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the Use of Force Rules

By

Ivana Stradner

A dissertation submitted in partial satisfaction of the
requirements for the degree of
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Committee in charge:

Professor John C. Yoo, Chair
Professor Robert L. Powell
Professor Laurent Mayali

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ABSTRACT

The Kosovo War in the Shadow of International Law and Power: A Rational Choice Theory Analysis of the Use of Force Rules

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NATO's military intervention in response to the Federal Republic of Yugoslavia's violation of human rights was illegal because it neither received the blessing of the Security Council nor was it justified under the rules of self-defense. This interdisciplinary research employs a rational choice approach to international law in order to understand the limits as well as the effects of international law during the Kosovo War in 1999. International law lacked any intrinsic importance within the utilitarian calculus of political decision-making during NATO's intervention in 1999.

After explaining a rational choice theory approach, this dissertation proceeds in the second chapter in order to outline the theoretical argument of *jus ad bellum* rules embodied in Article 2(4) of the United Nations Charter. In this chapter, I introduce three ways of thinking about compliance with the use of force in international law that will help us better understand why nations did not conform to the use of force rules embodied in the UN Charter.

The third chapter presents and criticizes the threats of force. International lawyers and the International Court of Justice have concluded that a threat of force is illegal if the use of force followed by a threat did not receive Security Council authorization nor was it justified under self-defense. In contrast to these arguments, by using the logic of strategic literature and game theory, this chapter proposes that threats of force are *sui generis* and should be treated separately from the use of force rules. Moreover, this chapter shows that military threats can be powerful instruments of coercion and can serve a useful purpose in the crises because they may mitigate the risk of war. Therefore, credible and capable threats should be permitted under international law since they can reduce the likelihood that the confrontation will end in war and therefore, the purpose of the U.N. Charter "to maintain peace and security" can be achieved.

The fourth chapter analyzes customary international law and it has developed two major claims. First, I argue that only the objective element, a state practice, should be considered relevant for establishing customary international law and *opinio juris* should not be regarded as a necessary requirement because it is a costless signal. Hence, by using logic of the “cheap talk” and signaling games, I suggest that the International Court of Justice should take into consideration only physical acts as a constitutive element of customary international law. My second argument is related to the compliance with customary international law. While international lawyers who use rational choice theory believe that customary international law refers to patterns of cooperative behavior since it requires widespread repetition of similar international acts over time by states and therefore states may build a negative reputation for non-compliance, this chapter argues that the “shadow of future” doctrine cannot be applied to peremptory norms, such as the prohibition of aggressive war. Although *jus cogens* are part of customary international law and they are fundamental norms from which no derogation is permitted, concern about the future of those norms depends on the temporal sequence of costs and benefits. I go on to show that even in infinitely repeated games, when stakes are high, such as *jus cogens* norms, cooperation is unlikely.

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Of course, all errors in this work are my own.

Babette Café in Berkeley 2016

INTRODUCTION TO INTERNATIONAL LAW'S INEFFICIENCY PUZZLE

Public international lawyers like to dislike realism and they delight in bandying about the famous Louis Henkin quote: “*Almost all nations follow international law almost all of the time*”¹ regardless of the fact that statistics have proved them wrong since 1945, when the United Nations Charter was signed in San Francisco. While some lawyers are unaware of international law’s ineffectiveness, others are conscious but do not know how to solve the puzzle of inefficiency because international legal tools are limited.

The principle of nonintervention is a cornerstone of the United Nations Charter but nevertheless, the NATO member states flagrantly violated those rules in 1999. NATO’s military intervention in response to the Federal Republic of Yugoslavia’s violation of human rights neither received the blessing of the Security Council nor was it justified under the rules of self-defense. Hence, it constituted a crime of aggression under international law, albeit it was later justified as a “humanitarian intervention.” Prior to this intervention, Igor Ivanov, Russia's foreign minister told Germany's foreign minister, Klaus Kinkel: “If you take it to the UN, we’ll veto it. If you don't, we’ll denounce you.”² Soon after the British foreign secretary Robin Cook told Madeleine Albright that he faced “problems with [his] lawyers” regarding the bombing of Yugoslavia in the absence of the Security Council. Madeleine Albright simply answered: “Get new lawyers.”³

This story of the violation of international law comes as no surprise to political scientists, and “one of the key theoretical questions” for them is “why such a small state would be willing to risk war with such a powerful state such as the United States.”⁴ On the other hand, this story has sparked intense debate among lawyers, but their discussion centered on the analysis of legal rules by failing to ask two natural questions. First, whether international law embodied in the United Nations Charter can prevent wars? Second, even more importantly, how is it possible to have rules encompassed in the United Nations Charter without supranational power to enforce those rules?

International lawyers are highly optimistic about compliance, and by overlooking the anarchy in international relations they claim that states either obey international law because it is a “morally just thing to do” or because “the law is the law”. On the other hand, realists see international law as epiphenomenal; “Where there is neither a community of interest nor balance of power, there is no international law.”⁵ In other words, our perception of problems in foreign affairs stems from a legal analysis of strict

¹ Louis Henkin, *How Nations Behave*, Columbia University Press 1979. Similar statement was echoed by Thomas Franck who stated: “In the international system, rules usually are not enforced yet they are mostly obeyed. Lacking support from a coercive power comparable to that which provides backing for the laws of a nation, the rules of the international community nevertheless elicit much compliance on the part of sovereign states.” Thomas M. Franck “The Power of Legitimacy among Nations”, Oxford University Press 1990 at 3.

² Tim Judah “Kosovo: War and Revenge”, 2000 at 183.

³ How War Left the Law Behind, NY times 2002 available at <http://www.nytimes.com/2002/11/21/opinion/how-war-left-the-law-behind.html> .

⁴ John A. Vasquez Review Article: The Kosovo War: Causes and Justification, *The International History Review*, 24:1, 2002 at 107.

⁵ Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 6th edn, 1985 at 296.

rules embodied in the United Nations Charter, and their understanding of the world's problems is deeply rooted in foreign policy within the confines of the political system.

Albeit this dissertation mirrors the realists' conclusions about international law ineffectiveness, both sides of this debate err, I believe, in taking an all-or-nothing approach. The central task before international lawyers is to solve the legal puzzle as to why countries sometimes comply with international law and other times flagrantly violate those rules. Therefore, this dissertation aims to describe why the strategic approach to the use of force rules is a sound theoretical basis for understanding why international law on the use of force did not successfully prevent the Kosovo War.

The primary purpose of this dissertation is to analyze the limits of current international law on the use of force and test these assumptions on the case of the Kosovo War in 1999. International law lacked any intrinsic importance within the utilitarian calculus of political decision-making during NATO's intervention in 1999.

In addition, this dissertation aims to remind international lawyers that realists view world-affairs as a zero-sum game, but also to make them aware that the idealists' "system-thinking" has greatly contributed to the existence of the zero-sum situations in international law as well.

Namely, the United Nations Charter was drafted seventy years ago with the ambitious aim of eliminating war from the face of the earth, preventing future world conflicts, and guaranteeing peace and security among states. Although there has been no global war since the Second World War, the world has seen over one hundred intrastate wars throughout the globe. International law that regulates the use of force does not affect states' behavior but another reason why international law was unsuccessful, lies in the fact that contemporary threats do not stem from "great powers" but rather they arise from "international terrorist organizations, proliferation of weapons of mass destruction, and rogue nations"⁶ and in turn, international law rules embodied in the United Nations Charter are not capable of tackling these new challenges.

While the United Nations is celebrating its 70th anniversary with the theme "Strong U.N. Better World", the civil wars in Syria and Libya, territorial dispute in the China Sea, the war against ISIS and the conflict in Ukraine, all demonstrate that international law on the use of force is in crisis and has reached the point of inefficiency mostly because current legal rules do not reflect the reality of international relations. Therefore, contemporary statesmen are captured in the "zero-sum legal game" where they have to choose between two antipodes: preserving international legal order or preserving their vital national interests.

For statesmen like Putin, al-Assad and Obama who are faced with the Syrian crisis today, the criticisms of their international law violations in Syria voiced by the most prominent international law scholars in prestigious law reviews are not going to affect their decision-making process. Hence, the first task international lawyers have to accomplish, if they want their advice to be heeded, is to view international relations problems in the same way statesmen perceive them. Otherwise, government officials will not replace their *realpolitik* approach to international conflicts with the legal idealism that is far from reality and not practical for their policy needs.

⁶ John C. Yoo and Will Trachman, Less than Bargained for: The Use of Force and the Declining Relevance of the United Nations, 5 Chi. J. Int'l L. 379 (2004).

Efforts to explain the illegality and legitimacy of NATO's intervention in the former Yugoslavia have generated copious volumes of literature. An overwhelming majority of international law scholars analyze the use of force rules by employing the legal-positivist and legal-moralist account of international law and this work shows how the long-established views of international law not only disregard or obscure power and interests, but also shows how it can be harmful and counterproductive. The literature on the Kosovo War is largely doctrinal, historical, and philosophical; hence, international law scholars have focused on the question of legality under international legal norms and its justification under the emerging norm of "humanitarian intervention" using the just war theory.

Adopting an interdisciplinary approach and adducing to strategic literature and international relations, this dissertation seeks to distinguish itself from the other literature by examining the Kosovo War through a rational choice theory, which assumes that nations are self-interested agents that comply with international legal norms for instrumental reasons in order to maximize their interests. Although the economic analysis of international public law is still in its infancy, international law literature that employs the game theory approach is rapidly growing. The writing on cooperation, threats, compliance with international law, and bargaining is more sophisticated in international relations literature. Hence, this dissertation shall borrow many of the concepts and definitions from international relations scholarship and apply it to international law analysis while studying the case of NATO intervention in the former Yugoslavia in 1999.

This dissertation uses an inductive reasoning by looking at a real case in international law, trying to find patterns from the Kosovo War and formulating a tentative hypothesis that will be explored in order to draw general conclusions about the limits of international law. Using induction alone may be viewed as a strange means of legal reasoning for lawyers because a categorical syllogism "lies at the heart of legal argument,"⁷ but also international relations scholars would consider applying a rational choice theory to the Kosovo War case as odd way of thinking.

Namely, scholars in international relations would not regard NATO's military intervention to be any different from other wars in terms of solving a "war's inefficiency puzzle", which is the starting point of this thesis. Bearing in mind that the target audience is lawyers, an analysis of NATO's "Operation Allied Force" in the Former Yugoslavia has been chosen because it is a "uniquely non-unique" case. Namely, lawyers believe that the Kosovo War "raises profound questions about the future of contemporary system of international politics that was first formulated at the end of the Second World War."⁸ Moreover, they perceive the Kosovo War to be "one of the defining moments in post-Cold War international relations"⁹ and some even went as far as to claim NATO's intervention signaled the death knell for Article 2(4). Finally, NATO's military intervention was regarded as a "dangerous precedent" and many conflicts after 1999, including the Russian intervention in Ukraine, have been justified based on the "illegal but legitimate war" formula. Hence, it would be of utmost importance to test the

⁷ Nita, Hon. Ruggero J. Aldisert, *Logic for Lawyers: A Guide to Clear Legal Thinking*, 2015.

⁸ James Ker-Lindsay, *Kosovo, Intervention and Statebuilding: The International Community and the Transition to Independence*, 2010.

⁹ *Intervention and Statebuilding: The International Community and the Transition to Independence*, edited by Aidan Hehir at 185.

assumptions about the limits of the use of force rules in a case that has been widely regarded as a momentous event for the international legal order.

Moreover, many conclusions of this dissertation should not come as unexpected to realists in international relations. I make the same inference in the context of limits of the use of force rules through a different route, by exploring the Kosovo War employing international legal norms instead of power and interests.

As Paul Krugman reminded his readers: “[...] those who can - do, while those who cannot - discuss methodology,”¹⁰ this dissertation begins with the methodology analysis in the ***first chapter*** in order to explain the debate about the role of a rational choice theory in international public law. The past decade has seen the rapid growth of a rational choice theory in international law. However, it still remains highly controversial and is poorly integrated in the international legal academia. The game-theoretic approach has been the subject of much criticism in international relations literature where authors questioned “whether formal techniques are of any value whatsoever, and regard the modeling community as a group of narrow-minded imperialists seeking to impose its preferred method on the entire discipline.”¹¹ International relations scholars have been successfully dealing with the game-theory animosity and there are many lessons international lawyers can learn from them in order to defend this methodology. The chapter concludes that much of the confusion stems from a misunderstanding of the basic assumptions in the rational choice theory among traditional international lawyers.

The ***second chapter*** outlines the theoretical argument of *jus ad bellum* rules embodied in Article 2(4) of the United Nations Charter. Albeit the rest of the dissertation avails of a rational choice theory approach, the first section of this chapter is concerned with the body of positivist international law in order to demonstrate that NATO’s intervention was unlawful under international law since it neither received Security Council authorization nor was it justified under Article 51 (self-defense). The second section continues with the analysis of natural law and “just war theory”. The discussion continues in the third section in order to see why positivist analysis of legal rules leaves us nowhere. In particular, it presents the perils of idealism since if nobody complies with Article 2(4) of the United Nations Charter, it is barely important. Of course, if all states honor Article 2(4), the world might be a better place. However, if some states believe that everyone will obey Article 2(4), while others disobey, this planet would be in a greater state of disarray were it not for international law. It shows that the international legal system as it stands has the appearance of a zero-sum game where states are left with only two options: either they have to violate strict international legal rules on the use of force in order to keep the peace, or stick to their guns i.e. their positive interpretation of United Nations Charter rules and accept the fact that wars will be waged.

The ***third chapter*** presents and criticizes the threats of force since Article 2(4) of the United Nations Charter prohibits not only the use of force, but also the threat of force in foreign relations. It shows that even when lawyers are presented with an opportunity to

¹⁰ Paul Krugman, *The Fall and Rise of Development Economics*, 1993. Available at <http://web.mit.edu/krugman/www/dishpan.html>. The original text was published in 1993 “Toward a Counter-Revolution in Development Theory”, *Proceedings of the World Bank Annual Conference on Development Economics* (Washington DC: World Bank, 1993) pp. 15-38.

¹¹ Stephen M. Walt. "Rigor or Rigor Mortis? Rational Choice and Security Studies." *International Security* 23, no. 4 (Spring 1999) at 6.

preserve world peace, they fail to do so due to a lack of understanding of function and limits of threats in international politics. Domestic law prohibits the use of ‘threats’ if a defendant has the ability or intent to carry it out. By using this analogy, international lawyers and the International Court of Justice have concluded that a threat of force is illegal if the use of force followed by a threat did not receive Security Council authorization nor was it justified under self-defense. If there is one lesson we can learn from this chapter it is this: Making the analogy of international law with national law is precarious because threats of force in foreign affairs have a very different role than threats in national legal systems.

The core lesson we can learn from the strategic literature is that military threats can be an *effective instrument of coercion* and can serve a *useful* purpose during time of crisis because they may mitigate the risk of war, unlike the use of threats as classified in a domestic legal regime therefore, the purpose of the United Nations Charter “*to maintain peace and security*” can be achieved. In contrast to international law mainstream literature, I argue that threats of force are *sui generis* and should be treated *separately from the use of force* rules.

Now, one could reasonably challenge this assertion by arguing that this proposal is logically inconsistent because this dissertation mirrors the realists’ claim that international law on the use of force does not affect states’ behavior. Therefore, why should we fix a problem, which even when fixed, will not work? The reason for this is because I want to emphasize the danger of ignoring international politics. Namely, when the International Court of Justice delivered the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* in 1996, Judge Shi pointed out to the international community that the deterrence theory is part of international politics, hence it should continue to exist *detached* from international law.¹²

The remainder of this chapter is organized as follows. After outlining the scope of the threats of force embodied in Article 2(4) and analyzes the potential interpretations. The second part examines the International Court of Justice judgments related to the threats of force. The third part focuses on the deterrence theory in international relations and seeks to offer alternative means of prohibiting threats of force by reinterpreting Article 2(4). The final part examines the Kosovo War where I test criteria of effective threats by relying on a simple game to motivate research and illustrate the logic of the findings from a previous chapter.

The fourth chapter analyzes customary international law. In addition to establishing a treaty obligation under Article 2(4), the provision of non-intervention also creates obligations arising under customary international law, which requires the presence of two elements: a general state practice and *opinio juris*.

This chapter has developed two major claims. First, I argue that only the objective element, a state practice, should be considered relevant for establishing customary international law and *opinio juris* should not be regarded as a necessary requirement because it is a costless signal. The International Court of Justice stated in the *Nicaragua* case that because the United States voted in favor of General Assembly Resolution 2131(XX), it was bound by the principle of non-intervention.

In international politics where states operate in an anarchic system where there is no higher authority to enforce mutual obligations among states, states have to do

¹² See paragraph 69 of the Declaration of Judge Shi in Nuclear Weapons Opinion. Available at <http://www.icj-cij.org/docket/files/95/7503.pdf>

whatever is required to maintain their security; including lying and bluffing. Governments often say one thing and do another. Hence, by using logic of the “cheap talk” and signaling games, I suggest that the International Court of Justice should take into consideration only physical acts as a constitutive element of customary international law.

Thomas Schelling stated that bargaining power is “the power to fool and bluff” hence, I ask how much information can be credibly transmitted when communication is direct and costless like in the situation when the United States supported Resolution 2131? By using a simple information-transmission game, I argue that those statements are ‘cheap talk’ and they do not directly affect payoffs. Not only can a truthful message never be part of equilibrium, but there is also an equilibrium in which the United States’ valuable private information (positive vote for General Assembly Resolution 2131 (xx)) will have no effect on the Court’s choice and therefore the International Court of Justice should only consider physical acts as an evidence for a state practice element of customary international law.

My second argument is related to the compliance with customary international law. The central question to be addressed here is when states are able to comply with customary international law and in particular *jus cogens* norms such as the crime of aggression. While international lawyers who use rational choice theory believe that customary international law refers to patterns of cooperative behavior since it requires widespread repetition of similar international acts over time by states and therefore states may build a negative reputation for non-compliance, this chapter argues that the “shadow of future” doctrine cannot be applied to *peremptory* norms, such as the prohibition of aggressive war. Although *jus cogens* are part of customary international law and they are fundamental norms from which no derogation is permitted, concern about the future of those norms depends on the temporal sequence of costs and benefits. I go on to show that even in infinitely repeated games, when stakes are high, such as *jus cogens* norms, cooperation is unlikely.

The chapter begins with the theoretical foundations of customary international law and proceeds with a rational choice theory analysis of *opinio juris* and state practice. The following section argues that the International Court of Justice should not consider votes for the General Assembly Resolutions as a relevant evidence for the creation of customary international law because those statements are cheap talk and they do not directly affect payoffs. Hence, only the real conduct of states, such as physical acts, reflects what they consider binding as law since their actions are costly and can credibly communicate their true intentions. In other words, for the creation of customary international law it is important what states *do* (physical acts) rather than what they *say* (verbal statements). The last part of the chapter aims to show that infinitely repeated games do not necessarily lead to cooperation as it is widely believed among international lawyers.

Several caveats should be noted before concluding, therefore it is important to say what this dissertation is *not* about. First, this dissertation focuses on the use of force rules but only those related to *jus ad bellum*, a criterion of law that regulates the conditions under which a State may resort to war or to the use of force in general. Therefore, *jus in bello* rules that govern the conduct of belligerents during a war, will not be discussed here. Second, although this dissertation relies on the assumption of anarchy, which raises

the logical question as to whether international law is actually law since it lacks a sanction, this question, irrespective of its importance will be omitted here. In addition, this dissertation does not evaluate *jus ad bellum* rules in terms of deciding whether rules are good or bad in some moral sense based on Just War theory but it is rather interested in the positive analysis of legal norms.

THE KOSOVO WAR BETWEEN POWER AND PRINCIPLE- A NOTE ON METHODOLOGY

When Hans Morgenthau published his article “*Positivism, Functionalism and International Law*” in 1940 he emphasized the urgency to “reexamine the methodological assumptions with which the traditional science of international law starts.”¹³ It has been more than seventy years since his sage warning, but positivism is still a dominant methodology in international law. The positivist idea that states obey international law because *international bargains must be kept*, does not square comfortably with the empirical findings when states violated international legal rules.

Regardless of the strict rules on the use of force only three wars since 1945 have received Security Council authorization, yet we have had more than one hundred intrastate wars since then. Hence, the ultimate goal of maintaining security and peace has failed. One of the most pressing issues in international law is the question of compliance with international treaties, as well as customary international law. Why would states comply with international law rules when there is no a central authority to enforce those international legal obligations?

Much ink has been spilled over this controversial and perennially perplexing matter and international legal scholarship is divided between legal moralists who argue that states conform to international legal rules out of a sense of moral obligation, and legal positivists who claim that states must respect the law due to *pacta sunt servanda* rule.¹⁴ These two observations are truisms, and they do not provide a very persuasive justification for compliance. This interdisciplinary research employs a rational choice approach to international law in order to understand the limits as well as the effects of international law during the Kosovo War. International law scholarship has mainly been doctrinal in nature and a rational choice approach to international law is a recent phenomenon that has risen to fame after 2000.

Stephen Walt held that *logical consistency*, *degree of originality*, and *empirical validity* are necessary conditions for “social science to develop useful knowledge about social behavior.”¹⁵ The degree of originality of positivism and moralism in international law can be subject to dispute. However, these two approaches are open to criticism as lacking in logical consistency and empirical validity. Louis Henkin’s legendary observation that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time”¹⁶ does not reflect the empirical findings considering that international law on the use of force has been violated more frequently than it has been adhered to since 1945. The next chapter is devoted to an analysis of the use of force rules and *empirical validity* of the current regime of the use of force. International lawyers are principally concerned with the preservation of

¹³ Hans Morgenthau *Positivism, Functionalism, and International Law*, 23 AJIL. 1940 at 260.

¹⁴ International law has always been largely doctrinal work with the ultimate goals of “telling the ought from the is, for prudently creating consistency, for distilling general principles from colorful case law, for boldly helping state practice gaining momentum, and turning into *opinio iuris*.” *Public International Law and economics*, Anne von Aaken, Christoph Engel, Tom Ginsburg, *Illionis Law Review* 2008.

¹⁵ Stephen M. Walt. “Rigor or Rigor Mortis? Rational Choice and Security Studies.” *International Security* 23, no. 4 (Spring 1999) at 12.

¹⁶ Louis Henkin, *How Nations Behave* 1979 at 47.

international peace, however current legal norms are *logically inconsistent* with their wishes and hopes because different legal rules contradict each other and legal certainty is nothing but uncertain in international law. In the next chapter, I will show that current rules on the use of force fail to assist international law in meeting international political reality. Namely, current security threats differ from those in 1945, and adopting the textual approach to the U.N. Charter rules does nothing to help us regulate modern wars. With this in mind, the third chapter proceeds to describe and elaborate on the logical inconsistency of international lawyers' wishes and hopes to prevent wars. Namely, the U.N. Charter requires all member states not only to refrain from the use of force but also threats thereof and under international law, a threat of force is unlawful when the use of force contemplated by the threat would itself be unlawful. This proposal is logically inconsistent with the purpose of the U.N. Charter and the third chapter seeks to assign a more realistic function to international law that reflects the political reality, hence it shows that military threats can be effective tools of coercion and can serve a useful purpose in time of crisis because they may reduce the risk of war. The main argument is that threats of force should be treated separately from the use of force rules and military threats should be permitted under international law as long as they are credible and capable.

Bearing in mind this logical inconsistency and the empirical invalidity of current international law theories and legal rules, there is an urgent need for international lawyers to take a closer and more careful look at the social sciences and apply the findings to international law. The interdisciplinary approach to international law started three decades ago as the intersection of international relations and international law.¹⁷ A decade later, international lawyers began to apply law and economics to public international law, which caused controversy.¹⁸ The rational choice approach to international law assumes that states comply with international treaties for instrumental reasons in order to maximize their interest and their work has focused on treaty-making, international adjudication, customary international law, and compliance with international law. The rational choice approach understands international law as self-enforcing because no universal government exists to impose sanctions for violation of international legal norms. Their starting premise is that "states are rational, self interested agents that use international law in order to address international externalities and obtain the other

¹⁷ Kenneth Abbott, *Modern International Relations Theory; A Prospectus for International Lawyers*, 14 *Yale Int'l J* 335 (1989), Anne-Marie Slaughter Burley, *International Law and International Relations, A Dual Agenda*, 87 *AM. J. INT'L* 205 (1993), Kal Raustalia & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in *Handbook of International Relations* 2002.

¹⁸ Jack Goldsmith and Eric Posner, *The Limits of International Law*, Oxford University Press, 2006, book review rationalism and revisionism in international law Reviewed Hathaway, Oona A. and Lavinbuk, Ariel N., *Rationalism and Revisionism in International Law*. *Harvard Law Review*, Vol. 119, No. 5, pp. 1404-43, 2006; Ohlin, Jens David, *Nash Equilibrium and International Law*, *Cornell Law Review*, Vol. 96, pp. 869-900, 2011, Berman, Paul Schiff, *Review Essay: 'Seeing Beyond the Limits of International Law,'* Jack L. Goldsmith and Eric A. Posner, *'The Limits of International Law'*. *Texas Law Review*, Vol. 84, pp. 1265-1306, 2006; Anne van Aaken *To Do Away with International Law? Some Limits to 'The Limits of International Law'*, *European Journal of International Law*, 2006; Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 *Cal. L. Rev.* 1823 (2002); Robert C. Hockett *Review Essay: The Limits of Their World*. *Minnesota Law Review*, Vol. 90, 2006; David C. Gray, *Rule-Skepticism, 'Strategy,' and the Limits of International Law*, *Virginia Journal of International Law*, Vol. 46, 2006.

benefits of international cooperation.”¹⁹ Although the economic analysis of international public law is still in its infancy, international law literature, which employs the rational choice approach, is rapidly growing.

The rational choice theory is based on the realist approach to international politics and in order to understand the self-enforcing nature of international law, the following discussion will attempt to probe beneath the surface to analyze the realists’ perspective on legal norms. Unlike international lawyers who like to dislike realism, political leaders have always delighted in encouraging highly contentious realist theory. Realists have always seen international law as epiphenomenal²⁰ and have been skeptical about advancing international order by arguing that international law is the image of the distribution of power and it demonstrates the interests of the leading states.²¹ The realists’ skepticism for international legal treaties, soft law and customary international law resulted in animosity on the part of international lawyers because it “make(s) their jobs irrelevant, wasteful and quixotic.”²² The realists see politics and law as separate and international law serves the political goals of the most powerful states.²³ International cooperation is possible for realists but as long as it advances their interests.

Realism has been the dominant approach to international relations since the Second World War²⁴ and it dates back to the work of Sun Tzu, Thucydides, Hobbes and Machiavelli.²⁵ Classical realists such as E.H. Carr and Hans Morgenthau accepted international legal rules to be law but they emphasized the limited role of international law. Carr was a critic of Willsonian liberalism and in his famous work: *The Twenty Years’ Crisis* he attacked utopian musings of liberals that had led to a dangerously flawed postwar settlement in 1919.

While there are several schools of realism and they differ one from another, their core principles are the same. First, states are the main actors in world politics. Second, the

¹⁹ Eric Posner, Alan Sykes, *Economic Foundations of International Law*, Harvard University Press, 2013 at 3.

²⁰ “The struggle with Nazism cast doubt on the efficacy of international law and emphasized the role of power in world politics.” Robert.O. Keohane, *Neorealism and its Critics*, New York, Columbia University Press, 1986 at 9.

²¹ John J. *Mearsheimer*, *The False Promise of International Institutions*, *International Security*, Vol. 19, No. 3 (Winter, 1994-1995), Hans Morgenthau stated: “Where there is neither a community of interest nor balance of power, there is no international law” Morgenthau, *Politics Among Nations The struggle for power and peace*, 6th edn, 1985 at 296. Francis A. Boyle, *World Politics and International Law* (1985) 6-7; Francis A. Boyle, *The Irrelevance of International Law: the Schism between International Law and International Politics*” 10 *Calif. West. Int’l L.J.* (1980) at 198.

²² Richard Steinberg, *Wanted-Dead or Alive: Realism in International Law*, in Jeffrey Dunoff and Mark Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013).

²³ Carr argued that law could not be “understood independently of the political function on which it rests and of political interests which it serves” E.H. Carr, *The Twenty Years Crisis’, 1919-1939: An Introduction to the Study of International Relations*, 2nd edn, London, Macmillan, 1946, p.179.

²⁴ Kenneth W. Abbott, “Modern International Relations Theory: A Prospectus for International Lawyers”, 14 *Yale J. Int’l L* (1989).

²⁵ The Chinese strategist Sun Tzu, instructed Chinese leaders on using power to maximize their interest. In the book “*The Art of War*” he provides leaders with a manual how to protect their survival. Another classical realist, Thucydides, wrote of the Peloponnesian War that “the strong do what they have power to do and weak accept what they have to accept”. This idea had been further developed by classical realists such as Niccolo Machiavelli and Thomas Hobbes.

international system is anarchic. Third, the material factors such as military resources and the balance of power matter far more than non-material factors such as norms, institutions, and international law. Fourth, states are rational actors and rational action finally depends on self-help.

NEW INTERNATIONAL LEGAL REALISM

Rationalist International Legal Theory has its origins in the New International Legal Realism and is related to the theory of realism in international relations.²⁶ According to legal realists, states are the principal actors and international rules are understood as the product of the most efficient outcome in maximizing some value, most commonly economic wealth or some form of self-interest.²⁷ Realists believe that the international system exists in a state of anarchy, which is “the fundamental fact of international relations”²⁸- a term that implies not chaos or absence of structure and rules, but rather a lack of central government that can enforce rules.²⁹ According to Robert Art and Jervis “international politics takes place in an arena that has no central governing body. No agency exists above individual states with authority and power to make laws and settle disputes. States can make commitments and treaties, but no sovereign power ensures compliance and punishes deviations. This-the absence of a supreme power-is what is meant by the anarchic environment of international politics.”³⁰

The neorealists and neoliberalists have been engaged in an earnest and profound debate about the meaning and consequences of anarchy, which “shows that our continuing emphasis on anarchy is misplaced.”³¹ While neorealists posit that cooperation

²⁶ “[New Legal Realism] draws broadly on social scientific methodologies derived from fields like history, anthropology, sociology, and psychology. Rationalist legal theory [...], supplements Chicago school law and economics with behavioral law and economics while retraining assumptions associated with traditional International Relations realism.”

²⁷ “They do not track realists like Hans Morgenthau in assuming that a state’s interest are limited to security and wealth” Andrew F. Cooper, Jorge Heine, and Ramesh C. Thakur. *The Oxford Handbook of Modern Diplomacy*. Oxford, U.K.: Oxford University Press, 2013 at 502.

²⁸ Robert J. Art, and Robert Jervis. *International Politics: Anarchy, Force, Imperialism*. Boston: Little, Brown, 1973 at 7

²⁹ Jack Donnelly explains that the word “anarchy” in international relations differs from the term “in popular discourse [which] often suggests chaos or violent disorder.” He further explains that the word “anarchy” comes from the ancient Greek indicating the state without rules. “*Arche* is the term Thucydides uses to refer to the Athenian “empire”; rule of one city over another, in contrast to both the formal equality of alliances and the hegemonic leadership of the first among equals.” Jack Donnelly, *Realism and International Relations*. Cambridge: Cambridge University Press, 2000, at 81; Also see Axelrod and Keohane “Achieving Cooperation Under Anarchy” *World Politics*, Vol. 38, No. 1 (Oct., 1985), pp. 226-254 ; Kenneth Oye “Explaining Cooperation under anarchy” *World Politics*, Vol. 38, No. 1 (Oct., 1985), pp. 1-24

³⁰ Robert Art and Robert Jervis, *International Politics*, 3d ed cited in Powell, Robert. "Anarchy in International Relations Theory: The Neorealist-Neoliberal Debate." *International Organization* 48, no. 2 (1994): p.330.

³¹ Powell, Robert. "Anarchy in International Relations Theory: The Neorealist-Neoliberal Debate," *International Organization* 48, no. 2 (1994). More about this debate see Waltz, Kenneth N. *Theory of International Politics*. Reading, MA: Addison-Wesley Pub., 1979 where he claims that anarchy is the primary component of the system in international relations. Robert Axelord argues that the issue of

under anarchy is not possible, Robert Keohane developed an institutional approach to international relations and in his work *After Hegemony* asked the crucial question; “Under what conditions can independent countries cooperate in the world political economy?”³² He criticized neorealism by saying that “cooperation can under some conditions develop on the basis of complementary interests and that institutions, broadly defined, affect the patterns of cooperation that emerge.”³³

Certainly, there are some ways of enforcing international law but they have limits that pose serious limits on international law. Namely, the United Nations Security Council can determine the existence of any threat to peace, breach of the peace or act of aggression and may impose mandatory sanctions in order to remedy the situation under Chapter VII of the UN Charter. Those sanctions may be economic, diplomatic or military, but when the stakes are high in cases such as war and the use of military force in international relations, enforcement instruments of international law are inefficient and limited at best. Moreover, states can rely on measures such as retorsion³⁴ and countermeasures which must meet the requirement of necessity and proportionality and may not include the use of military force³⁵. In this anarchic world, realists emphasize prudence as a great virtue in foreign policy and Jack Goldsmith and Eric Posner argue that states’ compliance with international legal rules is a “prudential decision, not a moral decision.”³⁶ The New Legal Realist approach to the use of force rules is pessimistic hence it is understandable that a plethora of commentators have responded to the “Limits of International Law.” The use of game theory has been proven a stellar tool in international relations for explaining the strategic interactions among states in situations where states are staring down the barrel of anarchy.

GAME THEORY AND INTERNATIONAL LAW

Game theory has been at the center of the international relations literature for more than six decades and gained currency in international law literature after 2000.³⁷

anarchy is of great importance for international relations because “today nations interact without central authority.” Robert Axelord, *The Evolution of Cooperation*, 1984 at 3.

³² Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton, NJ: Princeton University Press, 1984.

³³ Robert Keohane, *After Hegemony* p.9. Joseph Grieco responded to the institutionalist theory by emphasizing importance of the relative gains. Grieco, Joseph M. "Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism." *International Organization* 42, no. 3 (1988).

³⁴ However, the International Law Commission prohibits retorsion under Article 22 of the Draft by saying that “measures that are normally lawful, such as simple measures of retorsion or other forms of conduct, which, while harming the interests of subject that infringed the state’s right, yet do not conflict with an international obligation towards that other subject. In such a situation there is no need to ‘excuse’ the measures to preclude, as an exception, their lawfulness, for in any case they are not unlawful”.

³⁵ See *France v United States* (18 RIAA 411) Air Services Agreement Arbitration.

³⁶ Jack Goldsmith and Eric Posner, *The Limits of International Law*, Oxford University Press, 2006.

³⁷ Even before 2000, some international relations scholars used the rational choice theory approach to international legal problems. See Abbott, Kenneth “Modern Relations Theory: A prospectus for International Lawyers.” *Yale Journal of International Law* 14 (1989): 335-411; Jeffrey Dunoff and Joel Trachtman “Economic Analysis of International Law.” *Yale Journal of International Law* (1999) 1-59; Baird, Douglas G., Robert Gertner, and Randal C. Picker. *Game Theory and the Law* (1994) this book applies game theory to law but it does not focus specifically to international law. John Setear, *An Iterative*

Game theory analyzes “individual decisions, in situations where each player’s payoff depends in part on what the other players are expected to do”³⁸ and this approach to international law can help us understand possible solutions to problems of international cooperation. This thesis shall demonstrate the problem of cooperation during the Kosovo Crisis where NATO member states were better off violating the U.N. Charter rules. In order to do so, the dissertation will borrow a number of concepts and rational choice theory models from international relations literature and apply them to international law and the use of force rules.

The game-theoretic approach has been the subject of much criticism in international relations literature where authors questioned “whether formal techniques are of any value whatsoever, and regard the modeling community as a group of narrow-minded imperialists seeking to impose its preferred method on the entire discipline”.³⁹ International relations scholars have been successfully dealing with the game-theory animosity and there are many lessons international lawyers can learn from them.

It has been argued that international lawyers use simple game theory.⁴⁰ This criticism has been frequently advanced in international relations literature by emphasizing the complexity of world politics and the inability of game theory to respond to such intricacies⁴¹. On the other hand, when rational choice theorists attempted to overcome this obstacle by using sophisticated models they were criticized again but this time for ignoring Thomas Schelling's advice not “to treat the subject of strategy as though it were, or should be, solely a branch of mathematics.”⁴² and using sophisticated models “plac[ing] far more emphasis on formal proofs and mathematical derivations.”⁴³ Jens Ohlin argues that the new realism “misunderstands” and “misuses” the game theory by inferring that “self-interested behavior and normativity are mutually exclusive.”⁴⁴ While the world of foreign relations is far more complicated than the Prisoner’s Dilemma game it is important to note that “simplicity actually enhances the power of theory for grasping complexity”⁴⁵ and according to Robert Powell “a model is a tool and a tool must be simple enough to use.”⁴⁶

Perspective on Treaties: A Synthesis of International Relations Theory and International Law, 37 Harv. Int’l L.J. (1996).

³⁸ Stephen M. Walt. "Rigor or Rigor Mortis? Rational Choice and Security Studies." *International Security* 23, no. 4 (Spring 1999) at 10. This article emerged as a volume called Rational Choice and Security Studies Stephen Walt and his Critics where rational choice scholars responded to his criticism. See Robert Powell. "The Modeling Enterprise and Security Studies." *International Security* 24, no. 2 (1999): 97-106.

³⁹ Stephen M. Walt. "Rigor or Rigor Mortis? Rational Choice and Security Studies." *International Security* 23, no. 4 (Spring 1999) at 6.

⁴⁰ Jens Ohlin, *The Assault on International Law*, Oxford University Press, 2015.

⁴¹ Robert Powell, *In the Shadow of Power: States and Strategies in International Politics*. Princeton, NJ: Princeton University Press, 1999 at 24; Duncan Snidal, "The Game Theory of International Politics." *World Politics* 38, no. 1 (1985) at 44.

⁴² Schelling, *Strategy of Conflict*, pp 10-11, n4 cited in Stephen M. Walt. "Rigor or Rigor Mortis? Rational Choice and Security Studies." *International Security* 23, no. 4 (Spring 1999) at 8.

⁴³ Stephen M. Walt. "Rigor or Rigor Mortis? Rational Choice and Security Studies." *International Security* 23, no. 4 (Spring 1999) at 8.

⁴⁴ Jens Ohlin, *Nash Equilibrium and International Law* Cornell Law Faculty Publications Paper 572 (2011).

⁴⁵ Duncan Snidal, "The Game Theory of International Politics." *World Politics* 38, no. 1 (1985): 44-55

⁴⁶ Robert Powell, *In the Shadow of Power: States and Strategies in International Politics*. Princeton, NJ: Princeton University Press, 1999 p. 24.

Furthermore, one of the rational choice assumptions is that players are rational. International law scholars attack this assumption by emphasizing that actors are not always rational players. While this is true, they do not define rationality using the standard we use. Namely, by rationality we mean that a rational actor selects the action that gives him the highest possible payoff from a possible set of actions.⁴⁷ The player ranks possible outcomes from most desired to least desired. This preference relation should be complete, transitive and complete.

The chapters that follow will show the incoherent international legal system that regulates the use of force; hence, a game theory can “provide a kind of accounting mechanism that enables us to think through some issues more carefully than ordinary-language models can.”⁴⁸ With this methodological frame in mind the next chapter proceeds to describe and detail the use of force rules.

⁴⁷ Steve Tadelis, *Game Theory: An Introduction*. Princeton: Princeton University Press, 2013. at 11.

⁴⁸ Robert Powell, *In the Shadow of Power: States and Strategies in International Politics*. Princeton, NJ: Princeton University Press, 1999.

CHAPTER 1

THE KOSOVO WAR IN THE SHADOW OF INTERNATIONAL LAW

INTRODUCTION TO THE SEVENTY YEARS' CRISIS OF INTERNATIONAL LAW

Edward H. Carr in his famous book *The Twenty Years' Crisis 1939: An Introduction to the Study of International Relations* challenged the idealist viewpoint, which he described as utopianism. As one of the founders of political realism, he emphasized that it was impossible to understand international law “independently of the political foundation on which it rests and the political interests it serves.”⁴⁹ Although this article was published in 1939, his arguments are still relevant today.

The United Nations was founded seventy years ago with the principle aim of preventing world wars; however, regardless of the strict rules embodied in the UN Charter, we have had more than one hundred wars. Contemporary international legal academia ignores power and they take an incorrigible utopian approach to the world's politics⁵⁰ and have “an imperative to change the world”⁵¹ just like the idealists during 1930s. Carr believed that it was crucial to discern the line where “the combination of utopia and reality”⁵² meets. In this chapter, my goal is to emphasize that “politics are made up of two elements – utopia and reality-belonging to two different planes which can never meet.”⁵³

The central task before international lawyers is to solve the puzzle why countries sometimes comply with international law and other times flagrantly violate those rules. The main task before us is to evaluate alternative approaches in regard to the legal analysis of the Kosovo war. The objective is to understand how international law on the use of force during the NATO's intervention in 1999 worked.

In this chapter, I introduce three ways of thinking about compliance with the use of force in international law that will help us better understand why nations did not conform to the use of force rules embodied in the UN Charter. The first section outlines international legal positivism. The second part summarizes the arguments based on the Just War theory. In the third part I show why current positivism and the Just War theory do not lead to solving our puzzle and why a rational choice approach to the use of force rules is a more convenient theory for understanding the violation of the use of force rules during the Kosovo War.

NATO's intervention in 1999 in response to the Federal Republic of Yugoslavia's (hereinafter FRY) violation of human rights raised numerous legal questions concerning the right to respond to humanitarian crises. The United States did not tender any specific

⁴⁹ E.H. Carr, *The Twenty Years Crisis, 1919-1939 an Introduction to the Study of International Relations* at, Palgrave 2001 at 177.

⁵⁰ Carr stated “the utopian believes in the possibility of more or less radically rejecting reality, and substituting utopia for it by an act of will.”

⁵¹ Tim Dunne and Nicholas J. Wheeler, "Introduction." in *Human Rights in Global Politics* (Cambridge: Cambridge University Press. 1999.

⁵² E.H. Carr, *The Twenty Years Crisis, 1919-1939 an Introduction to the Study of International Relations* at, Palgrave 2001.

⁵³ E.H. Carr, *The Twenty Years Crisis, 1919-1939 an Introduction to the Study of International Relations* at, Palgrave 2001.

legal rationale for their intervention, resulting in difficulty justifying their action in conventional terms of the use of force. Much ink has been spilled over the Kosovo crisis but the literature is largely doctrinal, historical, and philosophical; hence, international legal scholars have focused on the question of legality under international legal norms and its justification under the emerging norm of “humanitarian intervention”.

While this dissertation attempts to discern some of the reasons why international law did not prevent NATO member states from waging war on the territory of the FRY, it is important to outline a comprehensive and detailed legal analysis of the military intervention.

Two kinds of theoretical perspectives have been often employed to analyze the Kosovo War. The first one, which lies within the branch of legal theory known as “positivism”, asserts that NATO’s military use of force was illegal because it violated Article 2(4), Article 39 and Article 53 of the UN Charter. The second school is that of “naturalism”, and argues, in essence, that NATO’s intervention was taken in defense of values, not interests and regardless of its illegality, it was morally justified.

This chapter does not proffer anything new with regard to the legal analysis of the Kosovo War but it aims to present the methods conventional international lawyers use, in order to illustrate that the rules embodied in the U.N. Charter get us nowhere. This chapter endeavors to take a step further and explain why a rational choice theory is a convenient tool that can contribute to a more fruitful analysis of the use of force rules. In addressing that analysis, it is important to note that this chapter does not propose a reform of the current international law regime rather it provides one of the possible avenues for tackling this issue.

The discussion below looks at the strict application of the Charter of the United Nations, which leads to a conclusion that NATO’s actions against FRY constitute a violation of the fundamental principles of international law. Positivism focuses on legal rules and consent in relations between states where rights and obligations about rules and principles are based primarily on the texts of treaties.

NATO’s intervention in 1999 in response to the Federal Republic of Yugoslavia’s violation of human rights opened numerous legal questions concerning the right to respond to humanitarian crises. The United States did not tender any specific legal rationale for their intervention, resulting in difficulty justifying their action in conventional terms of the use of force. Much ink has been spilled over the Kosovo crisis but the literature is largely doctrinal, historical, and philosophical; hence, international legal scholars have focused on the question of legality under international legal norms and its justification under the emerging norm of “humanitarian intervention”. While this dissertation attempts to discern some of the reasons why international law did not prevent NATO member states from waging war on the territory of the Federal Republic of Yugoslavia (hereinafter FRY), it is important to outline a comprehensive and detailed legal analysis of the military intervention.

Two kinds of theoretical perspectives have been often employed to analyze the Kosovo War. First one, which is located within the branch of legal theory known as “positivism”, asserts that NATO’s military use of force was illegal because it violated Article 2(4), 39 and 53 of the UN Charter. The second school is called “naturalism”, and argues, in essence, that the NATO’s intervention was taken in defense of values, not interests and regardless of its illegality, it was morally justified.

In this chapter, by using strict application of the Charter of the United Nations, I conclude that NATO's actions against FRY constitute a violation of the fundamental principles of international law. Positivism focuses on legal rules and consent in the relations of states where rights and obligations about rules and principles are based primarily on the words in treaties. They consider the UN Charter to be treated as a constitution that reflects to have power the same like in the national law. Based in the empiricism of Locke and Hume, positivists in international law, such as Humprey, Schachter and Henkin among lawyers and Donnelly among political scientists, have argued that rules take precedence over claimed principles or unprecedented customs of states.

UN(WORTHY) USE OF FORCE RULES

After NATO commenced "Operation Allied Force" in March 1999, FRY brought an action before the ICJ⁵⁴ against ten NATO member states arguing that military strikes were unlawful.⁵⁵ The argument provided by FRY that the NATO bombing was not simply an illegal act, rather it constituted a crime against peace and the crime of genocide.⁵⁶ FRY called for provisional measures to "cease immediately its use of force and...refrain from any act of threat or use of force against FRY."⁵⁷ Brownlie, who was representing FRY argued that: 1. The attack on the territory of FRY involves a continuing breach of Article 2(4) of the Charter of the United Nations; 2. The attack cannot be justified as individual or collective self-defense and is not authorized by any Security Council resolution. 3. Humanitarian intervention, the justification belatedly offered by the respondent States, has no legal authenticity whatsoever. 4. The reliance upon humanitarian intervention is in any case invalidated by the unlawful modalities of the aerial bombardment, and the means adopted by the respondent States are extremely disproportionate to the declared aims of the action; 5. The few exponents of humanitarian intervention invest the doctrine with a profile, which is totally dissimilar to this bombing campaign; 6. The command structure of NATO constitutes an instrumentality of the respondent States, acting as their agent.⁵⁸

The Court determined that it lacked *prima facie jurisdiction* necessary to indicate provisional measures as requested by FRY.⁵⁹ The lack of ICJ jurisdiction in the *Legality of the Use of Force* cases makes it difficult to explain the impact of NATO's intervention

⁵⁴ Legality of Use of Force (Serb. and Montenegro v. U.K.), Judgment, 2004 I.C.J. 1307, para 113;

⁵⁵ Yugoslavia's claim had concerned the following crimes: "unlawful use of force, unlawful intervention, violation of the humanitarian law of armed conflict, violation of the fundamental human rights of the Yugoslav population, breach of the obligation to respect Yugoslavia's rights of free navigation of navigable rivers, and violation of the Genocide Convention through the use of weapons containing depleted uranium" Rosenne, Shabtai. *The World Court: What It Is and How It Works*. Leyden: A.W. Sythoff, 1962. at 207

⁵⁶ O'Connell, Mary Ellen. *International Law and the Use of Force: Cases and Materials*, 2005 at 366.

⁵⁷ Schwabach, Aaron, Yugoslavia V. Nato, Security Council Resolution 1244, and the Law of Humanitarian Intervention. *Syracuse Journal of International Law and Commerce*, Vol. 27, No. 1, 2000 at 84.

⁵⁸ Mary E. O'Connell, *International Law and the Use of Force: Cases and Materials*, 2005 at 368. More about the analysis of these arguments see Paul R. Williams and Michael Scharff, *NATO Intervention on Trial: The Legal Case that Was Never Made*, *Human Rights Review*, January-March 2000.

⁵⁹ In particular, the ICJ claimed that Serbia and Montenegro "had not access to the Court"

in FRY on the *ius ad bellum* doctrine, and to explain important limitations for unilateral interventions in the future.⁶⁰

Hence, the decision by ICJ remained ambiguous since it neither affirms nor rejects the lawfulness of NATO's intervention. NATO member countries provided numerous justifications in order to prove that the military intervention was legitimate. The United States, Germany, and Belgium stressed the humanitarian aspect of the intervention.

THE USE OF FORCE UNDER THE UN CHARTER SYSTEM AND EXCEPTIONS TO USE FORCE

There is no universal definition of the "use of force" rules and it is a subject of controversy among many international legal scholars. It is widely believed that the use of force pertains to armed attacks. However, the ICJ emphasized that along with armed attacks, "the use of force could reasonably include economic coercion, political coercion, physical force not involving arms, or computer attack."⁶¹ Analyzing the drafting history of the UN Charter and interpretation by governments and the ICJ, Article 2(4) makes illegal any force except an armed force.⁶²

Since 1945, hundreds of violations have occurred and there is much controversy as to whether Article 2(4) represents a rule to which states consent.⁶³ I present both a strict and liberal approach to the question of the legality of NATO's intervention in Kosovo and I argue that NATO's use of force in FRY violated international law because it never received authorization from the United Nations Security Council and NATO member countries, including the United States, never claimed self-defense.

The League of Nations was founded with the principal aim of preventing future world conflicts and to guarantee peace and security among states.⁶⁴ Bearing in mind that the League of Nations failed to maintain peace and security in the world, nations again attempted to promote peace, this time through the system of the Charter of the United Nations. One of the main goals during the drafting process was to close the loopholes of the Kellogg-Briand Pact. As a result, the United Nations Charter uses the language of "use of force" instead of "war."⁶⁵

The United Nations Charter is an obligatory, multilateral treaty. It prohibits the use of force except when United Nations members act in self-defense or with the authorization of the UN Security Council.

⁶⁰ Cheng, Tai-Heng. *When International Law Works: Realistic Idealism after 9/11 and the Global Recession* Oxford: Oxford University Press, 2012 at 272.

⁶¹ O'Connell, Mary Ellen. *International Law and the Use of Force: Cases and Materials*, 2005 at 14.

⁶² O'Connell, Mary Ellen. *International Law and the Use of Force: Cases and Materials*, 2005.; More about the debate on the definition of armed force see Christine Gray, *International Law in the 21st Century: Rules for Global Governance*, International Law and the Use of Force.

⁶³ Michael Glennon, "The Fog of Law: Pragmatism, Security and International Law", Stanford University Press 2010.

⁶⁴ "The League of Nations had as its mandate the codification of international values, the resolution of disputes, and above all, the prevention of war", "International Crime and Justice" edited by Mangai Natarajan, 2011 at 345.

⁶⁵ Yoram Dinstein, *War, Aggression and Self-defence*. Cambridge: Cambridge University Press, 2011.

Article 2(4) is the cornerstone of the Charter of the United Nations⁶⁶ and it prohibits the use of force by individual states:

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

Article 2(4) is the subject of disagreement among legal scholars and states⁶⁷ as to its meaning. First, it is controversial whether it restricts all force, or only armed force. The ICJ stated in its opinion that “regardless of the common reference to ‘force’ in Article 2(4) the kind of force prohibited is armed force, not other kinds of forceful action.” On the other hand, Professor Brownlie interpreted Article 2(4) in accordance with *travaux préparatoires* and he argued that Article 2(4) outlaws *any* use of force by states.⁶⁸ In addition, some argue that the notion of “territorial integrity” as well as “political independence” of states may be considered like qualification but as Professor O’Connell argues, “they are not intended to restrict the scope of Article”.⁶⁹ Finally, Article 2(4) reads that states should refrain from the threat or use of force when not consistent “with the Purposes of the United Nations.”

Another reason that Article 2(4) is a subject of different opinions among international lawyers is because it is unclear as to whether it reflects customary international law, treaty or *ius cogens* norm. Simma argues that the threat or use of force against another state is part of customary international law and it has an essence in *ius cogens* norms.⁷⁰

Here, I shall focus only on the scope of Article 2(4) through a positivist lens, analyzing the United Nations Charter only. The next chapter of the dissertation shall

⁶⁶ The ICJ in *Armed Activities on the Territory of Congo* stated that Article 2(4) is a cornerstone of the UN Charter. See ICJ Reports (2005) 168 at *para* 148, 45 ILM (2006) 271.

⁶⁷ The debate is about whether ‘the use of force’ includes both armed forces and economic coercion. See Christine Gray, *International Law and Use of Force*, 2004 at 30. The uncertainty also addresses the question of what types of activities can amount to ‘use of force’ as opposed to Intervention or mere law enforcement. See the judgment in *Nicaragua case. The Republic of Nicaragua v. The United States of America*.

⁶⁸ Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo*, New York: Palgrave, 2001 at 111.

⁶⁹ On the other hand, Professor Henkin poses the question whether the prohibition of force against “the territorial integrity” of another state forbids only force designed to deprive it of territory, or also force which merely violates territorial borders however temporarily and for whatever purpose. In addition, he asks whether the prohibition of force against “the political independence” of another state outlaw force only if t its aim is to end another state’s political independence, or also force to coerce another government to take a particular decision. See Louis Henkin, *How Nations Behave: Law and Foreign Policy*. London: Pall Mall Press, 1968 at 140.

⁷⁰ “In contemporary international law. As codified in the 1969 Vienna Convention on the Law of Treaties (Articles 53 and 64), the prohibition enunciated in Article 2(4) of the Charter is part of *jus cogens*, i.e., it is accepted and recognized by the international community of States as a whole as norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same peremptory character. Hence, universal *jus cogens*, like the prohibition embodied in Article 2(4), cannot be contradicted out of at the regional level. Further, the Charter’s prohibition of the threat or use of armed force is binding on states both individually and as members of international organizations, such as NATO, as well as on those organizations themselves.” Brunno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, EJIL, 1999, Vol. 10, No. 1.

attempt to sketch some of the possible arguments that Article 2(4) mirrors customary international law and peremptory norms in order to ascertain whether NATO's use of force manifests an act of aggression under international law.⁷¹

Michael Glennon argues, "The qualification is in fact a broadening of the prohibition to include not only uses of force against the territorial integrity or political independence of any state but, in addition, other uses of force against a state that are inconsistent with the purposes of the United Nations."⁷² In the case of FRY, the argument for "the purposes of the United Nations" is not important because "if 'force' was not threatened and used by NATO against the 'territorial integrity' of FRY, it is difficult to imagine circumstances in which that standard would ever be met."⁷³

Taking into account both Article 2(4) and Article 2(7) a likely conclusion is that NATO's intervention in Kosovo was illegal. Namely, and albeit through a broad interpretation, Article 2(7) may permit the United Nations to intervene inside a state on grounds that human rights violations were not merely an issue of domestic jurisdiction, nevertheless this does not justify unilateral NATO action, which was undertaken without the Security Council authorization.⁷⁴ Yugoslavia's conduct was entirely within its own borders and against citizens on its territory. Namely, according to the Constitution of the Federal Republic of Yugoslavia (which was in force at the time), Kosovo was part of the territory of FRY. Bearing in mind that Article 2(7) does not permit the United Nations to intervene in matters that fall under the domestic jurisdiction of a state it is clear that the U.N. Charter was violated.

The next part is devoted to an analysis of Security Council authorization. It presents and criticizes the explicit and implicit blessing of the Security Council in the Kosovo case by applying both a strict and liberal interpretation. It concludes that neither explicit nor implicit authorization was granted to NATO to use force.

SECURITY COUNCIL AUTHORIZATION

As noted before, if not authorized by the Security Council, the use of force is illegal. In the Kosovo war case, if we apply a strict interpretation, it is likely to conclude that the use of force by NATO in the territory of FRY violates international law. Although the United Nations Charter requires explicit Security Council authorization to use force, proponents of liberal analyses of Article 2(4) of the United Nations Charter, hold that both prior and *ex post facto* resolutions authorized NATO to use force. I argue that the absence of explicit authorization by the Security Council to use force is a clear violation of the UN Charter.⁷⁵

⁷¹ More about the discussion of the Article 2(4): Ronziti "Use of Force, Jus Cogens and State Consent, in cassese", Weisburd Mark: "*The Emptiness of the Concept of Jus Cogens, as illustrated by the Law in Bosnia Herzegovina*" Michigan Journal of International Law, Vol. 17, No. 1, 1995.

⁷² Michael J. Glennon, Limits of Law, Prerogatives of Power: Interventionism after Kosovo, 2001 at 22.

⁷³ Michael J. Glennon, Limits of Law, Prerogatives of Power: Interventionism after Kosovo, 2001 at 22.

⁷⁴ See McCullough, H.B., 'Intervention in Kosovo: Legal? Effective?' 7 ILSA Journal of International and Comparative Law (2001).

⁷⁵ This claim has been supported by several legal scholars: Simma, Bruno "*NATO, the UN and the Use of force: Legal Aspects*," European Journal of International Law" 1999; Joyner, Daniel H "*The Kosovo Intervention Legal Analysis and a More Persuasive Paradigm*," European Journal of International Law,

The State Department during the Kosovo crisis stated that Security Council authorization was not required because "...as a result of and stemming from and relying upon the existence of Article 51 of the UN Charter, as well as the Washington Treaty that created NATO, that there is a position that such a Security Council resolution would be desirable but not imperative."⁷⁶ Shortly before NATO intervened, the Secretary of State Madeleine Albright, in contrast emphasized the importance of Resolutions:

*"... Acting under Chapter VII, the Security Council adopted three resolutions:-- 1160, 1190, and 1203 – imposing mandatory obligations on the FRY; and these obligations the FRY has flagrantly ignored. So NATO actions are being taken within this framework, and we continue to believe that NATO's actions are justified and necessary to stop the violence."*⁷⁷

Before turning in more detail to what I see as the main arguments for implicit authorization is, it is important to discuss possible justification under implicit authorization within Security Council resolutions.

During 1998, the Security Council passed three resolutions, which emphasized the deteriorating situation in Kosovo.⁷⁸ Security Council Resolution adopted on March 31, 1998 condemned the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as acts of terrorism by the Kosovo Liberation Army.⁷⁹ The Security Council acted under Chapter VII of the United Nations Charter and it banned arms sales to FRY and imposed economic sanctions aimed at ending the use of excessive force by the Serbian government. Moreover, Resolution 1160 called upon "the Federal Republic of Yugoslavia (...) to take the further necessary steps to achieve a political solution to the issue of Kosovo through dialogue and to implement the actions in the Contact Group statements of 9 and 25 March 1998."

If we take into account operative clause five and operative clause nineteen of Security Council Resolution 1160, there can be little question that NATO did not have explicit authorization to intervene in FRY. Namely, according to the pre-amble and operative clause five,⁸⁰ the Security Council affirmed "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia."⁸¹ Therefore, the Security Council denied any right of intervention at that

2002; Chaney Johnatan "*Anticipatory Humanitarian Intervention in Kosovo*" American Journal of International Law, 1999.

⁷⁶Glennon, Michael J. Limits of Law, Prerogatives of Power: Interventionism after Kosovo, 2001 at 25.

⁷⁷Glennon, Michael J. Limits of Law, Prerogatives of Power: Interventionism after Kosovo, 2001 at 25.

⁷⁸ SC Resolution 1160 (March 1998), SC Resolution 1199(September 1998), SC Resolution 1203(October 1998).

⁷⁹ SC Resolution 1160 (October 1998).

⁸⁰ [...]without prejudging the outcome of that dialogue, with the proposal in the Contact Group statements of 9 and 25 March 1998 that the principles for a solution of the Kosovo problem should be based on the territorial integrity of the Federal Republic of Yugoslavia and should be in accordance with OSCE standards, including those set out in the Helsinki Final Act of the Conference on Security and Cooperation in Europe of 1975, and the Charter of the United Nations, and that such a solution must also take into account the rights of the Kosovar Albanians and all who live in Kosovo, and expresses its support for an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration; SC Resolution 1160.

⁸¹ SC Resolution 1160.

time. Even though the operative clause nineteen emphasized that the “failure to make constructive progress towards the peaceful resolution of the situation in Kosovo will lead to the consideration of additional measures,”⁸² I am of the opinion that Security Council Resolution on Kosovo did not grant authorization for military intervention.

Security Council Resolution, which dealt with the Kosovo crisis, was passed on 23 September 1998, and was the subject of controversy because some scholars argue that NATO justified its military intervention on the grounds that the Security Council, by way of Resolution 1999, determined that “the situation in Kosovo constituted a threat to peace and security in the region.”⁸³ Bellamy states that Security Council Resolution 1160 recognized “that emerging conflict in Kosovo posed a ‘threat to international peace and security’.”⁸⁴ This notion lacks merit because Security Council Resolution 1160 does not mention these words.

Here, the Security Council reaffirmed the sovereignty and territorial integrity of FRY,⁸⁵ but it also emphasized “the need to ensure that the rights of all inhabitants of Kosovo are respected.”⁸⁶ Although the Security Council affirmed “that deterioration of the situation [...] continues a threat to peace and security in the region”⁸⁷, Security Council Resolution 1199 did not explicitly authorize intervention. The conclusion by the Security Council that “should the concrete measures demanded in Resolutions 1160 and 1199 not be taken, to consider further actions and additional measures to maintain or restore peace and stability in the region” opened the room for implicit interpretation of this Resolution, which will be discussed in the following part.

NATO member countries supported the need for a prompt end to the fighting by using an “activation warning” for an air campaign against the FRY. It is important to note the words of NATO Secretary General Javier Solana that Resolution 1199 did not allow the use of force and the “activation warning” was “an important political signal of NATO’s readiness to use force if it becomes necessary to do so.”⁸⁸ However, two weeks later NATO Secretary General Solana changed his position and said that the Kosovo crisis constitutes a threat to peace and security in the region:

Because of unfolding crisis in Kosovo and the impossibility of obtaining a Security Council authorization for the use of force to end the same due to Russian opposition, the NATO Allies believe that in the particular circumstances with respect to the present crisis in Kosovo as described in UNSC resolution 1999, there are legitimate grounds for Alliance to threaten, and if necessary, to use force⁸⁹.

⁸² SC Resolution 1160.

⁸³ Jasvir Singh Problem of Ethnicity: Role of United Nations in Kosovo Crisis, Unistar Books at 123.

⁸⁴ Aidan Hehir Kosovo, Intervention and Statebuilding: The International Community and the Transition to Independence 2010 at 46.

⁸⁵ SC Resolution 1199.

⁸⁶ SC Resolution 1199.

⁸⁷ SC Resolution 1199.

⁸⁸ NATO Press Statement 24.9.1998 <http://www.nato.int/docu/pr/1998/p980924e.htm>.

⁸⁹ Jasvir Singh Problem of Ethnicity: Role of United Nations in Kosovo Crisis at 125.

Some scholars argue that this statement, in which NATO's Secretary General Javier Solana mentions the unlikelihood of obtaining a Security Council resolution, makes the violation of the UN Charter "all the more flagrant."⁹⁰

It is important to read Resolution 1199 in conjunction with Articles 33, 41 and 42 of the UN Charter. Namely, Article 33 outlines the list of non-military means that should be exhausted.⁹¹ In addition, Article 41 provides a list of the coercive non-military measures that should be exhausted before employing the use of force.⁹² Finally, Article 42 reaffirms that the use of force is permitted only as a last resort. Bearing all these in mind, the Security Council was not able to determine the use of military means and Resolution 1199 "merely imposed certain demands on Yugoslavia and warned it that non-compliance with same would necessitate a consideration of further action."⁹³

The White House argued that NATO's intervention was endorsed by Security Council Resolutions 1199 and 1203 since they "affirm that the deterioration of the situation in Kosovo constitutes a threat to peace and security of the region."⁹⁴

A third Security Council Resolution was passed on 24 October 1998, which reaffirmed "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia."⁹⁵ However, Resolution 1203 invoked Chapter VII of the Charter and urged all "Member States and others concerned to provide adequate resources for humanitarian assistance in the region and to respond promptly and generously to the United Nations Consolidated Inter-Agency Appeal for Humanitarian Assistance Related to the Kosovo crisis."⁹⁶ Resolution 1203 did not explicitly authorize the use of force but it "reaffirmed the sovereignty and territorial integrity of Yugoslavia."⁹⁷

The key question to be addressed in evaluating permission to wage war is whether international law permits any authorization to use force other than explicit authorization. Lobel and Rather claim that only explicit Security Council authorization is permitted under international law.⁹⁸

⁹⁰ Jasvir Singh *Problem of Ethnicity: Role of United Nations in Kosovo Crisis* at 125.

⁹¹ The list includes: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice

⁹² The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

⁹³ Jasvir Singh *Problem of Ethnicity: Role of United Nations in Kosovo Crisis* at 123-124.

⁹⁴ William Brangin and John M. Goshko, *legality of Airstrikes Disputed in US, U.N.*, *wash. Post*, Mar. 27, 1999 at A 10. Cited by Walter Gary Sharp "Operation Allied Force: reviewing the Lawfulness of NATO's Use of Military Force to Defend Kosovo" 23 *Md. J. Int'l L. & Trade* 295, 1999.

⁹⁵ SC Resolution 1203 (1998).

⁹⁶ SC Resolution 1203 (1998).

⁹⁷ Jasvir Singh *Problem of Ethnicity: Role of United Nations in Kosovo Crisis* at 124.

⁹⁸ "[r]equiring clear Security Council authorization acts as a brake on the use of force by the international community: it is a procedural condition designed to fulfill the Charter's substantive goal of ensuring that force be employed only when absolutely necessary." Cited via Jeffrey S. Moron "The Legality of NATO's intervention in Yugoslavia in 1999: Implications for the Progressive Development of International Law, 9 *ILSA J Int'l & Comp L* 75, 2002 at 90.

A) IMPLICIT AUTHORIZATION

A main requirement to use force under a strict interpretation of the United Nations Charter is an explicit Security Council authorization. The foregoing part concluded that NATO intervention in the FRY in 1999 lacked explicit Security Council authorization to use force under Chapter VII of the UN Charter. Not only that, but the Security Council did not explicitly authorize the intervention, but also each resolution emphasized sovereignty and territorial integrity of FRY. Hence, here I shall focus on the liberal approach, which may include implicit and ex-post facto authorization to use force. In diplomacy, ambiguity is a central practice “since it creates the necessary room to manoeuvre and momentum for transaction and compromise.”⁹⁹

Michael Glennon compared the wording advanced in Security Council Resolutions 1160, 1199, and 1203 with those resolutions concerning Korea, the Gulf War, and Bosnia, which explicitly authorized use of force¹⁰⁰ and concluded that the Kosovo resolutions “contain no wording remotely like the Korea, Gulf War, or Bosnia resolutions that authorized the use of force.”¹⁰¹

One of the arguments, in contrast suggests that NATO was authorized to use force because Russia’s proposal to condemn Operation Allied Forces was disregarded.¹⁰² Namely, Russia introduced a resolution on March 26, with Belarus and India asserting that “NATO unilateral use of force against the FRY constituted a flagrant violation of the UN Charter and a threat to international peace and security.”¹⁰³ This resolution was supported by only three Security Council member states: Russia, China, and Namibia, while it was rejected by other Security Council member states.¹⁰⁴ Rejection of the Russian proposal paved the way for implicit authorization by the Security Council.

Resolution 1160 states, “that failure to make constructive progress towards the peaceful resolution of the situation in Kosovo will lead to the consideration of additional measures.” The wording “additional measures” is understood as “a reference to a future armed enforcement action under Chapter VII of the UN Charter.”¹⁰⁵

The subsequent Resolution 1199 declared that the situation in Kosovo posed “a threat to peace and security in the region.” Furthermore, the operative part 16 stated: “should the concrete measures demanded in this resolution and resolution 1160 (1998) not be taken, to consider further action and additional measures to maintain or restore peace and stability in the region”¹⁰⁶ Germany’s Foreign Minister Klaus Kinkel stated that

⁹⁹ Bolewski, W., *Diplomacy and International Law in Globalized Relations*, Springer, 2007 at 16.

¹⁰⁰ Glennon, Michael J. *Limits of Law, Prerogatives of Power: Interventionism after Kosovo*, 2001 at 31.

¹⁰¹ Glennon, Michael J. *Limits of Law, Prerogatives of Power: Interventionism after Kosovo*, 2001 at 31.

¹⁰² Two days before Russia proposed the Resolution, Russian Minister of Affairs Lavrov said on the UNSC 3988th meeting that “Those who are involved in this unilateral use of force against the sovereign Federal Republic of Yugoslavia—carried out in violation of the Charter of the United Nations and without the authorization of the Security Council—must realize the heavy responsibility they bear for subverting the Charter and other norms of international law and for attempting to establish the world, *de facto*, the primacy of force and unilateral diktat.”

¹⁰³ Roy Allison, *Russia, the West, and Military Intervention*, Oxford University Press, 2013 at 53.

¹⁰⁴ Professor Allison argues that this rejection of the Resolution “was surprising since it would have been only necessary to abstain from voting to defeat the text.” Roy Allison, *Russia, the West, and Military Intervention*, Oxford University Press, 2013 at 53.

¹⁰⁵ Bieber, Florian, and Židas Daskalovski. *Understanding the War in Kosovo*. London: F. Cass, 2003 at 156.

¹⁰⁶ SC Resolution 1199.

the wording in this resolution justified NATO's use of force in FRY¹⁰⁷ but he has hardly been alone in this view. The NATO Secretary General echoed this view:

*"[...] I conclude that the Allied believe that in the particular circumstances with respect to present crisis in Kosovo as described in UNSC resolution 1199, there are legitimate grounds for the Alliance to threaten, and if necessary, to use force."*¹⁰⁸

B) *EX POST* AUTHORIZATION

Explicit and prior Security Council authorization is considered as a rule.¹⁰⁹ However, Article 53 seems to be indifferent as to the form such authorization should take. The question of *ex post* authorizations arose in the 1960s when the Security Council dealt with OAS sanctions against the Dominican Republic.¹¹⁰

The principle of legality is a core value of international law. It pertains to the obligation for states, governments, and judicial and legislative bodies not to authorize *ex post facto* clauses.¹¹¹ The previous section showed that the Security Council did not condemn NATO's intervention in FRY. However, the Security Council's inaction does not constitute authorization of enforcement measures, also by a regional organization.¹¹² Here, I shall focus on Resolution 1244, which is debatable due to its potential retroactive ratification of the use of force by NATO. I argue that Security Council authorization must be given prior to, and not subsequent to the military operation.¹¹³

Some scholars argue that NATO had a retroactive authorization for the use of force.¹¹⁴ Resolution 1244 was adopted on 10 June 1999 by the Security Council following an agreement between the parties, which ended the NATO intervention.¹¹⁵ Here, I argue that Resolution 1244 cannot be viewed as lending retrospective endorsement of NATO's use of force because theory does not recognize *ex post facto* authorizations and state practice does not support subsequent authorization to use force. Namely, where the use of force contravenes international law, subsequent resolutions by the Security Council cannot be seen as legal because "they were based on the previous unilateral breach of international law by NATO and on the endorsement of, for example the Military Agreement concluded between KFOR and FRY, and obtained through the illegal

¹⁰⁷ Heike Krieger, *The Kosovo Conflict and International Law: An Analytical Documentation, 1974-1999*. Cambridge: Cambridge University Press, 2001 at 398.

¹⁰⁸ Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, EJIL, 1999, Vol. 10, No. 1. at 9.

¹⁰⁹ Cited via Max Planck Yearbook of United Nations Law, 1997 at 177.

¹¹⁰ The OAS ended diplomatic relations with the Dominican Republic and imposed economic sanctions on the country.

¹¹¹ Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, Cambridge University Press, 2010.

¹¹² Yoram Dinstein, *War, Aggression and Self-Defense*, 2011 at 337.

¹¹³ Yoram Dinstein, *War, Aggression and Self-Defense*, 2011 at 338.

¹¹⁴ Yoram Dinstein, *War, Aggression and Self-Defense*, 2011 at 314, see also Alain Pellet, "Brief Remarks on the Unilateral Use of Force", EJIL 11 (2000); Ruth Wedgwood, "*Unilateral Action in the UN System*", EJIL 11 (2000).

¹¹⁵ Resolution was adopted by fourteen Security Council members' votes to none against (with a Chinese abstention). The Russian Federation supported this resolution because it was based on the G-8 principles. On the other hand, China claimed that it did not block adoption of the resolution because Yugoslavia accepted the peace plan. See <http://www.un.org/News/Press/docs/1999/19990610.SC6686.html>

use of force contrary to Article 52 Vienna Convention on the Law of Treaties.”¹¹⁶ Article 52 states:

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

In addition, international law does not permit subsequent authorization by the Security Council because “UN would act in bad faith if it profited from illegally gained advantages and by that perpetuated the illegally created situation.”¹¹⁷ Although this argument is based on several court decisions and is also found in some international documents,¹¹⁸ the argument is not persuasive because the doctrine of good faith is too vague to be enforced in international law.¹¹⁹

It is argued that cases in Liberia, Sierra Leone and Iraq, in which the use of force was justified based on subsequent ratification of resolutions, serve as examples similar to the Kosovo crisis. I believe that these cases cannot be compared with NATO’s justification in FRY in 1999 for several reasons. First, the Security Council treats crises as if they were *sui generis*.¹²⁰ Moreover, the political situations in Liberia and Sierra Leone differ from the political circumstances in Kosovo.¹²¹ Finally, in these two cases “the authorization was addressed to a regional organization.”¹²²

Following NATO’s intervention, the Security Council had several chances to approve NATO bombing *ex post facto*. Namely, the Security Council issued Resolution 1239 on May 14, 1999 that was very neutral and did not approve, censure or criticize NATO’s intervention. Resolution 1239 “noted with interest the intention of the Secretary

¹¹⁶ See W. Weiss, “Security Council Powers and the Exigencies of Justice after War”, 12 MPYUNL, 45 cited via Yoram Dinstein, *War, Aggression and Self-Defense*, 2011 at 309.

¹¹⁷ See Wolfgang Weiss, “Security Council Powers and the Exigencies of Justice after War”, 12 MPYUNL, 2008 at 49.

¹¹⁸ For example, ICJ decision states that good faith is “[o]ne of the basic principles governing the creation and performance of legal obligations.” Furthermore, *bona fides* concept is found in Article 38 of the ICJ. In addition, Article 2 of the United Nations Charter provides that “[a]ll Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with... Charter”. Article 26 of the Vienna Convention on the Law of Treaties of 1969 states that “[e]very treaty in force is binding upon the parties to it and must be performed in good faith”. Vienna Convention also provides an obligation to states that “[a] treaty shall be interpreted in good faith”.

¹¹⁹ There has been a large volume of literature published on the doctrine of *bona fides* in the theory of just war. However, bearing in mind the methodology of this dissertation, I shall not focus my arguments on explaining its implementation in the Kosovo case.

¹²⁰ My argument is based on the fact that the Security Council drafts resolutions for each case without referring to other crises. For example, in the Kosovo case Security Council in Resolution 1199 referred to Resolution 1160.

¹²¹ Professor Gazzini states: “In Liberia, the significance of the authorization of the use of force is reduced by the fact that the ECOWAS operations action were allegedly undertaken with the consent of the concerned parties and, more importantly, were qualified by the Security Council and most of its members as peace-keeping operations”. As per the Sierra Leone case he holds that: “the naval coercive measures decided on and undertaken by ECOWAS had been authorized by the Security Council when they were underway, not afterwards,” See Tarcisio Gazzini, “The Changing Rules on the Use of Force in International Law”, Manchester University Press, 2006.

¹²² See Gazzini T., “The Changing Rules on the Use of Force in International Law”, 2005.

General to send a humanitarian needs assessment mission to Kosovo and other parts of the FRY” and “reaffirmed the territorial integrity and sovereignty of all states in the region.”¹²³ The Security Council issued Resolution 1244 as an end to the NATO campaign that “decided on the deployment in Kosovo, under UN auspices, of international civil and security presence, with appropriate equipment and personnel as required.”¹²⁴ Resolution 1244 did not provide any comment on or analysis of NATO’s intervention in Kosovo and it concerns the situation as the Security Council found it. Glennon argues that Resolution 1244 does not have retroactive application because “if the Council had wished to maintain its previous posture of silence with respect to NATO’s action, the Resolution would not have been carried out any differently.”¹²⁵

To recapitulate my argument so far: In order to wage war lawfully under international law, states must obtain Security Council authorization. In the case of NATO’s intervention in FRY, neither implicit nor explicit authorization was given. The following section is devoted to an analysis of the exception to the prohibition on using force, Article 51.

SELF DEFENSE AND UNITED NATIONS CHARTER

In the absence of UN Security Council authorization, states may lawfully use force in self-defense in accordance with Article 51. This article is firmly rooted in the United Nations Charter and it states that:

*“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence 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.”*¹²⁶

Furthermore, Article 5 of the NATO Treaty allows NATO to use force in self-defense against an “armed attack.”¹²⁷ This is the fundamental principle of the NATO and “It provides that if a NATO ally is the victim of an armed attack, each and every other

¹²³ SC Resolution 1203.

¹²⁴ SC Resolution 1244.

¹²⁵ Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo*, 2001 at 34.

¹²⁶ Article 51 of the UN Charter.

¹²⁷ *The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. 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.*

member of the Alliance will consider this act of violence as an armed attack against all members and will take the actions it deems necessary to assist the Ally attacked.”¹²⁸ Individual or collective self-defense using armed force is only acceptable in the case of an armed attack. The main problem with using these provisions to justify NATO’s intervention is that FRY did not attack another nation or UN member because the province of Kosovo was not an independent state but was a part of the territory of the FRY. This is reaffirmed in Article 2(7) of the United Nations Charter: “Nothing...in the present Charter shall authorize the United Nations to intervene in matters which essentially are within the domestic jurisdiction of any state...”

It is widely recognized that recourse to Article 51 (self-defense and collective self-defense) is available when a humanitarian crisis transcends international borders and leads to armed attacks against other states. It seems that even under the broadest interpretation of self-defense, the war in Kosovo does not fall under Article 51 because Yugoslavia’s actions were completely within its own territory and against its own citizens. FRY did not pose a threat to the United States and showed no sign of hostility that it would do so. “The probability of an attack on the United States was almost non-existent, and the magnitude of an attack would have been small.”¹²⁹

However, the opposing argument is that FRY was a “threatening presence” in the region, which gives right to exercise collective-self defense.¹³⁰ Advocates for this position argue that although the treatment of ethnic Albanians in Kosovo was an internal matter for FRY, it had the potential to spread regionally. The Clinton Administration and NATO relied on the justification that the action “was the potential disruption to European security that Yugoslavia’s assault on the Kosovar Albanians could cause.”¹³¹ The major concern was that refugees “will likely reignite the historical animosities, including those that can embrace Albania, Macedonia, Greece [and] even Turkey.”¹³² Namely, Yugoslav military, paramilitary and police forces forcibly expelled more than one million Kosovars. Starting from March 1998, roughly 700,000 Kosovars fled to neighboring states.¹³³ Such an exodus had the potential to destabilize the countries in the region.¹³⁴ Therefore, the end to the war in FRY helped “reduce the chance of a wider conflict.”¹³⁵

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¹²⁸ Article 5 NATO.

¹²⁹ John C. Yoo. "Using Force" U. Chi. L. Rev. 71 (2004) at 28.

¹³⁰ More about Kosovo and collective self defense *see* Patrick T. Egan, The Kosovo Intervention and Collective Self-defense, *International Peacekeeping* 8, 2001; Leslie A. Burton Kosovo: To Bomb or not to Bomb? The Legality is the Question, 7 *Annual Survey of International & Comparative Law*, 2001.

¹³¹ Abraham D. Sofaer, *International Law and Kosovo*, 36 *Stan. J. Int’l L.* 1 n. 7, 14 (2000).

¹³² The President’s News Conference, 35 *Weekly Comp. Pres. Doc* 471 (Mar. 29, 1999) cited via Walter Gary Sharp “Operation Allied Force: reviewing the Lawfulness of NATO’s Use of Military Force to Defend Kosovo” 23 *Md. J. Int’l L. & Trade* 295, 1999.

¹³³ Heike Krieger, *The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999*, 2012 at 84.

¹³⁴ Kosovars not only fled to neighboring countries including Albania, Bosnia-Herzegovina, the Former Yugoslav Republic of Macedonia, and the Republic of Montenegro but they fled to Italy, Austria, Hungary and Greece. *See* *The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999* edited by Heike Krieger, *The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999*, 2012 at 84.

¹³⁵ *See* John C. Yoo. "Using Force" U. Chi. L. Rev. 71 (2004) at 83.

Chapter VII of the UN Charter permits the Security Council to take “far reaching decisions which are binding on member states.”¹³⁶ Security Council adopted Resolution 1199 based on Chapter VII of the UN Charter, in which it emphasized that the situation in Kosovo constitutes a “threat to peace and security in the region.” However, as was mentioned earlier Resolution 1199 did not explicitly allow NATO to use force. The Security Council may approve the use of force under the provisions of Article 39, 41 and 42. I claim that none of these provisions can be implemented in the case of Kosovo because Security Council resolutions did not explicitly authorize NATO to use force in the territory of FRY, as explained in the previous section.

An Article 39 authorizes the Security Council “to determine the existence of any threat to the peace, breach to peace or act of aggression” and permits it “to make recommendations, or decide what measures shall be taken...to maintain or restore international peace and security.”¹³⁷

The Security Council in accordance with Article 41 may impose economic and other sanctions, which do not involve armed force. Although Article 41 pertains to the employment of non-military sanctions, “it has been clearly established that it can provide a legal basis for a fuller range of measures not involving the use of armed force.”¹³⁸ Moreover, if the Security Council decides that such measures are insufficient to “maintain or restore international peace and security”, then it may authorize the use of armed force as stated in Article 42. Article 42 may permit use of force but only as a last resort, which follows that the Security Council should specify the use of military means. However, Resolution 1199 did not determine that non-military measures were unsuccessful in dealing with the threat posed by the Kosovo crisis¹³⁹.

None of the abovementioned resolutions allowed for even the less severe sanctions referred to in Article 41 or the use of force under Article 42. These articles cannot be applied to the case of Kosovo because in order for states to use force, Article 25 obliges them “to accept and carry out decisions of the Security Council...”. As mentioned earlier, NATO did not have Security Council authorization.¹⁴⁰ In fact, it was impossible to obtain Security Council authorization because China and Russia would have exercised their vetoes.

Secretary of State Madeleine Albright stated that the Security Council “by issuing these Resolutions, had authorized the use of armed force in Kosovo,”¹⁴¹ This argument lacks merit because “nothing in the U.N. Charter provides for an Article 39 resolution to

¹³⁶ More about Chapter VII see David Schweigman, *The Authority of the Security Council Under Chapter VII of the UN Charter: Legal Limits and the Role of International Court of Justice*, Martinus Nijhoff Publishers, 2001.

¹³⁷ When applying this provision to the case of Kosovo, there is the problem of a lack of definition and inconsistent practice in interpreting “threat to peace, breach of peace or act of aggression”. Professor Michael Glennon argues that should be interpreted within the scope of Articles 2(4) and 2(7) and therefore it refers to a threat of action by a state that is “violent and has cross-border effects”

¹³⁸ See Gary Wilson, *The United Nations and Collective Security*, Routledge, 2014 at 85.

¹³⁹ UNSC 1199.

¹⁴⁰ UN secretary General Kofi Annan affirmed that NATO lacked SC authorization.

¹⁴¹ Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo*, 2001 at 52

be construed as a self-executing Article 42 resolution.”¹⁴² States do not have Security Council authorization to use armed force to enforce Security Council resolutions.¹⁴³

AUTHORIZATION UNDER CHAPTER VIII OF THE UNITED NATIONS CHARTER AS REGIONAL ARRANGEMENT

Further support for a legal defense of FRY can be found in Chapter VIII that concerns regional responses to threats to peace.

Article 52 states that nothing in the Chapter precludes “[...] regional arrangements or agencies from dealing with matters relating to the maintenance of international peace and security”; these arguments and activities must be “consistent with the Purposes and Principles of the United Nations.”¹⁴⁴ Pellet argues that NATO’s intervention is an exemplification of “regional or collective unilateralism.”¹⁴⁵ Article 52 should be read in conjunction with the “territorial integrity” provision of Article 2(4). Doing so would seem sufficient to render unilateral action by NATO in Kosovo illegal.

The use of force in the form of an enforcement action taken by a regional agency also requires prior Security Council authorization under Article 53: “The Security Council shall...utilize such regional arrangements or agencies...but no enforcement action shall be taken...without the authorization of the Security Council” Therefore, a contextual interpretation of the language of Article 53(1) might lead to the conclusion that the state has to be a member of a regional organization invited by the Security Council to use force. Therefore, even under such a narrow interpretation of Article 53(1), NATO would not be allowed to intervene because FRY was not a NATO member.

However, some scholars claim that the Security Council has construed the UN Charter differently in practice. The Southern Rhodesia case is an example where the Security Council utilized a regional organization for enforcement action outside the boundaries of the region, because “the organization in question is willing and able to serve as an instrument for performing the task assigned to it.”¹⁴⁶

This chapter does not lend legal justification, based on Chapter VIII, to NATO’s intervention in Kosovo for the following reasons. First, even though the UN FRY representative at the meeting on February 1, 1999 stated “...the decision by NATO, as a *regional agency*, to have its Secretary-General authorize air strikes against targets on FRY territory...”,¹⁴⁷ NATO is an international organization, not a regional organization¹⁴⁸ in the sense of Chapter VIII.¹⁴⁹ Further, even if NATO was considered a regional organization, the absence of Security Council authorization for NATO’s use of force is sufficient to conclude that the requirement found in Article 53 is not ‘formally

¹⁴² Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo*, 2001 at 52

¹⁴³ Walter G. Sharp, *Operation Allied Force: Reviewing the Lawfulness of NATO’s Use of Military Force to defend Kosovo*, at 323-24.

¹⁴⁴ U.N. Charter, Article 52(1).

¹⁴⁵ Pellet Alain, “Brief Remarks on the Unilateral Use of Force”, *EJIL* Vol. 11 No. 2 2000, 385-392.

¹⁴⁶ Yoram Dinstein, *War, Aggression and Self-Defense*, 2011 at 311.

¹⁴⁷ *Review of International Affairs*, Vol.49-50.

¹⁴⁸ Advocates who claim that NATO is a regional organization, argue that “when acting under Article 53(1), Resolutions 816 and 836 lend full legitimacy to the NATO military operation in Bosnia-Herzegovina” See Yoram Dinstein, *War, Aggression and Self-Defense*, 2011 at 312.

¹⁴⁹ See Brunno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, *EJIL*, Vol. 10. 1999.

applicable' to the case of Kosovo. Finally, there is uncertainty surrounding the conditions under which a regional organization can conduct actions. The NATO operation may also be viewed as "an important and undeniable invocation of the so-called right of humanitarian intervention in state practice."¹⁵⁰

THE NATURAL LAW APPROACH

Whoever invokes humanity is trying to cheat
-Carl Schmitt-

The previous section shows that NATO's intervention was a flagrant breach of the most fundamental norms of the UN Charter. NATO's intervention has sparked debate about its legal nature and scholars have been divided between arguments as to whether the use of force was exercised for values or the intervention was held for maximizing interests. The rest of this dissertation is based on the strategic approach to international law and realism opposes the application of morality to international relations by saying that moral actions constitute a menace to international order.¹⁵¹ However, it is important to explain the Just War theory because the major literature on Kosovo primarily focuses on the question of morality and the main argument is that the war was illegal but justified under the doctrine of humanitarian intervention.¹⁵² Therefore, this part brings some of the most important work in the Just War theory written by leading scholars throughout history and it aims to provide the main arguments for the justification.

Although Article 2(4) was adopted 70 years ago, its roots date back to ancient times and the ancient world when the Just War Theory was created. Just War doctrine has always been an opportune instrument for justifying illegal wars and it opens one of the most pressing questions facing legal philosophers: When is a military action, a *just* action? This question has preoccupied scholars for the last two millennia and the debate continues today with the crises in Ukraine and Syria.

The Just War theory has a long history with roots in ancient times when a primitive international law was more interested in the normative questions of why states should comply with international law than in the positive question of why they actually

¹⁵⁰ Yoram Dinstein, *War, Aggression and Self-Defense*, 2011 at 315.

¹⁵¹ Charles Krauthammer stated that "statesmen... do not have the right to launch their nations into large unfathomable military adventures to risk not their lives but the lives of their countrymen purely out of humanitarian feeling."

¹⁵² More about the humanitarian intervention and just war theory and the Kosovo war: McCullough, H.B., 'Intervention in Kosovo: Legal? Effective?' 7 *ILSA Journal of International and Comparative Law* (2001). Abraham D. Sofaer, *International Law and Kosovo*, 36 *Stan. J. Int'l L.* 1 n. 7, 14 (2000); Walter G. Sharp Sr., *Operation Allied Force: Reviewing the Lawfulness of NATO's Use of Military Force to Defend Kosovo*, 23 *Md. J. Int'l L.* 295, 323-24, (1999), Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects", in *European Journal of International Law*, (1999), Richard Bilder: "Kosovo and the 'New Interventionism', *Promise or Peril*" / 9.1 *J. Transnational Law & Policy* 153(1999), Michael J. Glennon, *The New Interventionism: The Search for a Just International Law*, 78 *Foreign Affairs* at 6 (May/June 1999).

do so.¹⁵³ Their interest in what is morally right and wrong should not be surprising to us given that power of religion at that time.¹⁵⁴

Jus ad bellum rules regulate the conditions under which a State may resort to force. The *jus in bello* rules regulate conduct in war. Under *jus ad bellum* rules, a war is justified if it meets the criteria of just cause, right authority, right intention, reasonable prospects of success, proportionate cause, and a last resort.¹⁵⁵

The just war theory and in particular, the idea of the “just and pious” (*justum piumque*) wars date back to Roman law.¹⁵⁶ Rome used force with religious ceremony and without priests’ approval a war could not commence.¹⁵⁷

St. Augustine proposed a new Just War theory approach at a crucial point in Christianity when it became “linked to the secular power of the Roman Empire.”¹⁵⁸ He believed that a particular use of force might be considered ethically justifiable if it met the core just war principles before (*jus ad bellum* rules) and during (*jus in bello* rules) a war¹⁵⁹. The main puzzle for St. Augustine was whether one could wage war without a

¹⁵³ More about the general theory of compliance with ancient international law see Harold H. Koh, Why Do Nations Obey. *International Law? The Yale Law Journal*, vol 106, no. 8, 1997.

¹⁵⁴ For instance in Rome the priests (*fetiales*) had to execute *jus fetiale*, which was part of *ius sacrum*. In Rome, for a just war to start, it had to receive the approval of the Roman priests. Namely, *fetiales* conducted *fetial* procedure and rituals before the declaration of war to guarantee that the war would be regarded as a “just war”. In these rituals, Roman priests had to determine whether “the duties owed to Rome by her neighbors had been violated, i.e., whether or not Rome had been wronged”. G.I.A. D. Draper “The Origins of the Just War Traditions.” 1964. The role of *fetiales* was to “take care that the Romans do not enter upon an unjust war against any city in alliance with them, and if others begin the violation of treaties against them, to go as ambassadors and first make formal demand for justice, and then, if the others refuse to comply with their demands, to sanction war” Naphtali Lewis, Meyer Reinhold *Roman Civilization: Selected Readings*, 1990 at 144.

¹⁵⁵ Jeff McMahan, Just Cause for War. *Ethics & International Affairs*, 19, 2005, 1-21.

¹⁵⁶ Although the theory was advanced in ancient Rome, it is believe that “[...] Roman contributions to the just war ‘conversation’ had significantly less impact in the war-decision than did those in Hebrew and Greek civilizations” Michael J. Butler, *Selling a 'Just' War: Framing, Legitimacy, and US Military Intervention*, Palgrave Macmillan, 2012 at 299. Also, Christian critics of just war theory argue that the idea was established not by Christian thinkers but with pagan Romans.

¹⁵⁷ Robert J. Delahunty and John Yoo, *From Just War to False Peace*, 13 *CHI. J. INT'L L.* 1, 2012. They also emphasize that Cicero observed just war theory as a part of natural law. “In a republic the laws of war are to be maintained to the highest degree. For there are two ways of deciding an issue, on through discussion, the other through force [...] The former [is] appropriate for human beings the later for beasts” See Cicero, *De officiis*, Book I, 11 cited in Robert J. Delahunty and John Yoo, *From Just War to False Peace*, 13 *CHI. J. INT'L L.* 1 (2012), at 8. They conclude that “Cicero’s vision of just war was an ideal, one which Rome rarely, if ever, followed in its long conquest of the Mediterranean world” Robert J. Delahunty and John Yoo, *From Just War to False Peace*, 13 *CHI. J. INT'L L.* 1 (2012) at 9.

¹⁵⁸ Brownlie, Ian. *International Law and the Use of Force by States*. Oxford: Clarendon Press, 1963 at 5. Also, it is important to note that “the work of the late Roman and early medieval thinkers did not train their sights primarily on state policy and notions of international law. Rather, the question remained whether individuals could serve in the military and kill in combat without violating their Christians ideals.” Yoo and Delhanunty at 11. Moreover, his “religio-philosophical” rules resulted were borrowed from Cicero’s ideas which he mixed with “the divine purpose of waging war to advance the will of God and biblical principles” Robert J. Delahunty and John Yoo, *From Just War to False Peace*, 13 *CHI. J. INT'L L.* 1 (2012), at 8.

¹⁵⁹ Professor Karoubi states that the work of St. Augustine pertained to *jus ad bellum* rules rather than *jus in bello* rules Just Or Unjust War? *International Law and Unilateral Use of Armed Force by States at the Turn of the 20th Century*. According to St. Augustine, it is just to use force “in self-defense, to restore what was stolen, to respond to wrongdoing in an attempt to deter future wrongs, and to promote Christianity” J Von

sin?¹⁶⁰ According to his theory, a war can be just only if a number of criteria are met. Nonfulfillment of these principles results in proving that “war is unjust and participation is sinful.”¹⁶¹ After the Christians established the Holy Roman Empire in 800 after the crowning of Charlemagne the just war theory continued to be developed. He was a leading thinker who accomplished the goal of “systematic and realistic elaboration of all thought in light of collective traditions and newly emerging forces pointing to the future”¹⁶² in developing Just War doctrine by merging Aristotle’s method with natural law.¹⁶³ His major contribution to the just war theory was his principle of “double effect”.¹⁶⁴ Aquinas acknowledges that war is evil and the use of force can be morally justified only under three conditions: First of all, the war has to be declared by a legitimate authority. Second, the conflict must come from a good cause. Third, a military action has to be fought by a right intention.¹⁶⁵ This Just War theory proposed by Aquinas has been largely criticized and in order to overcome some of the shortcomings, later thinkers added several more conditions for a just war such as a last resort. Moreover, war can be declared only when there is a certain and imminent danger of an attack or invasion by a foreign power. The condition of reasonable probability of success as well as proportional end are the final two requirements that a state has to meet.

Hugo Grotius was responsible for the development of the rise of modern public international law and is often cited as the “father of international law”. He was one of the most famous legal theorists with his famous book *De Jure Belli Ac Pacis* (On the Law of War and Peace) in which he tried to secularize just war doctrine by utilizing natural law theory by arguing that “[war] cannot be just on both sides”.¹⁶⁶ His work represents the

Elbe “The Evolution of the Concept of the Just War in International Law” (1939) 33 American Journal of International Law at 665.

¹⁶⁰ For different interpretations of the St. Augustine’s just war theory see John Yoo, *Point of Attack, Preventive War, International Law, and Global Welfare*, Oxford University Press, 2014.

¹⁶¹ Companion Encyclopedia of Theology edited by Peter Byrne, Rev Prof Leslie Houlden at 717.

¹⁶² William Ebenstein, Alan O. Ebenstein, *Great Political Thinkers: Plato to the Present*, Harcourt College Publishers 2000.

¹⁶³ See Michael Farrell, *Modern Just War Theory: A Guide to Research* at 77. The critics say that Francisco de Vittoria is responsible for integrating natural law into just war theory. “Although Aquinas in principally knows as the father of modern natural law theory, and for introducing the ideas of Aristotle in scholastic philosophy, he did not apply either to the concept of just war.” Lawrence Rockwood, *Walking Away from Nuremberg: Just War and the Doctrine of Command Responsibility*. Amherst: University of Massachusetts Press, 2007 at 21.

¹⁶⁴ He argues “It is necessary that the belligerents should have a right intention so that they intend the advancement of good or avoidance of evil. Hence Augustine says...” True religion looks upon as peaceful those wars that are waged not for motives of aggrandizement, or cruelty, but with the object of securing peace, of punishing evil doers, and of uplifting the good.’ Furthermore, “The passion for inflicting harm, the cruel thirst for vengeance, and unpacific and relentless spirit, the fervor of revolt, the lust of power, and such like things all these are rightly condemned in war.” See Joseph E. Capizzi, *Politics, Justice, and War: Christian Governance and the Ethics of Warfare* Oxford University Press, 2015 at 117.

¹⁶⁵ Shadia B. Drury, *Aquinas and Modernity: The Lost Promise of Natural Law*. Lanham, MD: Rowman & Littlefield Pub., 2008 at 66.

¹⁶⁶ He had three main contributions to the just war doctrine: “The relations of states can be judged as if they were individuals, crimes by nations can be addressed in the same way as individual crimes; and the reciprocity of malice among nations must be replaced by a reciprocity of trust.” Rockwood Lawrence. *Walking Away from Nuremberg: Just War and the Doctrine of Command Responsibility*. Amherst: University of Massachusetts Press, 2007 at 21. According to Grotius’s just war theory “war is justifiable when, and only when, it serves right. Since the conditions for service to right are numerous and

transition from the Christian just war theory to a universal international law, which includes elements from theology and natural law. It is difficult to interpret his role in the codification of the just war doctrine and therefore, it is not clear whether he developed or rejected just war theory.¹⁶⁷ Soon after Grotius's death, European leaders signed a series of peace treaties (The Peace of Westphalia) that ended the Thirty Years' wars (1618-1648). It is believed that the "Peace of Westphalia" was the "first attempt at international organization for the maintenance of peace."¹⁶⁸ Therefore, it should not be surprising that "contemporary scholars have often argued that one of the major Grotian's contribution was creation of legal order in Western Europe after the War."

The end of the 18th century brought with it a shift from natural law doctrine to the theory of positive law when it comes to the use of force although the just war doctrine was not completely eliminated because it was deeply rooted in the Western legal thought.¹⁶⁹ Emmerich de Vattel in his book "The Law of Nations" transformed the law above states to the law made by states. He argued that "disputes arise from injuries received or from contests over rights" and thus he urged states to use different ways of peaceful settlement such as "arbitration, multi-state conferences, congress and inquiry."¹⁷⁰ Although positivism began to ignore natural law in different areas of law, in the field of peace and war natural law theory was still the primacy. The 19th century brought different ways of using force with less formal declarations of war and states adopted Clausewitz's formula that war is the continuation of policy by other means. However, regardless of this pragmatic approach to wars, leaders continued to justify wars mostly because of the important role of domestic public opinion in circumstances where use of force was deployed.

With the entry of the USA into the Great War on 6 April 1917, President Woodrow Wilson announced his peace goals before the end of conflict and he had high hope for lasting postwar peace. During the period of the League of Nations, states tried to strengthen the system with additional treaties such as the Kellogg Briand Pact in 1928. It was an ambitious document, with the shortcoming being that, very soon after its adoption, it became an obsolete document. Christopher Joyner summarizes it: "First, it contained no teeth in the form of enforcement powers; second, it failed to furnish any

nonobvious, [Grotius] must expend considerable effort identifying and explicating them." Miller, Stanford Encyclopedia of Philosophy. Cited in John Yoo, Point of Attack, Preventive War, International Law, and Global Welfare, Oxford University Press, 2014 at 56.

¹⁶⁷ Michael Walzer argued that Grotius "incorporated just war theory into international law" Michael Walzer, *Arguing about War*. New Haven: Yale University Press, 2004 at 5. However, there are scholars who reject this view and argue that "his doctrine of the law of nations effectively *overturned* traditional just war theory [and] Grotius did not so much codify just war theory as eviscerate it." See Robert J. Delahunty and John Yoo, *From Just War to False Peace*, 13 *CHI. J. INT'L L.* 1 (2012) at 18.

¹⁶⁸ A Nussbaum A Concise History of Nations, 1962 at 117 cited in Mary Ellen O'Connell, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement*. New York: Oxford Univ. Press, 2011.

¹⁶⁹ However, there are legal scholars who argue that "the legal positivism of the 19th century brought dualism [amalgamation of natural law and positive law] to an end, as natural law was cast out of the world of law and reduced to a code of morality." Randall Lesaffer, 'Too much history: from war as sanction to the sanctioning of war', in Marc Weller, Alexia Solomou, and Jake William Rylatt. *The Oxford Handbook of the Use of Force in International Law*, Oxford, Oxford University Press, 2015, at 45.

¹⁷⁰ Mary E. O'Connell "Peace and War" in *Bardo Fassbender, Anne Peters, and Simone Peter. The Oxford Handbook of the History of International Law*. Oxford: Oxford Univ. Press, 2012 at 278.

means of deterrence against potential aggressor governments; and third, it proved for no mandatory dispute settlement procedures among the parties.” However, he acknowledges one good thing about the Pact that it “stipulate[s] a prohibition on the right to go to war and ensured that the right to use force.”¹⁷¹

After explaining the main Just War literature and the origins of humanitarian intervention, this sections proceeds with an analysis of the legal justification of NATO’s intervention in 1999. The Kosovo War represents the central debate about humanitarian intervention and it “brought the controversy to its most intense head¹⁷²” in addition to triggering the adoption of the Responsibility to Protect Doctrine. The Kosovo Report concluded that the NATO military intervention was “illegal but legitimate.”

As mentioned above, the military intervention was unlawful under the textual approach to international law because it violated Article 2(4) of the UN Charter. There is no provision in the UN Charter that allows states to use force contrary to Article 2(4). Hence, the legal basis for humanitarian intervention can be found in customary international law. Bearing in mind that states have rarely used force legally, they have had to justify their illegal wars and thus they privilege justice over order.¹⁷³

There are several justifications for defending the legality of humanitarian intervention. One group of scholars argue that the humanitarian intervention is in accordance with the Article 2(4) because military intervention for humanitarian purposes is not directed against “the territorial integrity or political independence” and is not “inconsistent with the Purposes of the United Nations.”

The second group of scholars relates to the functional approach and their argument is that the purpose of the United Nations is to preserve peace and security in the world and when the Security Council is not able to carry out its duties, the states have a responsibility to act and the prohibition of the use of force embodied in Article 2(4) is suspended.¹⁷⁴

The third approach is related to the customary international law development of the humanitarian intervention.¹⁷⁵ International law customs are codified in Article 38 of the Statute of ICJ.¹⁷⁶ President Clinton called the bombing a moral duty and declared NATO’s intervention “a just and necessary war”. Moreover, British Prime Minister Tony Blair stated that NATO “must be willing to right wrongs and prosecute just causes.”¹⁷⁷

¹⁷¹ Christopher C. Joyner, *International Law in the 21st Century: Rules for Global Governance*. Lanham, MD: Rowman & Littlefield, 2005.

¹⁷² International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Research, Bibliography, Background*, vii.

¹⁷³ “Humanitarian intervention exposes the conflict between order and justice at its starkest” Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford University Press, 2011, at 11.

¹⁷⁴ Robertson argues that Article 2.4. “means to prohibit any armed attack which is inconsistent with Charter purposes, and does not necessarily exclude those which are directed to uphold those purposes.” Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice*. London: Norton, 2006.

¹⁷⁵ “If you read the letter of international law, it does not expressly provide an exception for a humanitarian intervention. But many people think such an exception does exist as a matter of custom and practice.” cited in Aidan Hehir *Kosovo, Intervention and Statebuilding: The International Community and the Transition to Independence* 2010 at 23.

¹⁷⁶ *The Paquete Habana Case* (1900), also see Article 38 of the Statute of International Court of Justice.

¹⁷⁷ Richard Bilder: “Kosovo and the “New Interventionism”, *Promise or Peril*”/ 9.1 *J. Transnational L& Policy* 153(1999).

The theory of humanitarian intervention is connected with international compliance to specific standards of humanity such as international human rights. International lawyers do not share the same view of legality and morality of humanitarian intervention. Skeptics of the concept of humanitarian intervention claim that this category “has no *raison d’être* in contemporary international law”, while others believe that, considering the horrid human rights violation taking place all over the world, there is an absolute need for its existence.¹⁷⁸ Humanitarian intervention aims to protect those individuals whose fundamental human rights are “gravely violated en masse”¹⁷⁹. Even though human rights are relatively a new category in international law some segments have the characteristic of *jus cogens*. In the case of Kosovo, there is a conflict between some of the traditional *jus cogens* norms of international law, like the obligation not to use force - Article 2(4) U.N. Charter, or the obligation to respect the sovereign equality of states. The question whether or not human rights prevail over traditional, older *jus cogens* norms on the basis of the principle of *lex posteriori derogate lex priori* cannot be answered at present. When Syliok wrote his article “Theory of Humanitarian Intervention” ten years ago, he correctly anticipated that “...human rights will gain more importance, but may never rise above other *jus cogens* norms of international law.”¹⁸⁰ Even today, the situation has not changed and human rights are not considered as a ‘supreme’ law. I am of the opinion that there is no need for human rights to become ‘supreme’ in potential conflict with fundamental norms because they all have the same goal. The U.N. Charter does not permit states to use force unilaterally in order to call for humanitarian intervention.¹⁸¹ Sean Murphy stated that there is nothing to support the claim that humanitarian intervention is a legitimate exception to the prohibition of the use of force in Article 2(4) of the U.N. Charter.¹⁸² Although humanitarian intervention requires Security Council approval, nations have intervened in the internal affairs of other countries in many cases such as “India’s 1971 intervention in Bangladesh; Tanzania’s 1978 ouster of Idi Amin in Uganda; France’s intervention in the Central African Empire; American, British, and French use of force in Northern Iraq to protect the Kurds in 1991; intervention by African States in Liberia and Sierra Leone in the 1990s.” Also, there was the latest intervention in Libya.

In practice, humanitarian intervention without U.N. approval is still recognized but strictly limited and it should be used as a last resort, be limited in duration, and should not be aimed at a continuing alteration of pre-existing legal arrangements.¹⁸³ A

¹⁷⁸ Florian Bieber, and Židas Daskalovski. *Understanding the War in Kosovo*. London: F. Cass, 2003 at 143.

¹⁷⁹ Florian Bieber, and Židas Daskalovski. *Understanding the War in Kosovo*. London: F. Cass, 2003 at 143.

¹⁸⁰ Florian Bieber, and Židas Daskalovski. *Understanding the War in Kosovo*. London: F. Cass, 2003 at 155.

¹⁸¹ See Eric. Posner, Alan O. Sykes, *Optimal War and Jus ad Bellum*, *Georgetown Law Journal*, 1021 (2005)

¹⁸² Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*. Philadelphia: University of Pennsylvania Press, 1996, at 129.

¹⁸³ Michael E. Smith, *NATO, the Kosovo Liberation Army and the War for an Independent Kosovo: Unlawful Aggression or Legitimate Exercise of Self-determination?* S.I.: S.n., 2002. at 17; He also adds two additional criteria: (i) any humanitarian military intervention should be carried out by a group of states-whether they act in the context of an alliance, a regional organization, or a “coalition of the willing”; and (ii) the participating states should act in close coordination with the U.N., demonstrate a clear readiness to

humanitarian intervention is lawful only if the Security Council has previously authorized it. The U.N. Charter does not exempt unilateral humanitarian intervention from the prohibition on the use of force and General Assembly resolutions support this interpretation.¹⁸⁴ Finally, unilateral humanitarian intervention does not fall under the scope of customary international law - as decided in *Nicaragua v. United States* by the International Court of Justice. Hence, advocates for Security Council authorization of humanitarian intervention may argue that even if the situation in Kosovo was so grave that it required humanitarian intervention outside, this should have been decided by the Security Council and not unilaterally by NATO.

The humanitarian intervention, although not in accordance with Article 2(4) of the U.N. Charter, was consistent with the purposes of the United Nations. Michael Glennon argues that the U.N. Charter's provisions are inadequate to cope with human rights challenges and other challenges such as Kosovo and need not be respected and therefore, NATO and other nations devoted to international justice should adopt an "ad hoc...opportunistic" approach. Hence, breaking the law is less dangerous to the international system than pretending to comply with it.¹⁸⁵ He further states: "the new interventionists should not be daunted by fears of destroying some lofty, imagined temple of law enshrined in the U.N. Charter's anti-interventionist proscriptions...If power is used to do justice, law will follow."¹⁸⁶ Thomas Franck admitted that the Kosovo intervention was a breach of international law and the international community did not need Security Council authorization to bring about a halt to the human rights abuses in Kosovo.

STRATEGIC UN RULES

The previous two sections have shown that the current international law regime, embodied in the UN Charter, which is based on the positivist and moralist theoretical stands, does not get us very far in solving the main puzzle of this dissertation about the limits of the use of force rules during the Kosovo War. International law was flagrantly violated in 1999 and advocates of both theories failed in their "predictions". International legal positivism was unsuccessful in their assumption that international agreements *must* be kept. However, instead of recognizing their defeat, they declared the Kosovo War to be a *sui generis* case. A natural lawyers have followed the same approach and have argued that committing aggression by violating the UN Charter was more morally justified than the crime of genocide committed by FRY. The theory is incorrect when it generates predictions that are at odds with facts in the real world. The real world may be just or unjust, but reality is what it is, not what international lawyers want it to be. The

obtain post facto legitimization by the Security Council and, when possible, to hand the matter back to the U.N.

¹⁸⁴ See Definition of Aggression, GA Res. 3314 (Dec.14,1974); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with Charter of the United Nations, GA Res. 2625 (Oct. 24,1970); Declaration on the Inadmissibility and Interference in the Internal Affairs of states, GA Res. 36/103 (Dec 9, 1981).

¹⁸⁵ Michael J. Glennon, *The New Interventionism: The search for a Just International Law*, 78 *Foreign Affairs* at 6 (May/June 1999).

¹⁸⁶ Michael J. Glennon, *The New Interventionism: The search for a Just International Law*, 78 *Foreign Affairs* at 7.

evaluation of any legal theory centers on its logical truth or falsity and whether its predictions are accurate or not. The positivist theory, which is based on *pacta sunt servanda* premise,¹⁸⁷ or a natural law theory that posits that states comply with international agreements for ethical reasons, contradict empirical findings on compliance because the UN Charter has been violated more than one hundred times since 1945. Therefore, theories presented in this chapter do not help us predict states' compliance in future.

Pursuing this step further, the obvious question arises as to what is the standard for comparing international legal theories? First, it would be unfair to compare natural law with international legal positivism or a rational choice theory, because natural law is a normative theory and it asks what is right and wrong as well as just and unjust in international society. Someone may argue that economic analysis of public international law is also a normative analysis because some parts of this dissertation make policy recommendations for efficient breach of international legal agreements. However, unlike the natural law approach, this thesis does not evaluate international law by virtue of ethics rather through the notion of efficiency.

On the other hand, it would be reasonable to compare a rational choice theory with international legal positivism from the "positivist" approach. The standard of judgment here is a pragmatic one. According to de Mesquita "[w]hen two theories make predictions about the same phenomena or set of events, one is judged to be better than the other if it explains those facts accounted for by the rival theory plus some additional facts not explained by the competing theory."¹⁸⁸ Here, I shall explain why a rational choice theory outshines international legal positivism when analyzing the question of compliance with the use of force rules.

According to international legal positivism, states comply with international law because "agreements must be kept" and the main function is "not to facilitate the decisionmaker's dilemma between law and politics (and, occasionally, law and morals), but to clarify the legal side of things".¹⁸⁹ In other words, law is considered as a system of rules which is "an 'objective' reality and needs to be distinguished from law 'as it should be.'" ¹⁹⁰

¹⁸⁷ This is also true for positivism in international law: "The legal positivist proceeds from the assumption that the law is a constituent element of social reality, in other words, that it exists as an institutional fact which is to be grasped and explained by legal science." Neil MacCormick, and Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism*. Dordrecht: D. Reidel Pub. 1986. at 116. Also, for more about positivism in international law see Francis A. Boyle "World Politics and International Law" 17-58.

¹⁸⁸ Bruce Bueno de Mesquita: "Principles of International politics: People's Power, Preferences, and Perceptions" 2nd edition, 2003 at 71.

¹⁸⁹ See Bruno Simma and Andreas L. Paulus, "The Responsibility of Individuals for Human Rights Abuses in International Conflicts: A Positivist View, 93 AM.K. Int'l L. 1999 cited in Tai-Heng Cheng "When International Law Works: Realistic Idealism After 9/11 and the Global Recession. Moreover, see Lotus decision: In the Lotus case, the PCIJ stated: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these coexisting independent communities or what a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed. Lotus, 1927 No.10, at 18.

¹⁹⁰ Steven R. Ratner and Anne-Marie Slaughter *The Methods of International Law*. Washington, D.C.: American Society of International Law, 2004 at 26.

The theories are evaluated based on their logical consistency and their capacity to describe or predict empirical results and some realists have criticized international legal realism. Accuracy of prediction about compliance with international law is the central way to choose the most appropriate theoretical perspectives. A theory is unsuccessful if it leads to more faulty predictions than some other theory, which aims to describe identical events. Hans Morgenthau who was disappointed with the collapse of labor law in Nazi Germany wrote a provocative article “*Positivism, Functionalism and International Law*”, in which he criticized international lawyers and their positivist approach that was a far from real world politics.¹⁹¹

Realism has been the main theory in international relations after WWII, which ignores international law as being peripheral to international affairs.¹⁹² The realists’ blatant disregard for international law has largely contributed to the separation between these two fields.¹⁹³ Both realism and idealism are ideal type and neither international law is able to explain situations when international law does not matter nor realism is able to explain situations when states show deference to international legal regimes.

The neorealists basic assumption is that states are in the “state of nature” which is a state of war and states are concerned about balancing, bipolarity and relative gains. Hence in the state of anarchy, where there is no supranational organization to enforce those rules, the United Nations cannot do much more than provide a means by which individual states can coordinate their activities. Hence, international law plays a negligible role.

According to legal realists, the use of force rules embodied in the UN Charter are outdated because “[t]he major threat to international peace and security today does not come from the threat of conflict between great powers. Threats arise from international terrorist organizations, proliferation of weapons of mass destruction, and rough nations.”¹⁹⁴ John Yoo criticizes the use of force rules by reason of their empty function and assigns a more “modest” role to the UN that can be achieved through “[not]forcing states to obey its formal legal rules, but by producing information that causes states to alter their respective calculi of conflict. If the UN can provide more information to states about the relative power of nations and the costs and benefits of conflict, it could help encourage negotiated settlements. This function is consistent with theories about the role of international institutions in facilitating bargains between member nations.”¹⁹⁵ Posner and Goldsmith in their controversial book, *The Limits of International Law*, echo the

¹⁹¹ He was urging international lawyers to accept “sociological context of economic interests, social tensions, and aspirations of power, which are the motivating force in international field.” See Hans Morgenthau, *Positivism, Functionalism and International Law*, *The American Journal of International Law*, Vol. 34, No. 2. See also, Jack Goldsmith and Eric Posner, *The Limits of International Law*, Oxford University Press, 2006; Andrew T. Guzman *How International Law Works: A Rational Choice Theory*. Oxford: Oxford University Press, 2008.

¹⁹² Francis A. Boyle, “The Irrelevance of International law: the Schism between International law and International Politics”, 10 *Calif. West. Int’l L. J.* (1980).

¹⁹³ Kenneth W. Abbott “Modern International Relations Theory: A Prospectus for International Lawyers”, 14 *Yale J. Int’l L.*(1989).

¹⁹⁴ John C. Yoo and Will Trachman, *Less than Bargained for: The Use of Force and the Declining Relevance of the United Nations*, 5 *Chi. J. Int’l L.* 379 (2004) at 381.

¹⁹⁵ John C. Yoo and Will Trachman, *Less than Bargained for: The Use of Force and the Declining Relevance of the United Nations*, 5 *Chi. J. Int’l L.* 379 (2004) at 388. See also Robert J. Delahunty and John Yoo, *Great Power Security*, 10 *Chi. J. Int’l L.* 35 (2009).

main realists' argument that states comply with international law when it is in their own interest.¹⁹⁶ With this methodological framework in mind, Posner and Sykes show why the UN cannot prevent wars and then contradictory to their methodological assumptions, they offer ambiguous conclusion in which they "question the wisdom of banning humanitarian intervention."¹⁹⁷ In employing a rational choice theory, Michael Glennon offers a pragmatist approach to the UN Charter and argues that the use of force rules have fallen into desuetude.¹⁹⁸ Albeit Andrew Guzman is considered to be a liberal institutionalist, he also assigns limited role to the use of force.¹⁹⁹

There are two sides to every story and the truth usually lies somewhere in the middle. In my view, both realism and classical international law scholarship are incomplete. While realists emphasize the assessment of self-interest, they see international law as epiphenomenal. In the world of anarchy where states are concerned about balancing, bipolarity and relative gains, international institutions such as the United Nations "cannot do much more than provide a means by which individual states can coordinate their activities and help each other on a case-by-case basis."

On the other hand, international lawyers are exceedingly hopeful about international law compliance. These all-or-nothing approaches to respect for international law are incomplete because an empirical record of compliance with international agreements and customary law shows that states sometimes adhere to the international legal system and sometimes they do not.

In setting forth a strategic theorization of the relationship of international law to international relations the aim is not to discredit idealist and realist theories but to show why a strategic choice to international law based on game theory enable scholars to understand how the use of force rules work.

¹⁹⁶ Jack Goldsmith and Eric Posner, *The Limits of International Law*, Oxford University Press, 2006.

¹⁹⁷ Eric A. Posner, A. O Sykes, *Economic Foundations of International Law*, 2013 at 189. Before this book was published, Professors Goldsmith and Posner wrote an article about humanitarian intervention and use of legal and moral rhetoric from a rational choice theory perspective. Their main argument is that "the use of international legal and moral rhetoric is an equilibrium phenomenon that emerges from nations pursuing their self-interest." The accuracy of their "cheap talk" argument will be explored in the last chapter, but for the purpose of this analysis, it is important to show their argument. See Jack Goldsmith and Eric Posner "Moral and Legal rhetoric in International Relations: A Rational Choice Perspective, *Journal of Legal Studies* vol XXXI, January 2002.

¹⁹⁸ Michael Glennon, *The Fog of Law: Pragmatism, Security and International Law*, 2010. See also Glennon's book "Limits of Law, Prerogatives of Power: Interventionism after Kosovo, 2001.

¹⁹⁹ Guzman distinguishes between low, moderate and high stakes, which are essential condition with compliance with international law. Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 Cal. L. Rev. 1823 (2002).

CHAPTER 2

RATIONAL THREATS OF FORCE AND INTERNATIONAL LAW DURING THE KOSOVO WAR

Preparation for war does not make war inevitable. On the contrary, prudent preparation for war, accompanied by a wise policy, provides a guarantee that war will not break out except for the gravest of reasons

Count Sergei I. Witte

INTRODUCTION

During the Kosovo War, NATO's objective was to prevent an escalation of conflict and reach political agreement without the use of military force. During the Rambouillet and Paris conferences, NATO threatened to use force unless Serbia agreed to the Contact's Group settlement. NATO's policies failed and they did not compel Serbia to sign the agreements and desist from Operation Horseshoe. The foundering of NATO's threats has generated much literature in the political science arena, which attempts to answer the question why NATO failed to prevent war.

NATO's coercive diplomacy raised the important issue of the use of threats of force in international law. During the Kosovo military intervention, NATO member states not only violated the use of force rules but also *the threat to use force*, which resulted in Yugoslavia bringing a suit before the ICJ. Article 2(4) of the United Nations Charter prohibits not only the use of force, but also the threat of force in foreign relations and this logic has been followed by the ICJ in its advisory opinions and the mainstream of international law scholarship. A United Nations Charter commentator Albrecht Randzelhofer stated that threats "ha[ve] received far less consideration in legal writing than use of force." Although this claim was made more than 50 years ago, still very little attention has been given to the legal analysis of the "threat of force".²⁰⁰ Regardless of the scarcity of literature on this topic, it is important to examine the legality of the use of threats under international law because states frequently deploy them as a tool of international diplomacy and there are an increasing number of states' complaints about illegal use of threats.²⁰¹

²⁰⁰ The threats of force has not been analyzed in the international law literature as much as the use of force rules because "in most cases those threats preceded an actual use of force, so that the resulting dispute focused on the latter aspect. On the other hand, State practice reveals a relatively high degree of tolerance towards mere threats of force, once decisive reason for which seems to be that some of the most obvious threats of force are legitimized by the right of self-defense embodied in Article 51 UN Charter." The Charter of the United Nations: A Commentary, Volume I (3rd Edition). Moreover, the same commentary offers only two short paragraphs of the analysis of the threats of force.

²⁰¹ See Anne E. Sartori, *Deterrence by Diplomacy*. Princeton: Princeton University Press, 2013. Francois Dubuisson and Anne Lagerwall use examples that illustrate the importance of the subject at 911. Francois Dubuisson and Anne Lagerwall, *Threat of Force and Ultimata*, in *The Oxford Handbook of the Use of*

Since the creation of the United Nations, keeping the global peace has preoccupied international law scholars. The previous chapter examined the use of force rules and explained why current rules on the use of force are not consistent with the purpose of the United Nations Charter- “maintaining peace and security.” This chapter shows that even when lawyers are presented with an opportunity to preserve the world’s peace, they fail to do so due to a lack of understanding of the importance of threats in international relations. Unlike Judge Shi who argued that the policy of deterrence is a political doctrine and should continue to exist detached from international law, I go on to show that the deterrence theory in international relations is significant for international law theory because effective military threats can be a successful instrument of coercion.²⁰²

The two conventional arguments about the legal status of threats are these: First, threats of force are considered *in the same way* as the use of force rules and a threat of force is illegal if the use of force followed by the threat did not receive Security Council authorization or it was not justified by self-defense. In other words, if we use a positivist interpretation, international law forbids *any* threat of military action against the territorial integrity or political independence of a state in terms of Article 2(4) of the United Nations Charter.²⁰³ Second, international law scholars make an analogy with the regulation of threats under national legal systems, which posit that a person making a threat must intend and be prepared to carry out the threat. Applying this analogy to international law they conclude that a *credible threat* falls within the scope of Article 2(4). In addition to these main arguments, the debate about legality of threats has continued through discourse as to whether threats of force constitute customary international law and preemptory norms.²⁰⁴ The debate was between those advocating that the number of threats of force has contributed to the creation of customary international law²⁰⁵ and those claiming that there is insufficient state practice for the creation thereof.

Considering all these arguments, the logical question is whether *all* threats should be deemed contrary to Article 2(4)?

In contrast to these arguments, this chapter proposes that threats of force are *sui generis* and should be treated *separately from the use of force* rules. Moreover, this chapter shows that military threats can be powerful *instruments of coercion* and can serve a useful purpose in the crises because they may mitigate the risk of war because “they can establish intent to wage war and communicate that fact to the opponent in a way that he will believe it.”²⁰⁶ Therefore, credible and capable threats should be permitted under international law since they can reduce the likelihood that the confrontation will end in war and therefore, the purpose of the U.N. Charter “*to maintain peace and security*” can be achieved.

Force in International Law, edited by Marc Weller, 2015. Also see, Olivier Corten, Bruno Simma, The Law against War: The Prohibition on the Use of Force in Contemporary International Law. Oxford: Hart Pub., 2010.

²⁰² <http://www.icj-cij.org/docket/index.php?sum=498&p1=3&p2=4&case=95&p3=5>.

²⁰³ ICJ advisory opinion to the General Assembly in the Legality of the Threat or Use of Nuclear Weapons

²⁰⁴ ICJ in Nicaragua states that *opinio juris* “may...be deduced from, inter alia...the attitude of States towards certain general Assembly resolutions, and particularly resolution 2625(XXV)” See Nicaragua case para 188.

²⁰⁵ Romana Sadurska. "Threats of Force." The American Journal of International Law 82, no. 2 (1988).

²⁰⁶ Branislav Slantchev, Military Threats: The Cost of Coercion and the Price of Peace, Cambridge University Press, 2012 at 4.

Now, one could reasonably challenge this assertion by arguing that this proposal is logically inconsistent because this dissertation mirrors the realists' claim that international law on the use of force does not affect states' behavior. Therefore, why should we fix a problem, which even when fixed, will not work? The reason for this is because I want to emphasize the danger of ignoring international politics, which has been a regular practice of the ICJ.

The remainder of this chapter is organized as follows. The following section outlines the scope of the threats of force embodied in Article 2(4) and analyzes the potential interpretations. The second part examines the ICJ judgments related to the threats of force. The third part focuses on the deterrence theory in international relations and seeks to offer alternative means of prohibiting threats of force by reinterpreting Article 2(4). The final part examines the Kosovo War where I test criteria of effective threats by relying on a simple game to motivate research and illustrate the logic of the findings from a previous chapter.

Several caveats should be noted before proceeding. First, this chapter will only deal with Article 2(4), whereas Article 39,²⁰⁷ which regulates the threats to international peace, is outside the scope of this work. Second, the following discussion will omit literature on pre-emptive defense and its relationship to threats.²⁰⁸ Finally, this chapter does not have the lofty goal of developing a new theory of deterrence rather the major aim is to take the logic of strategic literature and show that threats can be effective tools of coercion under certain circumstances and they can reduce the likelihood of war.

LEGALITY OF THE THREATS OF FORCE

Before embarking on explaining that states, through the judicious use of military threats, can achieve preferable peaceful results and mitigate the possibility of war by persuading the opponent that going to war is too costly and inefficient, it is important to address the current state of threats of force under international law. Conventional international law wisdom holds that threats are prohibited under Article 2(4) of the United Nations Charter and ICJ has confirmed this view. The following section will first examine Article 2(4) and put forward an argument that threats of force should be separated from the use of force. Moreover, this section discusses the ICJ cases and the disappointing conclusion is that the Court failed to address properly the question of legality of threats of force.

ARTICLE 2(4) OF THE UNITED NATIONS CHARTER

THREAT AND FORCE ATTACHED

The first chapter of this thesis shows that it is widely accepted that Article 2(4) provides for a blanket prohibition on the use of force, and that Security Council authorization and the "inherent" right of individual or collective self-defence codified in

²⁰⁷ Article 39 of the UN Charter reads: The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

²⁰⁸ See Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks*, Cambridge University Press, 2002.

Article 51, are the only two exceptions to this prohibition. Having read this, many authors have supported the idea that the test for deciding *the illegality of threats of force should meet the same requirements for illegality of the use of force*.²⁰⁹ International law regards threats and use of force in the same vein and considers the threats of force to be as grave as the use of force.²¹⁰ Prohibition of the use of force has not been set apart from the threat of force,²¹¹ and the threat to use force is unlawful “if the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4.”²¹²

This symmetry of threats and the actual use of force was introduced by Ian Brownlie in 1963 in the so-called “Brownlie Formula”:

*“A threat of force consists in an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government. If the promise is to resort to force in conditions for which no justification for the use of force exists, the threat itself is illegal.”*²¹³

In other words, “an illegal threat is a conditional promise to resort to force in circumstances in which the resort to force will be itself illegal.”²¹⁴ The formula gained the support of some countries during the Nuclear weapons Advisory Opinion,²¹⁵ and the para. 47 of the opinion mirrored the Brownlie Formula. However, it still remains highly controversial among academics.²¹⁶ Most disputed is the symmetry of the use and threat of

²⁰⁹ See Nigel D. White and Robert Cryer, “Unilateral Enforcement of Resolution 687: A Threat Too Far?”, 29 Cal. WJIL. 243-89 (1999); Matthew A. Myers, “Deterrence and the Threat of Force Ban: Does the UN Charter Prohibit Some Military Exercise?” 162 Mil. LR 132-79 (1999).

²¹⁰ Francis Grimal *Threats of Force: International Law and Strategy*. Abingdon, Oxon: Routledge, 2013 at 6. Francois Dubuisson, Anne Lagerwall, The Threat and the Use of Force in Marc Weller, Alexia Solomou, and Jake William Rylatt, *The Oxford Handbook of the Use of Force in International Law*, Oxford, Oxford University Press, 2015 at 911.

²¹¹ ICJ in its advisory opinion stated that: “The notions of ‘threat’ and ‘use’ of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force in a given case is illegal [...] the threat to use force will likewise be illegal.”

²¹² ICJ advisory opinion to the General Assembly in the Legality of the Threat or Use of Nuclear Weapons para 47.

²¹³ Ian Brownlie, *International Law and the Use of Force by States*, 1963 at 364.

²¹⁴ Ian Brownlie, *International Law and the Use of Force by States*, 1963, at 431.

²¹⁵ For example see the statement of the government of Malaysia 19 June 1995 at 8. Nuclear Weapons Advisory Opinion. “In order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self-defence against any State violating their territorial integrity or political independence. Whether a signaled intention to use force if certain events occur is or is not a “threat” within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of “threat” and “use” of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal for whatever reason the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter. For the rest, no State whether or not it defended the policy of deterrence suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal.”

²¹⁶ Academics who support this view: See White, Nigel D. and Cryer, Robert, “Unilateral Enforcement of Resolution 687: A Threat Too Far?,” *California Western International Law Journal*: Vol. 29 (1999), also see Marco Roscini, Threats of Armed Force and Contemporary International Law, Netherlands International Law Review, Vol. 54, pp. 229-277, 2007.

force, which assumes when it is illegal to use force it is illegal to threaten to use it.²¹⁷ In other words, the formula does not allow for the possibility of threatening to use force in situations where it would be unlawful to use force. According to Hayashi, this formula has been misunderstood when used “*a contrario*” for the argument that [n]ot only is every threat illegal where force is illegal, but, obviously, any justification put forward for the use of force will work equally well for the threat of such force.”²¹⁸ Duboisson and Lagerwall claim that the academic debate is divided by those who interpret the symmetry in a “broader” or “stricter” manner.²¹⁹

THREATS AND FORCE DETACHED

The main argument of this chapter is that the prohibition of the use of force should be independent from the prohibition of the threat of force and threats should be treated as *sui generis*. A similar argument was made by Sadurska who used the functional approach to the analysis of the U.N. Charter in which she examines threats within the context of the purpose of the U.N. Charter and she argues:

*The Charter prohibits the use of force in violation of the political independence and territorial integrity of a state because it may lead to international instability, breach of the peace and/or massive abuses of human rights. But if that is rational of Article 2(4), then there is no justification for the claim that the use of force and the threat of force should be treated equally. Typically, an effective threat of force will not have the same destructive consequences as the use of force. (As a matter of fact, in specific cases, an effective threat may be an economical guarantee against open violence.) Therefore, there is no reason to assume that the threat will always be unlawful if in the same circumstances the resort to force would be illicit.*²²⁰

Although she has also reached the same conclusion in respect of the usefulness of threats, she has not taken the next step and considered the criteria by which a threat would be beneficial to prevent war. Furthermore, she stated that threats have useful functions. Namely she listed three functions of the threats of force: “First, a threat of force may be meant to operate as notice of the likelihood of a sanction to support a norm or demand enunciated by the threatener. Second, a threat of force may be used to speed up resolution of a dispute by nonforcible measures. Third, the threat of force plays the role of a ritualized substitute for violence.”²²¹ Her article was one of the first papers that analyzed the threats of force in international law and although it was written almost three decades ago it remains one of the most controversial and disputed academic writings about the use of threats. For instance, Grimal argues that threats can contribute to crises escalation and therefore,

²¹⁷ Olivier Corten, Bruno Simma, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law*. Oxford: Hart Pub., 2010.

²¹⁸ Nikolas Stürchler, *The Threat of Force in International Law*. Cambridge: Cambridge University Press, 2009 at 41.

²¹⁹ For examples see Duboisson and Lagerwall at 915.

²²⁰ Romana Sadurska. "Threats of Force." *The American Journal of International Law* 82, no. 2 (1988) at 250.

²²¹ Romana Sadurska. "Threats of Force." *The American Journal of International Law* 82, no. 2 (1988) at 246.

Sadurska's third function i.e. a "substitute for violence", is miscalculated because threats are not "an effective mechanism for dissuading international actors from using violence."²²² His criticism is followed by the argument that states lack rationality and do not "restrain themselves from overstepping the line between verbal conflict and armed hostilities."²²³ Although Sadurska is "quick to point out" the deterrence function of threats of force because she does not elaborate and show in a systematic way the positive role of threats,²²⁴ neither is Grimal correct in his argument of the spiral model since his argument only supports one side. Moreover, this argument was echoed by Cryer and White who emphasized that "a threat of force is as liable to escalate the dispute as much as it may defuse a situation."²²⁵ As already admitted, there is a vast body of literature on international relations that discuss the threats of force and their spiral effects; however, neither of these authors, who criticize the deterrence function of threats, employ enough data to prove their argument. Struchler is concerned that the proposition that threat and force are uncoupled is "a double-edged sword, as it can be wielded both to weaken the no-threat rule (threats are always lawful) or to strengthen it (threats are always unlawful)." This is not necessarily true because not *all* threats are the same and the next section will look at the different uses of threats in foreign relations. Moreover, his concern about her approach is that some powerful states may use this provision to their own benefit "in precisely ways that the ICJ in 1996 tried to prevent."²²⁶

JUDICIAL INTERPRETATION INTERNATIONAL COURT OF JUSTICE

This chapter turns to international jurisprudence for guidance and examines whether it provides true clarity in terms of defining and analyzing threats of force. There are surprisingly very few cases, which refer to threats of force albeit none of these cases directly regulates the threats although they are mentioned in a broader context.

THE CORFU CHANNEL CASE

This part will begin by examining "one of the finest and one of the most important, if not prophetic, in the history of the World Court"²²⁷ cases. This was the first case that entered in the General list of the Court and although this decision was rendered almost 70 years ago, it is a landmark decision that has been widely cited in international legal literature as well as

²²² Romana Sadurska. "Threats of Force." *The American Journal of International Law* 82, no. 2 (1988) at 247.

²²³ Romana Sadurska. "Threats of Force." *The American Journal of International Law* 82, no. 2 (1988) at 247.

²²⁴ Namely, she only briefly explains the effective threats stating that "the threat is effective" but she does not offer a detailed explanation of what constitutes effective threats of force.

²²⁵ Nigel D. White and Robert Cryer, "Unilateral Enforcement of Resolution 687: A Threat Too Far?", 29 *Cal. WJIL*. 243-89 (1999) at 250.

²²⁶ Nikolas Stürchler, *The Threat of Force in International Law*. Cambridge: Cambridge University Press, 2009 at 44.

²²⁷ M. Fitzmaurice, "The Corfu Channel Case and the Development of International Law", in N. Ando, E. McWhinney, and R. Wolfrim (eds) *Liber amicorum Judge Shigeru Oda* (The Hague Kluwer, 2002). Vol. 1, p.119.

in international litigation.²²⁸

The Corfu Channel Case concerned two incidents, the first involving the passage of British ships through the Corfu Channel and the second concerning a minesweeping operation conducted by the UK in the Corfu Channel and the ICJ dealt with the two main issues: One was related to the sovereignty in territorial sea, and the other issue concerned the innocent passage of warships.²²⁹

The incident started on 15 May 1946 and it was triggered by Albanian batteries from ashore on two British cruisers, the *Orion* and *Superb*. The UK government stated the Corfu channel to be an international waterway, arguing that innocent passage through straits is lawful under international legal rules. The Albanian government argued that “foreign warships and merchant vessels had no right to pass through Albanian territorial waters without prior notification to, and the permission of, the Albanian authorities.”

In response, the Albanian Ambassador in Belgrade received the final note from the British Government that “His Majesty’s Government cannot accept the reply of the Albanian Government to their last communication as being satisfactory, and they cannot agree that British ships passing through the straits of Corfu should give prior notification of their passage to the Albanian authorities. Furthermore, the Albanian government should take note that should Albanian coastal batteries in future open fire on any of His Majesty’s vessels passing through the Corfu Channel, fire will be returned by His Majesty’s ships.”²³⁰ This communication was interpreted by Albania as a threat.

Four months later on 22 October, 1946 the Admiralty sent the cruisers *Mauritius* and *Leander* and destroyers *Suamarez* and *Volage* through the North Corfu Strait and the destroyers struck mines and suffered significant damage. The Albanian Government argued that the UK’s passage violated their sovereignty and was not an innocent passage because: “the passage was not an ordinary passage, but a political mission; the ships were maneuvering and sailing in diamond combat formation with soldiers on board; the position of the guns was not consistent with innocent passage; the vessels passed with crews at action stations; the number of the ships and their armament surpassed what was necessary in order to attain their object and showed an intention to intimidate and not merely to pass; the ships had received orders to observe and report upon the coastal defenses and this order was carried out.”²³¹

This incident of 22 October 1946 when two British warships struck mined in the North Corfu Channel gave rise to the first question submitted to the ICJ: “Is Albania responsible under international law for the explosions which occurred on the 22nd October 1946 in Albanian waters and for the damage and loss of human life which resulted from the,

²²⁸ As the former ICJ President Bedjaoui asserts: The solution developed for the resolution of the Corfu Case attracted a seal of approval and become a benchmark for later jurisprudence.

²²⁹ The questions raised before the courts were: (i) Whether Albania was responsible under international law for the explosions occurred on 22 October 1946 in Albanian waters, for the resulting damage and loss of human life and for payment of any compensation. (ii) Whether the United Kingdom had violated the sovereignty of Albania under international law by reason of the acts of the Royal Navy in Albanian waters on 22 October and 12 and 13 November 1946 and if there was any duty to give satisfaction; (iii) Whether the minesweeping operation by the British Government in Albanian waters had violated the sovereignty of Albania; and (iv) If the Court found that it had jurisdiction to do so, to assess the amount of compensation. See *Digest of International Cases on the Law of the Sea*, at 33.

²³⁰ Corfu Case at 27.

²³¹ William W. Bishop Jr, *Judicial Decisions Involving Questions of International Law*, 43 *Am. J. Int’l L.* 577 (1949).

and is there any duty to pay compensation? ”

NICARAGUA CASE

This is the second case before ICJ, in which the Court had the opportunity to shed some light on the conundrum of when threats of force are unlawful in international law. The facts of the case have been raised in the previous chapter concerning the use of force and apart from dealing with the use of force, this case is important because it also provided some guidance to the meaning and criteria of “threats” of force.

Nicaragua complained that the “continuous US military and naval maneuvers adjacent to Nicaraguan borders, officially acknowledged as a program of “perception management” amounted to a threat of force under Article 2.4. as they formed part of a ‘general and sustained policy of force, publicly expounded, intended to intimidate the lawful Government of Nicaragua into accepting the political demands of the United States Government, and resulting in substantial infringements of the political independence of Nicaragua.”²³²

Here, the ICJ had a job to discern the conditions under which military maneuvers or rearmament constitute threats of force. Namely, the ICJ had the task of providing an answer as to whether US military maneuvers near Nicaraguan borders amount to a threat. This case is important because it clarifies what behavior constitutes a threat under international law and it concludes that “indirect action by state A against state B via the use of rebels is a clear threat in international law.”²³³

In the Memorial, Nicaragua argued that “continuous US military and naval maneuvers adjacent to Nicaragua borders, officially acknowledged as a program of ‘perception management’ ” amounted to a threat of force under Article 2(4) as they formed part of a “general and sustained policy of force, publicly expounded, intended to intimidate the lawful Government of Nicaragua into accepting the political demands of the United States Government, and resulting in substantial infringements of the political independence of Nicaragua.”²³⁴

The ICJ stated: “The Court has also found (paragraph 92) the existence of military maneuvers held by the United States near the Nicaraguan borders; and Nicaragua has made some suggestion that this constituted a ‘threat of force’, which is equally forbidden by the principle of non-use of force. The Court was “not satisfied that the maneuvers complained of, in the circumstances in which they were held, constituted on the part of the United States a breach, as against Nicaragua of the principle forbidding recourse to the threat or use of force.”²³⁵ The US tried to justify its operations and the US Judge Schwebel in his dissenting opinion asserted “The United States decided to exert military pressure upon Nicaragua in order to force it to do what it would not agree to do.”²³⁶ The Court on the contrary stated: “It is irrelevant and inappropriate, in the Court’s opinion to pass upon this allegation of the United States, since in international law there are no rules, other than such rules as may be

²³² Nicaragua case *para* 92.

²³³ Francis Grimal, *Threats of Force: International Law and Strategy*. Abingdon, Oxon: Routledge, 2013 at 59.

²³⁴ Nicaragua, ICJ Pleadings 1991, Vol IV *para* 457.

²³⁵ Nicaragua at 227.

²³⁶ Dissenting Opinion, Judge Schwebel, Nicaragua case, *para* 34.

accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.”²³⁷

NUCLEAR WEAPONS CASE

The ICJ had the opportunity to rule on the legal status of the threats of force after the General Assembly passed Resolution 49/75 and requested an Advisory Opinion to answer the question “Is the threat or use of nuclear weapons in any circumstance permitted under international law?”²³⁸

The Court said that a threat of force not authorized by the inherent right of self-defense and Article 51 was a violation of the prohibition in Article 2(4).²³⁹ It also rejected the argument that the possession of a nuclear weapon per se violates Article 2(4)²⁴⁰, stating that the degree of force and the weapon employed were not ameliorating factors which change the legal fact of a violation of the article.²⁴¹ This is because the prohibition in Article 2(4) applied to ‘any use of force, regardless of the weapons employed.’²⁴² The Court focused more on the use of force and the Opinion on threats is very brief and is explained only in paragraph 47 and 48.²⁴³

The ICJ opinion supported the argument for the Brownlie Formula that is based on the symmetry of the use of force and threats of force:

In order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self-defence against any State violating their territorial integrity or political independence. Whether a signaled intention to use force if certain events occur is or is not a "threat" within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of "threat" and "use" of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a give case is illegal for whatever reason - the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter. For the rest, no State - whether or not it defended the policy of deterrence suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal²⁴⁴

From paragraphs 47 and 48, which cover the threats of force, the Court failed to shed

²³⁷ Nicaragua 135, para 269.

²³⁸ UN Doc A/Res/49/75K (1994) .

²³⁹ Nuclear Weapons case para 47.

²⁴⁰ Nuclear Weapons case para 48.

²⁴¹ Nuclear Weapons case para 39 .

²⁴² Nuclear Weapons case para 39.

²⁴³ Nuclear Weapons case see para 47 and 48.

²⁴⁴ Nuclear Weapons case para 47.

any more light on the question of what constitute threats under international law.²⁴⁵ The Court also analyzed the theory of deterrence and argued in paragraph 48 that credibility is a necessary condition for successful deterrence although it stated in the previous paragraph that signaled intention amounts to threat. The Court stated:

Some States put forward the argument that possession of nuclear weapons is itself an unlawful threat to use force. Possession of nuclear weapons may indeed justify an inference of preparedness to use them. In order to be effective, the policy of deterrence, by which those States possessing or under the umbrella of nuclear weapons seek to discourage military aggression by demonstrating that it will serve no purpose, necessitates that the intention to use nuclear weapons be credible. Whether this is a "threat" contrary to Article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality. In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter.²⁴⁶

The Court's opinion failed to shed any more light on and explain the legal status of the threats of force except that it confirmed Brownlie's formula that the legality of threats of force is conditional on the legality of projected use of force. The next section discusses the deterrence theory in order to shed some light on the usefulness of threats of force in international law and to understand why the symmetry of threats and the use of force is not efficient.

THE THREAT THEORY

What you cannot enforce do not command
-Sophocles-

The previous section analyzed the legality of threats of force under international law and it showed that threats are perceived in the same manner like the use of force and are unlawful if they are credible. This section focuses on the theory of deterrence in international relations in order to show that effective military threats can be successful instrument of coercion and thus, should be justified under international law because they can play an important role in maintaining peace and security. The classical deterrence theory assumes that waging war is always the worst result of any deterrence confrontation and all

²⁴⁵ Although it did not provide explanation for threats it provided us with some guidelines and Struchler summarizes the guidelines: (1) nuclear deterrence prima facie amounts to a violation of article 2(4) of the UN Charter; (2) justification according to the Brownlie formula depends on the legality of implementing a deterrent threat; (3) the law is indeterminate as to the extent of justification endorsed by custom; and (4) justification equally cannot be excluded for threats of self-defence for the purpose of securing the very 'survival' of a state.

²⁴⁶ Nuclear Weapons case *para* 48.

other outcomes are better than the use of force.²⁴⁷

DEFINITION

The concept of threats has given rise to considerable discussion and controversy. Therefore, it is crucial to make clear what is meant by “threat” in international law. The United Nations Charter is silent on the definition of a “threat to use force” but also the *travaux préparatoires* and General Assembly Resolutions do not clarify the meaning. International relations theory also does not provide any substance to the meaning of threats, while strategic literature is even more confusing.

While international legal documents remain quiet in respect of the interpretation of what constitutes a threat, international law scholars have offered several interpretations.

Ian Brownlie defines the threat of the use of force as “an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government.”²⁴⁸ One of the international law pioneers who studied threats, Romana Sadurska defines a threat of force as “a message, explicit or implicit, formulated by a decision maker and directed to the target audience, indicating that force will be used if a rule or demand is not complied with.”²⁴⁹

Another hurdle must be cleared before proceeding to the next chapter, which will clarify the requirements for legality. This is the question of which acts qualify as a threat of force. The previous chapter showed that force in Article 2(4) of the United Nations Charter pertains to armed force. Bearing in mind that the United Nations Charter prohibits the threat of force in identical fashion as it forbids the use of force²⁵⁰, the Charter should prohibit only an armed threat.²⁵¹ Moreover, only credible threats fall under the scope of Article 2(4). It means that ‘mere verbal excesses’ do not constitute threats.²⁵²

It is important to analyze threats of force in their strategic setting if we want to see how international law should respond to them. Current international law theories forbid states to use threats of force because scholars draw parallels with regulations of threats under national criminal law, which posit that a threat is illegal if it is explicit and likely to result in illegal action. In other words, a threat is unlawful if the defendant has the ability or intent to carry it out. If there is one lesson we can learn from this section it is this: drawing parallels between international law and national law is flawed because threats of force in foreign affairs have a very different role than threats in national legal systems, and in some

²⁴⁷ See Thomas C. Schelling, *The Strategy of Conflict*, Harvard University Press, 1981., Thomas C. Schelling, *Arms and Influence*, Yale University Press, 1966. Robert L. Powell, *Nuclear Deterrence Theory, The Search for Credibility*, Cambridge University Press, 1990.

²⁴⁸ Ian Brownlie, *International Law and the Use of Force by States*, 1963 at 364.

²⁴⁹ Romana Sadurska, “Threats of Force”, 82 *AJIL* (1998) p. 242 She further provides another definition of threats: “...an act that is designed to create a psychological condition in the target of apprehension, anxiety and eventually fear, which will erode status quo.” at 241.

²⁵⁰ See para 47 ICJ *Nuclear Weapons Case* “The notion of threat and use of force under Article 2, para 4, of the Charter stand together...”

²⁵¹ Francois Dubuisson, Anne Lagerwall, *The Threat of the Use of Force and Ultimata* at 912.

²⁵² Report of the ILC on the work of its 41st session, *YILC* (1989) vol II, Part Two, 68, para 4 cited in Olivier Corten, Bruno Simma, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law*. Oxford: Hart Pub., 2010.

circumstances they can play a very useful role.

Threats of force have widely been studied in strategic literature and the purpose of this section is not to build a new theory of threats but rather to draw on the logic and findings from strategic literature in order to understand how military threats operate in reality and how international law should respond to them. The core lesson we can learn from strategic literature is that military threats can be *successful instrument of coercion* because they can form intention to conduct war and can communicate this message to the opponent in a believable way. Moreover, military threats can lessen the probability that conflict will culminate in war.

Although law can tell us what constitutes illegal threats of force, it does not clarify what constitutes threats and also when threats are an effective instrument of coercion.²⁵³ For a threat to be effective, it has to achieve two goals. First, it should convince the opponent that one is to be expected to recourse to use of force if one's requests are not fulfilled. Second, it has to render fighting sufficiently unpleasant for the opponent relative to the concessions demanded.²⁵⁴

The classical deterrence theory posit that a state can threaten *effectively* if it has *capability* to carry out the threat and it needs to communicate its intention to other side so the threat must be *credible*. We shall assume here two main deterrence theory assumptions. First, war is the worst possible outcome; Second, actors are instrumentally rational.

COERCIVE DIPLOMACY DURING THE KOSOVO WAR

As the previous chapter shows, the legal literature on the Kosovo crisis focuses on the issue of the violation of the use of force rules. However, NATO member states employed unlawful threats of force. The UN and ICJ did not focus on the question of the legality of threats, however the Federal Republic of Yugoslavia objected before the Security Council that NATO's threat of using airstrikes was "an open and clear threat of aggression."²⁵⁵ NATO used threats as part of their coercive diplomacy strategy and this section focuses on the period between 1998 and 1999.

The beginnings of the Kosovo conflict are complex and very old and the countries in the Balkans are no strangers to conflicts. The war in Kosovo and especially the negotiation process cannot be understood without placing it in its historical context; hence for the purpose of this section is to describe events before the beginning of NATO's intervention in 1999.

²⁵³ Francis Grimal, *Threats of Force: International Law and Strategy*. Abingdon, Oxon: Routledge, 2013.

²⁵⁴ Branislav Slantchev, *Military Threats: The Cost of Coercion and the Price of Peace*, Cambridge University Press, 2012 at 4.

²⁵⁵ Tim Judah, *Kosovo: War and Revenge at 197*. Some scholars argue that this decision was backed by Russia and China. See Marco Roscini, *Threats of Armed Force and Contemporary International Law*, *Netherlands International Law Review*, Vol. 54, 2007 at 246.; Bellamy states that Yugoslav Foreign Minister Jovanovic "overlooked the fact that ultimatum was issued not by NATO but by the Contact Group, which included Russia". Alex J. Bellamy, *Kosovo and International Society*, Palgrave, 2002 at 128.

The Kosovo Liberation Army (KLA) started its insurrection campaign in 1998 in the former Yugoslavia against Serbian civilians.²⁵⁶ The Yugoslav government rapidly increased its presence in Kosovo and the international community employed peaceful measures to end the hostilities.

In March 1998, the Security Council passed Resolution 1160 which called for the Yugoslavs and Albanians in Kosovo to reach a political solution and placed an arms embargo on both sides. Despite these measures, the KLA continued with its campaign of violence which resulted in it taking control of 40% of Kosovo.²⁵⁷

These events gave Milosevic the justification he needed for proceeding with attacks on Albanian Kosovars. Serbian forces were greater in number and better equipped and their tactics included “killings, torture, burning Kosovo’s villages and expelling residents.”²⁵⁸ Serbia's use of force resulted in the displacement of over one million ethnic Albanians from Kosovo into Albania, Bosnia-Herzegovina, the Former Yugoslav Republic of Macedonia, and the Republic of Montenegro.²⁵⁹ The scale of the massacre, accompanied with the likelihood that the hostilities would spread in the region, resulted in NATO’s involvement.

In order to end the conflict in Kosovo, NATO wanted to make its threat credible by demonstrating air power along the Albanian and Macedonian borders. On June 11, 1998 U.S. Secretary of Defense William Cohen emphasized that: “this exercise is going to demonstrate NATO’s capability to project power rapidly in the region.”²⁶⁰ NATO’s effort to prevent Yugoslavia from descending into conflict was not successful because the threat lacked credibility. Namely, Milosevic was aware that NATO did not have consensus among its member states because France and Germany stood firm about securing a Security Council resolution.²⁶¹ Madeleine Albright tried to convince Milosevic that UN Security Council authorization “may be desirable but is not required,” therefore NATO can justify the use of military force based on self-defense under Article 51.²⁶²

On 13 October 1998, NATO issued an ACTORD for limited air operations and a phased air campaign against Yugoslavia which resulted in Milosevic’s acceptance of the agreement after eight months of conflict in Kosovo.²⁶³

Although the Milosevic-Holbrooke agreement made peace, it did not last long. KLA “used well-known guerilla strategies, consisting of attacks, provocation, and harassment,

²⁵⁶ Ronald C. Santopadre, *Deterioration of Limits on the Use of Force and its perils: A rejection of the Kosovo Precedent*, 18 St. John's J.L. Comm. 369, 385, (2003).

²⁵⁷ Sabrina P. Ramet, *The Three Yugoslavias: State-building and Legitimation*, 2005 at 514

²⁵⁸ Ronald C. Santopadre, *Deterioration of Limits on the Use of Force and its perils: A rejection of the Kosovo Precedent*, 18 St. John's J.L. Comm. 369, 385, (2003) at 386.

²⁵⁹ Heike Krieger, *The Kosovo Conflict and International Law: An Analytical Documentation* 1974.

²⁶⁰ <http://www.cnn.com/WORLD/europe/9806/11/nato.kosovo/>

²⁶¹ According to Miach Zenko, “The threat failed because Yugoslav president Slobodan Milosevic recognized cracks in NATO’s public display of unity. Before any actual bombing of Serbia could take place, France and Germany insisted that the alliance obtain the imprimatur of a UN Security Council resolution authorizing the employment of ‘all necessary means’ to halt the killing in the Kosovo. The United States disagreed, stating that NATO retained the right to act independently of the UN, while Great Britain was on the fence. The allies were aware that efforts to obtain UN support could be vetoed by Russia and China, both judging the violence in Kosovo to be an internal matter for Serbia. Milosevic recognized the operation as nothing more than symbolism, an exercise in public relations, not a rehearsal for war.”

²⁶² Ryan C. Hendrickson, *The Clinton Wars: The Constitution, Congress, and War Powers*, 2002, at 119.

²⁶³ Mary Buckley, Sally Cummings, *Kosovo: Perceptions of War and Its Aftermath*. London: Continuum, 2001 at 21.

designed to intensify violent responses and to create 'events' that in turn would attract the attention of international media."²⁶⁴ This time the West had to send a credible signal to the Serbian government after a series of empty threats because NATO's credibility was at stake and they reactivated the ACTORD and the Secretary-General stated: "We remain ready to use whatever means are necessary to bring about a peaceful solution to the crisis in Kosovo and to prevent human suffering."²⁶⁵

After NATO began the military intervention in March 1999, they believed that Yugoslavia will be easily deterred from continuing with the conflict in Kosovo. After 79 days of bombing Yugoslavia, Milosevic halted the violation after NATO credibly communicated their threat to put troops in Kosovo to fight wars.

THREAT ANALYSIS

Under international law, NATO member states violated the United Nations Charter while using threats because interpretation of Article 2(4), ICJ decisions and state practices are based on the symmetry of actual 'use' and 'threat' of force:

The notions of 'threat' and 'use of force under Article 2(4) of the Charter stand together in the sense that if the use of force itself in a given case is illegal - for whatever reason - the threat to use force will likewise be illegal. In short, in order to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter.²⁶⁶

The first chapter of this thesis is devoted to the discussion of the use of force during the Kosovo War and it showed that NATO's military intervention was a flagrant breach of the UN Charter. Therefore, under the strict analysis of the legal rules, the use of threats prior to the NATO's intervention was unlawful.

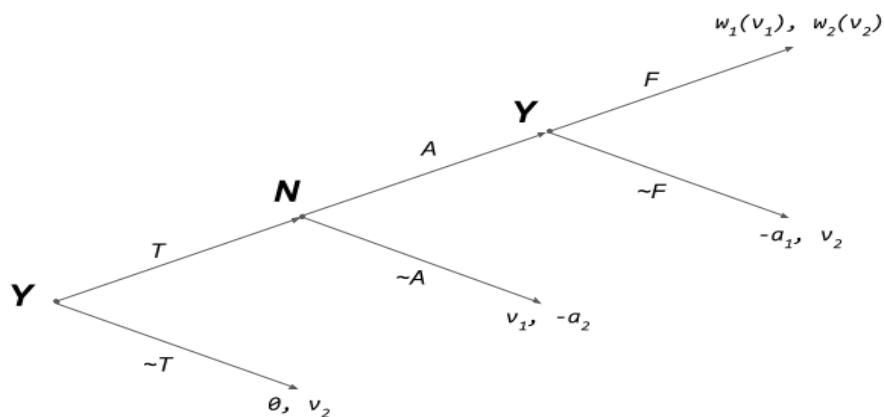
When international law scholars talk about the use of threats within the context of the Kosovo War, they focus mostly on the coercive diplomacy and ultimatum offered during the negotiations in France when Yugoslavia was offered two choices: "either voluntarily to give up a part of its territory or to have it taken by force."²⁶⁷ They often overlook the use of 'empty' threats in 1998 when NATO activated ACTORD and reinforced Milosevic's resolve to continue with hostilities in Kosovo. More importantly, scholars do not analyze in depth, credible and successful threats in June of 1999 when NATO put an end to the use of force. These two situations will be dealt with in turn in order to show that effective threats should be legitimate in international law because they uphold the UN Charter preamble to "maintain peace and security".

²⁶⁴ Dusan Sidjanski, *The Federal Future of Europe: From the European Community to the European Union* 2001 at 388.

²⁶⁵ cited in Olivier Corten, Bruno Simma, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law*. Oxford: Hart Pub., 2010.at 105, Also, the US Secretary of State asserted that "I would just like to remind President Milosevic that NATO stands ready to take whatever measures are necessary."

²⁶⁶ ICJ *para* 47, Nuclear Weapons case.

²⁶⁷ UN Doc. S/PV.3989, at 11 (1999).



In order to understand why effective threats should be allowed under international law, we need to depict a crisis game in order to see the importance of credibility and capability.

Before we begin with the game it is crucial to make several assumptions. In the first chapter, I made the assumption that wars are costly and therefore war is the worst outcome, hence all other outcomes are better. In this case, fighting for the Kosovo territory is worse than not having it. Moreover, we shall assume that this is a game of complete and perfect information.

Assume a conflict of interest exists between Yugoslavia and NATO where the United States, via NATO, wanted to deter Serbia from engaging in hostilities in Kosovo.²⁶⁸

In this game there are two players: Yugoslavia (Y) as player 1 and the NATO (N) as player 2. This is one-sided deterrence situation in which NATO wants to deter Yugoslavia. On March 22nd NATO issued a threat and Yugoslavia had to determine how to solve the challenge.

Let v_1 be Yugoslavia's gains if it continues the ethnic cleansing in Kosovo, and let v_2 be NATO's gain if it can stop this ethnic cleansing. In a typical game over possession of disputed territory, there is a tangible value that both players can assign to the control of such territory. In the current situation, however, the values v_1 and v_2 are the values that Yugoslavia and NATO assign to whether the ethnic cleansing continues or not, respectively.

The game begins once NATO has issued a demand that Yugoslavia cease its actions in Kosovo. Yugoslavia now has to decide how to deal with the challenge. If Yugoslavia does not escalate by threatening ($\sim T$), the game ends in appeasement. Yugoslavia is left with no benefits from the conflict so the payoff is 0, and NATO enjoys the rewards of deterring Yugoslavia, v_2 . If Yugoslavia threatens NATO, it may either act (A) or give up ($\sim A$). Yielding to Yugoslav's threat ends the crisis without the transfer of the Kosovo territory.

²⁶⁸ Although it would be more appropriate to call NATO's goal towards Yugoslavia 'compellence' which can be defined as "a threat intended to make an adversary do something" as opposed to 'deterrence', which is "a threat intended to keep him from starting something." For the purpose of the Kosovo War analysis, this difference is not significant. See Thomas C. Schelling, *The Strategy of Conflict*, Harvard University Press, 1981.

The payoffs are v_1 for Yugoslavia and $-a_2$ for NATO, where $a_2 > 0$ denotes NATO's reputational loss for conceding to Yugoslavia's threat. If, on the other hand NATO resists in response to the threat, Yugoslavia must make the final choice between peace and war. If Yugoslavia chooses ($\sim F$), the crisis ends in capitulation and the payoffs are $-a_1$ for Yugoslavia and v_2 for NATO. On the other hand, if fights (F), the crisis ends with a war. Here are the expected payoffs:

$$w_1(v_1) = pv_1 + (1-p)0 - c_1 = pv_1 - c_1$$

$$w_2(v_2) = pv_2 + (1-p)v_2 - c_2 = (1-p)v_2 - c_2,$$

Where p is the probability that Yugoslavia wins the war, and $1 - p$ be the probability that NATO wins the war. c_1 and c_2 are the costs that Yugoslavia and NATO have to incur as a result of the war.

Now, let us recall the assumption from the first chapter that wars are costly, which means that fighting for the goods is worse than not having it. That is $w_i(v_i) < 0$ for all v_i . We can solve this game by backward induction from the terminal node. Yugoslavia will choose to attack only if doing so is better than capitulating, *i.e.* $w_1(v_1) > -a_1$

This is NATO's credibility condition and if this condition is satisfied, then it will end up in war if Yugoslavia resists the threat. In order to specify what Yugoslavia will choose to do, two cases should be examined. First, assume that NATO's credibility condition is satisfied. If Yugoslavia resists, it should expect NATO to attack, so the outcome will be war. NATO will act only if the war is more desirable than capitulating, *i.e.* $w_2(v_2) > -a_2$

This is NATO's credibility limitation because if it is certain that resistance will not culminate in war, it would only resist when this requirement is met. When NATO issued a threat, President Clinton clearly stated on March 24 that NATO did "not intend to put [their] troops in Kosovo to fight a war". Backing out after a threat at a time when NATO certainly did not want to commit itself would have resulted in a much smaller reputation loss (a small a_2) compared to a full-blown war. Thus, the credibility constraint for NATO was not satisfied. Had NATO's credibility be satisfied, Yugoslavia's response to a threat would depend on its own credibility constraint. However, here NATO had no viable threat and this is why Yugoslavia resisted.

In contrast, when NATO threatened with sending ground troops in June 1999, Yugoslavia capitulated. Backing out after a much more committed threat with ground troops would have resulted in a larger reputation loss, thus increasing a_2 . This satisfies the credibility constraint for NATO. If Yugoslavia threatens with the escalation of the conflict and NATO resists (which it will, since the credibility constraint is now satisfied), the outcome is war. However, Yugoslavia can threaten only if war is preferred to the loss of Kosovo: $w_1(v_1) > 0$. However, bearing in mind that our assumption is that war is always costly, this is never the case. Hence, Yugoslavia did not threaten and the status quo was peacefully returned in NATO's favor.

What happened in June 1999 was that a settlement was reached through the Military Technical Agreement, which imposed an immediate cessation of hostilities and set timelines for withdrawal of Yugoslav forces from Kosovo. In addition, the United Nations passed Resolution 1244 on June 10th. These settlements only happened as a result of a credible threat by NATO of sending ground troops. The conclusion from the crisis game is that when the defender's credibility constraint is fulfilled, the challenger's reply to a threat will be

conditional on its own credibility constraint. In other words, the challenger will abstain from acting if such a constraint is not satisfied and will pursue the action in any other way. By contrast, if the defender's threat is not feasible, the challenger will fight the threat in spite of its own credibility limits.

To summarize: If both Yugoslavia and NATO had been completely informed about the credibility of their commitments during the Paris and Rambouillet agreement, the war would never have happened. Were both commitments credible, in that case Yugoslavia would have never threatened because doing so would have led to a war. Also, Yugoslavia would not have threatened, if it was not in a position to commit to fight. The only way Yugoslavia could have threatened if it had a credible commitment but NATO did not, in which case it would capitulate with certainty.

CONCLUSION- BROWNLIE FORMULA REVISITED

When the ICJ delivered the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* in 1996, Judge Shi pointed out to the international community that the deterrence theory is part of international politics, hence it should continue to exist *detached* from international law.²⁶⁹ Two decades later, in March 2016, the tiny Marshall Islands, a home to the Bikini Atoll nuclear testing grounds, began legal proceedings at the ICJ against United Kingdom, India and Pakistan for their “failure to fulfill their obligations regarding the cessation of the nuclear arms race at an early date and to nuclear disarmament”²⁷⁰ and once again, one of the most pressing issues in international affairs has been put before the ICJ to decide.²⁷¹

²⁶⁹ See *para* 69 of the Declaration of Judge Shi in Nuclear Weapons Opinion: “In my view, ‘nuclear deterrence’ is an instrument of policy which certain nuclear-weapon States use in their relations with other States and which is said to prevent the outbreak of a massive armed conflict or war, and to maintain peace and security among nations. Undoubtedly, this practice of certain nuclear weapon States is within the realm of international politics, not that of law. It has no legal significance from the standpoint of the formation of a customary rule prohibiting the use of nuclear weapons as such. Rather, the policy of nuclear deterrence should be an object of regulation by law, not *vice versa*. The Court, when exercising its judicial function of determining a rule of existing law governing the use of nuclear weapons, simply cannot have regard to this policy practice of certain States as, if it were to do so, it would be making the law accord with the needs of the policy of deterrence. The Court would not only be confusing policy with law, but also take a legal position with respect to the policy of nuclear deterrence, thus involving itself in international politics - which would be hardly compatible with its judicial function.” Available at <http://www.icj-cij.org/docket/files/95/7503.pdf>

²⁷⁰ In April 2014 the Marshall Islands filed lawsuits against all nine weapons states: China, North Korea, France, India, Israel, Pakistan, Russia, the United Kingdom, and the United States. However, only India, Pakistan and the United Kingdom accepted the ICJ’s compulsory jurisdiction <http://www.icj-cij.org/presscom/files/0/18300.pdf>

²⁷¹ In *para* 5 of the Application, the Republic of the Marshall Islands notes that this is not “an attempt to reopen the question of the legality of nuclear weapons addressed [by ICJ] in its Advisory opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons. Rather, the focus of this Application is the failure to fulfill the obligations enshrined in Article VI of the NPT and customary international law; and particularly the failure of the NPT nuclear-weapon States to keep their part of the strategic bargain and do what the Court unanimously called for based on its analysis of Article VI, namely “pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”

In the introduction of the Application, the Republic of the Marshal Islands begins its statement by emphasizing that “[i]t is a most fundamental *legal* and *moral* principle that bargains must be kept. This is embodied in international law through the principle of *pacta sunt servanda*.”²⁷² When we consider Judge’s Shi recommendation for separating international politics from international law, together with the Marshal Islands’ Application, in which it stresses the importance that strategic bargains must be kept based on the obligation in good faith, the final decision of the case does not hold much promise because international law and politics are *inseparable*.

Although Judge Shi in the *Nuclear Weapons case* held that the policy of deterrence is a political doctrine and should continue to exist detached from international law, this chapter aimed to show that it is very difficult, if not impossible, to analyze threats of force without adducing to strategic literature on international relations.

This chapter had a twofold goal: First, the main argument runs direct to the conventional view based on the Brownlie Formula that “an illegal threat is a conditional promise to resort to force in circumstances in which the resort to force will be itself illegal.” I have put forward an argument that threats of force should be treated *separately* from the use of force rules. The challenge of the symmetry of use and threats of force does not only come from the fact that threats are less grave than the use of force, but also because the current regime on the use of force explained the reason why we had more than 100 wars and only handful legal wars since 1945. The second goal was to show that military threats could be useful in crises since they may scale back the risk of war compared with purely diplomatic endeavors. First, they allow the parties to signal the commitments needed to acquire better deals. In addition, they can communicate these commitments credibly so that the adversary can be convinced by them. Finally, threats can weaken the adversary’s commitment and increase the possibility that he will surrender, which lessens the probability of war.

²⁷² See *Marshal Islands v United Kingdom para 1*. (emphasis added). Available at <http://www.icj-cij.org/docket/files/160/18296.pdf>

CHAPTER 3

THE KOSOVO WAR IN THE SHADOW OF FUTURE

INTRODUCTION

When NATO used military force in the Former Yugoslavia in 1999, it committed a crime of aggression as the use of force was neither authorized by the Security Council nor was it justified as self-defense. The crime of aggression is now defined in the Rome Statute that established the International Criminal Court.²⁷³ Albeit the crime of aggression was adopted at a diplomatic conference in Rome in 1998, it entered into force on July 2002; hence, it was not applicable to the case of the Kosovo War due to the retroactive jurisdiction clause.²⁷⁴ Therefore, the only way that Yugoslavia was able to prove the illegal use of force before ICJ was to rely on General Assembly Resolution 3314 which provides a definition of aggression since it was considered to be a customary international law (CIL).

CIL is one of the most controversial sources of international law and for the past several decades, international scholars have not been able to solve the puzzle of this unwritten set of rules. They have created numerous theories but they have fallen short in evaluating what exactly constitutes CIL.

In my view, much of the confusion around CIL derives from the fact that international lawyers are taken with “Grand Theories” and believe that these abstract theories can solve all legal problems ranging from international business law to international human rights to the use of force regime. While theory should apply across space and time, it is important to note that theories in international law should not be universal but should apply only to a particular field. Theory is the lodestone in international law, and it can help us to understand how international society works by simplifying reality. I believe that so-called “middle ranged theories” that focus on more narrowly defined phenomena are more appropriate for studying international law.

Namely, public international law functions in a different vein to private international law and when stakes are high and vital national interests are on the line, compliance with international law is less likely. On the other hand, when the stakes are moderate or low, states may count on reputation or reciprocity in order to enforce compliance in an international system that faces a problem of anarchy.²⁷⁵ Pursuing this step further, this chapter focuses on applying a rational choice theory to rules that regulate prohibition of the use of force embodied in Article 2(4) of the U.N. Charter and CIL.

²⁷³ For more about International Criminal Court in general, see William Schabas *The International Criminal Court: A Commentary on the Rome Statute*. Oxford: Oxford University Press, 2010. Noah Weisbord, Prosecuting Aggression, 49 *Harvard International Law Journal* 161-220 (2008); Michael Glennon, The Blank-Prose Crime of Aggression 35 *Yale Journal of International Law* 2009; M.E. O’Connell, M. Niyazmatov What is Aggression? *J Int Criminal Justice* (2012).

²⁷⁴ It means that ICC does not have retroactive jurisdiction and can only hear cases alleging crimes that took place after July 1 2002. See William Schabas *A Commentary of the Rome Statute*, Oxford University Press 2010.

²⁷⁵ Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 *Cal. L. Rev.* 1823 (2002).

CIL is an unwritten set of rules and they have brought more uncertainties to international legal orders than they have solved. Mainstream international law literature has been preoccupied with solving questions such as: How many participants are required to generate a rule of CIL? Are omissions considered for creation of CIL? Under what conditions can treaties form CIL? What is the hierarchy of international custom and treaties?

On the other hand, rational choice theory scholars have tried to solve the CIL puzzle by asking a question when states have a rational incentive to comply with CIL. Goldsmith and Posner were pioneers in developing a rational choice theory analysis of CIL and have argued that states comply with customs only when it is in their self-interest and have showed that CIL does not affect states' behavior.²⁷⁶ They go on to demonstrate their theory by using a prisoner's dilemma game and name those models as "coincidence of interest," "coercion," "cooperation," and "coordination."

As I have already explained in the methodology part of the dissertation; the use of a rational choice theory to explain state behavior is not novel and international relations scholars have used this methodology to describe a state's conduct. Goldsmith and Posner's controversial argument about the limits of international law was too pessimistic not only for classical international lawyers but also for liberal institutionalists who have argued that states can escape the prisoner's dilemma if they care about future and "play" this game for infinite rounds. For instance, Guzman tried to "save" international customs by arguing that states care about their reputations and then modeled cooperation among states by using a repeated prisoner's dilemma. He recognized that states interact with one another repeatedly which leads to the conclusion that CIL rules can affect payoffs and provide an incentive for compliance.²⁷⁷ Guzman has hardly been alone in this view and other liberal institutionalists have seen opportunities for escaping pessimistic prisoner's dilemma outcomes.²⁷⁸

Posner and Goldsmith's pessimistic conclusion about states' compliance with international law stems from the interpretation of the Prisoner's Dilemma game where the dominant strategy equilibrium for both players is to confess, which means that confess-confess is dominant strategy equilibrium, even if this equilibrium is not a Pareto optimal. This argument gives rise to at least two nagging problems. First, while we reach the same conclusion that CIL does not affect states' behavior, they have not taken the obvious next step to model a CIL as a repeated game since one of the constitutive elements is a state's practice that has to be "uniform, extensive and representative."²⁷⁹

In addition to this problem there is another issue with the theoretical confusion surrounding so-called "Grand Theories." By using a rational choice theory, they conclude that cooperation is unlikely to occur in the international legal arena. I shall deal with this in detail later in the discussion. For now, it will suffice to observe that stakes in international law vary from one international law field to another; hence, cooperation may be expected when vital national interests are not at stake.

²⁷⁶ Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, Oxford University Press, 2006.

²⁷⁷ Andrew T. Guzman, *Saving Customary International Law*, 27 *Mich. J. Int'l L.* 115 (2005).

²⁷⁸ George Norman, Joel Trachman, *Measuring the Shadow of Future: An Introduction to the Game Theory of Customary International Law*, *University of Illinois Law Review*, Vol 1, 2008.

²⁷⁹ Jean-Marie Henckaerts, Louise Doswald-Beck, *Carolin Alvermann Customary International Humanitarian Law: Volume 1, Rules XXXVI*, Cambridge University Press 2007.

Guzman wanted to rescue CIL from the “confess” dominant strategy equilibrium. His work is more precise compared to that of Posner and Goldsmith because he analyzes CIL through repeated interactions among states, but then he incorrectly assumes that states are inevitably concerned about reputational sanctions in foreign affairs.²⁸⁰ He may be correct in asserting that reputation affects payoffs but a repeated version of prisoner’s dilemma does not always lead to cooperation among states. His argument can be challenged on the basis that it is possible to imagine states handling situations that are of vital national interest and in these circumstances cooperating with CIL such as peremptory norms (*jus cogens*) to the extent that they forgo opportunities to exploit each other in the short run in order to achieve long-run gains and reputation does not facilitate cooperation.

Moreover, Guzman builds his theory based on *opinio juris* and has argued that a state’s practice is irrelevant for cooperation.²⁸¹ His position is based on *Nicaragua* case that takes into account only verbal acts. My argument also relies on the *Nicaragua* case where the ICJ accepted as a state practice not only General Assembly resolutions but also resolutions of other international organizations where Nicaragua and the United States participated. By contrast, I argue that state practice and in particular, physical acts, are important for establishing CIL. Governments often say one thing and do another. Hence, by using a logic of the “cheap talk” and signaling games, I suggest that the ICJ should take into consideration only physical acts as a constitutive element of CIL and should ignore statements.

To summarize: This chapter has developed two major claims. First, I seek to show how current rational choice theories of CIL fall short in explaining the importance of state practice and they rather focus on the *opinio juris* element of CIL. Namely, how much information can be credibly transmitted when communication is direct and costless like in the situation when the United States supported Resolution 2131? I argue that physical acts, unlike statements should be relevant element of a state practice because the statements cannot credibly communicate the message.

Second, the central question to be addressed here is when states are able to comply with CIL and in particular *jus cogens* norms such as the crime of aggression. Guzman’s argument that reputational sanctions affect payoffs and facilitate compliance with CIL shows one possible avenue toward finding a solution for compliance with CIL. I have put forward another argument. It is important to separate *jus cogens* norms from the rest of CIL because these norms are related to vital national interests, such as the norm of aggression. While emphasizing that compliance with CIL is possible, I argue that it is harder to achieve compliance than Professor Guzman suggests. Compliance with CIL is a Pareto improvement on violation, so breaching an international custom is regarded as inefficient. The more states value future payoffs, the easier compliance is to obtain because the more states care about the future, the less temptation there is to have immediate gains. I show that this is not the case with the *jus cogens* norms.

²⁸⁰ Professor Guzman stated that when stakes are high compliance is less likely to occur. See Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 Cal. L. Rev. 1823 (2002).

²⁸¹ Andrew T. Guzman, *Saving Customary International Law*, 27 Mich. J. Int’l L. 115 (2005).

THEORY OF CUSTOMARY INTERNATIONAL LAW

Customary international law and treaties constitute primary sources of international law.”²⁸² A more precise definition was given by the American Law Institute’s Restatement (Third) of Foreign Relations Law, which states that “customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”²⁸³ Therefore, in disputes relating to the presence of CIL, the ICJ confirmed that the evidence of a general practice and evidence that the practice was followed out of a sense of legal obligation.

For instance, in the Lotus case, the Permanent Court of International Justice in 1929 stated that international law is based on the will of states expressed in conventions or in “usages” generally accepted as expressing principles of law.²⁸⁴ Moreover, the ICJ in the North Sea Continental Shelf case held:

*“Not only must amount to a settled practice, but they must also be such, or be carried out in such as way, as to be evidence of a belief that this practice is rendered obligatory by the existence of the rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitates. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough.”*²⁸⁵

Also in the Nicaragua Case, the ICJ noted:

*“[A]s we observed in the North Sea Continental Shelf Cases, for a new customary rule to be formed, not only must the acts concerned ‘amount to a settled practice,’ but they must be accompanied by the opinio juris sive necessitates. Either the States taking such action or other States in apposition to react to it must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief...is implicit in the very notion of the opinio juris sive necessitates”*²⁸⁶

Where those two elements are manifest, a rule of CIL will be deemed to bind all states (with the exception of persistent objectors) without necessity to show that the particular state allegedly bound by the rule has participated in its formation or has otherwise accepted it.

In this chapter, I reach the same conclusion about the limits of *opinio juris* like legal positivist, but I use a different route by employing a rational choice theory.

²⁸² Statute of ICJ, June 26, 1945, 59 Stat. 1055, T.S. No 993 Article 38 of the ICJ “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply... (b) international custom, as evidence of a general practice accepted as law.

²⁸³ Restatement 1987; Also see the definition by ILC, Second Report, 2014 according to which customary international law “means those rules of international law that derive from and reflect a general practice accepted as law”.

²⁸⁴ Lotus case, 1927 (PCIJ) at 18.

²⁸⁵ See North Sea Continental Shelf Case.

²⁸⁶ Nicaragua Case 14 *para* 207.

THE SUBJECTIVE ELEMENT

Along with uniform, consistent and general practice, states must acknowledge the binding character of the norms. The *opinio juris* is a subjective or psychological element, which has a purpose to distinguish situations that are legally binding from those situations that are not.

The main debate among international law scholars stems from the issue whether it is necessary to show *opinio juris* for a CIL to exist. Some traditional international law scholars argue that for a CIL to emerge, it is not obligatory to show *opinio juris* element. For instance Maurice Mendelson, one of the proponents of this theory, argues that ICJ should not search for evidence of *opinio juris* in cases where “there is a well-established practice”²⁸⁷ This position was further supported by ILA in their 2000 Report where they claimed that “where practice exists which satisfies the conditions, it is not necessary to prove the existence of an *opinio juris*.”²⁸⁸ We should not be surprised by this position since Maurice Mendelson was chair of the ILA in 2000.

On the other hand, scholars have argued that *opinio juris* is “the primary and fundamental component of customary law, with practice serving the subsidiary and superficial role of merely providing evidence of what *opinio juris* comprises.”²⁸⁹ Some scholars went as far as to argue that *opinio juris* is the only essential element of custom.²⁹⁰

However, the large majority of scholars support the view that CIL cannot be established without having both elements: State practice and *opinio juris*. The main argument advanced by those scholars can be summarized in the words of Kammerhofer that “the reason why both elements can be seen to be necessary is that without *usus*, it would not be customary and without *opinio* it would not be law.”²⁹¹ Another reason given by Dumberry is that “*opinio juris* is necessary to distinguish between different kinds of omissions: those that count as relevant State practice in the formation of rules of custom and those that do not.”²⁹²

The PICJ in the Lotus Case, stated that *opinio juris* was a necessary element in the creation of CIL. The necessity of *opinio juris* was restated in the North Sea Continental Shelf case where the ICJ held:

²⁸⁷ Maurice H. Mendelson, The Subjective Element in Customary International Law, 66 British Yearbook of International Law 1995, 206-07.

²⁸⁸ ILA, Final Report, Pt. III p.31 *para* 4. Moreover, the ILA argued that “the more the practice, the less the need for the subjective element.” ILA at 41.

²⁸⁹ Stephen C. Neff “Opinio Juris: Three Concepts Chasing a Label” p. 4 cited in Patrick Dumberry, the Formation and Identification of Rules of Customary International Law in International Investment Law, Cambridge University Press 2016.

²⁹⁰ See Bin Cheng, ‘United Nations Resolutions on Outer Space: “Instant” International Customary Law?’ 5 *Indian J Int’l L* 23, 1965 at 36.

²⁹¹ Kammerhofer “Customary International Law Needs both *Opinio* and *Usus*, cited in Patrick Dumberry “The Formation and Identification of Rules of Customary International Law in International Investment Law” Cambridge University Press 2016.

²⁹² Patrick Dumberry “The Formation and Identification of Rules of Customary International Law in International Investment Law” Cambridge University Press 2016 at 308.

*“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of opinio juris sive necessitates. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy convenience or tradition, and not by sense of legal duty.”*²⁹³

The next natural question is how *opinio juris* is established. The ICJ has not been consistent in its decisions since in the North Continental Shelf case, it suggested that “the frequency or even habitual character” of a state practice is not sufficient requirement for demonstrating *opinio juris*. The dissenting opinion however held a different view, when Judge Tanaka indicated the problems of collecting evidence by emphasizing “the fact of external existence of a certain custom and its necessity felt in the international community.”²⁹⁴

Another question arises as to how *opinio juris* can be manifested?

The subjective element of CIL can be demonstrated by general principles, actions of the executive, legislative and judicial branches of national governments, views of experts, nongovernmental organizations (NGOs), religious texts, multilateral and bilateral treaties.²⁹⁵ One of the ways how *opinio juris* can be demonstrated is through State practice. “The only way to determine what a State thinks about the existence of any given norm is often to look at what that States actually does in practice. Alvarez stated:

*“Another, more complex response is to recognize that in the real world, evidence of opinio juris is usually drawn from the actual, practice of states, at least where those practices would otherwise be difficult to explain, and that it is the rare case where distinct or explicit evidence of the subject intentions behind a state’s actions. Indeed, most have assumed that evidence of opinio juris usually needs to be gleaned from state practice itself.”*²⁹⁶

Moreover, ILA stated that “the more the practice, the less the need for the subjective element.” The International Committee of the Red Cross study on custom in the field of humanitarian law held that “when there is sufficiently dense practice, an *opinio juris* is generally concerned within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of *opinio juris*.” Patrick Dumberry argued that “even when the practice is consistent and uniform, it is still necessary to

²⁹³ North Sea Continental Shelf Case, ICJ Rep.1969, p.44 para 77.

²⁹⁴ North Sea Continental Shelf Case 176.

²⁹⁵ For comprehensive analysis of the evidence of *opinio juris* see Brian D. Leppard, Customary International Law: A New Theory with Practical Applications. Cambridge: Cambridge University Press, 2010, 171-229.

²⁹⁶ Jose E. Alvarez “A Bit on Custom” N.Y.U.J. Int’l L and Pol. 17, 2009, 42 57.

demonstrate *opinio juris*.”²⁹⁷ This view was supported by the United States in response to the ICRC Study. “Although the same action may serve as evidence both of State practice and *opinio juris*, we do not agree that although the same action may serve as evidence both of State practice and *opinio juris* simply can be inferred from practice. Both elements instead must be assessed separately in order to determine the presence of a norm of customary international law.

Where to find *opinio juris*? What type of State practice is necessary to show State’s *opinio juris*. In 2013 the ILC secretariat stated that Commission “relied upon a variety of materials in assessing the subjective element for the purpose of identifying a rule of customary international law.” It made a list of the following elements.

*“[P]ositions of States before international organizations (including written comments and responses to questionnaires) or international conferences pronouncements by municipal courts; statements before international courts and tribunals; stipulations in arbitration agreements; diplomatic practice and notes; a State’s actual conduct (as opposed to its stated positions); a State’s treaty practice; multilateral treaty practice; as well as a variety of international instruments.”*²⁹⁸

The ICJ found evidence of a State’s *opinio juris* in several opinions. In the case the Legality of the Threat or the Use of Nuclear Weapons, the Court held that UN General Assembly resolutions can provide evidence of the *opinio juris* of States:

“General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.”²⁹⁹

In the Nicaragua case, the ICJ stated that the *opinio juris* of States regarding the obligation to abstain from the use of force “may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions”.³⁰⁰ In this case, the ICJ indicated that “expressions of an *opinio juris* regarding the existence of the principle of non-intervention I customary international law [were] numerous and not difficult to find.” The Court listed a number of General Assembly resolutions, the United States reservations and ratification of treaties, and the Final Act of the Conference on Security and Co-operation in Europe.

I arrive to the same conclusion like Mendelson by using a different path. His criticism of the Nicaragua case is based on the ground that the vote by a State in favor of a non-binding UN General Assembly Resolution cannot represent its *opinio juris*.

²⁹⁷ Patrick Dumberry “The Formation and Identification of Rules of Customary International Law in International Investment Law” Cambridge University Press 2016.

²⁹⁸ ILC Memorandum 2013, 21.

²⁹⁹ Legality of the Threat or the Use of Nuclear Weapons, Advisory Opinion, ICJ Report 1996 254-255 *para* 70.

³⁰⁰ Nicaragua ICJ rep 1986 *para* 188.

Mendelson states that this would amount to “double-counting”, i.e. interpreting the resolution as evidence of both State practice and *opinio juris*).

He argues: “And even if we grant, for the sake of argument, that the resolutions represented the *opinio juris*, where then is the practice which, the Court seemed to be stating, is an independent element? If we say that the resolutions constitute verbal practice, then we are guilty of double-counting them - both as the objective and as the subjective elements.” Wolfke provides a very similar reasoning by arguing that “Individual positive votes cast by the members do not necessarily represent the actual acceptance as law of the conduct only verbally postulated in the content of the recommendation, since the motive for such votes may be various.”³⁰¹

In 2012 in the case: Jurisdictional Immunities of the State (Germany v. Italy), ICJ Rep 2015 para 55 faced the issue of ‘double counting’. The Court stated that state practice can be found in “the claims to immunity advanced by States before foreign courts.”

THE OBJECTIVE ELEMENT

State practice is considered to be an objective or material element of CIL and scholars are divided between those who believe that a state practice is the most significant element of CIL,³⁰² and those who support the argument of supremacy of *opinio juris*. I go on to briefly explain the debate regarding the question of whether a state practice should be general, constant and uniform and the question of duration of state practice and then I focus on the state practice in order to show why physical acts should count as CIL.

The first issue regarding the evaluation of state practice stems from the debate among international law scholars concerning the *general, constant and uniform practice*.

Albeit the ICJ has noted that “constant and uniform usage practiced by the states in question” is the necessary condition for discovering a CIL³⁰³, the Court also stated that perfect consistency was not essential. International Law Association noted that “general practice suffices” to generate CIL as binding on all states. An example that practice must be practically uniform and the general conflicting practice should not exist can be found in the Nicaragua case.³⁰⁴

³⁰¹ Karol Wolfke, Custom in Present International Law, Springer Netherlands, 1993 at 84.

³⁰² Anthony D’Amato, Concept of Custom in International Law, Cornell University Press, 1971.

³⁰³ Asylum Case 116, 131.

³⁰⁴ It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule. Nicaragua *para* 184.

The second issue concerns the *duration of state practice* and there is no set standard specifying when a state practice turns into law. Long-term practice was a traditional view, which required several decades to pass before a certain norm evolved into a rule of CIL. Nowadays, the period is shorter for a state practice to become a rule. The ICJ in the North Sea Continental Shelf Cases stressed that a “passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law,” if the practice is “both extensive and virtually uniform.”³⁰⁵

I shall have more to say in the next section about the third issue, when I apply the identification of state practice in Article 2(4) and CIL. For present purposes, it will be suffice to convey the conventional wisdom among scholars and jurists. The debate stems from different arguments whether verbal acts or physical acts should count as a state practice. I support the restrictive view and argue that only physical acts and not statements constitute State practice for purposes of CIL because statements are separated from States actions *de facto*.

For the majority of scholars, the International Law Association and the International Law Commission, statements count as evidence of State practice. They take many different forms, including diplomatic correspondence, declarations of government policy, the advice of government legal advisers, press communiqués, official manuals dealing with legal questions, orders to the armed forces, statements and votes in international organizations, the comments of governments on draft texts produced by International Law Commission or similar bodies, national legislation, domestic court decisions, and pleadings before international tribunals.³⁰⁶ In addition, UN General Assembly resolutions and other resolutions by multilateral bodies count as state practice. This non-restrictive position has been taken by those scholars who claim that verbal acts can count as either the objective or subjective element, with the International Law Association observing that it is possible for the same conduct to manifest both.³⁰⁷ ICJ practice also supports the view that state practice embraces any act or a verbal statement given by a state.³⁰⁸ According to Akehurst “state practice means any act from which views about customary international law can be inferred; it includes physical acts, claims, declarations *in abstarcto* (such as General Assembly resolutions), national laws, national judgments and omissions.”³⁰⁹ For Wood, “if a state acts unlawfully but nevertheless seeks to justify what it has done (or omitted to do) with legal argument, the justification is itself an element of State practice, and may even have more legal significance (in terms of preserving or reinforcing the law) than the action itself.”³¹⁰

This approach has also been taken by Guzman who argues that “there is no certainty that these statements bear any relationship to what states actually believe or do.” He provides an example of torture by saying that “there is no shortage of agreements and

³⁰⁵ North Sea Continental Shelf Case 1969 at 4.

³⁰⁶ James Crawford, *Brownlie’s Principles of Public International Law*, Oxford University Press 2012.

³⁰⁷ Report of International law Association, Committee on Formation of Customary (General) International Law, 2000, 7.

³⁰⁸ See *Asylum case* (1950) ICJ Rep. 256; *The North sea Continental Shelf Cases* (1969) ICJ rep. 3, *Nicaragua Case* (1986).

³⁰⁹ Michael Akehurst, *Custom as a Source of International Law*, 47 BYIL 1, 1974 at 53.

³¹⁰ Michael Wood and Omri Sender, 'State Practice', in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*.

statements condemning torture, yet its use by states is commonplace.”³¹¹ By adopting the “modern approach,”³¹² which is paradoxically based on moral values, and applying a rational choice theory, he concludes that “the main lesson to be drawn from the theory [...] is that CIL is really about the *opinio juris* requirement and not practice requirement.”³¹³ He specifies this by stating that “a rational choice approach, then leaves no room for a state practice requirement other than as an evidentiary touchstone to reveal *opinio juris*. Practice can shed light on whether a particular norm is regarded as obligatory, but it does not by itself make it so.”³¹⁴

Albeit this dissertation also uses a rational choice theory, I see two different problems with Guzman’s argument. First, his example of torture is not accurate because it is considered a *jus cogens* norm and it does not require neither of the two constitutive elements of CIL such as *opinio juris* and state practice. Second, while I agree with Guzman that governments make statements strategically and they “often [do] not reflect the reality of practice,” he does not discuss the physical acts but his focus is on statements, which in my view should be the only relevant evidence for state practice. I argue that state practice should be limited to physical acts only.³¹⁵

This restrictive view of analyzing CIL in which only state practice is relevant to the formation of CIL, has been often attached to the so-called American way of thinking,³¹⁶ and it has been a subject to numerous criticisms mostly because it appears to be very narrow in the analysis. In addition, this position of taking into account only physical acts has not been embraced under ICJ decisions. International law scholars who support the restrictive view argue that state practice amounts to the physical acts of a state. Anthony D’Amato holds that only physical acts and not verbal statements account for state practice.³¹⁷ D’Amato’s view caused controversy among international legal scholars. As Akehurst has observed, the problem with D’Amato’s argument is the unavoidable dispute that will come from states declaring physical acts contrary to one another.³¹⁸ Moreover, for Michael Byers, D’Amato’s claim “leaves little room for diplomacy and peaceful persuasion, and, perhaps most importantly, marginalizes less powerful states in the process of customary international law.”³¹⁹ Regardless of its controversy, this argument was echoed by Wolfke who argued that statement’s in the

³¹¹ Andrew T. Guzman, *Saving Customary International Law*, 27 Mich. J. Int’l L. 115 (2005) at 152.

³¹² Andrew T. Guzman, *Saving Customary International Law*, 27 Mich. J. Int’l L. 115 (2005) at 155.

³¹³ Andrew T. Guzman, *Saving Customary International Law*, 27 Mich. J. Int’l L. 115 (2005) at 153.

³¹⁴ Andrew T. Guzman, *Saving Customary International Law*, 27 Mich. J. Int’l L. 115 (2005) at 153.

³¹⁵ This position was taken also by D’Amato albeit our interpretation differs in methodology. Anthony D’Amato, *Concept of Custom in International Law*, Cornell University Press, 1971.

³¹⁶ Gregory H. Fox, Brad R. Roth, *Democratic Governance and International Law*, Cambridge University Press, 2000 at 267. Also, this way of analyzing a state practice is called Rambo’s superpositivism. See *The United Nations Charter and the Use of Force 1945-1985* in Antonio Cassese, *The Current Legal Regulation of the Use of Force*. Dordrecht, The Netherlands: M. Nijhoff, 1986.

³¹⁷ “A state may make certain claims in diplomatic correspondence, but these often clash with competing claims of other State and thus are not a reliable indicator of the content of international law...But a state can act in only one way at one time, and its unique actions recorded in history. Speak eloquently and decisively.” Anthony D’Amato, *The Concept of Custom in International Law*, Ithaca, NY: Cornell University Press, 1971 at 50. For similar restrictive view also see Karol Wolfke, *Custom in Present International Law*, Springer Netherlands, 1993 at 84.

³¹⁸ Akehurst, “Custom as a Source of International Law”, (1974-75) 47 BYIL 1, at 53.

³¹⁹ Michael Byers *Custom, Power and the Power of Rules: International Relations and Customary International Law*, Cambridge University Press, 1999 at 134.

form of voting in international organizations do not “constitute acts of conduct, nor, even multiplied, any conclusive evidence of any State practice.”³²⁰ In addition, Michael Glennon also notes that “We need to look not at words but at deeds – not at paper rules but at real rules – not at *opinio juris* but at practice.”³²¹

According to the International Law Association, those who deny that verbal acts count as practice “seem to be motivated (whether expressly or not) by the consideration that talk is cheap”, and that to make a statement is not the same as arresting a ship.

With this theoretical frame in mind the chapter proceeds to describe the Article 2(4) and elaborate the argument about the physical acts within the context of state practice.

ARTICLE 2(4) AND CIL: ACTIONS SPEAK LOUDER THAN WORDS

In addition to establishing a treaty obligation under Article 2(4), the provision of non-intervention also creates obligations arising under customary international law. The International Law Commission held the view that “the great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force.”³²² The Court did not hold that in order for the prohibition of the use or threat of force embodied in the UN Charter to be identified as CIL, the state practice has to be in full conformity with that compliance with the rules but there has to be general consistency.³²³ As the chapter on the use of force shows, Article 2(4) has been frequently dismissed since its creation in 1945 hence the obvious question arises as to whether this provision of the UN Charter constitutes a CIL since both elements are required for its formation. Thomas Franck in 1970 stated that Article 2(4) completely

³²⁰ Karol Wolfke, *Custom in Present International Law*, Springer Netherlands, 1993 at 84. D’Aspermont has also been supportive of this restrictive view. “International lawyers have been forced to resort to all new sorts of nets and traps to hunt and capture practice where there was none. The stratagems and ploys which are being used to ‘discover’ practice are numerous and well-known. It suffices to mention a few of them. The most common of which is to turn a declarative process into a constitutive one. This is the idea that what is said about a given behavior is constitutive of that behavior. A clear example of this is the argument that declarations by states about what they do or do not do are themselves constitutive of practice. The possible evidence of behavior thus become the behavior itself. Another trick is to discover behavioral practice in interpretative practice. According to this approach, what is said about an existing rule feeds into the behavioral practice supporting the customary rule. This mean, for instance, that qualifications made by certain international actors of a given situation (e.g. the Security Council in the framework of Chapter VII) generate behavioral practice for the sake of the customary law applicable to that situation”

³²¹ Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo*, New York: Palgrave, 2001 at 65.

³²² ILC Yearbook 1966, vol II p.247. Also see Gazzini: “[T]he norms on the use of force embodied in the Charter and those existing under international law are substantially identical because of the interaction between the Charter and customary international law, on the one hand, and the virtual universality of the UN, on the other hand.” Tarcisio Gazzini, “The Changing Rules on the Use of Force in International Law”, Manchester University Press, 2006 at 320.

³²³ If a state in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule. Nicaragua Case, 1986 I.C.J. Reports 98, 186.

deteriorated that it “mock us from its grave.”³²⁴ After numerous violations of the provision that is considered to be “the heart of the United Nations Charter,”³²⁵ Franck concluded in 2002 that “Article 2(4) has died again, and, this time, perhaps for good.”³²⁶

The ICJ in the Nicaragua case stated a position that the use of force is not only subject to the UN Charter’s provisions but that it is regulated by customary international law although “the areas governing by the two sources of law [did] not exactly overlap, and the substantive rules in which they are framed [were] not identical in content.”³²⁷

In specifying the meaning of CIL on the use of force, the Nicaragua Case analyzed the Friendly Relations Declaration since the first principle of the Declaration, reflects the language of the UN Charter.

Namely, the ICJ accepted as state practice not only General Assembly resolutions but also resolutions of other international organizations, especially those in which Nicaragua and United States participated. Although this approach accords with mainstream international law literature, I am going to show why only actions that have physical consequences as state practice should count.

The ICJ has to explain considerable state practice of intervention in another state’s affairs in order to justify its conclusion that the principle of non-intervention is “part and parcel of customary international law.”³²⁸

Although the ICJ recognized the objective element such as a state practice to be an element of CIL along with a subjective element such as *opinio juris*,³²⁹ it shied away from any examination of state practice and did not provide an example of it. Instead of looking at state practice, the ICJ focused only on *opinio juris*.³³⁰ The ICJ states a position

³²⁴ Thomas Franck, “Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States,” 64 AJIL 809, 835 1970, also see Louis Henkin response to Thomas Franck “The Reports of the Death of Article 2(4) Are Greatly Exaggerated” 65 AJIL, 1971.

³²⁵ Bruno Simma, Hermann Mosler, The Charter of the United Nations: A Commentary, Oxford University Press, 1995 at 111.

³²⁶ Thomas M. Franck, “What Happens Now? The United Nations after Iraq” 97 AJIL, 2003 at 610.

³²⁷ Nicaragua case *para* 175. Also, on the distinction between CIL and conventional use of force rules see the separate opinion of Judge Singh: “If an issue was raised whether the concepts of the principle non-use of force and the expectation to it in the form of use of force for self-defense are to be characterized as either part of customary international law or that of conventional law, the answer would appear to be that both concepts are inherently based in customary international law in their origins, but have been developed further by treaty-law. In ant search to determine whether these concepts belong to customary or conventional international law it would appear to be a fallacy to try to split any concept to ascertain what part of percentage of it belongs to customary law and what fraction belongs to conventional law. There is no need to try to separate the inseparable.” 152

³²⁸ Nicaragua Case *para* 196-198.

³²⁹ Nicaragua Case *paras* 205, 206, 207.

³³⁰ The ICJ restated the North Sea dictum that CIL is constituted from state practice and *opinio juris*, but its analysis does not mention state practice at all but focus solely on *opinio juris*: “The significance of the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel rights or an unprecedented exception to the principle might, if share in principle by other States, tend towards a modification of customary international law. In fact however the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition. [...] In particular, as regards to conduct towards Nicaragua which is the subject of the present case, the United States has not claimed that its intervention, which it justified in this way on political level, was also justified on legal level, alleging the exercise of a new right of intervention regarded by the United States as existing in such circumstance. Nicaragua Case *paras* 207-208.

that the principle of non-intervention has been “reflected in numerous declarations adopted by international organizations and conferences in which the United States and Nicaragua have participated.”³³¹ The ICJ provided an example of General Assembly Resolution 2131 (XX),³³² the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.³³³ The ICJ stated that a positive vote for GA Resolution 2131(XX), regardless of the fact that the United States viewed it as “only a statement of political intention and not a formulation of law,” was bound by this norm.³³⁴ Therefore, we should not be surprised that Judge Schwebel, dissenting, held that “[t]here is hardly sign of custom-of the practice of States- which suggests still less demonstrates, a practice accepted as law which equates with the standards of non-intervention prescribed by the OAS Charter.”³³⁵ Moreover, the ICJ considered verbal acts given by the United States, such as its acceptance of a resolution condemning aggression adopted at the Sixth International Conference of American States in 1928, or its ratification of Montevideo Convention on Rights and Duties of States in 1933. In the same spirit, the United States’ approval of the principle of the prohibition of the use of force, which was part of the Helsinki Final Act was also considered to establish an evidence of its official position towards the legal position of the inter-State use of force.

BLUFFING AND AGGRESSION 2(4)

States often take advantage of using language for their self-interest, thus governments often cautiously phrase their statements in a way that is convenient for their purposes. In international politics where states operate in an anarchic system where there is no higher authority to enforce mutual obligations among states, states have to do whatever is required to maintain their security; including lying and bluffing.

It is hard to find a state that does not support the prohibition of the use of force in their verbal and written political statements. However, often these statements do not reflect the reality when states use military force and violate those non-intervention statements. Thomas Schelling stated that bargaining power is “the power to fool an bluff” therefore we should not be surprised that the United States’ affirmative words for the principle of non-intervention and their positive vote for GA Resolution 2131(XX) were not in harmony with their deeds during the Nicaragua incident.

Here, I go on to show why the ICJ should not take into consideration *statements* but only *physical acts* as a *constitutive element of CIL*. My main argument, in a nutshell, is that those statements are cheap talk and they do not directly affect payoffs.³³⁶ Hence,

³³¹ Nicaragua Case para 203.

³³² Resolution 2131 (XX) states that “no State organize, assist, foment, finance or tolerate subversive terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State” Resolution 2131 (XX), 21 December 1965.

³³³ Nicaragua Case *para* 203.

³³⁴ The ICJ took this point of view by arguing that “the essentials of resolution 2131 (XX) are repeated in the declaration approved by resolution 2625 (XXV), which set out principles which the General Assembly declared to be ‘basic principles’ of international law, and on the adoption of which no analogous statement was made by the United States representative. Nicaragua Case *para* 203.

³³⁵ Nicaragua Case, *para* 98.

³³⁶ ILA also considered *opinio juris* as a cheap talk.

only the real conduct of states, such as physical acts, reflects what they consider binding as law since their actions are costly and can credibly communicate their true intentions. The key question is how much information, if any, can be credibly transmitted when communication is direct and costless? Had the Court relied on the physical acts, it would have probably voted in favor of the United States.

The main purpose of communication is to communicate information from someone who has it to someone who does not. In this situation, by only supporting GA Resolution 2131 (XX), should the ICJ believe the United States' statement for non-intervention? Hence, should the ICJ consider the statements as a part of CIL? In other words, how much can "cheap talk" accomplish in creation of CIL? My answer is - very little or nothing. The question I address here is how much information can be credibly transmitted when communication is direct and costless like in the situation when the United States supported Resolution 2131 (XX)?

In this game, United States' will try to convince ICJ that it supports the Resolution, no matter what its actual stance is. I show this using the payoff matrix below:

	ICJ's belief of US stance	
US's actual policy	Support	Oppose
Support GA Res.	2, 1	0, 0
Oppose	3, 0	1, 3

With this payoff matrix, the dominant strategy for United States is always to try shifting towards left column, i.e. make ICJ believe that it supports the Resolution 2131 (XX) regardless of what their actual policy is. ICJ can as well ignore what United State votes, because in the case when United States' policy is, in-fact, to support the Resolution, it will vote accordingly. However, in the case when the policy of United States is to oppose the Resolution, it has an incentive to lie and mislead ICJ into thinking that it truly supports the resolution.

In this simple game, I am considering how much information can be transferred from the sender to a receiver. I conclude that when the preferences of the two parties are not aligned, it will not be in the interest of the sender to reveal fully the private information it holds.

If the ICJ wants the United States to share their opinion about the principle of non-intervention, can ICJ rely on the United States' statement such as a simple vote for Resolution 2131 (XX) in order to reveal the truth, or will the United States offer a biased statement? As it has been demonstrated, ICJ cannot rely on such costless signals.

COMPLIANCE WITH JUS COGENS NORMS

After outlining a theory of *Jus Cogens*, this chapter proceeds in the next section in order to explain the compliance with peremptory norms.

A THEORY OF *JUS COGENS*

Jus cogens norms are in danger and there is very little we can do to save them from the scourge of power. *Jus cogens* are peremptory and fundamental norms in international law which are accepted by the international community as a whole from which no derogation is allowed.³³⁷ These norms give rise to *erga omnes* obligations and states have to conform to these norms regardless of their consent or their state practice. In theory, any conflicting law with peremptory norms is null and void but they have been widely ignored in practice.

While international law scholars swoon over the idea of *jus cogens*, this question is whether this concept makes sense. To a legal realist, it does not because its core methodology is contradictory.

The *jus cogens* norms have been analyzed by international law writers through natural law. In this part, I analyze *jus cogens* norms through rational choice theory by delinking *jus cogens* norms from moral arguments. The *jus cogens* norms have raised numerous legal questions: whether states are bound by rules to which they do not consent. Moreover, the confusion among international law scholars stem from the controversial and ambiguous content, derogations of *jus cogens*,³³⁸ their effect³³⁹ as well as the legitimacy of these norms.

The main purpose of peremptory norms lie within the obligation to protect the values and interests, which are primarily significant for the international community as a whole.³⁴⁰ There are many definitions of *jus cogens* norms but the concept pertains to compelling on higher law from which no derogation is permitted. The Vienna Convention on the Law of treaties defines *jus cogens*:

*“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general law having the same character.”*³⁴¹

³³⁷ Fitzmaurice distinguishes between peremptory and ordinary rules: “The rules of international law in this context fall broadly into two classes—those which are mandatory and imperative in all circumstances (*jus cogens*) and those (*jus dispositivum*) which merely furnish a rule for application in the absence of any other agreed regime, or, more correctly, those the variation or modification of which under an agreed regime is permissible, provided the position and rights of third States are not affected.” Fitzmaurice, Third Report on the Law of Treaties, II YILC 1958, 40.

³³⁸ More about the question whether *jus cogens* norms can be changed see Brian D. Lepard “Customary International Law: A New Theory with Practical Applications” Cambridge University Press 2010 at 258-260.

³³⁹ Mark A. Weisburd, The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina, Michigan Journal of International Law, Vol. 17, No. 1, 1995. For more about derogations, see Sondre T. Helmersen, The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations, Netherlands International Law Review, Vol. 61 Issue 02, 2014.

³⁴⁰ Furundzija Case (Trial Chamber, ICTY) 35 ILM (1996).

³⁴¹ Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 344. Professor Bassiouni states that “the very words ‘*jus cogens*’ mean ‘the compelling law’ and, as such a *jus cogens*

The *jus cogens* doctrine has not only been recognized by scholars but also by commentators and has been included in the American Law Institute's Restatement (Third) on the Foreign Relations Law of the United States.³⁴²

Peremptory norms present the top of the international legal hierarchy and take precedence over national law at the international level and other sources of international law. They protect the most compelling and essential interests of the international community as a whole and invalidate treaty law and other ordinary rules of customary international law not endowed with the same normative force.

As a result of its universal character and nonderogability, a rule of *jus cogens* creates state responsibility *erga omnes*.³⁴³

For *jus cogens* to gain a status of a legal norm, there must be a general norm of international law that is recognized and accepted by the international community of states as a whole.³⁴⁴ According to Article 38 of the Statute of the International Court of Justice, an international rule has to meet the three basic criteria of international law: treaty, custom, and general principles of law. Members of the International Law Commission put forward an argument that *jus cogens* norm could be determined using these criteria: (1) whether the norm is incorporated into norm-creating multilateral agreements and is prohibited from derogation in those instruments; (2) whether a large number of nations have perceived the norm to be essential to the international public order, whereby the norm is reflected in general custom and is perceived and acted upon as an obligatory rule of higher international standing; (3) whether the norm has been recognized and applied by international tribunals, such that when violations occur, the norm is treated in practice as a *jus cogens* rule with appropriate consequences ensuing.³⁴⁵

Although the concept of peremptory norms was formally recognized in 1969,³⁴⁶ the debate among international law scholars dates back to 1937 when Alfred von

principle holds the highest position in the hierarchy of all other norms, rules and principles. It is because of that standing *jus cogens* principles have come to known as 'peremptory norms'. " Cherif M. Bassiouni, A Functional Approach to "General Principles of International Law, 11 Mich. J. Int'l L., 1989-1990. More about hierarchy and *jus cogens* see Prosper Weil, Towards Relative Normativity in International Law, 77 Am. J. Int'l L. (1983). More about *jus cogens* critical analysis see Jerzy Sztucki, *Jus Cogens* and the Vienna Convention on the Law of Treaties: A Critical Appraisal, Springer Verlag, 1974.

342 "an international agreement is void...if at the time the agreement is concluded, it conflicts with a peremptory norm of general international law." Restatement (Third) of Foreign Relations Law 331(2) (1986).

343 In the case Furundžija Judgment, the ICTY held: "Because of the importance of the values it protects, the principle has evolved into a peremptory norm of *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy." Prosecutor v. Furundžija, IR-95-17/1-T, para 153 (1998).

344 Kamrul Hossain, The Concept of *Jus Cogens* and the Obligation Under The U.N. Charter, 3 Santa Clara J. Int'l L. 72 (2005).

345 Cited in David S. Mitchell, The Prohibition of Rape in International Humanitarian Law as a Norm of *Jus Cogens*: Clarifying the Doctrine, 15 Duke Journal of Comparative & International Law 219-258 (2005).

346 A group of scholars argue that *jus cogens* norms have not been recognized under international law until 20th century. See Jerzy Sztucki, *Jus Cogens* and the Vienna Convention on the Law of Treaties: A Critical Approach 12-54 (1974). For the opposite point of view see Hannikainen who argued that certain rules of international law in fact had come to meet Brownlie's criteria for *jus cogens* in earlier periods. However, there are scholars who believe that the origins of *imperative* norms date back to the work of Christian Wolff and Emerich de Vattel in the 18th century and the concept of *jus cogens* can be found in the work of international law scholars in the 19th century. Wladyslaw Czaplinski "Jus Cogens and the law of Treaties" in The Fundamental Rules of the International Legal. Order: *Jus Cogens* and Obligations Erga Omnes. Edited by Christian Tomuschat and Jean-Marc. Thouvenin, 2005, at 83.

Verdross held the position that “no juridical order can...admit treaties between juridical subjects, which are obviously in contradiction to the ethics of certain community.”³⁴⁷ Verdross’s moralist view of *ius cogens* challenged the legal positivism and provoked scholars such as Schwarzenberger to conclude that “the ultimate explanation of the validity of any treaty rests on metalegal motive powers which are not explicable on a normative level, but readily reveal themselves on the sociological plane.”³⁴⁸ Verdross also influenced McNair to state “there are, however, many rules of customary international law which stand in a higher category and which cannot be set aside or modified by contracting States.”³⁴⁹

Kelsen continued the discussion of peremptory norms and argued that: “no clear answer...can be found in the traditional theory of international law [and it was] probable that a treaty by which two or more states release one another from the obligations imposed upon them by the norm of general international law prohibiting occupation of parts of the open sea, will be declared null and void by an international tribunal competent to deal with this case.”³⁵⁰

The Vienna Convention was drafted by the United Nations International Law Commission (ILC) and over the years the ILC discussed the *jus cogens* norms in their reports. The First Report on the Law of Treaties by Lauterpacht put forward an argument that *jus cogens* norms indicate “principles of international public policy”. This argument of *jus cogens* norms as a reflection of international public policy continued until the adoption of the Vienna Convention but in 1966 this argument was put forward on the table for further discussion:

“Drawing an analogy from the concept of *ordre public*” in municipal law,...*jus cogens* [is] not formulated in precise rules...[C]onsequently, the only method of deriving it [j]udicial determination. Thus, it [is] left to the judge to extract *jus cogens* limitations from the legal system as a whole by transforming social values directly into legal imperatives.³⁵¹ The academic discussion of *jus cogens* norms influenced International Law Commission to emphasize that “there exist in general positive international law of today certain fundamental rules of international public order contrary to which States may not validly contract.”³⁵²

After much discussion, the ILC was not able to come up with a definition of *jus cogens* but nevertheless, the Vienna Convention was put forward by the ILC for ratification. Vienna Convention talks about *jus cogens* norms in Articles 53 and 64.

³⁴⁷ Verdross claimed that there are two types of norms having the character of *jus cogens* in international law; states were simply not free to conclude treaties violating these norms. The first of these categories included discrete rules that had become compulsory; as an example, Verdross suggested the prohibition on states disturbing other states in the use of the high seas. The second category included rules that were *contra bon mores*. Moreover, he argued that four types of treaties would be immoral and therefore void: treaties which would have the effect of denying a state the ability to protect the lives and property of persons in its territory, as by requiring excessive reductions of its police force; treaties requiring arms reductions to the point that a state was rendered defenseless; Alfred von Verdross, *Forbidden Treaties in International Law*, 31 *Am. J. Int’l L.* 571 (1937).

³⁴⁸ Georg Schwarzenberger “*International Jus Cogens*” 43 *Texas Law Review*, 1965 at 455.

³⁴⁹ Arnold McNair, *Law of Treaties*, Clarendon Press, 1961 at 215.

³⁵⁰ Hans Kelsen, *Principles of International Law*, Rinehart, 1952 at 344.

³⁵¹ *The Concept of Jus Cogens in International Law*, papers and proceedings Conference on International Law, Lagonissi, Carnegie Endowment for International Peace, 1967.

³⁵² *Rep. of the Int’l Comm’n*, 15th Sess. Nov 6, 1963, U.N. Doc A/5601, *para* 18, GAOR, 18th Sess (1963).

Jus cogens norms are defined and for the first time formally identified in Article 53 of Vienna Convention Law of Treaties (VCLT) and it provides as holds:

Article 53: Treaties Conflicting with a peremptory norm of general international law (*Jus Cogens*)

“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

The *jus cogens* doctrine is also set out in Article 64 of the Vienna Convention on the Law of Treaties, which provides as follows:

Article 64: Emergence of a New Peremptory Norm of General International Law (*Jus Cogens*)

“If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”

These two articles are inconsistent with their own purpose. Namely, Article 53 requires *jus cogens* norm to be “accepted and recognized by the international community as a whole”. For the purposes of the Convention “whole” means “entirety” and “the international community in its entirety is not a part to the Vienna Convention. A third of international community in its entirety is not a party to Vienna Convention, including the United States and France, has not ratified because of *jus cogens*”

The International Law Commission has continued the discussion about the peremptory norms and concluded that “there exist in the general positive international law of today certain fundamental rule of international public order contrary to which States may not validly contract.”³⁵³

CUSTOMARY INTERNATIONAL LAW AND *JUS COGENS* NORMS

Although many scholars mix these two concept, I believe it is of significant importance to distinguish these two norms. This part will address the question of what are the norms falling within the category of *jus cogens*? While there can be compliance with some CIL, there is no compliance with *jus cogens* norms because of the high stakes.

Verdross included the freedom of the seas and prohibitions on treaties which obliged a state to forego extending diplomatic protection to its nationals abroad or which rendered a state defenseless. Hans Kelsen agreed with Verdross regarding freedom of the seas, but not with respect to a prohibition upon waivers of the right to extend diplomatic protection.

Article 2(4) of the United Nations Charter, forbidding the threat or use of force against the territorial integrity or political independence of a member of the United

³⁵³ Rep. of the Int'l Comm'n, 15th Sess. Nov 6, 1963, U.N. Doc. A/5601, para 18, GOAR, 18th Sess. (1963).

Nations, is widely considered a peremptory norm. The ILC took this position in its commentary to the draft articles on the law of treaties, as did a number of states at the Vienna Conference.³⁵⁴ More about the use of force rules and peremptory norms will be discussed in the following lines. A second norm having the character of *jus cogens* is the prohibition on genocide. The ILC took this position in its comments on Draft Article 50 to the Vienna Convention on the Law of Treaties³⁵⁵ and again in its draft articles on state responsibility³⁵⁶. The Restatement of Foreign Relations also takes this position. A third set of norms arguably of *jus cogens* status are those forbidding grave breaches of humanitarian law or crimes against humanity. A fourth norm is the right to self-determination.

THE PROHIBITION OF THE USE OF FORCE

The prohibition of the use of force constitutes a peremptory norm from which derogation is not permitted. This prohibition is embodied in the UN Charter, Article 2(4). The Vienna Convention regulates *jus cogens* norms as stated in the previous part and it applies to constituent instruments of international organizations, such as the UN Charter:

The Charter is a subject to the effect of Article 53 and Article 64 VCLT, dealing with voidness and termination of treaties conflicting with *jus cogens*. But Article 53 and Article 64 do not exhaustively govern the interplay between a treaty and *jus cogens*. States violate *jus cogens* not only by inserting explicit clauses in treaties, but also-and predominately-by the manner in which they exercise their right and prerogatives under a treaty not explicitly conflicting with *jus cogens*.

COMPLIANCE WITH *JUS COGENS* AND THE CRIME OF AGGRESSION

Guzman in his article “Saving Customary International Law” wrote a general theory of CIL in which he “provide[d] a firm and modern theoretical foundation of custom.”³⁵⁷ As I have already explained in the introduction of this chapter; One of the main problems with these “across the board” theories lies in their difficulty to empirically test them. International law is consisted of many different fields and for example, the CIL on the use of force work differently than a customary norm that regulates diplomatic protection. Hence, writing a general theory that can be implemented in both cases will not produce the accurate results. On the other hand, Goldsmith and Posner did a better job in distinguishing situations where states face different circumstances during the compliance with CIL such as the problems of cooperation, coordination, coincidence of interest, and coercion.³⁵⁸ In addition, in their 2nd chapter they “examine in detail four areas of

³⁵⁴ See James Crawford, *The Creation of States in International Law* Clarendon Press, 1979, at 106-107; Ian Sinclair, *The Vienna Convention on the Law of Treaties*, *Manchester University Press*, 1973 at 222-23, Marjorie Whiteman, *Jus Cogens in International Law: with a Projected List*, 7 *Georgia Journal of International and Comparative Law*, 1977.

³⁵⁵ 1966 ILC Report.

³⁵⁶ 1976 ILC Report.

³⁵⁷ Andrew T. Guzman, *Saving Customary International Law*, 27 *Mich. J. Int'l L.* 115, 2005 at 118.

³⁵⁸ Jack Goldsmith, Eric Posner, *A Theory of Customary International Law*, 66 *University Chicago Law Review*, 1999.

customary international law chosen on the basis of their prominence and on the availability of a detailed historical record.”³⁵⁹ Those four cases are: “free ships, free goods” rule of wartime maritime commerce; the breadth of the territorial sea; ambassadorial immunity; and the wartime exemption from prize for coastal fishing vessels.³⁶⁰ Although they distinguished different cases, their models leave unanswered a critical question concerning the CIL. Many international law scholars have challenged their work by arguing that their application of simple game theory models does not reflect the complexity of global politics.³⁶¹ My evaluation of their argument is not based on the lack of sophistication of their models since “a model is a tool and a tool must be simple enough to use.”³⁶² An important part of my critique of their rational choice theory analysis of CIL is based on the idea that custom norms require a state’s repetition of a certain act. Hence, using a one-shot prisoner’s dilemma game does not shed more light on the question of compliance with CIL.

Professor Guzman has tried to overcome this obstacle by modeling cooperation between states using a repeated version of prisoner’s dilemma game.³⁶³ Concerns about reputational sanctions in international law are a natural successor to the literature on cooperation based on liberal institutionalism. His main argument is that “a refusal to comply with international obligations today signals to other countries a willingness to violate law.”³⁶⁴ In order to see how reputation affects state behavior, he applies a game theory to a customary norm of diplomatic immunity to foreign dignitaries. After showing that violation of this norm is possible by making a reference to one-shot prisoner’s dilemma game, he continues with the assumption that a state might be concerned “to have a ‘good’ reputation for following CIL, which simply means that other states believe that the state complies with CIL.”³⁶⁵ The most important thing in the theory of cooperation is to think about how the stakeholders value future payoffs. In his model where the CIL has changed behavior, he assumed that there is “sufficiently large values of R (meaning a sufficiently low discount rate, r)” hence, states have an incentive to obey the customary rule.³⁶⁶

³⁵⁹ Jack Goldsmith and Eric Posner, *The Limits of International Law*, Oxford University Press, 2006, at 45.

³⁶⁰ Jack Goldsmith and Eric Posner, *The Limits of International Law*, Oxford University Press, 2006 at 45. Peter Spiro argued that “at least three of the four (the territorial sea excluded) are musty old rules of little contemporary relevance or interest...Insofar as international relations, in those contexts and many others, was mostly about relations between states, perhaps Goldsmith and Posner’s applications have something to tell us about the evolution of traditional customary norms” Peter J. Spiro, *A Negative Proof of International Law*. *Georgia Journal of International and Comparative Law*, Vol. 34, 2006. Goldsmith and Posner responded that they “looked for well-settled contemporary rules of CIL against which to test our theory, but frankly could not find a single example. The CIL of human rights is much talked about, of course. But as we explained in a different part of *Limits*, the gap between what this CIL requires and the actual behavior of states is vast. We thus do not think that human rights was a plausible candidate for a case study of a CIL- it would have been too easy a case to discredit” Eric A. Posner and Jack L. Goldsmith, *The New International Law Scholarship*, University of Chicago, Public Law Working Paper No. 126, 2006.

³⁶¹ Jens David Ohlin *Assault on international law*, Oxford University Press, 2014.

³⁶² Robert Powell, *Shadow of Power: States and Strategies in International Politics*, Princeton University Press, 1999 at 24.

³⁶³ Andrew T. Guzman, *Saving Customary International Law*, 27 *Mich. J. Int'l L.* 115 (2005) at 122.

³⁶⁴ Andrew T. Guzman, *Saving Customary International Law*, 27 *Mich. J. Int'l L.* 115 (2005).

³⁶⁵ Andrew T. Guzman, *Saving Customary International Law*, 27 *Mich. J. Int'l L.* 115 (2005) at 136.

³⁶⁶ Andrew T. Guzman, *Saving Customary International Law*, 27 *Mich. J. Int'l L.* 115 (2005) at 136.

In short, his argument is that the more a state cares about the future, the easier cooperation is to accomplish because the more a state values future payoffs the less temptation there is to pursue immediate gains at the price of long-term relationships. Hence, *the shadow of future* advances cooperation. Professor's Guzman argument can be challenged on the basis that it is possible to imagine a customary norm of a vital national interest such as a CIL of the prohibition of the use of force where cooperation is less likely to occur.

Liberal theory rests on the idea of the shadow of future, which assumes that under certain circumstances, states that gain from the short run from the noncooperation can be persuaded to participate in cooperative relationships if they are shown that to do so would benefit them on a long run.³⁶⁷ This theory was written as a challenge to a realists' pessimistic conclusion that states do not cooperate because they face one-shot Prisoner's Dilemma situations. In 1984 Robert Axelrod published the first book on the Repeated Prisoner's Dilemma Game (RPD) and this idea was soon further developed and applied to different areas of international relations.³⁶⁸

Realists immediately replied to this challenge posed by liberal institutionalists by developing an argument based on "relative gains." According to Grieco, states are interested in relative gains rather than absolute gains as liberal institutionalists believe. With international anarchy and zero-sum situations in international politics, the cooperation is unlikely to occur.³⁶⁹

In this part, I will depict situations when states are able to sustain cooperation and when they cannot. The argument is that the cooperation with CIL is possible in RPD only if the shadow of future is long enough and if players employ suitable strategies that penalize defection. In the case of *Jus Cogens* norms, where stakes are high, the shadow of future makes cooperation less likely because benefits of defecting are greater than costs.

In order to understand RPD it is important to briefly explain one-shot version of this game. In the Prisoner's Dilemma game, player 1 chooses the row and player 2 chooses the column. The cells represent the utility values for the players. This is a positive sum game where the strategies are labeled as C (cooperate) and D (defect). The payoffs are T (temptation), R (reward), P (punishment), and S (sucker). We assume that the payoff ordering is this: $T > R > P > S$. This is a positive sum game where mutual cooperation is better than defection for both players. However, a dominant strategy for both players is to defect, which is the unique Nash equilibrium to the game.

³⁶⁷ Robert Axelrod, *The Evolution of Cooperation*, New York: Basic Books, 1984.

³⁶⁸ Kenneth Oye, *Explaining Cooperation under anarchy*, *World Politics*, Vol. 38, No. 1, 1985. Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton, NJ: Princeton University Press, 1984.

³⁶⁹ See Joseph M. Grieco, "Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism." *International Organization* 42, no. 3, 1988. This influenced an intense debate among game theorists in international relations. Snidal responded by arguing that states that seek relative gains can still cooperate apart from the two person zero sum game. See Snidal, Duncan. "Relative Gains and the Pattern of International Cooperation." *The American Political Science Review* 85, no. 3 (1991): 701-26. Robert Powell showed that states seek absolute gains but sometimes due to security concerns, must obtain relative power in order to secure their absolute gains. Robert Powell, *Absolute and Relative Gains in International Relations Theory*, *The American Political Science Review* 85, no. 4, 1991.

The Prisoner's Dilemma

	Player B's Choice	
Player A's Choice	Cooperate	Defect
Cooperate	R, R	S, T
Defect	T, S	P, P

How can one escape the Prisoner's Dilemma? According to liberal institutionlists, if the shadow of future is large enough to permit a state to recover from a temporary defects then possible equilibria of this game allows cooperation. The prerequisite for this cooperation is to consider how players value future payoffs. This game can be implemented in the case of compliance with *jus cogens* norms. We should assume that two states (A and B) are considering compliance with a CIL of aggression.

In the infinite version of the Prisoner's Dilemma game we should consider several strategies that may promote cooperation. The first strategy that states may employ is "always defect." Therefore, the strategy where a player always defects, establishes Nash equilibrium. In our case, if a state A knows that a state B is going to violate the *jus cogens* norms, then the best strategy for a state A is to ignore those peremptory norms. Therefore for both states violation of *jus cogens* norms is a Nash equilibrium. Now, one may ask a logical question using the analogy: If "always defect" strategy leads to the pessimistic result of mutual violation of *jus cogens*, does the strategy "always cooperate" results in compliance with the peremptory norms? Unfortunately, playing cooperate is not a Nash equilibrium. If a state A is going to comply with *jus cogens* norm regardless of what a state B does, then B is better off violating *jus cogens*.

Now, when we have seen that strategies for 'always violate' and 'always comply' with *jus cogens* norms are separate from the history of the game, it is important to answer the question whether they can deter each other from breaching *jus cogens* with the threat of violating this norm after one state defects. In order to solve this puzzle, it is important to set forth the reciprocal strategy, called Tit for Tat.

Guzman outlines a model where states' care about building the reputation for compliance with CIL. In a nutshell, his model shows that if state 1 complies with CIL but then state 2 deviates by defecting both sides return to Tit-For-Tat strategy, albeit he is not using this particular language. That implies that in round 2, the initial violation by state 2, is punished by state 1, while state 2 complies, because that is what state 1 did in the first round. In the round three, the roles reverse and state 2 defects, while state 1 cooperates. This leads to an endless cycle of cooperation and defection. Guzman is using different payoffs but it can be summarized as the following: $T + \delta S + \delta^2 T + \delta^3 S \dots$

In this case compliance with CIL beats the single violation of CIL if

$$R + \delta R + \delta^2 R + \delta^3 R \dots \geq T + \delta S + \delta^2 T + \delta^3 S \dots$$

$$\frac{R + \delta R}{1 - \delta^2} > \frac{T + \delta S}{1 - \delta^2}$$

$$\delta > \frac{T - R}{R - S}$$

This implies, if you care enough about the future, it is in a state's interest to comply with *jus cogens*. The threshold here is greater than 0, and will be less than 1 if $T - R < R - S$, or $\frac{T+S}{2} < R$

To summarize, with a large enough shadow of the future, and with indefinite repetition, compliance with CIL can be an equilibrium strategy. Hence, states can get away from the Prisoner's Dilemma. This is precisely how rational choice scholars in international law think of the CIL game and cooperation. However, there are several caveats that should be explained here. First, compliance with CIL is not the only equilibrium strategy, even if states repeat this game infinite times. In Folk Theorem, almost any equilibrium is possible if a game is played infinite number of times. Second, even if Tit-for-Tat strategy may promote compliance, there can be incentives to violate the rules because valuing the shadow of future does not always leads to cooperation. Here, if δ is close to 0, then the most patient states would not be able to sustain compliance with *jus cogens* because temptation to defect would be too high.

CONCLUSION

The International Law regime that regulates the use and threat of force is in crisis and there is very little we can do to save it from Hobbesian power politics. The results of this dissertation mirror the realists' conclusion that international rules on the use of force do not affect state behavior and as a result, the United Nations Charter was not able to prevent the Kosovo War. Hence, it is naïve to believe that a strong international legal system can be built on normative doctrines that are contained in international public law when vital national interests are at stake. As the United Nations Charter is turning 70, international law on the use of force is suffering from a crisis of ineffectiveness. Regardless of the strict rules on the use of force only three wars since 1945 have received Security Council authorization, yet we have had more than one hundred intrastate wars since then.

Although an enormous literature exists on the limits of international law, this dissertation has presented a different approach. The two central approaches to international norms, positivism and naturalism, do not help us to understand why Article 2(4) has been widely disobeyed for the past seventy years. By adopting an interdisciplinary approach and making a reference to strategic literature and international relations, this research has sought to distinguish itself from the other literature by examining the Kosovo War using the tools of rational choice theory to explain the limits of international law on the use of force.

One of the most challenging questions facing international law scholars is why states conform to international agreements and customary international law without a central government to enforce those rules? While realism in international relations considers international law as epiphenomenal, international law scholars, on the other side, are overly enthusiastic about compliance. Both sides of this debate err by taking all-or-nothing approach because statistics show that states sometimes follow and other times disobey international law. This dissertation affords very little sympathy for the current rules on the use of force because the government decision-makers pay no attention to the rules of international law when they create their foreign policy, but they refer to international legal norms *ex post facto* in order to provide a justification for their *realpolitik* actions.

On the other hand, there are situations in international affairs when stakes are not high and then international law may influence how nations will behave. Therefore, a rational choice theory approach can help us to recognize areas of international law which successfully function and which are worth the investment of international legal scholars' time, effort and energy. This indicates that international law scholars should pay attention to areas where international law works.

The New Legal Realism is a novel approach to the international legal regime and it holds great promise for exploring the limits of international law by using tools of a rational choice theory. However, because this is a recently developed theory, many important questions require further consideration.

Because *logical consistency*, *degree of originality*, and *empirical validity* are necessary conditions for "social science to develop useful knowledge about social

behavior,³⁷⁰ the first task before New Legal Realists is to determine clear and concise assumptions. Many scholars in international law either identify themselves as part of a group of New Legal Realists, but then they end up developing their work based on different assumptions. Only after having a set of unambiguous assumptions, we can expect to have a rational explanation of why states conform to international law and to have conclusions that proceed from starting premises. Therefore, in the mean time we should not hold responsible traditional legal scholars for criticizing our theory only because they do not begin with “our” assumptions.

Equally important is question regarding the standard of originality of the New Legal Realism, which warrants more detailed attention than I have been able to devote in this dissertation. Namely, it remains to be seen how the New Legal Realism differs from Classical Realism in international relations because originality has always been an essential condition of any theory. It is important to develop further the New Legal Realism so it could assist scholars see well known phenomena in a novel way.

Finally, the third criterion, empirical validity, is the degree to which a legal theory is compared against suitable evidence. The New Legal Realists have been mostly occupied with a debate over *whether* international law is relevant. It is only a first step in understanding the limits of the international legal system. Many important questions require further consideration. For example, it remains to be seen *how* and *when* international law affects states’ behavior. Therefore, finding areas of international law where stakes are moderate or low and using empirical research can help us bring the abstract theories closer to the real world of practice.

The main goal of this dissertation has been to emphasize the limits of international law on the use of force during the Kosovo War. The *first* chapter has shown that not only Positivist theory and Just War theory are not sufficient to explain the limits of the use of force, but also it has demonstrated that current rules of the United Nations are outdated. The dissertation has proceeded in the *second* chapter to explain the threats of force. Article 2(4) of the United Nations Charter prohibits not only the use of force, but also the threat of force in foreign relations. This chapter has shown that it is impossible to disregard international politics and make the analogy with national legal system if we want to understand international law. The core lesson we can learn from the strategic literature is that military threats can be an effective instrument of coercion and can serve a useful purpose during times of crisis because they may mitigate the risk of war, unlike the use of threats as classified in a domestic legal regime. Hence, in contrast to international law traditional literature, I argue that threats of force are *sui generis* and should be treated separately from the use of force rules. The *third* chapter has developed two claims. First, I have demonstrated how current rational choice theory analysis of customary international law falls short in explaining the importance of state practice. I have argued that physical acts, unlike statements should be a relevant element of a state practice because the statements cannot credibly communicate the message. Second, I have argued that peremptory norms should be distinguished from other customary international law because they regulate areas where stakes are high. Therefore, it is unlikely that those norms will affect states’ behavior.

³⁷⁰ Stephen M. Walt. "Rigor or Rigor Mortis? Rational Choice and Security Studies." *International Security* 23, no. 4 at 12.

NATO's intervention in the Former Republic of Yugoslavia has been considered as a momentous event for international legal order. Hence, the obvious question arises as to why there has been no a detailed legal rational choice theory analysis of the Kosovo War. The simple answer is a lack of plurality of ideas in legal academia.

A rational choice theory approach took hold a bit more than a decade ago especially in American legal academia and it provoked serious debate among classical international lawyers. When Goldsmith and Posner published a book *The Limits of International Law* in 2005, it was subject to strong criticism among international lawyers mostly because international academia loathes pessimistic theories. The idea that states comply with international law for instrumental reasons is anathema for traditional international lawyers. Some referred to this work as “a classic straw man”³⁷¹ while others expressed concern about the possibility that it “threatens to send international law scholarship backward nearly half a century.”³⁷²

Article 38(1)(d) of the International Court of Justice Statute states that the “teachings of the most highly qualified publicists of the various nations” are considered to be subsidiary sources of international law. Hence, international law scholars have a responsibility to take political reality into account when analyzing international legal rules because “[w]e need legalists who do not build utopias that are either irrelevant or turn into nightmares, but who look at the chances of legal prescriptions in the real world.”³⁷³

Jens Ohlin asserted that an attack on international law does not come from American politicians as much as from “a small group of legal scholars... [who] have earned a completely outsized influence on the legal discourse in [the USA]” and who have “directly changed American foreign relations since 9/11.”³⁷⁴ It is hard to see the causality of this “coordinated and deliberate attack” of “fewer than six...*dramatis personae*” lawyers who are having a tremendous influence among Washington elites,” since correlation does not imply causation.

E.H. Carr in his famous book *Twenty Years Crisis*, published at the outset of World War II, wanted to warn against the dangers of idealism that was deeply rooted in the League of Nations, and his work provoked heated debate among idealists in academia. To make my position clear: This dissertation is by no means a *cri de coeur* by a New Legal Realist who is nostalgic about some bygone “Golden Age” of classical realism. My criticism stems from the lack of plurality of ideas nowadays that widely existed in times of Morgenthau and Carr. Nowadays, academia is abound with idealists who are set on creating the “security community” where states sacrifice their sovereignty

³⁷¹ Margaret E. McGuinness, *Exploring the Limits of International Human Rights Law*, 34 GA. J. INT'L & COMP. L. 393, 2006. Daniel Bodansky, *International Law in Black and White*, 34 GA. J. INT'L & COMP. L. 285, 2006.

³⁷² Oona A. Hathaway and Ariel N. Lavinbuk, “Rationalism and Revisionism in International Law,” Harvard Law Review, 2006.

³⁷³ Andreas Paulus, 'Realism and International Law: Two Optics in Need of Each Other', 96 ASIL, 2002 at 272.

³⁷⁴ According to Ohlin, this group of scholars “influence how the State Department conducts diplomacy, how the CIA and the NSA spy on foreigners and citizens alike, and how judges craft their opinions.” Jens David Ohlin “The Assault on International Law, Oxford University Press, 2015 at 8.

and the security of their citizens in exchange for the welfare of the international community where people obey international law and behave morally. However, it has been said: “In theory, theory and practice are the same. In practice, they are not.” Therefore, the idealists’ plan for making the world a better place have not produced the expected results when one considers that more than 100 wars have been waged since the UN Charter was drafted.

International law academia has a responsibility for educating future elites and the monopoly of idealism in academia stems from the fear that realists “might convince some impressionable young students – maybe even a lot of them – that there is no such thing as international society or a security community, and states should therefore worry about their position in the global balance of power.”³⁷⁵ Although many Americans believe that realism is dead³⁷⁶ and is “utter nonsense today,”³⁷⁷ there are still many who believe that it has a bright future in modern times³⁷⁸ “and serious scholars with controversial ideas can always find a few institutions willing to support them.”³⁷⁹

My concern is more about European academia where liberalism has a monopoly. John Stuart Mill’s work *On Liberty* warned of the danger of curtailing the freedom of expression of a divergent point of view. Plurality of different ideas is not only morally good, as Mill argued, but in my view it is also crucial and efficient for advancement in the academic field and critical thinking. As Mearsheimer stated in lieu of producing a hegemonic discourse of silencing their competition, they should “rely on reason to show the inadequacies of power politics.” Silencing realism among liberal academia and fostering hegemony of their theories can only hurt European society.

In response to the terror attacks in Paris, France has invoked for the first time in the history of the EU Article 42.7 (collective self defense) of the EU’s Lisbon Treaty requesting military help from its European partners. This has started a lively debate among international lawyers about the illegality of this potential military action among EU member states. With radical Islam on the rise and the ongoing migrant crisis in Europe, it is not only fickle to disregard the balance of power in European politics but it is also naïve to try to establish a European “security community.”

More than one hundred years ago, George Santayana stated, “Those who do not remember the past are condemned to repeat it.” His wise advice was disregarded during the twentieth century, which survived two world wars and more than one hundred civil wars. The failure of Article 2(4), which is the cornerstone of the UN Charter, to prevent more than 100 aggressions since 1945 including the Kosovo War, demonstrates that not only is this institution was not able to influence states’ behavior but it also leads us to the belief that this collapse of the “heart” of the UN Charter will continue in the future. Fortunately, Santayana’s words have been well understood among some political

³⁷⁵ John Mearsheimer, E.H. Carr vs. Idealism: The Battle Rages On, *International Relations*, Vol 19(2), 2005 at 147.

³⁷⁶ Jeffrey W. Legro, and Andrew Moravcsik. "Is Anybody Still a Realist?." *International Security* 24, no. 2 (Fall 1999).

³⁷⁷ Quoted in Michael Brecher, Frank P. Harvey, *Millennial Reflections on International Studies*, The University of Michigan Press, 2005.

³⁷⁸ John Mearsheimer, *Realism, the Real World, and the Academy*, in Michael Brecher, Frank P. Harvey *Millennial Reflections on International Studies*, The University of Michigan Press, 2005 at 25.

³⁷⁹ John Mearsheimer, *Realism, the Real World, and the Academy*, in Michael Brecher, Frank P. Harvey *Millennial Reflections on International Studies*, The University of Michigan Press, 2005 at 31.

scientists who realized that in order to understand the world around us, we have to understand how it got to be this way.

BIBLIOGRAPHY

- Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *Yale J. Int'l L* (1989)
- Anne van Aaken, Tom Ginsburg, and Christoph Engel, *Public International Law and Economics Symposium Introduction (July 2007)*, *Illinois Law Review (Symposium Issue on International Law and Economics)* (2008)
- Anne van Aaken, *To do Away with International Law? Some Limits to the 'Limits of International Law'*, *European Journal of International Law* (2006)
- Michael Akehurst, *Custom as a Source of International Law*, 47 *BYIL* 1 (1974)
- Roy Allison, *Russia, the West, and Military Intervention*, Oxford University Press (2013)
- Jose E. Alvarez, *A Bit on Custom*, *N.Y.U.J. Int'l L and Pol.* 17 (2009)
- Robert J. Art, and Robert Jervis, *International Politics: Anarchy, Force, Imperialism*, Little, Brown (1973)
- Robert Axelrod, and Robert O. Keohane, *Achieving Cooperation under Anarchy: Strategies and Institutions*, *World Politics* 38, no. 1 (1985)
- Robert Axelrod, *The Evolution of Cooperation*, Basic Books (1984)

- Douglas G. Baird, Robert H. Gertner, and Randal C. Picker, *Game Theory and the Law*, Harvard University Press (1994)
- Cherif M. Bassiouni, *A Functional Approach to General Principles of International Law*, 11 *Mich. J. Int'l L.* (1989)
- Alex J. Bellamy, *Kosovo and International Society*, Palgrave (2002)
- Florian Bieber, and Zidas Daskalovski, *Understanding the War in Kosovo*, *F. Cass* (2003)
- Richard Bilder, *Kosovo and the New Interventionism, Promise or Peril*, 9.1 *J. Transnational Law & Policy* 153 (1999)
- William W. Bishop Jr, *Judicial Decisions Involving Questions of International Law*, 43 *Am. J. Int'l L.* 577 (1949)
- Wilfried Bolewski, *Diplomacy and International Law in Globalized Relations*, Springer (2007)
- Daniel Bodansky, *International Law in Black and White*, 34 *Ga. J. Int'l & Comp. L.* 285 (2006)
- Francis A. Boyle, *World Politics and International Law*, Duke University Press (1985)
- Francis A. Boyle, *The Irrelevance of International Law: The Schism between International Law and International Politics*, 10 *Calif. West. Int'l L.J.* (1980)
- Michael Brecher, and Frank P. Harvey, *Millennial Reflections on International Studies*, The University of Michigan Press (2005)
- Ian Brownlie, *International Law and the Use of Force by States*, Clarendon Press (1963)
- Mary Buckley, and Sally Cummings, *Kosovo: Perceptions of War and Its Aftermath*, Continuum (2001)
- Leslie A. Burton, *Kosovo: To Bomb or not to Bomb? The Legality is the Question*, 7 *Annual Survey of International & Comparative Law* (2001)

- Michael J. Butler, *Selling a Just War: Framing, Legitimacy, and US Military Intervention*, Palgrave Macmillan (2012)
- Edward H. Carr, *The Twenty Years Crisis', 1919-1939: An Introduction to the Study of International Relations*, 2nd edn, London, Macmillan (1946)
- Joseph E. Capizzi, *Politics, Justice, and War: Christian Governance and the Ethics of Warfare*, Oxford University Press (2015)
- Antonio Cassese, *The Current Legal Regulation of the Use of Force*, M. Nijhoff (1986)
- Johnatan Chaney, *Anticipatory Humanitarian Intervention in Kosovo*, *American Journal of International Law* (1999)
- Bin Cheng, *United Nations Resolutions on Outer Space: Instant International Customary Law?*, 5 *Indian J Int'l L* 23 (1965)
- Andrew F. Cooper, Jorge Heine, and Ramesh C. Thakur, *The Oxford Handbook of Modern Diplomacy*, Oxford University Press (2013)
- Neil MacCormick, and Ota Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism*, D. Reidel Pub. (1986)
- Olivier Corten, and Bruno Simma, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law*, Hart Pub. (2010)
- James Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press (2012)
- James Crawford, *The Creation of States in International Law*, Clarendon Press (1979)
- Anthony D'Amato, *Concept of Custom in International Law*, Cornell University Press (1971)
- Robert J. Delahunty, and John Yoo, *From Just War to False Peace*, 13 *Chi. J. Int'l L*
- Robert J. Delahunty, and John Yoo, *Great Power Security*, 10 *Chi. J. Int'l L.* 35 (2009)
- Yoram Dinstein, *War, Aggression and Self-defence*, Cambridge University Press (2011)
- Jack Donnelly, *Realism and International Relations*, Cambridge University Press (2000)
- Shadia B. Drury, *Aquinas and Modernity: The Lost Promise of Natural Law*, Rowman & Littlefield Pub. (2008)
- Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law*, Cambridge University Press (2016)
- Timothy Dunne, and Nicholas J. Wheeler, *Human Rights in Global Politics*, Cambridge University Press (1999)
- Jeffrey L. Dunoff, and Joel Trachtman, *Economic Analysis of International Law.*, *Yale Journal of International Law* (1999)
- Jeffrey L. Dunoff, and Mark A. Pollack, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, Cambridge University Press (2013)

- William Ebenstein, and Alan O. Ebenstein, *Great Political Thinkers: Plato to the Present*, Harcourt College Publishers (2000)
- Patrick T. Egan, *The Kosovo Intervention and Collective Self-defense*, *International Peacekeeping* 8 (2001)
- Bardo Fassbender, Anne Peters, and Simone Peter, *The Oxford Handbook of the History of International Law*, Oxford University Press (2012)
- Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks*, Cambridge University Press (2002)
- Thomas M. Franck, *The Power of Legitimacy among Nations*, Oxford University Press (1990)
- Thomas Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 *AJIL* 809, 835 (1970)
- Gregory H. Fox, and Brad R. Roth, *Democratic Governance and International Law*, Cambridge University Press (2000)
- Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, Cambridge University Press (2010)
- Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law*, Manchester University Press (2006)
- Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo*, Palgrave (2001)
- Michael Glennon, *The Blank-Prose Crime of Aggression*, 35 *Yale Journal of International Law* (2009)
- Michael J. Glennon, *The Fog of Law: Pragmatism, Security and International Law*, Stanford University Press (2010)
- Michael J. Glennon, *The New Interventionism: The search for a Just International Law*, 78 *Foreign Affairs* (May/June (1999)
- Jack Goldsmith, and Eric Posner, *Moral and Legal rhetoric in International Relations: A Rational Choice Perspective*, *Journal of Legal Studies* vol XXXI, January (2002)
- Francis Grimal, *Threats of Force: International Law and Strategy*, Routledge (2013)
- Jack Goldsmith, and Eric Posner, *A Theory of Customary International Law*, 66 *University Chicago Law Review* (1999)
- Jack Goldsmith, and Eric Posner, *The Limits of International Law*, Oxford University Press (2006)
- Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, *International Organization* 42, no. 3 (1988)
- Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 *Cal. L. Rev.* (1823) (2002)
- Andrew T. Guzman, *How International Law Works: A Rational Choice Theory*, Oxford University Press (2008)

- Andrew T. Guzman, Saving Customary International Law, 27 Mich. J. Int'l L. 115 (2005)
- Oona A Hathaway, and Ariel N. Lavinbuk, Rationalism and Revisionism in International Law, Harvard Law Review, Vol. 119 (2006)
- Aidan Hehir, Intervention and Statebuilding: The International Community and the Transition to Independence, Routledge (2010)
- Sondre T. Helmersen, The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations, Netherlands International law Review, Vol. 61 Issue 02 (2014)
- Jean-Marie Henckaerts, Louise Doswald-Beck, and Carolin Alvermann, Customary International Humanitarian Law, Volume 1, Rules XXXVI, Cambridge University Press (2007)
- Ryan C. Hendrickson, The Clinton Wars: The Constitution, Congress, and War Powers, Vanderbilt University Press (2002)
- Louis Henkin, How Nations Behave, Columbia University Press (1979)
- Louis Henkin, The Reports of the Death of Article 2(4) Are Greatly Exaggerated, 65 AJIL (1971)
- Kamrul Hossain, The Concept of Jus Cogens and the Obligation Under The U.N. Charter, 3 Santa Clara J. Int'l L. 72 (2005)
- Robert C. Hockett, Review Essay: The Limits of Their World. Minnesota Law Review, Vol. 90 (2006)
- Daniel H. Joyner, The Kosovo Intervention Legal Analysis and a More Persuasive Paradigm, European Journal of International Law (2002)
- Christopher C. Joyner, International Law in the 21st Century: Rules for Global Governance, Rowman & Littlefield (2005)
- Tim Judah, Kosovo: War and Revenge, Yale University Press (2000)
- Hans Kelsen, Principles of International Law, Rinehart (1952)
- Robert O. Keohane, After Hegemony: Cooperation and Discord in the World Political Economy, Princeton University Press (1984)
- Robert. O. Keohane, Neorealism and its Critics, Columbia University Press (1986)
- Harold H. Koh, Why Do Nations Obey. International Law?, The Yale Law Journal, vol 106, no. 8 (1997)
- Heike Krieger, The Kosovo Conflict and International Law: An Analytical Documentation, 1974-1999, Cambridge University Press (2001)
- Brian D. Lepard, Customary International Law: A New Theory with Practical Applications, Cambridge University Press (2010)
- James Ker-Lindsay, Kosovo, Intervention and Statebuilding: The International Community and the Transition to Independence, (2010)
- H.B. McCullough, Intervention in Kosovo: Legal? Effective?!, 7 ILSA Journal of International and Comparative Law (2001)

- Margaret E. McGuinness, Exploring the Limits of International Human Rights Law, 34 Ga. J. Int'l & Comp. L. 393 (2006)
- Arnold McNair, Law of Treaties, Clarendon Press (1961)
- John Mearsheimer, E.H. Carr vs. Idealism: The Battle Rages On, International Relations, Vol 19(2) (2005)
- John J. Mearsheimer, The False Promise of International Institutions, International Security, Vol. 19, No. 3 (Winter (1994)-(1995)
- Bruce B. de Mesquita, Principles of International politics: People's Power, Preferences and Perceptions, 2nd edition (2003)
- Maurice H. Mendelson, The Subjective Element in Customary International Law, 66 British Yearbook of International Law (1995)
- David S. Mitchell, The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine, 15 Duke Journal of Comparative & International Law (2005)
- Hans Morgenthau, Politics Among Nations: The Struggle for Power and Peace, Alfred A. Knopf, 6th edn (1985)
- Hans Morgenthau, Positivism, Functionalism, and International Law, 23 AJIL. (1940)
- Jeffrey S. Moron, The Legality of NATO's intervention in Yugoslavia in 1999: Implications for the Progressive Development of International Law, 9 ILSA J Int'l & Comp L (2002)
- Sean D. Murphy, Humanitarian Intervention: The United Nations in an Evolving World Order, University of Pennsylvania Press (1996)
- Matthew A. Myers, Deterrence and the Threat of Force Ban: Does the UN Charter Prohibit Some Military Exercise?, 162 Mil. LR (1999)

- Mangai Natarajan, International Crime and Justice, Cambridge University Press (2011)
- George Norman, and Joel Trachman, Measuring the Shadow of Future: An Introduction to the Game Theory of Customary International Law, University of Illinois Law Review, Vol 1 (2008)

- Mary Ellen O'Connell, International Law and the Use of Force: Cases and Materials, Foundation Press/Thomson West (2009)
- Mary Ellen O'Connell, The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement, Oxford University Press (2011)
- M.E. O'Connell, and M. Niyazmatov, What is Aggression?, Journal of International Criminal Justice (2012)
- Jens D. Ohlin, Nash Equilibrium and International Law, Cornell Law Review, Vol. 96 (2010)
- Jens D. Ohlin, The Assault on International Law, Oxford University Press (2015)
- Kenneth Oye, Explaining Cooperation under Anarchy, World Politics, Vol. 38, No. 1 (1985)

- Andreas Paulus, Realism and International Law: Two Optics in Need of Each Other, 96 ASIL (2002)

- Alain Pellet, Brief Remarks on the Unilateral Use of Force, EJIL 11 (2000)
- Eric A. Posner, and Alan Sykes, Economic Foundations of International Law, Harvard University Press (2013)
- Eric A. Posner, and Jack L. Goldsmith, The New International Law Scholarship, University of Chicago, Public Law Working Paper No. 126 (2006)
- Eric A. Posner, and Alan O. Sykes, Optimal War and Jus ad Bellum, Georgetown Law Journal (1021) (2005)
- Robert Powell, Absolute and Relative Gains in International Relations Theory, The American Political Science Review 85, no. 4 (1991)
- Robert Powell, Anarchy in International Relations Theory: The Neorealist-Neoliberal Debate, International Organization 48, no. 2 (1994)
- Robert Powell, In the Shadow of Power: States and Strategies in International Politics, Princeton University Press (1999)
- Robert Powell, Nuclear Deterrence Theory, The Search for Credibility, Cambridge University Press (1990)
- Robert Powell, The Modeling Enterprise and Security Studies, International Security 24, no. 2 (1999)

- Sabrina P. Ramet, The Three Yugoslavias: State-building and Legitimation, Woodrow Wilson Center Press (2005)
- Kal Raustalia, and Anne-Marie Slaughter, International Law, International Relations and Compliance, Handbook of International Relations (2002)
- Steven R. Ratner, and Anne-Marie Slaughter, The Methods of International Law, American Society of International Law (2004)
- Geoffrey Robertson, Crimes against Humanity: The Struggle for Global Justice, Norton (2006)
- Ruggero J. Aldisert, Logic for Lawyers: A Guide to Clear Legal Thinking, (2015)

- Romana Sadurska, Threats of Force, The American Journal of International Law 82, no. 2 (1988)
- Ronald C. Santopadre, Deterioration of Limits on the Use of Force and its perils: A rejection of the Kosovo Precedent, 18 St. John's J.L. Comm. 369, 385 (2003)
- Anne E. Sartori, Deterrence by Diplomacy, Princeton University Press (2013)
- William Schabas, The International Criminal Court: A Commentary on the Rome Statute, Oxford University Press (2010)
- Thomas C. Schelling, The Strategy of Conflict, Harvard University Press (1981)
- Thomas C. Schelling, Arms and Influence, Yale University Press (1966)
- Berman, Paul Schiff, Review Essay: Seeing Beyond the Limits of International Law, Texas Law Review, Vol. 84 (2006)
- David Schweigman, The Authority of the Security Council Under Chapter VII of the UN Charter: Legal Limits and the Role of International Court of Justice, Martinus Nijhoff Publishers (2001)
- John Setear, An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law, 37 Harv. Int'L.J. (1996)
- Rosenne Shabtai, The World Court: What It Is and How It Works, A.W. Sythoff (1962)

- Walter G. Sharp, Operation Allied Force: reviewing the Lawfulness of NATO's Use of Military Force to Defend Kosovo, 23 Md. J. Int'l L. & Trade 295 (1999)
- Dusan Sidjanski, The Federal Future of Europe: From the European Community to the European Union, University of Michigan Press (2001)
- Ian Sinclair, The Vienna Convention on the Law of Treaties, Manchester University Press (1973)
- Jasvir Singh, Problem of Ethnicity: Role of United Nations in Kosovo Crisis, Unistar Books (2008)
- Brunno Simma, NATO, the UN and the Use of Force: Legal Aspects, EJIL, Vol. 10 (1999)
- Bruno Simma, and Andreas L. Paulus, The Responsibility of Individuals for Human Rights Abuses in International Conflicts: A Positivist View, 93 AM.K. Int'l L. (1999)
- Anne-Marie Slaughter Burley, International Law and International Relations, A Dual Agenda, 87 AM. J. INT'L 205 (1993)
- Branislav Slantchev, Military Threats: The Cost of Coercion and the Price of Peace, Cambridge University Press (2012)
- Michael E. Smith, NATO, the Kosovo Liberation Army and the War for an Independent Kosovo: Unlawful Aggression or Legitimate Exercise of Self-determination?, Army Lawyer (2001)
- Duncan Snidal, The Game Theory of International Politics, World Politics 38, no. 1 (1985)
- Abraham D. Sofaer, International Law and Kosovo, 36 Stan. J. Int'l L. 1 (2000)
- Peter Spiro, A Negative Proof of International Law, Georgia Journal of International and Comparative Law, Vol. 34 (2006)
- Nikolas Stürchler, The Threat of Force in International Law, Cambridge University Press (2009)
- Jerzy Sztucki, Jus Cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal, Springer Verlag (1974)

- Steve Tadelis, Game Theory: An Introduction, Princeton University Press (2013)
- Tai-Heng Cheng, When International Law Works: Realistic Idealism after 9/11 and the Global Recession, Oxford University Press (2012)

- John A. Vasquez, Review Article: The Kosovo War: Causes and Justification, The International History Review, 24:1 (2002)
- Alfred von Verdross, Forbidden Treaties in International Law, 31 Am. J. Int'l L. 571 (1937)

- Stephen M. Walt, Rigor or Rigor Mortis? Rational Choice and Security Studies, International Security 23, no. 4 (1999)
- Kenneth N. Waltz, Theory of International Politics. Reading, Addison-Wesley Pub (1979)
- Michael Walzer, Arguing about War, Yale University Press (2004)
- Ruth Wedgwood, Unilateral Action in the UN System, EJIL 11 (2000)

- Noah Weisbord, Prosecuting Aggression, 49 Harvard International Law Journal (2008)
- Wolfgang Weiss, Security Council Powers and the Exigencies of Justice after War, 12 MPYUNL. (2008)
- Marc Weller, Alexia Solomou, and Jake William Rylatt, The Oxford Handbook of the Use of Force in International Law, Oxford University Press (2015)
- Nicholas Wheeler, Saving Strangers: Humanitarian Intervention in International Society, Oxford University Press (2011)
- Nigel D. White, and Robert Cryer, Unilateral Enforcement of Resolution 687: A Threat Too Far?, 29 Cal. WJIL. (1999)
- Karol Wolfke, Custom in Present International Law, Springer Netherlands (1993)

- John C. Yoo, and Will Trachman, Less than Bargained for: The Use of Force and the Declining Relevance of the United Nations, 5 Chi. J. Int'l L. (2004)
- John C. Yoo, Using Force, University of Chicago Law Review 71 (2004)
- John Yoo, Point of Attack, Preventive War, International Law, and Global Welfare, Oxford University Press (2014)