence was not applicable to the authors of the declaration of independence, who were acting as the representatives of the people of Kosovo".[432] It did not address the legality issues of the recognition of Kosovo by other states, nor did it offer statements on Kosovo's right to separate from Serbia or whether the population of Kosovo had the right to self-determination giving it a right to secede, or whether the population has a right of 'remedial secession' in the face of the factual situation in Kosovo.[433] In other words, the answer given by the ICJ caught many by surprise as it did not base its reason on essential issues such as the right to self-determination or secession. The Courts respond to this case is as follows as it was 10 votes to 4:

[430] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion), General List No. 141, International Court of Justice (ICJ), 22 July 2010. Para 79 and 80.
[431] Ibid., para 80.
[432] See the ICJ summary concerning Kosovo, ICJ summary 2010/2, 22 July 2010. Viewed: 5th July 2011. See also Talmon & M. Weller, 'Kosovo: The ICJ Opinion-What Next?' *Chatham House,* 2010, p. 6.
[433] See S. Talmon & M. Weller, 'Kosovo: The ICJ Opinion-What Next?' *Chatham House,* 2010, p. 6.

> "the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework adopted on behalf of UNMIK by the Special Representative of the Secretary-General", and that "consequently the adoption of that declaration did not violate any applicable rule of international law".[434]

However this may sound, it is widely misunderstood and misinterpreted because of its narrow scope.[435] In a speech given by the Prime Minister of Kosovo, he claimed that "the ICJ has finally declared that Kosovo is a sovereign, independent state and the Court reaffirmed Kosovo's status in the international community".[436] This was reaffirmed by the claim presented in the various statements and letters to States and international organizations by Kosovo; stating that the ICJ had endorsed Kosovo's independence rather than merely the declaration.[437] To some, the ICJ's opinion has ratified Kosovo's declaration of independence and statehood while some scholars and lawyers oppose to this, claiming that the opinion of the ICJ and most state is rather political than legal. Some judges like Bruno Simma, Abdulqawi Ahmed Yusuf, Leonid Skotnikov, Mohamed Bennouna have argued that the ICJ's opinion lacked essentiality and there were no thorough findings into the question put to it by the General Assembly.[438] They claimed that the ICJ adopted a minimalist approach in exploring the background of the question put to it by the General Assembly; the focus therefore was on the declaration of independence by Kosovo and not the causes, neck deep in the sad succession of the

[434]International Court of Justice Report, No. 2010/25, 22 July 2010. Viewed: 7th July 2011. see more on www.ic-cij.org.
[435] See A. Thorp, 'international Court of justice Advisory Opinion on Kosovo Declaration of Independence', International Affairs and defense section, 2011.
[436] See Hashim Thaci Speech on the Guardian, 2nd September 2010. Viewed: 2nd August 2011 <http://www.guardian.co.uk/commentisfree/2010/sep/02/Kosovans-blair-true-hero>
[437] See S. Talmon & M. Weller, 'Kosovo: The ICJ Opinion-What Next?' *Chatham House,* 2010, p. 7.
[438] See separate opinion by judges Bruno Simma, Abdulqawi Ahmed Yusuf, Leonid Skotnikov, Mohamed Bennouna; see also <http://www.citsee.eu/citsee-story/what-it-did-not-say-secession-after-icjs-opinion-kosovo>

prolonged and atrocious humanitarian crisis; and would lead to the adoption of the Security Council resolution 1244.[439]

Major European powers such as Germany, the United Kingdom and France have made known their position on recognizing Kosovo as a sovereign state. The United States openly announced its position, recognizing and congratulating Kosovo on a bold step towards democracy.[440] These states amongst other supporting states, consistently emphasized the special nature of the case; but the Court would not make any reference to Kosovo being *sui generis* or a special case and consequently not a precedent.[441] Furthermore, the Court examined the question of whether there was any special prohibition that applied directly to this declaration. It found that the only special element in the case was resolution 1244, describing it as creating the *lex specialis.* Presently, 79 UN member states support Kosovo independence including Turkey, regardless of its history with the Kurdish separatist question. However, there are those states that have different stands such as Serbia, Spain, Greece, Romania, Russia, Nigeria, China, Slovakia, and Israel. The main argument of these states, rise from the fear of a ripple effect of separatist movement that the recognition of Kosovo would most likely cause. In an interview with BBC, the Spanish Minister for Europe stated that "he was frustrated that the future of Kosovo was being decided by the world's big powers in breach of international law, and said he feared it would boost separatism".[442] Russia also takes this position claiming that "general international law inhibits Kosovo from declaring

[439] Ibid
[440] See ICJ report on states written proceedings. www.icj-cij.org.
[441] Ibid.,
[442] See news.bbc.co.uk. Monday, 18 February 2008, viewed 15th July 2011.
< http://news.bbc.co.uk/2/hi/europe/7249909.stm>

independence, reminiscing that the UN Security Council declared Northern Cyprus and Rhodesia's independence as illegal, since secession is prohibited outside the colonial context".[443]

5.5 Evidence of Change Based on Kosovo Declaration of Independence

The debate on the legality of the independence of Kosovo is one that will endure for as long as "international relations" is in existence. I am obliged to state that during the course of my research I got exposed to a variety of literatures and formal documentations on the Kosovo case. The Martti Ahtisaari Plan for the future status process for Kosovo dubbed the independence of Kosovo as necessary[444] and it is upon my findings I conclude that the independence of Kosovo could not have been better timed. One might interpret the ICJ's advisory opinion on the declaration of Kosovo independence as approval to Kosovo's statehood even though it stated clearly that its opinion should not be used as a precedent. However, the Courts advisory opinions are considered by states and international organization, and may more often than not affect the authoritative decisions of international actors that may in turn set off some changes in international law.[445] For instance, the opinion of the ICJ on the declaration of Independence of Kosovo increased the states recognition by six. Arguably, the opinion of the ICJ is significant to the development of international law and can be seen as an authoritative decision making body. Furthermore, it has been argued that the UN Charter once prohibited secession outside the colonial context, yet it was revised after

[443] See ICJ Report on States Written Proceedings
[444] See UN Report of the Special Envoy of the Secretary General on Kosovo's Future Status.
[445] See A. Thorp, 'international Court of justice Advisory Opinion on Kosovo Declaration of Independence', International Affairs and defense section, 2011.

the cold war when the Eastern European states broke out from the USSR and the dissolution of the Former Yugoslav republics, and the recent adaption to the Kosovo case. As a process theorist, the world is adjusting to issues of human rights and sovereignty; consequently bringing about continuous changes in international law.

In a nutshell, I conceive that if the declaration of independence by Kosovo ensures a lasting solution to a once nagging ethnic crisis in the region; observing the basic humanitarian rights of all citizens unbiased, then the independence stands legal. States like Greece and Israel claim that separatism should not be an option in cases like that of Kosovo. They argue that other forms of peaceful resolution exist. I dare say that their stand is quite myopic, because any one aware of the Kosovo case should know that the ethnic crisis had been on for decades. One conspicuous trend that featured throughout this thesis; whether it was with the decision of NATO to launch an air campaign in Kosovo, the United Nation's attempt to restore the peace in Kosovo, the declaration of independence by Kosovo or the ICJ's advisory opinion on the legality of the independence of Kosovo, is a process of authoritative decision making by the responsible actors. And yes, in the eyes of a process school theorist, it is a reaffirmation that international law is indeed a process.

Chapter 6

CONCLUSION

This thesis attempted to reveal the changes and developments that the Kosovo cases have brought to international law. For this reason, it attempted to explore the Kosovo crisis in two parts. It examined the NATO intervention in Kosovo and the declaration of independence by Kosovo as regards the changes in international law caused by events in the international system. The process school theory of international law served as the theoretical framework for our hypothesis which postulates that events in the international system like that of Kosovo influence and effect changes in international law. The concept of the "Grotian moment" served the purpose of illustrating remarkable developments in international law since the Peace of Westphalia and the adoption of the concept of sovereignty and the balance of powers till present. The stakeholders of the Kosovo crisis possessed a common feature which may have been observed in series of decisions made that in turn caused a ripple effect in the international society. In an attempt to establish the legality of the NATO campaign in Kosovo, the concept of humanitarian intervention was scrutinized based on the just war tradition. In doing this, it became obvious that the heated debate on humanitarian intervention has challenged areas like that of humanitarian rights, state sovereignty and international humanitarian law. In analyzing the legal status of the declaration of independence by Kosovo areas like that of the principles of statehood, recognition, self-determination and secession

was challenged. Hence, this thesis sought to reaffirm that the actions of international actors informed by a process of authoritative decision-making (as conceived by the process school theory of international law) cause shifts in the international system that more often than not require consequent transitions (developments) in international law. Therefore, this thesis serves as an outline of the perceived changes of the Kosovo cases on the development of international law. It is true that these changes may yet be soft; nonetheless, we may observe that there is strong evidence on elements of change in areas like that of human rights, state sovereignty, state recognition, and humanitarian intervention. Perhaps it would be appropriate at this point to give a sketch of the most recent development of international law as regards humanitarian intervention- "the Responsibility to Protect", regardless of the doubts on whether it can be considered hard law.

UN Secretary General Kofi Annan in his 2000 Millennium report recalled the failures of the Security Council to undertake decisions on the cases of Rwanda and Kosovo. In his speech challenging the UN he asked: "if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and systematic violation of human rights that offend every precept of our common humanity?"[446] In response the International Commission on Intervention offered the concept of the "Responsibility to Protect" which was endorsed in the UN 2005 world summit. At the Summit, world leaders agreed that when any state failed to measure up to the "responsibility", the "international community" would take

[446] See the UN discussion guide, Lessons From Rwanda: The United Nations and the Prevention of Genocide http://www.un.org/preventgenocide/rwanda/responsibility.shtml viewed: 7th August 2011

over the responsibility to protect peoples threatened under such dehumanizing conditions like was seen in Rwanda, Srebrenica and Kosovo.[447] Hence, if all diplomatic means of resolving the crisis are exhausted and the authorities in question still fail to protect their citizens the international community will then act collectively in a "timely and decisive manner", through the "UN Security Council and in accordance with the Charter of the UN by using force".[448] The R2P embraces three specific responsibilities and are as follows. (a) "The responsibility to prevent addresses the root and immediate causes of conflicts within countries, as well as other man-made crises. (b) The responsibility to react responds to situations of massive human rights violations in a suitable manner, for example, imposing sanctions, bringing international prosecution; and, in extreme cases, intervening with military force. (c) The responsibility to rebuild ensures recovery, reconstruction and reconciliation particularly after any military intervention". The responsibility to protect has gained prominent supporters like Joyner who argues that the international community should "rethink the fundamental meaning of sovereignty, evidently pointing out a fundamental tension between the concept of state sovereignty and the concern for human rights".[449] He strongly agrees to the use of "responsibility to protect" arguing that it "furnishes greater worth to the humanitarian issues in question, with its notable features reaching beyond the mere responsibility to react, but also the responsibilities to prevent and rebuild".[450] In view of this Higgins

[447] Ibid., pp. 3
[448] Ibid
[449] C. Ku & P. F. Diehl, 'International Law: Classic And Contemporary Readings', *Boulder London*, 3rd Ed. 2009, pp. 326-332 see also C. C. Joyner 'The Responsibility to Protect: Humanitarian Concern and the Lawfulness of Armed Intervention'
[450] Ibid., pp. 327.

claim on international law being a system of continuously emerging norms (either by consent of non-opposition) stands to be justified.[451]

Surely the Kosovo case not only stirred the R2P response but also provided a different interpretation of state sovereignty, self-determination and state recognition. In view of the gross violations of human rights in places like Rwanda and Kosovo, Dallaire made known his disapproval of saying "you cannot hide behind sovereignty when you are massively abusing people in your country through as extent to genocide or through simply massive crimes against humanity".[452] You cannot let countries say, "I am a sovereign state, though".[453] Hence it is possible that the NATO's humanitarian intervention in Kosovo and the declaration of independence by Kosovo give a whole new interpretation to state sovereignty in international law. For this, one might say that today's conception of sovereignty bears an element of change in international law as against the Westphalia concept of sovereignty. Indeed to NATO and the international community, the Westphalia concept of sovereignty was not enough to shield the perpetrators of the gross human rights violations within the borders of Serbia from an international reaction. In addition, the Security Council endorsed an international armed presence in Kosovo after the NATO intervention, "with the forced withdrawal of Yugoslav troops".[454] This was done by the adoption of "Resolution 1244" in June 1999, which imposed "a mandatory international regime on a sovereign state deploying

[451] R. Higgins, 'Problems and Process: International Law and How to Use It', Oxford University Press, 1995, pp. vi, 2, 3.
[452] [452] R. Dallaire, U.N. force commander, Rwanda, 1993-'94 on The Frontline, retrieved 07/29/11 *See more* at http://www.pbs.org/wgbh/pages/frontline/darfur/themes/responsibility.html.
[453] Ibid
[454] R. Wedgewood, " NATO's Campaign in Yugoslavia', *The American Journal of International Law*, Vol. 93, No. 4, 1999, pp. 828-834.

collective (regional) armed force to counteract gross violations of humanitarian law and human rights".[455] Following the details of Resolution 1244 it will be observed that the traditional characteristic of statehood is significantly diminishing.[456] Then again in the words of Cassese, "I must agree that Resolution 1244 is a pointer of an important evolution in international law".[457] He notes that "human rights are increasingly becoming the main concern of the world community as a whole. There is a widespread sense that they cannot and should not be trampled upon with impunity in any part of the world".[458] This perhaps may be noted as a significant movement in international law according to Casesse.[459] It must be stated here that the Kosovo crisis was not the first of its kind. It did not "happen in isolation, but after the United Nations was unable to act effectively in Rwanda and Bosnia as noted by Wedgewood".[460] In light of this, the veto of the permanent members of the Security Council comes to mind too readily and reaffirms more often than not, the delay or thwarting of possible viable solutions to certain international situations. It may therefore be necessary for the United Nations to revisit this issue to avoid future international catastrophe or humanitarian emergencies born of the UN's delay to address such situations.

Furthermore, the 1933 Montevideo Convention on Rights and Duties of States provides the internationally accepted criteria of statehood which notes that the state as an

[455] Ibid.
[456] A Cassese, 'Ex iniuria ius oritur: Are we moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', *European Journal of International Law*, Vol. 10, 1999, pp. 23, 26.
[457] Ibid
[458] Ibid.
[459] Ibid.
[460] R. Wedgewood, " NATO's Campaign in Yugoslavia', *The American Journal of International Law*, Vol. 93, No. 4, 1999, p. 834.

international person should possess the following qualifications: "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states".[461] It goes then from inferences made by most UN member states that have denied according Kosovo recognition that "in the condition of an effective government, Kosovo is found lagging as it is dependent upon the involvement of international organizations such as the EU, UN and NATO for military leadership and a 'rule of law' mission respectively". [462] In other words, without the help of international organizations Kosovo's internal social and economic infrastructure lack function. Notwithstanding the challenge to Kosovo about its reliance on international organizations as against an effective government, about seventy-five UN member states have offered Kosovo recognition. One might infer then, that perhaps the Kosovo case may have introduced an element of change as regards the concept of statehood according to the Montevideo Convention; which ideally would expect that Kosovo possess an effective sovereign government. Yet Kosovo has been declared a sovereign state and reserves all rights of a state. In addition, one could conceive a notable change as regards the right to self-determination. In the time of U'Thant, secession of a member state was impossible even while exercising the right to self-determination. Traditionally secession according to self-determination was only acknowledged in the case of decolonization. Therefore the declaration of the independence of Kosovo stemming from the right to self-determination of the people did not fall into the decolonization framework, yet the ICJ and a good number of UN member states recognized the state of

[461] See 'The Montevideo Convention on Rights and Duties of a State', <http://www.cfr.org/publication/15897/montevideo_convention_on_the_rights_and_duties_of_states.html>, last visit: 15.07.2011.

[462] These NATO and EU roles are expressly recognized by the Assembly of Kosovo, in its declaration of independence; *supra* n. 1, para. 5.

Kosovo. Indeed the independence of Kosovo was an instance of secession of a UN member state and yet the advisory opinion of the ICJ did not condemn it even though it warned that its decision should not be seen as a precedent. This shows that the principles of self-determination might have attained a different interpretation in the international law of today. If not, why was Biafra not recognized by the UN after its secession from Nigeria?

Indeed, one might infer from the ongoing NATO operation in Libya that changes in international law that came with the Kosovo crisis are not mere speculations. Wedgewood acknowledges that the events in Kosovo may represent "a sea change in the responsibility of multilateral organizations to attempt to thwart ethnic slaughter-even if multilateralism takes a different form".[463] Perhaps human right has become as important as state sovereignty. As the war on terrorism and other issues like the recent emphasis on human rights continue to top the list of the concerns of the international community, it appears rather obvious that the "today concept of sovereignty has eroded". However, Kosovo is not solely responsible for this erosion on the concept of sovereignty as other events have contributed in one way or the other starting from the inception of the codification of human rights in international law. Thus, it becomes obvious that the continuous trend of events in the international system bring about changes, regardless of how soft they may be to international law. In sum, the Kosovo cases may not match the "Grotian moment" specifications, but most certainly bear elements of it. In view of this, continuous changes and developments in international

[463] R. Wedgewood, 'NATO's Campaign in Yugoslavia', *The American Journal of International Law*, Vol. 93, No. 4, 1999, p. 834.

law should be expected as long as man exists and constitutes the systems that make up the international system. It would however be hazardous to try to predict the future of international law,[464] but as the process school postulates; decision makers will keep making authoritative decisions that would keep causing events in the international system and in turn transitions in international law.[465] In Higgins words, "international law is a rational process based on decisions made by those authorized to do".[466]

[464] J. L. Kunz, 'The Changing Law of Nation: Essays on International Law', Ohio State University Press, 1968, p. 349.
[465] M. S. McDougal, 'The Impact of International Law upon National Law: A Policy-Oriented Perspective', *Yale Law School Legal Scholarship Repository*, Vol.1, 1959, pp. 25-92.
[466] R. Higgins, 'Problems and Process: International Law and How to Use It', Oxford University Press, 1995, pp. vi, 2, 3.

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