THE ROLE OF NATO IN INTERNATIONAL CONFLICTS AFTER KOSOVO, AFGHANISTAN AND LIBYA:
FROM CLASSICAL INTERVENTIONS TOWARDS A RESPONSIBILITY TO PROTECT

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“They are resolved to unite their efforts for collective defense and for the preservation of peace and security.”
(North Atlantic Treaty, 4 April 1949, preamble)
Preface

This thesis has been written in the framework of my education at the Law faculty of the University of Ghent. It is the coronation of five years of excellent education at this institution.

This work could not have been created without the help and support of many. I would therefore like to extend my gratitude to all those who made it possible.

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Table of Contents

Introduction ........................................................................................................................................ 1


1.1. PROLOGUE ................................................................................................................................ 5
1.2. AN ALLIANCE BORN BETWEEN DESPAIR AND HOPE ................................................................. 5
1.3. A COLLECTIVE SELF-DEFENSE ORGANIZATION .................................................................... 7
   1.3.1 Tracing Back the Origins of NATO ............................................................................................ 7
   1.3.2. The Legal Framework of the Concept of Self-Defense ............................................................... 7
      1.3.2.1 : An Exception on the Principal Prohibition on the Use of Force ......................................... 7
      1.3.2.2 : The Concept of Self-Defense ............................................................................................. 7
         a) Article 51 of the UN Charter ...................................................................................................... 7
         b) Self-Defense requires an Armed Attack .................................................................................... 8
         c) The Principle of Necessity ......................................................................................................... 9
         d) The Principle of Proportionality ................................................................................................ 9
         e) The Obligation to Report to the UN Security Council ................................................................ 9
   1.3.3. The Concept of Collective Self Defense in the North Atlantic Treaty ......................................... 10
      1.3.3.1 : Article 5 of the North Atlantic Treaty ................................................................................. 10
      1.3.3.2 : Strong links with the UN Charter ....................................................................................... 11
      1.3.3.3 : No Automatic Obligation .................................................................................................. 12
   1.3.4. The Concept of Self Defense during the Cold War: Deterring the Communist Powers ........ 12
1.4. CONCLUSION ............................................................................................................................... 14

Chapter 2. NATO standing on an Intersection : 1989-1998 ............................................................... 17

2.1. AWAKENING IN A NEW WORLD ORDER ................................................................................... 17
2.2. THE 1991 STRATEGIC CONCEPT ............................................................................................. 17
2.3. BAPTISM BY FIRE : NATO IN BOSNIA ...................................................................................... 19
      2.3.1. Yugoslavia : a Ticking Time Bomb .......................................................................................... 19
      2.3.2. NATO’s Actions in Bosnia ..................................................................................................... 20
2.4. CONCLUSION : THE FIRST STEP IS ALWAYS A DIFFICULT ONE ........................................... 22

Chapter 3. NATO in Kosovo : Legitimately trying to justify the Unjustifiable ........ 25

3.1. INTRODUCTION .......................................................................................................................... 25
3.2. GOING BACK IN TIME : NATO’S WAR IN KOSOVO ................................................................. 26
      3.2.1. The Prelude for an Unavoidable War : June 1989 – February 1998 ..................................... 26
      3.2.2. A Summer of Violence: March 1998- October 1998 ............................................................. 28
      3.2.3. The “Sitzkrieg” : November 1998 – March 1999 ................................................................. 30
      3.2.4. Operation Allied Force ......................................................................................................... 31
3.3. THE LEGALITY OF THE WAR IN KOSOVO : NATO’S ATTEMPTS TO JUSTIFY THE USE OF FORCE .... 32
      3.3.1. Introduction .......................................................................................................................... 32
      3.3.2. Humanitarian Intervention as Justification for NATO’s Use of Force ................................. 34
         3.3.2.1. Possible Justifications for the Use of Force ................................................................. 34
         3.3.2.2. Kosovo, the Breakthrough of the Concept of Humanitarian Intervention? .................... 36
            a) The Rise of the Humanitarian Intervention .......................................................................... 36
Chapter 4. NATO in Afghanistan: Experiencing Historic Days from the Sideline ................................................................. 47

4.1. INTRODUCTION: 9/11 AND THE LAUNCH OF OPERATION ENDURING FREEDOM .................. 47
4.2. INVOKING ARTICLE 5: COLLECTIVE SELF DEFENSE IN PRACTICE .................................................. 48
  4.2.1. Article 5 of the NATO Treaty ......................................................... 48
  4.2.2. The Significance of the Invocation of Article 5: A Historic Step during Historic Days .......... 49
4.3. ARTICLE 5 IN PRACTICE: THE SELF-WEAKENING OF NATO ......................................................... 51
  4.3.1. A Story of Missed Opportunities .................................................... 51
  4.3.2. Despite experiencing Historic Highlights ......................................... 51
4.4. COMPARISON: NATO’S ACTIONS IN KOSOVO, NATO’S ACTIONS IN AFGHANISTAN .................... 53
  4.4.2. The Lessons from Kosovo applied in Afghanistan ............................... 54
  4.4.3. Not a Single legal, Political or Military Reason to cooperate .................. 55
4.5. CONCLUSION: AFGHANISTAN, A STORY OF THROWN CHANCES AND MISSED OPPORTUNITIES ...... 56

Chapter 5. Libya: the First Application of the Responsibility to Protect........59

5.1. INTRODUCTION: FROM ARAB SPRING TO LIBYAN FALL ................................................................. 59
5.2. THE RESPONSIBILITY TO PROTECT: A STORY OF SLOW BUT CONTINUOUSLY PROGRESS .......... 61
  5.2.1. From Humanitarian Intervention to Responsibility to Protect .................... 61
    5.2.1.1. Introduction: A Pressing but Long Lasting Question .......................... 61
    5.2.1.2. An Answer for a New Century: the ICISS Report ......................... 62
      a) The Birth of a New Doctrine: The Responsibility to Protect ................. 62
      b) The Responsibility to Prevent ....................................................... 63
      c) The Responsibility to React .......................................................... 64
        c.1. Many Options of Reaction ....................................................... 64
        c.2. The Six Criteria for Military Intervention .................................... 65
data) The Responsibility to Rebuild ..................................................... 67
e) Publication and Impact of the ICISS Report ........................................ 67
    5.2.2. From the Law of the Books towards the Law in Practice: The 2005 World Summit .......... 67
      5.2.2.1. Four More years: the Time to wait for Progress ......................... 67
      5.2.2.2. The 2005 World Summit ....................................................... 68
      5.2.2.3. The Aftermath of the 2005 World Summit ................................ 70
5.3. NATO AND THE RESPONSIBILITY TO PROTECT: THE CIVIL WAR IN LIBYA ................................. 71
  5.3.1. NATO meets Responsibility to Protect .............................................. 71
  5.3.2. NATO’s operation in Libya ............................................................. 72
    5.3.2.1. UN Security Council Resolution 1970 ....................................... 72
    5.3.2.2. UN Security Council Resolution 1973 ....................................... 73
      a) Historic Words for a Historic Resolution ........................................ 73
      b) Resolution 1973, the Result of a Long Traveled Road .......................... 74
    5.3.2.3. NATO in Libya: enforcing UN Security Council Resolution 1973 ......... 75
      a) The Result of a Unique Unanimity ............................................... 75
      b) Operation Unified Protector ......................................................... 75
      c) Legality of Operation Unified Protector ......................................... 76
5.4. **Conclusion: Libya for the Responsibility to Protect, Libya for NATO, a Double Landmark or Double Failure?** ................................................................................................................................................ 79

5.4.1. Libya and the Responsibility to Protect: a Unique Landmark or a Historic Mistake. 79
5.4.2. Libya and NATO: a New Impulse or a Missed Opportunity .................................................... 80

**Chapter 6. Lessons from the Past, Starting Points for the Future: NATO’s Evolution through the Time within the International Community** ..........83

6.1. **Introduction** ........................................................................................................................................... 83
6.2. **Collective Self Defense, the Navel Cord of NATO** .............................................................................. 84
6.3. **Expanding the Scope towards a Post-Cold War Reality** ................................................................... 86
   6.3.1. From Stability to Protection, NATO in Bosnia................................................................................. 86
   6.3.2. Kosovo, a Landmark Case for NATO ............................................................................................... 88
   6.3.3. Libya: Unique, Unexpected Opportunities in an Unprecedented Situation ...................................... 90
   6.3.4. Experiences of the Past, Lessons for the Future? ............................................................................ 91

7. **Conclusion** .................................................................................................................................................. 95

**Bibliography** .................................................................................................................................................. 99

**Nederlandstalige Samenvatting** .................................................................................................................. 113
Introduction

1. The North Atlantic Treaty Organization has been a powerful institution within the international community for more than sixty years. Founded in 1949 as a mutual defense pact between twelve states within the North Atlantic Area, NATO wrote his first pages in history as the deterrent of the communist powers. However, during all these years, NATO passed through multiple transitions. In this disquisition it is principally my goal to discuss NATO’s behavior during those transitions and the influence they had on future events. More importantly, through this thesis, I will try to recycle the lessons from the past to give an answer to contemporary questions raised about NATO. Because as we will discover further on, questions of the past often return in the future, and the answers we learned through our life’s, are often useful for the future.

2. I will start my disquisition in Washington D.C. There, in the capital of a nation, pending between victorious for winning the Second World War and cautious to not start another conflict, NATO was officially founded with the signing of the North Atlantic Treaty on 4 April 1949. Several allies aimed to collaborate on a military level to be able to defend themselves against new threats. They concluded an agreement that foresaw in a provision that an attack against one of them would be considered as an attack against them all. By proclaiming to the world that they were united, they warned their enemies that they would be confronted with a solid block if they would consider an attack. This deterrence would prove its effectiveness for more than fifty years. Despite the sometimes giant tensions between the superpowers, no military conflicts occurred within the North Atlantic area. NATO never invoked its mutual defense clause and faced a peaceful period of more than half a century.

3. The alliance awakened in the last decennium of the twentieth century in a world that was different from the one that uphold the bipolar battle for more than fifty years. Unprecedented change reformed the most unwavering regimes into new, often democratic, but also unstable nations. Curious enough, the first conflict that resulted from this turnover did not occur in this new democracies. It was in the Socialist Federal Republic of Yugoslavia\(^1\), a country that possessed a long history of functioning as the bridge between the Western and the Eastern World, where unrests broke out. Within a few years, the entire territory of Yugoslavia, a state that once united all the Slaves was expired into little republics. Especially the conflict in Bosnia became derailed at a very high speed. Violence exploded between the Muslim part of the population and the Serbian minority. First Europe and later the United Nations failed to coerce a long lasting ceasefire. When the massacre of Srebrenica killed thousands of people, the international community arrived at an unknown low point. NATO

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\(^1\) Hereinafter further referred to as : “Yugoslavia”.
eventually took over the initiative and got a mandate from the United Nations to launch an airstrike campaign. This was a historic step for the alliance. For the first time, the alliance actually operated in practice. In this thesis, I want to go back to this period and examine NATO’s role in the conflict. This role evolved from little supportive missions all the way to the leading negotiating party at the peace negotiations in Dayton. This evolution can only be declared if we take the specific circumstances into account that NATO experienced after the end of the Cold War. NATO determined new goals and tactics and was immediately able to try them in practice in Bosnia. But the reality appeared to be harder than the theory and especially the unity within the alliance was severely tested. Bosnia was NATO’s first test case, an instructive experience for an alliance looking for a new place in a new world.

4. Four years later, the violence returned in the former Yugoslavia, and so did NATO. The Serbian president Milosevic, one of the seepage devils of the previous war, send his forces into the Serbian province of Kosovo to expel the Albanian Kosovars by violent means. This time, NATO responded rapidly and threatened with airstrikes if the Serbs did not refrain from any use of force. Unfortunately, the old tactic of deterrence failed and NATO had no other choice than to execute its threat or to climb down. A severe obstacle in the execution of the threat with airstrikes was the lack of a legal basis. Opposite to Bosnia, NATO had no authorization from the UN Security Council and it did not appear that this would change in the future. Nevertheless, NATO took the risk, executed the threat and justified its operation on the grounds of humanitarian intervention. I want to examine this NATO claim more deeply. Was there a real legal basis for the alliance to intervene for humanitarian reasons? The outcome of this question could be decisive for the future of the alliance. If the alliance would have got such a right, Kosovo could have been a precedent for future interventions. On the other hand, if NATO would have violated international law, its reputation would be blamed and its survival could be at stake. Kosovo was a crucial moment in NATO’s history. NATO took an enormous risk by acting independently, the alliance swallowed lots of criticism but also experienced a situation of intense collaboration. The fact that NATO survived these decisive weeks in the spring of 1999 could perhaps be considered as a victory equal to the one after the Cold War. Nevertheless, the price that was paid was high and the alliance would suffer for a very long time the consequences of its choices.

5. NATO was still recovering from its damage in Kosovo when Al Qaeda attempted to destroy the established balance within the international community. These attacks eventually resulted in the United States “War on Terror”. For NATO, the start of the War on Terror would evolve from a unique opportunity to a bitter nightmare. The rapid invocation of the mutual defense clause in the North Atlantic Treaty presumed that the alliance was ready for a new step in its development. For the first time, NATO could have executed its collective defense provision in practice. However, the United States decided to fill in the history of NATO differently. The leading country between the allies neglected the alliance completely by launching its military campaign without any NATO support, except for Great
Britain. The supportive missions NATO executed through the months of October could not change this impression. Afghanistan brought the alliance in an unprecedented crisis, a crisis which created wounds that could only be healed by time. This Chapter will return to these days and examine the influence of the choices made on the alliance future. I want to discuss the mutual defense clause and its disappointing interpretation in Afghanistan and the future consequences for NATO as a collective defense organization.

6. Ten years passed by between the horrible attacks on 9/11 and NATO’s return to the international front. In those years, an evolution in international law took place. The right of humanitarian intervention NATO claimed in Kosovo had evolved towards a “responsibility to protect”. This evolving doctrine was already confirmed by the General Assembly of the United Nations on the 2005 World Summit. It was according to several people the confirmation of a right to intervene if some human rights are continuously violated on a large scale. When during the spring of 2011 revolutions in several Arab states took place and the Libyan leader Gadhafi suppressed its people with the use of force, the question of invoking the responsibility to protect doctrine became ubiquitous. NATO, refined by ten years of absence, returned to the international front and expressed its will to enforce future UN Security Council resolutions. Eventually, the UN Security Council adopted resolution 1973 on 17 March 2011. This resolution paved the way for a NATO airstrikes campaign focused on the protection of civilians. But the fact that NATO interpreted its mandate in such a large way that it would eventually result in the overthrown of the Gadhafi regime elicit a waterfall of criticism. I will elaborate widely on NATO’s return in Libya. After having examined the position within international law towards the responsibility to protect, I will look into NATO’s concrete completion of the concept. Did NATO really execute the legal mandate provided by the UN or did the execution of its own, larger interpretation damage the concept of responsibility to protect?

7. Before concluding this dissertation, I will insert a moment for consideration. What has been NATO’s lessons from the past. How can these experiences support NATO’s further development towards a modern, multifunctional military pact. Through the years, NATO has often explored the borders of international law. Did NATO effectively influence, or even expand, international law? Therefore, I will compare NATO’s position in international law during these situations. Taking the Cold War NATO as the point of departure, I will discuss its evolution in Bosnia, Kosovo, Afghanistan and Libya and try to make a synthesis for the future. Next to the disquisition of these historic events, this dissertation will also focus on contemporary and future situations such as the civil war in Syria. With regard to Syria, the contemporary paralysis of the UN Security Council can be partly explained by foregoing experiences in for example Libya. Because, as we will discover, many lessons from the past return in the future and we will also not be able to overcome the contemporary problems if we do not take these historic conclusions into account.
8. When we finally arrive at the conclusion of this thesis. One should be able to understand where NATO arrives today. The alliance has taken a long journey, it has experienced many challenges through different timeframes characterized by changing balances of power. It has known huge victories and deep lows, some even argued for its dissolution. But NATO still exists today, slow but steady the alliance tries to adapt itself towards an organization prepared for the challenges of the twenty-first century. The alliance once again looks confident to the future. Nevertheless NATO will always continue to experience problems as being an actor in these specific parts of international law where the grey zone rules and black and white are the exception. Fortunately, NATO is experienced in these kind of problems. It has a long lasting history of overcoming crisis. Therefore, NATO’s wealth of its past could be its life insurance for the future. I’ll hope this disquisition will contribute to this understanding.

1.1. Prologue

9. It’s an old expression but no one shall deny it, to define the future, you have to understand the past. Before I will examine and compare NATO’s operations in contemporary days, I want to travel back in time, to 1949, the year the North Atlantic Treaty was concluded. During these decisive days, decisions were taken and agreements were made that would influence the history of modern times. This thesis will start with an examination of this treaty that laid down NATO’s foundations. First of all, this dissertation will focus on the initial task of collective self-defense by examining its legal framework in international law. Afterwards, I will apply this legal framework on NATO’s particular development during the second half of the twentieth century as a classic collective self-defense alliance. Finally, this paragraph will be concluded at the eve of the big turnover in Eastern-Europe in 1989. The end of the Cold War heralded difficult times for the traditional collective defense pact.

1.2. An Alliance born between Despair and Hope

10. When on 26 June 1945, fifty states congregated in San Francisco to sign the United Nations Charter, these leaders set an important step towards a more peaceful world.\(^2\) Nine weeks earlier, the “Third Reich” was officially defeated and within a few months, Japan would also unconditionally surrender. The international community finally got the opportunity to start recovering from this dreadful drama. Although the foundation of the United Nations was very promising, multiple states had not forgotten the disaster of the failed League of Nations.\(^3\) Therefore, countries all over the world agreed that this new international organ was not enough to prevent another war and sought a solution in regional collaboration on a political, economic and even military level.\(^4\)

11. This regional cooperation also evolved in Europe. On 14 March 1948, the representatives of Belgium, France, Luxembourg, the Netherlands and the United Kingdom...

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\(^2\) Charter of the United Nations, 26 June 1945, Can TS, 1945, No 7; the United Nations were founded by 50 states, Poland, the 51 state, signed the UN Charter two months later.

\(^3\) The League of Nations was founded in 1919 and dissolved in 1946. The organization is generally considered as the predecessor of the UN Nations.

signed the Treaty of Brussels. This treaty aimed to fortify the economic, political and military cooperation between these states. With regard to the military cooperation, this treaty provided a mutual assistance clause in order to create a common defense system. If one member became the victim of an armed attack, the other treaty parties would provide its co-member “with all the military aid and assistance in their power”. This military cooperation was considered as absolutely necessary to protect Europe from another war. Western Europe felt threatened by the advancing communist movement and a new war could not be excluded.

12. The United States welcomed this European military cooperation and became convinced of the necessity to support these states. In the summer of 1948, the Congress of the United States adopted the famous Vandenberg Resolution. This resolution recommended the United States to join regional and other collective arrangements for individual and collective self-defense. This change of politics ended the American tradition of isolationism. Especially the British who saw the Brussels Treaty as a predecessor for a larger Atlantic Pact reacted with enormous enthusiasm to this new opportunity. The islanders embraced the idea of a military alliance between the United States as the leading senior partner and Western Europe as its junior partner.

13. The negotiations to conclude a transatlantic pact took place in Washington D.C. from the summer of 1948 until the spring of 1949. Eventually, a mutual defense pact, the North Atlantic Treaty was concluded and signed by twelve states on 4 April 1949. This North Atlantic Treaty, or also commonly referred to as the Treaty of Washington, mothers an organization which found its legal origins in the UN Charter itself. It establishes a collective self-defense system within the North Atlantic area. This new alliance was baptized, the North Atlantic Treaty Organization, or abbreviated “NATO”.

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10 NATO’s founding member states were Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom and the United States.
1.3. A Collective Self-Defense Organization

1.3.1 Tracing Back the Origins of NATO

14. Many decades have passed since these twelve states agreed upon a collective defense treaty in April 1949. Also today, the North Atlantic Treaty still remains the core of NATO. So the attempt to trace the development of NATO can sensibly begin by analyzing what its founding treaty has to say.13 The North Atlantic Treaty aimed to establish a collective self-defense alliance in the North Atlantic Area. Since the use of force is explicitly prohibited, only a recognized exception can justify such a clause.14 Article 51 of the UN Charter provides for NATO the legal basis for its mutual defense clause. However, the scope of this article 51 is still subject to an intense debate. In this Chapter, I will talk about this article, its origins and its conditions.

1.3.2. The Legal Framework of the Concept of Self-Defense

1.3.2.1 : An Exception on the Principal Prohibition on the Use of Force

15. Collective Self Defense is an explicitly recognized exception on the principal prohibition on the use of force.15 This prohibition is considered as the cornerstone of the contemporary ius ad bellum and anchored in article 2 (4) of the UN Charter.16 This article provides: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”17

Besides the exception of self-defense, which is determined in article 51 of the UN Charter, two other deviations on the general principle are allowed. These are the authorization of the UN Security Council, as described in article 42 of the UN Charter and the consent of the hosting state.18

1.3.2.2 : The Concept of Self-Defense

a) Article 51 of the UN Charter

16. Every examination of the concept of self-defense should start with article 51 of the UN Charter itself. This article declares: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

17. Originally, article 51 of the UN Charter was adopted into the UN Charter because of the pressure exercised by Latino American countries which had concluded several collective self-defense agreements over the years. From the beginning, article 51 has been subject of an intense debate. Several conditions need to be fulfilled. First of all, an armed attack has to occur. Secondly, the response to this attack needs to be necessary and proportionate. The last condition provides that the UN Security Council has to be informed by the state acting in self-defense. Despite the apparently clear conditions, these requirements are all subject to an ongoing debate.

b) Self-Defense requires an Armed Attack

18. When a state is attacked by another entity, every member state of the United Nations is, according to article 51 of the UN Charter, allowed to take all necessary measures against this violence. Although this provision can only be invoked by states, is it not required that the provision is invoked against a state. Armed attacks can also be committed by non-state actors. Even though the wording of “armed attack” seems understandable, there is an ongoing debate about the meaning of these words. The most obvious armed attack is the one of a state organ of a certain state on the territory of another state. More discussion rises about cyber-attacks, attacks with long distance rackets or supplying arms to rebellion groups. The International Court of Justice recognized self-defense as an exception on the

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principal prohibition on the use of force in the Nicaragua case. In this case however, the Court rejected the reliance of the United States on this particular exception since the necessary precondition of an armed attack was, according to the Court, not fulfilled.

c) The Principle of Necessity

19. The measures taken by a state or alliance of states as a consequence of an armed attack should also be in accordance with the principle of necessity. This necessity contains two requirements. First, the armed attack could only be responded with force as a matter of last resort. States should prove their intentions to settle the conflict peacefully, only if these peaceful ways fail, a response by force is considered as a possibility. The second requirement is the fact that the decision taken in response should be taken reasonably and in good faith.

d) The Principle of Proportionality

20. The third condition for the correct application of article 51 of the UN Charter is the principle of proportionality. Since the self-defense provision is an exception on the principal prohibition of article 2(4) of the UN Charter, it needs to be interpreted narrowly. The element of proportionality will have a decisive influence on the assessment of the legal character of the measures taken. However, if these measures are considered as being legal, the state acting in self-defense gains the right to use all means necessary, without any proportionality requirement. For example, the United States obtained the right, after the attacks on Pearl Harbor in December 1941, to coerce Japan to the unconditional surrender. However, a distinction should be made in the situation where a terrorist group resides on the territory of a state but cannot be identified with that particular state. If this is the case, measures taken could only target the organization.

e) The Obligation to Report to the UN Security Council

21. According to the text of article 51 of the UN Charter, the UN Security Council plays a very important role in the invocation of the self-defense clause. Measures taken by member states in the exercise of the right of self-defense should be immediately reported to the UN Security Council. These measures may in no way affect the authority and responsibility of the UN Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. 28 This obligation needs to be tempered. In practice, the UN Security Council shall be very careful with declarations about the legality of the claim of a state. This was the case in the eighties in the conflict between Iraq and Iran and during the nineties in the Ethiopian-Eritrean war. Only during the first Gulf War, she explicitly recognized Kuwait’s right of self-defense. Despite this carefulness in the UN Security Council, states mostly obliged towards their notification obligation especially since the Nicaragua Case. 29 The ICJ deemed the invocation of the right of self-defense by the United States not credible because of the non-compliance with this notification obligation. 30

The military operation in Afghanistan in the fall of the 9/11 attacks is a recent example of acting in self-defense. The United States fulfilled the obligation in article 51 when it reported to the UN Security Council on 7 October 2001: “In response to the attacks on 11 September 2001, and in accordance with the inherent right of individual and collective self-defense, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States.” 31 The United Kingdom, who supported the United States in Afghanistan military, also reported on the same day to the UN Security Council, to be acting in self-defense. 32 I will elaborate more on the military campaign in Afghanistan in Chapter 4 of this thesis. 33

1.3.3. The Concept of Collective Self Defense in the North Atlantic Treaty

1.3.3.1 : Article 5 of the North Atlantic Treaty

22. All NATO allies committed themselves to the mutual defense clause of article 5 of the North Atlantic Treaty. This article provides that:

31 Letter from Ambassador John Negroponte, Permanent Representative of the USA to the UN in New York, to the President of the Security Council, S/2001/946 (7 October 2001).
33 Infra from par. 93.
“The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.”

When we analyze the text of the founding treaty and have a look to the collective self-defense provision, two remarks can be immediately raised. The first one is the explicitly stated strong link between the United Nations Charter and the NATO Treaty. The second one is that contrary to popular belief the North Atlantic Treaty places no automatic obligation on its signatories to come to the assistance of allies under attack. As will be explained below, both remarks are related towards the relationship between the United States and Europe at the time the treaty was signed.

1.3.3.2: Strong links with the UN Charter

23. The creators of the North Atlantic Treaty aimed to give their new alliance a legal basis in conformity with the UN Charter. However, the possibility of portraying the alliance as a regional organization under Chapter VIII of the UN Charter was excluded by legal and political reality. According to article 54 of the UN Charter, regional organizations have an obligation to report its activities to the UN Security Council. In this UN Security Council, the Soviet Union held a seat and veto power. If NATO was a regional organization under Chapter VIII, it would have lost its primary purpose, namely, to build a defense structure that would not be subject to Soviet interference. The assumption of its founding fathers was that NATO was needed to counter Soviet obstructionism in the United Nations. The only article that could provide NATO the necessary legal basis was Article 51 of the UN Charter. By relying exclusively on this provision of collective self-defense, NATO was, at the moment of its foundation, an agreement between states which committed themselves to the obligation to determine an attack against one of them in Europe or North America.

37 Infra par 24-25.
40 Charter of the United Nations, 26 June 1945, art. 54, Can TS, 1945, No 7
41 Charter of the United Nations, 26 June 1945, art. 53, Can TS, 1945, No 7
24. However, the enormous respect for the new UN Charter appears through the entire North Atlantic Treaty. The text is permeated by explicit references towards this document. Immediately, in the first sentence of the preamble, the parties to this treaty reaffirm their faith in the purposes and principles of the UN Charter.\footnote{North Atlantic Treaty, 4 April 1949, preamble, available at: \url{http://www.nato.int/nato_static/assets/pdf/stock_publications/20120822_nato_treaty_en_light_2009.pdf}.} Also in the articles 1; 5; 7 and 12, the North Atlantic Treaty explicitly refers towards the UN Charter. This is not a coincidence. At the time of concluding the treaty, many people, especially the Americans, believed that the UN Charter was the key to a new world order. This well-balanced document did not only invoke rights but also determined limits towards possible actions. By confirming these limits, the founding fathers assured the criticizers, particularly the members of the American Congress, that the treaty’s purpose was not only to support the aims of the world’s organization but to be in conformity with its restrictions as well.\footnote{L.S. Kaplan, NATO Divided, NATO United: the evolution of an alliance, Praeger, Westport, 2004, 2.}

1.3.3.3. : No Automatic Obligation

25. Another interesting determination concerns the content of the mutual defense clause of article 5 of the North Atlantic Treaty. Although many people share the common belief that article 5 contains a binding obligation for NATO members to assist an ally under attack, is this not the case. On the contrary, article 5 was especially adjusted in the way that instead of the “allies” taking “forthwith such military or other action ... as may be necessary,” the adjective military was finessed by “including the use of armed force” to follow “such action as it deems necessary”. As a result, individual members are therefore presumably free to fashion their response to an attack according to their respective national interests. This ascertainment is the result of the pressure exercised by the, especially Republican, isolationists on the American, Democratic president, Harry Truman. Many Americans were also afraid that an open-ended military commitment towards the European allies would exceed the American capacities beyond a reasonable level on the one side and would give the Europeans a freeway to neglect their own military expenses.\footnote{L.S. Kaplan, NATO Divided, NATO United: the evolution of an alliance, Praeger, Westport, 2004, 2.} History would prove that this fear was not totally unfounded.

1.3.4. The Concept of Self Defense during the Cold War: Deterring the Communist Powers

26. NATO was founded because of the consideration, by both the European, as well as the North American states, that military cooperation was absolutely necessary to create a more stable and peaceful world. At the moment of the signing of the North Atlantic Treaty, the Cold War wrote his first pages in the history books and the fear for the communist threat was present in multiple states. NATO appeared to be the ideal mean to stop the further
expansion of the communist powers. The alliance was the flagship of the force of the Western world. It represented the common values between its member states of democracy, individual liberty and the rule of law. Values within the North Atlantic area NATO would defend with all necessary means.45

27. Besides the transatlantic alliance, the pact formation did also proceed on a second, European track. Both the United States and several states in Western Europe considered it absolutely necessary to create a European army. This willingness was already expressed in the Brussels Treaty where the parties declared their eagerness to cooperate on both the economic, political and military level.46 Although the concluding of the Brussels Treaty was the direct onset for the transatlantic negotiations that would eventually lead to the North Atlantic Treaty, the idea of the creation of a “European army” next to the transatlantic commitments still existed. One of the main reasons for this European Defense Community (“EDC”) was the situation of Germany. As being a strategically important country without NATO membership and without army, the fear existed that the Soviet Union would eventually take advantage of Germany’s vulnerable position. The blockade of Berlin from June 1948 to May 1949 only fortified this anxiety. A possible solution was the incorporation of Germany into a European army. By acting in this way, the Germans did not regain a new “Wehrmacht” but still possessed the necessary protection against the communist forces. Encouraged by the United States, negotiations started between several West-European countries. Eventually, this resulted in the signing in Paris of the treaty creating the EDC on 27 May 1952. Despite the agreement, the EDC would never become reality. The French “assemblée” refused to ratify the treaty in 1954. This would eventually lead to the incorporation of West Germany into NATO shortly after this refusal. Despite the failure of the military cooperation, Europe decided to continue its collaboration on the political and economic level with the conclusion of the Treaty of Rome in May 1957. However, it appeared that a European army was a bridge too far for a still divided Europe.47

28. Military collaboration was not only a transatlantic concern. The Kremlin similarly feared the pact formation in the North Atlantic area. Especially, after the integration of West Germany into the alliance, the distrust between the two superpowers reached a new peak. It is not a coincidence that, in the same year of this reintegration, multiple communist states concluded a common defense treaty as well. The Warsaw Treaty Organization of Friendship, Cooperation, and Mutual Assistance, commonly known as “the Warsaw pact” was the

46 The Brussels Treaty, art. 1 and 4.
communist answer to the North Atlantic alliance.\textsuperscript{48} Both NATO and the Warsaw Pact served as the defenders of their own half of the bipolar world for the entire Cold War.

29. During the Cold War, NATO’s overriding mission was to deter the enemy. NATO acted like a traditional collective self defence organisation with countries who committed themselves to the promise to help defending each other in case of an armed attack. Since the Warsaw Pact acted in a comparable way, a strange equilibrium was created. This balance continued undisturbed for more than forty years. But by the end of the eighties, the international community reached a tipping point. The ongoing enmity between the two superpowers started to thaw. The “glasnost” and “perestroika” heralded radical change within Eastern Europe and the Soviet Union. These changes resulted in the end of the hostility between east and west. The threat, that worried NATO for more than forty years, disappeared. NATO outlived the Warsaw Pact, that ceased to exist in 1991, and thereby won the Cold War. Although NATO could not have dreamed a bigger victory, this new situation caused severe difficulties for the alliance. Some even argued that “NATO should declare victory and cease to exist”.\textsuperscript{49} NATO entrained the nineties with more questions than answers and with severe doubts about its future.

1.4. Conclusion

30. The second half of the twentieth century has been characterized by the ongoing conflict between the United States and the Soviet Union. The North Atlantic Treaty Organization was perhaps one of the first products of this Cold War. Multiple states in Western Europe realized that, after the Second World War, cooperation was the only way towards peace and stability. They considered NATO as the ideal mean to keep the Soviet Union out, the United States in and Germany down.\textsuperscript{50} Also the United States understood the importance of a transatlantic military alliance. The postwar years were characterized by the existence of the development of the new bipolar world. The United States had all profit by forging closer links with its European allies to assure themselves from their unconditional support. The result of this similarity of interests was NATO, a mutual defense pact that should deter their opponents in order to defend the values of the Western World.

\textsuperscript{48} Treaty of Friendship, Cooperation and Mutual Assistance Between the People's Republic of Albania, the People's Republic of Bulgaria, the Hungarian People's Republic, the German Democratic Republic, the Polish People's Republic, the Rumanian People's Republic, the Union of Soviet Socialist Republics and the Czechoslovak Republic, 14 May 1955, available at : http://avalon.law.yale.edu/20th_century/warsaw.asp.


31. The commitment to support their co-members in case of an armed attack is anchored in article 5 of the North Atlantic Treaty. This article is an application of the exception of article 51 of the UN Charter on the principal prohibition on the use of force of article 2(4) of the UN Charter. This implicates that NATO cannot be considered as a regional organization under chapter VIII of the UN Charter. This had no significant implications during the Cold War since NATO’s only function was to deter the communist powers and thereby preventing the North Atlantic area from any use of force. The fact that Europe did not known any armed conflict during the four decennia of the Cold War is a very good illustration of NATO’s success as a deterrent.

32. When Glasnost and Perestroika melted the Cold War, NATO savored the taste of victory. The alliance had defeated its communist powers by peaceful means and achieved its main goal of averting the threat that menaced the North Atlantic area. However, similarly to this achievement, NATO lost its entire reason of existence. What was NATO’s place within the international community if there was no threat to deter? Did NATO, as a product of the Cold War, die together with its creator? These questions were all issues that would determine NATO’s future. Dark clouds threatened the survival of NATO and it appeared that the fame of victory was rapidly exchanged for uncertain times.
Chapter 2. NATO standing on an Intersection : 1989-1998

2.1. Awakening in a New World Order

33. When Mikhail Gorbachev resigned as president of the Soviet Union in December 1991, a period of unexpected and unprecedented change was completed and the bipolar world order, which had ruled the world for more than five decades, came to an end. In a period of only three years, an array of extraordinary events gripped the global community and left a changed world order. The turnover started in the latter half of 1989 when one Eastern European state after another broke free from the Kremlin’s long hold. Communist leaders who lead their countries for decennia were replaced, imprisoned or even executed. Despite this violence, Europe experienced an atmosphere of positivism, democracy and peace during these revolutionary events. Less than a year after the fall of the Berlin Wall, Germany was reunited in the fall of 1990. Towards the end of that year, Iraq invaded Kuwait, providing the world its first significant post-cold war conflict. The international community reacted directly and vigorous with a coalition of twenty-eight states coercing Saddam Hussein to flee back to Bagdad. In the aftermath of that conflict, the United States used its influence in the Middle East to propel peace talks in Madrid between Israel and numerous Arab governments in October 1991. Although Mikhail Gorbachev would play co-host at this conference, his days, and the days of the Soviet Union were numbered. After the failed “August Putsch” which tried to remove Gorbachev and to herald a return for the Soviet Union to its hardline principles, all that was left for Gorbachev, and the Soviet Union, was the final curtain call, which came on 25 December 1991. The world would never be the same.\textsuperscript{51}

34. The revolutions in Eastern Europe and the collapse of the Soviet Union would herald tumultuous times for NATO as well. For more than fifty years, the ancient allies were tied by their opposition against the communist powers. Now, the bells of revolution did not only sound for Eastern Europe, NATO also realized itself that the clouds of transition would descend over the alliance. The victory of the Cold War had the peculiar effect that together with its ancient enemies, NATO’s main function as deterrent disappeared as well. NATO had to reconsider its future and to rethink its Strategic Concept.\textsuperscript{52}

2.2. The 1991 Strategic Concept

35. NATO’s quest for transition started in July 1990. In London, NATO leaders came together to discuss NATO’s response to the recent transitions within the international

The result of the conference as the “Declaration on a Transformed North Atlantic Alliance”, also known as the “London Declaration”. The London declaration outlined the ways in which NATO was going to deal with its role at the end of the Cold War. It included proposals for developing cooperative relationships with the countries for Central and Eastern Europe. The London Declaration also instructed the governments of the several member states to undertake a comprehensive review of the Alliance. Determined to adapt NATO to the emerging era, the alliance began the process of considering a renewed identity and future missions. Finally, after many months of intense debate, the sixteen member states agreed upon a new strategic concept at the Rome Summit in December 1991.

36. This 1991 Strategic Concept reaffirmed the old collective defense provision of article 5 but also provided a response to the problems threatening the new world order. The new Strategic Concept proved to be farsighted when it stated that: “Risks to Allied security are less likely to result from calculated aggression against the territory of the Allies, but rather from the adverse consequences of instabilities that may arise from the serious economic, social and political difficulties, including ethnic rivalries and territorial disputes, which are faced by many countries in central and Eastern Europe. The tensions which may result, as long as they remain limited, should not directly threaten the security and territorial integrity of members of the Alliance. They could, however, lead to crises inimical to European stability and even to armed conflicts, which could involve outside powers or spill over into NATO countries, having a direct effect on the security of the Alliance.”.

At the same time, terrible events took place in Yugoslavia which should prove within a few months that NATO’s 1991 Strategic Concept sketched a thoughtful impression of the challenges for NATO at the beginning of the nineties.

37. The words adopted by NATO in the 1991 Strategic Concept also set the stage for the gravitation of NATO toward collective security. The aim of collective security is more ambitious than the aim of collective self-defence. It does not set forth a specific threat, but a class of threats. As opposed to the Soviet Union’s Mig-75’s that could be readily identified, the 1991 Strategic Concept designated no explicit threat. Instead, NATO’s 1991 Strategic

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Concept asserted that “instabilities” would constitute new threats for the alliance. This new concept also opened the discussion within NATO about conducting operations outside the borders of the North Atlantic area. The outcome of the so called “out of area” discussion played a major role in NATO’s future operations such as Kosovo, Afghanistan or Libya. But in 1991, the NATO leaders assumed that all member states held a common concern for engaging those instabilities and were willing to use NATO as a tool for ameliorating conflicts. Despite this beautiful starting point, reality would soon confront NATO with the obstacles of this concept during the war in Yugoslavia.

2.3. Baptism by Fire: NATO in Bosnia

2.3.1. Yugoslavia: a Ticking Time Bomb

38. The first major challenge that faced the reformed NATO after the disappearance of the Iron Curtain was war in a region that had long threatened European stability, the Balkan. Since the end of the Second World War, the Balkan had remained peaceful under the leadership of Tito. The former partisan had united all Slaves into one new state, Yugoslavia. The republic consisted six socialist republics, the socialist republic of Bosnia-Herzegovina, of Croatia, of Macedonia, of Slovenia and of Serbia. The latter also included the autonomous provinces of Vojvodina and Kosovo which had similar rights as the previously named socialist republics. Without elaborating on the Yugoslavian wars and limiting ourselves to NATO’s role in this particular conflict I will confine my discussion of the events to the following non-exhaustive overview.

39. By the end of 1991, Yugoslavia was on the verge of disintegration as Croatia, Slovenia, Bosnia-Herzegovina and Macedonia declared their independence in rapid succession. The result was a series of bloody ethnic-conflicts. The Serbian leader Slobodan Milosevic utilized nationalism in an effort to bolster and maintain his political power by drawing Serbs into a series of conflicts of which the goals were not the preservation of what remained of Yugoslavia, but the effort to create “ethnically pure” Serbian communities with allegiance to their “parent nation” of Serbia. The Croats countered with similar efforts to drive out Serbs and create their own cross-border communities.

Although the conflicts in Slovenia and Croatia ended both relatively quickly by a negotiated cease-fire, the seeds for further conflict were sown in Bosnia-Herzegovina. Following its declaration of independence from Yugoslavia on 1 March 1992, Bosnia-Herzegovina became engulfed in a brutal ethnic conflict in which some 250.000 people were

61 Serbian President Milosevic stripped Kosovo’s autonomous rights in 1987.
killed and some 1.3 million were displaced. The conflict prompted atrocities on a scale unseen in Europe since the Second World War.\(^{62}\)

40. NATO became involved in the conflict at a critical moment in its history. The Yugoslav conflict was closely intertwined with the post-Cold War adaptation of NATO itself. So when the European Union, who had tried to manage the conflict in cooperation with the United Nations and the Organisation for Security and Cooperation in Europe (hereinafter “OSCE”), asked NATO for military support, the post-Cold War NATO challenged its first real test.\(^{63}\)

41. Despite this urgent request, NATO was not able to react unanimously. During the Cold War, the collective self-defence alliance overriding mission was the deterrence of the Soviet Union, and, if necessary, to defend the territory of the member states collectively in case of an armed attack.\(^{64}\) But that threat had disappeared and had left NATO orphaned. The question of going “out of area” was one of the issues raised at the 1990 London and 1991 Rome summits.\(^{65}\) In the new 1991 Strategic Concept, NATO reinforced its commitment towards the collective defence of its member states but also opened doors for cooperation. These actions of cooperation and assistance were not backed by article 5 of the North Atlantic Treaty. But the scope of these actions was unclear. The United States and Great Britain had the view of a large scope while Germany and France wanted to limit this scope as much as possible. So when the question of assistance was raised, NATO’s new policy was immediately tested. Many observers suggested that if NATO could not play a role in a conflict on its doorstep, such as this one in Yugoslavia, the alliance had little future. NATO, it was argued should “go out of area” or “go out of business”. The events which should follow were decisive for both NATO and Yugoslavia and will be discussed below.\(^{66}\)

2.3.2. NATO’s Actions in Bosnia

42. The story of NATO’s operations during the war in Yugoslavia is one of gradual rising involvement. Initially, the European Union and the OSEO were convinced to deal with this “European conflict” and to achieve a solution for the conflict by peaceful means.\(^{67}\) However, it appeared that their attempts to restore peace ran ashore in a lack of authority as well as serious internal division. Germany, for example, strongly supported Croatia while France saw all states as equally guilty. Their conflict management appeared to be such a failure that the matter had to be dealt within the UN Security Council. Several UN Security

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\(^{63}\) T. LANSFORD, All for One : Terrorism, NATO and the United States, Ashgate, Burlington, 2002, 47-49.

\(^{64}\) Supra par. 26-29.

\(^{65}\) Supra par. 35.


\(^{67}\) T. LANSFORD, All for one, Terrorism, NATO and the United States, Ashgate, Burlington, 2002, 47-49.
Council resolutions were issued to dam in the violence. From then on, NATO started to expand its role in the conflict. From July 1992, NATO participated in the naval missions to enforce an arms embargo promulgated by the United Nations. From October 1992, NATO air forces monitored and from March 1993 also enforced the no-fly zone over Bosnia-Herzegovina. This marked the first time that NATO assets were deployed in an out-of-area mission. In June 1993, the UN Security Council authorized “all necessary measures, through the use of air power” to support the UN Protection Force peacekeeping mission. This brought NATO more directly into the Yugoslav conflict. Nevertheless, it would last until 28 February 1994 until NATO asserts in combat for the first time in the so-called Banja Luka incident. American fighter planes shoot down four Serbian warplanes engaged in a bombing mission in violation of Bosnia's no-fly zone. This was the first time since its creation that NATO undertook military action. Nevertheless, the conflict between Serbs and Bosnian forces would drag along for months because of the political unwillingness of the international community to intervene in a significant way.

43. By the start of 1995, NATO was engaged in several operations providing support for the UN peacekeeping operations, thereby successfully limiting the spread of the conflict. Nevertheless, the longer the war continued, the greater the public pressure on the leaders of international community to stop the conflict. It was eventually NATO itself that decided in May 1995, after increased shelling of Sarajevo, the capital of Bosnia-Herzegovina, by the Serb artillery, to take the initiative to end the conflict. NATO commanders asked the UN Security Council permission to launch an airstrikes campaign against Bosnian Serbs targets. Despite an initial refusal, the UN agreed by the end of May 1995. The Bosnian Serbs were not impressed and responded with seizing and humiliating three hundred fifty UN Peacekeepers. By taking these hostages, the stakes were seriously raised, leaving the alliance with little choice than to respond or to withdraw. The possibility of withdrawal would have meant the complete bankruptcy of NATO’s policy towards the Yugoslavian conflict and the resulting recriminations could mean the end of NATO as an effective military alliance.

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71 Hereinafter further referred to as “UNPROFOR”.


44. The final stage of this horrible war was heralded on 28 August 1995 when thirty-seven civilians were killed by an mortar attack on Sarajevo. This massacre proved to be the proverbial straw that broke the camel’s back. It was the final push the West needed. NATO launched Operation Deliberate Force, a three week bombing campaign, against Bosnian Serb targets.\textsuperscript{76} By the end of September, the Bosnian Serbs were coerced to agree to a cease-fire agreement. Otherwise, they should risk the threat of the resumption of the bombing. Unlike previously, these threats were now credible and were to be taken seriously. NATO was finally able to take military action without also requiring authorization for each strike to go through a UN envoy.\textsuperscript{77} On 1 November 1995, peace settlements began in Dayton, Ohio and a peace agreement was signed in Paris, on 14 December 1995.\textsuperscript{78} Under the auspices of this plan, NATO forces were deployed in a peace-enforcement role. This mission was named, the Implementation Force or I-FOR.\textsuperscript{79} On 16 December 1995, the North Atlantic Council gave its approval for Operation Joint Endeavour to implement the military aspects of the peace agreement. Four days later, on 20 December 1995, I-FOR was deployed to Bosnia.\textsuperscript{80}

45. The year 1995 ended with what appeared to be a resurgent NATO. The conflict in Bosnia had finally been brought to a halt due, in part, to the aggressive use of NATO airstrikes. A multilateral peacekeeping force had been deployed to implement the peace agreement, which could be seen as indicative of the role that NATO could play in Europe after the Cold War. But while the Dayton agreement formally ended the war in Bosnia, it did not address the instability already apparent in Kosovo. In fact, in retrospect, it is clear that this omission contributed to the escalation there, which finally led to the events during the summer of 1999. The apparent-unity that followed the signing of the peace agreement proved to be short lived and the decisions within NATO that emerged over Bosnia soon resurfaced once again as the Alliance had to address questions about its future in the wake of Bosnia and in the face of the mounting problems in Kosovo.\textsuperscript{81}

2.4. Conclusion: The First Step is Always a Difficult One

\textsuperscript{79} I-FOR (Implementation Force) was the name of the initial peace keeping mission in Bosnia and was established by Resolution 1031 of the Security Council of the United Nations (15 December 1995), UN Doc. S/RES/1031(1995).
46. When the founding fathers of NATO signed the treaty in 1949, they never had in mind that NATO’s first operation would be one like in Bosnia. NATO was created to address a single well-defined threat within a limited geographical area. The conflict in Bosnia was a challenge to both of those premises. NATO plunged itself in a civil war outside its borders to enforce the resolutions of the UN Security Council.

47. When we look back at NATO’s actions during these early nineties, it is remarkable to see that even the NATO member states where not convinced of the utility of NATO to manage the conflict. Despite the promising declarations in the London Declaration and the new Strategic Concept, none of the member states were initially convinced that restraining the violence in Yugoslavia would be NATO’s first military operation. At the time, the Europeans tried to reach a solution for the conflict through mediations organised by the EU and the OESC. The Americans, on the other hand, were initially not very interested in this European conflict. As I highlighted earlier, the attempts of the EU and OESC failed dramatically because of a lack of authority towards the parties and divisions within their own grades. Europe learned, faster than it would have liked, that when it comes to foreign policy, it depends on the United States to act powerful. Therefore, Bosnia was a perfect illustration of NATO’s usefulness as a platform for Europe to have decisive influence within the international community. The United States learned an important lesson in Bosnia as well. Because of their interdependence within NATO, European security problems were in fact an American problem as well, and staying absent only made the problem last longer.

48. Much earlier than NATO itself, the international community was convinced of the necessity of NATO’s involvement in managing the Yugoslavian conflict. More than ever, the events in Bosnia underlined NATO’s important spot within the international community. The inability of the European Union and the OSCE to end the Yugoslavian conflict demonstrated the continued centrality of NATO to Europe’s security regime. Besides, NATO succeeded to enforce the compliance of the parties with the UN Security Council resolutions. As being essential to give power towards these decisions, NATO proves its necessity on the international forum. The missions in Bosnia demonstrated the importance of NATO as a mean to provide military credibility to international peace keeping operations. Besides the use of force, Bosnia also heralded a first important experience for NATO as peace keeper. NATO’s unique ability to coordinate multinational troops from both sides of the Cold War and to provide the capabilities and assets to conduct such operations made NATO the organisation which was the best suited for the I-FOR and S-FOR missions.

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82 This appears from the text of the London Declaration and the 1991 Strategic Concept.
84 S-FOR (Stabilization Force) was the successor to I-FOR and was established by Resolution 1088 of the Security Council of the United Nations (12 December 1996), UN Doc. S/RES/1088(1996).
85 T. LANSFORD, All for One : Terrorism, NATO and the United States, Ashgate, Burlington, 2002, 47-49.
49. Notwithstanding this positive overtone, many authors also criticize NATO actions in Bosnia. For example Mandelbaum stated “NATO’s Bosnian intervention was hesitant, reluctant, limited an only modestly successful in reaching the goals that at least some member initially sought to achieve”.86 These authors particularly criticize the internal division within NATO during the conflict. NATO was in Bosnia for the first time confronted with the situation that, although they act as an alliance to the outside, the interest of NATO is mostly the sum of the interests of every single member state. Too often was NATO’s credibility undermined by statements from national politicians which made reservations towards an important NATO decision. The campaign in Bosnia underlined the weaknesses of the alliance, which was as a traditional, Cold War minded, collective self-defence organisation not founded for such operations. Therefore, despite having equal goals, NATO acted too often as a divided alliance.87

50. Despite this criticism, it is important to state that NATO played eventually a decisive role in ending the war. The launch of Operation Deliberate Force coerced the Serbs to stop their violent actions and return to the negotiating table. NATO was the only organisation capable of causing this change because it was the only actor able to enforce effectively the UN Security Council resolutions. The criticism that it lasted too long before decisive actions were undertaken can be weakened taking into account the complexity of the conflict and the unwillingness of the international community to react. Therefore, looking from an external perspective, NATO’s operation in Bosnia was rather successful. NATO gave the impression towards the international community to act, for the first time since the end of the Cold War, like an alliance which thoughtfully approaches the challenges of a changing Europe.88

Nevertheless, I do not want to be blind for the shortcomings of NATO’s actions during the conflict. NATO went, despite its new Strategic Concept, unprepared to Bosnia and had not a decisive response towards this complex conflict during the first years of its actions. The internal divisions between the member states also illustrated the weaknesses within NATO which still remains a political organisation. But in the end, we should remember that NATO overcame these divisions and by reacting in an effective way bringing the war to an end. The war in Yugoslavia was a terrible war but without NATO, it would have ended in an even more dramatic way.

Chapter 3. NATO in Kosovo: Legitimately trying to justify the Unjustifiable

3.1. Introduction:

51. Not many military interventions has been as much discussed as NATO’s Operation Allied Force against the forces of the Former Republic of Yugoslavia in Kosovo during the spring of 1999. This military operation included the launch of airstrikes against several military targets within the FRY. NATO had started to threaten with these airstrikes one year earlier when the international community had become aware of severe human rights violations committed by the FRY’s army and police forces against the Albanian Kosovars in the former autonomous province. For almost a year, the FRY played a game of cat and mouse with NATO. Famous is the story of the Serbian diplomat joking during the summer of 1998 that “a village a day would keep NATO away”. But after the noncompliance with the October agreement, a peace agreement between NATO and the FRY negotiated by the “hero of Dayton”, Richard Holbrooke, and the continuously violations of all the UN Security Council resolutions issued with regard to the Kosovo situation, NATO started to lose its patience. When the negotiations of the final chance in Rambouillet failed in March 1999, the situation had become so gravely that NATO had no other options than to execute its long standing threat or to disappear quietly from the front stage. The latter option could not be seen as a real possibility for two reasons. The first and also the officially mentioned reason, was that NATO’s disappearance would cause a humanitarian catastrophe. After the massacres of Rwanda and Srebrenica, NATO wanted to act this time before it was again to late. The second, and for NATO most important reason, was that NATO did not want to be the shouting but powerless sideliners. A possible reeving would result in a huge victory for Milosevic and would seriously damage NATO’s reputation.

52. So NATO went to war. The alliance started an airstrike campaign, Operation Allied Force, against Milosevic on 23 March 1999. But what was the legal basis for this use of force? In general, NATO justified its intervention on the grounds of humanitarian necessity. NATO Secretary-General Javier Solana declared at the eve of Operation Allied Force that NATO would take “whatever measures necessary to avert a humanitarian catastrophe”. Considered from a legal perspective, these humanitarian grounds are too vague to justify a military intervention. Well aware of this lack of legality, governments of the NATO members

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89 Hereinafter referred to as: “the FRY Forces”.
searched for a possible justification. Great Britain and Belgium for example, have argued that this intervention was an application of the doctrine of humanitarian intervention. Others possessed the view that the UN Security Council had authorized the operation implicitly while France and Germany considered the situation as a unique concurrence of circumstances which could justify this specific situation but could not be considered as a precedent for the future.

53. This Chapter will start with a short elaboration on history since it is necessary to know the facts for understanding this controversial situation and comprehending the occasions that happened afterwards in a better way. After this survey of the facts, I want to discover the legal basis for this operation. Especially, I want to elaborate on the concept of humanitarian intervention which was often used to justify this operation. Could a humanitarian intervention, taken without explicit permission of the UN Security Council characterize the operation as legal? This disquisition will end with an overview of the lessons that NATO learned from its Kosovo intervention and that would appear as useful for later operation in Afghanistan and Libya on which I will highlight further on in this thesis.

3.2. Going back in Time : NATO’s War in Kosovo

3.2.1. The Prelude for an Unavoidable War : June 1989 – February 1998

54. The land of Kosovo has been disputed between Serbs and Albanians for a very long time. Because, none of the parties have a valid claim of exclusivity over the country, both populations are condemned to live together in peace or to expel the other outside the territory. Already during the time Kosovo was a part of the Federal People’s Republic of Yugoslavia, since 1974 as an autonomous province, the call for an independent Kosovo lived amongst its Albanian majority. It was a silent sleeping volcano.

55. By 1998, due to lack of attention of the international community, there was still not dealt with the Kosovo question. This conclusion can be upheld if we look at the evolution of the events that happened since the end of the eighties. According to the conclusions of the Independent International Commission on Kosovo, Kosovo exhibited all the signs of a upcoming catastrophe from the 1980’s onwards. A juvenile society characterized by unemployment and criminality fed by nationalism and tired of getting terrorized by the

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94 Infra from par. 93.
95 Hereinafter further referred to as “the Kosovo report”.
Belgrade government created a hotbed of increasing tensions which would explode eventually. The Albanian Kosovars aimed the independence just as much as their former nationals from Bosnia, Croatia, Macedonia or Slovenia. But while the former states all became independent at the beginning of the nineties, Kosovo remained a province of what was left of Yugoslavia. The unofficial but democratically elected leader of the Kosovars Ibrahim Rugova preferred peaceful resistance with his Democratic League of Kosovo to bring Kosovo’s situation under the attention of the international community. The Serbs however, suppressed all kinds of resistance against the regime. The then president of Serbia, Slobodan Milosevic, a position he held from 1987 until becoming president of Yugoslavia in 1997, already stripped Kosovo of its autonomy in 1989. The same year he gave his famous Blackbirds speech in Kosovo. This speech, which promoted the Serbian nationalism, is seen as one of the main start-ups for what eventually would lead to the breakup of Yugoslavia. Although the instability of Kosovo was well known, no one in the international community wanted an escalation of the situation which could be caused by a possible independency declaration. Therefore, when violence broke out in Croatia and later in Bosnia-Herzegovina, the international community’s priority was to keep the situation in Kosovo peacefully. Therefore, the American President George Bush Sr. warned in December 1992 in its famous “Christmas speech” Milosevic to not violate the human rights in Kosovo. However, besides this warning, no further steps were taken. It was not only the will to prevent another war that crippled the Kosovar independency dream. In contrast to the situation in Bosnia-Herzegovina, Croatia, Macedonia and Slovenia, Kosovo was during the Republic of Yugoslavia only an autonomous province. Therefore, the international community saw the territory of Kosovo as an integral part of the territory of Serbia. So when the major players of the war in what was now former Yugoslavia negotiated a peace agreement in Dayton, Kosovo’s request for independence was not even on the table. This missed opportunity created lots of frustration for the Kosovar people. Peaceful resistance appeared to be insufficient. In some radical groups the idea raised that only violence would lead to an independent Kosovo.

56. In the years after the Dayton agreement and despite the presence of NATO at his borders, Milosevic continued to suppress the Albanian Kosovars, thereby often using force. However, his crimes were responded with assassinations of Serbian police officers and soldiers by the Kosovo Liberation Army, a Kosovar extremist organization. The KLA thread upon the perilous path of provocation in order to cause an escalation of the conflict, which should, similar to Bosnia, eventually lead to an international intervention. Taking into account this particular situation with a Belgrade government, led by an extreme Serb nationalist and backed by paramilitary forces with the goal to keep Kosovo firmly within Serbia’s orbit and on the other side the Kosovar Albanians, who constituted the

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99 Hereinafter further referred to as “KLA”.
overwhelming majority of Kosovo’s population and who had suffered under Serb repression and strived for independence. A violent confrontation became unavoidable.  

3.2.2. A Summer of Violence: March 1998-October 1998

57. The violence within the region increased heavily when Serbia launched an offensive to crack down on the KLA in early 1998. When new, daily killings highlighted the Western media, e.g. the killing of fifty-eight people in Prekazi, international attention was immediately present and so was the will to react. The western powers wanted to avoid by all means a repetition of the atrocities in Bosnia where in Srebrenica thousands of men were killed with the Dutch UN Protectors witnessing. This time, the international community aimed to react stronger, faster and in a more efficient way. The UN Security Council adopted Resolution 1160 and called upon both the Serbian and the Kosovan forces to achieve a peaceful solution. It also emphasized that failure to make constructive progress towards the peaceful resolution of the situation in Kosovo will lead to the consideration of additional measures. Also most NATO governments shared several key assumptions during the spring of 1998 to tackle the conflict in the most optimal way. After the Bosnia saga the allies understood that it was crucial to act promptly. A common approach under American leadership was necessary to coerce Milosevic to conclude a peace settlement. At this point, NATO was already convinced that Kosovo should get a new status which was short of independence.  

58. Despite the initial attention for the situation in Kosovo, the policy of the international community towards Kosovo was stuck and marked by the tendency to avoid making difficult decisions. At the time, the focus was on economic sanctions, inter alia the European Community’s air embargo, a moratorium on government financed export and on encouraging a dialogue between the parties. But none of the sanctions or diplomatic efforts effectively improved the situation. On the contrary, in September 1998, the UN Security Council adopted Resolution 1199 which, being adopted under Chapter VII, determined that the deterioration of the situation in Kosovo constituted “a threat to peace and security in the region”. The Security Council demanded the cessation of hostilities, a ceasefire, as well as immediate steps by both the parties to improve the humanitarian

situation and enter into negotiations with international involvement. They also considered taking further actions if Resolution 1199 as well as Resolution 1160 would not be respected in order to maintain and restore peace and stability in the region. Despite this firm resolution, it became clear within a few weeks that Russia or China would veto any resolution which would provide for a mandate to launch military action against Milosevic.  

59. NATO, from its side, was initially not eager to launch another military campaign in the Balkan region to arrive at a solution for Kosovo’s political future. The allies preferred a solution through peaceful negotiations. But when the violence continued and even intensified during the spring of 1998, some members, for example Great Britain, started to take the option of threatening with or even launching airstrikes into account. The Secretary-General of the United Nations, Koffi Annan, advised NATO already in April 1998 of the necessity of a UN Security Council mandate in case of a military intervention in Kosovo. However, the Russian threat to veto any resolution which could provide such a mandate seriously weakened this option. Nevertheless, when the violent Serbian repression continued, the idea of an intervention without Security Council authorization slowly mellowed into parts of the international community.

By the start of October, NATO members gave the organization the go ahead for military action if the FRY did not comply with the former resolutions. Such action could be, according to NATO, justified on several, mainly humanitarian, grounds. The idea of airstrikes was based on the strategy to coerce Milosevic to negotiate a deal for Kosovo which could guarantee the peace and stability of Kosovo on the short and longer term. It appeared that Solana’s announcement did not miss the aimed effect on Milosevic. The president of the FRY started negotiations with the United States Special Balkan Envoy Richard Holbrooke with the aim of reaching a political solution for Kosovo. Above all, Holbrooke wanted to persuade Milosevic to stop the continuously human rights violations in Kosovo. Backed by the threat of NATO airpower, Holbrooke succeeded in his mission and gained Milosevic’s apparent commitment to cease attacks on civilians. This resulted in what was later called “the October agreement”. A short time later, the UN Security Council corroborated the

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October agreement in Resolution 1203.\textsuperscript{111} Although this agreement was not a definitive solution, at least, crucial time was bought to achieve a solution for the crisis in Kosovo.\textsuperscript{112}

\textbf{3.2.3 The “Sitzkrieg” : November 1998 – March 1999}

60. Despite the acceptance of the October agreement, real peace was never created in Kosovo. Not only did Milosevic continue to commit crimes against the Albanian Kosovars, the KLA saw the agreement also as an opportunity to enhance its influence in Kosovo. While negotiating the October agreement, no one draw the KLA into the discussions. Since they never accepted the agreement, there were also not bound. Therefore, when the Serbs withdraw from their positions in Kosovo, they used the withdrawal to fortify their own positions in Kosovo. During the month of January 1999, it became clear that the October Agreement was a lost case and that new initiatives should take place. NATO Secretary-General Javier Solana repeated on 17 January 1999 NATO’s threat with airstrikes if the Serbs did not comply with the October agreement.\textsuperscript{113}

61. For the second time, Kofi Annan played an important role in increasing the pressure on Milosevic. He met with the North Atlantic Council on 28 January 1999 and urged the NATO members to learn from Bosnia when he said that “\textit{bloody wars of the last decade have left us with no illusions about the difficulty of halting internal conflicts – by reason of force ... nor have they left us with any illusions about the need to use force, when all other means have failed}”.\textsuperscript{114} Annan’s statement suggested that NATO had his blessing to threaten or even use force against the FRY, a sovereign state, if that should become necessary and without the explicit approval of the UN Security Council. NATO understood that the clock was ticking and that military action came closer. The alliance took the decision to throw its final diplomatic card on the table. They invited both the Serbs and the Kosovars, including the KLA, to France for a diplomatic conference in the medieval castle of Rambouillet with the aim to end the conflict peacefully.\textsuperscript{115}

62. At the start of February 1999, the hope existed that Rambouillet could become a second Dayton. However, as soon as the conference started, on 7 February 1999, it appeared that a Dayton scenario was more than a bridge too far. In fact, Rambouillet was doomed to fail from the beginning. The conference was headed, not by the world’s most

\textsuperscript{111} S/RES/1203 (24 October 1998).
influential country the United States, but by France and Great Britain, countries whose world leadership was as old as the castle itself but which had become only of secondary importance in contemporary days. As a consequence, none of the combatting parties took the conference seriously enough to achieve an agreement. Both the leaders of the FRY and the KLA remained absent during the negotiations and replaced themselves by less influential collaborators. Another main difference was the need for an agreement. While in Dayton everyone needed an agreement, the conclusion of Rambouillet can be easily catch phrased by stating that only NATO needed one. The Serbs underestimated NATO and possessed the opinion that the threat of airstrikes was only hypothetically. The KLA, for its part, had not an interest in an agreement with far going concessions. They followed a strategy of escalation which could eventually lead to an international intervention similar to Bosnia. These initial problems did not disappear through the negotiations and by the start of March 1999, the international community knew that Rambouillet was meant to fail. Final efforts to avoid the inevitable took place through the month of March but failed dramatically. By the morning of 24 March 1999, the first NATO bombs felt over Serbia. NATO was officially in war.\textsuperscript{116}

### 3.2.4. Operation Allied Force

\textsuperscript{63}. On the 23rd of March 1999 at 22.27 UTC NATO Secretary-General Javier Solana announced the following statement:

“I have just directed SACEUR, General Clark, to initiate air operations in the Federal Republic of Yugoslavia. All efforts to achieve a negotiated, political solution to the Kosovo crisis having failed, no alternative is open but to take military action.”

“Our objective is to prevent more human suffering and more repression and violence against the civilian population of Kosovo. We must also act to prevent instability spreading in the region. NATO is united behind this course of action. We must halt the violence and bring an end to the humanitarian catastrophe now unfolding in Kosovo. We know the risks of action but we have all agreed that inaction brings even greater dangers. We will do what is necessary to bring stability to the region. We must stop an authoritarian regime from repressing its people in Europe at the end of the 20th century. We have a moral duty to do so. The responsibility is on our shoulders and we will fulfill it.”\textsuperscript{117}

\textsuperscript{64}. So at the eve of its fiftieth anniversary, NATO went to war, for the second time in a decade, in a region which was not part of the North Atlantic area and for a reason different from self-defense. During the first days of the airstrikes the attacks were exclusively focused

\begin{footnotes}
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on strategic targets such as airports, ammunition factories and aerogun. The leaders of the allies believed that a few days of airstrikes would be sufficient to coerce Milosevic to find his way back to the negotiation table. But NATO underestimated the Serbian leader. Milosevic did not return to the negotiation table, on the contrary, his military actions against the Albanian Kosovars were even intensified. By 27 March 1999, when it became apparent that the limited bombing strikes were inadequate, NATO agreed to expand to phase two. This involved attacking a broader array of targets, including depots and military headquarters. This list of targets was expanded several times during the following weeks. Weeks went by and Milosevic did not collapse under NATO’s bombing. On the contrary, the fact that the human rights violations committed by the Serbs were never more intense than since the start of the bombing campaign created the impression of a powerless NATO. In this atmosphere of default, NATO went to its fiftieth anniversary party in Washington D.C.\textsuperscript{118}

65. In the days leading up to NATO’s anniversary meeting, the awareness grow amongst several member states that NATO should win this war if it wanted to uphold its reputation as a credible regional organization. To achieve this goal, Great Britain argued that a ground troop invasion could no longer be excluded. However the majority of the member states did not directly support this option, they did no longer exclude this option as well. The allies returned from Washington D.C. with a clear message of not stopping the airstrikes before Milosevic would give in. A second important step towards the final victory for NATO was most certainly the change of mind of the Russians. Russia became aware that its opposition near the playing field was not effective at all. If they wanted to play an important role, they needed to change their conduct and start to collaborate for a common solution. Therefore, together with NATO, Russia worked out the conditions which would be acceptable for all the parties involved. After several meetings in Helsinki, Moscow and Bonn, their text was ready and they were send to Belgrade. Milosevic, confronted with the change of conduct of its main ally could only agree with the terms and by 4 June 1999, the airstrikes were ceased. The Kosovo conflict came to an end.\textsuperscript{119}

3.3. The Legality of the War in Kosovo: NATO’s Attempts to Justify the Use of Force

3.3.1. Introduction

66. As I already discussed earlier in this thesis, the use of force is principally prohibited by article 2(4) of the UN Charter.\textsuperscript{120} NATO’s Operation Allied Force constituted, beyond any reasonable doubts, actions which included this particular use of force. As a

\textsuperscript{120} Supra from par. 16.
consequence, NATO needed to find a justification for its actions. Otherwise they would have violated this principal prohibition of the UN Charter. If we take the close links between the North Atlantic Treaty and the UN Charter into consideration, a flagrant violation of the latter would have involved for NATO a violation of its own principles and seriously damage NATO’s credibility within the international community.\textsuperscript{121} Therefore, it is important to determine whether NATO can apply an exception on this principal prohibition to justify its operation under international law.

67. NATO has always justified its actions in Kosovo by relying on grounds of humanitarian necessity linked as closely as possible to the UN Charter.\textsuperscript{122} NATO has argued that its actions did by no means violated the law of the UN Charter since Operation Allied Force was an action in accordance with the aim of the UN Charter to protect the Albanian Kosovars from further human rights abuses. Moreover, these abuses were already confirmed in several UN Security Council resolutions\textsuperscript{123}. According to NATO, the UN Charter is not a static instrument but leaves on the contrary space for political realities. Therefore, if the United Nations itself recognize and condemn the large scale human rights violations but is unable to act, international actors should be able to react.\textsuperscript{124} This is even more the case if the UN Security Council has condemned the human rights violations in the region. Some have even argued that the UN Security Council gave NATO an implicit mandate for their actions over the FRY, because of the refusal of the UN Security Council to approve the draft resolution proposed by Russia to condemn the violence.\textsuperscript{125}

68. This NATO point of view is however far from generally approved. In fact, the contrary is true. According to the majority of the opinio iuris and state practice, it appears that the above stated interpretation cannot be accepted. Many authors rejected and still reject NATO’s point of view.\textsuperscript{126} The Group of 77 have also rejected the existence of a right of unilateral humanitarian intervention in its Ministerial Declaration produced by the meeting of foreign ministers in New York on 24 September 1999.\textsuperscript{127}

\textsuperscript{122} Legality of Use of Force (Yugoslavia v. Belgium), Preliminary Objections of the Kingdom of Belgium, 5 July 2000, ICJ Reports, 2000.
\textsuperscript{127} “The Group of 77, a group of countries created to strengthen the economic bargaining power and promote the collective interests of its members condemned NATO’s intervention”, in K. TETZLAFF, “Humanitarian Intervention Post Kosovo: Does a Right to Humanitarian Intervention Exist in Customary International Law After
69. However, it has to be admitted that despite the waterfall of criticism, many insisted with NATO’s actions and saw the airstrikes campaign as unavoidable, necessary and legitimate. They concurred with then UN Secretary-General Kofi Annan who stated in its 2000 Millennium Report to the UN General Assembly that: “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 offend every precept of our common humanity?”

NATO’s actions also pushed the concept of humanitarian intervention to unknown heights of attention. The war in Kosovo illustrated that the rules of humanitarian law were not able to cover all aspects of warfare. More specifically, when a country commits atrocities against its own nationals and the UN Security Council remains unmoved, it is very difficult to force a state to stop its actions. This particular situation raised questions about the possibility to take actions without permission of the UN Security Council. Is it perhaps possible that the UN Charter is a dynamic instrument which leaves room for exceptions if these are required through the political reality? Could these exceptions contain a right to intervene unilaterally in case of humanitarian necessity?

In the next paragraph I want to examine these specific topics into more detail by giving a short overview of the most important arguments. I will continue with an examination of the legality and possible justifications and will finish with an elaboration on the final result for both the alliance and the concept of humanitarian intervention.

### 3.3.2. Humanitarian Intervention as Justification for NATO’s Use of Force

#### 3.3.2.1. Possible Justifications for the Use of Force

70. Sometimes, when the questions are difficult, the answers are simple. This not one of those times. The question about which actions can be taken in case of states violating the human rights of their own nationals is rather difficult to answer. First of all, countermeasures could be taken by the international community. Contemporary international law makes a distinction between countermeasures taken against states which include the use of force and countermeasures which do not. Let us first have a look to the countermeasures which do not include the use of force. These countermeasures are justified

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since the obligation on a state to respect and protect the basic human rights is an obligation erga omnes.\textsuperscript{131} This means that, in the event of a material breach of this obligation by a state, all the other states may lawfully consider itself legally “injured”. The ability to take countermeasures is however limited. According to the Declaration on Friendly Relations as adopted by the General Assembly in 1970, countermeasures may not involve the threat or use of armed force.\textsuperscript{132} These measures were for example taken by the European Union with the suspension of the landing rights of the Yugoslav Airlines and by the international community with a mandatory arms embargo vis à vis the FRY in Resolution 1162 of the UN Security Council.\textsuperscript{133}

\textbf{71.} It is however clear that NATO’s Operation Allied Force did not possess the characteristics of such peaceful countermeasures. The UN Charter law limits the ability for states to take measures which include this threat or use of armed force since they constitute an exception on a general prohibition of the UN Charter.\textsuperscript{134} A possible exception is determined in article 51 of the UN Charter and constitutes the use of force in case of self-defense. But since the conflict in Kosovo, as most conflicts in recent decades, constitute an internal conflict, the severe burden of proof to justify the self-defense is almost impossible to fulfill. More specifically, the necessary “armed attack” will be very difficult to prove.\textsuperscript{135} Since the UN Charter does not explicitly provide other exceptions on the principal prohibition of article 2(4) of the UN Charter, we can conclude that, in se, the Kosovo intervention constitutes a violation of the UN Charter.\textsuperscript{136}

\textbf{72.} Since NATO’s Operation Allied Force did not comply with the exceptions of the UN Charter law, the operation can only be considered legal if it is able to rely on an exception outside this document. It may be possible to imagine, and this is in fact argued several times by authors and (NATO)governments that the state of the law has changed in recent decades. Could it not be that, after the events in Rwanda and Srebrenica and without the Cold War east-west contradiction, the opinio iuris and the state practice has changed towards other possible grounds of justification, for example the concept of an intervention


\textsuperscript{134}Charter of the United Nations, 26 June 1945, art. 2(4), Can TS, 1945, No 7.

\textsuperscript{135}Supra par. 18.

\textsuperscript{136} B. Simma, “NATO, the UN and the Use of Force : Legal Aspects”, European Journal of International Law, vol. 10, 1999, 1-6.
based on humanitarian grounds.  

This argument is supported by state practice during the nineties in Somalia, Rwanda or Haiti. Different opinions divide the international community on this issue. Hereinafter, I will deal with the question that it could be the case that the rising doctrine of humanitarian intervention constitutes a new exception on the principal prohibition of the use of force which may justify NATO’s operation allied force.

3.3.2.2. Kosovo, the Breakthrough of the Concept of Humanitarian Intervention?

a) The Rise of the Humanitarian Intervention

73. The concept of humanitarian intervention dates back to the seventeenth century and has been filled up in different ways through the time. However, since the adoption of the UN Charter in 1945, all considerations about legality or illegality in international law should depart from this document. Since the UN Charter prohibits the threat or use of force and does not provide in an explicit exception, the legality of an intervention exclusively based on humanitarian grounds is doubtful. As with so many concepts and terms, the concept of humanitarian intervention was sometimes misused during the Cold War as an excuse to wage a war for political motives and without consent of the UN Security Council. Very well illustrations of the latter are for example the 1979 Russian intervention in Afghanistan and the 1989 Panama Invasion by the United States. Nevertheless, other situations could have been actual examples of the particular concept to justify the use of force. It is remarkable that especially in these situations, for examples India’s 1970 intervention to end repression and support self-determination in East Pakistan, Tanzania’s 1979 intervention which overthrew Idi Amin in Uganda and Vietnam’s use of force in 1978 which ended the murderous rule of Pol Pot in Cambodia, the states involved have preferred to base their actions on the well-established concept of self-defense than rather claiming a right of humanitarian intervention.

74. The end of the Cold War would herald “the golden nineties” for the concept of humanitarian intervention. The concept was the topic of many articles, books and speeches. The UN Security Council even approved humanitarian interventions in Somalia, Rwanda and Haiti. Some even argued that the world would react collectively against any violation of human rights, even if these were committed by their own government. Nevertheless, these

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examples of state practice in Somalia, Rwanda or Haiti all had a strong legal basis in article 42 of the UN Charter.\textsuperscript{142} When it became clear that the UN Security Council was paralyzed concerning the situation in Kosovo, the concept of humanitarian intervention experienced decisive days. Was the rising doctrine, which was at the time omnipresent in both written and spoken word, ready to rise from the law of the books to the law in practice?\textsuperscript{143}

b) The Concept of Humanitarian Intervention explained

b.1. A variety of definitions

75. The concept of humanitarian intervention knows multiple definitions ranging from very restrictively interpreted, to very extensively.\textsuperscript{144} In general, humanitarian intervention can be summarized as “the coercive interference in the internal affairs of a state, involving the use of armed force, with the purposes of addressing massive human rights violations or preventing widespread human suffering”.\textsuperscript{145} The concept can be subdivided into two kinds of humanitarian intervention. The first one is the so called “collective security humanitarian intervention”, this is an intervention authorized by the UN Security Council to stop terrible human rights violations. The second concept, the right of unilateral humanitarian intervention is, on the other hand much more controversial. The possible existence of such a right is widely disputed.\textsuperscript{146} NATO’s operation in Kosovo heralded a tipping point in the development of this doctrine.

b.2. Collective Security Humanitarian Intervention

76. The examples of state practice of the concept of humanitarian intervention in Somalia, Rwanda and Haiti all had one thing in common: they were explicitly authorized by the UN Security Council.\textsuperscript{147} Since the early nineties, it appeared that the UN Security Council has extended the concept of what constitutes a threat to international peace and security, to cover humanitarian catastrophes. As an explicit exception to the general prohibition on the use of force, the UN Security Council may authorize armed interventions under the rules of Chapter VII of the UN Charter. The implicit impetus of this extension seems to evolve in

\begin{itemize}
\item \textsuperscript{142} S/RES/814 (26 March 1993); S/RES/912 (21 April 1994) and S/RES/940 (31 July 1994).
\item \textsuperscript{144} For a more extensive overview of several definitions of humanitarian intervention see : M.A. SMITH AND P. LATOWSKI, \textit{The Kosovo Crisis and the Evolution of Post-Cold War European Security}, Manchester University Press, Manchester, 2003, 24.
\item \textsuperscript{147} E.g. : S/RES/814 (26 March 1993); S/RES/912 (21 April 1994).
\end{itemize}
the way that that gross human rights violations anywhere are a threat to peace and security everywhere.\textsuperscript{148}

Also in the case of Kosovo, the UN Security Council considered the situation as a threat under the conditions of Chapter VII.\textsuperscript{149} However, it appeared from the wording of the three adopted resolutions that they did not include any legal mandate for NATO to set aside the general prohibition of article 2(4) of the UN Charter.\textsuperscript{150} This is reflected in the fierce opposition of Russia and China to any kind of mandate to use force against the FRY. One can state that the actions taken by NATO were in accordance with the general opinion within the international community but not that these resolutions gave an implicit authorization for Operation Allied Force.\textsuperscript{151} After the intervention took place, the UN Security Council also passed Resolution 1244, which allowed NATO to create “international peace and security” in Kosovo.\textsuperscript{152} According to Christine Gray, “Resolution 1244 was not a retrospective acceptance of the legality of NATO action.”\textsuperscript{153} Despite this apparent lack of authorization to use force against the FRY, NATO member states still considered its actions as legal because they argued that the concept of humanitarian intervention was a part of international customary law. Hereinafter, I will examine this claim.\textsuperscript{154}

b.3. Unilateral Humanitarian Intervention

77. The question on the possible existence of a right to intervene unilaterally for reasons of humanitarian necessity is one of the most debated topics in international law through the past decades. During those years, many scholars and governments have tried to demarcate the scope of the topic.\textsuperscript{155} It is not my aim to give an exhaustive overview of the development of these criteria through the years, instead I will highlight these criteria which are considered as essential for undertaking a humanitarian intervention. Generally summarized, a humanitarian intervention is considered as possible: “when there is an overwhelming necessity for undertaking action with the aim to stop large scale human rights violations in the targeted state and this intervention is exercised in accordance with the principle of proportionality”. However, I should seriously nuance these criteria. These conditions only set out the requirements when a humanitarian intervention could occur. It does not assess the legality. Many scholars, such as Cassese, although they do not recognize

\textsuperscript{149} S/RES/1199 (23 September 1998).
\textsuperscript{152} S/RES/1244 (10 June 1999).
\textsuperscript{154} Infra par. 82.
the right of a unilateral humanitarian intervention as an exception on the use of force, have given an extensive view on the criteria.\footnote{156}

- Occurrence of Gross Human Rights Violations in the Targeted State

\footnote{156 A. C\textsc{as}se\textsc{e}, “Ex \textit{Iniuria Ius Oritur: Is International Legitimization of Forcible Humanitarian Countermeasures Taking Shape in The World Community?}, European Journal of International Law, vol. 10, 1999, 25}

78. Human rights violations and humanitarian intervention are strongly linked with each other. Professor Greenwood, for example, who represented at the time the United Kingdom before the International Court of Justice in the case concerning “the Legality of the Use of Force”\footnote{157} stated that a humanitarian intervention can only be legal if “there exists, or there is an immediate threat of, the most serious humanitarian emergency involving large scale loss of life”.\footnote{158}

However, as a general rule, every intervention is prima facie illegal and every exception should be interpreted narrowly. Nevertheless, certain human rights violations are considered as violations of a norm of ius cogens. It has been argued that such norms of ius cogens are the highest norms in international law. For example the right to life, the right to be free from torture and the right not to be subject to genocide are considered as norms of ius cogens.\footnote{159} If these norms are violated, a violation of ius cogens occurs.\footnote{160} This violation is a violation erga omnes and violates the interests of all states. This criterion is widely recognized in state practice and opinio iuris and is generally viewed as the preliminary condition to bring a situation under the concept of humanitarian intervention, irrespective of its legality.\footnote{161}

- The Overwhelming Necessity to act

79. The criterion of necessity is a very vague criterion. Four requirements are generally accepted as essential preconditions to fulfill the obligation of necessity. First of all, it should be clear that the domestic state is does not have the intention to stop the human rights violations. Secondly, the United Nations is paralyzed and will or cannot act in the future. Thirdly, the obligation of last resort, all non-military options have to be explored by

\footnote{157 International Court of Justice, Legality of the Use of Fore (Yugoslavia v. United Kingdom), Provisional Measures, Order of 2 June 1999, ICJ Reports, 1999, 124.}
\footnote{159 Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc A/CONF.183/9, (17 July 1998); the ICC Rome Statute can constitute a useful guide to determine which norms could be considered as norms of ius cogens.}
\footnote{160 C. Chinkin., “The Legality of NATO’s action in the former Republic of Yugoslavia (FRY) under international law”, International & Comparative Law Quarterly, vol. 49, no. 4, 919-920.}
the state claiming this right. Fourthly and lastly is the need for some impartial and neutral evidence, for example a report of the International Committee of the Red Cross.

This obligation of overwhelming necessity is probably also the most problematic precondition. This is caused by the factual nature of this requirement. Every situation needs to be assessed on an individual basis. This makes it very difficult to determine when to act and when to resign. The criterion of necessity was also the main source of criticism after the intervention in Rwanda in 1994 where the international community waited way too long before undertaking action. In Kosovo, on the other hand, the main criticism was especially NATO’s eagerness to use force and the lack of patience to reach a settlement through negotiations.\textsuperscript{162}

- Proportional to the Objective pursued

\textbf{80}. The proportionality criterion provides that the use of force cannot go beyond its limited purpose of stopping the atrocities and restoring the respect for human rights. Consequently, the use of force must be discontinued as soon as this purpose is attained.\textsuperscript{163} The means used to achieve these goals must still be in conformity with the obligations under international humanitarian law such as the 1949 Geneva Convention and the 1977 Additional Protocols to the 1949 Geneva Convention.\textsuperscript{164} The assessment on the proportionality criterion always occurs on a factual basis.

c) NATO in Kosovo : the Only Way is Forward

\textbf{81}. When NATO’s Secretary General Javier Solana stated on 9 October 1998 that NATO had decided to start threaten Milosevic with the possibility of the launch of airstrikes NATO had no legal mandate to undertake these actions.\textsuperscript{165} NATO chose to justify its intervention on humanitarian grounds and to link these grounds as closely as possible under the circumstances to the UN Charter.\textsuperscript{166} NATO’s Secretary General Javier Solana explained:

“\textit{The relevant main points that have been raised in our discussion yesterday and today are as follows:}

- The FRY has not yet complied with the urgent demands of the international community despite UN Security Council Resolution 1160 of 31 March 1998 followed by UN Security

Council Resolution 1199 of 23 September 1998, both acting under Chapter VII of the UN Charter.
- The very stringent report of the Secretary-General of the United Nations pursuant to both resolutions warned inter alia of the danger of a humanitarian disaster in Kosovo.
- The continuation of a humanitarian catastrophe, because no concrete measures towards a peaceful solution of the crisis have been taken by the FRY.
- The fact that another UN Security Council resolution containing a clear enforcement action with regard to Kosovo cannot be expected in the foreseeable future.
- The deterioration of the situation in Kosovo and its magnitude constitute a serious threat to peace and security in the region as explicitly referred in the UN Security Council Resolution 1199.

On the basis of this discussion. I conclude that the Allies believe that in the particular circumstances with respect to the present crisis in Kosovo as described in UN Security Council Resolution 1199, there are legitimate grounds for the Alliance to threaten, and if necessary, to use force.”

82. The case of Kosovo was therefore an interesting test for the concept of humanitarian intervention. While the former precedents were all based on UN Security Council authorization, NATO wanted to act in Kosovo without any UN Security Council mandate. The legality of the acts that emanated from this decision was questionable from the beginning. The concept of humanitarian interventions was, despite its popularity in the minds of legal experts and in the words of policy makers, not yet recognized as an exception on the principal prohibition on the use of force. NATO members were also reluctant to use the term “humanitarian intervention” because of the big impact of this concept. Only a few of the allies, of which the United Kingdom was the most enthusiastic, tried to rely exclusively on this concept. Several British scholars and politicians widely elaborated on the concept and tried to defend the choice to launch the operation from a legal perspective.

British Prime Minister Tony Blair stated in April 1999 in his speech in Chicago: “the criteria to determine the appropriateness of an intervention are: firstly, are we sure of our case, secondly, have we exhausted all other diplomatic options, thirdly, on the basis of a practical assessment of the situation, are there military operations we can sensibly and prudently undertake and fourthly, do we have national interests involved?” These criteria are also commonly known as the Blair Doctrine.

As stated earlier, most allies, such as the United States, were more reluctant to use the concept and preferred to justify their actions on various grounds. This uncertainty on the

legality of the possible use of force was a point of controversy within NATO. But NATO remained quiet, despite the internal struggles, it took a decision and did not look back.

d) Illegal but Legitimate, an Ambiguous Conclusion of an Ambiguous Operation

83. The legality or illegality of NATO’s Operation Allied Force is widely examined by all kinds of institutions, governments and experts. Many experts, especially the British, support the claim made by for example the United Kingdom and Belgium that the bombing campaign was justified by the concept of humanitarian intervention.\textsuperscript{170} Despite their arguments, the majority of the doctrine is convinced that Operation Allied Force was not in conformity with the UN Charter.\textsuperscript{171}

84. One of the most influential assessments on this issue was the report of the Independent International Commission on Kosovo (hereinafter “The Commission”). The Commission was an initiative of the Prime Minister of Sweden, Mr. Groan Person, who was concerned by the absence of an independent analysis of the conflict. UN Secretary-General Kofi Annan endorsed the project.\textsuperscript{172} The Commission was chaired by Richard Goldstone.\textsuperscript{173} Most of its members were human rights observers who had routinely been skeptical, or even hostile to Western interventions of various types. The Commission gave its final conclusions in the so called “Kosovo Report”. According to this panel of expert, NATO’s intervention was “illegal but legitimate”.\textsuperscript{174} This conclusion is an ambiguous but not illogical result. The governing framework was simply not adapted for situations in which states, despite their possibly noble intentions, aimed to intervene in a country that found itself in a civil war and where the government itself violated human rights on a large scale.

85. The Commission considered the operation as illegal because it did not receive prior approval from the UN Security Council. In the framework that governed the threat or use of force. UN Security Council authorization was considered as a necessary step to take measures that include the threat or use of force. There is no room for derogations unless they are explicitly recognized by the UN Charter. In the actual legal framework, no exceptions for rising norms, such as the concept of humanitarian intervention, are allowed.


\textsuperscript{173} Richard Goldstone is a South African Judge who prosecuted war crimes in Yugoslavia and Rwanda and lead the United Nations Fact Finding Mission on the Gaza Conflict.

Despite the lack of a legal basis, the Commission determined the operation as legitimate. According to the Kosovo report, all diplomatic avenues had been exhausted and the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule. The Commission explicitly accepts that in this situation there was a gap between what was legal and what was legitimate. To shorten this gap in the future, it recommended that the General Assembly should adopt a “principal framework for humanitarian intervention which could be used to guide future responses to imminent humanitarian catastrophes.”

86. The interpretations on this report are divergent. Some authors, like Bruno Simma, judge of the International Court of Justice, stress the principal conclusion of the Commission that the operation was illegal because the UN Charter does not allow any exception on the threat or use of force that is not explicitly allowed in the Charter.

Others, like Weiss saw room for derogations. They meant that their opinion was supported by the former UN-Undersecretary-General Shashi Traroop who pointed out that “The UN guards the vital principles entrenched in its Charter, notably the sovereign equality of states and the inadmissibility of interference in internal affairs. It is precisely because the UN is the chief guardian of both these sacrosanct principles that it alone is allowed to approve derogations from them.”

The International Commission on Intervention and State Sovereignty also emphasized that “there is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes”. At the same time, the Commission left open the possibility for a Kosovo-like situation: “If the UN Security Council fails to discharge its responsibility in conscience-shocking situations crying out for action, then it is unrealistic to expect that concerned states will rule out other means and forms of action to meet the angle that there is a huge gap between acting one time in an exceptional situation and turning such exceptional operation into a general policy.”

The concept of humanitarian intervention was made very actual by NATO, but only the future would decide whether the concept could evolve to a real, usable concept, whether this right of humanitarian intervention would stay a theoretical idea.

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3.4. Considerations about Kosovo, the Impact for NATO and the Consequences for the Concept of Humanitarian Intervention

87. If someone would ask me the question, “how do you consider NATO’s operations in Kosovo?”, the answer would probably be that although choosing the wrong means and having no explicit legal basis, Operation Allied Force was an intervention with a just cause which can eventually be considered as legitimate. I do realize that this statement deserves some explanation.

88. It is widely recognized that NATO intervened in Kosovo for a just cause when it launched Operation Allied Force. At the eve of March 23, 1999, the international community, having experienced the violence in a region, had already get acquainted with the large scale human rights violations in the Balkan region. Multiple UN Security Council resolutions had condemned the atrocities and called upon the parties to stop the violence. An equal amount of resolutions were subsequently violated by the combatting parties. The main problem was that no military force could be used to enforce these resolutions since any attempt would be vetoed by at least one permanent member. The UN Security Council was once again paralyzed by its own veto system.

NATO, on the other hand, had always played a unique role in the Balkan conflicts. Its actions in Bosnia heralded the end of the violence in the former Yugoslavian republic. So when the violence escalated in Kosovo, NATO showed again its intention to play an important role in managing this conflict. However, since NATO had no UN Security Council mandate to actually launch a military operation, it could only try to convince the parties to solve the conflict through negotiations. Nevertheless, by March 1999, all diplomatic attempts had failed. The failure of diplomacy left NATO only with the choice of undertaking action or withdraw. NATO eventually decided to launch an airstrikes campaign, without a legal mandate and without the certainty of success but with the aim of stopping further atrocities within the Kosovo region.

89. This brings us to the second part of my conclusion. Despite acting in the right way, NATO had no legal basis for its operations. NATO launched an airstrikes campaign without a legal mandate from the UN Security Council and exercised this campaign in a way that was more aimed at avoiding any military casualties than saving peoples life’s. At the time and also in contemporary days, the UN Security Council is primary responsible for the maintenance of peace and security in the world. This is also confirmed by NATO in its 1999

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Strategic Concept. This strategic document was adopted by the alliance at its Washington Summit in April 1999. Interesting to remark is the fact that in this 1999 Strategic Concept, NATO recognizes the UN Security Council only as the primary actor, but not as the exclusive one.\textsuperscript{184} If the UN Security Council is paralyzed and certain conditions are fulfilled, NATO possessed the opinion that actions without the Security Council’s legal blessing were still a possibility. This statement reflected the opinions of most NATO members during Operation Allied Force. Next to the NATO member states, the operation’s legitimate character is also further supported by the international community itself. The majority of the UN Security Council supported Operation Allied Force. This was illustrated during the airstrikes campaign when a proposal for a UN Security Council calling for a halt to the NATO attacks was rejected.\textsuperscript{185} However, the international community never gave Operation Allied Force the etiquette of legal. This was also confirmed within the Kosovo report. Nevertheless, this Kosovo Report also confirmed that the operation was perhaps not an action conform the rules but one in accordance with the aims of the UN Charter.\textsuperscript{186}

90. Besides the lack of a legal basis, NATO’s means used in the exercise of Operation Allied Force were also the subject of criticism. The fact that the option of a ground troop invasion was immediately excluded by the American government can most certainly not be considered as a thoughtful consideration. Milosevic knew that an airstrikes campaign was his worst case scenario so he was not forced to fear other actions. Secondly, the fact that the participating airplanes remained above an altitude of 15000 feet above sea level to limit casualties made that the effectiveness of their bombs were limited as well.\textsuperscript{187} Because of these facts, Milosevic was able to intensify his atrocities against the Albanian Kosovars. This can be considered as a miscalculation of NATO.\textsuperscript{188} Nevertheless, the accusation made by some politicians that NATO caused this atrocities cannot be followed. For more than ten years, Milosevic had continuously committed human rights violations to coerce the Albanian Kosovars out of Kosovo, sooner or later, with or without NATO, these atrocities would have happened, thanks to NATO, Milosevic was coerced to withdraw. NATO’s military operation caused that Kosovo is a better place in contemporary days.\textsuperscript{189}

\textsuperscript{184} The Alliance’s Strategic Concept Approved by the Heads of State and Government participating in the meeting of the North Atlantic Council (24 April 1999), Washington D.C., par. 15, available at : http://www.nato.int/cps/en/natolive/official_texts_27433.htm.


91. As mentioned in the former paragraph, Kosovo is a better place than before NATO’s airstrikes campaign. Despite the criticism on the means, despite the doubtful legal character, the international community still considers the operation not as a crime but as an intervention that prevented the Kosovar people from worse.\textsuperscript{190} Besides the well-being of the Kosovar people, Operation Allied Force was also of enormous importance for NATO itself. The conclusion that NATO remained united through the entire campaign is both remarkable and hopeful. Milosevic count upon NATO’s internal disharmony to stop the bombing campaign, but he underestimated NATO. It was exactly NATO’s unity that eventually coerced him to capitulate, after his main ally Russia had left his side. The Russians already understood by the end of April that NATO was not going to give up their campaign without achieving their aims. Russia changed plans and tried to collaborate actively to get their ally Milosevic the best deal that was possible. For the first time, NATO showed the world that it was able to act as a strong, credible actor within the international community. The alliance also dealt with the discussion of “going out of area”. In its new Strategic Concept, NATO determined that its primary aim is to maintain the security, freedom and stability of its members in the North Atlantic Area. But instability at the periphery can affect its members, for example, through the spill-over of war, large scale refugee flows, the disruption of vital resource flows, terrorism or organized crime.\textsuperscript{191} NATO feels this justifies deployment outside NATO territory as part of a crisis prevention or crisis response operation, or to support other international organizations, such as OSCE, with operations to preserve international peace and security.\textsuperscript{192}

92. NATO’s fiftieth year of its life was for many reasons a crucial year in its history. NATO undertook its first independent military operation in its history and similarly adopted its 1999 Strategic Concept. This concept set out NATO’s policy for the future. Very important was the fact that it had incorporated the changing reality of the post-Cold War world order. The nineties had been a hard time for NATO. There was the identity crisis, the operations in Bosnia and Kosovo and the difficulties of possible enhancement. The 1999 Strategic Concept should be the solution for an alliance fully prepared for the 21\textsuperscript{st} century. However, at the same moment, no one suspected that far from the Brussels headquarters, in the mountains of Afghanistan, a group of terrorists prepared for an attack that would change the first decade of the new millennium. In the next Chapter, I will elaborate on their actions and the consequences they had for NATO.

\textsuperscript{191} The Alliance’s Strategic Concept Approved by the Heads of State and Government participating in the meeting of the North Atlantic Council (24 April 1999), Washington D.C., par. 24, available at : http://www.nato.int/cps/en/natolive/official_texts_27433.htm.
\textsuperscript{192} The Alliance’s Strategic Concept Approved by the Heads of State and Government participating in the meeting of the North Atlantic Council (24 April 1999), Washington D.C., par. 48, available at : http://www.nato.int/cps/en/natolive/official_texts_27433.htm.
Chapter 4. NATO in Afghanistan: Experiencing Historic Days from the Sideline

4.1. Introduction: 9/11 and the Launch of Operation Enduring Freedom

93. Not many days have characterized the course of our history as much as 11 September 2001. The day that Al Qaeda, a terrorist organization led by Osama Bin Laden, attacked the United States, the most influential state on earth, in its heart. Four very precise and well thought assaults destroyed these specific targets that symbolized the power of the American nation. The attacks were unprecedented, unexpected and highly destructive. Unprecedented was also the reaction of the international community which offered almost unanimously its condolences and support to the United States. In this Chapter, I want to go back to this traumatic times and the months that followed since they would influence the entire international community for the next decennium.

94. These attacks also heralded historic days for NATO. The United States, the driving military force, the primus inter pares, was painfully attacked in its own territory by an unknown threat in a way that could not be imagined. The North Atlantic Council immediately met in emergency in Brussels and expressed their support for the American people and expressed their intentions to assist the United States, not only by words but also by acts. In a joint press release issued on the evening of 11 September 2001, they stated “those responsible will not get away with this”. One day later, on 12 September 2001, the allies took the historic step when they, for the first time in the history of the alliance, invoked the North Atlantic Treaty’s the mutual defense clause of article 5.

95. Despite the historic value of this first invocation of article 5, the significance of this decision would decrease drastically within a few weeks. While NATO looked unanimous immediately after the dramatic events, it rapidly felt back into the classic debate between the countries eager to wage this war and the countries which were more reluctant. When the Bush administration unfold its plans to start its “War on Terror”, it appeared that several European governments, such as France, Germany or the Netherlands did not want to follow the Americans blindly. This reluctance of several NATO allies supported the arguments of these people in Washington D.C. who did not want to involve NATO in the conflict. They were convinced, and it has to be said that, from a legal perspective, they had a point, that

the invocation of article 5 only meant that NATO was eager to help if this help was asked.\textsuperscript{197} This was also confirmed by NATO’s Secretary-General Lord Robertson who stated “the country attacked has to make the decisions, it has to be the one to ask for help”.\textsuperscript{198} It rapidly appeared that Washington appreciated the support of the allies but that they did not want to be limited in their decision making by exercising the operation within the framework of NATO. This was an American matter and the United States were ready to deal with it.\textsuperscript{199}

96. When the United States launched Operation Enduring Freedom, the military response to those who had hit them so effectively, in Afghanistan, there was no place for NATO in the coalition. The Bush administration believed that the mission needed to determine the coalition and not that the coalition must determine the mission.\textsuperscript{200} In this case, the coalition contained only America’s most loyal ally Great-Britain and several countries which surrounded Afghanistan. NATO only fulfilled a supportive role. More specifically, NATO adopted eight measures which included intelligence sharing, providing increased security for American facilities and those of other allies, providing blanket over flight clearances and providing access for the United States and other allies to ports and airfields on the territory of NATO nations for operations. Additionally, NATO declared its will to support the military action by deploying elements of its NATO Airborne Early Warning force. Despite the confident and self-important words of Lord Robertson, the image was created of a dumped NATO only able to play a secondary role.\textsuperscript{201} The random highlights, such as the first time that NATO executed an action under article 5, did only win the space of the history books but not the minds and the hearts of the people.

4.2. Invoking Article 5 : Collective Self Defense in Practice

4.2.1. : Article 5 of the NATO Treaty

97. As set out in Chapter 1 of this paper, NATO is an organization based on a mutual collective self-defense pact.\textsuperscript{202} This provision, that aims to assist collectively these member states that are victim of the use of force, is established in article 5 of the North Atlantic Treaty. This article is always been considered as the key provision within the North Atlantic

\textsuperscript{202} Supra from par. 9.

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Treaty as it is the reflection of NATO’s common spirit of collectively defending each individual ally. Earlier in this thesis, I already highlighted the fact that the obligation on the member states to assist member states attacked is not obligatory. Individual members are free to fashion their response to an attack according to their respective national interests.

98. These determinations were also confirmed in practice when the allies invoked for the first time the collective self-defense clause. This invocation is rather remarkable since it appears that the founding fathers of the North Atlantic Treaty would have never thought that this article would have been invoked for reasons of collective self-defense against a group of terrorists mainly harbored in a country in central Asia. During the entire Cold War, a possible invocation of article 5 was never discussed. But in this case, the question immediately appeared. This exceptional situation required exceptional measures. NATO decided to take the historic step, but had no idea of what would follow.

4.2.2. The Significance of the Invocation of Article 5: a Historic Step during Historic Days

99. The immediate, overwhelming support of the entire international community for the United States after the attacks on 11 September 2001 presumed also a powerful reaction from its oldest and most loyal allies, its NATO partners. The allies immediately met in Brussels and issued already a few hours after the attack a joint statement. They declared: “At this critical moment, the United States can rely on its eighteen Allies in North America and Europe for assistance and support. NATO solidarity remains the essence of our Alliance. Our message to the people of the United States is that we are with you. Our message to those who perpetrated these unspeakable crimes is equally clear: you will not get away with it.”

100. Discussions between the allies on the situation in Brussels rapidly turned to the question of invoking article 5, the mutual defense clause of the North Atlantic Treaty. The general assumption existed that invoking article 5 meant, in principle, mobilizing NATO for war. This article never served to reflect any symbolic signal of allied unity and a possible

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203 Supra par. 25.
205 An illustration of this uncertainty is the statement by NATO issued after an article in the British newspaper “The Guardian” that reported that NATO was drawing up plans for a massive attack on Afghanistan something which was immediately denied by NATO in a press statement: see therefore: Statement by the NATO Spokesman (False news on NATO invasion of Afghanistan), Press Release, PR(2001) 125, 13 September 2001.
invocation was not a process that could have been taken lightly. The apparently quick and unanimous decision to invoke article 5 one day after the destructive assaults were proves of an apparently united NATO when it stated: “It is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe of North America shall be considered an attack against them all.”

101. However, as Tom Lansford’s study on the debate at the NATO Headquarters reveals, the possible invocation of article 5 of the North Atlantic Treaty was subject to an intense debate and eventually lead to a compromise that would hurt NATO on the longer term. Despite the fact that most of the permanent members were willing to invoke article 5, there were considerable reservations expressed by the representatives of France, Germany, the Netherlands, Belgium and Norway. For example, the French Minister Hubert Vedrine stated that: “Article 5 does not abolish the freedom of action of each ally.”

This reluctance expressed by these key member states increased the tensions in the Brussels headquarters. Secretary-General Robertson enhanced the pressure on the reluctant member states and urged them to table their concerns and vote affirmatively. Robertson was adamant that the alliance move decisively and boldly in these decisive days. So adamant that he even assured the allies that invoking article 5 would not necessarily lead individual members, or the alliance as a whole, into military operations. Responding to questions as to whether article 5 would require joint actions, Robertson publicly said “the country attacked has to make the decisions, it has to be the one to ask for help.”

102. With these limited assurances, NATO took the historic step to invoke article 5. But both the statement of the Secretary-General and these of national politicians seriously weakened the significance of this invocation. For example, Belgian’s foreign minister Louis Michel flatly stated: “we are not at war.”

By acting this way, NATO reduced the opportunities that 9/11 brought them already on the first day after these terrible events. Invoking article 5 could have been brought a new dynamism and inspiration for the organization but the approach adopted immediately after the events weakened the significance of the invocation. In fact, it heralded NATO’s story in Afghanistan, a story of missed opportunities and painful marginalization of the NATO allies by the United States.


4.3. : Article 5 in Practice : the Self-Weakening of NATO

4.3.1. A Story of Missed Opportunities

103. In general, one could consider NATO’s role during the initial operations in Afghanistan in the fall of 2001, the so called “Operation Enduring Freedom”, as rather poor. This marginalization of the alliance was caused by both the we-want-no-limitations-attitude of the United States as well as the weak reactions of several key allies on the invocation of article 5.215 Towards the outside, it looked like NATO took decisions that were considered as historic, but immediately, the member states weakened the impact by expressing declarations that seriously limited the power of this initial decision. A first example is the initial invocation itself. It was the Secretary-General, Lord Robertson, who immediately declared after the invocation that it was not certain that NATO would provide any support. Despite the declaration of the member states that they would guarantee the necessary forces to undertake a successful military operation, the German, French and Belgian politicians simply stated : “we are not at war”.216 It was not that these declarations were violations of their commitments towards NATO, it was more that this attitude did not create an image of a motivated NATO. It was also especially this lack of enthusiasm that supported exactly these opinions in Washington that were arguing to deal with the whole Al Qaeda and Taliban problem alone. Many Americans had felt during the military operations in the nineties that NATO’s aid was often an obstruction for an efficient and powerful operation. Washington simply considered that nor technically, in terms of military capacity, nor politically, Europe was fully on the same speed as the United States.217 These people considered the support of the NATO allies as welcome, but did not want any interference that could obstruct this American operation.

Eventually, the United States left NATO outside the biggest part of the military operation. They did reject NATO’s aid, not in their words but in their actions. The United States launched Operation Enduring Freedom on 7 October 2001. Together with the British, and in cooperation with the “Northern Alliance”, the collective noun for the Afghan opposition, they expelled the Taliban from power within two months and coerced them to flee to the mountains near Pakistan. NATO’s share in this military success remained limited to only a few breadcrumbs.218

4.3.2. Despite experiencing Historic Highlights

215 Supra par. 101.
217 L.R. GOLUM, “Europe, the War on Terrorism, and the EU’s International Role”, Brown Journal of World Affairs, vol. 61, no. 8, 2001-2002, 63-64.
Perhaps, the above standing may sketch a too negative image of NATO during the first months after 9/11. This must be nuanced since NATO did fulfill a role during Operation Enduring Freedom. A supportive, small role, but a role. A role which made the whole Afghanistan experience part of NATO’s history. NATO supported the campaign against the international terrorism with six supportive measures and two military operations that, although they were not executed on a battlefield, were part of the military campaign. NATO Secretary General Lord Robertson did not omit to stress that these measures were crucial in the “War on Terror” and that these actions were actually evidence of NATO’s important role. Moreover, during the fall of 2001, NATO adopted the following measures to support the military campaign in Afghanistan:

- enhancing intelligence sharing and co-operation, both bilaterally and in the appropriate NATO bodies, relating to the threats posed by terrorism and the actions to be taken against it;
- providing, individually or collectively, as appropriate and according to their capabilities, assistance to allies and other states which are or may be subject to increased terrorist threats as a result of their support for the campaign against terrorism;
- taking necessary measures to provide increased security for facilities of the United States and other allies on their territory;
- backfilling selected Allied assets in NATO’s area of responsibility that are required to directly support operations against terrorism;
- providing blanket over flight clearances for the United States and other Allies’ aircraft, in accordance with the necessary air traffic arrangements and national procedures, for military flights related to operations against terrorism;
- providing access for the United States and other Allies to ports and airfields on the territory of NATO nations for operations against terrorism, including for refueling, in accordance with national procedures.

These measures were, although generally considered as secondary and purely supportive, welcomed by the Bush administration and did eventually contribute in a very positive way to the entire operation. Especially the two high profile military operations that NATO executed at the request of the United States were both historic and useful. NATO started its first military operation, codenamed “Operation Active Endeavour”, on 6 October 2001. This operation was in many ways historic since it was NATO’s first article 5 operation ever. Operation Endeavour involved the control and possible interception and confiscation of ships which could carry cargo that could be useful for terrorists. The second

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221 T. Lansford, All for One: Terrorism, NATO and the United States, Hampshire, Ashgate, 2002, 111-117.
military operation concerned the deployment of surveillance aircraft to the United States between October 2001 and April 2002. Five NATO Airborne Warning And Control Systems were used to patrol the airspace of the United States. This was another historic event for NATO since it marked the first time that NATO assets were used to defend the United States.

106. As the winter felt over Afghanistan, NATO got more involved in the ongoing operations in the region. At the time, Washington was convinced that the military operations were for the most part ended and that the rebuilding could start. This rebuilding of Afghanistan would involve many people and money and therefore the United States counted on the support of the international community. Therefore, the UN Security Council adopted on 20 December 2001 a resolution that created the International Security Assistance Force. ISAF had the main purpose to rebuild a country that had met all the conditions of a failed state. From the start, ISAF had been primarily staffed by personnel from NATO states. NATO even took over the formal command in August 2003. But despite this meaningful contribution to solve the crisis in Afghanistan, it cannot be denied that these are not actions that were linked to article 5 of the North Atlantic Treaty. Therefore, the feeling exists that the invocation of article 5 of the North Atlantic Treaty was purely symbolic and for those who expected more from article 5, Afghanistan still lasts a bitter taste.

4.4. Comparison : NATO’s Actions in Kosovo, NATO’s Actions in Afghanistan

4.4.1. Kosovo and Afghanistan : More in Common than One could expect

107. From an outside perspective, NATO’s operations in Kosovo and Afghanistan are two totally different situations. This is only partly correct. Kosovo was an out of area, European conflict that threatened the region for almost a decade, while Afghanistan was the result of an unexpected, unforeseen and highly destructive attack on the territory of the United States which caused a worldwide shock. However, without the experiences of the allies during Operation Allied Force, the war in Afghanistan could have been totally different. The decisions made by the Bush administration in the days that followed the cruel attacks on the Pentagon and the World Trade Center were highly influenced by the experiences in Kosovo. In this paragraph, I want to compare both situations in Kosovo and Afghanistan and, although there were initially very different, highlight the influence of the first on the latter.

224 Hereinafter further referred to as “ISAF”.
From an American perspective, the lessons from Kosovo were both lessons related to a military, political and legal nature. In considering the aims of this thesis, I will mainly focus on the legal part and only shortly mention the political and military lessons.

4.4.2. The Lessons from Kosovo applied in Afghanistan

108. Kosovo was in many ways a landmark case for NATO. For the first time in history, NATO actually threatened and executed force against a sovereign country without being backed by the United Nations. When NATO launched its bombing campaign in the spring of 1999, it was convinced that it could perform this operation rapidly and highly efficient. Unfortunately, it turned out that NATO made some miscalculations. Operation Allied Force caused a few very hard, but also instructive, lessons for NATO. When NATO finally ended its operations in Kosovo, it was more relieved that the campaign had not destroyed the entire organization than it was victorious. As being stated, Operation Allied Force was very instructive for NATO. The member states encountered themselves in good and in hard days and learned lessons that would become useful for the future.

109. When four hijacked airplanes attacked the territory of the United States, the expectation existed that Washington would respond in a very effective way to these terrible events. However, it was not clear how and more importantly with who they were going to respond. NATO already offered their aid and assistance only a few hours after the attacks. On 12 September 2001, the allies even unanimously invoked article 5 for the very first time. But NATO was not the only option for the United States. An operation covered under UN Security Council authorization or even with the Organization of American States which had also invoked its mutual self-defense clause were possible options. Nevertheless, the United States chose a fourth option, the option to deal with this matter on a unilateral basis. Support was welcomed but only if it really contributed to the mission, and more importantly, if it was fully under American command.

110. This decision taken by the Bush administration was for a large part influenced by the events in Kosovo two years earlier. Kosovo was characterized by UN Security Council paralysis which induced a unilateral NATO bombing campaign which was on her turn characterized by miscalculations on both the political and the military level. Taking into account the dimension and motives of the attacks, destroying the nation’s most important symbols in order to achieve the final aim of ultimate destruction, the Bush administration

was not willing to weaken their response because of another international actor.\textsuperscript{231} Besides, the United States considered UN Security Resolution 1368 as sufficient to claim a right of self-defense and to exercise this right on a unilateral basis.\textsuperscript{232} Therefore, the United States made the choice to exercise their response with a self-chosen coalition. Remarkable was the fact that only one other NATO member was involved, the United Kingdom. This decision to left NATO aside is directly linked to the experiences in Kosovo on which I will elaborate in the next paragraphs.

4.4.3. Not a Single legal, Political or Military Reason to cooperate

\textbf{111.} Having a look from a political and legal perspective, the influence of the Kosovo campaign is remarkable on the choices made in Afghanistan. The operation in Kosovo was for many American military and political leaders a perfect example of what Gordon called: “excessive European meddling, with French politicians and European lawyers interfering with efficient targeting and bombing runs, and compromising operational security”.\textsuperscript{233} Therefore, American policymakers clearly believed that "the mission must determine the coalition, the coalition must not determine the mission." Their fear was that otherwise the mission would be reduced to the "lowest common denominator"- a reference to NATO’s decision-making process, which relies on consensus.\textsuperscript{234} This was, according to the Bush administration, something that absolutely needed to be avoided. The American nation was hit in her heart by cowardly attacks and was going to respond powerful to these attacks. Washington was done with the continuously interference of European lawyers and politicians which only weakened their response with, in the eyes of the Bush administration, inferior legal and humanitarian arguments. This time, no limitation on the power of their response could be tolerated. Therefore, no one wanted a repetition of the situation in Kosovo.

\textbf{112.} The above mentioned reasons heralded the final decision to left NATO aside. One could argue that this time the thoughts of the allied partners were different. This time, the response was rapidly and powerful through the immediate invocation of article 5. However, the reactions of some European governments, as I stated earlier, weakened the intentions of NATO seriously.\textsuperscript{235} The United States considered these reactions as another confirmation of their opinions after Kosovo that launching an operation with NATO was not desirable. Therefore they eventually decided to deal with these matter on their own. They only allowed a small collaboration with some privileged partners which were fitted for this operation.\textsuperscript{236}

\textsuperscript{231} P.H. Gordon, “NATO after 11 September”, \textit{Survival}, vol. 43, no. 4, 2000-2002, 4-5.
\textsuperscript{232} S/RES/1368 (12 September 2001).
\textsuperscript{235} Supra par. 101-102.
113. Besides its political and legal reasons, the United States had also some well-founded military arguments to left NATO aside. In Kosovo, the allies learned that European forces are simply technologically inferior to those of the United States. As a result, the interoperability between American and European forces was greatly reduced.237 The United States aimed to launch a specific air and special forces campaign in Afghanistan for which most NATO allies simply lacked the capabilities required to operate.238

114. After having considered both the situations in Kosovo and Afghanistan. I possess the opinion that for the United States, there was not a single legal, political or military incentive to involve NATO in Operation Enduring Freedom. The Americans linked many of the troubles experienced during the military operation in Kosovo to the participation of the European member states in both strategy and execution. Therefore, the Bush administration made the historic decision to let NATO aside, despite the invocation of article 5 of the North Atlantic Treaty.

4.5. Conclusion: Afghanistan, a Story of Thrown Chances and Missed Opportunities

115. Looking back to NATO’s behavior in that notorious fall of 2001, we can only have ambiguous feelings. The attacks gave NATO a unique opportunity to prove the effectiveness of its mutual defense clause. Only during the first hours after these terrible events, NATO gave indeed the impression of a united coalition that was going to undertake action to those responsible for the drama. By their joint statement on 11 September 2001 and the invocation of article 5 of the North Atlantic Treaty one day later it appeared that NATO was going to execute a military operation, relying on article 5 and justified by self-defense.

116. However, the ink of the invocation was not yet dry before the first internal troubles would arrive. Internal division preceded the United States choice to leave NATO aside. As a consequence, Operation Enduring Freedom was not a NATO operation. This is regrettable for NATO, both on the short and the longer term. On the short term, because it was painful to see that NATO was not necessary to support its leader in its response to the attacks. But also on the longer term, the denial caused severe damage to the alliance. The so-called “War on Terror” could have been a new start for NATO, it could have turned itself into a modern, multifunctional organization that was prepared for a new century in which the threat was not only posed by states but also by terrorism from non-state actors.

117. Both American and European experts have argued that, on the longer term, it was a huge mistake to not involve NATO more actively in the American response to 9/11.\textsuperscript{239} For example both retired general Wesley Clark and NATO Secretary General Lord Robertson defended NATO’s leadership of the Kosovo campaign and argued that NATO should have played a larger role in the “War on Terror”.\textsuperscript{240} The fact that NATO was more involved in the ISAF mission could not heal this wounds. The unwillingness of the Americans to collaborate with NATO on the military level would last in Europe an image of the Bush administration as a sheriff chasing down criminals without taking into account any institution or law. Europe’s attitude on the other hand was for many Americans an illustration of the growing weakness of a continent that was not able to take crucial decisions.\textsuperscript{241} This contradiction would last for almost half a decade and was even fortified because of the campaign in Iraq. Eventually, it would last several years before NATO’s own Cold War would melt. With the inauguration of a new American president and a changed international community, the alliance cherished the hope that it would finally find the incentives that were needed to finally deal with its continuously quest for a place within the international community.

Chapter 5. Libya: the First Application of the Responsibility to Protect

5.1. Introduction: from Arab Spring to Libyan Fall

118. In January 2011, large parts of the Middle East awakened suddenly and roughly when persistent protest forced the Tunisian president Ben Ali, a man who had ruled the country for twenty-four years, to renounce from power and to flee to Saudi Arabia. This success achieved by the Tunisian people became a milestone for the entire Arab world and encouraged the populations of states, who also suffered from oppression by dictatorial presidents and their military, to stand up against their governments and ask for changes. Protests burst out in Egypt, Bahrain, Jordan, Yemen and Oman and caused the impression of a falling domino. This feeling was even fortified when the Egyptian president Mubarak was also coerced to sign away from power when, after weeks of protests, the Egyptian army chose the side of the protesting population. The initial enthusiasm went that far that some even compared the situation with the fall of the communist regimes in Eastern Europe at the end of the eighties.242

119. In Libya, where Colonel Gadhafi predicted his “Green Revolution” since 1969, peaceful protests similar to these in other Arab states started to rise on 15 February 2011. Gadhafi reacted by suppressing the protest with disproportional violence. In response, the opposition set up a small army and united themselves in the “National Transitional Council”.243 From the beginning, the entire international community followed the situation in Libya with suspicion. At the time, the general perception was that the call for change in the Arab world could not be hindered. Western countries explicitly supported the peaceful call for democratic reforms. This was reflected in the change in position from the Obama administration in December 2010. The United States policy turned from “creating and upholding stability” to “support for change”.244 Since the support for the revolution in Libya was, in contrast to for example the protests in Bahrain, omnipresent. Gadhafi’s level playing field was therefore very limited. The Libyan leader worsened his situation by threatening his enemies of a terrible fate when he stated: "officers have been deployed in all tribes and regions so that they can purify all [...] from these cockroaches" and "any Libyan who takes

243 Hereinafter further referred to as “NTC”.
arms against Libya will be executed”. The NTC, already recognized by France at the beginning of March 2011 as the official Libyan representative, saw a unique opportunity to overthrow Gadhafi’s government with the support of the international community.

120. The events seriously accelerated when on 26 February 2011, the Permanent Representative of Libya to the United Nations sent a letter to the President of the UN Security Council calling for a referral of the situation to the International Criminal Court and defended this position in front of the UN Security Council. The UN Security Council reacted promptly and adopted resolution 1970. This resolution condemned the violence, imposed sanctions on the regime and referred the case to the International Criminal Court as well. Despite the adoption of resolution 1970, the violence continued uninterruptedly. Moreover, it appeared that the rebels were driven back and that the revolution would die a bloody death. When Gadhafi forces moved towards the rebel capital of Benghazi and all signs pointed out to an imminent slaughter, the international community decided to take over. On 17 March 2011, the UN Security Council issued a second resolution. This resolution 1973, on which I will elaborate extensively in this Chapter, imposed a no fly zone and authorized member states “to take all necessary measures ... to protect civilians and civilian populated areas under threat of attack ...” Pursuant to this resolution, NATO took command of enforcement of the no-fly zone and the arms embargo by launching naval and air operations against the Gadhafi forces. After protracted military operations, which continued for seven months, the Gadhafi regime was overthrown, ending an area of forty-two year rule. Ultimately, he was captured and killed by rebels of the NTC on 20 October 2011.

121. The Arab Spring created new opportunities for NATO to further develop the ancient Cold War alliance towards a modern organization adapted to the needs of the twenty-first century. The alliance considered its military actions as a fulfillment of its

responsibility to protect the people of Libya. By relying on the responsibility to protect doctrine to justify the UN covered enforcement of the no-fly zone in Libya, NATO opened a box, both full of opportunities and traps. Later on in this Chapter I will discuss more precisely the legal background of NATO’s operation in Libya, what the initial purposes were and how the operation turned out in the end. It is however necessary to firstly discuss the theoretical concept of the responsibility to protect. This doctrine, which lives for decades in the corridors of the international community, was eventually used for the first time to serve as a justification for a military operation. During this disquisition, I will discuss this of the concept, from the cellar of the UN building, via the podium of the General Assembly all the way to the voting able to of the UN Security Council. Finally, I will question, what is the current position of the responsibility to protect and which role can NATO play in its further development.

5.2. The Responsibility to Protect: a Story of Slow but Continuously Progress

5.2.1. From Humanitarian Intervention to Responsibility to Protect

5.2.1.1. Introduction: A Pressing but Long Lasting Question

122. Many doctrines with just as many names were developed to find an accurate answer for the question of when, if ever, it is appropriate for states to take coercive military action, against another state for the purpose of protecting people at risk in that other state. This issue has divided the entire international community for almost a quarter of a century. Especially during the nineties, a decade characterized through the dramatic events in Somalia, Rwanda and Bosnia, the discussion on the right to intervene to avoid a humanitarian disaster grew to a peak. Many international experts and countries blamed the international community, and more specifically the UN Security Council, for their weak and late reactions. But strange enough, when a new humanitarian disaster was threatening the Balkan and the UN Security Council looked paralyzed once again, criticism rose for a whole other reason. This time, NATO was widely criticized for its eagerness to launch an airstrikes campaign against the Serbian forces threatening Kosovo in the spring of 1999.

123. This ambiguous position was criticized by then UN Secretary-General Kofi Annan. Annan, a strong supporter of NATO’s military campaign in Kosovo, made compelling

255 Supra par. 37-45; 72; 74; 76.
pleas to the international community to find a consensus on this matter. In his “2000 Millennium report”, he put forward a challenge toward the UN General Assembly by stating starkly and directly: “…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?”

124. The pressing question of Kofi Annan was responded with the establishment of the International Commission on Intervention and State Sovereignty\(^\text{258}\), a group of prominent experts in international security lead by Gareth Evans and Mohamed Sahnoun and sponsored by the Government of Canada together with a group of major foundations.\(^\text{259}\) Their conclusions were collected in what would become famous as the “ICISS Report”.\(^\text{260}\) This report, which I will discuss extensively, can be considered as the birth of the doctrine of the responsibility to protect and the first step towards the long road that would eventually result in the operation in Libya.\(^\text{261}\)

5.2.1.2. An Answer for a New Century : the ICISS Report

a) The Birth of a New Doctrine : The Responsibility to Protect

125. Being founded in September 2000, the ICISS aimed to find a balance between on the one side finding a way to prevent new humanitarian disasters and on the other side respecting the well-established principle of sovereignty. Therefore, the ICISS wanted to break with the controversial concept of humanitarian intervention. The new doctrine should deflect attention from this infected “right” of some states to intervene, to the duties, or even responsibilities, of all states to protect their own citizens from avoidable catastrophes and for third parties to come to rescue. This new concept was called the “responsibility to protect”. The virtue of this responsibility to protect was that it would entice states to engage in humanitarian relief by shifting the emphasis from an unattractive right of “state interveners” to the less threatening idea of “responsibility”. The responsibility to protect turns the focus from the rights of states to intervene towards the right of the peoples which are threatened. The obligation is twofold. First of all and most importantly, states have the responsibility to protect their own people. Next to this obligation, states should also aim to

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258 Hereinafter further referred to as “ICISS”.
259 Gareth Evans is a former Secretary of State of Australia and a very respected author in international law, Mohamed Sahnoun is an Algerian diplomat who worked for the Organization of African Unity.
protect those people which are suffering harm and whose state in question is unwilling or unable to halt or avert it.\textsuperscript{262}

\textbf{126.} The doctrine of the responsibility to protect, as developed by the ICISS, is built around three core elements: the responsibility to prevent, the responsibility to react and the responsibility to rebuild. According to Gareth Evans, chairman of the ICISS, the responsibility to prevent is by far the most important of the three elements.\textsuperscript{263} This is also explicitly stated in the ICISS report.\textsuperscript{264} Nevertheless, most of the attention has gone to the responsibility to react since this contains the military intervention component. Hereafter, I will discuss these three elements individually. Taking into account the purpose of this disquisition which is focused on the relevance of the concept for NATO, we will spend most of our attention towards the second element, the responsibility to react.

b) The Responsibility to Prevent

\textbf{127.} The responsibility to use all appropriate means to prevent conflicts is considered as the most important responsibility for all states all over the world. If the international community or the individual state concerned can prevent conflicts, the situation will always be better than in case of a conflict.\textsuperscript{265} First of all, the costs to prevent a conflict are always much lower than the costs of a possible reaction or rebuilding. Secondly, preventing a conflict is morally superior to reacting to an already existing conflict. The ICISS set out three types of models to reach this goal. The first one is an effective warning system and more importantly, a clear analysis and a following translation into policy prescription.\textsuperscript{266} The second type concerns the issue of an effective approach to the root causes of conflict and the need to pursue long-term effective preventive strategies.\textsuperscript{267} The last model to prevent conflicts is by undertaking direct prevention efforts.\textsuperscript{268} Most of the conflicts could be prevented if both the country and the international community respect these three strategies. Hereafter, I will discuss each model individually.

128. It has to be remarked that most of the humanitarian disasters during the nineties were not caused by a lack of information. The CIA was immediately aware of the upcoming genocide in Rwanda also knew. In Kosovo, the international community was also well aware of the gross human rights violations by the FRY forces. Nevertheless, the ICISS considered the early warning and a clear analyze of the signs as crucial to avoid conflicts. This clear analyze should then be reflected in a concrete prevention policy. To fulfill this aims, the conclusions of the ICISS propose greater involvement by local actors. During later discussions at the United Nations, this model was the only one which was subscribed by the General Assembly.269

129. Root cause prevention is the second technique to prevent future conflicts. It was the UN Security Council itself that has stressed the importance of responding to the root causes of conflict and the need to pursue long-term effective preventive strategies. Root cause prevention possesses many dimensions. It may mean tackling economic deprivation and the lack of economic opportunities. It may also have a political dimension and this might involve democratic institution and capacity building. Root cause prevention contains a legal dimension as well. This includes attempts to strengthen the legal protection and institutions. This might involve for example supporting efforts to strengthen the rule of law; protecting the integrity and independence of the judiciary. Lastly, it also could have a military dimension with could mean for example enhanced education and training for military forces; reintegration of ex-combatants; strengthening civilian control mechanisms, including budget control.270

130. The last technique is the direct prevention. This is in fact a “toolbox” that has essentially the same compartments – political/diplomatic, economic, legal and military – as the one for root cause prevention, but different instruments, reflecting the shorter time available in which to make a difference. These measures could include fact-finding missions, economic measures such as positive as well as negative inducements, offers of mediation, threatening with the establishment of specialist tribunals to deal with war crimes or the International Criminal Court and even the sending of military troops.271

c) The Responsibility to React

c.1. Many Options of Reaction

131. There are situations where prevention appeared to be insufficient. The state concerned cannot, or will not interfere to redress the situation of imminent crisis. In such situations, an intervention can be considered as a possibility. However, the international community stresses the very exceptional character of this possibility. First of all, the state concerned need to be unable or unwilling to react. Secondly, other non-military measures should appear to be inadequate. As a matter of first principles the ICISS also stresses that less intrusive and coercive measures, for example of a political, judicial or military nature should always be considered before more coercive and intrusive ones are applied. If eventually military action should be considered, several criteria need to be fulfilled. These criteria, which I will discuss in the next paragraph, needs to be fulfilled before the use of force can be even considered. They represent the essential and ultimate character of the use of force which prohibition will remain the point of departure.\(^{272}\)

c.2. The Six Criteria for Military Intervention

132. The six threshold conditions as determined by the ICISS are according to this Commission to be considered as absolute requirements which need to be fulfilled before the use of force can even be considered. The ICISS states: “While there is no universally accepted single list, in the Commission’s judgment all the relevant decision making criteria can be succinctly summarized under the following six headings: right authority, just cause, right intention, last resort, proportional means and reasonable prospects.”\(^{273}\)

133. The first criterion is the one of right authority. GARETH EVANS, the chairman of the ICISS described in an article of the “NATO Review” the purpose of this criterion: “There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.”\(^{274}\)

This could not be received as a surprise. The prevalence of the UN Security Council in the international community is widely accepted and belongs to the primary principles of our modern international law foundations. But what if the UN Security Council is unable or unwilling to act in a case crying out for an intervention as we have seen in Kosovo. The ICISS, aware of this problem provided two institutional solutions. The first possibility is the consideration of the matter by the General Assembly in Emergency Special Session under the


"Uniting for Peace" procedure. The second option is action by regional or sub-regional organizations under Chapter VIII of the UN Charter within their area of jurisdiction, subject to their seeking subsequent authorization from the Security Council. Other options, such as an intervention by ad hoc coalitions, are more problematic. Nevertheless, the ICISS leaves the option for an ad hoc coalition which fully observes and respects all the necessary threshold and precautionary criteria, which intervenes successfully and whose intervention is generally approved by the international community. The NATO intervention in Kosovo could be, according to Gareth Evans, considered as an example of such an intervention.

134. The second criterion is according to the ICISS the one of the “just cause”. Military intervention may be justified if the action is aimed: “to halt or avert large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large scale “ethnic cleansing,” actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.” This threshold stresses the exceptional character of the military intervention. A military conflict alone is not enough to meet this threshold. Nevertheless, when such a war derails towards a humanitarian catastrophe, the possibility could be considered for an intervention by the international community.

135. The other four conditions are generally considered as the precautionary criteria. First of all, there is the criterion of “right intention”. The primary motives of the state intervening must be to halt or to avert the human suffering. This criterion is rather subjective to prove. Multilateral operations which are clearly supported by regional opinion and the victims concerned are less suspicious than the one which are not. The second precautionary criterion is already stressed in the introduction of this paragraph. Every military intervention should always be an option of last resort. Other measures of a political, economic or judicial nature should always be preferred if they are appropriate to resolve the humanitarian catastrophe. The execution of such a military intervention should always be proportionate to the objective pursuit. Lastly, there must be a reasonable chance of success in halting or averting the suffering which has justified the intervention. The consequences of action may not be likely to be worse than the consequences of inaction.

275 Examples of the application of the Uniting for Peace Procedure are the operations in Korea in 1950, in Egypt in 1956 and in the Congo in 1960.
276 Chapter VIII operations were for example the West African interventions in Liberia in the early 1990s and Sierra Leone in 1997.
d) The Responsibility to Rebuild

136. Recent wars in Afghanistan and Iraq have illustrated that ending the military operations is absolutely not sufficient to restore the peace and security within a state on the longer term. The ICISS report stressed already in December 2001 that the responsibility to rebuild is an essential component of a successful intervention. Moreover, the responsibility to protect doctrine could only be successfully applied if states fulfill their responsibility to rebuild. This means that after the reactive measures are taken and the imminent humanitarian crisis is averted, a new phase, the responsibility to rebuild should be enforced. This responsibility involves the reparation of the political, judicial and economic life in the state concerned. If states want to complete the responsibility to protect successfully, they have to support the country until these goals are achieved, not only on the short, but also on the longer term.²⁸¹

e) Publication and Impact of the ICISS Report

137. The conclusions of the ICISS were an important landmark for the responsibility to protect. The triptych of prevention, reaction and rebuilding was a very important distinction and would function as the basis for future evolutions. However, the ICISS report, published in December 2001, was not only an important milestone in the history of the responsibility to protect doctrine, it heralded, and this is in fact very contradictory, also the end of a decennium of important focus on the issue of internal human rights catastrophes. At the time, the publication of the conclusions was totally overshadowed by the events that happened three months earlier on 9/11. The Al Qaeda attacks caused a change of focus within the international community towards the issue of international terrorism. It would last four years, in which both in Afghanistan and Iraq two international armed conflicts took place, before the conclusions of the ICISS were actually debated and that the responsibility to protect doctrine would regain its place as an important issue of discussion within the international community.²⁸²

5.2.2. From the Law of the Books towards the Law in Practice: The 2005 World Summit

5.2.2.1 Four More years: the Time to wait for Progress

138. In the run-up to the United Nations Sixtieth Anniversary World Summit, the responsibility to protect regained its place on the international agenda. This UN convention

was aimed at preparing the United Nations for the challenges within the twenty-first century. In the lead-up to the anniversary, two major peace and security reports were prepared. It was especially the work of the UN Secretary-General’s High-Level Panel on Threats, Challenges and Change that extricated the way for the revival of the responsibility to protect doctrine. The High Level Panel was the essential link between the ICISS Report and the future 2005 World Summit Outcome Document. It improved the ICISS report in different ways, for example by ranging the scope of the new doctrine, for example linking poverty and disease to violence. It recreated a momentum for the responsibility to protect, a momentum that would debouch into the achievements reached at the 2005 World Summit.

5.2.2.2 The 2005 World Summit

139. The 2005 World Summit was announced as the decisive conference that would prepare the United Nations to approach all challenges of our modern international society. More than hundred fifty heads of state and government leaders assembled in September 2005 in New York to both commemorate the sixtieth anniversary of the United Nations and to adopt measures that should ensure stable progress within the international community. Despite the overall conclusion that the summit was not the aspired success; the Secretary-General’s recommendation concerning the responsibility to protect survived almost unscathed.

140. Concerning this responsibility to protect, the General Assembly adopted the following conclusions with regard to the protection of populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. They are stated in paragraphs 138-138 of the World Summit Outcome Document:

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

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283 Hereinafter further referred to as “the High Level Panel”.
288 Hereinafter further referred to as : “Outcome Document”.

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The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.»

141. The Outcome Document was unanimously adopted by the UN General Assembly. Nevertheless, the strength of support for the responsibility to protect was not as substantial as this vote would seem to indicate. Almost till the end, severe opposition was exercised by a small group of developing countries which were joined by Russia. Also the consistent support from the United States and the United Kingdom, two countries which had nearly misused humanitarian reasons two years earlier with the aim to invade Iraq, did not help at all. It was eventually the persistent advocacy by sub-Saharan countries, led by South-Africa which did succeed the proposal.

142. Afterwards, the text of paragraph 138 and 139 of the Outcome Document became the topic of discussion too. One argued that it was a further evolution of the ICISS report. Others called the report a far going limitation of the responsibility to protect. Making abstraction of this discussion, the assembled heads of state and government agreed that R2P rests on three pillars. The first pillar is the responsibility of the state to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity, and from their incitement. The second one is the commitment of the international community to

assist states in meeting these obligations. Finally, the third pillar contains the responsibility of the member states to respond in a timely and decisive manner when a state is manifestly failing to provide such protection.294

143. The biggest disappointment concerning paragraphs 138-139 is most certainly the failure to deal with the question who may invoke the doctrine and what criteria could be applied to consider a possible military intervention. One of the earnings of the ICISS report were its criteria for military intervention which aimed to close the gap between the legality and the legitimacy that was a very critical topic in approaching the NATO intervention in Kosovo.295 The Outcome Document, on the other side, does not deal with these kind of questions and neglects the criteria of the ICISS. It appears, that these issues were still too controversial to agree upon unanimously.296

5.2.2.3: The Aftermath of the 2005 World Summit

144. Looking back to the 2005 World Summit, its results and its implications for the sequel of the decennium, I arrive at a surprising conclusion. While the results of the Outcome Document were not sufficiently successful, the positive atmosphere that was afterwards created on the issue of the responsibility to protect caused, despite the rather weak results, a new momentum and significantly progress for the rising doctrine.

145. The above cited paragraphs, 138 and 139, does accept the obligations on both the individual states and the international community as a whole to protect the people from the most severe crimes which are, according to the General Assembly, genocide, war crimes, ethnic cleansing and crimes against humanity.297 Despite this remarkable progress, some marginal notes should be made in considering this apparently new approach. First of all the scope of the protection that should be guaranteed by all states individually and the international community as a whole. The four crimes listed in the relevant paragraphs of the Outcome Document limits the scope slightly in comparison with the ICISS report.298 Secondly, the Outcome Document does not deal with the most critical topic of humanitarian intervention. When can a state invoke the responsibility to protect to intervene with military means? The contradiction that was raised by the Kosovo report between legality and legitimacy is in no way solved by the Outcome Document. This can be easily clarified by the

295 Supra par. 84-86.
lack of unanimity that lived within the international community on this specific topic. This brings me to my final point of criticism on which I already elaborated in the former paragraph that the strength of support for the new developed doctrine was not as substantial as this vote would seem to indicate. They agreed upon a text that could be explained in so many ways that it was questionable that this doctrine could ever be applied in practice.

146. Despite this rather week result, time would prove that, for the development of the responsibility to protect, the Outcome Document would become a very important landmark. The positive atmosphere concerning the rising doctrine that accompanied the adoption of paragraphs 138 and 139 helped the doctrine to hold on the momentum that was created by the 2005 World Summit. So when the international community took action to protect the Kenyan population from genocide during the 2007 Kenyan election crisis, many authors have put forward that these actions could have been considered as a first example of state practice of the responsibility to protect. However, for the real breakthrough, the doctrine would wait another four years. The Arab spring would herald a landmark case for the responsibility to protect.

5.3. NATO and the Responsibility to Protect: the Civil War in Libya

5.3.1. NATO meets Responsibility to Protect

147. In the spring of 2011, NATO and the responsibility to protect doctrine met in the airspace of Libya. This was caused since NATO started to enforce the measures imposed by two UN Security Council resolutions 1970 and 1973 which included a no fly zone and an arms embargo. The continuously non-compliance with these resolutions by the Gadhafi forces made such an operation inevitable in the eyes of the international community. NATO started its actions by the end of March 2011. The alliance’s actions were principally aimed at protecting the threatened civilians. However, by the middle of April, a change in policy took place when NATO enlarged the scope of its mandate to the aim of a regime change. This was widely criticized by several countries such as Russia and China. The course of the

operation against Gadhafi had also severe effects on the responsibility to protect doctrine. While at the beginning of the operation, many have argued that this operation was the breakthrough of the responsibility to protect, the more the scope was extended, the more the enthusiasm and support for this purport disappeared. The outcome of the Libyan case had serious implications for the course of events in other Arab States as well. The distrust created within the UN Security Council through the expansion of the scope in Libya is for example reflected in the reluctance of Russia to allow any severe UN Security Council resolution on the matter of Syria. For NATO however, Libya was a spot of light. The successful execution of the operation as well as the successful cooperation with non NATO members, for example Qatar, brought a new atmosphere of enthusiasm and positive vision on the future of the alliance. This positivism within the alliance contrasted with those visions which consider NATO’s actions in Libya as an abuse of the concept of the responsibility to protect and its operations even as violations of international law. Only time will determine whether NATO and the responsibility to protect could be a successful marriage or it will remain a once in a lifetime experience. However, NATO supporters do believe that the Arab Spring could herald the spring for NATO as well.

5.3.2. NATO’s operation in Libya

5.3.2.1: UN Security Council Resolution 1970

148. The story of NATO in Libya starts with the adoption of resolution 1970 by the UN Security Council on 26 February 2011. This was only eleven days after parts of the Libyan population followed the example of their Arab brothers in Tunisia and Egypt and started protesting for democratic changes. Unfortunately, Gadhafi had immediately responded this peaceful cry by excessive use of force. The western allies, which supported this pro democratic wave through the Middle East, threatened Gadhafi to stop the violence since they considered it essential to keep the Arab Spring alive. The international community also gave a significant signal with the adoption of UN Security Council resolution 1970. This resolution imposed various sanctions on Libya. More importantly for this thesis is the explicit reference towards Libya’s responsibility to protect its population in the preamble of this resolution. The fact that this was explicitly stated by the UN Security Council would


make the Libyan situation more likely to considered as an application of the responsibility to protect.\textsuperscript{307} However, it is important to stress the distinction between the responsibility to protect as such and the military component of the responsibility to protect, namely the responsibility to react. As I already stressed earlier, invoking the responsibility to protect doctrine does not necessary mean that the use of force can be applied. The UN Security Council Resolution itself confirms this statement since the resolution is a resolution under article 41 of Chapter VII of the UN Charter. An article that explicitly stresses the peaceful attempts and does not allow the use of force.\textsuperscript{308} Although resolution 1970 did not allow the use of force, the international community kept the pressure on Gadhafi by leaving the possibility to allow the use of force in the future.

\textbf{5.3.3.2. UN Security Council Resolution 1973}

\textbf{a) Historic Words for a Historic Resolution}

\textbf{149.} The continuously noncompliance with UN Security Council resolution 1970 and, maybe even more, the fact that the chances at the Libyan battlefront were turning in the advantage of Gadhafi, forced the international community to consider more far going measures against Gadhafi and his government. On 17 March 2011 they adopted UN Security Council resolution 1973, a resolution largely discussed and crucial for the events in Libya and the development of the responsibility to protect.\textsuperscript{309} Next to strengthening the arms embargo and expanding the assets freeze, the UN Security Council imposes a no fly zone which may be enforced. This resolution provided the following crucial statements:

"Reiterating the responsibility of the Libyan authorities to protect the Libyan population and reaffirming that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of civilians [...] Considering that the widespread and systematic attacks currently taking place in Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity [...] 3. Demands that the Libyan authorities comply with their obligations under international law. [...] 4. Authorizes Member States that have notified the Secretary General [...] to take all necessary measures [...] to protect civilians and civilian populated areas under threat of attacks in Libyan Arab Jamahiriya [...] while excluding a foreign occupation force of any form on any part of Libyan territory l...]. 6. Decides to establish a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians. [...]"

\textsuperscript{308} Charter of the United Nations, 26 June 1945, art. 41, Can TS, 1945, No 7. 
8. Authorizes Member States that have notified the Secretary General [...] to take all necessary measures to enforce compliance with the ban on flights imposed.”

150. The historic adoption of UN Security Council resolution 1973 was the result of the approach adopted by the international community in the months that preceded this tipping point. Although some have disputed the fact that the approach adopted by the international community was not an application of the responsibility to protect doctrine. In the next paragraph, I will argue that an evaluation of this approach will determine the opposite but that the existence of a responsibility to protect without the approval of the UN Security Council is doubtable.

b) Resolution 1973, the Result of a Long Traveled Road

151. If one fact is very remarkable concerning the approach adopted to Libya, it’s the speed of initial reaction of the international community. The ultimate resolution 1973 was adopted only six weeks after the initial protests broke out. Resolution 1970, which preceded this resolution, had already referred to the responsibility to protect doctrine. But in the weeks that followed this initial adoption, the Libyan opposition did not stop asking for more powerful measures. This reaction was in line with the World Summit Declaration, which does not avoid strong wording when it comes to the subsidiary responsibility. Although precise conditions for the interpretation of this responsibility did not exist, in contrast to the previous ICISS document, the international community understood that a determined approach was necessary to fulfill the commitments of which they entered into in paragraph 138 and 139 of the Outcome Document. These commitments can be reduced towards these two conditions in which further actions could be necessary. The first one is the manifest failure of the state to protect, in spite of the commission of one of the specified four crimes. The second condition is that peaceful means are inadequate to solve the crisis. The first condition was asserted in both resolutions 1970 and 1973 with the sentence “the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity”. The second requirement could be deduced from the fact that violence had not stopped after the adoption of UN Security Council resolution 1970. Because, step by step, it appeared that the

conditions required by the Outcome Document were met, a scenario of military led protection appeared at the horizon.  

5.3.2.3. NATO in Libya: enforcing UN Security Council Resolution 1973

a) The Result of a Unique Unanimity

152. The international community issued an important signal with the adoption of UN Security Council resolution 1973 towards those who still threatened civilians. Nevertheless, and opposite to the announcements made by Libyan government officials, the Gadhafi forces continued to commit terrible human rights violations. Both France, the United Kingdom and the United States expressed their will to enforce the no-fly zone as well as the measures to protect civilians as it was imposed by UN Security Council resolution 1973. Between 19 March 2011 and 31 March, these three countries, individually enforced the resolution. However, on 31 March 2011, they agreed that NATO should take command and control over the operation.

b) Operation Unified Protector

153. The scope of NATO’s operations in Libya, codenamed: “Operation Unified Protector”, is determined in resolution 1973. The crucial paragraph is paragraph 4, it is stated that the UN Security Council: “Authorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of Resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory, and requests the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization conferred by this paragraph which shall be immediately reported to the Security Council”

154. The first remark concerning the text of resolution 1973 is the large scope of possible means. All necessary measures may be applied except for a foreign occupation force. But importantly, this gave countries not a “carte blanche” in setting up a military

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operation. On the contrary, paragraph 4 establishes a distinction between “the authorized measures” and “the objective to be achieved”. The authorized measures are directly linked “to protect civilians and civilian populated areas under threat of attack”. Military measures taken in pursuit of other aims will represent a breach of this UN Security Council resolution and will unavoidably result in an unlawful ‘threat or use of force’ against the targeted state under article 2(4) of the UN Charter.

155. This resolution limits the protection explicitly to ‘civilians and civilian populated areas ... including Benghazi’. A civilian is defined in the 1977 Protocol I to the 1949 Geneva Conventions as all those who do not participate in the armed forces of any party or are members of militias belonging to a party to the conflict. This protocol only applies to international armed conflicts. However, it is agreed that in all kind of armed conflicts, civilians are not protected against attacks ‘for such time as they take a direct part in hostilities’. So, for the Libyan combatants who fought with the Gadhafi forces, the protection was not allowed. Only Libyan non-combatants enjoy protection under the term ‘civilians’ in resolution 1973.

However, it is well-known that NATO, while enforcing the no-fly zone and protecting the civilians, also protected the Libyan rebellion against the Gadhafi forces. Through the months, the policy of NATO joined more and more the objectives of the Libyan Transition Council which wanted to dissipate the Gadhafi regime. This caused the rise of the argument by several countries and scholars that NATO went beyond the mandate given by the United Nations. Some have even argued that NATO’s operation in Libya violated international law. In the next paragraph, I will elaborate widely on this issue.

c) Legality of Operation Unified Protector

156. In considering the legality of Operation Unified Protector, I want to make the distinction between the initial phase of protection and the continuation of the operation which was more and more aimed at regime change. During the first weeks of the operation, the international community was rather enthusiast by the apparent unanimity within the UN

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Security Council which resulted in a NATO lead coalition joined by Arab states to enforce the resolution. However, when the weeks passed by and the rebels were taken the upper hand driving back the Gadhafi forces, more and more criticism could be heard within the international community.\textsuperscript{327} Lead by Russia, many countries were arguing that NATO misused its protection mandate to reach the aim of a regime change in Libya. This criticism is understandable since the scope of UN Security Council resolution 1973 was limited and the facts indicate that NATO interpreted this mandate very broadly. It is however a thin line between a broad interpretation but still remaining within the mandate and overstepping it.\textsuperscript{328}

157. NATO responded to the United Nations call to prevent the supply of “arms and related materials” to Libya by agreeing to launch an operation to enforce the arms embargo against the country.\textsuperscript{329} This decision, concluded on 22 March 2011, was followed one day later by a naval operation in which NATO ships, operating in the Mediterranean, began cutting off the flow of weapons and mercenaries to Libya by sea. NATO also agreed to take control, which it took effectively on 31 March 2011, over the enforcement operations related to the no-fly zone imposed by UN Security Council resolution 1973. NATO air and sea assets began to take military actions to protect civilians and civilian populated areas.\textsuperscript{330} Most authors agree that this initial phase of the operation was in conformity with the scope of the mandate provided by the UN Security Council. In these early days of the campaign, Gadhafi forces were threatening all the areas occupied by the opposition and formed a well-known threat for the people living in these areas.\textsuperscript{331}

158. However, a change in course took place during the informal NATO summit in Berlin on 14 and 15 April 2011. The allies and the six countries which collaborated with NATO in the execution of the operation met in Berlin to discuss the situation in Libya. Simultaneously, the American President Barack Obama, French President Nicolas Sarkozy and British Prime Minister David Cameron published a joint article in several newspapers in which they argued that they only aimed to protect the civilian population. Besides this statement, they also claimed that ‘it is impossible to imagine a future for Libya with Gadhafi

\textsuperscript{327} E.g.: then Russian Prime Minister Putin declared to the Russian press agency Ria Novosti to be dumbfounded by NATO’s operations in Libya, source: “Putin says ‘dumbfounded’ over NATO’s operation in Libya”, Druzhin A., Rianovosti, 27 April 2011, available at: http://en.rian.ru/russia/20110427/163739739.html.


in power’ and that ‘a genuine transition from dictatorship to an inclusive constitutional process could only really begin when Gadhafi had resigned’.\textsuperscript{332} The ambiguity of this article is a perfect illustration of NATO’s attempt to find an equilibrium between the legal mandate and the actual reality on the ground.\textsuperscript{333}

159. When Russia and China, two permanent UN Security Council members which were already skeptical from the start of the operation, became aware of this change in course, they openly disputed NATO’s interpretation of resolution 1973.\textsuperscript{334} Several African States as well as the African Union also declared that both parties needed to strive for a ceasefire and that only a peaceful solution would be a worthy solution on the longer term.\textsuperscript{335} Within the United Nations, at the General Assembly dialogue concerning the responsibility to protect in July 2011, several states also raised their unease about NATO’s interpretation and execution of UN Security Council resolution 1973.\textsuperscript{336} For example the Ambassador of South Africa to the United Nations, Baso Sangqu declared that he believed that resolution 1973, which was supported by his country, authorized only a no-fly zone and did not mean ‘regime change or anything else’.\textsuperscript{337} The concerns of perceived overreach of resolution 1973 echoed the Secretary-General of the Arab League, Amr Moussa, who as early as 23 March 2011 underscored that the UN Security Council had authorized military measures to protect Libyan civilians, not to enforce regime change.\textsuperscript{338}

160. Not only the states within the United Nations are divided on the legality of NATO’s operation in Libya, also the doctrine has taken different stands. A first tendency is convinced that although the initial operation of protecting civilians was legal, the change of course to regime change in mid-April overstepped NATO’s mandate given by resolution 1973. NATO was only allowed to protect civilians, not to support the rebels actively in combatting Gadhafi.\textsuperscript{339} Others, however, maintain the position that protecting the civilians as was stated in resolution 1973 could only be achieved if Gadhafi was removed. If support to the Libyan opposition was necessary to fulfill the aims of protection, than this support was only a consequence of the mandate of protection. According to these authors, NATO did


\textsuperscript{334} Supra par. 156.


not overstep its mandate.\textsuperscript{340} UN Secretary-General Ban-Ki Moon also possessed the latter opinion when he stated that NATO had not exceeded its mandate.\textsuperscript{341}

161. Because of this polarization in international law, the military operation in Libya has become controversial. There are voices declaring that Operation Unified Protector was the great breakthrough of the responsibility to protect. For the first time, the international community intervened to fulfill its responsibility to protect. The fact that this intervention was under the command and control of NATO, a Cold War mutual self-defense organization even created the idea of a new future for NATO as a crucial actor for implementing the responsibility to protect. Nevertheless, others will state that, by interpreting its mandate, perhaps too, broadly, NATO destroyed its own legitimacy from the beginning. The turn from protecting civilians to regime change in Libya could damage the responsibility to protect as well as the reputation of NATO on the longer term.

5.4. Conclusion : Libya for the Responsibility to Protect, Libya for NATO, a Double Landmark or Double Failure?

5.4.1. Libya and the Responsibility to Protect : a Unique Landmark or a Historic Mistake

162. The events in Libya created a unique opportunity for the responsibility to protect to raise itself from an evolving doctrine to a legal norm confirmed by state practice and opinio iuris. The references in UN Security Council resolutions 1970 and 1973 to the obligations of protection created the possibility that, for the first time in history, the use of force could be justified by the aim of the responsibility to protect. The doctrine, which had been evaluating for many years in the books was finally ready to be used in practice. Some fervent supporters even hoped that Libya could become a precedent for future actions. However, things would turn out differently.

163. The course of the events in Libya, from the middle of February until the end of October 2011 had a huge impact on the responsibility to protect doctrine. During the weeks before the adoption of UN Security Council resolution 1973, the international community used all their means available to resolve the conflict peacefully. But when these attempts appeared to be not successfully to coerce Gadhafi to comply with the obligations, the more aggressive resolution 1973 was issued. This resolution formed the onset for NATO’s Operation Unified Protector. At that moment, China and Russia did not oppose the use of


force to protect civilians. It looked like the responsibility to protect experienced historic days.

164. But as I already stated earlier, the change in policy in the middle of April 2011, from protection to regime change submerged the operation in a bath of controversy. An etiquette of discordance which never disappeared and which would eventually damage the reputation of the responsibility to protect doctrine. Before the middle of April 2011, Russia and China recognized the necessity to protect the citizens of Libya although they never left their opinion that the sovereignty of Libya could not be violated. When NATO changed its position and declared to be still acting within the framework of the UN Security Council resolutions, these countries felt fooled. They did not consider the responsibility to protect doctrine anymore as a principle to protect people but as a mean to infirm the principle of sovereignty. This mistrust, originating from the actions in Libya, is today still reflected by the paralysis of the UN Security Council concerning the situation in Syria. The question rose or the responsibility to protect did not miss a giant opportunity in Libya by making the, perhaps wrong, choice to support the rebels actively and aiming a regime change. Did the responsibility to protect doctrine destroyed itself by expanding this scope in a situation which could have been a historic precedent at the same time. At the moment, the consequences of these actions are still undetermined but the situation in Syria with a paralyzed UN Security Council illustrates that the distrust between the permanent members is still existing.

165. It was not only the controversial character of NATO’s acts which halted the further development of the responsibility to protect. The declarations that the responsibility to protect provided the legal basis for the operation in Libya also needs to be nuanced. It is correct that the responsibility to protect served as a justification for the legal mandate for the enforcement by all means of resolution 1973. But, this resolution was still covered through article 42 of the UN Charter. It was not that the responsibility to protect alone justified NATO’s operations in Libya, there was still a UN Security Council mandate. Therefore, the responsibility to protect knew important days during the operation in Libya but is still not, if ever, developed enough to serve as an individual justification independent from the UN Security Council.

5.4.2. Libya and NATO : a New Impulse or a Missed Opportunity

342 Supra par. 156.
166. With the Operation Unified Protector in Libya, NATO got involved in another military bombing campaign, twelve years after Kosovo. NATO came to the Libyan airspace backed by UN authorization to protect the civilians. They achieved their goal. In the meantime, they supported a regime change which was, according to some policy makers, the best guarantee for a lasting peace.\textsuperscript{345} Nevertheless, the operation caused a storm of criticism as well, the fact that NATO supported actively the rebels damaged the doctrine of the responsibility to protect and made a repetition of the operations in Libya in other situations such as the one in Syria almost unthinkable.

167. One of the things NATO could remember from its military operation in Libya is the successful collaboration with several Arab states such as Qatar and Jordan. The fact that the operation was widely supported within the Arab world supported the legitimate character of the operation.\textsuperscript{346} The successful cooperation with these countries can also be a precedent for new actions in the future. The military operation as such is considered as rather successful as well. Besides the fact that it appeared another time that the Europeans could not finish an operation successfully on their own, the operation, taken as a whole, was considered as highly effective and with excellent results.\textsuperscript{347} Therefore, the overall feeling within NATO about the operation was very well.\textsuperscript{348} NATO proved another time, for itself and the entire international community, that it is still a relevant actor within this international community.

168. Despite these positive voices within NATO itself and in the appreciation of many authors, I want to conclude this paragraph with a point of criticism. When NATO launched Operation Unified Protector, it had the support of the Western World, the Arab World and most importantly, the UN Security Council. All these countries agreed that it was essential that the Libyan population was protected against the continuously violence. NATO took its responsibility and enforced the measures imposed by the UN Security Council resolutions. It looked like NATO was happily engaged with the responsibility to protect. But before their marriage was successfully concluded, the first troubles in paradise appeared. The active support that NATO granted to the Libyan rebels to achieve a regime change was heavily criticized by many countries such as Russia and China. By following this policy, NATO damaged the reputation of the responsibility to protect seriously and caused that a repetition of the actions in Libya is nearly excluded. To my view, Libya could have been the start of a promising marriage between NATO and the responsibility to protect, supported by the UN Security Council. But by expanding its mandate, NATO overplayed its hand and


destroyed the precedential value of Libya. In the end, Libya was a positive experience for NATO, but, maybe even more than in Kosovo or Afghanistan, it was also a story of missed opportunities.
Chapter 6. Lessons from the Past, Starting Points for the Future: NATO’s Evolution through the Time within the International Community

6.1. Introduction

169. NATO has performed in military operations in various conflicts, for various reasons and with various goals. The question I want to pose now is: “what has been the influence of these operations on NATO and on the international legal framework in which the alliance operates”? The disappearance of the bipolar world order made NATO rethink its entire strategy. Since the adoption of the 1991 Strategic Concept, NATO has enlarged its scope towards. Next to the mutual defense clause, which remains the core of the alliance, NATO also participated actively in crisis management for the last twenty years. These operations confronted NATO with new troubles of a political, military and legal nature. In this Chapter, I will especially focus on the legal aspects since NATO’s new commitments came sometimes close to the borders of international humanitarian law, sometimes crossed these borders and always caused a lot of controversy.

170. The first aspect I will deal with is the old concept of mutual defense. This old commitment remains crucial for NATO. Although collective self-defense seems to belong to the Cold War area, the last two decennia have been very instructive. For the very first time, NATO invoked article 5 of the North Atlantic Treaty. Although this initial invocation cannot be considered successful, the occasions that followed this historic event gave a good impression about the precise content of the mutual defense clause. In this Chapter, I want to highlight this precise content of article 5 and the lessons learned about its application after the operation in Afghanistan. I will finish with the examination of the further consequences for the alliance of this invocation in the future.

171. Already in the 1991 Strategic Concept, the allies did not only engage themselves towards the aspect of collective defense but extended their commitment towards the aim of protecting “the stability and peace within the region”. The definition of “region” became an interesting point of discussion. How far reached NATO’s region? In this debate, the relevant question appeared to be “could NATO act outside the North Atlantic area”. The engagement in the military operation in Bosnia-Herzegovina provided an answer to this question. These actions constituted NATO’s first out-of-area mission and its first use of force. This was also the first time NATO enforced particular UN Security Council resolutions. The coverage of a Security Council mandate would appear to be decisive for the


legality of NATO’s actions in the future. In Bosnia, NATO was also confronted with a situation of severe human rights violations by the Bosnian Serbs. NATO felt a responsibility to play a larger part in the protection of these threatened people. This was actually the first time that NATO undertook an operation with the aim to protect citizens during an armed conflict. This motive returned in later missions in Kosovo and Libya. In Bosnia however, NATO’s operation was legally covered by article 42 of the UN Charter, while this was more disputed in Kosovo and Libya. This reconnaissance of the international law would be a recurring event in NATO’s operations. In considering this NATO development, it is necessary to ask the question whether NATO has moved from a collective self-defense organization towards a modern protector of peace, stability and human rights whether these operations were just one-off opportunities caused by the particular situation and the “Zeitgeist”. And lastly, but most importantly, can NATO apply these conclusions from the past to further evolve from a Cold War organization into a modern alliance prepared for the challenges of the twenty-first century.

6.2. Collective Self Defense, the Navel Cord of NATO

172. At the moment of its foundation, NATO was an agreement between states committing themselves to the obligation to determine an attack against one of them as an attack against them all. It is a commitment to support an ally which is under attack and who can legally invoke article 51 of the UN Charter. Therefore, the legal basis of article 5 of the NATO Treaty is undisputed. As long as all the conditions of article 51 of the UN Charter are respected, actions in the execution of self-defense can take place. This mutual defense clause, a direct result of the tensions present during the first years of the Cold War, aimed to protect the entire North Atlantic area against the threat of the communist powers through the means of military cooperation. As I already stated in Chapter 1 of this thesis, the existence of the mutual defense clause was perhaps more important than the application of the clause in practice. The declaration of mutual assistance was presumed to be sufficient to prevent the world from a third, worldwide clash. Although the practical execution of this commitment was, as I highlighted earlier, unsure and not an unconditional obligation, the fact that the agreement existed proved to be enough to freeze the war fire during the Cold War.

173. The end of the Cold War forced NATO to review its strategy. The discussions concerning this reorientation resulted in the adoption of the 1991 Strategic Concept in

352 Supra from par. 9.
353 Supra par. 26.
November 1991. This 1991 Strategic Concept was the first official document that illustrated NATO’s position within the international community after the big turnover.

Concerning the matter of self-defense, no drastic changes did appear. Despite the fact that the threat from the past had disappeared, NATO remained wakeful for the future. However, the threat against which NATO had to defend itself had been adapted to the new world order. While in older Strategic Concepts, it was almost literally stated that the self-defense provision was aimed to deter the communist powers, NATO had enlarged this scope and no longer targeted a specific state anymore.

174. After being banished to the background through non-article 5 operations in Bosnia and Kosovo, the concept of mutual defense returned in September 2001. When the terrorist organization Al Qaeda executed four attacks on the territory of the United States, thereby supported by the Afghan Taliban regime, the collective self-defense provision of article 5 was immediately brought back to the foreground. The United States announced their will to react firmly and ruthlessly to these assaults. President Bush Jr. stated: “you are either with us or against us”. NATO, aware of the uniqueness of this situation, immediately invoked article 5. However, as stated earlier, the invocation of article 5 is one thing, the concrete execution another. Invoking article 5 of the North Atlantic Treaty did only mean the commitment to consider this attack as an attack against us all. The concrete consequences of this invocation were unknown. This vagueness immediately caused severe tensions after the invocation when several Western-European leaders minimized the impact of the invocation. This clashed severely with the maximizing attitude of the United States. This American frustration would eventually result in the exclusion of NATO from all offensive operations. The fact that NATO played a secondary role in the military operations in Afghanistan can be considered a missed opportunity for NATO to finally execute its mutual defense clause in practice.

175. The operation in Afghanistan rises two important questions for the alliance. The first question relates to the necessity of the invocation of article 5 of the North Atlantic Treaty. The second concerns the future consequences of the invocation for the alliance. The invocation of article 5 was a historic event for the alliance. This mutual defense provision had been the key to protect peace and stability within the North Atlantic area for more than fifty years. The invocation gave rise to expectations. Some expected that NATO would be
mobilizing for war and that a military NATO operation would be launched within days. However, this was not the case, NATO would only play a supportive role during the operations. However, from a legal perspective, this course of events is not surprising. The commitment of article 5 does not foresee in concrete measures. The other member states declared that they were prepared to support their ally, but the country under attack should take the initiative to ask for help.\footnote{R.E. Rupp, NATO after 9/11: An Alliance in continuous Decline, Palgrave MacMillan, New York, 2006, 96.} The United States made the choice to reduce this aid to a minimum. This public negligence was only a mental letdown, not a legal tipping point. One may ask, was it necessary to invoke article 5? From a symbolic perspective I will answer this question affirmative, from a practical view, negative. The message the North Atlantic Council gave by invoking article 5 was very strong. Despite the weakening of the invocation by the statements of the European politicians, the declaration remained more or less intact. However, from a practical perspective, these operations were not necessarily article 5 operations. NATO’s role during Operation Enduring Freedom was purely supportive. Nevertheless, the alliance always remained supportive towards the military campaign in which it did not play a leading part.\footnote{Statement by NATO Secretary General, Lord Robertson, Press Release (2001) 138, 8 October 2001, available at http://www.nato.int/docu/pr/2001/p01-138e.htm.}

176. Despite this unfortunate outcome in Afghanistan, I consider the consequences for article 5 to be limited. In the years after Operation Enduring Freedom, NATO did not change its policy towards collective self-defense. The dogma remained unchanged: an attack against one shall be considered against them all. In case of a new attack on a member state, NATO shall probably again invoke article 5. Likely, such a new attack will not be a traditional military attack. The twenty-first century reality faces at the threats of terrorism or technological attacks which could threaten a state as much as the old concept of armed attack. However, the situation in Afghanistan made clear that every future invocation will remain troublesome for NATO, since the interpretation of this article is very difficult because it remains a case by case appreciation.

6.3. Expanding the Scope towards a Post-Cold War Reality

6.3.1. From Stability to Protection, NATO in Bosnia

177. Looking back at the early nineties, one may note that NATO’s operations during the war in former Yugoslavia formed the bridge between the Cold War NATO aimed at collective self-defense and the Kosovo NATO claiming the right to intervene for humanitarian reasons. NATO set its first steps within this terrible conflict in July 1992. During the summit in Helsinki, NATO decided to assist the United Nations with the enforcement of
UN Security Council resolutions 713 and 757.\textsuperscript{361} It was the start of a successful cooperation of NATO undertaking actions covered by article 42 of the UN Charter. The fact that NATO committed itself to the enforcement of these resolutions was directly linked with the 1991 Strategic Concept which aimed at peace and stability within the North Atlantic area.\textsuperscript{362} At the time, the fear existed that the conflict would proliferate and destabilize the entire region.\textsuperscript{363}

\textbf{178.} NATO’s story in Bosnia was one of growing involvement. Initially, the alliance supported the relevant UN Security Council resolutions by enforcing a no-fly zone and patrolling the coast. In this first phase of the conflict, direct military assaults remained absent. Although these actions were rather small, the significance of NATO’s commitment to the situation appeared to be very important for NATO. For the first time in its history, NATO actively enforced resolutions of the UN Security Council. The war went into a second phase when it appeared that the attempts of the European Union and the OSCE to find a political solution for Bosnia had failed dramatically. The United Nations started to take full care of the matter. The UN Security Council resolution 758 gave UNPROFOR the mission to protect several areas in Bosnia.\textsuperscript{364} NATO got the important mission to protect UNPROFOR. This growing commitment heralded the first NATO operation in its history which included the use of force.\textsuperscript{365} The underlying reason for this bigger commitment of the alliance into the conflict was no longer upholding stability alone. NATO’s involvement became really a matter of necessity for the further existence of UNPROFOR. However, by 1995 the conflict was really at the point of derailment. NATO appeared to be the only organization that had the will, the means and the authority to coerce the parties into negotiations. Eventually, NATO initiated a bombing campaign, Operation Deliberate Force, to stop further atrocities. With NATO’s overwhelming force fully used against those who violated international law, the conflict came quickly to an end and the fighting parties started to assemble in Dayton for peace negotiations.\textsuperscript{366}

\textbf{179.} While NATO’s operation in Bosnia started as an action to bring back stability to the Balkans, NATO’s backyard, the alliance operations asked more of NATO than one could have imagined in 1992. The gradual transition from a small supportive role all the way to the decisive factor in ending the conflict had made a severe impact on NATO as an organization.


\textsuperscript{364} S/RES/758 (8 June 1992).


NATO discovered its ability to enforce the resolutions of the UN Security Council. From a legal perspective, this enforcement was an application of article 42 of the UN Charter, a recognized exception on the prohibition on the use of force. Although this initial enforcement was aimed at creating stability in the region, the motives rapidly changed into more humanitarian causes. Therefore, the war in Bosnia is often seen as an application of the concept of humanitarian intervention explicitly authorized by the UN Security Council. Nevertheless, it has to be remarked that the UN Security Council itself never mentioned this concept during the operation. This growing involvement within the international community also caused severe troubles. Despite the presence of a legal basis, NATO was often characterized by internal divisions during the war in Bosnia. The ambitious expansion of the scope in the 1991 Strategic Concept could not avert that NATO was still the sum of the interest of its members. Next to the contentment of their decisive role in Bosnia, the alliance realized that effectively taking part in actions always caused severe tensions and that the high days of deterrence belonged to the past.

6.3.2. Kosovo, a Landmark Case for NATO

180. The success in Bosnia inspired NATO to return its attention to Yugoslavia when the violence in the Serbian province Kosovo exercised by the FRY forces increased seriously against the Albanian Kosovars. Initially, NATO preferred the role of mediator trying to solve the crisis diplomatically. But after the experiences in Bosnia, the member states knew that it was crucial to act firmly and to set enough pressure on the Serbian president Milosevic. So when attempts to negotiate and even peaceful countermeasures missed their effect, NATO tried to coerce the Serbian leader into negotiations by threatening with another military campaign.

181. Despite this initial enthusiasm, NATO was rapidly confronted with a severe obstacle. In contrast to from the operations in Bosnia, no UN Security Council provided NATO with a legal mandate to violate the principal prohibition on the threat or use of force. So when NATO threatened with airstrikes, the alliance knew it had no legal basis to execute this threat. Since it was also clear that Russia would veto any resolution that would provide such a legal basis, NATO appeared to be in a very difficult position.\textsuperscript{367} Eventually, NATO exercised its threat with the launch of Operation Allied Force.\textsuperscript{368}

182. The allies relied upon both the concept of humanitarian intervention as the implicit UN Security Council authorization to justify their campaign. With regard to the implicit UN Security Council authorization, the allies relied upon a draft of a UN Security Council resolution that condemned NATO’s operation but which was rejected by the

\textsuperscript{368} Supra par. 63.
majority of the members of the UN Security Council. Three countries were in favor, nine against.\(^{369}\) The second and often used argument, the exception of humanitarian intervention, caused a dichotomy within the international community. The pro intervention camp argued that the main part of the international community was in favor of the intervention. This claim can again be supported by the result of the voting within the UN Security Council on the previously mentioned draft resolution.\(^{370}\) Also the then UN Secretary General Kofi Annan had stated before, during and after the bombing campaign his support for the operation.\(^{371}\) These supporters also mooted the state practice of the nineties, where in Somalia, Rwanda and Bosnia, the international community had intervened to safeguard the civilians.\(^{372}\)

183. Despite this set of arguments in favor of the legality of Operation Allied Force, the opponents still sounding more convincing. NATO never had the explicit authorization of the UN Security Council. Since no other exception on the principal prohibition of the use of force could be applied, the operation was a violation of this principle. The claim that there already existed a right of humanitarian intervention which could constitute a fourth exception on this principal prohibition was weakened in September 1999 when during a vote in the General Assembly, the majority of the states clearly rejected the right for countries to apply the humanitarian intervention unilaterally.\(^{373}\)

184. NATO’s operation in Kosovo can at least be called historic for the alliance. The allies decided to execute a military campaign that supported their goals of protecting stability and peace but which was illegal according to international law. The argumentation of the NATO member states that this operation was justified because it was an application of the right of humanitarian intervention has been widely discussed before, but appears in the end insufficient to justify the violation of article 2(4) of the UN Charter.\(^{374}\) Despite the legitimate character of the operation, NATO took an reckless risk by neglecting the rules of international humanitarian law. In Bosnia, NATO fortified its credibility within the international community by successfully enforcing the resolutions of the UN Security Council. However, this time, such a legal mandate was nonexistent. Although the thoughts

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\(^{372}\) Supra par. 38-50 and 72.


\(^{374}\) Supra par. 38-50
behind the operation were the same as in Bosnia, namely, creating peace and stability in the region by protecting the people and stopping the violence, the fact that there was no legal basis to undertake actions, based on this reasoning made a huge difference. The waterfall of criticism that was caused by this operation made a repetition of this action almost unthinkable in the future. Eventually, it was not until a decade later that NATO would undertake any other actions in pursuit of these aims.

6.3.3. Libya: Unique, Unexpected Opportunities in an Unprecedented Situation

185. After experiencing internal difficulties for more than a decade, NATO revived in the new 2010 Strategic Concept. This new policy document aimed to serve as the blueprint for NATO in the twenty-first century. Besides reaffirming NATO’s commitment towards defense and deterrence, it also stresses the importance of achieving security through crisis management and underlines the importance of promoting international security through cooperation. At the time, the text, which was received with enthusiasm by both the policy makers and experts, created a new atmosphere of optimism around NATO. Finally, the organization appeared to be ready for the challenges of the new decennium.

186. The escalating crisis in Libya in February 2011 was such an abrupt challenge for NATO. The Arab Spring came unexpected and created some confusion within the international community. In Libya, the protests derailed into a civil war and the UN Security Council intervened with a resolution. Resolution 1970 stressed the government’s responsibility to protect its people. This responsibility to protect was a doctrine developed after Kosovo by both UN Secretary General Kofi Annan and several other legal experts. The concept was eventually adopted at the 2005 World Summit by the General Assembly of the United Nations. The concept also foresaw the possibility for a military intervention if several requirements were fulfilled. However, it was uncertain if this doctrine could be applied without the authorization of the UN Security Council. But in this case, the UN Security Council gave its approval for military action. Resolution 1973 provided the legal basis to protect the civilians of Libya by all means necessary. Like earlier in Bosnia, NATO became the organization enforcing this resolution. On March 31, 2011, NATO launched Operation Unified Protector.

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The fact that NATO acted as the protector of the responsibility to protect raised the question whether the operation in Libya could serve as a precedent for NATO. Could it be that, after being the protector of an everlasting balance by creating a threat during the Cold War, NATO could rediscover itself in a post-Cold War area as a crisis manager who could use, if necessary, force to prevent mass atrocities. I consider this question to be crucial in the debate about NATO’s future and in my opinion, the answer will have a decisive influence on NATO’s policy in the future.

But before I even could argue such a proposition, I should examine the exact events in Libya, and as I mentioned earlier in Chapter 5, Libya was not a walk in the park for NATO. First of all, the UN Security Council authorization. These resolutions were historic since they relied on the responsibility to protect the Libyan people to justify the use of force. As mentioned earlier, this resolutions were the result of a twinkle unanimity within the Security Council which was unprecedented but also without any precedential value. Gadhafi had no special relations with one of the permanent members and was therefore in a very weak position. Secondly, despite the unique circumstances of the adoption of this resolution, the scope of this resolution was still very limited. NATO had a legal basis for the “protection of civilians”. The fact that NATO expanded the scope of this mandate towards regime change did both challenge the operation’s legality as well as NATO’s credibility.

In conclusion, Libya appeared to be another controversial chapter in NATO’s history. The legal mandate provided by the UN Security Council created a unique opportunity for the alliance. NATO returned to the international front with the action of enforcement, something it had successfully done in Kosovo. This time, the resolution was based on a responsibility to protect. This concept, slowly created during the decennium 2000-2010 should provide an answer to terrible humanitarian disasters. Therefore, the outcome of NATO’s operation in Libya was very important for the following two reasons. At first, the operation appeared to be a valuable precedent of NATO’s ability to enforce UN Security Council resolutions and a breakthrough for the responsibility to protect. But the unilateral enlargement of the scope drenched the entire operation in a bath of controversy. It is questionable that the combination of the responsibility to protect and NATO will return in future situations, such as Syria.

6.3.4. Experiences of the Past, Lessons for the Future?

In this Chapter, I have tried to explain NATO’s evolution during the last twenty-five years based on the different military operations it undertook within this timeframe. The enlargement of NATO’s scope after the Cold War caused troubles that accompanied these transitions. However, NATO was never more active and more present than during this period. The quest for a post-Cold War NATO was both difficult and interesting, and the conclusions we reached can serve as a guide for the alliance in the future.
First of all, the alliance still remains a collective self-defense organization. The commitment of article 5 of the North Atlantic Treaty did not change through the years. A historic moment was the invocation of this article, the day after the events on 9/11. However, as we already discussed, the consequences for the significance of this article are limited. This was recently confirmed by the confirmation of their commitment in the new 2010 Strategic Concept. The alliance was born out of the will to collaborate militarily and as long as this will is present, the alliance will survive.

Besides being a collective self-defense organization, NATO aimed to develop into a protector of peace and stability within the region. In the discussion of the scope of this region, the actions in Bosnia and Kosovo have been decisive. NATO has and will operate as a protector within and outside its borders, every time the “peace and stability” of the region are threatened. The aim of creating stability in the area immediately around the member states is in my opinion a very positive step towards a modern NATO adjusted for the twenty-first century. The world is no longer divided into two blocks but more a patchwork-quilt of states in a globalized world community. Therefore, a vigilant approach should be necessary to protect the balance within the international community. An illustration of the necessity of pursuing these aims can be the illustration of the twinkle balance in Eastern Europe, were the Russian power often clashes with the former Soviet Republics, for example in Georgia in 2008. NATO’s task as a creator of stability in the North Atlantic area is, even more than the former formula of deterrence, a guarantee for a lasting peace within the North Atlantic area.

Over the last twenty years, NATO has also stressed a third motivation to undertake any military actions: the protection of the civilians against severe human rights violations. When the conflict in Bosnia was starting to escalate towards a genocide, NATO undertook its responsibility and asked the UN permission to launch airstrikes. When the same troubles appeared in Kosovo five years later, NATO decided again to respond, this time even without UN Security Council authorization. Also in recent years, NATO intervened in Libya to enforce a UN Security Council Resolution which stressed the responsibility of the international community to protect civilians if the home state refuses to fulfill this. This trend towards NATO as being the protector of human rights is both promising and dangerous. On the one hand, it opens a giant box of tools for the alliance that could thereby contribute to a solution for the most awful situations that had threatened the international community since the creation of the United Nations. But on the other hand, the risk of NATO acting as a protector of human rights is that this giant box of tools turns into a box of Pandora, both from an inside NATO perspective, where there is uncertainty whether the protection of human rights is a real policy aim, as well as outside NATO, where NATO depends on the good will of the UN Security Council, the pursuit of the protection of human rights will always cause severe troubles.
In conclusion, I will state that NATO’s wider interpretation of its operation scope brought both new opportunities and new problems for the organization. Besides the traditional problems of internal discussion towards the interpretation of the goals, there is the legal restriction caused by the principal prohibition on the threat or the use of force of the UN Charter. The operations during the nineties made it crystal clear that the authorization of the UN Security Council is absolutely necessary to execute a successful operation. This is perhaps the most important lesson for NATO. Therefore, if NATO wants to further execute successful operations in pursuit of its new aims, it is crucial that it applies all its powers to obtain the necessary legal mandate. A North Atlantic alliance, devoted to self-defense and at the same time successfully collaborating with the UN Security Council to depress threats to the region’s peace and security will be the best life insurance for the alliance in this twenty-first century.
7. Conclusion

195. In this thesis I have discussed NATO’s transition since the end of the Cold War in the light of the alliance’s military operations in Yugoslavia, Afghanistan and Libya. These different experiences all had a large impact on the development of the alliance in contemporary days and could serve as a guide for the future. With this dissertation I have especially highlighted the relationship between on the one hand, the political aim that existed after the Cold War to expand NATO’s operational scope and on the other hand, the legal framework with which the expansion should be reconciled. The NATO’s scope often challenged the legal framework, tried to expand the established practices of international law but also often crossed these set of rules.

196. I have started my journey during the early days of the Cold War. NATO was founded with the signing of the North Atlantic Treaty in 1949. The new born alliance aimed to deter the communist powers from exercising threats against a member of the alliance. The key provision of the North Atlantic treaty was, and is still, the mutual defense clause anchored in article 5. The allies agreed upon the commitment to consider an attack against one of them as an attack against them all. This mutual defense provision found its legal foundations within the UN Charter. Article 51 of the UN Charter provided states an exception on the principal prohibition to use force if the conditions of article 51 were fulfilled. Notwithstanding the importance of this provision, article 5 was never invoked during the Cold War.

197. The end of the Cold War introduced the necessity for transition of the alliance. In this thesis, I discussed the creation of the new 1991 Strategic Concept that aimed to provide an answer to this new needs. However, as I have frequently stressed, the words of the Strategic Concept did not reflect the political and legal reality. The following operation in Bosnia served as the perfect illustration of NATO’s shortcomings. NATO, an article 51 organization, started to enforce UN Security Council resolutions. This enforcement, which found its legal basis in article 42 of the UN Charter, created both opportunities and troubles for the alliance. I have argued that Bosnia was an instructive experience for NATO. The alliance discovered new opportunities without exceeding the provided legal framework. I am convinced that Bosnia was, despite the internal troubles, a valuable first step towards a post-Cold War NATO.

198. I went on with the discussion of NATO’s operation in Kosovo. I discussed NATO’s arguments to justify its bombing campaign. The argument that the concept of humanitarian intervention was a possible exception on the principal prohibition of article 2(4) of the UN Charter and could therefore provide the alliance a legal basis was extensively examined. However, this concept could not be considered as a recognized exception on the UN Charter, despite the humanitarian interventions in Somalia, Bosnia and Haiti which were all covered
by a mandate of the UN Security Council. NATO’s Kosovo operation was generally considered illegal since the approval of the UN Security Council was an absolute necessity, a necessity which was not fulfilled. Despite the illegality, the operation was still considered legitimate. NATO’s airstrikes campaign was not an abuse of force but a sincere attempt to end the atrocities committed by the Milosevic regime. However, the controversy created by the airstrikes campaign would cause that NATO would not rapidly repeat this unilateral act. The UN Security Council is still the decisive organ within the United Nations and NATO did not have the legal authority to ignore this established hierarchy.

199. The examination of the events following the attacks on 11 September 2001 led to another important conclusion of this thesis. The invocation of article 5 of the North Atlantic Treaty, NATO’s mutual defense clause, does not mean that the alliance will be mobilized for war. It only implicates that a state shall consider an attack against one of his NATO allies as an attack against themselves. The state will provide its attacked ally with as much support if the state itself want to give and if the attacked ally asks for this support. As we have seen in Afghanistan, it is not because an ally is under attack that the alliance will undertake military action. The invocation of article 5 is only the first step in a process that could result in such a mobilization but which can also remain limited to moral support. We have often highlighted that article 5 remains the core of the North Atlantic Treaty but we have to acknowledge that its implications are much less high than is commonly presumed.

200. This thesis also highlighted the recent events in the Arab world. Particularly, NATO’s operation in Libya was extensively discussed. The alliance enforced UN Security Council resolutions 1970 and 1973 in order to protect the civilian population of Libya. The text of these resolutions explicitly refers to the responsibility to protect. The possible application of the responsibility to protect by the NATO member states created several questions on a further evolution of the alliance from a classic collective defense organization towards a regional organization focused on the responsibility to protect. However, this thesis has demonstrated that in contemporary days, such an evolution will not occur. The responsibility to protect still entirely depends on the UN Security Council authorization and is therefore not a separate exception on the use of force. Therefore, NATO’s legal basis to execute the operations in Libya was not based on the responsibility to protect but on article 42 of the UN Charter. NATO has already proven in Bosnia that it has the capacity to enforce these resolutions if necessary and repeated these acts in Libya. It is plausible that NATO will continue enforcing particular UN Security Council resolutions in the future. It is however advisable to the alliance not to expand its scope as large as in Libya if they want to continue to uphold a credible reputation within the international community.

201. In the last Chapter of this thesis, I examined NATO’s dual policy through the past twenty years. NATO remained in the first place a classic collective defense alliance. Article 5 still constitutes the core of NATO. Despite the implosion of the Soviet Union, NATO still faces
external threats. The invocation of the mutual defense clause after 9/11 proved the continuously relevance of the article for the alliance. I have argued that, even after the disappointing article 5 operations in Afghanistan, NATO remains prepared to act if an ally would become the victim of an attack. Next to the aspect of collective defense, NATO also evolves for the last twenty years towards a crisis manager with a multifunctional operational radius and able to operate outside the North Atlantic area. Bosnia, Kosovo and Libya were all very instructive experiences for NATO. NATO experienced that it has the abilities to act as an important factor to manage conflicts but that it has to be careful to not cross the borders of international law. Crossing these borders may appear to be a possibility on the short term, but will provide problems on the longer, as was illustrated in Kosovo. Therefore, in the future, NATO will need to be careful with the existing legal framework, but will uphold the flexible interpretation which is so peculiar to international law.

202. I will do the final curtain call with the following consideration. Although the alliance is often subject to criticism, although the alliance often flirts with the borders of international law, the alliance still symbolizes the common believe between the transatlantic states that through cooperation, a more peaceful and secure world can be achieved. Let us hope that NATO can find the necessary balance between this noble aim and the legal reality.
Bibliography

Case Law


Treaty Law


Treaty of Friendship, Cooperation and Mutual Assistance Between the People's Republic of Albania, the People's Republic of Bulgaria, the Hungarian People's Republic, the German Democratic Republic, the Polish People's Republic, the Rumanian People's Republic, the Union of Soviet Socialist Republics and the Czechoslovak Republic, 14 May 1955, available at: http://avalon.law.yale.edu/20th_century/warsaw.asp.


**Official Documents and Publications**

**United Nations Security Council Resolutions**


United Nations General Assembly Resolutions


Other United Nations Documents


**NATO Documents**

- Strategic Concepts


- Other NATO Documents


Other Official Documents and Publications


Letter to congressional leaders reporting on the no-fly-zone over Bosnia, Weekly Compilation of Presidential Documents, 29, Doc 586, 13 April 1993.


Convocation of the Twenty-Third Meeting of Consultation of Ministers of Foreign Affairs, Organization of American States Permanent Council, OEA/Ser.G. CP/RES 796 (1293/01), 19 September 2001


Doctrine

Books


Contributions in Compilations


Articles


Online Articles


Newspaper Articles


Other Sources


H. CLINTON, U.S. Secretary of State, Democratic Transitions in Maghreb Region, Address before Center for Strategic and International Studies, 12 October 2012, available at http://
Nederlandstalige Samenvatting

Introductie


NAVO gedurende de Koude Oorlog : een alliantie gericht op collectieve zelfverdediging

De NAVO werd opgericht met het Verdrag van Washington, gesloten op 4 april 1949 in Washington D.C. Deze alliantie, gesticht gedurende de begindagen van de Koude Oorlog, had het primaire doel de kapitalistische, West Europese landen te beschermen tegen de oprukkende communistische krachten. Haar voornaamste troef was de provisie van wederzijdse bijstand. Deze provisie was in feite een herneming van het internationaal rechtelijk kader dat een paar jaar eerder was geschapen door het Hanvest van de Verenigde Naties. Hoewel zij principieel elke dreiging of gebruik van geweld verbood, maakte het Hanvest toch ruimte voor drie excepties. Naast de toestemming van de betrokkene staat of het mandaat verleend door de VN Veiligheidsraad, beschreef zij in artikel 51 van het Hanvest van de Verenigde Naties onder welke voorwaarden staten rechtmatig hun recht van zelfverdediging konden uitoefenen. De provisie van wederzijdse bijstand, zoals beschreven in artikel 5 van het Verdrag van Washington, zegt in feite niet meer dan dat, in het geval een medelidstaat overeenkomstig artikel 51 het slachtoffer zou worden van een gewapende aanval, zij deze aanval zullen beschouwen als een aanval tegen hen allen. Hiermee gaven zij het signaal naar hun mogelijke belagers een hecht, sterk en vooral verenigd blok te zijn. Deze afschrikkingsfunctie zou de NAVO gedurende vier decennia met glans vervullen. Geen enkele staat zou, ondanks soms hevige spanningen, het aandurven een NAVO lidstaat aan te vallen.
NAVO maakt kennis met de nieuwe wereldorde

Het einde van de Koude Oorlog betekende ook meteen het einde voor de NAVO als vogelverschrikker voor de Sovjetunie en diens satelliet-vrienden van het Warschaupact. NAVO voelde dat een heroriëntering zich opdrong en belegde enkele belangrijke bijeenkomsten in London en Rome. Deze zouden uiteindelijk uitmonden in het nieuwe “1991 Strategic Concept”. Het 1991 Strategic Concept voorzag in een verruiming van de doelstellingen van de alliantie. De NAVO moest zich niet langer focussen op het aspect van zelfverdediging tegen de, ondertussen verdwenen, communistische krachten maar moest er meer naar streven een bewaarder van vrede en stabiliteit te worden in de regio ten noorden van de Kreeftskering. Desalniettemin werd de collectieve zelfverdediging niet afgezworen, de provisie van wederzijdse bijstand werd gehandhaafd en bleef het kloppende hart van de NAVO.

Hoewel de inkt van het 1991 Strategic Concept nog niet helemaal droog was en de boodschap nog niet goed doorgedrongen, zou de eerste oorlog in Europa in bijna vijftig jaar ervoor zorgen dat NAVO definitief met de post-bipolaire wereldorde werd geconfronteerd. De onafhankelijkheidsoorlogen in Joegoslavië, vooral deze in de voormalige deelrepubliek Bosnië-Herzegovina, veranderden al snel in ware etnische conflicten. De NAVO nam reeds in 1992 de beslissing de internationale gemeenschap militair te ondersteunen in haar pogingen vrede te stichten tussen de partijen, door de resoluties van de VN Veiligheidsraad, gewapend te handhaven. Dit kon echter niet verhinderen dat het conflict medio-1994 compleet zou ontsporen. De NAVO begreep dat een militair tussenkomen noodzakelijk was om het conflict definitief tot een einde te brengen. Uiteindelijk kreeg de alliantie in augustus 1995 de toestemming van de Verenigde Naties luchtaanvallen uit te voeren tegen de Bosnische Serviërs. Enkele weken later was het conflict voorbij en uiteindelijk werden in november de Dayton akkoorden gesloten.

Het optreden van de NAVO in Bosnia was er één van graduele versterking. Hoewel gestart als vrij klein en zuiver ondersteunend, zou NAVO uiteindelijk uitgroeien tot de beslissende factor in het beëindigen van het conflict. De NAVO veruitwendigde in Bosnië zijn nieuwe aanpak als een stichter van vrede en stabiliteit in de regio. Naar het einde van de oorlog had ook de toenemende bezorgdheid omtrent de op grote schaal geschonden mensenrechten een beslissende invloed op de beslissingen genomen door de alliantie. Hoewel de hele NAVO operatie gepaard ging met de nodige groeipijnen, kan men stellen dat de bijdrage van NAVO tot dit gebeuren zowel als nuttig voor de internationale gemeenschap, als leerrijk voor de NAVO kan worden beschouwd.

NAVO speelt hoog spel: de interventie in Kosovo

De militaire interventie in Kosovo is één van de meest ambigue bladzijden uit de geschiedenis van de NAVO. Aan de ene zijde is er het politieke aspect, de NAVO die optrad tegen de mensenrechtenschendingen en hierdoor Milosevic dwong zich terug te trekken. Aan de andere zijde is er het juridisch kader waarin dit gebeurde. De intenties van de alliantie mochten nog zo eerbaar zijn, de uitvoering van de operatie was een schending van het internationale recht, meer bepaald van het principiële verbod om gewapend op te treden, welke verankerd ligt in artikel 2(4) van het Handvest van de Verenigde Naties. Vele lidstaten gingen op zoek naar een rechtvaardigingsgrond voor hun acties. Zo argumenteerde België voor het Internationaal Gerechtshof dat de actie gerechtvaardigd was omwille van humanitaire redenen. Dit recht van humanitaire interventie zou, volgens voornamelijk Britse rechtsgeleerden en politici, een bijkomende exceptie op het principiële verbod uitmaken. Deze mening wordt echter niet gevolgd door het merendeel van de internationale gemeenschap die de actie van de NAVO in Kosovo als onrechtmatig zien. De meest gezaghebbende bron is misschien wel de conclusie van de “Onafhankelijke Internationale Commissie met betrekking tot Kosovo”. Zij beoordeelde de situatie als “illegal but legitimate”. Deze drie woorden geven inderdaad het best de hele problematiek rond Kosovo weer. De redenen voor tussenkomst waren nobel, maar het juridisch kader niet aangepast. Met haar interventie had NAVO heel goed deze kloof in het internationale recht geïllustreerd. Desalniettemin kwam de alliantie geblust uit het hele gebeuren. De drang
naar verruiming van haar actie radius had NAVO ver gedreven en velen vonden dat dergelijke verregaande acties niet voor herhaling vatbaar waren.

**Historie en tragiek, NAVO’s steun in Afghanistan**


De inroeping van artikel 5 van het Verdrag van Washington was geen groteske, doch belangrijke gebeurtenis voor de NAVO. Zij herinnerde de alliantie meteen aan een paar principes die, hoewel destijds overeengekomen, door de tand des tijds enigszins verkleurd waren geraakt. Zo betekent de inroeping van artikel 5 niet de mobilisatie van de alliantie voor een militaire operatie. Hoewel dit inderdaad een gevolg van dergelijke invocatie kan zijn, berust de beslissing hieromtrent voorzakelijk bij de lidstaat getroffen, door een aanval. Pas als deze lidstaat beslist hulp te vragen kan de alliantie overgaan tot het verstrekken van de noodzakelijke middelen. Welke middelen zij dan weer verstrekt, behoort dan weer geheel tot de beslissingsbevoegdheid van de individuele lidstaten. Het feit dat de Verenigde Staten de NAVO links liet liggen bij het uitvoeren van zijn militaire operatie in Afghanistan, op enkele kleinere ondersteunende missies na, heeft de alliantie, hoewel juridisch gezien perfect te verzoenen met het Verdrag van Washington, toch wel pijn gedaan. Het strekte NAVO’s reputatie niet meteen tot eer dat zij overbodig bleek bij het verdedigen van haar meest belangrijke collega-lidstaat. Desalniettemin mogen de implicaties van deze eerste invocatie niet al te zeer overschat worden. Artikel 5 blijft het kloppende hart van de NAVO en zal in het geval er een nieuwe aanval tegen een lidstaat mocht plaatsvinden, ongetwijfeld weer zijn rol spelen.

**Libië, de Arabische lente doet even NAVO bloeien**


Ervaringen uit het verleden, lessen voor de toekomst : de NAVO op zoek naar een plaats in de internationale gemeenschap
Hoewel de NAVO de voorbije twintig jaar talloze initiatieven nam, blijft zij nog steeds op zoek naar haar plaats in een post-bipolaire internationale gemeenschap. Desalniettemin kan haar rijke geschiedenis haar helpen deze plaats te vinden in de toekomst. Nog steeds is het vertrekpunt van de alliantie artikel 5 van het Noord Atlantische verdrag. Deze provisie van wederzijdse bijstand blijft de voornaamste verbintenis die de leden van de NAVO met elkaar zijn aangegaan. Ook in de toekomst zal men waakzaam moeten blijven voor een eventuele aanval al zal deze zich dan niet langer vertalen in een klassieke gewapende aanval maar eerder in een terroristische of technologisch meer gesofisticeerde aanval. Daarom blijft artikel 5 van cruciaal belang om de eenheid van het trans-Atlantische pact te onderstrepen en aldus zijn aloude afschrikkingsfunctie te bewaren. Daarnaast heeft de NAVO de afgelopen twee decennia haar actie radius aanzienlijk verbreed. Het handhaven van de resoluties van de VN Veiligheidsraad met het doel de vrede en stabiliteit te bewaren, kan zeker gezien worden als een nuttige expansie. Het daarentegen unilateraal gewelddadig tussen komen in conflicten zoals in Kosovo was dan weer een eerder donkere bladzijde uit de geschiedenis van de NAVO. Hoewel dit, in zeer extreme situaties een verantwoord risico lijkt, zal het de alliantie op lange termijn alleen maar schade toebrengen. Het is dan ook voor de NAVO noodzakelijk een goede relatie te onderhouden met de VN Veiligheidsraad en samen te zoeken naar een optimale oplossing voor welbepaalde conflicten. Op deze manier kan de NAVO zich ten volle manifesteren als een multifunctionele organisatie aangepast, aan de realiteit van de 21ste eeuw en wacht haar een mooie toekomst.

Conclusie

Deze thesis had tot doel bij te dragen in het zoeken van de NAVO naar een balans tussen verruiming van haar doel en het juridisch kader waarin dit mogelijk is. De verschillende operaties die ik hierboven heb besproken illustreerden zowel de mogelijkheden als de gevaren van deze doelverruiming. Het tweesporen beleid met aan de ene zijde het aspect collectieve verdediging en aan de andere kant het aspect crisis management bieden beiden oeverloze opportuniteiten voor de NAVO in de toekomst. De alliantie moet desalniettemin proberen nog beter het huidige juridische kader te respecteren indien zij niet opnieuw in het oog van de storm wil terecht komen. Ik ben ervan overtuigd dat deze ervaringen uit het verleden kunnen bijdragen tot de ontwikkeling van NAVO tot een organisatie helemaal aangepast aan de 21ste eeuw.