

Spring 5-29-2015

How has the practice of unilateral forcible / military intervention (as evident by the case of Kosovo, Tanzania, and Russia) eroded the primacy of territorial sovereignty? This question is answered through the use of three different frameworks : 1) legal positivism and 2) normative hierarchy, 3) third world approaches to international law (TWAAIL).

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MLA Citation

Eissa, Sama. *How has the practice of unilateral forcible / military intervention (as evident by the case of Kosovo, Tanzania, and Russia) eroded the primacy of territorial sovereignty? This question is answered through the use of three different frameworks : 1) legal positivism and 2) normative hierarchy, 3) third world approaches to international law (TWAAIL)*. 2015. American University in Cairo, Master's Thesis. AUC Knowledge Fountain.

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How has the practice of unilateral forcible / military intervention (as evident by the case of Kosovo, Tanzania, and Russia) eroded the primacy of territorial sovereignty? This question is answered through the use of three different frameworks : 1) legal positivism and 2) normative hierarchy, 3) third world approaches to international law (TWAIL).

Sama Eissa

Hodgkins

Abstract

The principle of state sovereignty; the right of states to exclusive control over their own territory, is seen as an integral part of the current international order...

The whole thesis project revolves around the impact of unilateral humanitarian intervention on the primacy of territorial sovereignty. To be more specific, it explores the role played by the emerging norm of unilateral humanitarian intervention and whether or not it washed away the notion of territorial sovereignty mentioned in the UN charter.

The main question the thesis project aims to answer is: How has the practice of unilateral forcible / military intervention (as evident by the case of Kosovo, Tanzania, and Russia) eroded the primacy of territorial sovereignty? This question is answered through the use of three different frameworks : 1) legal positivism and 2) normative hierarchy, 3) third world approaches to international law (TWAIL).

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INTRODUCTION

“One of the for most principles in international law is the inviolability of territorial sovereignty of individual states. Territorial sovereignty derives from the theory of the state, whereby the existing government is supreme within its territory, and no external force may interfere with that supremacy” (Benjamin, 1992)

The practice and doctrine of humanitarian intervention contradicts many international law academic scholars and experts' contribution to the definition of territorial sovereignty. The traditional conception of sovereignty according to international law classical scholars such as, Emer de Vattel is that sovereignty is of supreme authority within a territory as it helps to maintain a world order. Ian Brownlie and James Crawford also agree with this view. Quoting James Crawford, a practitioner in the field of public international law and a current Judge of International Court of Justice, in his book, *The Criteria For Statehood In International Law* stated “[i]n principle States are exclusively competent with respect to their internal affairs, a principle reflected by Article 2, paragraph 7 of the United Nations Charter” (2012). It is a fact that states are territorial entities, and states possess full control over their sovereign territory and people. According to the *Island of Palmas* arbitration “[s]overeignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State” (2012). In this sense, sovereignty is defined to be absolute, exclusive, and non-negotiable, where states are granted complete control over their territory and people. Moreover, if it is analysed from the legal positivism approach, article 2(7) of the United Nations Charter prohibits intervention “in the domestic jurisdiction of any state” (UN Charter article 2(7)). Article 2(4) of the UN Charter states “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state,

or in any other manner inconsistent with the Purposes of the United Nations” (UN Charter article 2(4)). The norm of humanitarian intervention therefore breaches the notions of sovereignty and non-intervention guaranteed in article 2(4) and article 2(7) of the UN charter.

According to Wheeler “The legality of an action in both domestic and international society is determined by whether it conforms to both substantive principles, and the correct procedural rules by which legal decisions are arrived” (2003) Therefore, from a legal positivist perspective the unilateral debate over the legitimacy of unilateral humanitarian intervention imposes a serious moral challenge. Precisely, if the United Nations security council authorisation was not obtained since it is an essential condition for the legitimacy of intervention for the purpose of protecting human rights. Nevertheless, article 2(4) of the United Nations Charter prohibits the use of threat or force, with the exception of self-defence cases which according to the Security Council permits the party under attack to resort to force. Therefore, overriding the United Nations security council’s authorisation give rise to criticism from proponents of the legal positivist perspective.

On the other hand, some recent doctrines and practices of humanitarian intervention reflect the following: humanitarian intervention arguably gives states the right to interfere in other states’ domestic affairs in order to end gross and systemic human rights violations from being perpetrated, which is not an accepted legal principle under International Law. However, “[t]he notion that a state must act like a state to maintain its sovereignty may sound like a novel doctrine, but it is implied by the doctrine of self help and in the modifications to the UN Charter emanating from state behaviour since 1945” said Mit Deutscher, and the norm of humanitarian intervention is therefore challenging the concept of state sovereignty (Deutscher, 1995).

On the other hand, the concept of unilateral humanitarian intervention is nothing new. “Since the end of the Cold War, states have increasingly come under pressure to intervene militarily and, in fact, have intervened militarily to protect citizens other than their own from humanitarian

disasters” (Finnemore,1996). All of the humanitarian intervention acts should have been dedicated to address humanitarian related matters, not territorial or strategic matters; however, this is not the case in practice since the primacy of territorial sovereignty has been breached through the act of unilateral humanitarian interventions, and the concept of multilateral humanitarian intervention has been overshadowed. Moreover, Sarah Wilbanks, asserts that geo-strategic interests and economic interests are most influential variables in interventions, and the international norm of humanitarian intervention serves as a tool for stronger states to achieve their national goals (Wilbanks, 2012).

According to Zabla, the notion of humanitarian intervention has been a heated topic among practitioners and theorists since the post cold war era imposing a challenge on the primacy of territorial sovereignty, and gathering considerable attention for developing into a forcibly protecting measure to address genocide or large scale murder (2011).

This thesis project argues that “Under international law, other states must respect this territorial sovereignty” (Benjamin,1992) since it maintains a world order, and the act of unilateral humanitarian intervention disturbs human rights and the primacy of territorial sovereignty, while limiting the act of unilateral humanitarian intervention would effectively maintain international stability, and world order.

The whole thesis project revolves around the impact of unilateral humanitarian intervention on the primacy of territorial sovereignty. To be more specific it explores the role played by the emerging norm of unilateral humanitarian intervention and whether it eroded the notion of territorial sovereignty mentioned in the UN charter or not.

The main question the thesis project aims to answer is how has the practice of unilateral forcible / military intervention (as evident by the case of Kosovo, Tanzania, and Russia) eroded the primacy of territorial sovereignty? This question is answered through the use of three different frameworks:

1) legal positivism 2) normative hierarchy, and 3) third world approaches to international law (TWAIL).

The thesis is divided into three parts, the first part provides a theoretical review for the two main key words in this thesis starting by defining humanitarian intervention and territorial sovereignty . It begins with a section illustrating the meaning of humanitarian intervention encompassing a historical overview, and an explanation of the norm, followed by defining the concept of territorial sovereignty.

The second part of the thesis introduces the framework of analysis for the norm of humanitarian intervention from three international law theories. Firstly, the legal positivism which examines existing international law principles reflected in the UN Charter and customary international law. Secondly, the thesis examines the normative hierarchy theory to argue against the justification of the intervention for the purpose of protecting human rights. Finally, it takes a critical approach to the violation of sovereign territory with the Third World Approaches to International Law, (TWAIL) by demonstrating that humanitarian intervention reflects an old form of colonialism.

The third part of the thesis focuses on two cases of humanitarian intervention that will be examined to illustrate the impact the emerging norm of humanitarian intervention imposed on eroding territorial sovereignty. The case studies have been carefully chosen to examine the hypothesis presented in this thesis.

First, the case of Kosovo in which the NATO intervention violates the definition of state sovereignty discussed earlier. It was formally “illegal” because NATO did not obtain authorisation from the Security Council. Henkin in his book, *Kosovo and the law of ‘Humanitarian Intervention’*, describes the Kosovo intervention as unlawful because the UN charter prohibits any act of intervention “on their territory”, even for humanitarian ends (Henkin, 1999).

Second, the case of the humanitarian intervention practiced by Tanzania against Uganda in 1978–1979, that led to the overthrow of Idi Amin’s regime, in the absence of Security Council authorisation in 1979.

The two cases demonstrate the danger the norm of humanitarian intervention imposes for the notion of territorial sovereignty, as defined by International Law practitioners and specialists. Moreover, the norm of humanitarian intervention breaches the concept of sovereignty incorporated in the UN charter. The academic gap I am trying to fill by mentioning the case of Kosovo, Tanzania, and Russia is to demonstrate the role the act of unilateral humanitarian intervention played in eroding the primacy of territorial sovereignty.

The final section following the third part of this research will contain some recommendations and concluding remarks derived from this proposed study.

CHAPTER 1

THEORETICAL REVIEW

1.1. Defining Humanitarian Intervention

Defining humanitarian intervention is a challenging task since it lacks a specific definition by several scholars and practitioners. In order to formulate a definition of the term humanitarian intervention, one first need to comprehend what counts as humanitarian, as well as what constitutes intervention. “To give an initial definition of intervention it simply means purposeful action by a human agent to create change” (Midgley, 2000).

According to Zabal, a specific action can be considered an intervention if “the state that is the object of intervention [is] widely acknowledged to be sovereign.”(2011). “This implies that the state in

question has to be recognised by other states to be exercising its right to autonomy, which means that groups that form states on their own that are not widely recognised by the world, are not considered sovereign nor autonomous and an act of interference from a state towards those is not considered an intervention.” (Zabal, 2011)

It also implies that the act is dedicated to generate a change in the internal affairs of a state.

However, any act of intervention that is welcomed by another sovereign state to interfere with its internal domestic affairs cannot be classified as an act of intervention. In this sense, the act of intervention is always associated with interference as a main feature regardless of the category under which the intervention falls; with the use of military force as a central characteristic.

After defining what constitutes an intervention, one needs to think carefully about the definition of the word ‘humanitarian’ on its own. For an action to be considered humanitarian, it needs to be addressing an issue related to basic human rights. Therefore, humanitarian intervention “is the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied” (Smith, 1998). The centre of interest here is that the word ‘humanitarian’ addresses matters only related to human rights; in this case, when a state commits an act of abuse against its own citizens’ human rights, the act of intervention by another state, group of states, or international organisation aimed to end the violations falls under the category of the word humanitarian. “Additionally, if a group within a state is committing acts of abuse against another group, and the government/state is not taking any actions to protect those harmed, this implies that an external intervention is considered humanitarian, too” (Zabal, 2011). Nevertheless, this excludes cases in which a state would be experiencing acute poverty due to collapse in its economy, or starvation due to a natural disaster, hence narrowing the scope to man made violence.

“This means that a state intervening in another state’s domestic affairs on the grounds of relieving suffering, cannot have ulterior motives, other than saving the citizens of the state in question. If a state intervenes in another state’s internal affairs, claiming that it is humanitarian but on the other hand has selfish interests and hidden agendas, then the act does not count as humanitarian.” (Zabal, 2011)

Taking the above definitions into consideration the term “Humanitarian Intervention” as a whole can hence be defined as: the practice of unilateral forcible / military interference in another state’s sovereign territory; aiming to end man-made physical suffering being committed by a government against its own citizens.

This definition acts as a guideline for the research of this project because it clarifies four focal points; first, humanitarian intervention can be unilateral or multilateral, meaning the act can be done by a state, a group of states, or an international organization. The term a guideline for the research of this project because it clarifies four focal points; first, humanitarian authorized by the United Nations Security Council under Chapter VII of the UN Charter (which is not addressed in this thesis). Second, military force is a central feature in the act of humanitarian intervention. Third, humanitarian intervention is allegedly motivated by humanitarian objectives to end gross and systemic human rights violations from being perpetrated. Fourth, the definition is narrowed down to human rights violations caused by man only; hence, natural catastrophes or a government's economic mismanagement that can cause human suffering are excluded. “However, determining the purpose or intention of a certain intervention conducted by a state or a group of states poses a big challenge, merely because states do not usually utter their intentions, or they state what they don’t mean, and sometimes they act differently to their own declarations.” (Zabal, 2011)

In order to understand the term humanitarian intervention, one needs to examine the history of humanitarian intervention; thus, the final and last part of the Theoretical Review for defining humanitarian intervention will include a historical overview for the term humanitarian intervention. According to Knudsen, the idea of humanitarian intervention arose from the political philosophy and diplomatic practices of the early European states system (2009). Use of force has always been a powerful diplomatic tool in the hands of the Europeans since the time of the reformation in order to “protect religious minorities from persecution” (Knudsen, 2009)

On the other hand, Benjamin states that humanitarian intervention has developed over time through different stages starting the 17th century when Hugo Grotius first proposed a theory of humanitarian intervention. Benjamin asserts that

“the rulers ordinarily could deal with their citizenry unimpeded, when the ruler terribly abused the citizens, others have a right to try to prevent the mistreatment. In the latter half of the 19th and early 20th centuries, humanitarian intervention became widely accepted as almost an absolute right of a state. The U.N. Charter, though, outlawed all resort to military force, including humanitarian intervention. Identification of the factors which legitimize state practice subsequent to the ratification of the Charter is difficult because interpretations of the same events vary considerably and arguments have been made supporting both the illegality and the legality of humanitarian intervention” (Benjamin, 1992).

In this sense, initial recognition of humanitarian intervention arose in the 17th century; however, the first state practice that used the doctrine of humanitarian intervention to justify military force was in 1829 “when France, Britain, and Russia militarily enforced the 1827 Treaty of London in order to prevent massive bloodshed in Greece” (Benjamin, 1992). Benjamin also mentions another example that illustrates state practice during this era “in 1912, when Greece, Bulgaria, and Serbia intervened in Macedonia to end mistreatment of Christians” (Benjamin, 1992). Another historical example of humanitarian intervention was when “France intervened militarily in Syria in 1860 to protect the Christian population from slaughter at the hands of the Ottoman Empire. The French intervention is considered a valid precedent for legalizing humanitarian intervention even by those opposed to it.” (Benjamin, 1992)

However, this is no longer the case since the United Nations Charter adopted radical measures that changed international law by outlawing all unilateral resort to the use of force. Under Article 2(4) of the UN Charter, any act of unilateral humanitarian intervention is illegal since the Charter forbids any external violation against sovereign territory, with the exception of self-defence under Article 51 and collective measures by the UN Security Council. Furthermore, the notion of sovereignty grants states the right to manage their internal affairs independently; therefore, any external interference in state internal affairs is unacceptable, according to Article 2(7) of the United Nations Charter. That being the case, unilateral humanitarian intervention became illegal under the UN Charter. “The provisions outlawing all resort to military force except when approved by the Security Council are considered the most important provisions of the Charter” (Benjamin, 1992). In light of the above, unilateral humanitarian intervention under the UN Charter is illegal.

In this respect, “[t]he concept of humanitarian intervention has long existed prior to the post Cold War era in the form of a doctrine that was a fundamental part of the European power politics” (Zabal, 2011). Nevertheless, the role of humanitarian intervention was noticeable in several humanitarian crises in the post-Cold war era, especially after the collapse of the USSR, and the rise of western liberalism. “In the post Cold War era ‘states that [undertook humanitarian] intervention[s] portray[ed] themselves as acting as agents of the 'international community’” (Zabal,

2011). They undertook such interventions as one state or as a coalition of many for the international community.

Briefly, such interventions allegedly stand for 'international' intervention that take responsibility for accomplishing 'humanitarian' objectives; furthermore, according to Zabal most of the hegemonic states were influenced by humanitarian obligation after the Cold War (2011). The protection of human rights became an international obligation; however, the UN charter refined the restrictions and legality of the use of force in an attempt to manage the interference through authorised use of force by the Security Council members. Unfortunately, the UN measures usually fail to prevent unilateral humanitarian intervention.

Customary rules gain their legitimacy from state practice that evolves into norms; hence, they become legitimate. The “[i]dentification of the factors which legitimize state practice subsequent to the ratification of the Charter is difficult because interpretations of the same events vary considerably and arguments have been made supporting both the illegality and the legality of humanitarian intervention” (Benjamin, 1992); “however, it is sometimes difficult to discern the true motives behind the state's action. Discerning these underlying motives is important because they determine the legitimacy of state practice, and thus legal action in the international

community,” (Benjamin, 1992). Having defined humanitarian intervention and its historical

background, the second part of chapter one will examine the definition of sovereignty since this thesis project’s main focus is the effect of the norm of humanitarian intervention on the primacy of territorial sovereignty.

1.2. Defining Sovereignty

“The word “sovereignty” is one of those powerful words which has its own existence as an active force within social consciousness” (Stéphane Beaulac, 237). “In the first quarter of the 20th century, during the *accalmie* of the Great War, Harold Laski wrote: ‘Nothing is today more greatly needed than clarity upon ancient notions. Sovereignty, liberty, authority, personality’.” (Stéphane Beaulac, 237). In this sense, state sovereignty is considered a milestone principle in international law, as it gives states exclusive control over their territory to maintain world order. The concept of territorial sovereignty undoubtedly constitutes the idea of exclusive and supreme power over territory and people.

Emer de Vattel the Swiss philosopher, and legal expert whose theories laid the foundation of modern international law defines the Externalisation of Sovereignty as “one of those powerful words which has its own existence as an active force” (Stéphane Beaulac, 2003) adding that the concept of state sovereignty pertains to state dignity. Furthermore, James Crawford is quoted in the book, *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* defining the concept of state sovereignty as “the unique, intangible and yet essential characteristic of states” and state sovereignty includes the protection of statehood from external violations (Chinkin, 2004)

Sir Ian Brownlie, who was a British practising barrister and a specialist in international law, defines sovereignty in his book; *The Principles of Public International Law*, as the starting point of international law, which is the basic statehood that is absolute and un-negotiable. Moreover, Brownlie defines sovereignty as the following “Jurisdiction, prima facie exclusive, over a territory and a permanent population living there; (2) duty of non intervention in the area of exclusive jurisdiction of other states; and (3) dependence of obligations arising from customary laws and

treaties on the consent of the obligors” (Brownlie, 289). In this sense, Brownlie is affirming that external sovereignty should not be subject to any violation. If any action is taken in terms of “customary laws and international treaties” it must be based on state consent. Therefore, the notion of state sovereignty carries a lot of power and a high degree of absoluteness and exclusivity.

In addition, Wolfrum in *Max Planck Encyclopaedia of Public International Law* states the concept of sovereignty is “supreme authority within a territory, [and] is a pivotal principle of modern international law. What counts as sovereignty depends on the nature and structure of the international legal order and vice-versa” (Wolfrum, R, 2011).

In this regard, the approach of Emer de Vattel, and later Ian Brownlie, and James Crawford consider the notion of state sovereignty as being absolute and non-negotiable which is also illustrated in the UN Charter article 2(4) and article 2(7) which provides states with supreme authority over their territory, and grants states immunity from other states.

Ian Brownlie in his book, *Principles of public international law* begins with a brief discussion of the concept of territory. Sir Ian Brownlie illustrates the following in Chapter 6 “Territorial Sovereignty.” Sovereignty represents but is not equal to ownership by stating that the analogy between sovereignty and ownership is evident; moreover Brownlie adds “[t]his general power of government, administration, and disposition is *imperium*, a capacity recognised and delineated by international law. *Imperium* is thus distinct from *dominium* either in the form of public ownership of property within the state or in the form of private ownership recognised as such by law” (1973).

International law recognises sovereign territory as an actual effective power by which the state is supreme, and independent by enjoying the right to manage its domestic affairs without interference.

The previous part defined the primacy of sovereignty, to be more specific the notion of territorial sovereignty. The following part in this chapter will introduce the history of the notion of

sovereignty in international law. According to Masahiro in his article *Sovereignty and International Law* “[t]he Peace of Westphalia that brought the Thirty Years’ War to an end in 1648 added a new chapter of State sovereignty to the modern history of international law. Before the Thirty Years’ War, which was partly a religious war, the European world of Christendom was largely a diarchic one of pope and emperor”; moreover, Masahiro adds “the Holy Roman Empire was dissolved into hundreds of relatively independent authorities with more or less equal sovereignty over their populations and territories, which theoretically marked the birth of the modern nation-State system. This meant the secular authorities taking over the religious power in the political world of Europe, where a common European international public law or the “droit public de l’Europe” prevailed among the sovereign Christian European States” (Masahiro, n.d.).

Consequently, states have exclusive jurisdiction and supremacy over their own territory. Therefore, “[t]he legitimacy of the sovereign State was considered to be no longer religious but secular” (Masahiro, n.d.). The concept of territorial sovereignty has changed; above all, the UN charter clearly mentions the notion of territorial sovereignty and political independence as an essential component related to the primacy of state sovereignty.

CHAPTER 2

2.2 Humanitarian intervention and Legal positivism theory

The second part of this thesis project is dedicated to the analysis and assessment of how the term humanitarian intervention breaches the notion of state sovereignty in international law and the UN Charter. This question will be answered through the framework of the legal positivism theory. This

section provides an explanation through which the term humanitarian intervention can breach the primacy of territorial sovereignty, and hereby erodes the notion of sovereignty.

Legal positivism states that what gives any legal norm its validity depends on its sources and not its merits. A norm has a status of law if a recognised human authority declares it to be law. Why do we say recognised human authority? We are distinguishing it from the spiritual. According to Bix quoting John Austin, the creator of the school of analytical jurisprudence “[p]ositive law consists of those commands laid down by a sovereign (or its agents), to be contrasted to other law-givers.” The content of a law from a positivist perspective is concerned with whether or not the law is enacted by the sovereign; hence, morality is irrelevant, and the law is valid only if the sovereign says it is valid. For the law to be valid from the positivist tradition, the law must have the correct pedigree to follow the established procedure for law making.

To sum up, the positivists assess the validity of law by asking two questions: was the law created by the correct authority? And did that authority follow the appropriate procedures? The law is valid only if the answer is yes to both questions.

“Legal positivists argue that there is a moral duty to obey the law. But what is the law?” (Holzgrefe, 2003). According to article 2(4) of the United Nations Charter, the act of intervention which violates territorial sovereignty is illegal since the charter forbids any external violation against sovereign territory with the exception of self-defence under article 51 and collective measures by the UN Security Council. Furthermore, the notion of sovereignty grants states the right to manage their internal affairs independently; therefore, any external interference in state internal affairs is unacceptable according to article 2(7) of the United Nations charter. Moreover, article 2(7) of the United Nations Charter prohibits intervention “in the domestic jurisdiction of any state” (UN Charter article 2(7)). Article 2(4) of the UN Charter states “[a]ll members shall refrain in their

international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations” (UN Charter article 2(4)). Moreover, according to Greenwood concerning the central principle of international law regarding the use of force “[t]he charter expressly provides for two situations in which the use of force is lawful. First, Article 51 preserves the inherent right of individual or collective self-defence in the face of an armed attack against a state” ; in addition, Greenwood states “[s]econdly, the charter provides for the use of force by the security council or by a regional organisation or group of states authorised to use force by the security council” (Greenwood, 2002). In this sense, humanitarian intervention is allowed if it is authorised by the Security Council.

Furthermore, Benjamin articulates in his journal, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, that “the U.N. Charter fundamentally changed

international law by outlawing almost all unilateral resort to the use force. Unilateral humanitarian

intervention became illegal under the Charter because Article 2(4) banned all uses of military force,

except actions taken in self-defence” (1992)

Nicholas J. Wheeler discusses unilateralism in International Law by demonstrating the legal problem of unilateral action, and the development of a new rule of customary international law permitting unilateral humanitarian intervention. Wheeler focuses on “the legal claims raised by the UK Government in defence of ‘Operation Allied Force’. The legal justification invoked by the UK

Government is that unilateral action is justified on the basis of enforcing the purposes embodied in Security Council resolutions. This attempt to link unilateral action to the enforcement of the wider moral purposes of international society challenges the traditional claim that unilateral action is driven by the selfish interests of states” (2003).

“Recent state practice has however raised questions as to the validity of the doctrine on Unilateral Humanitarian Intervention as more states are now willing to rely openly on this doctrine. An example of this is the UK, which has openly supported the doctrine of Unilateral Humanitarian Intervention. The UK commonwealth office has stated that international law needs further development to be able to meet new situations. The first sign of unilateral humanitarian intervention emerging was in the UK, France and US intervention in 1991 to protect the Kurds and Shiites in Iraq. Although they did not invoke the Unilateral Humanitarian Intervention as a justification for their intervention, it gave an indication that states would intervene without the express authorisation from the United Nations Security Council with the aim of providing safe havens and humanitarian relief in conflict areas” (Nyamwaro, 2011)

However, without the security council authorisation, this doctrine is far from being firmly established.

According to Chinkin in her article, *Kosovo: A "Good" or "Bad" War?* she states that unilateral humanitarian intervention does not constitute customary international law; moreover she highlights that “the language of law was engaged in various arenas to make claims with respect to the legality of the use of force under the UN Charter, or customary international law” (Chinkin, 1999); however those claims do not constitute customary international law.

Therefore, unilateral humanitarian intervention lacks a clear legal framework; as a result, it does not accord with customary international law; hence, unilateral humanitarian intervention is not allowed under international law.

The norm of humanitarian intervention therefore breaches the notions of sovereignty and non-intervention guaranteed in article 2(4) and article 2(7) in the UN charter. On the other hand, some recent doctrine and practices of humanitarian intervention reflect the following: humanitarian

intervention arguably gives states the right to interfere in other states' domestic affairs in order to end gross and systemic human rights violations from being perpetrated, which is not an accepted legal principle under international law. However, "[t]he notion that a state must act like a state to maintain its sovereignty may sound like a novel doctrine, but it is implied by the doctrine of self help and in the modifications to the UN Charter emanating from state behaviour since 1945" said Mit Deutscher, and the norm of humanitarian intervention is therefore challenging the concept of state sovereignty (Deutscher, 1995).

According to the article 2(4) and article 2(7) of the UN Charter, the notion of state sovereignty in the United Nations Charter demonstrates ultimate independence and authority of a state over its geographical territory. The notion of sovereignty described in article 2(7) and article 2(4) of the UN Charter illustrates that states have equal rights and enjoy juridical equality for states to exist as legal persons under international law. In this case, it is clear that the norm of humanitarian intervention challenges the concept of territorial sovereignty from the legal positivist perspective.

Thomas Franck reflected his concern regarding the challenge that humanitarian intervention imposes on state sovereignty in, *Who killed article 2 (4)*, in a very open and straight forward critique by stating bluntly that article 2 (4) of the United Nations charter which was drafted to protect states from external threats and sovereign territory violation is "admirable in itself" according to the author. However, the author uses a very expressive line regarding article 2(4) by stating that "it mocks us from its grave". Furthermore, the author highlights that the death of article 2(4) was caused by the world transformation after the Cold War era, and the emergence of new terminologies that emphasis the importance of human rights, with which the UN charter was faced. Frank articulated that the world was expected to live with article 2(4) instead of eroding territorial sovereignty for the causes of humanitarian intervention on behalf of the international community.

Nevertheless, the emergence of new developments regarding the importance of human rights that were manifested in humanitarian intervention is inconsistent with the basic principles of international law, which are founded on the concept of sovereignty, namely in article 2(4) and article 2(7).

According to Abiew, “there is the viewpoint that intervention for the sake of humanity cannot be legal, justifiable, or permissible” (1999). In this regard, legal positivist ideas give rise to a heated debate by highlighting the legality of such interventions and the notion of violating state sovereignty. In addition, the moral duty debate from a legal positivist perspective is invalid as it was mentioned earlier that the legal positivism school of thought relies on the sources and not the merits.

Traditionally, in legal terms, the definition of “International peace and security” has been narrowed down as the maintenance of inter-state order. Nevertheless, as mentioned above, the practice of humanitarian intervention eroded this concept as it is recognised among international law legal scholars and the UN Charter; for that reason, the exclusive right for intervention for the purpose of preventing or stopping widespread human right violation breaches the notion of sovereignty and non-intervention guaranteed in the UN Charter. Legal positivists argue in favour of legal validity; hence, unauthorised unilateral humanitarian interventions by a state, group of states or international ruling bodies is illegal.

Human rights were born of European State violence that was directed toward people. Therefore, the purpose of human rights was to establish certain norms of human dignity that all humans can enjoy regardless of their class, ethnicity, or nationality.

The objective of human rights was to constrain arbitrary state power because the world witnessed that it can cause human suffering. However, nowadays the objective of human rights is to pursue and promote universal truth by unleashing the arbitrary power of a state through massacres and bombing. In other words, with having some sort of “ulterior motives” all in the name of human rights; thus, the old days when human rights were about compassion has shifted, nowadays human rights campaigns are wearing military uniforms, carrying guns and riding fighter jets while leaving a pool of blood behind all in the name of human rights. This is reflected in humanitarian intervention false generosity with complete disregard to sovereign equality, international law, and human rights as it was originally envisioned (Morgan, 2009).

“Other counter-restrictionists admitted that there is no legal basis for unilateral humanitarian intervention in the UN Charter, but argued that humanitarian intervention is permitted by customary international law. For a rule to count as customary international law, states must actually engage in the practice that is claimed to have the status of law, and they must do so because they believe that the law permits this. International lawyers describe this as *opinio juris*. Counter-restrictionists contend that the customary right to humanitarian intervention preceded the UN Charter, evidenced by the legal arguments offered to justify the British, French and Russian intervention in Greece (1827) and American intervention in Cuba (1898). They also point to British and French references to customary international law to justify the creation of safe havens in Iraq (1991) and Kofi Annan’s insistence that even unilateral intervention to halt the 1994 genocide in Rwanda would have been legitimate” (Wheeler, 2001).

Legal Positivism Critique:

No legal positivist would argue that what gives law its validity is morality. Therefore, the most dominant critique of the legal positivist school of thought stems from its uncertainty of the moral duty in law.

“Accordingly, positivism’s critics maintain that the most important features of law are not to be found in its source-based character, but in law’s capacity to advance the common good, to secure human rights, or to govern with integrity” (Green, 2003). In fact, anti-positivists insist that moral obligation should not be a problematic issue when it comes to the validity of law.

According to Hart “some critics have thought that it blinds men to the nature of law and its roots in social life” (1958).

In the light of the above, there is an existing tension between the moral and legal aspects which divides theorists and legal scholars into two camps. According to Wheeler, “Some support this position on the grounds that morality should trump legality in exceptional cases where governments commit massive violations of human rights inside their borders” (2003) while others believe that “the law should not be changed to accommodate the practice of humanitarian intervention because this would be open to abuse” (2003). This would appear like an attempt to justify the illegal act of unilateral humanitarian intervention through linking it to a wider moral purposes. Yet, it is undeniable that the act of unilateral humanitarian intervention can be driven by state’s selfish interests.

All in all, from a legal positivist perspective, sovereignty is the key to international order, and each state holds the legitimate right to manage its domestic affairs with no external interference, and any disregard to the primacy of territorial sovereignty through the practice of humanitarian intervention is illegal.

2.2 Humanitarian intervention and normative hierarchy

I incorporated the normative hierarchy theory in this section to argue against the justification of the intervention for the purpose of protecting human rights. The normative hierarchy theory suggests that there is a hierarchy among the norms of international law. According to Martti Koskenniemi, an international lawyer and a former Finnish diplomat, “Legal reason is a hierarchical form of reason, establishing relationships of inferiority and superiority between units and levels of legal discourse” (Koskenniemi, 1997). The norms of superiority are called “Super Norms”, and include

principles of jus cogens and erga omnes character (which is a latin legal term that signals an obligation “against everyone”).

It has been argued that humanitarian intervention is a jus cogens norm or erga omnes obligation, which is superior to the notion of sovereignty. This section argues that humanitarian intervention is neither jus cogens nor customary international law. Jason Beckett best explains this delicate balance between sovereignty and humanitarian intervention when he wrote, “Of course sitting back and watching ‘bad things’ happen is not good, but neither is acting unilaterally, against the will of sovereign states, and in breach, or worse through manipulation, of the law on one’s own perception of the facts, and belief of right and wrong. This is a negation of law, and forms a bad precedent. Law is after all universal, and a source for one law is a source for another” (Jason Beckett, 2011).

This section of the thesis project will examine the role played by the normative hierarchy theory in justifying the practice of humanitarian intervention under jus cogens. This section will be divided into three parts. The first part provides a preview for legal scholars who argue that humanitarian intervention is necessary to protect jus cogens norms like the prohibition of genocide or crimes against humanity. The second part will demonstrate the other side of the debate by examining the work of Anthony D’Amato, who argues against that. The third part is dedicated to the analysis and assessment of how humanitarian intervention and state sovereignty are two jus cogens norms competing against each other.

The legal definition for the word jus cogens norm reflects the notion of humanity; in other words, it acts as a safeguard for peace and human rights. (Criddle ,2009)

Under the normative hierarchy theory jus cogens and erga omnes are considered to be superior norms under the umbrella of ‘super norms’ that represent humanity. In this sense, it can be easily argued that the act of humanitarian intervention which is dedicated to end human rights violation falls under the category of jus cogens. Manuel J. Ventura states that “[s]ince jus cogens trump all

other substantive norms of international law and modifies prior jus cogens the prevention of genocide as a jus cogens norm would overcome the prohibition on the use of force and unlock the door to lawful humanitarian intervention, albeit in a narrow and particular set of circumstances” (2014).

Therefore, from the perspective mentioned above humanitarian intervention developed an approach, in which it can gain legality under international law.

Moreover, according to Jan Kratochvil “Humanitarian intervention is a reaction to systematic violations of fundamental human rights, which are protected by general international law and are also rules of jus cogens. As a result humanitarian intervention is not a violation of the rule of non-intervention” (2006). He adds that “[t]he nature of these norms as *jus cogens* has also been recognised by the international courts. For example the International Criminal Tribunal for the former Yugoslavia (ICTY), in the *Furundzija* judgment, declared that the prohibition of torture is a rule of *jus cogens*” (Kratochvil, 2006). “Accordingly, humanitarian intervention should be understood narrowly as a reaction to an occurrence of the crime of genocide or crimes against humanity. Only this category fulfils the condition of widespread and systematic violations of fundamental human rights that can justify the use of armed force” (Kratochvil, 2006).

It is clear according to the scholars supporting the conceptualisation of humanitarian intervention as a jus cogens norm that the primary justification is the protection of human rights; moreover, the violation of state sovereignty is no longer regarded as an interference in other states’ domestic affairs; “[o]n the contrary, perpetration of these acts is internationally relevant conduct that violates international law and if the acts are attributable to the state, its responsibility under international law arises” (Kratochvil, 2006.)

On the other hand, Anthony D'Amato critiques the principle of *jus cogens* itself. According to D'Amato, in his paper *It's a bird, it's a plane, it's jus cogens* he argues that *jus cogens* is a senselessness norm that has no legal effects. Moreover, he articulates his dissatisfaction with the norm of *jus cogens* because it wipes out any norm that stands in its way. D'Amato adds "that *jus cogens* has no substantive content" (1990) by raising three challenging questions to illustrate the purposelessness of *jus cogens* by asking "(1) What is the utility of a norm of *jus cogens* (apart from its rhetorical value as a sort of exclamation point)? (2) How does a purported norm of *jus cogens* arise? (3) Once one arises, how can international law change it or get rid of it?" (D'Amato, 1990). Overall, D'Amato's critique considers the existence, impact, and validity of the emerging norms of *jus cogens*. Moreover, it could even be evident that intervening states use the language of *jus cogens* only to justify their intervention. Moreover, D'Amato quotes Ms. Parker and Ms. Neylon that "not all commentators agree that the whole of human rights law presently constitutes imperative rules of *jus cogens*. They cite Rosalyn Higgins' observation that while treaties undoubtedly contain elements that are peremptory, that fact alone does not lead to the view that all human rights are *jus cogens*" (D'Amato, 1990)

Overall, "[t]he problem of *jus cogens* has been conceptualised as a problem of identification of peremptory norms, taking as a starting point Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties. These provisions in fact, while defining *jus cogens* and contemplating invalidity and termination as special effects affecting incompatible treaties, fail to enumerate what norms are to be considered peremptory" (Focarelli, 2008).

In this sense, it is impossible to know what constitutes *jus cogens* norms, and which human rights principles fall under this category.. However, powerful states invoke the norm of *jus cogens* to justify their military intervention in other states internal affairs.

Even if we were to accept that certain atrocities need to be prevented through humanitarian intervention (as a matter of upholding jus cogens norms), then we run into another complication: state sovereignty itself is widely considered a jus cogens principle and therefore we are faced with two jus cogens norms competing against each other. According to Koskenniemi “[h]ierarchical thought is not exclusively directed at behaviour but equally at the law itself” (1997). The concept of state sovereignty is an essential building block of international law. The principle of sovereignty’s main application is the prohibition of intervention in other state domestic affairs, which was reflected “in the General Assembly’s Principles of International Law Concerning Friendly Relations and Co-operation Amongst States in Accordance with the Charter of the United Nations in 1970” (Kratochvil, 2006.) On the other hand, Criddle does not agree with Andrew J Batog affirming that sovereignty is a jus cogens norm by stating that,

“State must protect every individual against all forms of arbitrary discrimination (such as apartheid). Furthermore, under the fiduciary theory, jus cogens norms arise from the very concept that tends to be pitted against it-sovereignty-precisely because all states exercise sovereign powers which trigger application of the fiduciary principle. By positing the state as a fiduciary of its people, the fiduciary theory co-opts sovereignty by deriving peremptory norms from the very powers that are constitutive of it” (Criddle,2009). Therefore, Criddle argue that peremptory norms are inextricably linked to sovereignty (2009).

In this sense, sovereignty is considered to be also a peremptory norm of jus cogens under international law as well as humanitarian intervention creating a puzzled relationship between the two norms. Aceves critiques this paradox of sovereignty in his article, *Should we mourn the death of sovereignty?* by stating “[i]nternational law cannot be supposed to have established a crime having the character of jus cogens and at the same time to have provided immunity which is co-extensive with the obligation it seeks to impose” (1999). The normative hierarchy theory argues that states lose its sovereign immunity when they violate human rights norms because the latter are hierarchically superior; however, this claim is built on a puzzled presumption because sovereignty

is also a peremptory norm of jus cogens (Orakhelashvili, 2012). As a result, we end up having two jus cogens norms competing against each other.

2.2 Humanitarian intervention from the perspective of Third World Approaches to International Law (TWAIL)

This section will approach the violation of sovereign territory from the perspective of the Third World Approaches to International Law (TWAIL).

Makau Mutua in his article *what is TWAIL?* highlights that TWAIL is not a recent phenomenon, but it has its roots since the decolonisation wave that took place after World War II, which was dedicated to end the European colonial rule over non-Europeans (2000). Moreover, Makau Mutua asserts that TWAIL is driven by three basic objectives; first, to comprehend and unfold the uses of international law as it is being manifested as a tool to create a radicalised hierarchy of international law, and to convey an overall subordination of third world countries; second, launch an alternative normative legal structure for international governance; third, TWAIL seeks through policy, scholarship, and politics to eradicate the unfortunate circumstances in the third world (2000). In this regard, TWAIL focuses on the difficulties of the third world nations “as the historical context from which one might imagine an emancipatory international law” (Fakhri, 2012). Humanitarian intervention from TWAIL point of view is a structure of oppression.

B.S. Chimni illustrates that humanitarian intervention reflects an old form of colonialism by stating

“ [t]he North seeks to occupy the moral high ground through representing the third world peoples, in particular African peoples, as incapable of governing themselves and thereby hoping to rehabilitate the idea of imperialism. The inability to govern is projected as the root cause of frequent internal conflicts and the accompanying violation of human rights

necessitating humanitarian assistance and intervention by the North. It is therefore worth reminding ourselves that colonialism was justified on the basis of humanitarian arguments (the civilising mission). It is no different today” (Chimni, 2006).

In this sense, the discourse of humanitarian intervention seeks to retrospectively justify colonialism (Chimni, 2006). It is legitimate to interfere in other states internal affairs? Do gross violation of human rights justify armed intervention to stop violations? According to the UN Charter the protection of human rights is the responsibility of international society. In contrast, the Charter also prohibits forceful intervention against the territorial integrity and political independence of another state. The Charter rests on the principle of sovereignty. Here, the international community faces a legal and moral dilemma: which takes precedence in humanitarian crisis, sovereignty or human rights? From TWAIL point of view imperialism is being justified on human rights grounds using human rights as a foreign policy tool to promote national goals.

Nations who have been on the receiving end of bombs are usually not very supportive of humanitarian intervention because it often involves taking over their sovereign territory, and killing them to protect them. TWAIL believes that in this sense international law does not apply equally to all nations, third world states have been bombed and exposed to interventions several times; on the other hand, first world states have not (Anghie,2003).

Can humanitarian intervention ever be strictly humanitarian or are Western states just reviving their old colonial powers? TWAIL asks the question of whether first world state’s actions carried out in the name of human rights are classified as humanitarian intervention or as a western imperialism?

The concept of humanitarian intervention has been rarely used; however, as it has been emphasised above that the concept of humanitarian intervention in fact is very old. Three examples of humanitarian intervention from the period before World War II demonstrate this: first, when Mussolini invaded Ethiopia under the pretext of “civilizing” the country; second, when Hitler took over Sudetenland for the purportedly “noble” purpose of ending ethnic cleansing; and third when Japan invaded Northern China claiming to create an “earthly paradise” to protect poor people. All of the above examples illustrate that the early history of humanitarian intervention is quite similar to modern-day intervention; in other words, imperialism dressed up as humanitarian.

On the whole, TWAIL bases its critique regarding the practice of humanitarian intervention on the belief that past behaviour predicts future behavior. Moreover, it highlights that the process and application of humanitarian intervention constitutes a direct threat to the notion of territorial sovereignty. The central focus of TWAIL is to consider concepts such as power relations, norm influence, and colonialism when the international community calls for humanitarian intervention in order to prevent genocidal conflicts.

CHAPTER 3

Case Studies of Kosovo, Tanzania, and Russia

In order to assess the impact of the norm of humanitarian intervention on the primacy of territorial sovereignty case studies have to be examined for evidence. For humanitarian intervention to have tangible implications, it has to have had impacted state sovereignty through one or all of the frameworks mentioned earlier. In order to examine whether the norm of humanitarian intervention eroded the primacy of territorial sovereignty, three case studies have been chosen and examined in

the following part: starting with the case of North Atlantic Treaty Organisation (NATO) intervention in Kosovo in 1999, the case of Tanzania invading Uganda as a humanitarian intervention act 1978–1979, and case of Russia invading Georgia.

The variety of case studies selected for this thesis project demonstrates that it does not matter if the intervening country is a collation of European countries such as the NATO, third world African country such as Uganda, or a hegemonic power state such as Russia. The abuse of authority under the name of human rights protection has been considered a clear violation of territorial sovereignty and a failed attempt to protect human rights violations. Furthermore, the case studies have been chosen carefully to reflect each of the frameworks of analysis mentioned earlier in this thesis project because the three case studies are appropriate examples for the framework of analysis mentioned earlier.

3.1 Case study 1: Kosovo

The third chapter will assess the impact of humanitarian intervention on the primacy of territorial sovereignty thought examining the case of Kosovo. The objective is to add the analysis of one specific case which may provide understandings for the role of humanitarian intervention in eroding the primacy of sovereignty.

“The United Nations charter dictates that intervention should take place only if authorised by the security council and that intervention would be based on a threat to the international peace and security. However, in some rare incidents alliances have intervened in areas without being authorised by the security council. These incidents directly challenged the basic principle of the UN Charter and international law” (Hashem, 2007).

An obvious example of such incident includes the NATO unauthorised intervention in Kosovo which clearly violated the notion of state sovereignty and the prohibition of the use of force reflected in Article 2(4) and Article 2(7) in the UN Charter. This section will focus on six main parts in examining the case of Kosovo. The first part will focus on the roots of the Kosovo conflict. The second part will present a historical overview. The third part will illustrate the NATO goals. The fourth part will assess the legal implications. The fifth part will examine the argument in favour of the NATO campaign. The sixth and last part of this section will investigate the criticism of the NATO campaign.

Background on the roots of the Kosovo conflict:

This part aims to provide a more insightful approach regarding the nature of the Kosovo conflict. According to Marwa Hashem, “Kosovo is a small piece of land that unites both Kosovo Serbs and Ethnic Albanians. The only thing that is mutual between them is Kosovo land, otherwise they are very different” (2007). In this sense, Kosovo Serbs and Ethnic Albanians are initially different. The difference between Kosovo Serbs and Ethnic Albanians is also reflected in terms of language and religion; in other words, the Kosovo Serbs are Christians while the majority of the Ethnic Albanians are Muslims. The region had complete autonomy within the former Yugoslavia, until 1989 when the Serbian leader removed its autonomy by declaring its movement to be under the control of Belgrade; as a result, the Kosovo Albanians objected to the move. Marwa Hashem accentuates the importance of the Kosovo province for the Kosovo Serbs by quoting Savich stating that “[f]or the Kosovo Serbs, Kosovo is very significant province since Kosovo Serbs consider Kosovo as a part of old Serbia. The region was also a religious and political centre of the medieval Serbian State. For Ethnic Albanians the region is an important part of the emerging Albanian State” (2007). In this regard, the main root cause for the conflict in Kosovo is the oppression exercised by the Serbian leader Slobodan Milosevic against the ethnic Albanians. On the other

hand, there are several reasons that played a role in triggering the Kosovo conflict, starting with Ethnic Albanians constituting the majority of Kosovo's population, the death of Josip Broz Tito in 1980 which escalated the tension and caused the federal government to be extremely fragile.

The death of Josip Broz Tito was a very influential factor, as Bringa articulates in his book *The peaceful death of Tito and the violent end of Yugoslavia* that “[t]he idea of “brotherhood and unity” was above all embodied in Tito and his image, and the purging of this idea, the antithesis of ethnonationalism, ultimately demanded the destruction of his image and Tito's death final symbolic death” (2004)

Therefore, the death of Josip Broz Tito gave rise to intense demonstrations against the Yugoslavian government, followed by the collapse of the Yugoslav Radical Union which created a situation where countries request to split apart. Similarly, Kosovo Albanians began to demand their autonomous province. Marwa Hashem asserts that “[d]espite the fact that Kosovo crisis was inevitable, especially after the wars that Milosveic carried out in Croatia Bosnia, and Herzegovina, the International community failed to prevent the Kosovo crisis after it happened, but obviously it was too late” (2007).

Historical overview:

The Serbs and Albanians have a long history of conflicts among them for hundreds of years. Starting the Battle of Kosovo in the 1389 when the Ottoman Turks aimed to take over Kosovo but failed to do so due to the death of the Ottoman Khalifa during the battle. Later in time another battle took place in 1445 when the Ottoman turks managed to take over Kosovo. Back then the majority of Kosovo's population were Serbian Orthodox; therefore, under the Ottoman rule they were treated as second class citizens. As a result, several Albanians converted to Islam to escape discrimination under the Ottoman empire and also to gain social privilege; on the other hand, a huge number of

Serbs decided to migrate during the 17th and 18th centuries. In 1690 the 'Great Migration' took place during the Austrian - Ottoman rule struggles, which led to the migration of large number of Serbs from Kosovo. In this regard, Marwa Hashem explains that "the Kosovo Serbs and the ethnic Albanians have different accounts of history. That is why the ethnic Albanians claim that the number of Serbs who migrated from Kosovo was not as large as indicated (2007). Marwa Hashem also adds that the number was not large enough to create an imbalance in Kosovo (2007).

Kosovo once again became part of Serbia in 1912 following the fall of the Ottoman Turks in the First Balkan war. "The situation in Kosovo was reversed since Serbian and Montenegrin forces committed massacres and atrocities against the Albanian forces and civilians" (Hashem, 2007). After World War I Kosovo was declared to be under the kingdom of Serbs, Croats and Slovenes; in addition, renaming it to be Yugoslavia. As a result, the minority were mainly ethnic Albanians in this situation. Ethnic Albanians urged the international society to take their side; unfortunately, they did not succeed.

After World War II, Kosovo became part of the communist Yugoslavia. "Kosovo was granted autonomy by the Yugoslavian constitution becoming an autonomous province of Serbia in 1936. It became in 1974 a de facto Republic. Kosovo had its own National Bank, Supreme Court and an independent administration apparatus" (Hashem, 2007). On the other hand, Kosovo was suffering from extreme poverty, and harsh economic conditions; moreover, it was underdeveloped.

In 1989, Milosevic's Serbia limited the autonomy of Kosovo Province; furthermore, it changed its name to Kosovo-Methohija. As a result, the tension increased among Albanians and the Serbs. The ethnic Albanians reflected their anger through boycotting the elections, and rebelled by electing Ibrahim Rugova as president. Afterwards, a series of violence took place mainly from the Serbian police and government such as cutting of any mean of communication with the outside world by

disconnecting the phone lines, radio stations, and televisions. “The Serbian government suppressed the ethnic Albanians both culturally and politically” (Hashem, 2007). Back then the international community neglected the situation; moreover, the situation was getting worse and war became inevitable in Kosovo.

“Despite all the discrimination that the Albanians were experiencing, the Kosovo Albanian president, Ibrahim Rugova, was not in favor of any kind of violence. He believed that the Serbs were waiting for any act of violence by the Albanians in order to wipe them off the earth. The situation deteriorated after the Bosnian war and the Dayton peace talks. A violent turn occurred in Kosovo after years of resisting Serbs some Albanian groups restored to violence” (Hashem, 2007).

In 1998 the Serbian president Milosevic “moved machine guns into Kosovo; in addition he was trying to evoke the Serbian people by claiming that Serbs were being terrorised in Kosovo in order to justify his attack on Kosovo” (Hashem, 2007). As a result, massacres took place, and human rights were violated in Kosovo against unprotected civilians.

NATO’s goals:

After failing to reach an agreement with the Yugoslavian leaders, the NATO declared its intention to force Yugoslavian leaders to accept peace talks and end the humanitarian massacre.

The intervention of NATO in Kosovo in 1999 gave rise to controversy about the legality of such an intervention, and its impact on international law. According to Jonathan “[t]he participants face a legal and moral dilemma between the international law prohibition on the use of force and the goal of preventing or stopping widespread grave violations of international human rights” (1999).

NATO’s actions were driven by the moral obligation and did not consider the legal boundaries, accusing the political leaders of ignoring the moral obligation. In spite of all the legal restrictions

NATO decided to launch an unauthorised bombing campaign, which violates the notion of sovereignty in the United Nations Charter and international law. “As a result, the intervention risked destabilising the international rule of law that prohibits a state or group of states from intervening by the use of force in another state, absent authorisation by the UN Security Council” (Jonathan, 1999)

Indisputably, NATO chose to act with several objectives in order to end the Kosovo conflict in 1999. NATO goals were to end all of the military actions and any other act of violence by the Milosevic government in Kosovo through the evacuation of all police, and paramilitary forces. In addition, allowing a UN peacekeeping force to have a station in Kosovo to maintain stability, and a safe return for all the refugees.

Moreover, NATO added (in the meeting of the North Atlantic Council that was held at headquarter on 12 April 1999) that the main goal was to establish a balanced political framework agreement for Kosovo in conformity with the United Nations charter and international law as an attempt to bring an end to the human rights violation in Kosovo.

Former US president Clinton stated that “ the action was designed to avert a humanitarian catastrophe, preserve stability in a key part of Europe, and maintain the credibility of NATO” (Wedgwood, 1999). The NATO objectives were also illustrated by the NATO Secretary General statement in the NATO press release that it is to end human suffering and violence against the civilians of Kosovo in order to achieve stability in the region. The NATO leaders justify their intervention objectives as legal since violations of human rights were grave in Kosovo; “therefore the violations overweighed the territorial integrity. Moreover they considered their intervention in Kosovo based on the moral aspect of protecting humanity, which in this case was more important than international law” (Hashem, 2007). In this sense, the NATO object reflects the theory of the

normative hierarchy that was mentioned earlier in Chapter two, which conveys the language of Jus Cogens.

NATO's intervention legal implications:

NATO intervened in Kosovo with aggressive bombing campaign which breached the notion of state sovereignty mentioned in article 2(7) and article 2(4) of the United Nations Charter and international law. Moreover NATO acted unilaterally without UN authorisation.

This section is dedicated to assess the legal implication of NATO intervention in Kosovo.

The bombing campaign by NATO resulted in civilian casualties, targeting the country's infrastructure such as: electricity and water supplies and communication systems, which are crimes under international law (Fenrick, 2001). Moreover, the United Nations Charter clearly prohibits any act of military intervention in other sovereign states, unless it is done multilaterally upon the decision of the United Nations Security Council. NATO launched the bombing campaign with the assumption that it would pressure Milosevic to back down, which was proven wrong. NATO intervention was miscalculated and presumptuous.

“[T]he NATO operation miserably failed to accomplish its twin missions-one, to protect Kosovar Albanians from the excessive use of force by Serbs, and two, to prevent destabilisation of the Balkan region. Instead, Milosevic intensified the ethnic cleansing being waged against the Kosovars. The outcome was that villages were burned, homes destroyed, and thousands of Kosovar Albanians murdered. Over 800,000 ethnic Albanians fled Kosovo into Albania, Macedonia, Montenegro, and abroad, and hundreds of thousands were displaced within Kosovo. And the region was troubled-Macedonia and Albania bursting with refugees and other neighbouring countries feeling the economic pain caused by the devastation of Yugoslavia. Thus, political and economic stability was a further casualty of the operation.” (Ved, n.d)

NATO acted unilaterally without UN authorisation; hence, “[t]he bypassing of the United Nations has not set a healthy precedent” (Ved, n.d). Moreover, the norms reflected in Article 39 of the United Nations Charter grants the Security Council the upper hand in determining whether or not there has been a threat to peace, breach of the peace, or act of aggression. Furthermore, Article 2(7) prohibition against intervention in domestic matters has been challenged through the NATO

intervention. In this sense, the primacy of territorial integrity, UN norms, and international law has been replaced by the emerging norm of humanitarian intervention as an implication of NATO's intervention in Kosovo. On the other hand, Ved (n.d.) reflects his faith in international law by quoting Professor Glennon in affirming that "the imperative to halt gross violations of human rights and the doctrines of sovereign equality and non interference in internal affairs are seemingly irreconcilable. But that does not mean that the existing Charter norms are unworkable and are being replaced by new norms" (n.d). Therefore, the NATO intervention was hardly justified. On the legal implications, the NATO intervention in Kosovo illustrates the growing tension between the principle of state sovereignty prohibiting any act of intervention in other states domestic affairs. This tension has caused the international community to discourage the act of intervention, and resort to peaceful negotiations. The NATO intervention gave rise to several questions regarding the principle of sovereignty, territorial integrity, and the role of the United Nations.

Arguments in favour of NATO's campaign:

The supporters of the NATO intervention in Kosovo, and the decision to use armed force without any legal authorisation from the United Nations Security Council, had two main legal arguments to justify the NATO action in Kosovo.

The first legal argument rests on the UN Resolution 1199 of 23rd September 1998 condemning all acts of violence by any party, and requiring Yugoslavia to observe a ceasefire and refrain from targeting unprotected civilians; and to allow the return of refugees and displaced persons. In addition, the resolution mentioned a possible future action towards achieving a political solution to the situation in Kosovo as contained in the Contact Group statement of 12 June 1998 ; however, the actions mentioned in the resolution were not followed. UN Resolution 1203 of 25th October 1998 required the Serbs to comply with a number of provisions of the accords completed in Belgrade;

besides, establishing a verification mission in Kosovo. In light of the above, the supporters of NATO intervention in Kosovo argue that because the United Nations Security Council did not take necessary action under its own resolutions, it supplies a legal ground for NATO's intervention in Kosovo. In other words, these resolutions provided some form of implied authorization to use force in Kosovo. This is arguably supported by State practice, such as the imposition of no-fly zones over Northern Iraq. Greenwood elaborates by mentioning an example of State practice regarding the case of Somalia in his article, *Humanitarian Intervention: the case of Kosovo* that unilateral humanitarian intervention became widely accepted after resolution 794 which "went on to authorise military action in Somalia"; moreover, Greenwood adds that the case of Somalia demonstrates "that the Security Council may take, or authorise others to take, military actions on humanitarian grounds" (Greenwood, 2000). Greenwood highlights the legal justification for humanitarian intervention by stating "similarly, resolution 1244 (1999), while again a significant part of the resolution to the NATO action and of great significance in determining the legal basis for the subsequent military presence in Kosovo" (Greenwood, 2000).

Former UN Secretary General Kofi Annan regarding the approach of UN Security Council stated: "If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that affect every precept of our common humanity" (Focarelli, 2008). In this sense, the UN Secretary General declares that the notion of sovereignty as well as the primacy of territorial integrity can shift and change. Kofi Annan upholds that we live in a new globalized world which puts the notion of sovereignty into question when it comes to human rights violations. Kofi Annan claimed that in certain situations the use of force may be legitimate in the accomplishment of peace.

In addition, other legal advisors such as David Clark and Micheal Ignatieff believe that the NATO action in Kosovo was not legal, but morally justified.

Former US president Bill Clinton was a great supporter of NATO intervention in Kosovo. Clinton justified NATO's intervention in his statement by stating that it is an action that aims to prevent a wider war, and reflects the upholding of moral values. Moreover the former President stated in his statement on NATO's intervention in Kosovo that:

“Today we and our 18 NATO allies agreed to do what we said we would do, what we must do to restore the peace. Our mission is clear: to demonstrate the seriousness of NATO's purpose so that the Serbian leaders understand the imperative of reversing course; to deter an even bloodier offensive against innocent civilians in Kosovo and, if necessary, to seriously damage the Serbian military's capacity to harm the people of Kosovo. In short, if President Milosevic will not make peace, we will limit his ability to make war” (Clinton, 2011)

All of the above statements, which argue in favour of the NATO intervention in Kosovo, assert that the interference in other states' internal affairs is on the rise. Furthermore, the UN resolutions offer a legal ground for unilateral military interventions. Therefore, there should be a balance between the moral obligation, and the notion of sovereignty in international law.

Overall, the supporters of the NATO intervention in Kosovo justifications imply that sovereignty is not absolute, which breaches international law and United Nations Charter.

Criticism of NATO's Campaign:

The fifth and last section on the case study of Kosovo will investigate the criticism of the NATO campaign. From the legal perspective, the concept of territorial sovereignty undoubtedly constitutes the idea of exclusive and supreme power over territory and people; however, external military interventions have been disputed because they breach this concept. The case of Kosovo is a clear example which highlights the problem of the legality, and the legitimacy of an intervention.

Therefore, international law scholars believe that humanitarian intervention, as evidenced by the case of Kosovo, is dangerous for the notion of sovereignty. According to Jentlson, “The crucial question here has been how vested humanitarian intervention decisions are in the UN Security

Council. The Kosovo case brought this to a head when Chinese and Russian opposition prevented UNSC action. While not endorsing the U.S.-NATO intervention, Secretary-General Annan did speak out against Security Council inaction when faced with these ‘crimes against humanity’ ” (Jentlson, 2006).

The case of the NATO intervention in Kosovo violates the definition of state sovereignty as proposed by Ian Brownlie, and James Crawford that was mentioned earlier in Chapter one.

Moreover, it was formally “illegal” because NATO did not obtain authorisation from the Security Council. Henkin in his book, *Kosovo and the law of ‘Humanitarian Intervention’*, describes the Kosovo intervention as unlawful because the UN charter prohibits any act of intervention “on their territory,” even for humanitarian ends (Henkin, 1999).

The question arises then of the significance of state sovereignty outlined in the Charter of the United Nations. States are defined as being “supreme and sovereign within their own territory.” Following NATO intervention in Kosovo, an observation of many of the legal scholars writing on the subject indicates that a great number of these scholars argue against the right of unilateral or unauthorised humanitarian intervention. (Holzgreffe, 2003)

As demonstrated, while there is an obligation on sovereign states to establish respect for fundamental human rights; however, there is no legal right to violate other state sovereign territory. Nevertheless, the NATO intervention in Kosovo, which violates the concept of sovereignty, was formally “illegal” because NATO did not obtain authorisation from the Security Council.

Henkin expresses his discontentment by articulating that, “Kosovo has compelled us to revisit the troubled law of humanitarian intervention” (Henkin, 1999). The NATO actions concerning Kosovo reflect that according to some states, humanitarian intervention outweighs the importance of state sovereignty; however, other legal scholars such as, Ian Brownlie in his article, *Kosovo crisis inquiry*:

Memorandum on the international law aspects and James Crawford criticised this viewpoint by stating that NATO had violated international law by intervening in Kosovo.

The case of Kosovo demonstrates the impact of humanitarian intervention in eroding state sovereignty; furthermore, NATO did not have the right to intervene in the internal matters of another state or use of force according to UN Charter article 2(7) and article 2(4) with aggressive bombing campaign which breaches the notion of state sovereignty.

According to anti-intervention scholars, sovereignty is a notion of great significance and value, which ensures stability. In this sense, humanitarian intervention is destabilising the world order through interference in other states' national affairs, which is unacceptable under the language of international law.

The scholar Patrick Regan asserts that humanitarian intervention can give rise to great losses, more serious than they could be in the case of non-intervention considering the NATO bombing of civilian infrastructure and non-military targets (Regan, P. M, 1998). Since the concept of state sovereignty adopted by the United Nations Charter promotes the idea that states are supreme within their own territory, hence humanitarian intervention constitutes a serious challenge to the notion of state sovereign authority. Furthermore, Greenwood states “[i]t has been argued that, because the United Nations Charter contains a prohibition of the use of force and no express exception for humanitarian intervention, there can be no question of international law recognising a right of humanitarian intervention. That is, however, to take too rigid a view of international law”; moreover, Greenwood interprets whether military humanitarian intervention is customary international law by clarifying that international law “overlooks both the underlying principles on which the United Nations Charter is based and the development of customary international law, particularly during the last decade or so. It is important to remember that international law in general and United Nations Charter in particular do not rest exclusively on the principle of non intervention and respect the sovereignty of states” (Greenwood, 2000). On the other hand, state

practice has a profound impact on humanitarian intervention since “international law is not confined to treaty text. It includes customary international law. That law is not static but develops through a process of state practice, of action and reaction to those actions” (Greenwood, 2000).

Mr. Van Walsum, representative of Netherlands speech on June 1999 at the security council regarding the NATO’s intervention in Kosovo emphasised an evolution in international law by stating that:

“We sincerely hope that the few delegations which have maintained that the North Atlantic Treaty Organisation (NATO) air strikes against the Federal Republic of Yugoslavia were a violation of the United Nations Charter will one day begin to realise that the Charter is not the only source of international law. The Charter, to be sure, is much more specific on respect for sovereignty than on respect for human rights, but since the day it was drafted the world has witnessed a gradual shift in that balance, making respect for human rights more mandatory and respect for sovereignty less absolute. Today, we regard it as a generally accepted rule of international law that no sovereign State has the right to terrorise its own citizens. Only if that shift is a reality can we explain how on 26 March the Russian-Chinese draft resolution branding the NATO air strikes a violation of the Charter could be so decisively rejected by 12 votes to 3” (Greenwood, 2000)

3.2 Case study 2: Tanzania invading Uganda

Even though this case study Tanzania’s invasion of Uganda in 1978–1979 is generally perceived to constitute a use of force in self-defence, this thesis will address it from the humanitarian intervention approach since the humanitarian situation was one of the issues used as a justification to overthrow Idi Amin’s regime.

The case of the humanitarian intervention practiced by Tanzania against Uganda in 1978–1979 led to the overthrow of Idi Amin’s regime, in the absence of Security Council authorisation. Acheson-Brown, describes the invasion of Uganda under just war theory because it violated Uganda’s sovereign territory.

This section of the thesis is divided into four main parts. The first part will present a historical background. The second part will provide an insight about Idi Amin Dada, as one of the main reasons behind the intervention. The third part will discuss the invasion in 1972. The fourth and last part will examine and analyse the varying legal opinions on the invasion.

Historical Background:

Tension and conflicts between Tanzania and Uganda had been ongoing for several years before the intervention of 1972. The tension goes back to the incident in which Idi Amin seized power in a military coup in 1971. “Immediately after the coup, the Kenyan authorities forced Obote to leave Nairobi, and Kenya recognised Amin's government. The Tanzanians welcomed Obote and continued to consider him the Ugandan head of state” (Uganda Kenya and Tanzania, 1990) Afterwards, refugees escaped to join Obote, the president of Tanzania, after Idi Amin’s attempt to wipe out his opposition. A year later, a group of exiles headed by Obote, Ugandan socialist political leader, failed in their attempt to invade Uganda and take out Amin, which escalated the situation after the unsuccessful invasion. Nyerere, president of Tanzanian, who Amin accused of arming his enemies, was the one to be blamed after this attempt.

In 1978, Amin’s supporters started to decrease in number, while the number of his enemies in Uganda were increasing. During this period Amin was attacked in Kampala; however, he managed to escape along with his family.

A turning point was when Amin’s Vice President was injured in a car accident, military units who were loyal to General Mustafa Adrisi, the vice president of Uganda rebelled. As a result, Amin was determined to revenge himself from those military units by sending troops against them.

Consequently, a wave of rebellion took over in Tanzania where a huge number of exiles started to unite against Amin’s troops.

At this point Uganda sent military troops in attempt to invade Tanzania, declaring a state of war against the country in order to reclaim part of its land.

It is necessary to mention Idi Amin Dada when it comes to the humanitarian intervention case of Tanzania because he was the driving force behind the intervention.

Idi Amin Dada was the third president of Uganda, was commonly viewed by the international community as a brutal dictator.

“He led the coup that deposed Milton Obote in 1971, expelled the Asian community in 1972, and exercised a reign of terror over his people during which an estimated 300,000 people were killed. After he invaded Tanzania in 1978, the Tanzanian army combined with dissident Ugandans to counter-attack. Despite assistance from Libya, Amin's forces collapsed and he fled in 1979. He now lives in Saudi Arabia. Amin was commissioned into the new Ugandan army in 1962 and an alliance with President Obote led to rapid promotion; by 1966 he was commander of the armed forces. Mounting evidence of Amin's corruption and brutality had convinced Obote to replace him at the end of 1970, but Amin seized power before he could do so. He suspended the constitution and all political activity and took legislative and executive powers into his own hands.” (Helicon, 2013)

In October 1978 Amin launched an attack on Tanzania, with the help of the Ugandan nationalists.

Tanzanian military units responded, eventually gaining control over the Ugandan army. Tanzanian forces approached Kampala, Uganda’s capital, on April 13, 1979.

The massacres and mass killings committed by Idi Amin were mainly motivated by ethnicity and his desired political influence throughout his eight year rule of Uganda. The International Commission of Jurists estimated the number of casualties under Idi Amin’s rule to be around 300,000. In response to Idi Amin’s oppressive and brutal regime Tanzania claimed a humanitarian intervention against Uganda in attempt to dislodge Idi Amin; however, this intervention was not authorised by the UN security council, and the international community on the other hand did not react to the intervention.

The invasion in 1972:

The Defence Force for the invasion was deployed by Nyerere in the attack. Later, the number of Tanzanian troops increased, the number swelled to 100,000 troops; in addition, a massive number of citizens who were exiled by Amin also joined the troops. “The Tanzanian Army acquired a Soviet BM Katyusha rocket launcher, with which they started to fire on targets in Uganda. The Ugandan Army retreated steadily. Libya's Muammar Gaddafi sent 2,500 troops to aid Amin. However the Libyans soon found themselves on the front line, while Ugandan Army units were using supply trucks to carry their newly plundered wealth in the opposite direction” (History of the 20th century, n.d). The Libyan troops that were sent to assist Idi Amin consisted of Libyan, sub-Saharan Africans, and Militia troops, which played a crucial part in the attack.

Nevertheless, Tanzania launched an attack on Uganda from the South and the North-West, which led the Libyan army to retreat due to the casualties. In this sense, Tanzanian attack on Uganda was successful as it compelled Idi Amin to fled to Libya then to Saudi Arabia. “The Tanzanian army remained in Uganda to maintain peace while the UNLF (the political wing of the UNLA) organised elections to return the country to civilian rule” (History of the 20th century, n.d).

Legal scholars reaction to the invasion:

The case of Tanzania is another example of a humanitarian intervention that eroded state territorial sovereignty that led to the overthrow of Idi Amin’s regime, in the absence of Security Council authorisation in 1979.

According to Robert Holzgrefe in his book, *Humanitarian intervention, Ethical, Legal, and Political Dilemmas*, he discusses briefly humanitarian intervention by Tanzania claiming “that humanitarian intervention fails, on balance, to secure the best consequences for all concerned” Furthermore, Holzgrefe quotes H. Scott Fairley in his book by stating “the use of humanitarian intervention ends more often than not has become self-defeating, increasing human misery and loss of life it intended to originally relieve” (Holzgrefe, 2003). Moreover, Robert Holzgrefe continues in

his book by stating that Ian Brownlie and Caroline Thomas “likewise doubt that the positive consequences of the intervention in Uganda exceeded their negative ones” (Holzgrefe, 2003). Even though Idi Amin’s brutal dictatorship was described as a gross violation of human rights, however, the execution of the intervention breached the notion of territorial sovereignty mentioned in the UN Charter which forbids the external violation of another state’s sovereign territory.

3.3 Case study 3: Russia invading Georgia

The Russia-Georgia War is a very controversial matter. There are critical disagreements by the two parties involved regarding their motives behind the conflict, as well as who should be held responsible for its outbreak. However, Georgian President Saakashvili declared in his testimony at the Georgian Parliament that Georgia is the one who launched the military operation first in order to restore constitutional order in South Ossetia.

Ievgen Avramenko questions Georgia’s action by stating “why Georgia decided to begin the military conflict. How could any sensible Georgian decision maker initiate a military assault on Tskhinvali, South Ossetia’s de facto capital, in the face of a large-scale Russian military forces placed north of the border, giving the obvious risk of provoking a full-blown response from Russia that Georgia could not militarily resist?” (2014)

Rein Mullerson states that in the Georgia–Russian war, Russia was pursuing its national goals through the means of imperialism. Moreover, Mullerson in his writing examines Russia’s interest as a typical reaction by powerful states to internal conflict and secessionist movement; however,

Russia's action could be viewed as pursuing its global and regional interest (2009). "Partly such different reactions to the outside world may be due to national characteristics and recent humiliation in the Western hands, but partly they are also due to the fact that Russian and Western interests have come into starker conflict than Chinese and Western interests, though there is no doubt who will be (or already is) the main competitor of the West" (Mullerson, 2009).

Mullerson quotes Robert Kagan's article in the Wall Street Journal when he acknowledged that we live and, will continue to live in the world that is so well defined by powerful leaders who constantly pursue their interests because it defines their power (2009). In those powerful states national interests are often disguised in Western democratisation, moral obligation, international politics, or ideological matters. Mullerson quotes Sir Christopher Meyer in his writings that he "would bet a sackful of roubles that Russian foreign policy would not be one jot different if it were a fully functioning democracy of the kind that we appear keen to spread around the globe" (2009).

This section of the thesis is divided into six main parts. The first part will present a historical background. The second part will illustrate Russia's interest. The third part will discuss the Russian-Georgia conflict in South Ossetia. The fourth part will inspect the humanitarian impact. The fifth part will examine Russia's justification. The sixth part will analyse the legal argument for Russia's military intervention.

Historical Background:

The South Caucasus is located between Europe and Asia,. It has always been subject to territorial struggle. Their quests for independence triggered several conflicts and fights over their territorial borders. "South Ossetia and Abkhazia are two breakaway regions of Georgia" (Avramenko, 2014).

The tension goes back to 1920 when South Ossetia attempted to gain its independence, but the Red Army took control over Georgia; as a result, Georgia's was no longer independent.

In 1910 a phase of territorial and ethnic conflicts took over, which triggered a war between South Ossetia-Georgia and Abkhazia-Georgia. During these conflicts Russia acted as a mediator in order to ceasefire and ensure stability; nevertheless, no political resolutions were reached. Everything changed later in 2004 when Georgia went through a democratic transition "when pro-Western political leader Mikhail Saakashvili came to power in 2004 throughout the dramatic events of the Rose Revolution" (Avramenko, 2014).

The conflict began when Mikhail Saakashvili declared his intentions to take away South Ossetia's local autonomy, and bring it back under Tbilisi's rule along with Abkhazia. As a result, the August War began with violent attacks exchanged between Georgia and South Ossetia. The authorities of Tbilisi and Tskhinvali both accused each other for attacking the other side. Consequently, on 1st August, 2008 a massive bomb explosion took place where Georgian police officers got injured.

"Later that day, Georgian snipers shot and killed six South Ossetian police officers. The next morning, the firing of automatic weapons resumed between the southwest side of Tskhinvali and the Georgian village of Zemo Nikozi. Fighting intensified toward the evening of August 6 and throughout August 7. Late in the evening on August 7, around 11:30 p.m., Saakashvili gave the order of massive shelling of Tskhinvali and surrounding villages, the attack that is widely considered the start of the war. Georgian authorities claimed its forces launched the attack to suppress firing positions from which the South Ossetian militia attacked Georgian peacekeepers and Georgian villages. The Georgian government also claimed that they had received information that Russian forces crossed the Roki tunnel and entered South Ossetia in the early morning of August 7; hence, they launched the operation to prevent a full-scale Russian invasion of their country." (Avramenko, 2014).

The attacks between the two parties were intensified on the night of August 7th when Georgian forces launched a BM-21 multiple rocket on Tskhinvali. For that reason, street demonstration broke out between the Georgian and South Ossetian forces.

Russia-Georgia Conflict in South Ossetia:

Georgian forces took control over many villages in Tskhinvali. As a result, Russia's military responded by moving its forces through the Roki tunnel toward Tskhinvali; moreover, the Russians bombed Georgian ground forces in Tskhinvali.

On the 8th of August, the Russian government announced the deployment of its army in the outskirts of Tskhinvali. Two days later, after the withdrawal of Georgian troops from South Ossetia on August 10th, Russia took over Georgian territory in Southern and Western Georgia.

“After establishing all-out control over these two autonomous regions of Georgia, the Russian army did not stop. Instead, they invaded several of Georgia's undisputed central provinces, capturing the non-contested Georgian cities of Gori, Poti, Zugdid, and Senaki. The Russian military bombed military and civilian infrastructure across Georgia, including the railway connection between eastern and western Georgia. Russian warplanes destroyed Georgian airfields near the capital, took strategic positions just forty kilometers from Tbilisi, and according to Russian President Vladimir Putin, were ready to destroy the President's Administrative facility in two to three hours” (Avramenko, 2014).

On August 12, Russian President Dmitry Medvedev ceased fire, and the Georgians have been forced to leave South Ossetia. The suppressed historical tension between both parties was triggered when Saakashvili made the first attack; as a result, it gave Russia a great opportunity to retaliate with full-blown military action.

Russia's Justification:

Russia claims that its actions were an act to protect the Russian citizens in South Ossetia, and its own peacekeepers stationed there. In other words, just like NATO in the Kosovo conflict, Russia used humanitarian intervention as a justification to intervene in Georgia. Russia claimed during the war its peacekeepers stationed in South Ossetia suffered casualties. Therefore, Russia launched its first attack and moved its troops through the Roki Tunnel after Georgia had already launched its attack. Furthermore, Russia attacked the military infrastructure in order to assist the South Ossetia.

To begin with, Russia eventually blamed Georgia for committing genocide against Ossetians, condemning its attack operation. “The genocide claims that Russia used to justify its military intervention were based on the high casualty figures, which also significantly influenced public sentiment in South Ossetia. For example, some of the local residents interviewed by Human Rights Watch justified the torching and looting of the ethnic Georgian villages by referring to “thousands of civilian casualties in South Ossetia,” as reported by Russian TV channels” (Amashukeli, 2011). “According to the Investigative Committee of the Russian Federation Prosecutor's Office, on August 21 it had documented the deaths of 133 individuals. On December 23, 2008, Ria Novosti stated that 162 people killed in South Ossetia had been confirmed. Following his visit to the region, Luc Van den Brande, the chairperson of the Ad Hoc Committee established by PACE to study the situation in Russia and Georgia, said on September 29, 2008 that “independent reports put the total number of deaths at between 300 and 400, including the military” (Amashukeli, 2011). Russia’s justification is considerable poor because the conception of invading countries in order to stop a potential genocide, and mass human rights violation is not a valid excuse to violate sovereign territory of other countries by the use of military force. Russia bases its argument on claims that Georgia committed genocide against South Ossetia; however, the data findings demonstrate that less than 100 civilians died during Georgia's attack. “On August 30, Prime Minister Vladimir Putin said Georgia's goal was the “extermination of the peaceful population in South Ossetia” and asked, “What is this if it's not genocide?” None of this--the accusation of genocide” (Russia's Poor Excuse For Invading Georgia, 2008).

Legal argument for Russia’s military intervention:

According to Petro, “Russia’s emphasis on the legal justification for intervention should be viewed as a significant step to the adaptation of Russian foreign policy to post-Soviet norms” (Petro, 2008).

Petro clarifies, that Russia used the term “peace enforcement” as a legal justification for its actions in Georgia in front of the United Nation Secretary General Boutros Ghali 16 years ago (2008).

Russia initially claims that its action is classified as a humanitarian intervention case; therefore, Petro expresses his concern that Russia’s constructed legal argument is influencing and reshaping international law (2008) “ the international legal system has become a fundamental ambition of Russian foreign policy” (Petro, 2008). That being so, Russia affirms that its intervention in Georgia was under the responsibility to protect (R2P)

“The rationale for Russian intervention is laid out by Russia's ambassador to the United Nations, Vitaly Churkin, in his letter of August 11, 2008 to the president of the U.N. Security Council. In it Churkin cites the scale of the attack on Russian peacekeeping forces and Russian citizens, as well as statements of aggressive intent by Georgian political and military leaders to "demonstrate that we are dealing with the illegal use of military force against the Russian Federation. In those circumstances, the Russian side had no choice but to use its inherent right to self-defen[s]e enshrined in Article 51 of the Charter of the United Nations." Concluding his letter, Churkin pledges that Russia's use of force will be "strictly proportionate to the scale of the attack," aimed at defending both peacekeepers and citizens, and at preventing further attacks on them” (Petro, 2008)

Furthermore, Russia justifies its actions by relying on Article 51 of the United Nations Charter which give states the right to self-defence if an armed attacked took place; on the other hand, it can be easily argued that Georgia did not commit any act of aggression, but it was restoring constitutional order in South Ossetia. In this sense, Russia’s legal justification that invoked Article 51 as self-defence is invalid since it was not subject to the attack. Following this view, the main legal criticisms that can be argued against Russia’s action is the massive breach of human rights, which they claimed to protect, and violation of another states sovereign territory; in addition, “a breach of Russia’s obligations to international treaties and conventions in the human rights field, including the Helsinki Final Act” (Petro, 2008).

Humanitarian Impact:

According to Human Rights Watch, the “Russian forces allowed South Ossetian forces who followed in their path to engage in wanton and wide-scale pillage and burning of Georgian homes and to kill, beat, rape, and threaten civilians” (Human Rights Watch, 2009).

The Russian forces clearly did violate human rights in this war resulting in many casualties; moreover, the Russian forces targeted civilians and infrastructures such as; the parliament building, schools, and nurseries. According to the Human Rights Watch, Georgians constituted 50% of the population in Abkhazia, as opposed to 17 % Abkhazian, so the expulsion of Georgians caused a drastic change in the demographic situation there (HRW,1995).

On the other hand, Russia has clearly violated the territorial integrity of the Republic of Georgia; in addition, Russia violated international humanitarian law when their rockets targeted civilians in Georgian controlled territory. “Russian military vessels, manned by supporters of the Abkhaz side, were made available to shell Georgian-held Sukhumi, and at least a handful of Russian-trained and Russian-paid fighters defended Abkhaz territory in Tkvarcheli. The Russian role in this conflict has in part foreshadowed the brutal Russian behaviour in Chechnya, and has contributed to a pattern of Russian disregard for human rights and violations of the laws of war” (HRW, 1995). Human Rights Watch concluded that Russia often did not differentiate between the civilian and military targets, “and that witnesses in South Ossetia often referred to volunteer fighters as civilians, whereas under international humanitarian law they are combatants” (HRW, 1995).

Russian Interest:

It is undeniable that there are various factors behind Russia’s interest in the conflict starting with the strategic importance of the region since it is located between the Middle-East and the North Caucasus; in addition, the security concern for Russia is understandable, and gives Russia a reason

to take action in this specific matter. Furthermore, there is also the economic factor which is one of the main reasons behind Russia's involvement. Last but not least, Russia in this sense can control the Western influence by possessing a geopolitical importance in Central Asia as well. In the light of the factors mentioned above, "[i]n facing global challenges, Russia" is one who "pursues her own interests" (Mullerson, 2009).

Therefore, it explains that "we can see this most clearly in different attitudes towards independence of Serbia's province of Kosovo and Georgia's formerly autonomous regions of Abkhazia and South Ossetia" (Mullerson, 2009). It is ironic that Russia, which was one of the main critics of NATO intervention in Kosovo, used the same justifications and discourse to intervene in Georgia in 2008.

After the fall of the Soviet Union, Russia intended to return its control over the 'near abroad'. As a result, the Russian government was exceedingly engaged in the South Ossetian conflict. "Russia's geopolitical, economic and military long-term interests explain its involvement in the conflict, whereas the recognition of the Republic of South Ossetia was only a response to the NATO and US for the Kosovo independence" (Guseinova, 2012)

According to Guseinova, the political importance of Moscow decreased on the global level, as the majority of former republics in the European part of the USSR changed their position from Russia's political orbit to European Union; therefore, Putin was determined to take a political course for restoration of its sphere of influence (2012). "The means for re-establishment of its influence were cheap energy resources (oil and gas) that Russia could offer to the Europe" (Guseinova, 2012)

Moreover, Guseinova elaborates that Russia plays an important role in supplying Europe with large amount of energy resources; as a result, it gives Russia a considerable influence over European countries, which is inconvenient for Europe. (2011). Therefore, Europe was seeking an alternative supplier in order to substitute its dependency on Russia, and "[s]ubstitution to the existing way of

energy recourse transferring was through Georgia 'Baku-Tbilisi-Ceyhan pipeline'. BTC pipeline project according to some experts was solely political designed to damage Russia and at the same time, reinforce America's position in the region" (Guseinova, 2012). As an attempt for Russia to ruin Europe's plans, it had to get involved in Georgia to serve its own interest. Since substituting Russia's energy supply to Europe won't only mean a loss of hundred millions of dollars, but also Russia would lose its power in Europe.

The danger Humanitarian intervention posed on territorial sovereignty:

Has humanitarian intervention eroded territorial sovereignty? This is the guiding question addressed in this thesis. Under International law use of force is not allowed unless it is for the purposes of self-defence and collective enforcement action authorised by the UN Security Council.

According to Wheeler, "[h]umanitarian intervention poses a hard test for an international society built on principles of sovereignty, non-intervention, and the non-use of force" (2001). Wheeler articulates, that during the cold war, military humanitarian intervention was not legitimate because the international community placed more value on sovereignty than on enforcement of human rights; however, an evolution occurred during the 1990's especially among liberal democratic states, which "led the way in pressing new humanitarian claims within international society" (2001).

"The UN Secretary-General noted the extent of this change in a speech to the General Assembly in September 1999. Kofi Annan declared that there was a „developing international norm" to forcibly protect civilians who were at risk from genocide and mass killing. The new norm was a weak one, however. At no time did the UNSC authorise forcible intervention against a fully-functioning sovereign state and intervention without UNSC authority remained controversial" (2001).

On the other hand, the outcome of the humanitarian intervention case of Kosovo led the scholars supporting the non-intervention to question whether military humanitarian intervention actions are dedicated to protect human rights or redraw the map since it is undeniable that the NATO humanitarian intervention in Kosovo led to a smaller Serbia.

The Kenyan-American professor of law, Makau W. Mutua, in his article *Savages, Victims, and Saviors: The Metaphor of Human Rights*, examines humanitarian intervention from TWAIL's perspective and explains the complex relation between humanitarian intervention and the violation of territorial sovereignty. Mutua in his article critiques humanitarian intervention from three-dimensions which addresses several tangled matters. Mutua argues that "the first dimension of the prism depicts a savage and evokes images of barbarism"; in other words, the third world countries are viewed as uncivilised and barbaric nations by the first world states (2013).

"The second dimension of the prism depicts the face and the fact of a victim as well as the essence and the idea of victimhood. A human being whose "dignity and worth" have been violated by the savage is the victim" (2001); furthermore Mutua mentions "[t]he third dimension of the prism [as] the saviour or the redeemer, the good angel who protects, vindicates, civilises, restrains, and safeguards. The saviour is the victim's bulwark against tyranny" (2001). In this sense, humanitarian intervention falls under the third dimension Mutua mentions such as the United Nations acts as the saviour promoting Western Liberalism ideas. Even though the United Nations is an international organisation that respects and protects the primacy of territorial sovereignty, Makau condemns the United Nations for engaging more in military humanitarian actions that come at the expense of violating territorial sovereignty of states; for instance, the United Nations "failures in Rwanda and Somalia, as well as the atrocities in the former Yugoslavia, have embarrassed the world body and have made an urgent case for more effective intervention" (Makau, 2001). Overall, Makau's article requests the construction of a truly universal human rights corpus, one that is not motivated by political or personal interests.

On the other hand, Robert Knox accentuates that humanitarian intervention has been used as a doctrine that would enable states to legitimise their intervention into peripheral territories (2013). “What this ultimately means is that the form in which radicalisation occurs is determined by this relationship between an advanced core and an exploited periphery. The logic of civilisation is deployed as part of a process whereby this core is enabled to exploit and oppress the periphery” (Knox, 2013).

Knox illustrates the hypocrisy of hegemonic states by referring to the case of Russia invading Georgia. In response to the Russian military attack which drove the Georgian military out of South Ossetia that was mentioned earlier in Chapter Three “[g]iven the closeness of Georgia to NATO, there was consternation about this. However, what is ultimately surprising is how little condemnation there was. It appears, then, that Russia was attempting to usurp the imperial legal prerogative that the US had carved out for itself and its allies. The response of the US government to this was therefore telling. President Bush declared that Georgia was a “sovereign nation, and its territorial integrity must be respected” (2013). In this sense, the US argument did not refer to the humanitarian crisis nor did it acknowledge the fact that humanitarian intervention is posing a serious threat to sovereign territory; instead “the doctrine was conceived in such a way as to exclude Russia, as a rival, from being able to invoke it” (2013).

The implications if humanitarian intervention did not happen:

The questions of when it is suitable for a state or group of states to intervene in another state’s internal affairs to prevent or stop human right violation against citizens other than its own, and whether the international community should react to protect people at risk across borders or adhere to article 2(4) and 2(7) of the United Nations charter are critical.

The cases in which humanitarian intervention to prevent or stop man-made catastrophes occurred or failed to occur are the centre of this debate. For instance, “[t]here was the debacle of the international intervention in Somalia in 1993; the pathetically inadequate response to genocide in Rwanda in 1994; the utter inability of the UN presence to prevent murderous ethnic cleansing in Srebrenica in Bosnia in 1995 and then NATO’s intervention, without Security Council approval, in Kosovo in 1999. These were not the only the cases” (Evans, 2002).

All of these cases are examples of intervention acts whose justification rests on the moral obligation; however, according to Evans these intervention cases “were [a] little too late, misconceived, poorly resourced, poorly executed, or all of the above” (2002). However, it is undeniable that in certain cases such as: Bosnia, Rwanda, and Somalia the act of intervention did prevent human rights violations and saved people’s lives. Therefore, it can be argued that limiting the act of humanitarian intervention can be perceived as lawful countermeasures “in response to a breach of an international obligation by the culprit State. Under article 48 of the 2001 ILC Articles on State Responsibility, all States have a legal interest in the cessation of a breach of obligations *erga omnes*, as the violation of human rights. Thus, they are all injured States and can take proportionate countermeasures against the violating State in accordance with the law of international responsibility. This argument runs counter to the law of international responsibility, which does not permit forcible countermeasures, not even collective ones, as well as to the content of article 48 of ILC Articles.” (Oxford University Press, n.d). Comprehensively, it is obvious that the act of unilateral humanitarian intervention is illegal; however, in certain critical cases intervention is considered to be indispensable to stop human rights catastrophes. In this sense, it continues to remain unlawful, but absolutely necessary from the moral perspective.

CHAPTER 4

4.1 Conclusion

The findings of this thesis project are based on the analysis of the current existing literature, and the output of academic legal scholars. It used the three case studies of Kosovo, Tanzania, and Russia in order to demonstrate the danger which the norm of humanitarian intervention imposes on the notion of territorial sovereignty, as defined by Ian Brownlie, and James Crawford.

Humanitarian intervention has been and obviously will continue to be a much debated matter. Many legal scholars assert that humanitarian intervention poses a serious threat to the notion of sovereignty since sovereignty grants states the absolute right to manage their own internal affairs without any external interference. Moreover, the principle of sovereignty in international law aims to protect the weaker states from the powerful ones. In light of the above, NATO intervention in Kosovo was heavily critiqued by the international community because NATO acted unilaterally without a clear authorisation from the United Nations Security Council and intervened in another states' internal affairs. Interestingly, a number of other states such as Tanzania (in Uganda) and Russia (in Georgia) have used humanitarian intervention as a justification to intervene in other states, in order to promote their own national, strategic interests. This shows that humanitarian intervention can be easily manipulated. Under international law, the notion of sovereignty is a privilege that states enjoy, and humanitarian intervention is a serious threat to this privilege as evident by the case studies. The three frameworks examined in this thesis, namely positivism, TWAIL and normative hierarchy do not support the concept of humanitarian intervention; in fact, they are highly critical of it.

International law has evolved with the build up of cooperation among sovereign states. We wouldn't be able to have the strength of the European Union, African Union, and international bodies like the United Nations without the participation of sovereign entities. Therefore, it is undeniable that the norm of humanitarian intervention can be a double-edged sword, and depending on their perspective, some legal scholars consider it to be a moral obligation while others think it is a conspiracy to reshape international law as we know. An example of the latter view is the previously mentioned Third World Approach To International Law (TWAIL) school of thoughts, which argues that "the norm of humanitarian intervention can be exploited in favour of promoting hidden agendas and to put forth selfish interests of different states" (Zabal, 2011).

In Chapter two, the normative hierarchy theory was used to examine the claim that humanitarian intervention as a moral obligation is superior to the notion of sovereignty, and in this sense changing the principles of international law. It expresses a serious concern regarding the use of humanitarian intervention as an excuse to violate of the norm *jus cogens* and to surpass the UN Charter and international law principles. This thesis argued that, states should not abuse sovereignty; it is the states role to protect their own citizens and their basic human rights. As Wheeler puts it, "states should recognise the fact that they should protect....citizens [while] acknowledging the right to sovereignty and non intervention as a responsibility; however this does not annul or reject the principles of sovereignty and non intervention" (as cited in Hashem, 2007)

Finally, due to the requirements of this thesis project, the research was limited in terms of its components and findings. Three different frameworks were addressed, and three case studies examined to illustrate the impact of unilateral humanitarian intervention on the primacy of territorial sovereignty. This framework aimed to present different approaches to the notion of sovereignty and humanitarian intervention in order to expand the readers' horizon regarding one of the most controversial debates that the international community is facing.

Recommendation:

The influence of the norm of humanitarian intervention on territorial sovereignty has been examined throughout this thesis. This study concludes that the norm of humanitarian intervention is a threat to the primacy of state sovereignty. Therefore, military intervention should be the last resort instead of being the first resort when human rights violations occur.

The norm of humanitarian intervention is actually considered by many a double-edged sword, having a threatening impact on the primacy of territorial sovereignty. Some legal scholars view it as an obligation and a moral duty that would end human rights violations; on the other hand, some legal scholars clarify their concern that humanitarian intervention could negatively affect the future of international law.

Therefore, states should respect the notion of sovereignty mentioned in the United Nations Charter which in addition, provides legal assistance and political counsel to parties and mediators to resolve the humanitarian crises through peaceful negotiations. Instead of invoking Chapter IV to gain legal grounds for the use of military force, this thesis study urges states to refer to article 2(3) of the United Nations Charter “[a]ll [m]embers shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered” (UN Charter article 2(3)).

Furthermore, this thesis recommends the United Nations Security Council to engage more in promoting the idea of multilateral, collective measures to address gross and systematic human rights violations in order to limit unilateral humanitarian intervention. Multilateral humanitarian intervention emphasises the fact that the international community approves of the military humanitarian intervention; hence, it would gain the consent of world states and have a United

Nations mandate to ensure the maintenance of international peace and security, unlike the case of Kosovo and Russia.

According to Jentlson, “The crucial question here has been how vested humanitarian intervention decisions are in the UN Security Council. The Kosovo case brought this to a head when Chinese and Russian opposition prevented UNSC action. While not endorsing the U.S.-NATO intervention, Secretary-General Annan did speak out against Security Council inaction when faced with these ‘crimes against humanity’ ” (Jentlson, 2006).

Before the cold war era under international law, intervention was prohibited since article 2(7) of the UN charter incorporates the prohibition of the United Nations to intervene in matters of any state. However, the Security Council resolutions violated the prohibition mention in article 2(7) in passing a number of resolutions, such as resolution 1674 on protecting civilians, resolution 1706 for UN peacekeeping in Sudan, resolution 1973 in Libya, resolution 1975 in Cote d’ivoire, resolution 1996 in South Sudan, resolution 2014 in Yemen, and other resolutions which breach article 2(7) of the UN charter.

Therefore, the United Nations Security Council provides legal grounds as an entity that passes a number of resolutions which allow the norm of humanitarian intervention to take place. That being the case, the United Nations Security Council provides the norm of humanitarian intervention with the implementation mechanism through the resolutions they pass.

In this sense, the Security Council resolutions disturb the international order. Henkin in his book *Kosovo and the Law of Humanitarian Intervention*, articulated his disapproval by stating, “ In my view, unilateral interventions, even for what the intervention state seems to be important humanitarian end, is and should remain unlawful” (Henkin, 1999) .

Notwithstanding, those who believe that the implementation of the norm of humanitarian intervention “has actually been the first step towards its institutionalisation were and still are major proponents of the creation of the Responsibility to Protect report, which was initially produced in 2001 to discuss and set a framework for the “right of humanitarian intervention, [and how and when] it is appropriate for states to take coercive and in particular military action, against another state for the purpose of protecting people at risk in other states” (Zabal, 2011).

According to the ICISS Report “states have the primary responsibility to protect their citizens.

When they are unable or unwilling to do so, or when they deliberately terrorise their citizens, the principle of non-intervention yields to the international responsibility to protect” (ICISS 2001: xi).

In this sense, R2P has been designed in order to impose an obligation on states to protect their own citizens from any human rights violations, granting any state the right to “act upon atrocities taking place within its territories, before any foreign intervention” (Zabal, 2011). However, if a state did not protect its own citizen from all crimes against humanity, according to R2P the international community has the right to intervene.

In 2009, the United Nations Secretary General released a report, entitled *Implementing the Responsibility to Protect*. In this report, the Secretary General “argued that R2P is an ally of sovereignty, not an adversary, that grows from the principle of sovereignty as responsibility rather than through the doctrine of humanitarian intervention” (Bellamy, 2010). In this report, the United Nation stipulated three pillars for R2P to be implemented. The first and second pillar states that “R2P principle should be localised into each culture and society, states should have mechanisms in place to deal with bigotry, intolerance, racism, and exclusion, and those inciting or planning to commit crimes need to be aware that they will be held accountable” (Bellamy, 2010) while the third pillar puts further constraints by stating that “[t]he security council might use targeted sanctions, and the permanent members of the security council should refrain from using their veto in situations

of manifest failure and should act in good faith to reach a consensus exercising the council's responsibility. Furthermore, the UN should strengthen its capacity for rapid deployment of military personnel ” (Bellamy, 2010).

Responsibility to protect is an extremely useful and important report which provides a concrete framework of action when it comes to humanitarian intervention “and offering means by which the abuse of the right of intervention can be avoided” (Zabal, 2011). R2P managed to have a positive impact regulating humanitarian intervention activities and limiting the abuse of its actions.

Glossary

State Sovereignty: The principle of state sovereignty; the right of states to exclusive control over their own territory, is seen as an integral part of the current international order...

Humanitarian intervention: is the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied” (Smith,1998).

The legal positivism: states that what gives any legal norm its validity depends on its sources and not its merits, it examines existing international law principles reflected in the UN Charter and customary international law.

Normative hierarchy theory: suggests that there is a hierarchy among the norms of international law. According to Martti Koskenniemi, an international lawyer and a former Finnish diplomat, “Legal reason is a hierarchical form of reason, establishing relationships of inferiority and superiority between units and levels of legal discourse” (Koskenniemi, 1997).

Third World Approaches to International Law (TWAIL): TWAIL is driven by three basic objectives; first, to comprehend and unfold the uses of international law as it is being manifested as a tool to create a radicalised hierarchy of international law, and to convey an overall subordination of third world countries; second, launch an alternative normative legal structure for international governance; third, TWAIL seeks through policy, scholarship, and politics to eradicate the unfortunate circumstances in the third world (2000). In this regard, TWAIL focuses on the difficulties of the third world nations “as the historical context from which one might imagine an emancipatory international law” (Fakhri, 2012)

Responsibility to Protect (R2P): argued that states have the primary responsibility to protect their citizens. When they are unable or unwilling to do so, or when they deliberately terrorise their citizens, the principle of non-intervention yields to the international responsibility to protect” (ICISS 2001: xi).

NATO: North Atlantic Treaty Organisation (NATO), also called the North Atlantic Alliance, is an intergovernmental military alliance based on the North Atlantic Treaty which was signed on 4 April 1949 “North Atlantic Treaty Organisation (NATO), n.d”

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