The influence of legalization and justness on the legitimacy of military interventions without 'clear' UN approvement

International and national debate on military interventions in Kosovo, Afghanistan and Iraq

Lisette van der Ark, 317985
Public Administration, Erasmus University
Master International Management and Public Policy

Supervisors: Prof. dr. Colijn; dr. Haverland (co-reader).

Thanks to my family and friends for all patience. We will catch up soon!
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Table of contents

1 Introduction

This study will describe and evaluate the development of the public debate on legitimacy before, during and after a military intervention without a clear UN approval. As the legitimacy of an intervention is important for the legitimacy of the Defence organisation as a whole, this question is of utmost importance in the light of future interventions and recent debates about the future of the Defence organisation. These debates have attracted attention in the Netherlands, but also in other European countries. What role does the Defence organisation have in the current world? And is that the role society requests from it? To answer these questions, it is important to go back to the basis and evaluate the past debates about important missions after the Cold War. These debates will reflect the opinion of different actors and describe the different positions that these actors have in the debate. This study is not aiming to give a conclusive answer to all purposes and values of the Defence organisation, but aims to describe the acceptance of the evaluated missions and the role of defence in those missions. Answering this question will break new ground for more fundamental, philosofical and political questions about the future role of Defence.

1.1 The decision to use military force

The use of military force has been a common issue of debate in modern history, most recently in the context of foreign relations. It is however not a new discussion, as Sun Tzu (n.d.) wrote about the costs of war 2000 years ago: the mental and physical breakdown of soldiers and the economic consequences for the civilians. According to him, it is important that these costs be taken into account during the decision-making process about the start of a war: "They, who do not understand the dangers of the use of an army, will not understand how to gain by it either." (Sun Tzu, n.d.: 107)

Another classic strategist, Carl von Clausewitz (1780-1831), argues that is important to make a moral choice on basis of costs that are calculated. The choice to start a war, or engage in it, should be a political one (In Weeks, 2010, 3). The acceptability of costs is a typical – moral – political question: political can be defined as the authoritative allocation of values (Easton, 1965: 278). Within the struggle of power between politicians with different values, ideas and interests, there will always be a shortage of funds, which leads, therefore, to priorities discussions. (Bekkers, 2007a: 17).

Parts of the moral criteria for warfare are institutionalised by the establishment of the UN in 1945. This international institution was created to prevent new wars from developing. The main goal of the United Nations (UN) is, therefore, the promotion of safety and stability, according to Article 1 of the UN Charter (1945). In order to reach that goal, diplomacy, the establishment of economic sanctions and – as a last step – military interventions are sometimes used. (De Wijk, 2005: 17). This last measure is a rather controversial step, given the high costs – material, personal and social – for the different players involved. Recently, the discussion about military intervention was important within the international and national decision-making about how to deal with Iraq, who was at some points neglecting UN Resolutions. The same arguments about the use of military force can be seen within the debates about 'Responsibility to Protect'. This new approach points out that the international community has a responsibility to stop massive human rights violations within other states, also when this has to be done by military intervention.

1.2 The importance of legitimacy

Political communities are bound together by legitimacy. The consequences of the loss of legitimacy have been observed with the fall of communistic regimes in the Eastern part of Europe in 1989 (Bekkers, 2007b: 32), where policy and the ruling elite were no longer supported. This has resulted in popular protests, which caused the system and her policy – in the end – to destabilise.
The main difference between the Eastern Block and the current Western society is the constitution of the states. The current Western society is based on a model of democracy in which citizens have – at fixed periods in time – the opportunity to choose their political leaders within the parliament. Therefore, protests are not even necessary – although they can occure – to change the political settings. Therefore, legitimacy is in our current society just as important as it was in the past and in different societies.

Legitimacy is not only important for stable policy, but also for the executors of the policy, like the defence organisation. The legitimacy of a military operation is – more and more – important for the Defence organisation as a whole. (Van der Meulen, 2006) Realizing the importance of legitimacy, the Dutch government "Balkenende III" (2006) asked the Advisory Council on International Affairs (AIV) for advice on how to cope with this phenomenon in Defence matters. The AIV advised to communicate clearly to the citizens regarding military interventions: not only to inform the parliament and the citizens about the contents of the governmental decisions, but also because clear communication would show leadership. The government should have to focus on legitimacy, interests and values, expected success and the costs of an intervention. Both factors – using the right kind of arguments and leadership – would positively affect the support for an intervention. (Advisory Council on International Affairs, 2006: 14-16).

Leadership can, for example, be shown by a clear authorisation. The authorisation is unambiguous, when there is international consensus about the importance of an intervention, because authorities would not be forced into a debate about values and interest. A shared opinion therefore causes legitimacy to grow. The importance of such a joint decision differs between states. According to opinion research, the authorisation of an intervention by the UN is essential for the support of 80% of the European citizens, while UN authorisation is only essential to 58% of the American citizens. Furthermore, it is imperative for both Europeans and Americans that important European states and the North Atlantic Treaty Organization (NATO) are supporting a decision for military intervention. The role of NATO is more often called 'essential' by European citizens, than by Americans. (German Marshall Fund of the US, 2004: 13)

The importance of 'correct argumentation' is already mentioned. But why is this important? And what is 'right argumentation'? This research will list the important criteria and will explain how these are important for the development of legitimacy.

Legitimacy is a social phenomenon, as it is a binding factor in society. Communication and interaction are essential in this process. (Bekkers, 2007a: 71-74) Therefore, it will be interesting how the debate about legitimacy develops. The debate will be studied on two factors that influence legitimacy: lawfulness and acceptability. (Bekkers, 2007b)

1.3 Discussion about the lawfulness of a military intervention

The Bush administration started the war in Iraq in March 2003 without a clear UN mandate to justify their intervention. (Dutch Committee of Inquiry Decision-making Iraq, 2010: 217-242)

This caused discussions in other countries, especially when that government had supported the military intervention in Iraq by military or political means. The discussion focused on the legalization of the use of military power in this situation. The UN Charter, after all, forbids the use of solo interventions in another sovereign country, unless it is necessary in terms of self-defence. The UN Security Council, who has the authority to approve the intervention in Iraq, did not do so. Inquiries were started in several countries, such as the Chilcot Inquiry of the United Kingdom, which started on the 15th of June 2009 and has not drawn its conclusions yet. In the Netherlands started an inquiry, lead by Mr. Davids – therefore also called 'Committee Davids'. This committee presented her results on the 12th of January 2010. One of the findings was that the decision to intervene in Iraq was not based on UN authorisation, as the second resolution was never adopted. (Dutch Committee of Inquiry Decision-making Iraq, 2010)

While other interventions of recent years were not authorized by the UN either and although the authorisation of these interventions were debated as well, none of them was under such broad debate about legalization as the intervention in Iraq. The UN did not authorize the bombing campaign in Kosovo, which started in March 1999. Many countries, however, agreed that intervention in Kosovo was necessary to protect the citizens from genocide. The military intervention in Afghanistan was initiated by the US of America (US) as an action of self-defence, but the UN did not confirm – or disagree with – this status in an official reaction, such as Resolution 1378 of the Security Council. This Resolution condemned any connection between the Taliban regime and international terrorism, and agreed with the 'Declaration on the Situation in Afghanistan' that was agreed on by the Ministers and senior representatives of the neighbour states of Afghanistan and the US and Russia[a], on the 12th of November 2001. (Six-plus-two nations, 2001) This declaration did not make recommendations on military issues, but spoke about future reconstruction tasks in Afghanistan. The Resolution and declaration are both not explicit on legalization of the military intervention.

1.4   Discussion about the acceptability of a military intervention

Historically, three different paradigms have been active in the discussion about the justness of war: rationalists, pacifists and the scholars of the Just War theory. (Johnson, 2006). Chapter 3.3.2. will show that the concepts from the Just War theory have re-entered the society after the Second World War. The criteria became of uterly importance for the acceptance of war. This study evaluates 'interventions' which are – legally – different than wars. The Just War theory might, therefore, appear to conflict with the term 'intervention' in the main question (paragraph 1.5.1), there is good reason to use the Just War theory also in this situation. When the Just War theory developed, only the traditional form of warfare existed. This type of war had to be officially declared and was fought on battlegrounds. Later, the concept of total war developed, which was no longer fought at the battlefield, but involved the whole society in both war as well as aftermath. One of these total wars was the Second World War, in which no exceptions were made and citizens also became protagonists; for example, the bombings of cities became an undebated practice.

The UN was established after the Second World War and has forbidden states to start these total wars. At the same time, criteria were developed to allow certain kinds of military action in certain situations. To distinguish between 'war' and military action based on the UN criteria – or when *claimed* to be based on UN criteria – 'intervention' will be used. Although these international military interventions have a different juridical basis, they have in common with

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[a] These States are also called the 'Six-plus-Two nations': neighbourstates China, Iran, Pakistan, Tajikistan, Turkmenistan, and Uzbekistan, plus the US and Russia

'war' that military activity is established in another country.Since Just War theory mainly reflects on this military activity, it is used for modern 'military interventions' as well.

The rationalist starting point is the interests of the state and the chance to realise or protect these during a war. According to this movement, people make their choices in a rational way, so focus on realizing as many of their interests as possible. National authorities with a monopoly on violence regulate this behaviour, but these authorities do not exist on the level of the international community. Therefore, the international community is characterised by anarchy, in which the strongest survives. States make their choices within this setting rationally: out of self-interest. The ultimate goal of a state is to persist. (Waltz, 1979)

Pacifism is built on the belief that compromise is the only correct answer in conflict situations. This compromise has to prevent violence on the short and long term. Therefore, military force should not be used in an indirect or direct way. (Galtung, 1959: 67) 'Coercive diplomacy' is an example of indirect use of military force, in which the military power can be used to put pressure on the process of negotiations, in order to change the outcome, or speed up the process.

The Just War theory was developed within the Western states, as a compromise between several groups within the society and combines characteristics of both rationalism and pacifism. According to the Just War theory, neutral military means can be used in a positive or negative way. Several criteria are developed to be able to judge about the way the means are used. (Johnson, 2006: 168). These criteria have developed into current (legal) norms in international institutions.

1.5   Research design

Main question

How does the public debate about legitimacy develop, before, during and after a military intervention without clear[b] UN approval?

Subquestions

1. What arguments are important for a debate about the legitimacy of military intervention without clear UN approval

2. Which actors are present in the (international) debate on the legitimacy of an intervention without clear UN approval? In addition, which have a role in the decision-making process of an intervention?

3. What is the role of these different actors within the debate about the legitimacy of a military intervention without clear UN approval? Are the actors using the arguments that are important in the debate about legitimacy? In addition, how are the actors reacting to each other's arguments?

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[b] 'Clear UN approval would be: a clear, formulated UN mandate for the intervention, leaving no room for debate about legal authorisation. When a intervention does not have a clear UN approval, a intervention might – according to some scholars – still be legally authorized.

Design and overview research

The study is an descriptive evaluation of the debate of legitimacy. All used material is qualitative, published material which reflects parts of the public debate. The public debate will be analysed on international and national level. The national level is split up in the intervening state and the intervened state. (See paragraph 3.1.) Three group of actors have a role – which are usually related to their mandates – in this debate: political,juridical / ethical and military actors.

Since the debate about legitimacy will develop in the public debate, three periods are recognized: input legitimacy (input phase of intervention), througput legitimacy (throughput phase of intervention) and output legitimacy (output phase of intervention). This will be further elaborated in paragraph 3.2. Bekkers (2007b) revealed that legitimacy consist of two factors: lawfulness and acceptability. These factors are operationalized in paragraph 3.3. Lawfulness is operationalized using international law, while acceptability is operationalized using the Just War theory.

The cases that were selected – Kosovo, Afghanistan and Iraq – all were post-Cold War interventions; without an 'unclear' UN approval (debated); and with discussion about the acceptability of the war. The three cases were a good reflection, since all discussion was on international level.The internal validity of the study is assured by pattern matching, which is known (Yin, 2003a) to be a suitable methode for descriptive, evaluative studies. The results of this study can be generalised to other international debates about international interventions without 'clear' approval of the UN Social relevance of the study is related to the importance to understand legitimacy. This is important for the support for military interventions, but also for the department of Defence in general. (Van der Meulen, 2006) (Chapter 4).

Chapter 5,6 and 7 provide an overview of the debate on the cases Kosovo, Afghanistan and Iraq, while chapter 8 analyses the outcomes. Chapter 9 contains the conclusion. Based on the outcomes of the research, three recommendations were presented in chapter 10.
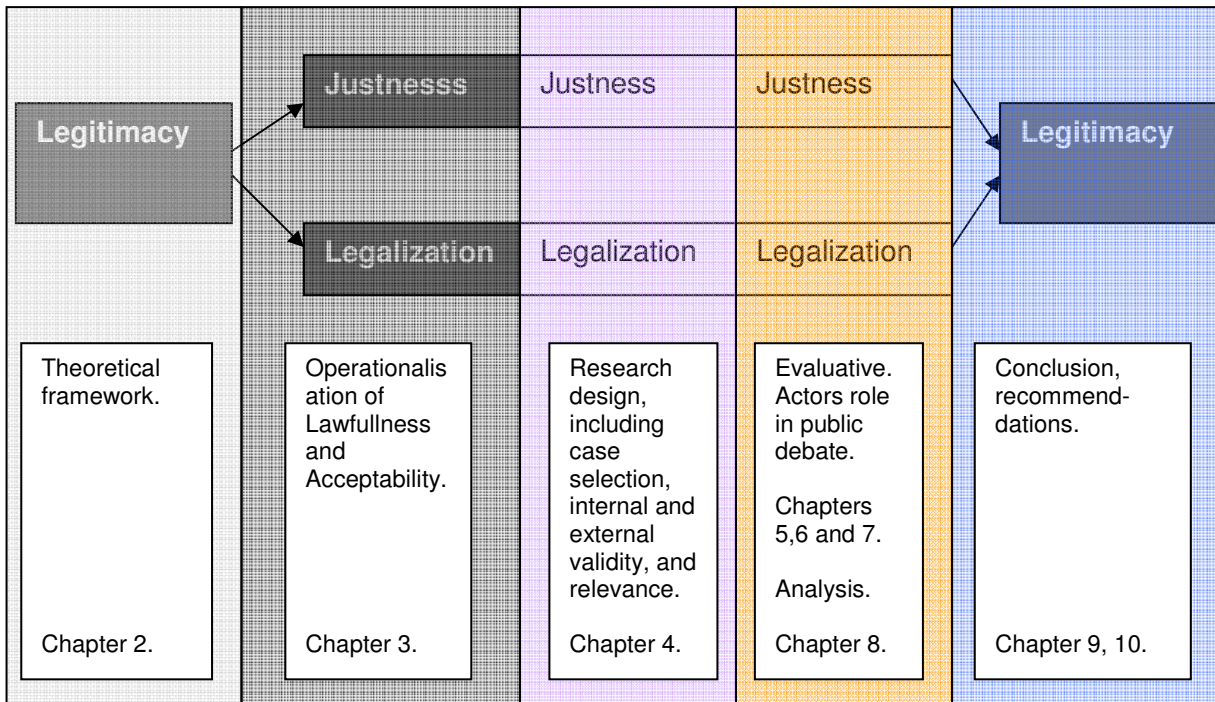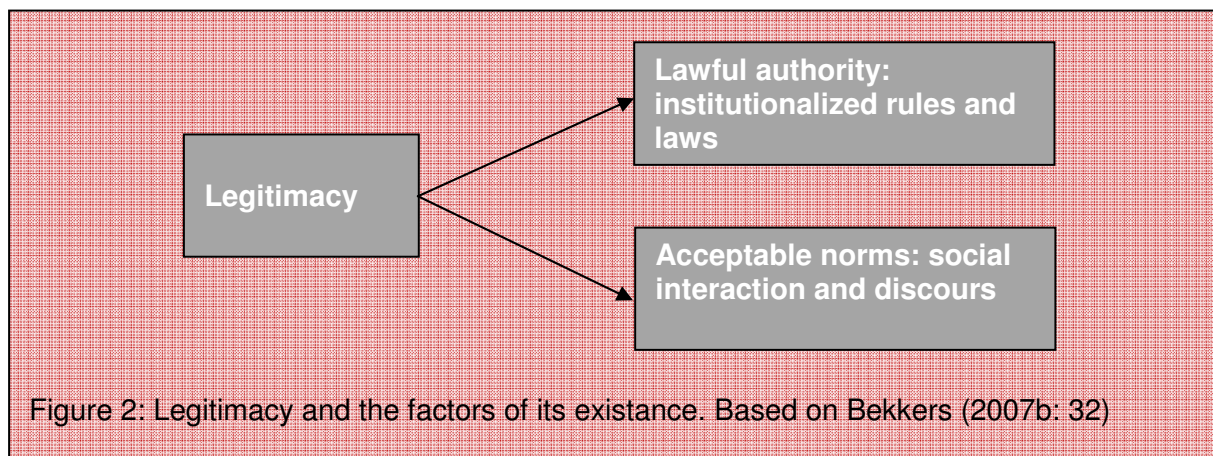
See Figure 1 for an overview.

Figure 1: overview of study. Legitimacy consists of factors lawfulness and acceptability.

2 Legitimacy and the role of social interaction

2.1. Legitimacy

Legitimacy is known to be difficult to define. Bekkers (2007b) argues that legitimacy is the determining factor within the political system because of its binding character. Legitimacy depends on the amount of authority that is exercised. The authority has to be recognized as lawful by the ones that are affected by it, so that its decisions are recognized as binding. (Bekkers, 2007b: 32) A decision should be taken legally – by a lawful authority – and is then experienced as acceptable. (Bekkers, 2007b: 32) (Tucker and Hendrikson, 2004: 18)

Bekkers (2007b) and Tucker and Hendrikson (2004) agree, therefore, on the schedule that is presented in figure 2.

Legitimacy

Lawful authority: institutionalized rules and laws

Acceptable norms: social interaction and discours

Figure 2: Legitimacy and the factors of its existance. Based on Bekkers (2007b: 32)

2.2. Acceptable norms: social interaction and discours

It is also important that a decision is consistent with the general accepted norms within a society so that trust in the decision is gained. (Bekkers, 2007b: 34) At the same time, an intervention that is lawfully authorized will more often be regarded as acceptable as well, since in most countries laws and rules are respected within society. Therefore, authority has a double role in this research on the development of legitimacy.

The government is not only judged by the effects it's policy achieves, but also on image, based on perspectives and social constructions within society. (Van der Walle, 2006: 125) Hill (1992. In Van der Walle, 2006: 132) Negative views about the government are supported by citizens as long as these views are in accordance with existing social constructions.

Social contructions give meaning to the world and influence the policy process. Firstly, policy institutionalizes political and social meanings. Secondly, policy itself is influenced by the social constructions and meanings. Communication and interaction are essential in this process. Within this communication process, people tend to seek for interaction that is meaningfull to them, thereby developing a dominant way of reflecting on society; a dominant discourse. (Bekkers, 2007a: 71-74)

The same is true for the acceptability of a decision. Acceptability depends on what is important and meaningful in the society: the dominant social discourse. In order to operationalize 'acceptability' it is, therefore, necessary to define a dominant social discourse. This social discourse will be visible in the public debate, since this is the arena where social

interaction between several actors in society develops. It is this <u>public debate</u> that will be studied.

2.3. Lawful autority: institutionalized rules and laws

According to Luhman (in Bekkers, 2007b: 33), lawful authorisation is about using rules and procedures correctly: both juridical values as well as non-juridical, more political norms. Therefore, the quality of the decision-making process of attaining political and social support is important to gain legitimacy.

When political and social meanings are institutionalized, they can limit the possibility of individuals to shape policy freely: organizations are formed and rules and laws established. (Bekkers, 2007b: 71) These organizations, rules and laws exists on multiple levels: national, encompassing both the intervening and intervened state, and international (see also paragraph 3.1). Both levels will be part of this study.

3   From theory to research

3.1   Units of analyses

Colijn (2009 and 2010) distinguishes three kinds of actors involved in the debate about military interventions: intervening states, intervened states and the international community. A military intervention can only be successful, when it is legitimate on all three sides. (Colijn, 2009: 30)

3.1.1   Intervening states

States are responsible for the internal and external security of their country. To protect it, they should be willing to go to war, according to Waltz (1979: 41).

> "Because some states may at any time use force, all states must be prepared to do so – or live at the mercy of their militarily more vigorous neighbours. Among states, the state of nature is a state of war."
>
> Waltz (1979: 41)

National politics are hierarchically ordered and this affects the relations of institutions and agencies. The exact blueprint gives basic information about the different positions in a state. (Waltz, 1979: 30) In general, it can be said that democratic constitutional states have a government with a legal monopoly on violence. The parliament has usually a role as well, but this depends on the kind of threat. In the most situations, a state does not take a decision about a military intervention autonomously because it needs an international mandate. The importance of this is different for each intervention. A state would need an international mandate for peace-enforcement, but not necessarily for peacekeeping. For the latter, an intervention could be justified by an agreement with the government of the intervened state as well. During the intervention it is important that violence is only used in a proportional way and results are achieved. That is why national monitoring of the intervention itself and the evaluation of the goals is important.

For both Americans and Europeans, it is important that the European countries would support the intervention. The 'important' European states are defined in the same way as the US German Marshall Fund (2004) did in their research: the UK, Germany and France.

3.1.2   Intervened states

An agreement on the national authority is often necessary regarding to peacekeeping interventions. This is important when individual states, regional organizations, or a 'Coalition of the Willing' wants to intervene, without explicit authorisation of the UN Security Council. The sovereignty is not violated when the sovereign power of an intervened state agrees with the intervention. Therefore, the role of an intervened country depends on the kind of intervention.

Democracies are more peaceful that other regimes, but this is especially visible in a peaceful attitude towards each other. (Oneal and Russett: 1999: 27) Therefore, intervened Western democracies will, in most situations, engage in a military conflict with a non-democratic opponent. Their state structure will usually not be characterized by a divided power as in the

Montesquieu theory. Decisions in undemocratic, or less democratically governed states will therefore be taken by a smaller group of people and might therefore have less (robust) support of the citizens.

3.1.3   The international community

The UN is the most internationalised political institute and the most important forum for international debates on military interventions. Regional coalitions are also involved in debates about military interventions, such as NATO, the African Union (AU), or the Economic Community of West African States (ECWAS). They have an important role in the debate about peacekeeping. Furthermore, International Non-Governmental Organizations (INGOs) like Amnesty International and Human Rights Watch are active in these debates. These organisations together are 'the international community'. The INGO's have a special role in this community, since they are also involved at the national level.

The international community has several functions:

Firstly, authorisation of the UN is needed to legalize an intervention. The only exception on this authorisation in advance is the situation in which a country is under attack. In this case, a country has the right to individual or collective self-defence until the Security Council has taken the necessary steps to maintain international safety and security. In this particular situation, the UN Security Council may be informed about the measures of self-defence that are adopted in line with Article 51 of the UN Charter afterwards. *Chapter VII*-interventions need a clear authorisation of the use of violence by the UN Security Council, based on Article 43 of the UN Charter.

Secondly, the international community needs to adopt a clear mandate, which includes a clear goal, a defined scope of the mandate and a clear time planning for military actions. This mandate will make sure participating countries know about the intentions, goals and restrictions of the intervention.

Thirdly, the UN is the manager of operations. The Secretary-General has a diplomatic role in peacekeeping operations. (Goodpaster, 1996) The Security Council and Secretary-General have a smaller role regarding other kinds of interventions. They do, for example, not participate in the process of (military) planning and organising after a certain mandate is given. The planning and organizing will be done by the member states that will participate in the intervention. Regional organization can have a role in the management of multilateral interventions, especially on the operational level. NATO is willing to do so and has worked this out in the new strategic concept that was agreed on in when the Cold War ended. According to this concept, the NATO wants to work on more intensive co-operations with partners and is willing to have a leading role in peacekeeping operations (NATO, 2006: 3) Other regional alliances – such as the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC) – have also had a role in the management of interventions, mostly in peacekeeping interventions and with authorisation of the intervened country, so that the UN did not have to authorize. 'Coalitions of the Willing' are another option and can mainly be seen under UN authorisation. An example is the International Security Assistance Force (ISAF) in Afghanistan. (Bellamy and Williams, 2005: 172) NATO has a leading role in this UN authorized intervention.

3.2 Phases of decision making and legitimacy

To facilitate research on the process of development of legitimacy, Bekkers (2007b: 38-42) has distinguished four kinds of legitimacy: input legitimacy, throughput legitimacy, output legitimacy and feedback legitimacy
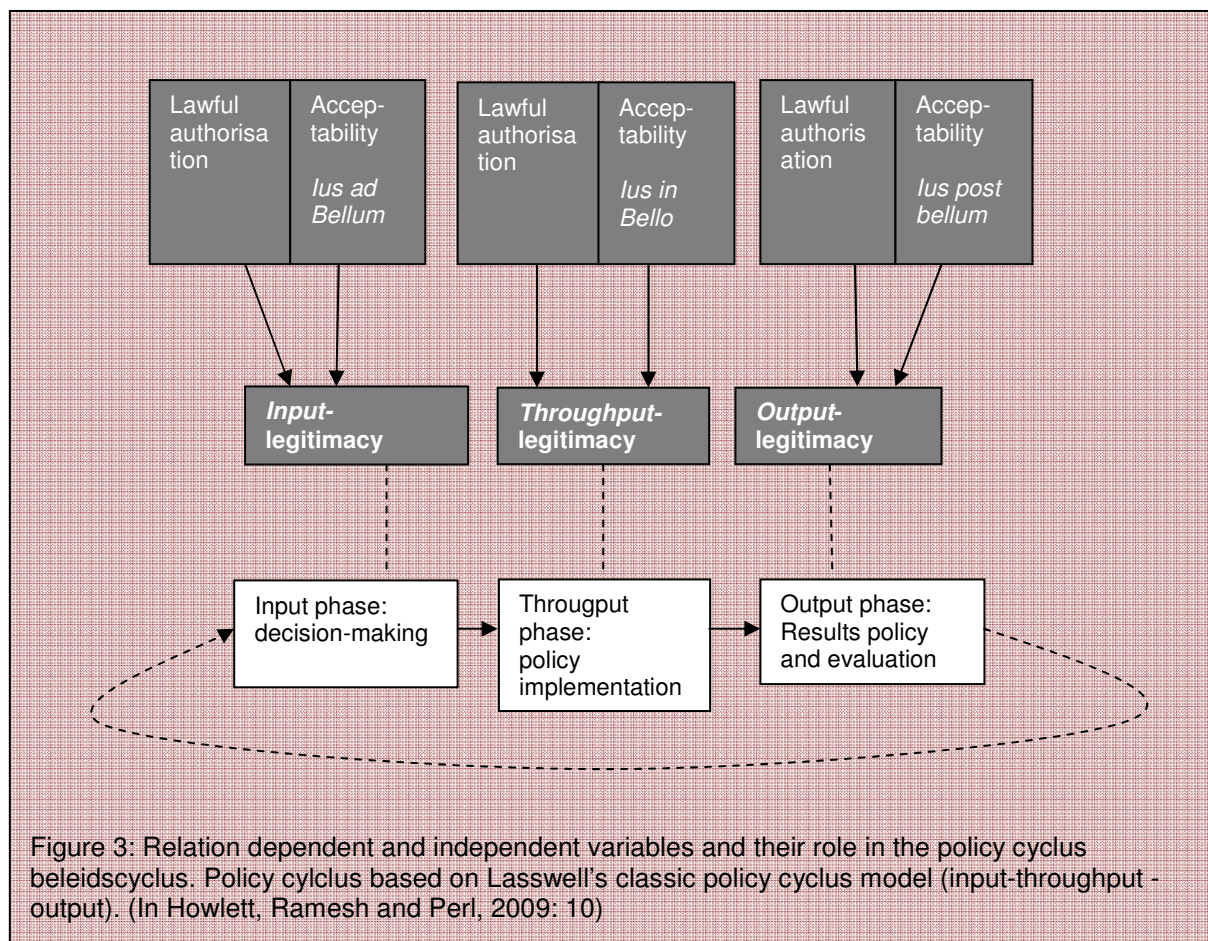
Colijn (2009 and 2010) has used a quite similar structure for the analysis of legitimacy of military intervention and does distinguish three different kinds of legitimacy. Input legitimacy is the support during the decision-making process about the military intervention. Throughput legitimacy includes the support of the execution of that decision during a military intervention. Output legitimacy shows the support after the fighting phase of the intervention, when the output becomes visible. (Colijn, 2009 and 2010)

Colijn does not distinguish feedback legitimacy as an independent category. The indicators that are used by Bekkers, for the 'feedback legitimacy', can be recognized in Colijn's indicators for input legitimacy. This research will use the categories of Colijn, because the evaluation phase of a military intervention will often be done during the process of output of one mission, and will be used in process of decision-making of a new one. The process of feedback and input and output are often not so easy to distinguish, because military interventions often have to get a new mandate during the ongoing intervention. The Netherlands, for example, decided on a new national authorisation for the ISAF mission in 2008. Feedback legitimacy had a role in this decision-making process, because the output of the intervention was presented in the important policy documents. That is why the integration of the feedback process in the input and output phase, would be more like the reality of the military intervention.

Figure 3 shows the stages of legitimacy as part of the policy cyclus. The figure gives an overview of the influence of the different kinds of legitimacy on policy, by linking them to a – very basic – model of a policy cycle. (Howett, Ramesh and Perl, 2009)

Lawful authorisation is of importance for each kind of legitimacy. This authorisation is not only important during the process of decision-making about the intervention, but is renewed repeatedly during the intervention. The UN, for example, has renewed the authorisation of the International Security Assistance Force (ISAF) and the UN Assistance Mission in Afghanistan (UNAMA) several times. The UNAMA is authorisation was for example renewed in 2010, by Resolution 1917, until the 23rd of March 2011. (UN Security Council, 2010)

During the intervention, acceptability is determined by *ius ad bellum, ius in bello* or *ius post bello* criteria, depending on the stage of the conflict (input, throughput or output).

Figure 3: Relation dependent and independent variables and their role in the policy cyclus beleidscyclus. Policy cylclus based on Lasswell's classic policy cyclus model (input-throughput - output). (In Howlett, Ramesh and Perl, 2009: 10)

3.3 The factors of legitimacy: lawfulness and acceptability

Legitimacy develops after a clear authorisation and an acceptable decision. Therefore, it is important to define 'lawful' and 'acceptable'.

The lawfulness of an intervention depends on the quality of the authorisation process. When all steps of this process are taken according to the written and unwritten law, this quality is assured. Depending on the kind of intervention, different levels of decision makers (see paragraph 3.1, units of analysis) have to be involved. When the lawful authority of the intervened state agrees with the intervention, the sovereignty of that particular country will not be violated by the intervention. This intervention would not need an authorisation of the UN Security Council. The authority of the intervening country has to agree with the use of military force as well, according to its national procedures and norms. The international community has a role in the authorisation process as well. The intervention is on international level authorized by two possible legal sources; the authorisation of the UN Security Council or the international custom law. (See for example: Burton, 2001: 49-62 and Alexander, 2000: 448-449) More specific criteria for the lawfulness of intervention, will be revealed in paragraph 3.3.1.

The acceptability of an intervention depends on what is acceptable within the society. To be regarded as legitimate, a military intervention has to be in line with generally accepted norms in society. But which norms are 'generally accepted'? And how do these norms cause a military intervention to be 'acceptable' during the decision-making, but also during the phase

of execution, and after the main operations of an military intervention are finished? To answer these questions, it is important to show which discourse is dominant in the current society and how it developed.

The Just War theory has played a major role in the thinking about legitimacy over the centuries. The Just War tradition originally developed from a Christian point of view and has, according to Johnson (1984. In Fixdal and Smith, 1998: 285), still an important influence in the judgement of acceptability of war. The Just War theory and its criteria will be discussed in paragraph 3.3.1.

See figure 4 for overview of legitimacy and the important factors, including the paragraphs where criteria for this concept will be discussed
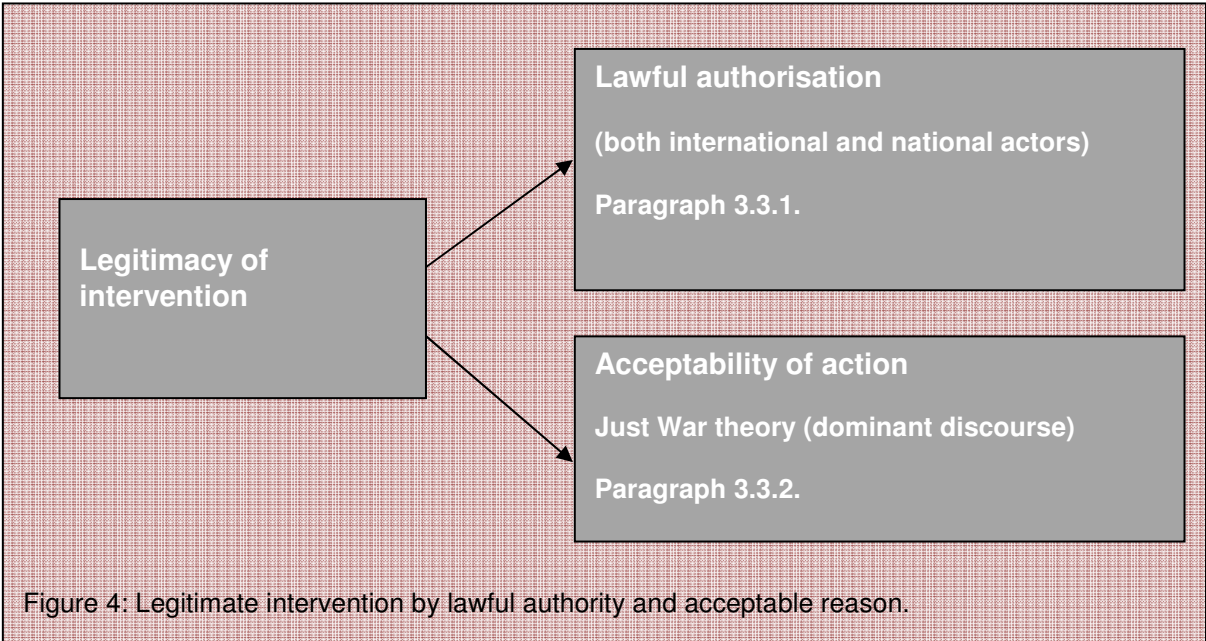

Figure 4: Legitimate intervention by lawful authority and acceptable reason.

3.3.1   Factor 1: lawful authorisation

The principle of state sovereignty is important in relation to lawful authorisation. According to this principle, states recognize each other as independent communities, with an autonomous source of power. State sovereignty is not explicitly mentioned in the official documents of the Peace of Westphalia in 1648, but developed into a doctrine in the years after (Lesaffer, 2004) and would later become the basis of the international law. (De Wijk, 2005: 11) Theologian and lawyer Hugo Grotius was the founding father of the principle. As a result, a clear relation with early Christian thinkers can be recognized.

One of them was Legnano (14th century) – professor of the University of Bologna – who wrote that only the Pope was justified in starting a war, because his actions could not be doubted by a higher authority. It would not even be necessary to discuss the acceptability of reasoning. (In Von Elbe, 1939: 672) According to Franciscus de Victoria, one person only should never decide to start a war. Even monarchs should ask for the opinion of a group of experts, in order to avoid misinterpretation. (In Von Elbe, 1939: 675)

The United Nations adopted the principle of sovereignty as one of its main principles (UN Charter, Article 2 (4)). The principle is no longer linked to the Christian background and is even used in new ways. While sovereignty was originally only meant to be used in relations between states, it is now used to describe the autonomy of power within a state: 'internal

sovereignty'. (Krasner, 1999. In Steiner, Alston and Goodman, 2007: 690-691). Other recent developments related to sovereignty will be shown in paragraph 2.4.4., in relation with the recent debate about 'Responsibility to Protect'.

Authorisation and the power within a state

Within a democratic state, the Defence organization is mandated and legitimated in her actions by the government. The military is executing the monopoly on the use of force authorised by the state (Van Baren, 2009: 84) and participates within international interventions.

Different powers are involved in decision-making: the legislative, executive and juridical power. In a modern, democratic constitutional state, the government decides in conjunction with other powers. According to Montesquieu, these powers should be equal to each other – with own tasks – so that the balance between them would be maintained. That would stop the concentration of powers. (Van Baren, 2009: 4-5) The (normative) separation of powers had a significant influence on the development of the Western state models.

Montesquieu (1689-1755) was a scholar who is influenced by the Enlightenment. During the sixteenth century, religion got a less dominant role in public and private live; the society individualized; independent – for example from the church – research developed; and old patterns became less important. The monarchies, which were for centuries seen as created by god, were replaced by republics (like France in 1792) or bounded by constitutions. The Netherlands did go through a special – reversed – development. The Netherlands had always had a national assembly, but Willem I would return as a king after the victory on France. This first King was bound by a Constitution, but still had freedom for own decisions and actions. This freedom would become less after the start of Ministerial responsibility in 1848. This constitutional change, proposed by Liberal Thorbecke, would separate powers in the Netherlands in the three classic groups that were already introduced.

All different states had an individual development regarding the separation of powers. That is why the details of Montesquieu's separation of powers are different in each state. (Burkens, Kummeling, Vermeulen and Widdershoven, 2006: 105) In one state is a clearer split of powers than in the other state, which has to be kept in mind when interpreting the results of a research involving different states.

In general it can be said, that the separated powers of a democratic constitutional state cause a process of internal control. The role of the juridical power is clearly different from the role of the legislative and executive power. While the authorities in the last two powers consist of democratically chosen citizens, the members of the juridical powers are selected on basis of juridical determined professional requirements. After this selection process, lawyers are appointed for life by the Crown and review laws that are developed by the other two powers. Because of the different task and position, the legitimacy of the juridical powers is very different from the legislative and executive power. The juridical power defines the boundaries to which the other powers have to adapt. (Van Baren, 2009: 167)

Authorisation from the international community

According to the realist paradigm, there is no power above the power of states. States have to stand up for their own interests and safety; international relations are characterized by anarchy. This situation causes a permanent 'state of war': military power is the solution when alternatives have failed (Art and Jervis, 2007: 1)

The main objective of the UN is to maintenain international peace and security (Article 1, UN Charter). The UN Charter contains the agreements to achieve this, signed by the – at this moment – 192 member states. Furthermore, different optional protocols are drawn up about human rights. The number of states that have signed these is different for each protocol. The United Nations does not have the autonomous power to force member states to cooperate, but has to depend on its member states for actions. The UN Security Council takes decisions about diplomatic measures, economical sanctions and – as a last option – military intervention. Five states have a central role in this Council, since they have the possibility to veto Resolutions. Member states have to execute the decisions that are taken.

The principles of the UN and UN Charter allow four different possibilities to develop peace:

1) Peacemaking involves the use of diplomatic means to negotiate a peaceful solution between conflicting parties. It is possible to mandate for peacemaking on the basis of Chapter 6 of the UN Charter. The use of force is not named within the UN Charter, but it is named in the EU treaty (Article 17). (Bossuyt and Wouters, 2005: 628-629)

2) Peacekeeping is neutral assistance by a military force or police force, with the agreement of the different authorities that are involved in the conflict. An example of such an intervention is the mission of 'blue helmets' in Cyprus, after the cease fire agreements. Because the different authorities agree on the external assistance, sovereignty is not violated (UN Charter, Article 2 (4)). That is why states or regional organizations can engage in peacekeeping without agreement within the UN Security Council (Bossuyt and Wouters, 2005: 628-629), while the UN as an organization can only get involved after a positive decision from the UN Security Council (Article 42, UN Charter). Peacekeeping and peace-enforcement operations have become – since the 1990's – more difficult to distinguish. (Bossuyt and Wouters, 2005: 628-629)

3) Peace-enforcements include the use of force and do not need to be agreed on by the conflicting parties. This kind of intervention does need a mandate of the UN Security Council, based on Article 43. (Bossuyt and Wouters, 2005: 628-629) Before evoking Article 43, other measures (Article 41-42) have to be proven not useful. All members of the UN have the obligation to contribute by 'armed forces, assistance, and facilities (…) necessary for the purpose of maintaining peace and security'. (UN Charter, Article 43)

4) Post-conflict peace building is assisted by the execution of the peace-agreement after a civil war, for example by humanitarian (financial) assistance and the monitoring of elections.

Regional military security organizations have been created to avoid war and instability. These 'coalitions' are reacting together when peace and stability of member states is under threat. The North Atlantic Treaty Organization (NATO) is one of these organizations. The Organization of American States is another organization that provides – according to the 'Rio Treaty' – collective military security as well. These member states of NATO have agreed that an attack on one of the states will be interpreted as an attack on all of them (NATO Treaty, Article 5). This policy enlarges the general costs for an enemy to attack one of the member states.

The degree of lawfulness; criteria

The UN is important for the authorisation process on the international level. The UN Charter forbids military intervention, unless this is done out of self-defence or when action is necessary based on other Articles within 'Chapter VII' of the Charter. So called 'Chapter VII-

interventions' need approval of the UN Security Council beforehand. The government and parliament of the intervening country have an important role on the national level. The exact distribution of power between these actors differs for each state. The authorisation of national actors is important, since the state has a monopoly on violence. The actors of an intervening state have to play a dominant role, when an intervention starts with their approval, as can be the case in a situation of peacekeeping.

Authorisation of several – national and international - actors is necessary for a lawful decision, depending on the kind of intervention. These actors might reach different conclusions within their process of decision making. This can cause a discussion between the actors about the interpretation of law. This thesis will not give a juridical judgement about the debate. When a debate occurs and is not completed or finished, it is assumed that different opinions about the intervention will be expressed within the society as a whole. In these situations, countries within the international community might have a different role in the discussion, depending on their countries' prioritisation and the dominant paradigms in the society.

3.3.2   Factor 2: acceptability of military intervention

In order to be able to distinguish criteria for a military intervention that is accepted by society, it is important to discover the dominant discourse within this society. Over history, there are three kind of discourses that have dominated in certain periods: Just War theory, rationalism and pacifism. Rationalism and pacifism are often dominating the social interaction within the same time, during times in which the society is polarized. Just War theory has developed as a compromise between several groups in society. This paragraph will discuss the development of these discourses over history, since this shows the depth of the discourses roots within society. After this historical overview, the paragraph will end with recent developments and the role of the current – Just War – discourse within society.

An acceptable war; historical perspective

'Acceptable' is not – and has never been – uniform. There have always been different groups with different ideas about the institutionalisation of society; about good and evil; and about war and peace. At some moments in history, these groups have been rather polarized, while they have been depolarised during other moments in history.

A trend for depolarisation emerged around the sixteenth century. This trend has been important for the current debate about military interventions, because it was the start of the Just War theory. This theory developed from a broad consensus between movements that were polarized earlier; the theological, juridical, political and military movement. (Johnson, 2006: 168).

The general thought of the Just War theory is that the army is a neutral instrument, which can be used politically, in a good or a bad way. According to historical thinkers, sovereign powers had to protect the interests of the state in an effective manner. When military means had to be used for this reason, it was seen as a 'necessary evil'. The intention was of most importance. (Johnson, 2006: 168)

The interdependence of the different movements can be clearly recognized within the Just War theory. The theological and juridical tradition is clearly interrelated in the theory. Hugo Grotius – important for the development of the Just War theory – was for example both a jurist and a theologian. In that time (1583-1645), law, religion and politics were intertwined in public life and all had significant inpact. Huge parts of the current Europe were predominantly

Christian. The king was seen as a representative of God on earth and the juridical power was not independent yet. Jurists still debate the role of Hugo Grotius. Firstly, there are the positivists, who think that Grotius mixed morality and law too much. Secondly, there are the jurists according to whom Grotius was the first to distinguish between morality and religion. (Onuma, 1993: 3)

This historical interdependence is important for the current relation between juridical and religious / ethical thinking. The religious / ethical ideas have institutionalised during the centuries and became the principles of the modern international institutions. After institutionalising, the principles developed until independent goals to live up to.

The classical Just War theory (Johnson, 1999) can be split into two different categories; *ius ad bellum* – about the acceptability of the decision to participate in a war– and *ius in bello* – about the acceptable execution of this decision. These two categories will be explained first, before more recent developments are discussed.

Ius ad Bellum; acceptable start of war

One of the founders of the religious / ethical thinking was St. Augustine (5th century), who searched for a moral justification for interventions (De Wijk, 2005: 11) and used that to distinguish between just and unjust wars. According to St. Augustine, the difference could be made based on the purpose of the war and the way it is executed. Furthermore, the decision had to be taken by an authority, the war had to be short and peace should be re-established as soon as possible. (Weeks, 2010: 22-23).

St. Thomas of Aquino (1225 – 1274) further developed the Just War concept and distinguished three criteria to judge about the acceptability of a war. Firstly, a war had to be authorized by legitimate powers, meaning legal governments. Non-state forces and piracy were, according to St. Thomas, illegal. Secondly, there had to be an acceptable reason to justify the start of a war; both goals as motivation had to be acceptable. The state could not start a justified war out of territorial motivation or revenge. That is why the old, peaceful situation should be re-established quickly. Thirdly, there had to be a right intention; necessary violence and only when an intervened country or group had 'earned it' on basis of wrong behaviour. (Weeks, 2010: 25)

Minor differences are visible in the reasoning of St. Augustine and St. Thomas. St. Augustine was convinced that a justified war could be started when citizens were oppressed. St. Thomas had stricter requirements: when an opponent had made a clear and conscious mistake, this was reason enough for punishment and a justification of war. (In Von Elbe, 1939: 669)

According to Belli, an acceptable war could be started out of self-defence, or to protect ones interests. It might not justify a war, when it is fought; a war will become 'unacceptable', when decisions are made out of revenge or for gain. (In Von Elbe, 1939: 173-174)

Hugo Grotius was very specific in the reasons that would justify a war and which would not: self-defence, regaining of property and punishment for wrong behaviour were good reasons, while the wish for better soil, the wish to separate from the state, and the wish to suppress citizens could not justify a war. (In Von Elbe, 1939: 678-679)

Ius ad bellum has gained an important role within the UN Charter. The Charter obliges states to have a good causeby forbidding all wars against other states with two exceptions; self-defence (UN Charter, Article 51) and the maintenance of international peace and security. These last operations are known as '*Chapter VII*' operations, after the chapter of the UN

Charter in whichthey are described. In the end, the UN Security Council has to decide about the acceptability of the motivation of states.

Ius in bello; about the execution of a war

The *ius in bello* concept was originally developed as acode of knights, which was the juridical tradition of the Middle Ages, and not – in contrast to the *ius ad bellum* tradition – from a juridical point of view. The tradition developed to protect citizens against damage because of warfare. The limitation of material damage had in this period priority overthe limitation on the number of civilian casualties. (Johnson, 1999: 36-37)

In the fifteenth century, the *ius ad bellum* principles were more important than ones of *ius in bello.* After all, no war would be fought when *ius ad bellum* could prevent this. In the seventeenth century, these criteria became less important and states based their decisions about the start of a war more and more on rational – self-interest – criteria. The *ius in bello* criteria became more important in this period, to limit the damage that was done during a war. The wars of the eighteenth century were mainly 'limited wars' (Johnson, 2006: 170), where opponents fought about a concrete, clearly defined goal and not about the total abolishment of an enemy. (Osgood, 1957 in Mallison, 1967: 340-341) This strategy changed in the nineteenth century, when 'total wars' were fought; full army capacity was used to destroy the enemy. *Ius in bello* became even more important in these wars, for example during the American civil wars. They were included in several norms of Lieber (1862, 1863) within *General Orders No. 100* of the American army. (Johnson, 2006: 170).

The first European treaty on *ius in bello* issues was drafted after terrible experiences during the French-Prussian battles (1859). After the battle near Solferino in Italy, dead and injured people remained on the battlegrounds, with almost no one taking care of them. The Swiss Henry Dunant took initiative to start neutral medical assistance for wounded of both warring parties. The basic idea behind the original Treaty of Geneva of 1864 was the equality of human beings, followed by the foundation of the International Committee of the Red Cross and several national associations. The four Treaties of Geneva (1949) were established after the Second World War and these would be followed by Additional Protocols (Kalshoven, 2006). These treaties agreed on proportional violence, to protect the citizens. These treaties are the juridical institutionalisation of the *ius in bello* concept.

Re-entry Just War in the American discourse

The concept of 'perpetual peace' made its reappearance in the early twentieth century, and norms, meant to ban war, were formulated on international level. The League of Nations (1920), the Kellogg-Briand Pact (1928) and the UN(1945) were founded on the same idea. In this period, war was no longer seen as necessary evil and a way to maintain security and public order. According to pacifists, war could never have a good or useful side. This way of thinking developed to an internationally acknowledged concept because of the similar focus of international institutions. Totalitarianism developed at the same time, and became widely known because of the violence used by the Nazis and Stalin. These groups were of opinion that war could be used unlimited against enemies. (Johnson, 2006: 171-172) The European discourse became polarized in pacifists and totalitarianians. The new treaties and constitutions were not able to stop the start of the Second World War. The debate in the US showed the same polarization. Realists were of opinion that 'total war' would be necessary to fight evil. Because the debate was polarized, there was no discussion about a justified use of force as necessary measure and bound by several important moral standards. (Johnson, 2006: 167-168)

A new change in discourse could, according to Johnson (2006: 172), be recognized from the 1960s onwards. The debate about the justification of war slowly returned to the public agenda. The Just War theory had been a compromise between political, juridical, military and theological views when it developed in the sixteenth century, and got a similar position from the 1960s onwards. The Just War tradition developed further during the second half of the twentieth century. A third category was added, to make it possible to monitor the acceptability during the last phase of the war – after the fighting. Furthermore, Johnson (1999) proposed significant changes within the *ius ad bellum* tradition, by adding four new indicators. The debate about the principle 'Responsibility to Protect' started and developed a totally different view on the principle of states sovereignty. Paragraph 2.2.5 – 2.2.7 describe these recent changes.

Adding 'ius post bellum'; acceptability during the end phase of war

Recently, a third category has been added to the Just War theory, with the aim of elevating the goal achievement(s) of the war and to check the acceptability of the end phase of war. This new category is called *ius post bellum*. Orend (2007: 571) calls this category the 'missing piece' of the Just War theory. Virtue ethics, which is related to the Just War theory, includes such a category about consequences as well. Judgements of virtue ethics are based on the intention, execution (in Westberg, 1994: 119-120) and the consequences of behaviour. (Driver, 2005) In total, three steps have to be taken in order to judge on the moral justification; intention, action and outcome.

The first to suggest to add a third category to the Just War theory was Michael Schuck (1994, in McCreay, 2009: 70). According to Schuck, three criteria were important for *ius post bellum*; the one who caused the war had to show remorse; there had to be an official surrender; and the reconstruction of the conquered state would have to be taken care of. These criteria should be reached after the end of the violence, not directly after the defeating of the enemy. Different scholars have done other suggestions for the development of *ius post bellum*. According to Rebecca Johnson (2008: 226), *ius post bellum* is important, because of the focus on the political and economical aspects, while *ius in bello* focused on military aspects. By adding the new theory, attention is developed for the civil-military co-operation and the reconstruction of the intervened country. (Johnson, 2008: 228). According to Orend, it is important to defend (human) rights and to support the proportionality of the policy to surrender. Therefore, the following criteria would be important: protection of the rights that were the reason to start the justified war; a proportional, reasonable and publicly available peace-agreement; a clear distinguishing between leaders, soldiers and citizens during the negotiations and the drafting of new policy; proportional punishment of (former) aggressors; financial compensation; and demilitarisation and political sanitization. (Orend, 2007: 580-581) These criteria have a clear relation with principles of *ius ad bellum,* such as acceptable intention and proportionality.

According to Orend, it is a logical step to monitor the end of a war by using the *ius post bellum* criteria. Recent conflicts – Afghanistan, Kosovo, Central Africa and two wars in Iraq – are enough proof for him that the end of a war is important in the judgement about the success of the war in general and the economical, social, political and military developments of the intervened country. Orend doubts the Second World War would had started when the First World War ended in line with the *ius post bellum* criteria. By drafting clear guidelines for ending a war, wars could be shorter and indicators would be helpful in the process of reconstruction. (Orend, 2007: 576-577).

Johnson's added criteria in ius ad bellum

The classical *ius ad bellum* theory has three criteria, which were developed by St. Thomas; a justified war has an acceptable reason; the decision is made by a lawful authority and with the right intention. Johnson (1999: 28-29) adds four criteria; proportionality of ends, military force has to be the last resort, the chance of success has to be reasonable and a peaceful situation has to be the intended outcome. According to Johnson, the first three – original – criteria are most important, but the added criteria are needed to enhance the role of the Just War theory in the process of policy implementation.

There has been debate about the role of Johnson's added criteria. According to McCready (2009: 67) the criteria are in fact *ius post bellum* criteria. He is right in the sense that Johnson describes his fourth criterion – proportionality of ends – as if it is a part of the evaluation of the war: 'the overall good achieved by the use of force must be greater than the harm done' (Johnson, 1999: 28). Johnson does not add a new '*ius post bellum*' criterion. On the other hand, Johnson uses his added criteria differently than the scholars who formulated the *ius post bellum* criteria. Johnson forces the authorities to anticipate on the chance of achieving the goals during the decision-making process.

Johnson's criteria are sometimes used by the pacifist-related *ius contra bellum* movement, to explain that a war cannot have any positive effects. This way of judging a war was developed during the Cold War and starts from the assumption that the new weapons are so destructive, that military intervention can only be disproportional. Johnson does not agree with this way of reasoning; firstly, weapons are steadily developed to such extend, that it is possible to use them in a way causing less 'collateral damage'. Furthermore, according to the Just War theory, a war is only 'just' when rights or values have already been violated. The new criteria have to be used as a checklist, to make sure a war can be justified. (Johnson, 1999: 34-35).

Making calculations and 'best guesses' about the chance of achieving the goals, can historically be placed in the rational tradition. Sun Tzu (n.d.) and Von Clausewitz had self-maintenance as their central goal. According to Von Clausewitz (1832: 1-3), war could be defined as the use of violence to force an opponent to behave in a certain way; in which situation the 'change of behaviour' would be the goal, while the military force would be the mean. The chance on a military victory depended, according to Von Clausewitz, on the availability of means and the goal of the war. The smaller the offer that is asked of the enemy, the smaller the effort of the enemy to resist will be. (Von Clausewitz, 1832: 8)

Rationalists traditionally have a calculating component in their decision-making on warfare. It has no implications when is calculation turns out to be wrong later, because the rational thinking is amoral. In this light, Johnson's new *ius ad bellum* criteria about the acceptability of war are unconventional. They assume that the outcome of a war can be calculated and planned beforehand, but to use this to decide on the acceptability of a war is contrary to the rationalist tradition with its amoral way of arguing. One of Johnson's remaining questions is what happens when an initial calculation turns out to be a wrong one and success is not achieved. Can an initially deemed just war turn out to be a wrong or unjust war later?

The recent discussion about Responsibility to Protect (R2P)

According to Chandler (2009: 244), current threats like the ones on the international policy agenda, are related to the failure of states and the safety of citizens. From these threats, the concept of 'sovereignty as responsibility' has developed. There is a difference between the recent use of sovereignty and the old one, because the latter was meant to show that the absolute power over a state was within that state. The 'old sovereignty' was mainly an

agreement between states, to respect the sovereign power of other states; sovereignty does only exist when others acknowledge it. The newly developed sovereignty, which is important for the discussion about Responsibility to Protect, has a different point of view. When a state does not want or can fulfil the responsibility to prevent massive human rights violations from happening, the international community has responsibility to react, even when that harms the sovereignty of a state. (Badescu and Bergholm, 2009: 288)

While Responsibility to Protect is a new term, the principles were already developed over the ages. Hugo Grotius, for example, already mentioned the responsibility of a king towards his citizens. (Onuma, 1993) However, there were no consequences when a king did violate this social contract.

> "A true and proper obligation arises from the contract of a king, which he entered into with his subjects (…) such is the nature of promises and contracts we have shown above; and this holds even between God and man"
>
> Hugo Grotius. In Onuma (1993: 202).

'Massive human rights violations' were already defined after the Second World war. The Treaty of Nuremberg, made it possible to prosecute war criminals for actions that were not seen as illegal by their nation, at the time of the war. Lawsuits became possible, by assuming human rights to be universally acknowledged. 'Massive human rights violations' as crimes against peace, war crimes[c] and crimes against humanity could be prosecuted in Nuremberg. (Maris and Jacobs, 2003: 4) The change made it possible to prosecute citizens of other states for harming the citizens of the prosecuting state. The focus was, however, still on the protection of the own citizens and not on the protection of citizens in other states.

The Genocide Treaty (Paris, 1948) added genocide as a massive human rights violation. Genocide means that action is taken 'to exterminate a national, ethnic, religious or racial group'. (Genocide Treaty, 1948: Article IV) (Bossuyt and Wouters, 2005: 248). The Genocide Treaty did not change the way state sovereignty was approached. Given the moral sensitiveness of the theme, the UN has always been careful with the use of term 'genocide'. Grünfeld (2009: 248-249) describes how the International Criminal Court has changed this policy in the case Serbia – Montenegro. According to Montenegro, the Court was aware of the chance of genocide, but did not actively try to prevent this. With help of this jurisdiction, if might be possible to use the Responsibility to Protect more actively, to protect citizens living in other states.

Still, there is much discussion about the role of humanitarian intervention within the UN. According to some scholars, humanitarian interventions are fully in line with the principles of the UN Charter, which would therefore not have to adapt to make it possible for the UN to decide about these interventions. It would be necessary to have a mandating Resolution of the UN Security Council. This could become a relatively difficult process, because the UN is lacking clear guidelines about the decision-making process. According to others, the state's practise and valid interpretations of the law could have led to a change of the custom law, which would make humanitarian intervention possible. The last group of scholars adheres to the position that the UN has to have the authority to force countries to protect the universal

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[c] The laws on warfare – ius in bello – were institutionalized in the Four Treaties of Geneva (1949), two Optional Protocols (1977) and a third Optional Protocol (2005). The laws on warfare did already exist before 1949, but as custom law. The Treaty of Geneva of 1874 had already enhanced the medical assistance on the battlefield; the 'Recommendation of St. Petersburg' (1868) had forbid the use of exploding gunfire; and The Hague Peaceconference clarified who could and who couldn't participate in the war and the way that conquered regions and States had to be treated. (Het Nederlandse Rode Kruis, 2006: 9-13)

human rights – even when use of military force is necessary to do so. The last group of scholars believes that humanitarian intervention cannot be an exception on the restriction of violence, for example because it would harm state sovereignty. (Molier, 2009: 202)

The debate about Responsibility to Protect has not subsided. Therefore 'humanitarian intervention' is, in this research, not added to the list of formally existing military interventions. When the Security Council decides to start such an intervention, this would be under one of the other *Chapter VII*-interventions: depending on the way the mandate for the intervention is achieved the intervention would either be seen as peace-keeping or as peace-enforcement.
According to Badescu and Bergholm (2009: 289) the principles of R2P are important in the rhetoric of international institutions. Possibly, this rhetoric is used by states, to argue about the acceptability (*ius ad bellum*) of the military intervention they wish to start.

Role of Just War theory in European discourse

Johnson (2006: 172-173) has written about the dominance of the Just War theory in the American discourse, from the 1960s onwards. But how would this be in the European discourse? Through the ages, three different ways of reasoning have dominated at different moments in time. (Johnson, 2006) In the 16th century, the Just War theory developed as a compromise between different categories of thinkers, while rational thinking was dominant in the 18th and 19th century. The discourse became polarized in the early 20th century, between pacifists and rationalists. Since these three discourses have been dominating the debate for ages, one of them will influence the current debate as well.

When the dominant way of thinking would be strictly rational, the focus within the discourse would be on self-interest and the successes that can be achieved in a war. A war would then be seen as amoral: a moral reason as 'acceptability' would not have a role in the dominant discourse. International organizations would not be important in legitimising an intervention, because the interest of the state would be central.

Empirical evidence reveals a different discourse. The European discourse has less rational features than the US. Authorisation of international institutions are of even more importance to Europeans than they are to Americans. During the research of the German Marshal Fund of the United States[d] (2004: 15) the question whether authorisation of international institutions would be important in a future situation like Iraq was asked. Of all European respondents, 82% thought that the UN had to approve such an intervention, while only 58% of the Americans shared that opinion. Furthermore, a decision NATO was for Europeans more often essential, than for the Americans (72% versus 58%). 80% of the Europeans thought a decision of the important European states (France, UK, and Germany) were essential. Again, this was less essential for the Americans. But – perhaps surprisingly – the consensus between the main European states was more important to the Americans than validation from the UN or NATO.

The goal of an intervention does not seem to be a strictly rational choice: the most important guideline for military intervention by Dutch troops is to act against violation of human rights (NIPO, 1995). The same is true for other European states. While both American and European respondents agree that it is important to use military means to protect interests of the own states and allies, this is relatively more important to Americans.
On the other hand, it can be questioned whether humanitarian support, peacekeeping or peace enforcing and the reconstruction after a civil war, more important to Europeans. (German Marshal Fund of the United States, 2004: 11).

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[d] Studies on the Transatlantic relation. European countries where the research has been conducted: France, Germany, Italy, Netherlands, Poland, Portugal, UK, Slovakia, Spain and Turkey.

Empirical evidence also shows that pacifism is not dominant in the European discourse either. Europeans are willing to use military force and even for broader purposes than strictly self-defence. On the other hand, this willingness is accompanied by criticism. Only 28% of the Europeans believe that military force is the best way to ensure peace, against 54% of the Americans. (US German Marshal Fund, 2004: 11). The research of the US German Marshal Fund (2004: 17) shows broad European support for the use of military means in different scenarios; to stop a civil war (from 41% in Germany to 70% in Spain); to realize regime change when a government is responsible for violation of human rights (from 36% in Germany, to 63% in Portugal); and even to secure oil stocks (from 27% of the Portuguese, to 61% of the Germans).

Although the opinions in Europe differ between countries, in general there support for military intervention, especially in order to enhance the situation of human rights in the world, or to stop a war. Simultaneously, there is also support for the perspective that more rational interests should be secured, such as the protection of a state and its allies. Especially for Europe, authorisation of an intervention by the international community is important. Europe has – even stronger than the US – a discourse which is dominated by the Just War theory.''

Just War: a worldwide discourse?

Just War theory is dominant within the European discourse, as is shown on the basis of opinion research. Johnson showed how Just War re-entered American society. How about the non-Western part of the world? The role of Just War might not be just as important for all countries, but are dominating the UN meetings. The current discussions about Responsibility to Protect show the importance of Just War in the UN. The same can be said for *Chapter VII*-interventions. In both situations an exception on non-intervention is made, based on humanitarian arguments. This is in line with the Just War principles, but not with strict rationalism or pacifism. In that way, the UN – started with a pacifist view – has changed over the years. The same principles can be recognized within the Treaty of the African Union (AU), in which the principles of Responsibility to Protect are already included. The AU has the right to intervene when states do not act in accordance to the decisions of the Assembly, regarding war crimes, genocide and crimes against humanity. (African Union, in Steiner, Alston and Goodman, 2007: 1064) Even China, often regarded as one of the most rationally behaving countries of the world, cares about the legitimacy of their actions. (Strecker Downs and Saunders, 1998) Although rationalism is important to this country, economic growth has become of growing importance for the legitimacy of the government. A position in international politics is important for economic growth. Therefore, even China's role is no longer strict nationalistic, but partly depending on international context for its legitimacy. Although the reasoning might be quite rationalist, the effect is another: it causes China to have a foreign policy that is more in line with international treaties, and, therefore, more focused on 'Just War' than in the past. (Strecker, Downs and Saunders, 1998: 114-119)

Actors with a key role in social interaction

The Just War theory is developed as a compromise between different movements in society; the theological, juridical, political and military (Johnson, 2006: 168). Still, the theory is a compromise between different groups within our society; the analysis of the debate in society about the acceptability of war will be based on the input from these different groups.

Compared to the past, one important change has occurred; the church will, in this research, be classified under the juridical / ethical group. There are three reasons for this change; firstly, the Western society is secularised and the current church has a less central role in the society compared to the Middle Ages. Secondly, within the debate about Just War not only

Christian theologians are involved, but also scholars from other religions. Not only have other religions an separate role within the intervening countries, but these can have also a major – or even dominant – role within the intervened societies. Thirdly, many laws – even within the universal UN laws – have their roots in the ideas of European theologists like St. Augustine and St. Thomas. That makes it hard to distinguish theological ideas and juridical procedures. Therefore, the analysis is based on the input of the following groups: the political, juridical / ethical and the military. The role of these different points of view within the discussion about 'acceptability' will be analysed for the three different units of analysis, creating the following figure for analysing.

| | Internationaal | Nationaal | |
		Interveniërende staat	Geïntervenieerde staat
Political	International institutions	Government, parliament	Government, parliament
Juridical / ethical	International Organizations, international scientific debate		
Military	International military security organizations	National military organizations	National military organizations

Table 1: Actors with a key role in social interaction

3.3.3 *The degree of acceptability: criteria*

The Just War theory is dominant in the universal discourse. It is therefore possible to reveal the development of legitimacy, by analysing the debate about military interventions using this theory. Criteria are developed for all three categories within this theory: *ius ad bellum*, *ius in bello* and *ius post bellum*.

St. Thomas' three criteria have a central role in the category of *ius ad bellum*, about the acceptability of the start of an intervention; acceptable reason, authorisation and acceptable intention. The indicator 'authorisation' will focus on the acceptability of the authority making the decision. The process of authorisation will be analysed within 'lawful' decision-making. The four added criteria from Johnson (1999) will be used as well. According to these criteria, the expectation about the outcome of the war has to be a part of the decision-making.

Johnson's two criteria (1999: 29) will be used as indicators for *ius in bello*; proportionality and protection of citizens. Both criteria have in recent times a different focus than in the past, because the protection of citizens is nowadays a more crucial factor. This new focus will be used in the analysis of the current debate.

Orend's six criteria (2007: 580-581) will be used to analyse *ius post bellum*. These are: safeguarding of rights that were the reason to start the lawful war; a public statement about a proportional and reasonable peace agreement; a clear differentiation between leaders, the military and citizens during the negotiations about the development of policy; (former) aggressors should be punished proportionally; financial compensation should be available; and political sanitization and demilitarisation when necessary. *Ius post bellum* assesses the reality, as if it is developed during the war, after the phase of fighting. It is important to point out that the phase of fighting and the post-fighting phase of the recent asymmetric wars are less easy to distinguish than in traditional warfare. It is therefore possible that a period of warfare can be evaluated on the of *ius in bello* and *ius post bellum* criteria simultaneously. *Ius post bellum* evaluates the output and the outcomes of war. The criteria are strongly interlinked with the reason to start a war or participate in one; the desired outcome has much

to do with the 'acceptable reason' and the 'acceptable intention' has to be visible in concrete behaviour.

Table 1 gives an overview of the three parts of the Just War theory and its indicators. By analysing the debate in society using this framework, it will become clear which indicators are leading in the debate about military intervention. This will show the influence of the actual use of military force and the ending of the war on the support for the intervention.

Religious – ethical tradition			Juridical tradition and international law		Rational tradition
Classic indicators *ius ad bellum*	Acceptable reason	Protection of values. (Johnson, 1999)	Self-defence (UN Charter, art. 51, when authorized)		
			International peace and security – UN Charter, *Chapter VII*, when authorized		
	Authorisation	By authorized members of the sovereign government.* (Johnson, 1999). For this research only the, 'acceptability of authorisation' will be included in this criterion, since that will make the difference with the criterion 'lawful authorisation', of the lawfulness of intervention.	Authorisation by UN Security Council.	"Peace-making" – UN Charter, *Chapter VII*	
				"Peace-keeping" – UN Charter, Art. 42 (only for UN mission).	
				"Peace-enforcement – UN Charter, Art. 43.	
				Self-defence until UN takes over (Art. 51 – Security Council informed after start mission).	
			Authorisation by UN General Assembly.	As extra authorisation of "peace-keeping".	
			Authorisation by regional organization & intervened state.	Agreement of intervened country necessary – UN Charter, art. 42). Regional Organizations can authorize "peace-keeping" intervention for extra legitimacy.	
			Authorisation by intervened country.	Intervened country has to agree with "peace-keeping" (Un Charter, art. 42)	
	Acceptable intention	The intention has to match with the 'acceptable reason' (Johnson, 1999)	Clear mandate, by authorized decision makers.		
Added criteria *ius ad bellum* Johnson (1999)	Proportionality of ends	Does more good than it will harm? (Johnson, 1999)	Part of the decision-making; the expectation to succeed in this criterion during the intervention.		
	Last resort	No other (economic / diplomatic) measures are left. (Johnson, 1999)	Part of the decision-making; no other measures to choose during decision-making. During intervention: expectation / intention to use violence only in situations when no other options are left.		
	Reasonable chance of success	Expectation to reach acceptable goals – based on calculation. (Johnson, 1999)			Enough means (employers, material and financial) to expect success.

	Peaceful goals	Promotion of peace, international stability and safety. (Johnson, 1999)		The opponent is forced to change behaviour, or – in preventive action – to keep behaviour the way it is (peaceful).
Criteria *ius in bello*	Proportionality		Treaties of Geneva.	
	Prevention of civil casualties		Treaties of Geneva.	
Criteria *ius post bellum*	Safeguarding rights	As far as safeguarding was goal of intervention.	The intervening power is the sovereign power of a country and is therefore responsible for the safeguarding of rights, public order and safety.	Provides feedback on the degree of success (goal attainment) of an intervention.
	Proportional, reasonable peace-agreement	Made publicly known.		
	Differentiating between groups	Differentiation between citizens, the military and leaders.		
	Proportional punishment	Of (former) aggressors.		
	Financial compensation	Differentiation between citizens, the military and leaders.		
	Demilitarisation and political sanitization	When necessary.		

Table 2. Overview of the Just War criteria.
* Authorisation by an authorised power of the intervening state is always necessary. Since this process is depending on national law, is this important juridical not included in the table.

4 Research design

4.1 Case selection

This study will evaluate the debate in society about interventions that were initiated without a clear UN mandate. It is important to select cases from the period after the Cold War, because the political-military way of thinking, the national interests and the international institutions have changed since then. Interventions prior to 1989 can therefore not be compared with later ones. This major shift in philosophy on international security issues since the end of the Cold War makes it also hard to use these interventions to understand today's development of legitimacy.

Another selection criterion is that the role of the UN should be discussed in the public debate. Of all selected cases, the lawfulness was discussed during the start of the intervention, but became more commonly accepted in the later stages of the conflict, when the UN got a clearer role in all cases.

The three biggest interventions of the post-Cold War era had these characteristics: Kosovo (1999), Afghanistan (2001) and Iraq (2003). Since these interventions were extensive of scale, a lot of countries were involved. This has resulted in a strong internationalized debate.

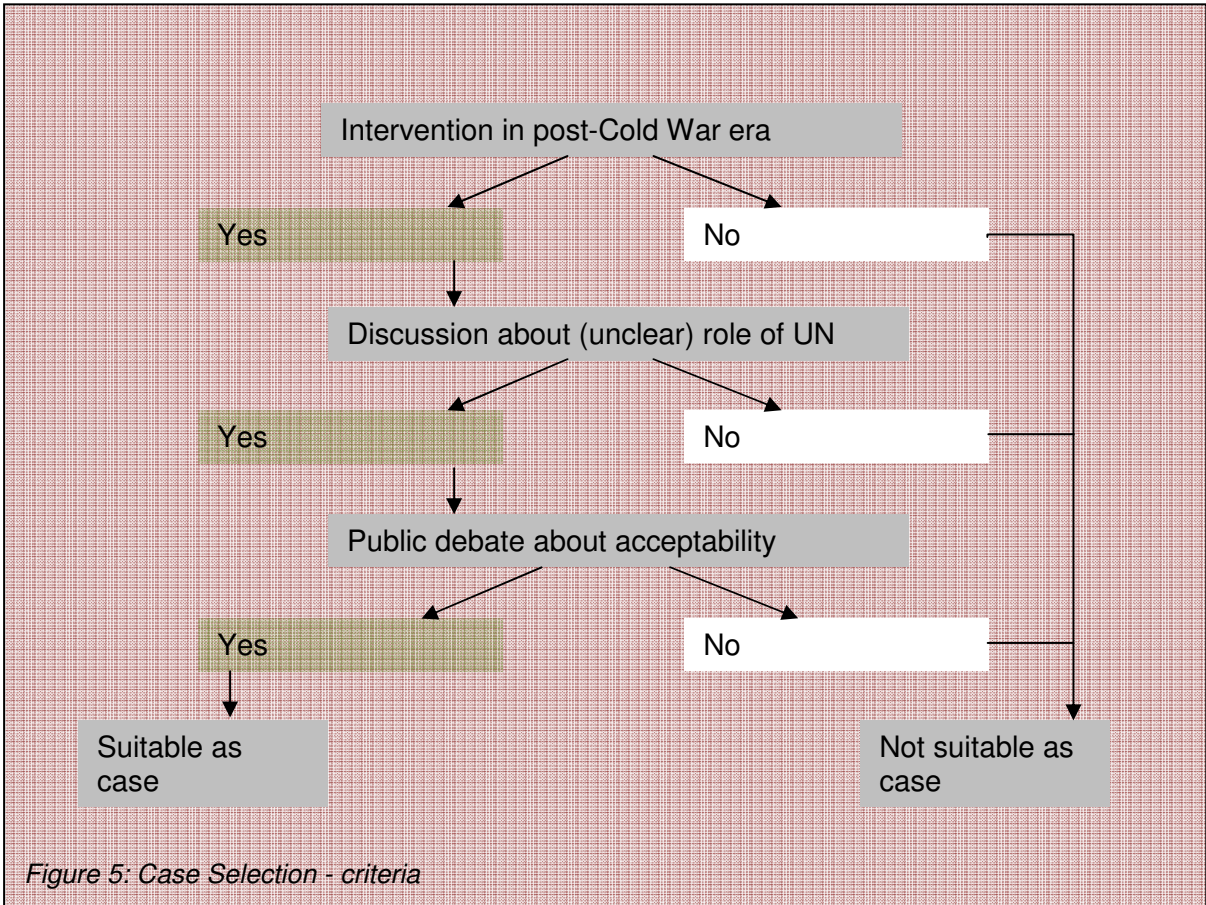See figure 5 for an overview of all criteria. See Table 3 for cases.

Figure 5: Case Selection - criteria

4.2 Case study: method

The three cases have in common that the criteria of 'lawfulness' is under public debate; groups within the society have different opinions about the role of the authorities. The reason to discuss the authority is different for each case, since other international and national actors have been involved and all cases developed in an own time frame and (political) context.

Since the authority is discussed, acceptability was even more important to gain legitimacy for military action. The second half of the military intervention was during all intervention legitimated by the UN. The social interaction should have been less determining in the second half of the interventions. As was discussed, the discours is important for determining the general values within a society – and, thereby, to determine what is accepted and what is not. The Just War theory is accepted as important for the universal discourse. The Just War theory consists of three different categories, for which several criteria were presented. These criteria, together with 'lawful authorisation' determine the development of legitimacy, as was shown in Figure 2. In general the Western World was discussed in previous chapters, but it is important to realize there are differences within the Western world as well. In paragraph 2.3.5. is shown how the US and the European differ. These differences will be used in the analysis to explain differences between the US and European countries.

This case study is an <u>descriptive, evaluative case study</u>. The case study is not aiming to prove a causal relation, but is evaluating an situation based on earlier academic material. The study has used the dominant discourse – that is equal to the normative theory 'Just War' – to operationalize the 'acceptability' of a war, which is one of the criteria for legitimation.

The other criterion for legitimation – lawfulness – was under debate since the cases did not have 'clear' UN approval. Criteria for the 'lawfulness' were formulated on basis of international law.

The methode of <u>pattern matching</u> makes the connection between the 'theoretical realm' and the 'observational realm'. When the outcome is as expected on basis of the theory, the pattern matches and this can be used as proof that the theory fits the reality (Trochim, 1989: 355). Pattern matching is usually used to proof causal relationships, but can also be used within descriptive case studies. In these cases, it is of major importance to define a predicted pattern prior to data collection. (Yin, 2003a) The pattern that is expected for this case study about legitimacy, is explained in chapter 3: the criteria of the Just War theory will have an important role in the debate about the acceptability of an intervention. When actors use the criteria of the Just War theory, the pattern is confirmed. In this case, the Just War theory is usable as a tool for analysing. When actors do not use the criteria of the Just War theory in the public debate, the pattern cannot be confirmed.

4.2.1 Evidence

According to Yin (2003b), evidence for case studies can be found in many sources. Yin summed up six important ones in his article: documentation, interviews, direct and participant observation, archival records and physical artifacts. Although it would be recommendable to use several of these sources, this study has only used documents. The reason to work with documents only, and not with interviews, direct and participant observation, archival records and physical artifacts, is that collecting of these other sources will be much more time consuming, since time was the critical factor during this thesis.

The lack of variety is partly solved by the variation within the written documents that are used. These documents include for example text of speeches, scripts of interviews, documents from government organizations and international organizations.

4.2.2 Analysis of the debate; different points of view and literature

The interventions are debated on international and national level. The latter level is divided in intervening country and intervened country. Different movements have a historic role in the debate about legitimacy. With a small adaptation to recent times the following movements will be distinguished; political, juridical / ethical and military.

The role of these groups of actors is depending on their position within society. The role of government and parliament of the intervening country is heavily depending on the mandates and laws intervening country. The military organization of the intervening country has a role in the debate as well, as executors of policy.

The roles of the groups within an intervened country depends on the kind of intervention. In a humanitarian intervention, the countries authority often has agreed with the military action within the country and will keep an independent role. An example of such a situation is the second part of the interventions in Kosovo, Afghanistan and Iraq, when new regimes have been established. These regimes are 'supported' by the former intervening states.

When a country is intervened without permission of the government, the authority over the country is overtaken by the intervening countries. The government and military organization in the intervened countries will not have a serious role in these situations and will, therefore, not be actors in the public debate.

The juridical / ethical debate is not necessarily limited to the country of publication. American scientific journals, for example, have become a podium for science all over the world as jurists often act rather independent of their country. Influential international organizations like Amnesty International and Human Rights Watch have an international focus. Therefore, it is not useful to distinguish between international and national debates within the juridical / ethnical movement.

See table 4 for an overview.

Intervention (starting year)		UN-authorisation	Agreement with intervened State	Initiative	Main argument
Kosovo (1999)	Bombing campaign	No	No	NATO	Stopping ethnic violence / preventing crimes against humanity (UN Charter, Chapter VII).
	NATO Kosovo Force (KFOR) and United Nations Interim Administration Mission in Kosovo (UNMIK)	Yes	No	UN	Creating security and stability and finding a political solution (UN Security Council, resolution 1244).
Afghanistan (2001)	Operation Enduring Freedam (OEF)	No explicit au-thorization *	No	US / NATO	Fighting terrorism and (on later moments) assist the Afghan authorities.
	International Security Assistance Force (ISAF)	Yes	Yes	UN ('Coalition of the Willing' under NATO command)	Assistance of Afghan authorities.
Iraq (2003)	Multi National Force – Iraq (MNF-I)	No	No	US and UK	Start: self-defence. Later: *regime change* to democratical government with respect for human rights and international law. (UN Charter, *Chapter VII*)
	United Nations Assistance Mission Iraq (UNAMI)	Yes	Yes	Coalition of the Willing.	Keeping peace and security.

Table 3: *Selected cases and characteristics.*

* The UN communicated that States should work together, to bring terrorists to justice, but did not explicitly agree (or disagree) with the intervention of the US / NATO in 2001.

	Internationaal	Nationaal	
		Interveniërende staat	Geïntervenieerde staat
Political	International institutions *Literature: policy documents, speeches, statements, scripts of interview.*	Government, parliament *Literature: policy documents, speeches, statements, scripts of interview.*	Government, parliament *Literature: policy documents, speeches, statements, scripts of interview.*
Juridical / ethical	International Organizations, international scientific debate *Literature: reports, websites*		
Military	International military security organizations *Literature: policy documents, speeches, statements, interviews.*	National military organizations *Literature: policy documents, speeches, statements, interviews.*	National military organizations *Literature: policy documents, speeches, statements, interviews.*

Table 4: *The different points of view within the three units of analysis.*

The literature sources are depicted in italic

4.2.3 Internal validity

Pattern Matching

According to Yin (2003a) the process of pattern matching can be used to ensure internal validity in descriptive, evaluative studies, as long as the expectation was formulated before the actual collection and analysis of sources. The results of the study should follow the same pattern to confirm that the theory that was used matches the reality of the cases.

A lot of attention was put in the formulation of the expectations, following three main steps. The first step that was taken, was building a theoretical foundation for legitimacy. Although scholars argue that a definition is hard to formulate, the found definitions were quite similar and even more coherence was found in the criteria that were described. The second step that was taken to ensure a solid expectation, was the operationalisation of the factors for legitimacy; lawfulness was operationalised by criteria found in international law; acceptability was operationalised by criteria of the dominant discourse within the world – Just War theory. Over time, it was always Just War theory or – in more polarised times – realisme and pacifism, that were the dominant discourses and scholars have used the theory, therefore, to describe the discours over centuries. At this moment, scholars argue that Just War theory is the dominant discourse ones again. The strong historical roots make that Just War theory makes a rather 'solid' description, although some criteria were added later to adapt the theory to modern times with different types of war.The third step that was taken 'double checked' the theoretical criteria of Just War theory with opinion research in Europe, the United States and decision making processes within the UN and China – of which the last was defined as a 'most extreme case', due to the rational image of the country within world politics. Even 'most extreme case' turned out to have adapted to the Just War theory. All this evidence found for the expectation, even before starting the collection of evidence and analysing the results, makes sure that the internal validity is assured. Since the results showed the same pattern as was expected on forehand, the Just War theory was – indeed – the right set of criteria to analyses of the public debate.

History

Positive is the internal valid regarding big historical developments, since only post-Cold War cases were selected, which makes the three cases comparable to each other. Furthermore, all three cases started within a rather limited period: between 1999 and 2003. Still, small changes may have occurred due to 'lessons learned'; the military term for all changes in thinking due to events during these missions. Furthermore, changes of power may have changed the debate between political actors, within this period. One of the changes that might have influence is, for example, the change of presidency in the United States. While the intervention in Kosovo was started by democratic President Bill Clinton, the intervention in Afghanistan and Iraq were initiated by republican President George W. Bush (jr.). Of course, it is impossible to control these kinds of events in society and this research could not have been done in more controlled – experimental – setting, since the influence of society is what makes a 'debate' to be an acual 'public debate'

4.2.4   Social relevance and general applicability

The outcomes of this research can be generalized for all post-Cold War international and multinational interventions which did not start with 'clear' UN authorisation. Just War theory is – since the end of the Cold War – the worldwide, dominant discourse in the public debate. On these terrains, the study is external valid.

The results cannot be used for pre-Cold War and Cold War period and for interventions with a more 'national' character and debate. The international debate on intervention has another scale and might focus on slightly different utilities than the separate national debates. When countries decide to act fully unilateral and the public debate stays at the same level, arguments could – for example – be more rational or strongly driven by social construction fo the national enemy, since the international institutions have less influence in this case.

The study is not reflecting on separate private debate and internal political debate, since this would only reflect part of society, which might not have the same opinion as the society in general on which the Just War theory is based. Thus, the results can not be generally applicated on privat and internal political debate.

Comparing these results to predict future situation, should not be taken light headed, since the discourse might change again, over time. New studies should therefore – again – start to assure that the Just War theory is still dominant as a discourse.

Legitimacy was used to explain the relevance of the debate about military intervention often. For example by Van der Meulen (2006). However, as far as known, the concept of legitimacy was not yet operationalized as precieze as in this study, in order to analyse the public debate during military interventions. This made pattern matching necessary, as an extra test of internal validy (see paragraph 4.2.3.). Since the pattern that was expected, could be recognized in the results of the study, the operationalisation of legitimacy was proven to be useble in these cases. Although this is only a small, next step for descriptive evaluative research on military interventions, the social relevance of this study is clear.

The social relevance of this study is in better understanding of legitimacy and the importance of this concept for military interventions. Public debates about military intervention might be slightly emotional, since these debates include principles, risks for all included societies, personal involvement and the start of an intervention is – last but not least – costly. Therefore, it is important to understand the thing about which people care. Accoring to Van

der Meulen (2006), this legitimacy is important for both the support of an intervention, but also for support of the department of Defence in general.

5 Kosovo case

The conflict in Yugoslavia was an internal conflict that developed out of misunderstandings, which had been building up during the decades before between the different ethnical groups. The dictator Tito had founded the Federal Republic of Yugoslavia in 1974, including two autonomous provinces within the Serbian region; Kosovo and Vojvodina. Both provinces were not recognized as independent regions, because their ethnical groups – Albanians and Hungarians, - had their 'own' states outside the territory of Yugoslavia. Their autonomous status meant that the provinces did not have to report to Serbia, but to the Federal Republic of Yugoslavia. Both provinces had the right to sign international treaties independently in their region Serbia and other parts of the Republic. (Postma, 1999a)

Kosovo developed a stronger relation with Albania over the years, and introduced education in the Albanian language. Citizens divided along ethnical lines; Serbian or Albanian. Simultaneously, nationalism was increasing.

Tito died in 1980. The first serious violence started in Kosovo in 1981. (Postma, 1999a) Kosovo lost its autonomy in 1989. The Serbian army surrounded the parliamentary building, to force the parliamentarians to vote in favour of this change in constitution. (Postma, 1999b)

Simultaneously, the popularity of Milosevic and the Serbian nationalism grew. In reaction on this, other parts of the Federal Republic of Yugoslavia started to claim independency; firstly Slovenia and Croatia and later Bosnia and Macedonia as well. In Kosovo an underground resistance started, that would become the Kosovo Liberation Army (KLA)

The Serbians started a violent campaign to force this resistance to stop in March 1998. In that violence so many Albanians were killed, that 'ethnical cleansing' was spoken about. The American diplomat Holbrooke and the Yugoslavian President Milosevic signed an agreement in October 1998, which had to prevent more violence from happening. Coercive diplomacy was used to force the Serbians to accept the conditions. The violence was started again in December 1998. (Michielsen, 1999)

This chapter will analyse the Kosovo case for the two afore mentioned factors that influence legitimacy; authorisation and acceptability. To be able to present the results in a clear way, it is chosen to differentiate input, throughput and output legitimacy. For each for of legitimacy is showed which national and international authorities have agreed with the intervention. After that, there is searched for publications, speeches and interviews that show to which degree the (decision about the) military intervention was acceptable for the involved actors. The actors will be divided in a political, juridical / ethical and military group, both on international and national levels. Table 4 shows an overview of the participants within the (international) public debate, who are included in the analysis of social interaction – so the parts about 'acceptability' of intervention. The paragraphs about 'lawfulness' will include the juridical debate of involved actors and lawyers and will include an overview of both national and international law.This case will be analysed – together with the cases of Afghanistan and Iraq – in chapter 8.

	International	National	
		Intervening State	Intervened State
Political	UN – did not authorize bombing campaign Kosovo. NATO – Political debate between States. Contact Group.	US and important European States (UK France, Germany)	Federal Republic of Yugoslavia: Serbians and Albanese Kosovars
Juridical / ethical	International Organisaties: Amnesty International, Human Rights Watch. International scientific discourse.		
Military	NATO – initiator (under leadership of the US)	Intervened military organizations	Military organizations of intervened State (Yugoslavian / Serbian troops and KLA – Kosovo Liberation Army)

Table 4: *The diffferent points of view within the three units of analysis.*

5.1   Input legitimacy Kosovo intervention; the start of the bombing campaign.

5.1.1   Lawfulness: authorisation of intervention

NATO declared that stability in the Balkans was in its own interest in the end of 1997. Furthermore, NATO called upon the different parties in the conflict to start a dialogue and declared to be concerned about the violent actions of the Serbian police. (Troebst, 1998: 53) The NATO-States had different opinions about the timeframe for starting the use of military force. While the US was willing to use these already in 1992, other member states remained convinced of a diplomatic solution for a longer period. France and Germany organized diplomatic consultations in November of 1997.

Russia and China refused to start military action against Serbia. China claimed sovereignty to be a precondition for human rights, and was – therefore – of opinion that a reaction on the violence in Yugoslavia could not harm the sovereignty of the state in any way. This is still the official Chinese point of view regarding international sanctions and other measures. (Wu, 2009). Russia voted in favour of Resolution 1199, on 23rd of September 1998, while China abstained of voting. (Wu, 2009: 78) This Resolution called upon the government of Yugoslavia – based on Chapter VII of the UN Charter – to act against violence and exclusion of civilians. Although the Resolution emphasized the sovereignty of Yugoslavia, it warned for further measures when the government would not act on the violence as demanded in Resolution 1160. (UN Security Council, 1998).

According to Clark (n.d.), the meeting of the NATO with its members Defence Ministers in June of 1998 was very important because it was the first time that, taking action against the Serbs was spoken about. The situation in Kosovo was debated; the participants realized to be witnesses of the first steps of a situation that would probably end in ethnical cleansings. Especially, because the pattern seemed the same as during the development of other situations in which ethnic cleansing had occurred on the Balkans. NATO decided to issue an 'activation warning' (ACTWARN) on the 24th of September 1998. This warning made it possible to start a collective, phased, air operation with limited air strikes. (Daalder and O'Hanlon, 2000: 43) The American diplomat Holbrooke and the Serbian President Milosevic signed an agreement on the 12th of October 1998, where Milosevic agreed on the withdrawal of a large number of Serbian troops from Kosovo and the start of a dialogue between the conflicting parties. The preparations of military interventions were going on simultaneously, in case it would be necessary later. (Maull, 2000: 2-3) In the end, the Yugoslavian / Serbian

troops were not withdrawn from Kosovo. The Contact Group decided on organizing a diplomatic summit in Rambouillet (France), on the 6th of February 1999. Both Serbian as Kosovo-Albanian leaders were invited. The summit aimed on an agreement of withdrawal of the Serbian troops from Kosovo, with simultaneously disarmament of the Kosovo-Albanians. The Summit in Rambouillet would not find a solution. That is why a second round of negotiations was organized in Paris, between the 15th and 19th of March 1999. The Kosovo-Albanian delegation would sign the agreement during this summit, but the Serbian delegation did not sign. (Independent International Commission on Kosovo, 2000: 82) That is why NATO – not the Contact Group – decided on the actual use of military measures. Several European member states had already agreed on military commitment in October 1998.

On the 24th of March 1999 NATO started the bombing campaign against the Federal Republic of Yugoslavia, with the intention to stop the crimes against humanity, which were carried out in Kosovo. The US wanted to stop the ethnical violence by forcing Milosevic to start new negotiations. (Daalder and O'Hanlon, 2000: 1) That is why this NATO operation is seen as a humanitarian intervention. (Minear, Baarda, Sommers, 2000: V). The humanitarian intervention was started without UN authorisation. According to Henkin (1999: 825) - former President of the American Society of International Law – no attempt was made to get an explicit UN agreement, because the NATO states feared that the UN Security Council would not agree on military intervention, because of Russia and China, and a difficult diplomatic process would be started. This fear turned out to be real; Russia proposed a Resolution to declare the NATO bombings to be illegal. This Resolution did not get enough votes to be adopted: only three countries voted in favour. According to Henkin (1999: 825), the UK was of opinion that authorisation would not be necessary and the US was of opinion that earlier Resolutions (1160, 1199 and 1203) were providing enough authorisation for a lawful intervention. On the 3rd of June, 1999 NATO and Serbia agreed on a peace agreement and the bombings were stopped. (Chomsky, 1999: 5)

Within the US, the intervention in Kosovo was rather controversial. President Clinton informed the Congress on the 26th of March 1999 – with the War Powers Resolution as legal basis – about the start of NATO bombings in Kosovo. On the 23rd of March 1999 the Senate had agreed – with 58 votes in favour and 41 votes against – on a non-binding Resolution that authorized the President to use military means in Kosovo. The *House of Representatives* only voted on the role of the US in the NATO operation when the bombing campaign already started. There was not a large majority in favour of the war among the members of Congress. On the 28th of April 1999 the Congress voted in favour (249 in favour, 180 against) of a proposal that bounded the Defence budget; the budget could not be used for the deployment of ground forces in Kosovo. On the same day Congress rejected a motion (139 in favour and 290 against) that would have called for withdrawal of all US soldiers from the Federal Republic of Yugoslavia. Furthermore, the representatives decided (2 votes in favour, 427 votes against) that a 'war' would not officially be declared against the Federal Republic of Yugoslavia. Congress also voted on the Resolution on which the Senate had already voted on the 23rd of March 1999. This Resolution was not adopted, as 213 representatives voted in favour and 213 voted against. (Grimmett, 2004)

The House of Commons of the UK was consulted several times about the intervention in Kosovo. Prime Minister Blair spoke five times to the House on this issue, the Foreign Affair Secretary spoke five times as well and the Defence Secretary four times. The House of Commons debated on the issue for four full days, on initiative of the government; on the 23rd of March, the 19th of April, the 18th of May and the 17th of June 1999. The House of Lords was involved in the same way. It gave the parliament the possibility to debate on the intervention with the government. The government, however, did not propose an amendable motion in the parliament. In the UK, there is no obligation to do so, because the government authorized military interventions independently, by execution of the *Royal Prerogative*. In the past, the government's strategy has differed from intervention to intervention. The

parliament, for example, did explicitly agree with the war in Korea and the intervention in Suez, but did not on the Falkland war. Later, the Select Committee on Foreign Affairs advised the government to propose an amendable motion to the parliament with the start of a new military conflict. (Select Committee on Foreign Affairs, 2000: nr. 165-166)

The Defence Secretary, Robertson, said in an interview – after the first parliamentary debate on Kosovo – that a consensus was found between the main parts of the parliamentarians. (Robertson, 1999)

> "Both Houses were full, the mood was sombre en determined, reflecting the seriousness with which the government and opposition parties view the developing events. I noted during the debate that although a variety of very passionate views were expressed, there was a strong consensus across the political spectrum that the difficult choices that we had to make were the right ones. This consensus is international too. As I said yesterday, and I emphasis again today, NATO action was taken with the agreement of all 19 member countries and has since attracted support from many other States."
>
> Minister of State, George Robertson. Pressconference 26th March 1999

The German Bundestag agreed on the 16th of October 1998 with a military intention in Kosovo. The intervention was a sensitive subject for all political parties, because Germany had for decennia kept to the idea of 'Von Deutschem Bodem darf nie wieder Krieg ausgehen'. Agreeing with the military intervention in Kosovo – even when the purpose of the intervention was humanitarian – would mean Germany sending military abroad to engage in action. The motion to authorize German engagement in the NATO air offensive was developed by of Helmut Kohl's (CDU/CSU) outgoing federal government and the incoming chancellor Gerard Schröder (SPD) and the future Minister of Foreign Affairs Joseph Fisher (Bandings 90 / Die Grüne). 500 of the 580 members voted in favour, 62 voted against and 18 members abstained. Only Gregor Grysi, of the socialists (PDS), pleaded against an intervention: the use of military force was – according to him – unacceptable from political, moral and historical point of view. (Deutscher Bundestag, 2008)

The French Prime Minister informed the parliament on the 23rd of March 1999, that France was willing to engage in military action, when an intervention in Kosovo would be necessary. The government promised the parliament quickly and full information on this matter and promised a debate with the Minister of Defence and Foreign Affairs within one of the meetings of the specialized parliamentary commissions. The French government and President agreed on the military engagement of France in Kosovo, but only informed parliament on the 26th of March, the third day of the military intervention in Kosovo. The French parliament had not voted on the French military engagement in the NATO air offensive in Kosovo, while France has a tradition of the involvement of the legislative power (parliament) regarding decisions of the executive power (government). According to the Prime Minister , the parliament did not have to vote on the intervention. He based that opinion on Article 35 of the constitution, which is about classical warfare. According to the Prime Minister , the air offensive in Kosovo was not a war in the classical meaning of the word, and therefore the executive power could make a solitary decision. (Tourard, 2000:199-200)

5.1.2   Debate about acceptability of ius ad bellum

Acceptable reason

The US and the UK were willing to intervene Kosovo since 1998. President Clinton justified the bombings by pointing out what the outcome would be if there where no military

intervention. This line of reasoning can be recognized in a text of Clinton in 1999, when the air strikes in Kosovo have already been started.

> It's "a Just and Necessary War", since "the Result would have been a moral and strategic disaster."
>
> President Clinton. In: Chomsky, 1999

Prime Minister Blair used the same arguments in his Chicago Speech (1999). The war was justified, according to Blair, because it was not fought out of territorial motivation, but on basis of values.

> "We cannot let the evil of ethnic cleansing stand. We must not rest until it is reversed. We have learned twice before in this century that appeasement does not work. If we let an evil dictator range unchallenged, we will have to spill infinitely more blood and treasure to stop him later."
>
> Prime Minister Tony Blair, Chicago Speech, 22nd of April 1999

Germany was wary of military intervention and was therefore asking for more diplomatic negotiations, over a longer period. This position had to do with Germany's role as 'civilian power', which was developed after the Second World War, from the idea that Germany would never employ military activity in Europe again. Kosovo was, therefore, a serious issue of debate within the Red-Greed coalition. Both the SPD as Die Grüne had many pacifists among their members. The SPD debated the issue during a specially organized political Congress, during which Schröder made a speech for the responsibility of Germany towards the victims of the ethnical violence in Kosovo, and towards its NATO allies. The discussion was even harder for 'Die Grüne', because their political program was clearly against the use of military force. Even though prominent members of the party and parliamentarians of 'Die Grüne' were supportive towards their Minister Fischer (foreign affairs) regarding the start of the bombings, the number of opponents grew during the period of bombings. Other political parties supported the initiative as well. CDU, CSU and FDP supported the decision of the Red-Green government, although these parties wanted to be careful with new initiatives, regarding the influence it could have on the relationship with Russia. CSU and FDP were wary of the use of ground troops. The only political party against a German military commitment in Kosovo was the PDS, which identified itself as the 'only left-wing party', with a position between pacifism and anti-imperialism. (Hyde-Price, 2001: 24-26) This description of the political situation in Germany, during the start of the intervention in Kosovo, can also be recognized in Schröders memoirs '*Entscheidungen. Mein leben in der Politik'*, about which *Der Spiegel* wrote an Article.

> "It was fully clear to me that for many in the (Social Democratic) party – and in the society in general – the idea that German soldiers, in this case fighter pilots, would intervene once again in a region that had suffered so much under German occupation during the World War II was unbearable"
>
> Gerard Schröder. In Der Spiegel Online (2006).

The German federal parliament would finally accept the decision of the government to support the intervention in Kosovo with military means, with 500 votes in favour, 62 against and 18 abstaining. (Maull, 2000: 3)

The opinions in Yugoslavia were divided along the same ethical lines as the conflict; the Kosovo-Albanian community and the Serbs. The Serbs had the power in Yugoslavia – President Milosevic – while the Kosovo-Albanian community had organized underground resistance. The international community – by the UN, the Contact Group and the NATO – had repeatedly called for a dialog, but this never really started. The international community kept repeating that the violence had to stop, especially the violence of the Serbian police against the Kosovo-Albanians. The Kosovo-Albanians signed an agreement, proposed in 1998 – to disarm the KLA and withdraw Serbian troops – but the Serbian diplomats were not willing to do that. The Serbian President Milosevic had argued that Kosovo was an internal affair and therefore external interference would be unnecessary and illegal. (Walker, 2000: 127)

The Serbian General Pavkovic (n.d.) was an officer in the Yugoslavian army from 1994 onwards. As commandant of the 'third Yugoslavian army', he was responsible Serbian military actions in Kosovo. Pavkovic (n.d.) argues in an interview that Kosovo is a part of Serbia to him and therefore it was only logical that Serbia identified the KLA as terrorists. Pavkovic describes how units of the KLA walked around with masks and uniforms and that incidentally local Serbs, or members of the Serbian police, were killed. These activities escalated during the summer of 1998, with aggressive actions taken against Serbs, police and state security every day. Pavkovic said during the interview that the large numbers of Albanian refugees could be explained by the terrorist acts of the KLA, of which the Yugoslavian army had heard. Bodies that were found in Racak were judged in the same way: these people would have died in a battle between MUP combat troops – on the Yugoslavian side – and terrorists.

Some jurists argue that there is no prohibition of a humanitarian intervention in the UN Charter, which would make it legal to intervene without explicit UN approval. According to these jurists, the sovereignty of a state will not be violated, because the political system is remained untouched and the action is only aimed at protecting the local citizens against the actions of this system. These jurists are of opinion that it is not right and formalistic when such kind of protection is not given, because a minority of the permanent countries of the Security Council is against such a military action. Regarding Kosovo, it is argued that only a small number of states opposed intervention. The Resolution that was issued by – among others – Russia in the Security Council would have condemned the bombing campaign in Kosovo, but was only supported by 3 other countries (12 votes against). (Rodley and Çah, 2007: 281-282) Louis Henkin, former President of the American Society of International Law is one of the jurists who think the intervention is lawful. Henkin (1999: 826) has a few extra arguments for his view; something had to be done in reaction to the serious human rights violations, but the UN could not act because of the veto-votes that Russia and China would have used. Furthermore, the NATO intervention was not 'unilateral', according to Henkin, since it was a collective action of a responsible organ in which three of the five permanent members of the Security Council are active. In the view of Chinkin (1999: 842-847) the UN Security Council has a primary, but not exclusively, responsibility to legitimate interventions. As a human rights lawyer, Chinkin argues that something had to be done in that particular situation.

Some lawyers do question if the action can be seen as a humanitarian intervention, because the situation in Kosovo did start to become more stable after the start of an OSCE-verification mission. (Rodley and Çah, 2007: 279-281) On of the jurists that doubts the humanitarian ends of the war is Cohn (2002: 80-86), according to whom to bombing killed many civilians, while the only final goal was gaining control over the East-European region and its oil.

Human Rights Watch (HRW) published about the violence that was committed under leadership of the Serbian President Milosevic in the period 1998-1999 several times. HRW

published for example on punishments and abuses in Kosovo on the 1st of December 1998 (Human Rights Watch, 1998) HRW (1999b), on the 10th of May about massive sexual violence in the region and about 'ethnic cleansing' that had taken place between 19th of March and on the 15th of June – after the agreement between NATO and Yugoslavian leaders – of the same year (HRW, 1999c).

Amnesty International wrote in a press publication dated the 12th of May 1999 that not much was done in reaction to the reports about human rights violations in Kosovo during the ten years before the intervention. (Amnesty International, 1999a)

Authorisation

American president George Bush (sr.) gave his so called 'Christmas Warning' already in 1992. In this speech he declared that the United States were willing to use military means against the Serbs, when they would continue the suppressing of Albanian minorities in Kosovo. (Skrpec, 2002: 95-96). In the same speech, president Bush emphasized that Kosovo was seen as a part of Serbia and not as a full autonomous area. (Holbrooke, n.d.)

> "in the event of conflict in the Kosovo caused by Serbian action, the United States will be prepared to employ military force against the Serbians in the Kosovo and in Serbia proper."
>
> President George H.W. Bush (sr.) (1992). In: Skrpec, 2002.

Right after this speech of Bush senior, Bill Clinton won the American elections and would be president of the United States until 2001. Kosovo would only reappear on the American military agenda after years.

The Contact Group on Bosnia-Herzegovina has published an official point of view on the conflict in Kosovo. This group was founded in 1994 and consisted of France, the United Kingdom, the United States and Russia, which countries were all permanent member of the UN Security Council as well. The Contact Group welcomed Germany and Italy in 1996 and gave the first detailed statement about the situation in Kosovo during that same year. The statement called for a dialog between the Serbs and the Kosovo-Albanian community and to take measures to ensure a safe return of refugees. The Contact Group was of opinion that Kosovo should not become an autonomous state, but should have a special status within the Federal Republic of Yugoslavia. (Bosnia Contract Group, 1997: 48) Kosovo would be one of the priorities of the Contact Group, from 1998 onwards. On the 9th of March 1998, a meeting of the Contact Group was planned in London. Russia only sent one representative to the meeting, but would support the common statement that was given in the end of the meeting. In this statement, the old point of view was repeated, but it did also warn that the disproportional form of control – for example violence in police actions – would not be accepted. To show the authorities in Belgrade that they could not simply neglect the international rules, the following steps were taken; the UN was asked for a mission of the High Commissioner on Human Rights; the International Criminal Tribunal of Yugoslavia[e] (ICTY) was asked to start collecting information; and the Organization for Security and Co-operation in Europe (OSCE) was asked to control more intensively. Furthermore, the Bosnia Contact Group (1998) asked for sanctions. The Contact Group did not ask for a military intervention.

According to Rodley and Çah, three different points of view can be found in the juridical literature, about the lawfulness of authorisation of the bombing campaign in Kosovo; one group of jurists is of opinion that intervention was legal in this situation; another group thinks

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[e] Now called 'International Criminal Tribunal for the former Yuguslavia'. www.icty.org.

intervention is illegal. A third group believes that intervention is illegal, but expects this to change in the future. (Rodley and Çah, 2007: 277-278)

Chinkin (1999) and Burton (2001) are jurists of the first group. According to Chinkin, the authorisation of the intervention in Kosovo was lawful, because the NATO provided a platform for collective decision-making and had already closely worked together with the UN in Bosnia. According to Burton (2001), the legal basis for interventions in general could be found in the UN Charter, but also in the international custom right. The bombing campaign in Kosovo was not legitimated by the UN Charter, because there was no situation of self-defence (UN Charter, Article 51). The bombing campaign had been authorized by international custom law, which is developed from the practises of earlier interventions. International custom law has developed several criteria to authorize an intervention; in case of (a developing situation of) genocide or massive violation of human rights; when diplomatic measures have already failed; intervening states may not have own interests in intervening; and the used of violence has to be necessary and proportional. (Burton, 2001: 49-62) Alexander (2000: 448-449) also emphasises that international custom law provided authorisation for the intervention in Kosovo.

A second group of jurist is of opinion that the bombings in Kosovo had not enough authorisation and were, therefore, illegal (Rodley and Çah, 2007: 277-278). Like Burton, they point out that the humanitarian intervention was not authorized by the UN Charter, but according to this second group, international custom law cannot be used independently for authorisation of an intervention.

A third group of jurists, are of opinion that the intervention in Kosovo was not legal, but expect that this kind of intervention will be legal in the future, especially since the intervention in Kosovo created a precedent for next missions. (Rodley and Çah, 2007: 282-283) International custom law can change slowly because of this precedent, but it could also lead to a quicker change, by adaptation of the UN Charter.

Several members of Congress in the United States were of opinion that President Clinton had not used the War Powers Resolution in the right way; the president had involved the Congress not enough in the decision-making process about military intervention. Several members of Congress actually started lawsuits and took their case in the end even to the American Supreme Court. The case would be rejected several times, because the members of Congress would have not enough juridical authority for starting a lawsuit to stop a military intervention. The Supreme Court agreed with the other courts, without hearing the members of Congress. (Grimmett, 2004)

Acceptable intention

The intention of the NATO bombings, which started on the 24th of March 1999, was a very quick military action, to force the Serbian president Milosevic to engage further diplomatic negotiations. (Daalder and O'Hanlon: 2000). The end was to stop 'ethnical cleansing' quickly and to find a political solution for the conflict.

The United Kingdom and the United States agreed about the kind of military action that was needed. Clinton did not have the intention to participate in an actual humanitarian intervention. That is why the United States wanted to solve the conflict by a relatively short period of bombings, to stop the Serbian president Milosevic with the violations of (fundamental) human rights of the Kosovo minority. (Fraser, 2002: 641). The United States asked the NATO to use this military strategy as well. (Krulak, n.d.).

The reason that the United States wanted to solve the conflict with the air strikes, is that humanitarian intervention was a very sensitive issue for the United States, since the American intervention in Somalia in 1993. This intervention had ended disastrous for the Americans; the American public had been supportive during the start of the intervention, but this support dropped when eighteen American soldiers were killed on one day – the 3rd of October. It was not the first Americans that were killed in Somalia, but the huge number of fatal victims on one day caused a shift in the public opinion. The death of the soldiers was even more shocking to the public, because recordings of dead American soldiers, who were dragged through the streets of Mogadishu by Aidid's combatants, were shown on national television. Clinton revealed four days later, that he would send more troops to Somalia for temporary enforcement, but would withdraw all troops at the end of March 1994. (Burk, 1999: 63)

The American General Charles Krulak (n.d.) talks in an interview with Frontline about the sensitiveness of Americans towards a humanitarian intervention and the reason why – originally – was chosen for air strikes.

"All the service chiefs knew that he (commander in chief, Clinton, *red*) was going to say something about the ground troops. Part of his sensing – and he's a very smart man – was that he had not, nor had the Congress, nor had the services, built any kind of constituency with the American people to cause mothers and fathers to say yes, send my son or daughter into Kosovo. Many of them didn't even know where Kosovo was, much less what this was all about. I think that was probably one of the reasons why he said no to ground troops. That's probably one of the reasons why the service chiefs were very reluctant to say send in the ground troops, although there was probably very few of us who believed that air alone was going to accomplish the mission."

General Clark Krulak (n.d.)

General Michael C. Short (n.d.) emphasises that war was a sensitive issue for Americans, due to the lessons from Vietnam. According to Short, the NATO made the wrong assumption that Milosevic would surrender quickly; in the end, more military force than expected was needed.

"We fought this conflict incrementally for all sorts of reasons… Many of our leaders went into this conflict believing that Milosevic only needed, quote, "a couple of nights of bombing", unquote, and then he would accept NATO terms. I personally doubt that all of our leaders had come to grips with the possibility of a prolonged air campaign… they thought that as soon as Milosevic saw our resolve, he would roll over, and all would be well."

General Michael C. Short (n.d.)

Military intervention was sensitive in several European countries. Afterward it became known that the United Kingdom would not have committed ground troops to the conflict in March 1999. (Fraser, 2002: 641) (Robertson, 1999) France and Germany were pleading for diplomatic meetings for a long period. (In Skrpec, 2002: 99)

The United States and the United Kingdom agreed on the goals that had to be set. Blair named these – not negotiable – goals in his Chicago Speech (1999).

> "a verifiable cessation of all combat activities and killings; the withdrawal of Serb military, police and paramilitary forces from Kosovo; the deployment of an international military force, the return of all refugees and unimpeded access for humanitarian aid; and a political framework for Kosovo building on the Rambouillet accords."
>
> Prime Minister Tony Blair, Chicago Speech 22nd of April 1999

Proportionality of ends

Chinkin (1999: 842-847) points out the importance of proportionality, especially when there will be no authorisation from the Security Council. Chinkin questions the proportionality, for the weeks of bombings, because there were no ground troops to protect the citizens during the air strikes. The French minister Hubert Vedrine warned for example about the possible negative effect of the use of military force, like the high numbers of refugees. (In Skrpec, 2002: 99)

NATO had not expected in advance, that the bombings would last for weeks, as becomes clear from a report of the British House of Commons. During the drafting to the report, a NATO Air Commander was interviewed, who was involved with the bombing; General Mike Short. He told that the NATO expected to bomb for two to three days. (In Select Committee on Foreign Affairs, 2000)

> "I had been told, I can't tell you how many times: you're only going to be allowed to bomb two maybe three nights – that's all Washington can stand, that's all some members of the alliance can stand … this'll be over in three nights"
>
> General Michael C. Short. In Foreign Affairs Committee (2000).

This general image was also confirmed by research of Roberts (in Select Committee on Foreign Affairs, 2000: no. 106), that was based on interviews with politicians and (military) staff members in the United States, the United Kingdom and the Netherlands. Simultaneously, the Minister of Foreign Affairs of the UK declared that he had been less optimistic in advance. He pointed out that Blair had warned the *House of Commons* in an early stage, because the start of the war could have serious consequences. (In Select Committee on Foreign Affairs, 2000: no. 107) Air Marshall Sir John Day said on the 2nd of April 1999 – more than a week after the start of the air strikes – that they had always known that it could become a long campaign. (Buckley and Day, 1999)

Last resort

According to Chinkin (1999: 842-847), a military intervention has to be absolutely necessary, especially when the Security Council did not approve the intervention. Important countries in Europe were convinced of that as well; France and Germany had long strived for a diplomatic solution. (In Skrpec, 2002: 99)

Simultaneously one of the former members of the Kosovo Liberation Army (KLA) argues that the intervention should have started earlier. Hassim Thaci was a former Kosovo-Albanian student, who assisted during the founding of the KLA. Furthermore, he has been prime minister of the KLA's improvised government, that was established when the war started. Thaci (n.d.) tells that the KLA was seen as a real army by the Kosovo-Albanians citizens. They supported the KLA with shelter and food. According to Thaci, the international community had no clear idea about what was happening in Kosovo and the action that was

needed. That was mainly caused by the disagreement between different states, about the necessity of military interference. The KLA never believed in a successful outcome of the negotiations in Rambouillet, but the meetings were prepared thoroughly, because that made it possible for the KLA to play a proactive role. The start of the NATO-bombings meant a new stage in the conflict to Thaci, because it made clear to him that the Kosovo-Albanians would win the war.

> "I believed that this was a point of no return, and this war will be won by the KLA and NATO. (…) Without the NATO bombing, the world's shame would still have been going on in Kosovo. Even bigger tragedies would be happening here. I'm glad that the world understood. General Clark especially was very determined, and of course he had the international political support, though I consider that we did our important duty on the ground. (…) I believe that the NATO knew very well the positioning of Serbian troops in Kosovo. Naturally our contacts were official communications with political structures of international community (…) but we don't exclude the possibility that we might have talked with military structures of NATO (…) KLA and the NATO had the same goal – to get the Serbian troops out of Kosovo. This common objective influenced the strengthening of our ground resistance and NATO bombing. NATO had all the possibilities to find out about the positioning of Serbian military forces in Kosovo."
>
> Hashim Thaci (n.d.)

Reasonable chance of success

General Klaus Naumann – until May 1999 chairman of the Military Committee of NATO – was critical about the way NATO had act in Kosovo. He made his comments during his farewell press conference, one month before the end of the NATO bombings. The General said not to believe that NATO has stopped the ethnic violence of the Serbs against the Albanians with the bombings. Simultaneously, Naumann believed that ground troops should only be sent in a setting that makes that possible. Naumann agrees therefore with the decision of NATO to work with air strikes only. (Naumann, 1999)

General Wesley Clark, 'Supreme Allied Commander' of NATO, did not agree with Naumann statement that states were very wary of military intervention and neither with the statement that the action was never planned as a war.

> "The military planning served a diplomatic purpose. (…) In the sense of what we were doing inside the military chain of command, we did very real military planning. On the other hand, the planning consisted of giving a concept, and then being asked to elaborate on it. Once we'd done the concept on the ground operations, it was clear there wasn't appetite for much elaboration… When people think about using force, they want to use the least possible force, and then increase it only if necessary. And no one wanted to declare war on Serbia."
>
> General Wesley Clark (n.d.)

Earlier – see the paragraph about 'proportionality of means' – was revealed that NATO – in general – had the expectation to reach the goals of the bombing campaign in two to three days.

Peaceful ends

The goal of the NATO member states was to bomb for a short period, to stop the violation of human rights in Kosovo. The NATO had no further plans for intervention.

5.2　Throughput legitimacy during bombing campaign

5.2.1　Authorisation of the next stages of bombing campaign

The bombings campaign in Kosovo was divided in several stages, in which the set goals were of increasing strategic importance to Milosevic. All NATO members had to agree on the start of a next stage. According to General Klaus Naumann, the decision-making process had a negative impact on the effectiveness of military action; the enemy had decided to go to war, while the NATO allies had decided to start a 'limited operation'. This discrepancy in the way of thinking would have caused a slow decision-making about the start of each new stage of bombings. (Naumann, 2000: 15-16) In an interview with Frontline, Naumann (n.d.) said:

> "one has to be prepared to escalate, if one doesn't achieve the political objective with the first military actions"
>
> General Klaus Naumann (n.d.)

Kosovo showed, according to Naumann, that the intention and speed of NATO's military action was depending on the country that was most wary to intervene. Regarding the decision-making of the NATO, these countries were Greece and Italy. (Naumann, 2002: 15-16) The fact that the UN had not mandated the war was not helpful in finding a political compromise. (Naumann, 2002: 14)

5.2.2　Debate about the acceptability of ius in bello

Proportionality

International Non-Governmental Organizations as Amnesty International and Human Rights Watch (HRW) have reported about the conflict in Kosovo. HRW had only one publication, in which a reaction on the bombings campaign in Kosovo is given. The publication was dated May 1999 and was about the use of cluster bombs. According to the press release, these kinds of bombings were not only used during the first stage of the bombings, but it was also announced that even more 'area weapons' would be used in upcoming bombings. The article makes a connection between the use of these weapons and the shortage of 'precision-guided weapons' of NATO. (Human Rights Watch, 1999a)

According a report of Select Committee on Foreign Affairs (2000: no. 105), the United States stopped using cluster bombs after the publication of Human Rights Watch, but the United Kingdom proceeded. The report called on the British government to evaluate the risk of the use of cluster bombs in Kosovo for citizens.

A report about Operation Enduring Freedom in Afghanistan two years after the bombings in Kosovo reflected on the use of cluster bombs during the bombings as well; it emphasizes the impact of cluster bombs on a society and the soldiers in the field (International Affairs & Defence Section, 2001b: 23)

> "During the Kosovo campaign the RAF used a total of 531 RBL 755 cluster munitions, which represented 52.5 per cent of all munitions deployed. The MOD has estimated that the failure rate for the RBL 755 bombs is around 5 per cent. The bomb contains 147 bomblets, which would mean that on average around 7 bomblets would fail to explode per bomb. In total throughout the whole campaign approximately 3,717 RAF bomblets failed to detonate. In june 1999 two soldiers with the Royal Gurkha Rifles were killed while trying to clear school classrooms of cluster bombs, shortly after NATO troops entered Kosovo."
>
> International Affairs & Defence Section (2001b: 23).

5.2.3   Preventing civilian casualties

Amnesty International was concerned about the way the war was fought. Amnesty reminds NATO on the 18th of May 1999(b) that – even though legitimate military goals can be found in an area – civilian casualties have to be prevented where possible. Several illegal military attacks would have been carried out and civilians had died during them. An example of such a situation is when NATO decided to bomb the area, while they are aware that Yugoslavian troops are using citizens as a human shield. This kind of action would violate the rule to minimize civilian casualties.

According to Naumann, the bombing campaign was successful in technical terms. 38,000 flights were operated without casualties under (military) personnel and with only two airplanes lost. 99 percent of the goals were hit successfully, because of the great precision of bombing. In the end, it turned out to be very difficult to explain how bombings could help to protect human rights, since they created mass streams of refugees. (Naumann, 2002: 13-14)

5.3   Output legitimacy; the end of bombings and start of KFOR

5.3.1   Lawful authorisation of KFOR

A peace agreement was signed between NATO and the Serbian president Milosevic on the 2nd of June 1999, and the bombings stopped. The UN Security Council adopted a Resolution (1244), which legitimated the use of force to create safety and stability in Yugoslavia, a week after the peace accord was signed. The Resolution emphasized the need for a political solution for Kosovo and made clear that the KFOR operation could not use systematic bombing any more (UN Security Council, 1999: Resolution 1244) Resolution 1244 was adopted with the support of the Russian Federation, but China abstained voting. (Wu, 2009: 78).

The KFOR operation was authorized by the UN. The first troops of KFOR entered Kosovo on the 12th of June 1999. The withdrawal of the Yugoslavian troops was completed at the 20th of June. Kosovo was decided in five different sectors, where the five countries with the most troops present in Kosovo, became 'leading nation'; Germany, France, Great Britain and the US. Although Russia did claim its own sector in first instance, the Russian troops were divided over five other sectors. (Nederlands Instituut voor Militaire Historie, n.d.)

The 'Interim Administration Mission Kosovo' (UNMIK) started at the same moment. This mission would temporary replace the Kosovo regime and establish new administrative

structures; Kosovo's Provisional Institutions of Self Government (PISG). The UNMIK would later hand over more and more responsibilities and power to the PISG. (UNMIK, n.d.)

There has not been much political debate about the UN authorized KFOR mission. China was still of opinion that the sovereignty of Yugoslavia would be violated by the intervention in Kosovo. The UN mission could be established, because China did abstain from voting.

Since the Kosovo administration was replaced by a temporary UN administration, there was – during the start of the UN intervention - no national administration. The citizens of Kosovo do still exist from several ethnicities, with a past that is separated by warfare. Therefore it can be assumed that – at least some of – the old issues of conflict still exist. This is supported by the statistics of criminality in the post-war period; Serbians had much more chance of being murdered than Albanians (see also: paragraph 5.3.2.).

5.3.2   Debate about the acceptability of ius post bellum

Safeguarding of rights

There was debate about the success of the bombings. According to Pavkovic (n.d.), a Serbian general, the bombings continued longer than expected. The Serbian soldiers, though, would have been willing to continue fighting for longer than was asked of them. The bombardments hardly hit their goals, according to Pavkovic (n.d); while a large number of bombs were used and a large number of buildings were destroyed, none of the command centres or army units were hit. Therefore, only a few Serbian soldiers died during the bombings. (Pavkovic, n.d.). De Wijk (2006: 38) describes how the NATO bombings were not successful at their start. In combination with coercive diplomacy, the goals could be achieved. The NATO and Yugoslavia / Serbia reached an agreement about the withdrawal of Serbian troops, while NATO would take over control in the Kosovo region.

There has been found only little debate about the utility of KFOR from military perspective. The only response found is of General Krulak (n.d.) who said not to expect a successful ending of the conflict.

> "Do you think it's over? Do you really think it's over, or do you think that our people on the ground put into effect a peacekeeping apparatus that is holding age-old ethnic cultural religious hatred in check? Do you think that, if we left tomorrow, it's all OK? If you do, then I've got some land in Florida for you."
>
> General Krulak (n.d.).

The juridical attention was directed at the way in which the KFOR / UNMIK mandate is implemented. Amnesty International asks the NATO to redouble the efforts in Kosovo, to make sure the situation does change quickly. (Amnesty International, 1999c)

> "As the 22 murders over the past week demonstrate, the international community is struggling to fulfil its mandate. Amnesty International urges the international presence led by the UN and NATO to redouble efforts to control and disarm all armed groups, regardless of their political affiliation, and ensure that current applicants to the civil defence force are not engaging in unauthorized activities."
>
> Amnesty International. (1999c)

That Amnesty's concerns were justified, is showed by an article of Neighbour, Bailey, Hawthorn, Lensing, Robson, Smith and Zimmerman (2002: 538-539), which describes the high level of violence and criminality during the first months of KFOR. The situation became even more complex, because of the exorbitant growth of Kosovo citizens between July (500.000) and august 1999 (1.500.000), due to the rehabilitation of refugees to their cities and villages. The risk to be murdered was especially high under a relatively small Serbian population in Kosovo; each year, 500 murders were committed per 100.000 Serbian inhabitants.

Furthermore, Kosovo-Albanians who travelled or lived outside the Kosovo region still disappeared or were prosecuted, in 1999. Amnesty International published about the disappearance of the ethnic Albanian judge and human rights activist Teki Bokshi, after he was taken by the Yugoslavian police. (Amnesty International, 1999d) These disappearances and prosecutions were, however, taking place in an area that was not under the control of KFOR / UNMIK.

Notable about the publications of both Amnesty International and Human Rights Watch is the descriptive manner of writing. Dangerous situation are described, but there is no judgement about the overall success or utility of KFOR and UNMIK.

Proportionality, acceptable peace agreement

Annex 1 of Resolution 1244 of the UN Security Council includes the principles of the political agreement of the 6th of May 1999, between the NATO and the Federal Republic of Yugoslavia. It is agreed that the troops of Milosevic will withdraw from Kosovo and the NATO will take over control in the region, while disarming the KLA. A small number of Yugoslavian / Serbian soldiers are allowed in Kosovo, to control the border, patrolling on the grounds of Serbs, to cooperate with the international military or civilian operation and to clear minefields. (See Security Council 1999, Resolution 1244, annex 2) There are no articles, speeches or other publications found, which doubt the acceptability of the agreement. Therefore, it is concluded that there is a consensus about the agreement.

Discriminating between several groups

The United Nations (1999, Resolution 1244) discriminates between different groups in Kosovo: Yugoslavian / Serbian soldiers and the Kosovo-Albanian KLA, as could be seen in the previous section.

Proportional punishments

The Yugoslavian / Serbian army did withdraw from Kosovo. In order to be able to punish (war)crimes in an proportional way, it was necessary to set up a new juridical system. Therefore, the *Joint Advisory Council on Judicial Appointments* was established. Seven lawyers were represented in this council, of which four from different ethnical groups of Kosovo's and three from international organizations. Nine lawyers and prosecutors were appointed, based on recommendations of the council, on June 30th, 1999. 28 lawyers were appointed by UNMIK on 24th July. (Strohmeyer, 2001:52-53) In the first period was worked with existing laws, as far as these safeguarded human rights. Kosovo-Albanian politician pleaded for the reestablishment of the laws of the period before 1989, when Kosovo was still an autonomous region. UNMIK decided to re-establish them on 12th December 1999. The juridical system was, however, still not efficient. 14,878 crimes were reported between January and August 2000, while only 3.734 people were arrested in the same period. (Strohmeyer, 2001:56-60)

Financial compensation

There are no sources found, that discuss the financial compensation. Humanitarian interventions are automatically combined with (in)material investments by the international community, which are meant to reconstruct the country. In this way, there is also compensation for the damage that is done during the war.

Demilitarising and political sanitization

Strohmeyer (2001: 46-47) – a German lawyer and policy advisor at the United Nations – writes about the difficulties during the process of establishing a new law system and the new administration in Kosovo. It became a huge challenge, because the high number of traumatized citizens, the high number of refugees returning to their villages and cities, the high criminality rates and the structures that the KLA established parallel to the UN ones.

5.4   Conclusion

The intervention in Kosovo scores decently on several of the criteria of the just war theory. Although there was no explicit permission of the UN Security Council, there has been no explicit rejection of the intervention or its goals either. Furthermore, the intervention was started for a reason that was subject to only limited political and juridical discussion. As well, the Contact Group as the NATO had been working on a diplomatic solution for years. The Federal Republic of Yugoslavia / Serbia had not been willing to sign the plans for disarmament and kept refusing while an intervention was announced and even though the Kosovo Liberation Army had already signed for the mutual disarmament. Therefore, there was no debate about the possibility of more diplomatic efforts. On the other hand, the American military had criticised on the slowness of decision-making, regarding the intervention.

The Kosovo intervention existed out of several phases of bombings, in which the goals where of growing strategic importance for the Federal Republic of Yugoslavia / Serbia. Every phase of bombings was authorized in a separate process. Naumann, who had been the chair of the Military Committee of the NATO until the beginning of May 1999, gave feedback on the process from military perspective; according to him, the NATO process of giving new mandates had been to slow. Simultaneously, human rights organizations were critical regarding the number of civilian casualties during the bombings. Human Rights Watch was mostly critical about the use of cluster bombs. This subject was not a major issue within the juridical scientific and the political discourse.

The UN mandate to start KFOR / UNMIK has been of great importance to the output legitimacy. Russia voted within the Security Council in favour of an UN intervention, while China abstained from voting. There has been less discussion about authorisation. The *ius post bellum* criterion 'safeguarding of rights' was most debated, because the Kosovo region would remain unsafe long after the KFOR / UNMIK had moved in, with high criminality rates including murders.

Furthermore, it took some time to establish a new juridical system and the number of arrests was lagging behind the number of reported crimes. The KLA established own structures that operated parallel to the UN institutions.

6 Afghanistan case

Afghanistan had a long history of war, even before US started its 'War on Terror' in Afghanistan. Three Anglo-Afghan wars were fought during the 19th and early 20th century. The leadership of the country would change several times, until Afghanistan became a monarchy in 1932. The monarchy ended already in 1973, when former-prime minister Daoud organized a coup with the support of the communists. Several Ministers of Daoud's cabinet were communists when the new government was originally established, but Daoud's policy would slowly develop to a more non-Communistic approach. After this policy shift, the PDPA – Communistic Party of Afghanistan – got a role as if they were in the opposition. (Rasanayagam, 2005: 65)

The next coupe took place in 1978, led by pro-communists military. The new president Amin concluded a Treaty of Friendship and Cooperation with the Soviet Union. Although this treaty was a lot like the Treaty that was signed by King Amanullah in 1921, there were provisions included that made it possible to call for military assistance by the Soviet Union when needed. Amin signed this Treaty, to ensure support against the Mujâhedin, This Mujâhedin gained power in Afghan refugee camps, and were strengthened by the Islamic revolution in neighbour country Iran in 1979. The Islamic revolution was one of the geopolitical reasons for the Soviet Union to gain control in Afghanistan. The other reason was the tightening relation of China with the US during President Nixon. The Soviet Union arranged military assistance, but did not trust President Amin anymore and therefore replaced him. Afghanistan would become a security zone to keep Iran and China on distance from the Soviet Union. (Rasanayagam, 2005: 83) Another explanation for the Russian invasion of Afghanistan is that the Soviet Union was eager to get an ice-free harbour and had calculated that a fast attack from Kandahar on the coast of the Persian Gulf would be possible, since the Gulf is only at 650 kilometres distance from Kandahar. (Fisk, 2007:73)

The Cold War had greatly influenced the developments in Afghanistan; other countries decided to support different groups of Mujâhedin. The war would become very violent – regarding the number of casualties during the conflict – because of the significant foreign investments in weapon supplies: The Soviet and Kabul army had support from the Soviet Union and the Mujâhedin got supplies from the United States, China and the Middle East. Furthermore, the Mujâhedin had safe havens in neighbouring states Iran and Pakistan. (Vogelsang, 2002: 318) Gorbatjsov started to withdraw the Soviet troops in 1987. (Vogelsang, 2002: 321) Militias from the North of Afghanistan took Kabul and the Islamic State of Afghanistan was established in 1992 and tribes and warlords ruled. The Taliban took over power in different parts of Afghanistan from 1994 onwards and took Kabul on the 26th September 1996. (Vogelsang, 2002: 328)

Both the internal and external position of the Taliban was weak. Afghanistan remained a splintered country, where several groups had their own powers within the inhospitable areas, were the Taliban lacked (full) control. One Northern Alliance had – as reflected by its name – power over parts of North Afghanistan. The Taliban was known for its policy of repression, what was used to remain in control over the citizens. (see: Basel and Hollywood, 2005). The regime had a weak position in international relations. The Taliban regime was only acknowledged by three Islamic states: Pakistan, Saudi Arabia and the United Arab Emirates. Neighbour Iran – also a strict Islamic state – had not acknowledged the regime. To be more specific; Iran had turned against the Afghan Taliban regime and supported the Northern Alliance with weapons.

The United States was subject to terrorist attacks on the 11th of September 2001. The NATO declared on the 12th of September to invoke Article 5 of the North-Atlantic Treaty, regarding these attacks. The attack on the United States was therefore seen as an attack on the whole alliance. Article 5 clears the road for collective military action, but only when necessary in the

light of (collective) self-defence. It was the first time that Article 5 was invoked by NATO. The United States asked the Taliban to extradite Al Qaeda leader Osama Bin Laden, who was regarded as responsible for the organization and the financing of the attacks of 9/11. The US decided to intervene in Afghanistan, when the Taliban did not want to cooperate with this request unconditionally.

This chapter will analyse the Afghanistan case for the two afore mentioned factors that influence legitimacy; authorisation and acceptability. The results will again be presented within the categories input-, throughput and output legitimacy. Table 5 shows which actors were involved in the public debate on the acceptability of intervention. The material that is collected to reflect the opinion of the Afghan Taliban and Al Qaeda in these matters is indirect material; their opinion as is reflected in existing scientific publications. The paragraphs about 'lawfulness' will include the juridical debate of involved actors and lawyers and will include an overview of both national and international law. The paragraphs about 'lawfulness' will include the juridical debate of involved actors and lawyers and will include an overview of both national and international law.

	International	National	
		Intervening State	Intervened State
Political	United Nations.	Government, parliament USA, United Kingdom, France, Germany.	Taliban regime Afghanistan and other groups.
Juridical / ethnical	International scientific debate. International Organizations: Amnesty International, Human Rights Watch.		
Military	NATO.	National military organizations.	Afghan / regional military organizations: Taliban and Al Qaeda.

Table 5: *Several perspectives within the three units of analysis.*

6.1   Input legitimacy; Operation Enduring Freedom

6.1.1   Lawfulness; authorisation of the intervention

Many countries promised to support the United States in collective defensive actions in the days after 9/11. The NATO invoked Article 5 of the North-Atlantic Treaty on the 12th of September 2001, regarding the terrorist attacks that the United States had suffered. The French government took initiative in this process (Lelouche, 2008), and the other member states supported without exception. For the first time since the founding of NATO was decided to use 'all necessary means' in the process of collective defence.

The European Union stated on the 14th of September, that she would support the United States with all the measures that were available. (Walker, 2003: 500) Member states gave a separate reaction as well, which Germany formulated more carefully that the European Union in general. Germany was unwilling to regard the terrorist attack as a declaration of war of one of the states or the Islamic world in general, but the *Bundestag* would agree with military support to the NATO and the United States. (Walker, 2003: 502) France did react quite similar to Germany, although France took the initiative to invoke Article 5. France called upon the United States to give a reasonable reaction on the attacks. (Walker, 2003: 502) Austria, Cyprus and Ireland supported by opening their airspace to military flights of the United States, and by allowing them to use their airfields and harbours. (Walker, 2003: 502)

Finland decided to give no support at all and called the action of the US and NATO a 'reprisal', which is restricted in the UN Charter. (Quigley, 2003: 556)

Australia decided to activate the 'Australia – New Zealand – United States Pact' on the 15th of September, after which Australian armed forces could be serving in American military operations and activities with and without the United States. The Organization of American States decided to support the United States with the activation of the 'Inter-American Treaty of Reciprocal Assistance' (Rio Treaty). (Walker, 2003: 499) By activating this treaty, states forced themselves to 'mutual assistance and collective defence' (Rio Treaty, 1947). Even Cuba voted in favour of activating the treaty, but called on the United States to react on the terrorist attacks in a calm way. (Walker, 2003:499-500) In practise, the military support was less than it should be based on the Rio Treaty. Although Brazil had invoked the treaty, there was no willingness to offer military assistance; Chile agreed with supporting UN actions, but did not want to promise military support yet. (Gerleman, Hildreth and Stevens, 2001) Japan promised assistance, based on a partnership dating from 1954, but this was limited to intelligence, medical assistance and logistics. (Walker 2003: 499-500) Japan had been very wary of using military means, because of its role and history in the Second World War. President Putin promised on the 24th of September – after contradictory comments of several Russian Ministers – to support the 'United Islamic Front for Salvation of Afghanistan' (from now on: Northern Alliance) in their fight against the Taliban. (Walker, 2003: 502) China sympathized with the United States and promised to support on intelligence. Conflicting signals were received from Iran, which stated in the end that there would be no official support for a military attack on another Islamic state. (Walker, 2003: 504) Nevertheless, Iran would remain an opponent of the Afghan Taliban regime and would, therefore, keep supporting the Northern Alliance with weapons and keep the border with Afghanistan closed. (Gerleman, Hildreth and Stevens, 2001: 5) Pakistan and India promised their full co-operation. Both countries received a reward for this decision; the United States decided to suspend sanctions that were imposed after the nuclear tests of both countries. Furthermore, the United States decided that Pakistan would not have to repay their debts to the United states and decided to review the economic sanctions against Pakistan. Shortly after that, Pakistan stated that the US proof against Osama Bin Lade had convinced them. (Walker, 2003: 504) Saudi Arabia promised support as well. Three Islamic states – Pakistan, Saudi Arabia and the United Arabic Emirates – had an important diplomatic role, since these states had acknowledged the Afghan Taliban regime and were, therefore, able to act as intermediates in diplomatic contacts. (Walker, 2003: 504) The United States could not make direct diplomatic contact, because it had not recognized the Taliban as lawful Afghan government. The Philippines supported the American campaign against international terrorism and the Vatican accepted the right on self-defence as a legitimate reason for military action. (Walker, 2003: 504-505). Other states that promised military support – or 'all necessary means' – to the United States were Bosnia, Bulgaria, Georgia, Kazakhstan, Kuwait, Latvia, Mexico ('willing to assist in security matters'), New Zealand, Nicaragua and Yemen (only under UN mandate). Countries that were willing to open their airspace to the United States for military means, or were willing to make strategic facilities – like harbours or airports – available to the United States were Albania, Armenia, Austria, Bahrain, Bangladesh, India, Indonesia (unspecified aid), Kyrgyzstan, Moldova, Oman, Philippines, Qatar, Slovenia, Tajikistan, Thailand, Turkmenistan, Ukraine and Uzbekistan. Non-military support, like intelligence, medical assistance, etcetera, was promised by Israel, Jordan, China, South Korea, Sudan and Sweden (wanted to maintain a neutral role in the conflict). Countries that supported the United States in tracing down terrorists, but wanted to remain passive otherwise, or were unclear about the kind of support they would give, were: Egypt, Ghana, Congo and Palestinian Authority. (Gerleman, Hildreth and Stevens, 2001)

Many of these states are now called 'coalition countries' on the website of the United States Central Command[f]. Even though several international organizations promised assistance, the differences between their member states were substantial. Regarding the NATO decision-making, it was meant to give the member states the freedom about the kind of assistance they were willing to offer. The American Deputy Secretary of Defence Wolfowitz announced during a visit to NATO headquarters on the 26th of September 2001 that the United States did not expect to start a collective NATO action. The United States planned to work with an ad hoc coalition that would assure a more flexible military. (International Affairs & Defence Section, 2001: 102) The national political processes of decision-making about military assistance differed from each other as well. France was military involved in Afghanistan from the start, which was decided by the French government and the president. The French parliament did not vote about the involvement. (France-Soir, 2008) The British House of Commons debated several times about the British involvement in Afghanistan; on the 14th of September, the 4th of October and the 8th of October. Furthermore, there was a debate about a motion of the government on the 16th of October 2001. The government received the support of the Labour party, Conservatives and the Liberal Democrats. A group of 24 Labour parliamentarians was against a war in Afghanistan. They declared to condemn the attacks on 9/11, but did not see military intervention in Afghanistan as a solution. (International Affairs & Defence Section, 2001b: 80-87) Germany did only participate within ISAF, and therefore only started from the 24th of December 2001 onwards. The German *Bundestag* did only agree with such assistance just before the start of ISAF. (See also: paragraph 6.2.1.)

The joint American Congress – the Senate and the House of Representatives – agreed on a Resolution, which authorized the Bush regime, based on the War Powers Resolution, to use all necessary and acceptable military violence against the terrorists behind the 9/11 attacks and the ones that supported them. (Walker, 2003: 495) Most members of the joint Congress supported the Resolution; ten members of the House of Representatives abstained from voting and one member voted against it. None of the Senators voted against the Resolution, but two did abstain. (Senate – United States, 2001)

The military operation in Afghanistan started on the 7th of October 2001. According to the United States, its actions were consistent with the UN Charter. The UN ambassador for the UN sent a letter, in which the UN was informed about the military action that the United States initiated in Afghanistan. The letter explained that the operation was started out of self-defence. The United Kingdom wrote in its ambassador's letter to the UN Security Council, that it participated in the Operation Enduring Freedom (OEF) out of collective self-defence. (Quigley, 2003: 542)

The Ambassador of the United States – Negroponte – declared in his letter, that its government had gained clear information since 9/11, which revealed a central role of Al Qaeda in the organization, planning and execution of the 9/11 attacks. According to the ambassador, Al Qaeda was supported by the Afghan Taliban that agreed on the establishment of Al Qaeda bases in its regions. The Taliban was, according to the American ambassador, not willing to change its policy, regardless the attempts of the United States and the international community to find a political solution to the conflict. With the support of the Taliban regime, Afghanistan would remain a *safe haven* for the deployment of terrorist activities, which would harm the American and international safety interests. (Negroponte, 2001)

The United States used the Resolution 1368 and 1373 (both September 2001) of the Security Council to defend their decision to undertake military actions in Afghanistan. (Walker, 2003: 512) Resolution 1368 of the Security Council, accepted on the 12th of

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[f] See: http://www.centcom.mil/en/countries/coalition/

September 2001, sympathized with the United States and called on its member states to increase their efforts to fight terrorism and to work closely together.

> "Calls on all states to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and *stresses* that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable."
>
> UN Security Council, Resolution 1368: 3 (2001)

Resolution 1373 called terrorism a threat to international peace and security. For that reason, states would have to stop terrorism by international co-operation and by executing the decisions that were made in the Convention on this subject.

> "*Reaffirming* the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every state has the duty of refrain from organizing, instigating, assisting or participating in terrorist acts in another state acquiescing in organized activities within its territory directed towards the commission of such acts,
>
> *Acting* under Chapter VII of the Charter of the United Nations."
>
> UN Security Council, Resolution 1373 (2001)

Several examples of actions that states would have to take in order to ban terrorism were named within the Resolution. Terrorism may not be supported actively of passively. (Resolution 1373: 2a) States had to inform other states of indications of the organization of an attack (Resolution 1373: 3b) and had to take responsibility for the prosecution of terrorists. (Resolution 1373: 2e)

The UN Security Council supported the United States demands that were send to the Afghan Taliban and included the extradition of terrorists. The UN announced to act in line with Chapter VII of the UN Charter, when the Taliban would not obey. Article 51 of the UN Charter is also included in Chapter VII, but when is spoken about *Chapter VII*-interventions, Articles 39-42 are meant, which describe several sanctions and – as a last step – also the possibility to military assistance and military intervention. Self-defence – described in Article 51 – is always named as a separate category.

Except for the UN Charter, there are other sources of law, which can lawfully authorize an intervention. In chapter 5 – about Kosovo – was already revealed that international custom law could also be a source of law that can authorize an intervention. The United States has guidelines for reacting on terrorist activities, which was developed by the U.S. Department of States under George Schultz. According to these guidelines, a state has the right to use military means for purposes of self-defence regarding terrorist attacks that are supported by another state. Self-defence is allowed when a State-supported terrorist group has attacked and when there is a reason to believe that more attacks would follow in the future. (Quigley, 2003: 558)

The United States followed this guideline, when it decided to bomb Libya in 1986. The United States revealed that it had information about planned attacks, but did not make it public. The General Assembly of the United Nations agreed on a Resolution, which condemned the bombings of the United States. (Quigley, 2003: 558) In the same Resolution, the General Assembly expressed its concerns about the cultural and economical sanctions of the United States against Libya. (UN General Assembly, 1986: declaration 41/38) The UN Security

Council voted on a similar Resolution; 9 of the 15 members voted in favour of the Resolution, while one member abstained voting. The Resolution was rejected, because three of the permanent members – France, the United Kingdom and the United States – voted against the Resolution and thereby vetoed the Resolution. The international custom law does not include a norm that supports military 'self-defence' to terrorist attacks that still have to happen (pre-emptive). Comparable situations have even been condemned in the past. The international custom law is therefore not a basis for authorizing an American intervention in Afghanistan.

6.1.2   Debate about acceptability according to ius ad bellum

Lawful reason

The NATO Ministers of Defence were provided with United States evidence of the involvement of Al Qaeda in the terrorist attacks of 9/11, in late September. Shortly after, NATO declared to have received 'clear and compelling' proves about the role of Osama Bin Laden.

The government of the United Kingdom published a document that would prove the involvement of Bin Laden. Blair stated that the 9/11 attacks would not only be seen as an attack on the United States, but also as an attack on all free, democratic states in the world. (Walker, 2003: 500) According to the White House (2001), 27 states had – in someway or another – supported Operation Enduring Freedom in 2001. The United States were the most important of those. Therefore, this paragraph will focus on the national debate in the United States.

The attacks of 9/11 had a deep impact upon the American society. Walker (2003: 489-491) describes his day on university; how deeply shocked students wandered around on the university and how the Bush administration made its first statements about the attacks.

> "Freedom itself was attacked this morning by a faceless coward, and freedom will be defended… Make no mistake, the United States will hunt down and punish those responsible for these cowardly attacks."
>
> President George W. Bush, in the afternoon of 11th September 2001. In Walker (2003: 492)

President George Bush stated that all possible measures would be used to track down the terrorists of 9/11 and the ones who supported them, during his *Address to the Nation* of 11 September 2001(a). Bush said to be pleased with the many condolences of states all over the world, and underlined that the United States government had received broad support from within the American society, and from other states.

> "The search is underway for those who are behind these evil acts. I've directed the full resources for our intelligence and law enforcement communities to find those responsible and bring them to justice. We will make no distinction between the terrorists who committed these acts and those who harbor them. (…) This is a day when all Americans from every walk of life unite in our resolve for justice and peace. America has stood down enemies before, and we will do so this time."
>
> President Georg W. Bush, Address to the Nation, 11th September 2001.

Within the 'War Cabinet' of President Bush, different opinions were expressed about the chosen policy. Wolfowitz (2001) – for example – mentioned 'ending states' in a press

conference; something that Powell would not repeat in the same manner in a later press conference. Powell (2001) made clear that he would only speak of 'ending terrorism'.

> "I think one has to say it's not just simply a matter of capturing people and holding them accountable, but removing the sanctuaries, removing the support systems, ending states who support terrorism. And that's why it has to be a broad and sustained campaign"
>
> Wolfowitz, from 2001 *United States Deputy Secretary of Defence*.

> "We're after ending terrorism. And if there are states and regimes, nations that support terrorism, we hope to persuade them that it is in their interest to stop doing that. But I think that ending terrorism is where I would like to leave it, and let Mr. Wolfowitz speak for himself."
>
> Powell, from 2001 *United States Secretary of State*.

Authorisation

Bush's *Address to the Nation* of the 20th of September 2001(b), claimed that Al Qaeda was responsible for the attacks. Bush did not only mention the attacks to the United States on 9/11, but reminded that more attacks had occurred in other countries. Bush also talked about the extremist policy of the strictly religious Taliban in Afghanistan. With that last statement, Bush revealed that the United States government saw a causal relationship between Al Qaeda and the Afghan regime.

> "The leadership of Al Qaeda has great influence in Afghanistan and supports the Taliban regime in controlling most of that country. In Afghanistan we see Al Qaeda's vision for the world. Afghanistan's people have been brutalized, many are starving and many have fled. (…) The United States respects the people of Afghanistan – after all, we are currently its largest source of humanitarian aid – but we condemn the Taliban regime"
>
> George W. Bush, Address to the Nation, 20th September 2001.

Although the European Union supported the military action of the United States at the start, there was debate about the acceptability of such a support. Especially the United States argument about self-defence got a lot of critique. Mainly the European left wing and green political parties were critical about the United States argumentation. (Walker, 2003: 512)

Quigley (2003) have developed several pre-conditions for the start of an operation of self-defence.

> 1) "The United States must have been experiencing an armed attack;
> 2) Afghanistan must have been the perpetrator of that armed attack;
> 3) Armed force must have been the perpetrator of that armed attack;
> 4) There must have been no time to resort to the UN Security Council;
> 5) The armed force employed must have been appropriately directed to protect against the armed attack;
> 6) The armed force employed must not, in its scope, have been out of proportion to the harm the United States sought to avert."
>
> Quigley (2003: 543)

According to Quigly, the United States did not meet these conditions; one terrorist attack would not yet be an 'armed attack' according to the UN Charter and it is not customary to

anticipate on possible future threats. The General Assembly adopted a Resolution that stated that sending 'irregulars' by one state to another, can be seen as agression. (Quigley, 2003: 544-545) See also the orginal text of the Resolution (General Assembly, 1974).

> "The sending by of on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein."
>
> General Assembly, 1974: resolution 3314, 3g.

The United States did, however, not claim that the terrorists were send by the Afghan government, but accused the Taliban of creating a safe haven for them. According to the United States, an unsecure situation was created by the instability of Afghanistan. Regarding this last claim, Quigley thinks it would have been possible to prosecute those responsible. The Taliban was willing to talk about the extradition of terrorists, but the United States refused (Quigley, 2003: 546-547), because she did not recognize the Taliban as the lawful government of Afghanistan. The argument that there was no time to wait for the judgement of the Security Council is according to Quigley, one that should be questioned, because there was no direct threat of new attacks. The United States does, according to Quigley, not meet the fifth condition, because the United States took more action then needed when strictly acting out of self-defence. The goals of the war were unclear to Quigley, and could even be related with the United States's wish for more control on the oil of Central Asia, by means of constructing a pipeline through Afghanistan (Quigley, 2003: 550). The United States did not meet Quigley's sixth condition, because the violence was not proportional, since a city was bombed while being at the edge of famine. That is one of the reasons why many more Afghans died during the US' intervention, than Americans died during the 9/11 attacks. (Quigley, 2003: 552)

Military intervention has to be approved by the UN Security Council, to be lawful. The debates between jurists illustrate that the aspects were not completely clear – a grey area; on one hand were jurists (see: Walker, 2003) who argue that the United States acted lawfully, based on Article 51 and Resolutions 1368 and 1373. On the other hand were jurists who believed that the UN did not authorize, because they did not give an official approval, in reaction on the letters of the American and British ambassadors to the president of the Security Council. (Quigley, 2003)

Simultaneously, no Resolution has been approved, which rejects the American action. According to Quigley (2003: 554), the UN Charter does not give any clue to how such a situation should be interpreted. However, the UN did not undertake action to stop the military intervention in Afghanistan.

Acceptable intention

An interview of Frontline with Lieutenant-General Michael DeLong – Deputy Commander Central Command 2000-2003 – provides insights in the military discussion in the United States. According to DeLong, it was not directly clear who was responsible for the terrorist attacks. Secretary of Defence Rumsfeld asked during a videoconference if it was certain that Iraq was not involved with the attacks, but Tennet – director of the CIA – argued he was sure that Al Qaeda, which operated from Afghanistan, had organized and executed the attacks. Powell was of opinion that the United States should focus on Afghanistan in that case, while Rumsfeld remained doubtful about the involvement of Iraq, Iran and Syria. (DeLong, n.d.)
Rumsfeld left the operational planning mainly to the military commanders. These decided to learn from all previous wars that had been fought in Afghanistan. Based on this information, the commanders decided it was necessary to co-operate with the Afghans themselves.

Therefore, the Northern Alliance was contacted. The expectation was that these groups would work together with the Americans, because one of their leaders – Massoud – was killed by the Taliban in the beginning of September 2001. It would also be important to get the Afghan civil society on their side, by handing out food to the civilians. (DeLong, n.d.)

The goal of the United States was – according to DeLong (n.d.) – to leave Afghanistan in a better condition than they had found it. The principle goal was not to find Bin Laden, although that would – of course – have been a good result. But since it was unclear where Bin Laden was hiding and as the region were he was expected to hide was rather difficult to access, DeLong expected that Bin Laden would be difficult to find.

Proportionality of goals

Especially the leftwing and green parties were critical regarding the proportionality of OEF. (Walker, 2003: 512) The German parliamentarian Nachtwei (2008a) criticized the proportionality of the intervention during a parliamentary debate: 'the shooting of suspects is an aspect of the Operation Enduring Freedom'.

Last resort

According to Walker (2003), going to war was the last resort of the United States. The Afghan Taliban made demands on the extradition of terrorists, which were impossible for the United States to meet. Knowing that, the Taliban was protecting the suspected terrorists actively. The demands were made during negotiations between the Afghan Taliban and Pakistan diplomats. Pakistan negotiated with the Taliban, because Pakistan was one of the three Islamic countries that had acknowledged the Taliban as the lawful authority of Afghanistan and had – therefore – the necessary diplomatic relations with the Afghan regime.

> 1) Evidence against him would be provided to the Afghan Supreme Court or to a panel of Muslim judges from three states;
> 2) His surrender must be approved by the Organization of Islamic Conferences ('OIC') fitfty-six member states;
> 3) The surrender must be accompanied by the diplomatic recognition of the Taliban as Afghanistan's legitimate government and the lifting of U.N. sanctions against Afghanistan for failure to turn over Bin Laden.
>
> Taliban's demands during the negotiations with Pakistan (Walker, 2003).

Reasonable chance of success

Nobody in the *War Cabinet* was sure about the chances to win the war, because the United States depended on the Northern Alliance. It was a peculiar situation, though it happened regularly in Afghanistan, was that members of the Taliban who were conquered often joint the Northern Alliance. The Northern Alliance, which started with a number of fighters that was five times lower than the total estimated number of Taliban fighters, got larger after each successful battle. A coalition of 20 to 40 countries delivered national information concerning terrorism to the US intelligence. (DeLong, n.d.)

Peaceful ends

The United States promised to focus on the capturing of terrorists and to minimize the number of civilian casualties. The United States would, futhermore, provide food, medication and other goods to the citizens of Afghanistan. (Negroponte, 2001)

6.2   Throughput legitimacy: OEF and the start of ISAF

6.2.1   Lawfulness; authorisation of the start of ISAF and the prolongation of OEF

The authorisation of the OEF was debated in the German Bundestag in 2008. Nachtwei (2008b), parliamentarian of 'De Grüne', doubted the legitimacy of the OEF, because it was still based on 'self-defence', while the United States had already been in Afghanistan for seven years.

The International Security Assistance Force (ISAF) started in December 2001 and ran parallel to Operation Enduring Freedom. The United Kingdom and France had already decided about the military intervention in Afghanistan when the governments decided to support Operation Enduring Freedom. The German parliament voted about the International Security Assistance Force (ISAF); 538 parliamentarians voted in favour and 15 voted against. Only the members of the socialistic PDS party voted against the intervention. (Der Spiegel, 2001)

A new intervention can legitimate in two ways; by authorisation from the UN Security Council by voluntary acceptance of an intervention or by an intervened State's sovereign government. (Ducheine and Pouw, 2009: 6-7)

Firstly, the UN Security Council authorized the ISAF in December 2001 (Resolution 1368). The Resolution was based on *Chapter VII* of the UN Charter. The Security Council asked to authorize the intervention, in one of the Annexes on the Bonn Agreement (2001). The meeting in Bonn was organized by the UN. More than twenty representatives of the Afghan society reached an agreement about the future structure of the Afghan political institutions. The representatives asked the international community to assist in the realization of security and stability in the country (Van Genugten, 2007: 801)

The interim government Karzai that was established in 2002 agreed with the ISAF, thereby officially authorizing the intervention. A Military Technical Agreement was signed by the NATO and the Afghan interim government in 2002. (Ducheine and Pouw, 2009: 7) The agreement can be seen as a far-reaching mandate.

> "The Interim Administration understands and agrees that the ISAF Commander will have the authority, without interference or permission, to do all that the Commander judges necessary and proper, including the use of military force, to protect the ISAF and its Mission."
>
> Military Technical Agreement (MTA-ISAF), article IV(2). NATO (2002).

The members of the UN Security council voted in favour of the mission, which would assist the permanent institutions of the Afghan government, on the 28th of March 2002; the United Nations Assistance Mission in Afghanistan (UNAMA – Resolution 1401). (Amer, 2009: 25)

Although the government of Kabul received international support, the support in its own country can be questioned. Both diplomatic and military actors believed that the power of the legal government of Afghanistan was and is limited to the region around Kabul. Opponents call Karzai therefore 'the major of Kabul'. The Taliban tried to harm his reputation more, by organizing their terrorist attacks mainly in this region, for example during the elections of 2009, thereby showing the weakness in Karzai 'even in Kabul'. Karzai (executive power) has a difficult relation with the parliament (legalistic power). The parliamentarians turned against Karzai, because they felt marginalized by the president. Karzai was seen as too dependent on the United States. Furthermore, Karzai was accused of too less repression against terrorism. Foreign countries directed their criticism mainly on the process of reconstruction of Afghanistan. Simultaneously, Karzai was able to play an intermediate role between several groups in Afghanistan, because he had close relations with the Taliban in 1995 and 1996, before he turned away from them. (Glavany and Plagnol, 2009: 46)

Irregularities were reported during the elections of 2009. Opponent Abdullah claimed that fraud had occurred during the elections. According to Karzai, however, the fraud was committed by foreigners who favoured another candidate than Karzai to be elected as president. (Karzai, 2010) Abdullah decided to withdraw as candidate, thereby preventing a second round of elections.

There has not been much international debate about the UN authorisation of the intervention of ISAF in Afghanistan. Even China and Russia – who are known to be wary of voting in favour of military interventions – supported Resolution 1386. The ISAF is not a traditional UN-mission, but a 'Coalition of the Willing', which is co-ordinated by the NATO. From May 2010 onward NATO states worked together with other states within the coalition, like Armenia, Austria, Azerbaijan, Bosnia-Herzegovina, Finland, Georgia, Ireland, Jordan, New Zealand, South Korea, Singapore, Macedonia, Ukraine and the United Arab Emirates. (NATO – ISAF, n.d.)

There seemed to be a broad international support for the ISAF, regarding the large number of states that were involved. However, there has been debate within those states. Policy makers in Germany knew that public opinion was in favour of a reconstruction operation, but that there was no support for involvement in an armed conflict (Kaim, 2008: 614). A substantial majority in the German parliament voted in favour of the prolongation of ISAF with one year on the 12th of October 2007. *Die Linke*, a left-wing German party, was the only party that officially demanded withdrawal of the troops from Afghanistan. (Kaim, 2008: 611) There was still a large majority in favour of the extension in the German parliament. (Abadi, 2010) The most recent debate was in December 2009. The German *Bundestag* voted in favour of the prolongation of the ISAF mission (Deutscher Bundestag, n.d.) until the 13th of December 2010 (Bundesregierung, 2009). *Die Linke* was still the only party that voted against the proposal of the government. One member of *Die Grüne* voted against the extension and two members of the same party abstained from voting. According to the German government, Afghanistan is of vital interest for Germany. The government warned that the conflict could again escalate, when the German parliament would not extend the mandate. The government reminded the parliamentarians that Germany had recently affirmed its commitment in Afghanistan. It would harm the reliability as international partner, when the mandate would not been extended now, with political and economical consequences. (Bundesregierung, 2009)

> "Für die Bundesregierung ist es eine Frage der Glaubwürdigkeit und Verlässlichkeit als Bündnispartner und Mitglied der internationalen Gemeinschaft, einen der politischen und wirtschaftlichen Bedeutung Deutschlands entsprechenden Beitrag zur Stabilisierung des Landes zu leisten.'
>
> Bundesregierung (2009). On the prolongation of the ISAF mission – November 2009.

The German citizens made a clear difference between OEF and ISAF, in which the first was often seen as an unlawful and unacceptable 'war on terror'. (Abadi, 2010)

The French participation in ISAF is characterized by more civilian and less military support; the command over the airfield of Kabul and the establishment of the Afghan army. There was some debate about the relation between OEF and ISAF, as they have a close relation and the Americans do not make a clear difference between the two missions. Both missions, for example, were under the command of the American general McKiernan. (Lellouche, 2008).

The French premier Fillon (2008) reminded the parliament of its big responsibility when taking the decision about an extension of the intervention; regarding the French foreign policy and Defence policy; the allies; the Afghan civilians and the serving soldiers.

6.2.2   Debate about acceptability - ius in bello criteria; OEF / ISAF

Proportionality

Criticism on the reaction of the world leaders was concentrated in certain regions of the world. Muslim fundamentalists and militants expressed their opinion by developing violent actions in Indonesia, Pakistan and the Palestine regions. The Organization of The Islamic Conference, which has 56 Islamic member states, did not criticize the American air strikes in Afghanistan during the start of the Operation Enduring Freedom, but did warn the United States to keep the military intervention limited to Afghanistan. (Walker, 2003: 512)

Non-governmental organizations and UN-agencies in the United States requested a break in the bombings that had started when the war in Afghanistan began on the 7th of October. (Quigley, 2003) One of the present INGO's was Human Rights Watch (HRW), which monitored the execution of the war. (HRW, 2001a) HRW does not interfere with the decision-making process about the start of the war, because that would harm the neutrality of the organization to much. HRW is mostly focused on the way the United States is treating the Taliban and Al Qaeda insurgents during the *ius in bello* phase of the war. Taliban insurgents should be treated in accordance with the international laws, in which the rules for military conflicts between states are defined. Al Qaeda is sometimes called the 55th brigade, as it seems almost to be embedded within the Taliban structures. Therefore, HRW is of opinion that Al Qaeda fighters have to be treated like soldiers during an inter-State conflict. Even when Al Qaeda fighters are not seen as a part of the Taliban, Article 3 of the Geneva Convention (1949) should be implemented.

HRW (2001b) published an open letter, which called on the United States not to use mines or cluster bombs. It asked the United States, furthermore, to embrace the international treaties publicly and to prevent civil casualties. The warnings in the letter of the HRW were based on earlier military actions of the United States, for example in Yugoslavia.

HRW (2001e) published about the actual use of cluster bombs during the Operation Enduring Freedom, on the 31st of October 2001. Although the Pentagon did not want to make statements about the use of cluster bombs, HRW received information from soldiers that confirmed the use of cluster bombs – although they were not used on a large scale.

The American and British troops stated that they would keep using cluster bombs, because the usefulness in the military campaign and since it was legal to use them. (International Affairs & Defence Section, 2001b: 23-24)

Prevention of civil casualties

After these first calls from HRW on the United States, the organization kept publishing when civilians were killed through United States actions. For example in articles of the 16th of October 2001 (HRW, 2001c) – 23 civilians killed during air strikes – and 31 October 2001 (HRW, 2001d) – between 25 and 35 civil casualties.

Soon after the start of Operation Enduring Freedom, there were doubts about the effects of the bombing on the Afghan society over a longer period. The main concern of the American and British troops – but also of the Afghan leaders – was the high number of civil casualties and, therefore, a fast declining support for the intervention of the Afghan civilians. The chief security officer of the temporary main city of the Northern Alliance – Faizabad - pleaded for an immediate stop of air strikes on villages, on the 27th of October 2001. A commander of the Alliance in Argun declared that the Americans attempted to kill Taliban insurgents, but that the images on television had mainly showed civil casualties. The Pentagon and the UN were also familiar with the high rates of civil casualties. A spokesperson of the UN warned that the allies had to differentiate between insurgents and innocent civilians. The Red Cross got involved when storage tents – marked with Red Cross emblems – were destroyed by air strikes of the allies. The Taliban made information public about the large number of civil casualties, which was picked up by the world press. According to British and American troops, the real numbers had been much less. Several foreign journalists had been in Afghanistan since mid-October and were allowed in the bombed areas. (International Affairs & Defence Section, 2001b: 35-36)

A part of ISAF's criticism was directed at the way violence was used; to much risk taking, which caused too many deaths among civilians. Amnesty International published regularly about civil casualties during the later stages of the intervention. Zarifi (2009), Asia-Pacific director of Amnesty International, revealed 2008 as the most violent year regarding civil casualties since the fall of the Taliban. That is why Zarifi warned the US and its allies that it would be a challenge to create a safer situation for the Afghans. The latter could already been read in a statement of Amnesty International, dating from 2007.

> 'Amnesty International fears that civilians have been killed, in contravention of international humanitarian law (the laws of war), as a result of failure by all parties involved in the conflict to take necessary precautions to protect civilians. The organization is concerned by the extent and the seriousness of violations reported (…)'
>
> Amnesty International, 2007.

6.3 Output legitimacy; OEF and ISAF merged

6.3.1 Lawful authorisation; merging OEF and ISAF

The UN authorisation of ISAF was initially intended for only six months, to preserve the security situation in Kabul. This would create a safe environment to develop the ISAF operation further. In the years after, ISAF had to be mandated by the Security Council repeatedly. The mission was organized in four stages, which would each mandate the operation for a larger area. Stage I (Resolution 1510) started in October 2003; the area of mandate was extended and the reconstruction tasks under the Bonn Treaty were named for the first time. Stage II (Resolution 1659) started in early 2005 and actually started to unite ISAF and OEF; it also brought West-Afghanistan under ISAF control. Stage III started halfway 2006, after which the mandate was extended to the southeast of Afghanistan.

Furthermore, the ISAF and OEF operation were united. (Ducheine and Pouw, 2009: 7-9) Stage IV started in October 2006. The NATO had gained command over all parts of Afghanistan. (NIMH, 2009)

6.3.2. Debate about the acceptability; ius post bellum

Safeguarding rights

There has been criticism on the military tasks of ISAF during the *ius in bello* stage. This mainly focussed on reconstruction tasks during *ius post bellum*. ISAF would be rather 'top-down', with only little possibility for Afghanistan to participate. Several initiating states were made responsible for separate parts of the process of reconstructing Afghanistan during the Bonn Conference. According to a report to the French parliament about the developments in Afghanistan, there had been difficulties coordinating between the regions under command of different lead nations. That would decrease the chances of success and the French troops – stationed in different regions – were of opinion that the situation was unnecessarily complex. (Lellouche, 2008)

The United States Institute of Peace (Miller and Perito, 2004: 8) describes how a new juridical system was drafted for Afghanistan by Italian lawyers, assistance of an American military judge and only limited involvement of Afghan lawyers. The Afghan interim government accepted the new system under strong international pressure. Ahmed (2005: 107) criticized the process; the Afghan civilians have always protested against laws that were established in a centralistic top-down approach, even when implemented by Afghans. Ahmed points out that even more resistance can be expected when the international community will implement a full, new juridical system.

The Secretary-General of the NATO, Rasmussen (2010), wrote in an op-ed in the New York Times about the actions of the Taliban, which will not bring them victory in the end. Rasmussen emphasizes that the NATO has a mainly political strategy, to make sure that the Taliban would not have any support of the civilians any more. President Karzai's peace jirga gives all Afghans who regret their old choices the chance to return into society for a peaceful and honourable life. Agreements will be made about the way of handing over ISAF's responsibilities of police and military tasks to the Afghan authorities, during the Kabul Conference in July 2010. Elections for a new Afghan parliament will be held in September 2010.

The NATO website is filled with video material, which underlines the joint task of NATO and the Afghan army in the process of stabilizing the country; 'Side by Side' (NATO, n.d. a) and 'Afghan Army Trains in Europe' (NATO, n.d. b)

Proportionality, acceptable peace agreement

The power in Afghanistan is transferred to the Karzai interim government. Karzai was re-elected as Afghan's president during the elections in 2004 and 2009. The representatives of Afghanistan have asked the international community for assistance during the Bonn Conference in 2001; a request that was repeated by the Afghan (interim) government when installed.

Discriminating between several groups

OEF and ISAF discriminated between the Taliban / Al Qaeda and the other Afghan citizens, as described in the paragraph on safeguarding of rights. Discriminating between different groups can be difficult in practise, because the fighters of Taliban / Al Qaeda do not appear to be different from the Afghan citizens, because they do not fight in uniform. It was the intention to win the *hearts and minds* of the citizens, to make sure that the Taliban would lose its support within the Afghan society. In general, this was regarded as the only possible strategy. According to Andrew, Enterline and Maganoli (2009), *hearts and minds* strategies have been successful in three quarters of the cases of the twentieth century. Over the period after the Second World War, two thirds of the *hearts and minds* interventions were successful.

Proportional punishment

There has been a lot of criticism on United States policy regarding 'foreign prisoners of war' (POWs). POWs were detained in Guantánamo Bay, in circumstances that were not consistent with the agreements of the Geneva Conventions. The Bush regime explained that the United States was not bound to apply the agreements of the Geneva Conventions on insurgents of Al Qaeda, in contrast to Taliban's fighters. Al Qaeda is not a state and therefore not a member of the Conventions. Therefore, Al Qaeda insurgents would be treated like international terrorists. (White House, 2002) Jurists have expressed different points of critique on this argumentation. Becker (2003) argues that these fighters have to be treated as agreed in the Geneva Conventions. Firstly because Al Qaeda members fought together with the Taliban and should therefore have a POW status as well. (Becker, 2003: 576). See also HRW's criticism in paragraph 6.2.2. Al Qaeda members that are accused of taking part in criminal actions against the United States could also be prosecuted under the federal law of the United States. (Becker, 2003: 577) When Al Qaeda fighters are seen as insurgents, who are involved in a conflict with a more national character, Article 3 of the Geneva Conventions of 1949 would be sufficient. (Becker, 2003: 578) According to Becker there are, therefore, enough international rules of law that describe how Al Qaeda fighters should be treated.

Other critical arguments are directed at the establishment of Military Committees with the Military Order of 13th of November 2001. These committees would organize the imprisonment, treatment and prosecution of terrorists who were partly responsible for the terrorist attacks of 9/11. The Military Order declares that it is for the President to decide which persons will be under the jurisdiction of these Military Committees. (Becker, 2003: 580) According to Addis (2003: 630-632), there are three categories of critiques; institutionalism, proceduralism and internationalism.

The first group – institutionalists – argued that the Military Order has too few checks-and-balances and does therefore not fit in the American juridical culture, which is traditionally focused on the separation of powers. Since the establishment of the Military Order, a suspect is not certain of the involvement of jurists or an independent committee and the government decides about the suspect. (Addis, 2003: 630) Becker's arguments against the military committees fit in this category. According to Becker (2003: 580-587) the president is rather free in this judgement, because the Military Order does not include a definition of international terrorism. The president has, furthermore, no power to establish military trials. This power is concentrated in the Congress, according to the American Constitution and other federal statutes. The Congress does only have this power in a state of war, while the United States has never declared war on Afghanistan. Although it has happened before that an official declaration of war is not given, Congress has this time not even officially approved the possibility of a war. In the joint Resolution is only spoken about the use of military force to prevent international terrorist attacks in the future.

The second Group – proceduralists – argued that the chance of misuse of law is enhanced by the organizational characteristics of Military Committees. Many hearings will be private and unanimity of judges in the decision-making is not necessary. (Addis, 2003: 632)

The third Group – internationalists – were afraid that the decisions of Military Committees would be regarded as legitimate within the international community. That could make negotiations about extraditions harder and harm the position of the United States as the guardian of human rights in the world. (Addis, 2003: 632)

There has also been criticism on the international cooperation, especially about the mutual understandings about the extradition of suspects. In the Memorandum of Understanding (MOU) between the Dutch government and the Afghan authorities, for example, is agreed that prisoners of the Dutch soldiers are handed over to the Afghan authorities. There is agreed on a system, which makes it possible for Afghan, Dutch and international institutions to check how the prisoners are been treated. The Netherlands has agreed with Afghanistan that suspects who are handed over will not get the death penalty, because the Netherlands is declared opponent of this punishment. (Troost, 2006) According to Troost, other punishments and inhuman treatments are not part of this particular deal; not even when the Netherlands is also an opponent of these treatments, like torture.

Financial compensation

Several countries and the United Nations were – already before the intervention of 2001 – involved in Afghanistan by providing humanitarian aid. New agreements about this aid were already made when Operation Enduring Freedom had just started. The coordinator of emergency aid of the UN declared at the 8th of October that donors has already promised 700 million dollar for humanitarian purposes. The United States had already made public on the 4th of October, that it would invest 320 million dollar in humanitarian aid in Afghanistan. (International Affairs and Defence Section, 2001b: 54) Humanitarian intervention (development) was also important during later stages of OEF / ISAF, when it got an important role next to diplomatic and military processes. Furthermore, there are programmes for compensations of citizens, when damage is caused by OEF / ISAF violence. No discussion about this subject was found in the examined literature.

Demilitarisation and political sanitization

Afghanistan is a segmented country, with many regional and ethnical groups, which are crucial for the development of identities of the members. These different groups are often ruled by *warlords* (McCleskey, 2003: 210-213), which get income from financial flows and trade in weapons. The OEF / ISAF combat these warlords by cutting their resources; by stopping their trade in weapons and drugs. (McCleskey, 2003: 214) A report to the French parliament was worrisome about the little progress the war against drugs. (Lellouche, 2008).

6.4   Conclusion

Regarding the authorisation of the intervention in Afghanistan, two things are important; firstly, the degree of support of international and regional organizations, like the UN and NATO; secondly, the practise of international custom law. The United States received endorsements of countries all over the world after 9/11. It would become clear that the practical meaning of these endorsements would differ between countries, even if regional organizations, like NATO and the European Union, or regional agreements on cooperation, like the Rio treaty, had declared support. It did not automatically mean, for example, that

military support was attached – even if this kind of cooperation was the whole purpose of an organization, as the Rio Treaty. President Bush used the endorsements to show that the United States did not stand alone.

The same pattern is present within states; there was overall support for the intervention, but specially the European left wing and green parties doubted the proportionality of the used violence and the lawfulness of the argument of self-defence. This doubt only grew over the years. The same delicate balance can be seen within the UN; the UN did not authorize the start of the intervention in Afghanistan, although it did not condemn the intervention either. Jurists discussed about the lawfulness of the United States arguments about self-defence. The juridical discussion emphasized that the international custom law does not support an intervention based on self-defence, when terrorist attacks have been the motive.

Regarding the throughput legitimacy, human rights organizations have questioned the proportionality of the use of violence, because many civil casualties were reported.

One of the factors with a positive effect for output legitimacy was the yearly-renewed authorisation for ISAF / UNAMA of the UN Security Council. The OEF and ISAF would merge in 2006, when NATO took over command in whole Afghanistan. There was a lot of criticism on the proportionality of the intervention, especially regarding the treatment of suspects by the United States. The critics could mainly be found within juridical science and the human rights organizations as Human Rights Watch and Amnesty International. Both the status of Al Qaeda suspects, as the establishment of Military Committees were judged negatively. Actors also had criticism on the 'safeguarding of rights' by the reconstruction tasks of ISAF. The top-down implementation of policy was regarded as ineffective. The recent strategy of NATO (see Rasmussen, 2010) focuses more on the transfer of tasks and responsibilities to the Afghan citizens and especially to the authorities. The role of Karzai, however, is doubted. The president is regarded as very dependent on the United States, because of the rather limited foundation for his power in Afghanistan. This critique is important to the discussion about the acceptability of the intervention in Afghanistan as well, because this acceptability is mainly based on the authorisation of the intervention by the Afghan authorities during and after the Bonn Agreements.

7 Iraq Case

When the United States and the United Kingdom decided to intervene Iraq in 2003, it already had a long history of war, UN Resolutions, diplomatic solutions and weapon inspections. This history – and the interpretation of it – had a major role in the debates about the authorisation of the war and the social judgement about the acceptability.

Saddam Hussein came into – dictatorial – power in 1979. His leadership became known because of the terror against his political opponents. Iraq started a war against Iran in 1980, wherein Iraq used chemical weapons. These weapons were also used during an attack of Iraq on Kurdish rebellions in 1988. The UN Security Council was quick with its response to the intervention of Iraq in Kuwait: it decided about Resolution 660 on the same day and called for direct withdrawal of Iraq troops. The reaction of the UN was clear and quick, because Kuwait was one of the sovereign members of the UN. When Iraq did not immediately meet the United Nations demands, more resolutions were adopted: Resolution 661, which introduced financial and economical sanctions; Resolution 678 (29th November 1990), which presented Iraq with an ultimatum for the withdrawal from Kuwait. All members states were free to use 'all necessary means' when Iraq would ignore this last Resolution. The United States started an intervention – the First Gulf War – against Iraq on the 17th of January 1991, two days after the date that was given by the ultimatum. The intervention had (military) support of an international coalition of 34 states. The first stages of the Gulf War consisted from air strikes, which continued for seven weeks; 'Operation Desert Storm'. The war on the ground started on the 24th of February, but only continued for three days, because Iraq declared to fulfil all UN demands and withdraw from Kuwait. (Dutch Committee of Inquiry Decision-making Iraq, 2010: 41-44)

The relationship between the UN and Iraq would continue to be problematic. The Security Council would accept many resolutions[9] during the years after the Gulf War. (UN Security Council, 1991) Iraq was bombed for five days in January 1993, after it was accused of acting against the international agreements on no-fly zones in the South of Iraq. The US organized one missile attack in June 1993, when the US discovered Iraq's plans to murder former-president Bush during a visit in Kuwait. According the United States, the attacks were legitimate on basis of Article 51 of the UN Charter, since an attack on a former president was considered as an attack on the United States. The Security Council did not agree on the legitimacy of this attack (Committee of Investigation Decision-making Iraq, 2010: pp. 46-47). Another US solo-action was the intervention of the US Air Force, in order to protect the Kurdish citizens in northern Iraq against violence of the state. This action had no authorisation of the UN, although the US pointed out that Resolution 688 was sufficient to take military action, since Iraq violated this Resolution. Further actions were planned, since Iraq was unwilling to allow weapons inspections into the Presidential areas. In the end, this intervention would not be necessary, as UN Secretary-General Kofi Annan reached a new agreement with Iraq. (Committee of Investigation Decision-making Iraq, 2010: pp. 50-51) Another unilateral intervention of the US and United Kingdom was the operation Desert Fox, on the 16th of December 1998. The UN was still studying two reports with very different outcomes, when Desert Fox was started. Within the Security Council, Russia, China and France were against the US-UK intervention. The intervention would not make Saddam Hussein comply with the UN. (Committee of Investigation Decision-making Iraq, 2010: pp. 52-53) During 1999, several follow-up resolutions were adapted on trade embargoes and

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[9] During 1991 alone: resolutions 686-689, 692, 699, 700, 705-707, 712 and 715. Resolution 687 called for disarmament of Iraq's biological and chemical weapons and all ballistic missiles with a range of more than 150 kilometres. Furthermore Iraq was not allowed to develop or acquire nuclear weapons and the UN would carry out on-site inspections to check Iraq's cooperation. (UN Security Council, 1991)

humanitarian aid for the citizens. Furthermore, Resolution 1284 decided on weapon inspections.

The United States had already lost its confident in the government of Saddam Hussein on the 31st of October 1998, when President Clinton signed the *Iraqi Liberation Pact*. This document was directed at regime change, which came not into policy during the presidency of Clinton. (Faber, 2009: 54) George W. Bush was elected as president of the United States in 2001. The US foreign policy would change significantly after the attacks of 9/11: the Bush Doctrine was introduced. This doctrine assumed clear interaction between the national state interests, the national security and the moral mission to spread values like freedom and democracy. (Dutch Committee of Inquiry Decision-making Iraq, 2010: pp. 155) Promotion of the United States national interest would therefore spread freedom over the world simultaneously. The legitimacy of this policy was found within the American military involvement in World War II, which led to a more democratic world. (Reyn, 2004:138) International Law was of less interest of the doctrine: instead, it allowed preventive military intervention to protect the national security, even when the UN Charter would not allow such a military action.

Resolution 1360 (2001) requested the Iraq's government to act according to the demands of Resolution 1284. Resolution of 1441 (November 2002) repeats this request, but add extra demands on the expected behaviour of Iraq and recalls that the 'Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations. (UN Security Council, 2002)

This chapter will analyse the Iraq case for the two afore mentioned factors that influence legitimacy; authorisation and acceptability. Table 6 gives an overview of the actors which were involved in the discussion about the acceptability of intervention. The paragraphs about 'lawfulness' will include the juridical debate of involved actors and lawyers and will include an overview of both national and international law.

	International	National	
		Intervening State	Intervened State
Political	United Nations.	Gouverment and parliament of US, UK, France and Germany.	Iraqi gouverment (Saddam Hussein) – reactions on the demands from the UN Security Council and UN resolutions.
Juridical / ethical	International Organisaties: Amnesty International, Human Rights Watch. International scientific discourse.		
Military	*Coalition of the Willing:* Multi National Force – Iraq (MNF).	National military organizations – no relevant role in this debate.	National military organizations – no relevant role in this debate.

Table 6: *Different perspectives within the three units of analysis.*

7.1 Input legitimacy; Multi National Force-Iraq

7.1.1 Lawfulness; authorisation of the MNF-I

The intervention in Iraq started under command of the United States on the 20th of March 2003. The United Kingdom did also make a significant contribution to the Multi National Force-Iraq (MNF-I).[h] (Murphy, 2004: 173) The direct motive was the refusal of Saddam Hussein to act fully in line with Resolution 1441, regarding the weapon inspections. (Dutch Committee of Inquiry Decision-making Iraq, 2010: 530)

The UN Security Council did not explicitly authorize the intervention in Iraq. France, Germany and Russia were of opinion that the American intervention was not lawfully authorized based on Resolution 678 (1991), because its mandate was already outdated (Yoo, 2003) and more recent resolutions did not provide a comparable mandate for violence. According to Yoo, these members of the Security Council took this position in the spring of 2003, when they could not agree on military action.

Although the UN Security Council has not officially authorized the intervention in Iraq, it has also not agreed on condemning the intervention. Regional organizations – like NATO –also did not support this intervention. The United States initiated the intervention. In October 2002, the American House of Representatives and the Senate gave permission for a resolution, which mandated the president to use military force in Iraq in line with the War Powers Resolution. President Bush made a public statement about the Resolution on the 2nd of October 2002, when the political leaders of both the House of Representatives and the Senate. The president emphasized the coercive character of the Resolution and continued that it was up to Saddam Hussein to decide.

One of the leaders of the House of Representatives, who agreed with the Iraq Resolution on the 2nd of October 2002, was the democratic senator Lieberman. Lieberman emphasized in a short statement that the Iraqi regime was a threat to the citizens of Iraq, but also to other states and to the American citizens and soldiers. (Lieberman, 2002)

The Senate and the House of Representative had both agreed on a 'joint resolution' by the 16th of October 2002 (Congressional Record, 2002: H.J. Res. 114) It authorized the president to use military force. It declared that the House of Representative and the Senate would have to be informed within 48 hours after the start of a military intervention, about the necessity of the use of military force for the protection of the American national security and to secure that Iraq would meet the demands of the resolutions as adopted by the Security Council. (Congressional Record, 2002: sec 3)

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[h] Ground troops: US 125.0000; UK 45.000; Australia 2.000; Czech Republic, Poland and Slovakia 600. (Murphy, 2004: 173)

> "The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to –
> (1) Defend the national security of the United States against the continuing threat posed by Iraq; and
> (2) Enforce all relevant United Nations Security Council resolutions regarding Iraq."
>
> Congressional Record. Public Law 107-243. Sec. 3. Authorisation for use of United States Armed Forces.

The Senate adopted the Resolution with 77 votes in favour and 23 votes against it. (Senate – United States, 2002). In the House of Representatives voted 296 members in favour and 133 members against. 3 members abstained of voting. (House of Representatives – United States, 2002) Although the democratic senator Lieberman had supported the Resolution, the opponents of the Resolution were mainly democratic. Only six republican representatives voted against, while 215 voted in favour and126 democrats voted against the Resolution, while only 81 voted in favour.

The United Kingdom was the second largest provider of ground troops in Iraq and supported the intervention in Iraq actively. The British former ambassador in the United States between 1997 and 2003, Sir Christopher Meyer, has told in an interview with Frontline about the process of gaining British support. According to Meyer (2007), the National Security Advisor of the US, Condoleezza Rice, questioned the role of Iraq in the terrorist attacks shortly after 9/11. Afghanistan was the priority of Bush. Blair informed the United States within a week after the attacks that the United Kingdom would support a military reaction by the United States. Blair thought a war with Iraq could be avoided when there would be a clear coercive diplomacy, including openly preparations for war. Blair judged Resolution 1441 to be in line with this kind of diplomacy. The United Kingdom tried to postpone the war with a few months in January 2003, because it had started too late with the preparations for war. Furthermore, Blair preferred a second Resolution, to add to the text of Resolution 1441 of November 2002, so that the intervention would have a clear UN mandate. Australia, Spain and Italia preferred this as well, because it would be better for the public opinion. The United States did not care about such a second Resolution. (Meyer, 2007)

> "The other thing we wanted was to get the United States on board for pressing for a second Security Council resolution that would enable war to go ahead within an UN framework, if that's what it came to. I remember sending a report to London on the eve of Blair's arrival saying, "Neither of these things are in the bag [with] the United States, so you're going to have to make the case to Bush and hope to win him over."…
>
> Meyer (2007). In an interview with *Frontline* about the visit of Blair to the United States, in the end of January 2003.

The House of Commons adopted a motion of the British government on the 26th of February 2003, in which Iraq was warned for the last time to meet the UN demands of disbarment, like formulated in the UN Security Council resolution 1441 (2002).

> "That this House takes note of Command Paper Cm 5769 on Iraq; reaffirms its endorsement of United Nations Security Council Resolution 1441, as expressed in its Resolution of 25th November 2002; supports the Government's continuing efforts in the United Nations to disarm Iraq of its weapons of mass destruction; and calls upon Iraq to recognize this as its final opportunity to comply with its disarmament obligations."
>
> Motion of UK goverment. House of Commons. 26 February, 2003.

An amendment was proposed, in which specifically included that there was, at that moment, insufficient reason for intervening in Iraq. This amendment was rejected by 60% of the parliament (against 30% of the voters in favour). The most Conservatives voted against (79% versus 9%) and 98% of the Liberal Democrats voted in favour (0% against). Although the proposal was issued by a Labour government, 30% of the Labour members voted in favour of the amendment (62% against). The original motion of the government did gain enough support; 66% of the members voted in favour and 19% against. The support of the Conservatives was the strongest, while none of the liberals supported it. 67% of the Labour members voted in favour, while 15 % voted against. The battle within the Labour members can be recognized in the high percentage of members who did not vote; 19%.[i]

France and Germany were of opinion that the intervention was not authorized by Resolution 687. France, Russia and China organized a joint press conference – at the 9th November of 2002 – in which they announced that Resolution 1441 did not include an automatic authorisation for the use of military means. (Youngs and Bowers, 2002: 24) Since three of the five permanent members of the UN Security Council opposed the draft, the so-called 'second resolution' would not be not adopted. The opponents did not want a resolution authorizing the use of military force. France was developing its own proposal, which had to include two steps; the authorisation of the use of force would depend on the outcomes of weapon inspections. This text would never be proposed. (Youngs and Bowers, 2002: 12-13) The British House of Commons debated about the coming intervention in Iraq on the 18th of March. Blair (2003) argued that it was crucial to the United Kingdom to uphold UN's authority, as formulated in Resolution 1441. Blair said he would rather have had a second resolution, but that France had announced to veto such a resolution.

Meyer (2007) told in his interview with *Frontline* that the United States was regarding France as a country able to give effective military support, but reminded that the relation between France and the United States was very difficult in that exact period. That is why the United Kingdom became the most important European partner in the intervention of Iraq.

The *Coalition of the Willing*, under the lead of the United States, consisted from 30 states, but not all these states supported with military means; Afghanistan, Albania, Australia Azerbaijan, Bulgaria, Columbia, The Czech Republic, Denmark, El Salvador, Eritrea, Estonia, Georgia, Hungary, Italy, Japan (aid after the military conflict), South Korea, Latvia, Lithuania, Macedonia, the Netherlands, Nicaragua, the Philippines, Poland, Romania, Slovakia, Spain, Turkey, United Kingdom and Uzbekistan. (Nataraja, 2008: 11) The coalition

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[i] A formal 'abstention' does not exists in the United States. Parliamentaries who do not vote in favour or against are catagorized in 'Did Not Vote' (DNV). Four parliamentarians do not vote, because of their function in parliament: The Speaker (*Labour*) en de drie deputies: Chairman of Ways and Means (*Conservative*), First Deputy Chairman of Ways and Means (*Labour*), Second Deputy Chairman of Ways and Means (*Conservative*). Furthermore, there are four *Sin Fein MPs* – of the Irish republican party – who have never took their seets but do count into the total number of votes. 19% of the *Labour* members did not vote about this motion, which are 76 parliamentarians, of which 74 did not vote out of principle and 2 because of their function.

would change several times; some countries decided to support on a later moment, while others withdrew their support.[j]

7.1.2 Debate about the acceptability of ius ad bellum

Acceptable reason

The American government gave two reasons for intervening in Iraq; firstly, as self-defence against terrorism; secondly, to meet the demands of UN resolutions, which were adopted to make sure Iraq would not develop weapons of mass destruction. (Johnstone, 2004: 830) Colin Powell, the US Secretary of State, provided scientific evidence to the Security Council on the 5th of July 2002 that had to support both reasons of the United States. The Security Council did not agree with the proof that was delivered on terrorism. The Security Council debated the issue thoroughly between September 2002 and March 2003. The letter that was send to the president of the Security Council by the US ambassador, and in which was explained why the United States intervened in Iraq, did not mentioned self-defence against terrorism. The only argument that remained was the compliance with UN resolutions. (Johnstone, 2004: 830-831) The argument of humanitarian intervention, later often used by President Bush, was not mentioned in the letter to the UN.

The United States explained in a letter from ambassador Negroponte (2003) to the Security Council, that Resolution 687 legitimated the use of military means, when Iraq did not meet to the demands formulated in the resolution. Resolution 1441 showed, according to the United States, that Iraq had not complied. Therefore, the United States argued that the use of military means was legitimate.

> "Resolution 687 (1991) imposed a series of obligations on Iraq, including, most importantly, extensive disarmament obligations, that were conditions of the ceasefire established under it. It has been long recognized and understood that a material breach of these obligations removes the basis of the ceasefire and revives the authority to use force under resolution 678 (1990). (…)
> Iraq continues to be in material breach of its disarmament obligations under resolution 687 (1991), as the Council affirmed in its resolution 1441 (2002)."
>
> Negroponte. Letter to the Security Council. 20th March 2003.

Simultaneously, the American government used the argument about terrorism to the American citizens. Condoleezza Rice – National Security Advisor of the United States – reminded during an interview of *Good Morning America* that the president would have told, only shortly after 9/11, that the *war on terror* would be fought on the territories of the terrorists. (In Peña, 2004: 127-128) Vice-president Cheney told in the same week in *Meet the Press* that a regime change would be necessary in Iraq, to make sure that Iraq would not pose new threats to peace and security in the future; would not get weapons of mass destruction; and would not be a *safe haven* for terrorists.

Murphy (2004: 186) is of opinion that self-defence is a wrong argument to use, because Kuwait had made clear not to support an intervention in Iraq, during a hearing of the UN Security Council. Murphy doubts the argument about the war on terrorism as well, especially

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[j] See for an actual overview: http://www.globalsecurity.org/military/ops/iraq_orbat_coalition.htm.

because the United States could not convince the other countries of the Security Council with the evidence.

Even within the United States were doubts about the – supposed – relationship between Al Qaeda and Saddam Hussein. McLaughlin (2006) – deputy director of the CIA between 2000 and 2004 – said in an interview with *Frontline* that the CIA had reported to the president that there was no prove found for this connection.

> "…We certainly said that. I just don't remember the dates. We said at some point in the timeframe that we had no evidence linking Iraq to Al Qaeda and to those attacks…"
>
> McLaughlin (2006). In an interview with *Frontline*.

Scheuer (2006) – chief of CIA's Bin Laden Desk and the head of research to the relation between Bin Laden and Iraq – told *Frontline* that his department had not found any prove for such a connection between Iraq and Al Qaeda. Even though, such a relation was an important part of the arguments that were provided to the UN.

> "Tenet, to his credit, had us go back 10 years in the agency's records and look and see what we knew about Iraq and Al Qaeda. (…) We examined about 20,000 documents, probably something along the line of 75,000 pages of information, and there was no connection between [Al Qaeda] and Saddam.
>
> There were indications (…) but nothing you could put together and say, "Here is a relationship that is similar to the relationship between Iran and the Lebanese Hezbollah," which was what Doug Feith's organization [DoD] was claiming. There was simply nothing to support that.
>
> (…) So there was a great deal of surprise when we heard Secretary Powell at the UN discussing the existence of that kind of a relationship. At least in that aspect of going to war with Iraq, it seems to me that the president was told what he wanted to hear."
>
> Schreuer (2006). In an interview with *Frontline*.

Falk – a former member of the Kosovo Committee – points out that a military intervention can be 'illegal, but legitimate' – as was the intervention in Kosovo according to him. Since the intervention in Iraq was, however, not legitimised by a direct threat, it was therefore not necessary. A preventive war, like the war in Iraq, is according to Falk not acceptable. (In Domrosch and Oxman, 2003: 556)

Authorisation

Jurists do not agree about the authorisation; while one group argues the intervention was sufficient legitimated, the other group argues it was not. According to Yoo (2003), the former deputy assistant Attorney General at the US Department of Justice, were France, Germany and Russia not acting in compliance with the customs of the UN and custom law, by declaring Resolution 678 outdated. By acting this way, the countries would no longer recognize decisions of the UN Security Council as rules of law, but would reduce these to temporary agreements between a group of member states. This could change the status of UN decisions in the future. Taft and Buchwald (in Domrosch and Oxman, 2003: 555) are juridical advisors for the US Department of state and support the American intervention, based on Resolutions 687 and 1441. Wedgewood (in Domrosch and Oxman, 2003: 555) is of opinion the UN Charter should leave more freedom to react adequately when necessary to protect the national security.

Simultaneously, other jurists are of opinion that there was no UN mandate for the American intervention in Iraq. One of them is Niskanen, who argues that Resolution 687 was only meant to force Iraq to withdraw from Kuwait. Violence could be used to force Iraq to withdraw and to meet the terms of the resolutions that did already exist. The text did not anticipate on possible terms in later resolutions. Furthermore, the first section of Resolution 687 said that a cease-fire would be established between the involved actors, when Iraq would make official that it would meet the terms of Resolution 687. (Niskanen, 2004: 439) The Dutch Committee of Inquiry Decision-making Iraq – Davids Committee in short – was established in the Netherlands in reaction to the discussion about the lawfulness of the intervention in Iraq and the Dutch role in the war. The Committee Davids concluded that Resolution 1441 alone was not enough reason for UN authorisation. A second resolution would have been needed for the use of military force. (Dutch Committee of Inquiry Decision-making Iraq, 2010: 530) According to Johnstone (2004: 831), the resolutions leave some issues open to interpretation. Personally, Johnstone is most convinced by the argument that a second resolution would have been needed. Murphy (2004) concludes that there is too little reason to assume that the war in Iraq was legitimated and focused mainly on the content of Resolution 687 to prove this. Hmoud (2004) – at that time juridical advisor of the Jordanian government, but written as a personal view – was of opinion that the intervention in Iraq was not legitimated based on the existing resolutions.

The United Nations has never issued a formal position on the military intervention in Iraq. Kofi Annan has been very reticent about the intervention. On a press conference on the 15th of September 2004, however, Annan said the war in Iraq was 'illegal'. At first, Annan answered only shortly to the question of a journalist, but after that he added the start of the intervention had not been accordance the rules of the UN Charter. (In MacAskill and Borger, 2004)

> "I have indicated it was not in conformity with the UN Charter. From our point of view and from the charter point of view it was illegal"
>
> UN Secretary-General Kofi Annan (In MacAskill en Borger, 2004).

Acceptable intention

The intention of the Coalition of the Willing was an important part of Blair's arguments to start the intervention in Iraq, during the parliamentary debate in the House of Commons on the 18th of March 2003. Blair emphasized that a new resolution would be proposed to the UN Security Council, shortly after the intervention. This resolution should include a plan for reconstruction. *Regime change* was seen as a solution for the violations of human rights in Iraq and as a positive development in the process of finding a peaceful solution for the conflict in the Middle East.

> "In the event of military operations requires that, on an urgent basis, the United Kingdom should seek a new Security Council Resolution that would affirm Iraq's territorial integrity, ensure rapid delivery of humanitarian relief, allow for the earliest possible lifting of UN sanctions, an international reconstruction programme, and the use of all oil revenues for the benefit of the Iraqi people and endorse an appropriate post-conflict administration for Iraq, leading to a representative government which upholds human rights and the rule of law for all Iraqis; and also welcomes the imminent publication of the Quartet's roadmap as a significant step to bringing a just and lasting peace settlement between Israelis and Palestinians and for the wider Middle East region, and endorses the role of Her Majesty's Government in actively working for peace between Israel and Palestine."
>
> Blair (2003). House of Commons Hansard Debates. 18 March 2003.

The intervening states did not have the plan to keep Iraq under their command for long. Blair was not the only one making that clear. Boucher (n.d.), US States Deputy Spokesman, told to *Frontline* about the 'Future of Iraq Project', that had to prepare the establishment of new, Iraq's political structures. Both independent Iraqis as well as representatives of political organizations participated in the meetings.

Proportionality of ends

A part of the debate within the Security Council was about the proportionality of ends. The United States and the United Kingdom agreed that military intervention would be a proportional reaction to the development of weapons of mass destruction by Iraq. Blair (2003) remembered the House of Representatives on the 18th of March how often Saddam Hussein had violated the terms of the weapon inspections.

> "I will not go through all the events since then, as the House is familair with them, but this much is accepted by all members of the UN Security Council: the 8 December declaration is false. That in itself, incidentally, is a material breach. Iraq has taken some steps in co-operation, but no one disputes that it is not."
>
> Prime Minister Blair (2003). Debate in the House of Representatives, 18th of March 2003.

Iraq declared it did not have a nuclear weapon program after April 1991. The International Atomic Energy Agency (IAEA) wrote that it was discovered – during a meeting in Bagdad on the 19th of November 2002 – that Iraq had unsuccessfully tried to import high quality aluminium pipes. Iraq declared that these pipes would not have been used to enriching uranium, but for manufacturing small rockets. The IAEA called the declaration of Iraq 'accurate and complete' and in line with the preliminary findings of the IAEA itself. (ElBaradei, 2002)

The CIA had – in the autumn of 2002, prior to the voting on the War Powers Resolution – completed a National Intelligence Estimate (NIE), in which was declared that Iraq could own weapons of mass destruction within a period between several months and a few years. (Global Security, 2003) According to Pillar (2006: 17-18), the political decision by the government was already made when the NIE was developed, but the Congress asked for the report. The order of events in a normal process would be exactly the other way around. Normally, there would be a decision based on *intelligence*, while the decision in the Iraq case was only supported by the intelligence on a later moment, during the process of winning the support of Congress and the public opinion. The NIE was developed quickly, within three weeks. (Pillar, n.d.) The website of the CIA states that the process of writing a NIE would take six to eight weeks, normally, but that it has been finished earlier in pressing situations.

In these cases, the NIE's were of less quality, because there had been less time to analyse contrasting findings, or to discuss the issue internally and find consensus. (Central Intelligence Agency, 2007) According to Pillar (2006) the Bush government was '*cherry-picking*'; using only the information that supported the decision to intervene in Iraq, or by making political statements which could not be fully supported by information of the CIA. The CIA, for example, had no information that Iraq owned *yellowcake* and advised the government not to mention this in their speeches. Bush, however, did mention *yellowcake* in his state of the Union speech, in January 2003. Pillar later regretted to have contributed to the NIE (Pillar, n.d.), since the CIA did not have an acceptable, neutral position in the process and analysts let their prejudgments prevail. (Pillar, n.d.) Maloof (2006), a former member of the Pentagon's Policy Counterterrorism Evaluation Group (PCTEG), had written a memo to his chief, that the information from the NIE could not be right. According to Maloof 'terrorism' was the only reason for the United States to intervene in Iraq in that time, but this changed later. Even Tenet would have had doubts about the report.

Other countries within the Security Council, like France and Germany, knew about the repeatedly violated terms of the weapon inspections by Iraq in the past, but were of opinion that this provided not enough reason for a military intervention.

The United Kingdom and the United States mentioned the repeatedly violated terms of the weapon inspections, but emphasized on their suspicion that Iraq would own or develop weapons of mass destruction, like Blair in his speech on the 18th of March and Bush in his speech of the 2nd of October 2003.

> "We know the designs of the Iraqi regime. In defiance of pledges of the UN, it has stockpiled biological and chemical weapons. It is rebuilding the facilities to make those weapons. (…) The regime has the scientists and facilities to build nuclear weapons, and is seeking the materials needed to do so. (…) They buy time with hollow promises. (…) They concede just enough to escape – to escape punishment, and then violate every pledge when the attention of the world is turned away."
>
> President Bush (2002). The Rose Garden, 2nd of October 2002.

The argument about weapons of mass destruction, which was important regarding the factor 'proportionality of ends', was never accepted by the UN Security Council and even within the United States – for example among employees of the CIA – were doubts about this argument.

Last resort

Natarajan (2008: 10) describes new weapon inspections were established at the start of 2003, in reaction to Resolution 1441. The report of the UN Security Council – about the period between August 2002 and July 2003 – described all activities of the weapon inspectors since the end of 2002. The weapon inspectors organized inspections, based on statements of involved Iraqis or information that UNMOVIC had received from external partners. Both French and American airplanes were involved in inspection flights above Iraq. A total of 731 inspections had been done between the 27th of November 2002 and the 18th of March 2003, and these inspections have been done on 411 different locations, of which 88 locations had never been inspected yet. (UN Security Council, 2003a: 188-191) ElBaradei, Director-General of the International Atomic Energy Agency (IAEA), stated, based on these inspections, that no prove or indication was found for a restarted nuclear weapon program of Iraq. Blix, Executive Chairman of the UN Monitoring, Verification and Inspection Committee (UNMOVIC) emphasized that all planned inspections, documentary analysis, interviews, and the drawing of conclusions would take several months, even with the proactive Iraqi mentality

because of the enhanced international pressure. (Nataraja, 2008: 10) The inspectors were withdrawn on the 18th March of 2003, based on a warning of the United States to the UN, to call all personnel back from Iraq, and the decision of the Secretary-General to react on this. (UN Security Council, 2003a: 190)

The United States and the United Kingdom agreed that renewed weapon inspections were necessary within short notice, although both countries had internal debates on this. Within the United Kingdom, the sceptics were mainly found in the Labour party, including parliamentarians who had supported the amendment on the government motion earlier in the process.

Reasonable chance on success

The members of the 'Future of Iraq Project' were all political refugees, who did not live in Iraq themselves. Kubba (n.d.), who had been a member of the *Iraqi National Congress* (INC) between 1992 and 1996, told *Frontline* about the atmosphere during the meetings. According to Kubba, the participants wanted democracy badly, but no one knew how the society would look like after Saddam Hussein was removed of his position, and what to expect of the situation. The full process of planning was left to the INC and therefore under responsibility of only a small group of people.

> "The reality is, by the beginning of 2002, Iraqis have not mobilized their expertise to map out what the issues and challenges are in a post-Saddam Hussein Iraq. Everybody agreed that Saddam should go. Everybody would like to have democracy afterwards. Nobody had a clue what the challenges are ahead. So for the State Department to have started to gather Iraqis, 200 of them in 15 working groups, was a good step."
>
> "I think they had a very simplistic agenda that can be summed up in few words: reducing Iraq to the opposition, reducing the opposition to the INC, and that all the post-Iraq planning should start from that small group, to be given all the resources and support, to become the nucleus for reestablishing authority in Iraq."
>
> Kubba (n.d.). In M. Smith. Transcript Truth, War and Consequences. *Frontline.*

Pachachi (n.d.) confirmed this, as he was of opinion that the establishment of a new government and institutions should not be left to external actors, like political refugees.

> "I don't think it's a good idea to try to impose a government from outside, so I was against the idea of having a provisional government composed of exiles. There should be a process by which Iraqi people, especially those who are inside, should have a say in any provisional government."
>
> Pachachi (n.d.). In M. Smith. Transcript Truth, War and Consequences. *Frontline.*

Members of the INC were not totally satisfied with the meetings about the future of Iraq, as for example Makiya (n.d.), who was an advisor at INC.

> "The State Deputy wanted to talk about how best to collect garbage in the streets the day after liberation, or how we recuit a thousand health workers to go to this or that area the day after. And I said I didn't have anything to contribute to such questions. Unfortunately,– I'm sure there were people inside Iraq who would know much better that I how to go about doing these things."
>
> Makiya (n.d.). In M. Smith. Transcrip Truth, War and Concequences. *Frontline.*

Peaceful ends

The ends of the intervening countries were peaceful; the power would be transferred to the new government shortly after the intervention. This new government would have to care more about human rights and would be more stable, and therefore it would be less of a threat to the international peace and security.

7.2   Throughput legitimacy; MNF-I and the start UNAMI

7.2.1   Lawful authorisation

The fall of Saddam Hussein was symbolized by the images of one of his statues pulled of its base with help of Iraqi citizens on the 9th of April 2003. (Keegan, 2004: 203) The American president Bush declared, standing on the *USS Abraham Lincoln* on the 1st of May 2003, that the 'major operations' of the Multi National Force-Iraq (MNF-I) were over, that the national interest of the United States – security – was safeguarded and Iraq was still owned by the Iraqis. Bush also stated that the United States would have a difficult job in Iraq, because not all areas were safe yet.

> "In this battle, we have fought for the cause of liberty and for the peace of the world. Our nation and our coalition are proud of this accomplishment, yet it is you, the members of the United States military, who achieved it. Your courage, your willingness to face danger for your country and for each other made this day possible.
>
> Because of you, our nation is more secure. Because of you the tyrant has fallen and Iraq is free."
>
> President Bush*, USS Abraham Lincoln*, 1st of May 2003

The Coalition of the Willing stayed in Iraq after this 'mission accomplished' declaration of Bush in Iraq, in order to reconstruct the country and to establish a stable administrative apparatus. Firstly, the administrative powers were executed by the Coalition Provisional Authority (CPA), which started with the reforms of the administration towards a liberal democracy. (Natarajan, 2008: 12-13) According to Hmoud (2004: 444-446), the United States had made the conscious choice not to claim 'victory', because the Coalition of the Willing would have been forced to leave the country after such a statement. By only declaring the major operations to be over, the Coalition of the Willing did not have to release the prisoners of war. Hmoud argued that the period after the 1st of May 2003 was an illegal occupation; the Coalition of the Willing had 'effective control' over Iraq, but could not explain this with legally valid arguments. Firstly, occupation was not necessary out of self-defence and secondly, the UN Security Council had not authorized occupation. The United States was involved in diplomatic consultations within the UN Security Council, to get such a mandate of the UN. Resolution 1483 (2003b) provided the mandate, with which the UN

Security Council called on the members to assist in the reconstruction of Iraq. Member states were authorized for assistance of the reconstruction of institutions and the country, and were allowed to assist in the stabilization of the security situation in Iraq. (Hmoud, 2004: 450) The UN Security Council (2003, Resolution 1500) decided to assist even more in the reconstruction of Iraq, by establishing the United Nations Assistance Mission in Iraq (UNAMI). The number of countries, which supported UNAMI military, was only twenty-five. (uniraq, n.d.)

7.2.2 Discussion about the acceptability of ius in bello

Proportionality

The UN Security Council emphasized the importance of the *ius in bello* criteria in Resolution 1472 (18th of March 2003(d)). The Resolution called on the intervening states, including the involved members of the Security Council – the United States and the United Kingdom – to act in line with the rules of law of the international treaties, like the Geneva Convention.

Bush (2003) underlined in his 'mission accomplished' – declaration of the 1st of May 2003 – that the Iraq war had been a 'clean' one; in contrast to the wars against Nazi-Germany and Japan, removing the regime did not leave a broken country.

Avoiding civil casualties

Amnesty International wrote on the 30th of April 2003(a) about civilian casualties during a demonstration against the American presence in Iraq. Amnesty feared that the American troops had not acted proportional and requested an investigation. Amnesty asked the United States and the United Kingdom to send enough troops, in order to create a stable security situation until the Iraqi police could bear this responsibility again.

Human Rights Watch warned on the 12th of June 2003 that the Coalition of the Willing is responsible for a secure situation in Iraq and has to prevent the development of a power vacuum. (HRW, 2003a)

Amnesty International also reminded the international forces of their responsibilities as occupiers; according to international law, there is a responsibility to protect the civilians. The occupying power does not have the right to change the juridical system in order to protect the human rights. These kinds of changes could only by executed by a new Iraqi government or a temporary, interim government authorized by the UN. Amnesty International wrote that it was still unclear how the occupying powers would deal with this situation in its publication of the 15th of April 2003. (Amnesty International, 2003b) The start of UNAMI was very important, because it was authorized to change the juridical system of Iraq radically, thus solving the problem.

Amnesty International was more straightforward in a publication of September 2003 (c).

Amnesty International did publish reports that described rather detailed how civil casualties were caused; including the name of the victim and the circumstances of death. See for example the report *"Iraq; One year on the human rights situation remains dire"*. (Amnesty International, 2004) HRW also brought other human rights into attention, for example the freedom of media. According to HRW, the coalition forces might have unlawfully attacked an Iraqi television station. That this station was used for publishing propaganda as well was not enough reason to attack it, argued HRW. That is why the United States would have to explain why it was military necessary to destroy the television station (HRW, 2003b)

7.3   Output legitimacy; MNF-I and UNAMI

7.3.1   Renewed, lawful authorisation

After the UN Security Council had authorized the presence of member states for reconstruction and stabilization tasks, by adopting Resolution 1483, the Coalition Provisional Government (CPG) administered Iraq. Iraq got a temporary constitution on the 8th of March 2004; the Transitional Administrative Law (TAL), which allowed the three Kurdish provinces to stay autonomic; guaranteed human rights like the freedom of expression and religious outing; and prescribed the election of the National Assembly, who had to develop a permanent constitution. (Amnesty International, 2005a: 6-7) The members of the Iraqi interim government were installed on the 1st of June 2004. The government's power had been divided between the different ethnical and religious groups in Iraq, but five of the six primary functions were taken by former political refugees. (Otterman, 2004) The Security Council declared in Resolution 1546, that the occupation of Iraq would be ended on the 30th of June 2004. The Multi-National Force-Iraq (MNF-I) was authorized until the end of 2005, to take necessary measurements to safeguard security and stability. Elections were held for the Transitional National Assembly, on the 30th of January 2005. A clear majority of Sunnite Arabs – many had supported the government of Saddam Hussein – boycotted the elections out of fear for reprisals of armed groups, or in accordance with calls of Sunni religious leaders and politicians. A majority of Shiite Muslims supported Grand Ayatollah 'Ali Al-Sistani, who would get 140 of the 275 seats during the elections. The Kurdish alliance got 75 seats and the former premier Allawi got 40 seats in the Assembly (Amnesty International, 2005a: 7-8)

The new president, Jalal Talabani, and two vice presidents were chosen by the 275 members of the Transitional National Assembly on the 6th of April 2005. (Pan and Otteman, 2005) The interview of *Frontline* with Lieutenant-General Garet (2006) made clear that the Americans had a substantial – indirect – influence on the composition of the interim government.

"(…) The next day, on the 21st [April, 2003], I was going up to northern Iraq to see [Kurdish leaders Jalal] Talabani and [Massoud] Barzani over this – they were going set up an interim government… Talabani and Barzani and I are old friends from the first Gulf War, and we sat down, had a very candid conversation. I said: "I can't let you guys set up an interim government, but what I can do is let you put together a leadership group that becomes the face of leadership for the Iraqi people. If that works, we can transition that into an interim government. But it will be under US authority, a coalition authority." (…)

"I said, "I've got two problems with that. (…) They're all expatriates. And you are Kurds." And then he said: "I understand that. We'll bring in a Christian and somebody else. We'll bring those names to you, a nominee." And I said:"The second problem I have with that is Hakim." I said "Hakim's too Iranian." And Talibani (…) said, "Jay, it's better to have Hakim inside the tent than outside the tent.""

Lieutenant-General Garet, 11th of August 2006. Interview with *Frontline.*

The first order of the Coalition Provisional Government was the de-Baathification, which dissolved the former political party of Saddam Hussein and removed its former members from administrative positions. Garet (2006) did not agree with the order, because he was afraid that it would destabilize the society too much. Garet and the CIA Station Chief talked about their concerns with Bremer – head of the CPG – who told them the order would be followed up, because 'Washington' had ordered to do so.

The Iraqi Constitution was presented in the end of August. (Beehner and Otterman, 2005) Faber (2004: 57-58) described how difficult it had been to get the different ethnical, religious and political groups in Iraq to cooperation. Faber called the situation Hobbian: a fight of 'all against all'. Not only there had been resistance against each other, but also towards the Americans. Even Iraqi who had been opposing Saddam Hussein's policy, started to resist the Americans when their presence started to feel like an occupation.

"I have been at a meeting in Iraq in October 2003, where more than hundred tribal elders tried to agreed on common policy towards the American occupying power – which failed. They turned out to be each others concurrents and felt responsible for the protection of their one tribe, including the ones who had decided to move back to their tribe areas from the cities, looking for safety."

Paraphrased from Mient Jan Faber (2004: 57). Original text in Dutch.

Dobbins (2005: 16-17) described the negative spiral of the Iraqi public opinion regarding the United States. According to the author, the citizens had lost their trust in the United States. The Iraqi citizens and citizens from the surrounding countries valued the MNF-I less legitimated and not reliable.

The presence of the MNF-I was regarded as an occupation by groups of Muslims inside and outside Iraq. Within Iraq, it was mainly the Sunnite Muslims – mostly supporters of Saddam Hussein's regime – who regarded the MNF-I as an occupying power. Several Muslim leaders in other countries had issued fatwa's, or made statements against the 'occupation'. Amnesty International (2005: 17) published about a statement of Sheikh van Al-Azhar in Egypt – Dr. Mohammed Sayyaed al-Tantawi – who argued that Muslims had the religious duty to support Iraq in the resistance against the aggressor (MNF-I). The same call came also from the *International Association of Muslim Scholars (IAMS)*. The 'resistance' against Iraq thus linked to the protests for the Palestinian situation. Simultaneously, other Muslims did protest against these statements: 2500 Arabic and Muslim intellectuals from 23 different states issued a

petition to the UN in October 2004, which called for an international treaty to forbid the use of religion in the recruiting for violent behaviour. (Amnesty International, 2005a: 19-20)

7.3.2   Discussion about the acceptability according to ius post bellum

Safeguarding of rights

There has been a lot of discussion about the safeguarding of rights. Several human rights organization had reminded the intervening states of their responsibility as occupying states in safeguarding the security and human rights in Iraq. (See paragraph 7.2.2.) The security of Iraq, however, remained problematic.

Amnesty International wrote a report about the rise of armed groups of rebellions in Iraq, who committed violent actions against individuals, women and the civilians in general and against the UN and humanitarian organizations. The groups were mostly active in the areas were Saddam Hussein had a lot of support; the *'Sunni triangle'* in central, west and northwest Iraq. Although there were no formal, political ties between the armed groups and the Sunnite authorities, the armed group got inspired by their political ideas – such as the vision that MNF-I is an occupying force against which the civilians have to organize resistance. (Amnesty International, 2005a: 15) Faber (2009: 58) explains how the safety decreased when the Sunnites demolished a Shiite mosque and the different groups of civilians in Baghdad started to fight each other. The consequences were – according to Faber (2009) – still recognizable in the security measures that were taken in the city when the violence decreased, like roadblocks and guardians patrolling neighbours, although the security had enhanced.

Human Rights Watch (2005) wrote about the difficult start of the Iraqi law system. Especially Iraqi police officers were under great risk of being murdered. HRW reminded that, while the abuses in the American Abu Graib prison had gained substantial attention, the bad circumstances in the Iraqi prison did not. That is why HRW called for a clear condemnation of torture by the Iraqi political leads. Amnesty International (2005b) published about the murder on one of the defending judges in the Saddam Hussein case, which showed how dangerous the situation was for the legislative powers in Iraq. Amnesty asked therefore for more protection for the other defending judges involved in the same case.

The unsafe situation for foreigners got attention as well. For example in an article of Amnesty International (2005c) about the murder on two Algerian diplomats, after they were kidnapped by an armed group on the 21st of July, 2005.

HRW published about the violent history of the Iraq and the Hussein regime, which reminded of the positive side of the intervention. An example is the article of the 3rd of November 2004; 'Iraq: State of Evidence'.

Proportionality, reasonable peace agreement

The occupation of Iraq was officially ended at the 30th of June 2004 (UN Security Council: Resolution 1546), but the MNF-I troops were authorized for assisting in security and stabilization tasks until at least the end of 2005. There has been criticism on the transfer of power to the Iraqi government; firstly, there has been criticism on the major roles of former political refugees in the new established government (see paragraph 6.3.1). Secondly, there has been criticism on the way the United States had interfered in the reforms of the political institutions in Iraq. (Hmoud, 2004) See also the article of Sepp (2007: 221) about the American role on this issue.

> "Call it militant Wilsonianism, call it expeditionary democracy, call it counterinsurgency, but this is not 'return to status quo', and it is decidedly not stabilising. It is an overturning of nations. It is, at its core, a revolution."
>
> Kalev I Sepp. (2007)

Distinguishing groups

Several groups were represented in the interim government of Iraq, but former political refugees got five of het six main functions. (See paragraph 7.3.1) Laith Kubba, former member of the Future of Iraq Project (see paragraph 7.1.2) had become one of the spokespersons of the Iraqi interim government. (Amnesty International, 2005d) Leaders of the Hussein regime were prosecuted and the Baath-party was forbidden.

Proportional punishment

Amnesty International and Human Rights Watch were worried about the punishments in Iraq. Amnesty International condemned the execution of members of armed troops, who were convicted of kidnapping, murdering police officers and raping women. Amnesty International expressed concerns about the 50 death penalties that were pronounced in the months before September 2005 and about the increasing number of these penalties that could be expected in the future. (Amnesty International, 2005e) Human Rights Watch (2003c) warned that Saddam Hussein should have an honest process.

Amnesty International, Human Rights Watch and the International Commission of Jurists (2005: 14) published in a joint plea to the Council of Europe member states, wherein it stated that prisoners of Abu Graib were tortured and abused, even though the International Committee of the Red Cross (ICRC) visited the prison regularly. Amnesty published a factsheet on the 6th of December 2005, which called to close down the Guantánamo Bay detention centre. The factsheet argued that its prisoners were treated badly and that secret CIA flights were used to transport the suspects to other – hidden – centres.

> "Stop Torture in the 'War on Terror'.
> Amnesty International is calling for the Guantánamo Bay detention centre to be closed and for all other 'war on terror' detention centres to be opened up to independent inspection.
> We are witnessing an alarming increase in torture and other ill-treatment of suspects detained as part of the US led 'war on terror'. The US military alone has taken more than 80,000 people into custody during its military operations in Afghanistan and Iraq.
> In Afghanstan, the US has operated some 25 detention facilities, and in Iraq another 17. In addition, the US has an unknown number of secret detention facilities or 'black sites' in several countries. More than 750 people have been held in Guantánamo, about five hundred remain."
>
> Amnesty International. 6th of December 2005.

Pictures, showing cases of abuse in the Abu Graib prison, were spread by the media, causing universal condemnation of the way the prisoners were treated in Abu Graib. Amnesty asked attention for Abu Graib, by starting an action on internet, by which participants could sign a standard letter to President Bush. To show that the criticism came from within the United States as well, Amnesty published the notes of an American jurist, which were written after a visit to the Guantánamo Bay prison. (Amnesty International, 2005g)

> "The stories they told were remarkably similar – terrible beatings, hung from wrists and beaten, removal of clothes, hooding, exposure naked to extreme cold, (…) They all confirmed that all thes treatment was by Americans (…) Several mentioned the use of electric shocks (…) some had this done; many saw it done"
>
> Notes of an US lawyer. In Amnesty International 2005. Internet action.

The Secretary-General of Amnesty International sent an open letter to president Bush in which he asked to stop the abuses and to give the prisoners a lawful treatment. (Amnesty International, 2005h)

Financial compensation

Financial compensation was, firstly, achieved by reconstruction tasks of the MNF-I and the UN. Furthermore, old economic and financial sanctions were abolished as soon the regime of Saddam Hussein was overturned. Furthermore, an article of Amnesty International (2004: 4) showed that the United States had already compensated victims for 1,5 million dollar in November 2003. Compensation was possible for injuries, the death of relatives, or the damage of property.

Demilitarisation and political sanitization

Human Rights Watch and Amnesty International emphasized the importance of fair processes and condemned the use of the death penalty. This was also underlined regarding the process of Saddam Hussein. An honest process would be important to do right to the thousands of victims of abuse and terror, and to show the importance of human rights to Iraq. (Amnesty International, 2005i)

7.4 Conclusion

Regarding the *ius ad bellum* criteria, it had been important that the intervention Iraq had not been authorized by the UN Security Council, because France, Germany and Russia were the announced opponents of an intervention in Iraq. France declared that it would veto a proposal for a second resolution (which would legalize the intervention). Therefore, the draft was never officially proposed by the United States and the United Kingdom, even though the United Kingdom had been keen to get it accepted. France, Germany and Russia were against an intervention, because the states were of opinion that the involvement of Iraq in terroristic activities was not adequately proven. Furthermore, the old resolutions did not authorize such an intervention. The United Nations did not actively condemn the intervention and neither did regional organizations, like NATO.

The United States had two arguments for intervening, at the start of the war; the War on Terror – because of the suspected connections between Iraq and Al Qaeda – and the existence / production of weapons of mass destruction. Employees of different security agencies of the United States doubted these arguments. Although Bush did not get permission from the Security Council, the American Congress adopted a joint resolution in October 2002, which authorized President Bush to start a war in Iraq when necessary.

President Bush got support from the United Kingdom. Both stated that Iraq did not cooperate enough, even though the weapon inspections had started again. The intervention of Iraq started on the 20th of March 2003 as a multinational intervention by the United States. The

United States declared in an informing letter to the UN Security Council, that Iraq was not meeting the conditions of the resolutions of the UN Security council, as was proved by Resolution 1441 of November 2002. Resolution 687, adopted in the 1990s, legitimated the use of violence.

The academic world was divided about the question if the intervention had been legitimate. Some of the influential academic thinkers regarding the intervention, like Yoo, who worked as juridical advisor at the United States government and were of opinion that the old resolutions were sufficient for legalizing the war. Other jurists were of opinion that these resolutions left some freedom for interpretation, or were of opinion that a second resolution would have been needed – as the United Kingdom had argued as well, initially. Both the United States and the United Kingdom emphasized the peaceful intentions of the intervention, for example by preparing the new Iraqi interim government even before the war was started. Interviews revealed the insecurity of the participants about the future of post-Hussein Iraq and the kind of policy needed after the intervention.

Soon after the fall of the regime of Saddam Hussein, President Bush declared the big operations to be over, but did not declare peace. Therefore, the United States could stay in Iraq until the UN Security Council would adopt a resolution that authorized the member states to assist Iraq in the process of stabilization and reconstruction. Although the intervention of Iraq had been relatively quickly and fairly 'clean', Amnesty International and Human Rights Watch warned already in 2003 for the responsibility of the occupying forces to protect the civil society. MNF-I did – according to press releases – not succeed in protecting the human rights. The chaotic, violent situation in Iraq just after the intervention was seen as *ius in bello* because the interim government was not operational yet and the MNF-I had daily fights with rebels.

After the declaration of President Bush, a *Coalition Provisional Government* was established, which decided to de-Baathification with Order No.1. Some involved actors expressed their doubts about the effect on the stability of the society, because the full Iraqi administration would be dismantled at once. The power over Iraq was transferred to the Iraqi interim government on the 30th of June 2004, which consisted mainly from former political refugees who returned to Iraq after the intervention. The United States had been actively involved in the formation of the Iraqi interim government. The interim government had a difficult position within the Iraqi society. MNF-I stayed in Iraq to support the interim government on stability and security tasks. The American policy and the civil casualties it caused were debated often. Amnesty International published about Guantánamo Bay, the Abu Graib prison and the number of civil casualties. While the Americans lost their legitimacy under the Iraqi citizens, armed groups gained power, with terrible consequences for the security in Iraq. These groups shared the ideological backgrounds with Sunnite leaders from the areas where Saddam Hussein had been popular. Iraq was characterized by a situation that Faber (2009) called a Hobbian war. Iraqi police officers were at risk of being murdered in this violence. Amnesty International and Human Rights Watch criticized the juridical system in Iraq, especially the bad circumstances in prisons, the reported violence against prisoners and the disproportional punishments for convictions.

8   Analysis of the development of the concept of legitimacy

In the previous Chapters the results from the case studies of Kosovo (chapter 5), Afghanistan (chapter 6) and Iraq (chapter 7) were shown. The process of authorisation was showed for each case and the public debate – on both national and international level – was discussed based on the criteria of the Just War theory.

This analysis will review the three cases as a whole and will discuss how the criteria of the Just War theory have influenced the legitimacy of the war. As was discussed in chapter 3, legitimacy will be split in three kinds; input legitimacy, throughput legitimacy and output legitimacy, which are all influenced separately by specific criteria of the Just War theory. Public debates about these criteria will thereby influence the legitimacy. The precise mechanisms depend on the characteristics of the discussion and the stage of intervention. The three case studies have been summarized in three tables (one for each kind of legitimacy) to make comparison and analysis easier.

In the three tables, the stages in the development of legitimacy will be shown (see table 1 of chapter 3), together with the influence of the public debate during the three interventions (see table 7, 8 and 9 on pages 93-95). The public debate will be summarized using a scale with five levels; very positive (++); positive (+); neutral / depending (±); negative (-); and very negative (--). It can also occur that there has been no public debate (reported) on a certain issue (0). The level of influence – for example the difference between 'positive' and 'very positive' – was determined by the level of correspondence between the different involved actors. If, for example, all involved actors agree with the authorisation of an intervention, the debate on the legitimacy was 'very positive' (++). The debate was 'positive' (+), when most involved actors agree, but a small number of actors have the opposite opinion. The weight of a certain actor in the debate will have influenced the discussion. Permanent members of the Security Council have, for example, a more important role in the debate on international level, than other states have.

The judgment 'neutral / depending' needs more explanation; this classification is used when several important parties were disagreeing with each other during the public debate and never reached a common agreement. Citizens have to decide which opinion makes most sense to them. Regarding this judgment, it is important to realize that (parts of) societies might have different values and therefore different priorities. The differences between the United States and Europe will therefore be most obvious during these debates.

8.1   Development input legitimacy

8.1.1   Lawfulness; authorisation

In general, the intervention in Iraq had the least support during the early stages, both on international and national level, while it was the intervention with the most and longest attempts to get authorisation from the UN before the start of the war. That enabled the opponents of the intervention in the Security Council to make statements about the war and the interpretation of Resolution 1441. When it turned out that the so-called 'second resolution' would not be adopted, the United States and the United Kingdom decided that the old resolutions of the 1990s provided enough juridical mandate for multi-national intervention. France and Germany remained opposed. About two-third of the parliamentarians of both the United States and the United Kingdom voted in favour of intervention. The intervention in Iraq started with limited support and with more than half of the states in the Security Council opposing the intervention. Besides, the jurists debated heavily on the authorisation of the

intervention. According to the intervening states, the intervention was authorized. It is expected that this explanation made most sense to the State's own citizens, because they had closer ties to the political leaders making the statements.

The intervention in Kosovo was less open debated on both international and on national level. The Security Council did not receive a proposal for a Resolution and the parliamentarians in the United States and France were only involved after the actual start of the intervention. That is why only the German parliament has officially authorized the intervention in Kosovo with a large majority of votes.

Although this policy brought the opponents in the difficult position that criticism could only be expressed afterwards, it also angered parliamentarians, especially within the United States. Although the intervention in Kosovo was not authorized prior to the start, there was broad international support. That became clear when Russia issued a resolution in the UN General Assembly to declare the intervention illegal, which was opposed by almost all countries. Furthermore, there was an agreement between the NATO-countries.

Although the degree of input legitimacy differs among different nationalities, the legitimacy of the Kosovo intervention started more positive than it would be during the start of the intervention in Iraq; the conflict about Kosovo caused less friction between the states and fewer states were involved in the conflict.

The intervention in Afghanistan developed differently. According to the United States, it was a matter of self-defence and therefore the United Nations could be informed on a later moment. The UN gave no reaction on the intervention; no agreement, but no disapproval either. Countries over the whole world offered to support the United States in actions to stop terrorism. Simultaneously, most states did not recognize the Taliban as the sovereign power of Afghanistan; the Taliban had no 'friends' in the international community. Countries like Russia, China – the two countries that would normally plea for state sovereignty above other rights – and Iran regarded the regime as a security problem. The intervention in Afghanistan got the support of NATO on international level, which promised to act as a collective on the terrorist attacks of 9/11. The important European countries unanimously supported the intervention and there were a reasonable number of positive reactions during the national debates about the intervention.

The intervention in Afghanistan started in a country without a clear authority, which caused as different situation than in Kosovo and Iraq, which were both countries with clear authorities against whom was started military action.

8.1.2   Acceptability

Acceptable cause

The broad consensus in NATO about the intervention in Kosovo started from the broad judgement that it would be acceptable to start an intervention to stop the development of a humanitarian disaster. Many jurists agreed with this reason for intervening. Regarding Afghanistan, there had been a broad political consensus about the right of self-defence – juridical right or wrong – of the United States. Both politicians and jurists debate much on the intervention in Iraq. Many states were not convinced that it was necessary to force Iraq with military means to meet the terms of the UN resolutions on that very moment. Both on international as on national level were doubts about the reason that the United States had used; the existence of weapons of mass destruction in Iraqi territory and the suspected ties between Iraq and Al Qaeda. The relative differences of the development of legitimacy between the United States and Europe will be important regarding the factor 'lawful reason'. The humanitarian intervention in Kosovo was less positive for development of legitimacy in

the United States, while the repressive character of the war in Iraq got relatively less support in Europe. However, after the start of the war the US and UK used many humanitarian reasons for intervention in Iraq, which had a positive influence on European legitimacy

Authorisation

The national discussion in the United States, about the mandate of the president, was the most eye-catching discussion about the acceptability of authorisation of the intervention in Kosovo. It was not possible to find reach political consensus about the intervention in Kosovo. Nevertheless, most jurists were of opinion that intervention was necessary and acceptable. The debate in Afghanistan had shown the opposite development; jurists debated the acceptability of the political consensus. Iraq divided both juridical and political opinions. Kofi Annan called the intervention in Iraq 'illegal' in 2004. Iraq caused – of all three interventions – most debate in the United Kingdom, especially within Labour, the political party of the British Prime Minister Blair.

Acceptable intention

The intention for all three interventions was to intervene for a short period and improve the humanitarian situation in the intervened country in a second stage. These 'right intentions' were used in many reviewed political speeches and therefore, this had a positive impact on the development of input legitimacy.

Proportionality of goals

Most countries, which already had a negative opinion about the intervention, used arguments about proportionality of goals in the cases Kosovo and Afghanistan. These arguments were of more importance in the debate about the war in Iraq. The Bush administration called the war 'proportional', as not starting the intervention would be more dangerous; the American government tried to prove with CIA reports, that Iraq had access to weapons of mass destruction at least within a short period.

Last resort

The intervention in Kosovo was support by many countries, because military intervention was commonly considered the last resort. Diplomatic meetings were continuing until all NATO states were convinced that new consultations would not result in successes. Regarding Afghanistan, the political actors agreed that no other option was available, but jurists doubted this. Some of them thought more would have been possible at diplomatic level, had the United States directly negotiated with the Taliban. There has been much debate about Iraq, regarding this criterion. The weapon inspections restarted at the end of 2002 and reported no special findings until the last inspections in March 2003. Weapon inspectors expected to finish their investigations within some extra months. France was willing to wait for their results and prepared a two-step proposal, which would describe the consequences when illegal possession or development of weapons of mass destruction was discovered by the inspections in Iraq.

Reasonable chance on success

The NATO and most of its member states expected quick results of the goals in Kosovo. The Bush administration was not too optimistic about the expected success of the war against terrorism in Afghanistan, because locating Osama Bin Laden and his fighters would be

extremely difficult in the difficult accessible country. Therefore, the Bush administration emphasized that this would not be the only goal. The stabilization of the country would also help – indirectly – to fight terrorism. The opinions were divided regarding Iraq. The members of the 'Future of Iraq Project' – who had to prepare *regime change* – were positive about the removal of Saddam Hussein, but were less optimistic about the chance of success.

Peaceful ends

All interventions had formulated peaceful ends. The peaceful end of the intervention in Kosovo was also the motive to intervene.

8.1.3 Conclusion input legitimacy

Table 7 gives an overview of the public debate on the input legitimacy of the three cases.

Many of the indicators are positive for the intervention in Kosovo, which had a positive role in the debate about input legitimacy. Only a small opposition doubted the proportionality of ends. There had been some doubts about the authorisation of the intervention as well. Most indicators for the input legitimacy of Afghanistan had been positive as well. This intervention had also a small opposition, which mainly disagreed with the proportionality of goals. The priori expectation about the chance of success was not a positive criterium within the debate, since decision-makers had their doubts about this. The intervention in Iraq has been debated thoroughly, with opponents and proponents strictly divided on both national and international level and unable to reach an agreement. That is why the development of legitimacy is judged as strongly 'depending' on the 'side' that was chosen. The results did not show doubts about the acceptability of the intervention. The debate focussed on the peacefulness of the ends. The input legitimacy of the intervention of Iraq was therefore low, but not absent.
The indicators for the input legitimacy of the case Afghanistan were also positive. Only a small opposition doubted about the proportionality of ends and the only negative role in the debate was the a priori estimation that the chance on success would be limited. The intervention in Iraq caused more discussions. Two sides, of opponents and proponents, formed on both national as international level. These 'sides' did not find consensus on most debated issues. Therefore, the development of legitimacy is judged as 'depending' on the side that was taken. The results did not indicate that the acceptability of the intervention was in doubt, nor was there debate on the peacefulness of ends. Although input legitimacy was very low, it was not absent.

Actors from all kind of perspectives participate in the public debate. INGOs do not play a part during this stage of the public debate, to make sure to maintain their neutral position. It is clear that the United Nations had only a limited role in the debate about Kosovo and Afghanistan. In both cases, intervening states did not ask the United Nations for authorisation before the actual start and the United Nations did not gave a positive or negative reaction afterwards. The intervention in Kosovo caused some debate, because Russia and China did not support the intervention. Afghanistan has not caused any debate. This is not only important for the lawfulness of the intervention, but also for the acceptability, because the United Nations has, therefore, not debated several of the Just War criteria at all.

Obviously, all intervening states underlined the acceptable intention and the peaceful ends for all interventions, even though the reason to start the interventions in Afghanistan and Iraq was a very different one. While self-defence was the main reason in Afghanistan, and terrorism, weapons of mass destruction and ignoring the terms of UN resolutions were the main reasons in Iraq, the intervening states emphasized the humanitarian abuses that happened in both countries. This last argument changed into the new main goal for the Iraq

intervention, when no evidence was found to support the original main goal of the intervention; weapons of mass destruction. The democratization of Iraq became the most important reason to stay in the country. Furthermore, it is striking that the parliament of most countries had only a limited role in the authorisation of the interventions. The intervention in Kosovo was clearly supported by the German parliament alone. The American Congress was involved in the decision-making about Afghanistan and Iraq, but only by activating the War powers resolution, after the president received a mandate to start a war when necessary, without returning to the parliament before the start.

The last important issue is the role of the intervened state in the public debate, influencing the input legitimacy. All three interventions took place in countries that were internally divided. Therefore, the opinions about the interventions were divided as well.

8.2 Development of throughput legitimacy

8.2.1 Lawfulness

Authorisation

The debates about the lawfulness of the three interventions were positive during the throughput stage. Each stage of the Kosovo bombings had to be authorized separately by all involved NATO states. Although this slowed down the military actions, it did cause a broad support of all member states. The UN authorized stabilization and reconstruction operations in Afghanistan and Iraq. The presence of the intervening countries was more accepted because of the UN resolutions.

8.2.2 Acceptability

Proportionality

The intervention in Kosovo got – because of the use of cluster bombs – a lot of criticism on the indicator of proportionality. Afghanistan did receive a lot of criticism on this issue as well; press releases about cluster bombs, the impact of bombings on the – already – instable state and the treatment of captured fighters of both Taliban and Al Qaeda. The criticism on the intervention in Iraq is only limited during the throughput stage. President Bush stated in his 'mission accomplished' speech, on first of May 2003, that the intervention had been a quick and 'clean' one.

Avoiding civil casualties

INGOs warned already in the throughput stage of the intervention in Iraq for the development of a vacuum of power, which would cause a high number of civil deaths. Local authorities in Afghanistan warned for the high number of civil deaths already in an early stage of the intervention. The press releases during the Kosovo intervention were two-sided; the NATO argued that bombings campaigns were increasingly precise and successful, while Amnesty International published about the high number of civil casualties during the same campaigns.

8.2.3 Conclusion througput legitimacy

Table 8 gives an overview of the public debate on throughput legitimacy. The throughput legitimacy for the intervention in Iraq is 'neutral / depending', while it is slightly negative for Kosovo and negative for Afghanistan. The difference between Iraq and Afghanistan has to do with a difference in the development of the conflict. While heavy battles were fought against the Taliban and Al Qaeda in Afghanistan right from the start, the intervention in Iraq started relatively 'easy', because the Iraqi resistance against the American intervention was not strong at the start. The number of internal conflicts would only dramatically increase after the development of a vacuum of power.

The INGOs had a very important role in this stage of the debates. The United States stopped using cluster bombs in Kosovo after a publication of HRW, but used these bombs again in Afghanistan and Iraq. It is possible that the United States had to be more careful in Kosovo, since the American Congress divided about Kosovo in such an extent, that the support was only leaning on a very small majority. Many INGO press releases about civil deaths linked to the debate about proportionality, due to the risk involved or the used violence.

8.3 Development of output legitimacy

8.3.1 Lawfulness

Authority

In all three cases, the United Nations had a role in the later stages of the intervention, by authorisation of reconstruction operations. It was involved in the establishment of new administrative structures in Iraq and Kosovo, which was important to increase the autonomy of the interim government. ISAF had an increasing mandate in Afghanistan, while the influence of OEF was reduced. That is how the UN enhanced the legitimacy of the intervention in the throughput stage (Afghanistan and Iraq) and the output stage (Kosovo).

8.3.2 Acceptability

Safe guarding of rights

The criterion 'safe guarding of rights' has received a lot of criticism during all stages; the crime rates in Kosovo were very high, while some parts of Afghanistan and Iraq were rated as dangerous to very dangerous.

Proportionality, acceptable peace agreement

Actors on both national and international levels were generally content with the developed peace agreements. The peace agreement of Iraq cause more debate, because former political refugees got most of the highest positions of the government, which was also involved in the further developments of the administrative and juridical system

Discriminating between different groups

The (peace) agreements and policy of the intervening states does clearly discriminate between the different groups in the intervened states. The policy in Kosovo has been mostly successful. More difficulties were reported during the intervention in Afghanistan, were discriminating was hard in reality, despite the strategic plans, because it turned out to be difficult to recognize Taliban- and Al Qaeda fighters from other citizens, because they did not wear uniforms. The role of the former political refugees in Iraq was also debated in this issue, since they had a rather privileged position. A clear deviation was made by banning the *Baath* party.

Proportional punishments

Regarding the proportionality of punishments, the effectiveness of the legal system in Kosovo was discussed concerning the small chance of solving crimes. Simultaneously, the new legal system was established in a very short time. The Americans received criticism on their role in Afghanistan and Iraq, for example regarding the treatment of foreign prisoners of war in the prisons Guantánamo Bay and Abu Graib. Furthermore, a lot of criticism was issued on the use of the death penalty in Iraq.

Financial compensation

In all three cases, both countries and their citizens received financial compensation for the harm and damage done by international assistance on stabilizing and reconstructing the country. There had not been critique on this criterion, although positive reflections were rare.

Demilitarization and political sanitization

The last criterion – demilitarization and political sanitization – was problematic during all interventions. The situation in Kosovo was complicated by a chaotic situation caused by large groups of refugees returning to their villages. The goals of demilitarization and disarmament were not reached, as was demonstrated by the parallel functioning 'legal system' of the KLA. The Coalition was determined to stop the trade in weapons and drugs in Afghanistan, because its turnover was one of the main sources of income for the warlords. The implementation of this policy was hard. The political sanitization in Iraq was often in debate, because former *Baath* party members were brought to Iraqi courts, where many convictions ended in death penalty.

8.3.3   Conclusion output legitimacy

Table 9 gives an overview of the public debates on the output legitimacy. The most striking in this overview is the limited role of the intervening states and the intervened state. The most debate about the *ius post bellum* criteria is caused by press releases of INGOs and the publications of jurists. There have been some reactions by intervening states and the NATO website includes video material that demonstrates the positive aspects and developments of intervention. These reactions, however, are difficult to match with the *ius post bellum* criteria. Some of the reactions were, for example, to broad to fit in the small framework of these criteria. However, mostly, it is simply not possible to fit a publication to the *ius post bellum* criteria, because a country has already transferred these responsibilities to the interim government of the former intervened country.

There has been more debate about the *ius post bellum* criteria authorisation, proportionality and acceptability of the peace agreement and the financial compensation. The intervening countries had still responsibility on these issues and could therefore debate them more easily. The intervening states kept responsibility for stabilization and security as well, in all three cases, which are summarized within the criterion 'safeguarding of rights'. There has been critique on the implementation of this task. The United States imprisoned foreign prisoners of war, which got a lot of criticism. Guantánamo Bay and Abu Graib had a negative role in the debate about output legitimacy. Within other states, the national debates focused on the national responsibility for the wellbeing of prisoners after being turned over to the legal powers of the former intervened country.

Page 96 - Table 7: *Lawfulness and acceptability on the development of input legitimacy; debate at international level, in intervening state and in intervened state.*

Legitimacy	Indicator	Kosovo			Afghanistan			Iraq		
Lawfulness	Lawful authorisation	Russia and China were against the intervention in Kosovo, at the start. Resolution to condemn intervention was supported by only three countries in the General Assembly. The intervention in Kosovo was started after a diplomatic process, with agreement within the NATO and under its command.	±		As far as it is made public, the UN did not debate the United State's argumentation that intervention was legally based on self-defence. International custom right does not support. NATO supported this intervention.	0 ±		UN Security Council does not agree on second resolution. Does neither condemn Iraq. International custom law does not support pre-emptive actions in this case.	±	
		The government of the United States and important European states voted in favour of the intervention. The role of the parliament was different for each country, depending on the national public law.	± / +		The American Congress strongly supported intervention. The governments of the most important European countries supported the intervention. The role of the parliaments was depending on public law. States from all over the world supported the actions of the United States (military) as reactions on 9/11.	+ / +	+	Intervening states argued to act in line with UN resolutions. The American Congress and the English parliament agreed with the intervention. Germany and France did not support. 30 states offered (military) support in Iraq.	±	±
								Authority intervening state does authorize intervention. Would, however not be necessary for intervention based on UN resolutions.	±	
		Internal conflict about authority. Serbian authorities do not approve.	-		Intern conflict about authority. In case of self-defence, the approval of the authority would not be necessary.	±				
Acceptability	Acceptable reason	Most jurists supported the reason for humanitarian intervention. Three UN member states did not support the NATO's argumentation.	+		The UN did not interfere in the debates about this indicator. NATO supported the argumentation of self-defence. Jurists were divided.	+		Three countries of the UN Security Council were of opinion that old resolutions were to less ground for intervention. Jurists are divided.	±	
		The reason to intervene, according to intervening NATO states, was preventing the development of a humanitarian disaster.	+ / +	+	All important European States supported the American right on self-defence.	+	+	US wanted to intervene based on ties terrorists – Iraq, but based it on meeting the terms of earlier UN resolutions later. Humanitarian intervention was the only reason that was used after the start of the intervention.	±	±
		Yugoslavia and Serbia called the problems 'internal affairs', so no reason for military intervention. The Kosovo-Albanians agreed the intervention was acceptable.	±		Afghanistan was divided	±		Iraq was divided.	±	
	Acceptable authorisation	The Contact Group was already looking for a solution for some time, but did not propose military intervention. NATO regarded stability in Kosovo as one of its interests from 1997 onwards. Many jurist called it 'formalistic' not to intervene in a severe crisis, when not fully authorized by Security Council, since only three of all UN members wanted to condemn intervention by a resolution of the General Assembly.	±		Most countries supported the United States after 9/11 and condemned the attacks. NATO offers military supported. Jurists are divided. International custom law does not support. No reaction of the UN.	±		Three countries of the UN Security Council were of opinion that old resolutions were to less ground for intervention. Jurists are divided. The Secretary-General of the UN – Kofi Annan – called the intervention in Iraq 'illegal'.	±	
		The intervention caused a debate in the United States, about the mandate of a president regarding the War powers resolution. Congress was only informed after the start of the intervention, but a small majority voted in favour. The French parliament was also informed after the start.	+	+	Support of important EU states and other states, broad coalition.	+	+	The majority of democrats of the American House of Representatives were against intervention. Within the British House of Commons, the liberals were opposed, while the Labour party was divided.	±	±
		Kosovo was divided.	±		Afghanistan was divided	±		Iraq was divided.	±	
	Lawful intention	The UN did not interfere in the debates about this indicator.	0		The UN did not interfere in the debates about this indicator.	0		The UN did not interfere in the debates about this indicator.	0	
		The United States and several European countries were prepared to participate in a short intervention without ground forces. Their goal was to put pressure on Yugoslavia	+		OEF wanted to cooperate with the Afghans, offer humanitarian help and leave Afghanistan as a better-developed state.	+	+	The United States and the United Kingdom planned to transfer the power in Iraq as soon as possible to an interim government.	+	+
		Kosovo was divided.	±		Afghanistan was divided	±		Iraq was divided.	±	
	Proportionality of goals	The UN did not interfere in the debates about this indicator. One of the jurists called the bombings not the most proportional way to solve the situation.	0		The UN did not interfere in the debates about this indicator.	0		Several members of the UN Security Council doubted the United States' evidence for the existence of weapons of mass destruction.	±	
		The French prime minister asked for a diplomatic solution as long as possible, out of fear for huge numbers of refugees after bombings. The American army was proponent of bombings, because this caused less risk for soldiers.	±	±	Mainly criticism from left and green political parties (on OEF).	±	±	The United States and the United Kingdom agreed it was proportional to turn over a regime, which developed weapons of mass destruction. There were, however, doubt about this argument on national level.	±	±
		Kosovo was divided.	±		Afghanistan was divided	±		Iraq was divided.	±	
	Last resort	The UN did not interfere in the debates about this indicator.	0		The UN did not interfere in the debates about this indicator. Jurists were divided about option of negotiating with the Taliban.	±		UN Security Council member France preferred to wait for the results of the weapon inspections. Several inspectors wanted to finish their jobs first as well.	-	
		Diplomatic consultations were continued until all intervening countries were convinced that military intervention was the last resort.	+	+	Intervening states were of opinion that the Taliban does not cooperate and protect the terrorists. Military intervention only solution.	+	+	The United States and the United Kingdom wanted to act on short notice. Military action would be last resort.	+	±
		Kosovo was divided; KLA wanted earlier start of intervention.	±		Afghanistan was divided	±		Iraq was divided.	±	
	Reasonable chance of success	The UN did not interfere in the debates about this indicator. The NATO did reckon on goal achievement after a short bombing campaign.	±		The UN did not interfere in the debates about this indicator.	0		The UN did not interfere in the debates about this indicator.	0	
		One American military, used in the literature of this research, called the chance on success limited, but the NATO member states thought that the goal of the intervention would be achieved sooner than it did.	+	+	The US *War Cabinet* is not sure about chance of success.	-	-	Several participants to the 'Future of Iraq Project' agreed that the future administration of Iraq should not consist from former political refugees. The United States prepared for a quick transference of powers after intervention.	±	±
		Kosovo was divided.	±		Afghanistan was divided	±		Iraq was divided.	±	
	Peaceful ends	The UN did not interfere in the debates about this indicator. NATO wanted to force Serbia to sign a peace agreement.	+		The UN did not interfere in the debates about this indicator. NATO just supports US, no 'own' policy.	±		The UN did not interfere in the debates about this indicator.	0	
		The NATO wanted to reach a peace agreement by forcing the involved parties to negotiate with a bombing campaign.	+ / +	+	Intervening states want to leave Afghanistan as 'better place'.	+	+	Transference of powers to the new government was the central end of intervention.	+	+
		Kosovo was divided.	±		Afghanistan was divided	±		Iraq was divided.	±	

Legitimacy	Indicator	Kosovo			Afghanistan			Iraq		
Lawfulness	Authorisation	The UN did not interfere in the debates about this indicator. NATO authorized all stages of the intervention separately, when all member states agreed. This slowed down the process, but also caused strong support of member states.	±		In December 2001 the International Security Assistance Force (ISAF) started, which the UN authorized based on *Chapter VII*. A broad coalition of countries was active.	+ +		The *Coalition of the Willing* (MNF-I) remained in Iraq after the '*mission accomplished*' statement from Bush. In August 2003 the UN Security Council authorized the presence of countries for reconstruction work. One source called the presence of the Coalition between May and August 2003 unlawful. This was only possible because Bush did not officially claimed victory in May 2003.	± / +	
		The different states caused strong support in member states. Greece and Italy were most reluctant states.	+	±	There were discussions within the participating countries of ISAF. In Europe there were mainly with green and left wing parties	±	+	The number of countries involved with UNAMI reconstructions remained limited to 25. France and Germany are not named as donors.	±	+
								No discussion known in the intervened state.	0	
		Intern conflict about authority. Not authorized.	-		In 2002, the interim government Karzai was installed. It asked the ISAR to remain in Afghanistan for assistance. Simultaneously, Karzai is known to have limited influence in Afghanistan and his opponents see him as too depending on the US.	±				
Acceptability	Proportionality	The UN did not interfere in the debates about this indicator. Human Rights Watch published about het use of cluster bombs.	-		The UN did not interfere in the debates about this indicator. In some parts of the world – for example Indonesia and Pakistan – protests were held against the intervention and the world leaders. INGOs were worried about the bombardments, the treatment of imprisoned Taliban and Al Qaeda fighters and the use of cluster bombs.	0 / -	-	In Resolution 1472 –authorizing the presence of international forces for stabilization and reconstruction – the UN calls on intervening countries to obey the *ius in bello* criteria.	±	+
		The United States stopped the use of cluster bombs as reaction to a report of HRW. United Kingdom did not change policy. But a report to parliament does explain the impacts of these bombs and asks for evaluation of the use of these bombs.	-		No discussion known within the intervening states.	0		President Bush stressed during his '*mission accomplished*' statement in May 2003 that the war was quick and clean.	+	
		No discussion known in the intervened state.	0		No discussion known in the intervened state.	0		No discussion known in the intervened state.	0	
	Avoiding civil casualties	The UN did not interfere in the debates about this indicator. According to departing chairperson of the Military Committee of NATO – Nauman – were the bombardments executed with great precision and success. Amnesty International however warned for civilian casualties, especially when they were used as a shield by Serbian soldiers and NATO continued bombing.	±	±	The UN did not interfere in the debates about this indicator.	0	-	INGOs warn for a vacuum of power in Iraq and the number of civilian casualties.	-	-
		No discussion known within the intervening states.	0		No discussion known within the intervening states.	0		No discussion known within the intervening states.	0	
		No discussion known in the intervened state.	0		Afghans worried about the increasing number of civil casualties.	-		No discussion known in the intervened state.	0	

Table 8. *Lawfulness and acceptability on the development of throughput legitimacy; debate at international level, in intervening state and in intervened state.*

Legitimacy	Indicator	Kosovo		Afghanistan		Iraq	
Lawfulness	Lawful authorisation	After het peace agreement between NATO and Yugoslavia / Serbia was signed, the UN authorized KFOR for the stabilization of Kosovo. Furthermore, UNMIK started with the reconstruction of the administrative system in Kosovo.	+	The area under command of ISAF, enlarged in four stages until the NATO was in command in the whole of Afghanistan in October 2006. OEF remained active as well.	+	The UN decided at the 8th of June 2004, that the occupation of Iraq would be stopped by the 30th of June 2004, but legitimated the MNF-I to stay in Iraq until - at least the end of 2005 - to stabilize the situation.	+	
		There has been no open discussion in the UN about the authorisation of KFOR. China abstained from voting. Russia voted in favour and did support KFOR militarily.	+	There are no results that show important changes in the national mandate for military intervention, in the United Kingdom, Germany and France.	+ +	The Coalition changes slowly: more and more countries withdraw from Iraq.	-	+
		The presents of KFOR and UNMIK was agreed in the treaties between NATO and Yugoslavia and Serbia.	+	The supporting role of ISAF is still wanted by the Afghan government. The role of Karzai remained unchanged.	±	Iraq had an own Constitution from the 8th of March 2004 onwards, and an Iraqi Interim government was established at the 1st of June. Elections were organized in 2005, for both the parliament (January) and the president (April).	+	
Acceptability	Safeguarding rights	Several (I)NGOs have warned for a higher level of violence.	-	NATO mainly expressed itself hopeful on the success of running projects. From the academic/juridical community there was criticism on the *top down* implementation in Afghanistan, which would be counterproductive.	±	INGO's published about the increasing violence in Iraq and the problems with the new Iraqi juridical system.	-	
			-	France criticized the lack of coordination between regions under the command of different *lead nations*.	- -	No discussion known within the intervening states.	0	-
		No discussion known within the intervening states.	0	No discussion known in the intervened state.	0	No discussion known in the intervened state.	0	
		According to Serbian resources, the NATO bombings were hardly successful.	-					
	Proportionality, reasonable peace agreement	The NATO and Serbia agree on a peace agreement in May 1999, in which the withdrawal of Serbian troops is arranged. There is no discussion known that doubts the reasonability of this agreement.	+	The intervening states transferred their powers to the interim government in 2002 and prepare for Afghan elections. The reasonability is not doubted.	+	The occupation of Iraq was ended on the 30th of June 2004. The major influence of former refugees in the interim government has been criticized.	±	
		There is no discussion known that doubts the reasonability of this agreement.	+	The reasonability is not doubted.	+ +	No discussion known within the intervening states.	0	±
		No discussion known, but since the civilians were strongly divided along ethical Lines during the war, it would be logical when the Serbians and Kosovo-Albanians still have a different opinion.	±	No discussion known, but since the civilians were divided during the war, so it would be logical when these groups still have different opinions.	±	No discussion known, but since the civilians were divided during the war, so it would be logical when these groups still have different opinions.	±	
	Discrimination between groups	The peace agreement and NATO policy discriminate between different ethnical / religious groups.	+	The UN / NATO policy discriminate between Taliban / Al Qaeda and the remaining citizens, although implementation of this policy is hard.	±	The international community wanted an interim government composed of the main ethnical / religious groups in the Iraqi society. The main positions, however, were taken by former political refugees. The Baath party was declared illegal.	±	
		No discussion known within the intervening states.	0	No discussion known within the intervening states.	0 ±	No discussion known within the intervening states.	0	±
		No discussion known in the intervened state.	0	No discussion known in the intervened state.	0	No discussion known in the intervened state.	0	
	Proportional punishments	The construction of a new juridical system was necessary and developed in a few months. There has been a lot criticism on the system, because of the low chance that a crime is solved.	±	The American treatment of foreign prisoners of war (POW's) and the establishment of Military Committees by the American President have received a lot of criticism. According to jurists, it is to the Congress to establish such committee.	-	INGOs criticize the sentences in Iraq; especially the death penalty and the treatment of prisoners in American detention centre – like Abu Graib.	-	
		No discussion known within the intervening states.	0	There has been debate on national level, about the acceptability of extradition of suspects to partner countries.	- ±	No discussion known within the intervening states.	0	-
		No discussion known in the intervened state.	0	No discussion known in the intervened state.	0	No discussion known in the intervened state.	0	
	Financial compensation	Humanitarian intervention of the UN includes financial compensation.	+	Humanitarian intervention of the UN includes financial compensation.	+	Humanitarian intervention of the UN includes financial compensation. Old sanctions on Iraq were lifted.	+	
		No discussion known within the intervening states.	0	Intervening states have their own arrangements for (financial) compensation of civilians who are unintentionally harmed by military action. No discussion known within the intervening states.	+ +	Intervening states have their own arrangements for (financial) compensation of civilians who are unintentionally harmed by military action. No discussion known within the intervening states.	+	+
		No discussion known in the intervened state.	0	No discussion known in the intervened state.	0	No discussion known in the intervened state.	0	
	Demilitarisation and political sanitization.	The start of a new juridical system and administration is a difficult process, because the regulation of returning refugees requires a major effort.	-	The NATO fights warlords – and the Taliban and Al Qaeda – by fighting trade in drugs and weapons, but the process is difficult.	-	The INGOs are concerned about disproportional punishment during political sanitization – for example the usage of the death penalty.	-	
		No discussion known within the intervening states.	0	There has been debate on level of intervening stats, about the difficulty of acting against the trade in drugs and weapons.	- -	No discussion known within the intervening states.	0	-
		KLA establishes own structures, parallel to the UN.	-	No discussion known in the intervened state.	0	No discussion known in the intervened state.	0	

Table 9. The Lawfulness and acceptability on the development of output legitimacy; debate at international level, in intervening state and in intervened state.

8.4   Development legitimacy

The analysis of the results showed that the different criteria of the Just War theory matched the actual issues on which the public debate focused during the three phases of policy making (decision-making, implementation, output of policy), thereby influencing the legitimacy during each of these policy stages (input, throughput, output).

Based on results of the study, the legitimacy of the interventions in Kosovo, Afghanistan and Iraq develops like showed in table 10. The intervention in Iraq was the least lawful case at the start, followed by the intervention in Kosovo. The United Nations authorized the humanitarian intervention in Iraq and Afghanistan during the throughput stage. These interventions are regarded as lawful from this moment onwards. The United Nations decided to authorize the humanitarian intervention in Kosovo during the output stage. Therefore, the intervention in Kosovo is only regarded as lawful during the output stage.

The development of the acceptability developed for all both interventions in the opposite direction; the interventions were acceptable during the start, but this decreased during the missions. The intervention in Kosovo receives its main criticism during the throughput phase and less in the output phase is. The intervention in Afghanistan received a lot of criticism regarding the Just War criteria (acceptability) in both the throughput as the output phase. Iraq received most criticism during the strong increase in violence of the output phase, while the throughput phase was reviewed as 'neutral / dependent', this phase was ended relatively quick and 'clean'.

Legitimacy		Kosovo	Afghanistan	Iraq
Input legitimacy	Lawfulness	±	+	±
	Acceptability	+	+	+
Throughput legitimacy	Lawfulness	±	+	+
	Acceptability	-	-	±
Output legitimacy	Lawfulness	+	+	+
	Acceptability	±	-	-

Table 10. Overview development legitimacy based on the Just War theory.

8.5   Conclusion analysis

Remarkable, regarding the development of the public debate, is the absence of the INGOs during the start of the war – to preserve their neutrality – while these organizations have one of the main roles during the throughput and output phase. The development of the role of intervening and intervened state, is the completely opposite. These actors have a main role during the start of the intervention, but much less role in the debate during the intervention and after the fighting phase. The arguments of the military actors of the (joint) intervening states – as the NATO or national armies – were often not fitting with the ethical Just War criteria, because the focus of these organizations seemed to be to practical; focused on 'how they do it' rather than answering questions like 'should this action be taken. Although this might seem a logical choice, regarding the executive character of their Ministry's mandate, these communication lines are not likely to have significant influence on the development of legitimacy. Political debates often focus on the *ius in bello* criteria, like proportionality and avoiding civil casualties, and have less attention for *ius post bellum* criteria about the reconstruction tasks. The role of intervening states is especially limited during the output phase, because their role in the conflict does not seems to fit with the Just War criteria any more; many criteria that are judged as influential for the development of legitimacy are not

the responsibility of the intervening states anymore, since some of the powers have already been transferred to the interim / new government. A good example are the trials of former leaders of the Baath party in Iraq, who were convicted based on the new Iraqi legal order, which did not meet the rule of 'proportionality of punishment' as defined in the human rights in UN Charters since the death penalty was used. Although the former intervening countries had no jurisdiction in these trials, the proceedings had negative consequences on the development of legitimacy.

The roles of the intervened states were complicated during all interventions, because several groups with conflicting opinions were active in each case. Remarkable for the intervention in Iraq is the role of the citizens of these groups, who became increasingly united in the resistance against the occupying role of the United States, especially in the debate about cluster bombs and civil casualties.

Furthermore, it is notable, that intervening states put emphasizes on the most difficult goal of the war during the input phases of the three cases; enhancing the humanitarian situation in these countries. The debates about the development of the war, regarding these goals, started already during the throughput phases. The most important debate was about civil casualties – which were often in the news because of the activists' role of the INGOs – influencing the debate about proportionality of the war. INGOs tried to show in press releases, that intervening troops had taken too many risks or had used too much violence, thereby not meeting the *ius in bello* criteria formulated in the Geneva Conventions. The same focus was present during the output phase, as 'proportionality of punishments'. Regarding the intervention in Iraq, the publications about the detention centres Guantánamo Bay and Abu Graib had a negative role in the debate on the development of output legitimacy.

9 Conclusion

Legitimacy during the policy cycle is important for stable politics and policy. Furthermore, legitimacy is of growing significance for the defence organisation. Therefore, it is interesting and relevant to know how legitimacy for military interventions develops.

Legitimacy is the agreement with a decision, the degree in which the society considers a decision as lawful and acceptable. Therefore, it is crucial that the legalised authority lawfully takes a decision. Furthermore, a decision has to correspond to the prevailing values and norms within a society to be judged as 'acceptable'. To facilitate the analysis of the development of legitimacy during a military intervention, this study recognises three phases: input legitimacy, throughput legitimacy and output legitimacy.

The arguments used in the public debate about legitimacy of military intervention are different within each phase of the intervention (subquestion 1). In every phase, lawful authorisation is important. Acceptability is important in each phase of the development of legitimacy as well, but has a different set of indicators of the Just War theory in each phase. The input legitimacy is indicated by the *ius ad bellum* criteria: acceptable reason, authorisation and intention, proportionality of ends, last resort, reasonable success and peaceful ends. Throughput legitimacy is indicated by the two *ius in bello* criteria: proportionality and avoiding civil casualties. *Ius post bellum* criteria are important for output legitimacy: safeguarding of rights, a reasonable peace agreement, discrimination between different groups, proportional punishments and financial compensation for war damage, demilitarisation and political sanitisation.

The actors with an active role in the public debate about military intervention are the international community, the intervening state and the intervened state (subquestion 2). All three actors influence the lawfulness of decision-making and the development of legitimacy. The states are the main actors in the actual decision-making process, but are led by the lawyers, since decisions are bound to be lawful – both according to national and international law. The process of political decision-making is of importance for an intervening state. The procedures of political decision-making differ between states. The United States has seen a lot of debate about the War Powers Resolution, which – once activated – authorised the president to act independently of the Congress regarding the start of a war, when this is judged as 'necessary'. The Congress had authorised the president to intervene Iraq – when necessary – already in October 2002. There have been many discussions about the degree of freedom of the US president, based on this resolution. President Bush used his mandate to install Military Committees. According to jurists, the president had no mandate for this. In France, the degree of autonomy of the government was debated. The government has to ask for parliamentary approval in classical situations of warfare, but the government argued that the interventions in Kosovo and Afghanistan were no classic situations. The parliament of the United Kingdom discussed the interventions, but did not vote on it, because the UK government is not obliged to issue an amendable motion. The parliament of Germany did vote in favour for all interventions with a large majority of votes.

The different phases in the development of legitimacy are all bound to specific stages in the policy cycle, where actors have their own specific role. Therefore, legitimacy is not a fixed parameter; it develops and changes during and after an intervention. A policy decision is taken in the input phase, with a major role for political decision-making. Simultaneously, military organisations are involved in military planning and preparations. Policy is implemented in the throughput phase: the phase during which the actual war is fought. Logically, military organisations play a major role and human rights organisations are active by the monitoring of the conflict situation. During the output phase, military tasks are (gradually) transferred to the interim government of the intervened country. During this transfer the responsibilities of the intervening states decrease, but human rights

organisations keep monitoring the situation and will direct their feedback and press releases mainly to the intervening states. The development of legitimacy continues to be influenced by the human rights organisations. Governments of intervening states can be held responsible for tasks that were already transferred, which makes it difficult for governments to react in an adequate way to such situations. Regarding to Iraq, for example, the only possible reaction to the criticism on the use of the death penalty by Iraqi lawyers, was one pointing out the responsibilities of the Iraqis. This situation will be more often the case when the intervening state transfers the powers to the new (interim) government in an early stage, while still being present in the country for other tasks. Although this strategy might have positive outcomes on other issues, it might not be the easiest way for the development of legitimacy.

The role of these different actors in the public debate differs for each stage of the policy cycle (subquestion 3). The role of the intervened state depends on the kind of intervention and is most significant during the input phase. Different parties with conflicting opinions about intervention were further limiting the role of the intervened state in all three cases, since the states were unable to publish one, clear opinion. The position of the Taliban was important regarding the intervention in Afghanistan as this regime had isolated itself from other states and was even judged as a threat to national security by neighbouring countries. Therefore, the influence of their opinion on the legitimacy of the intervention was very limited. The role of intervened states during the throughput and – especially – output phases is often limited, because an intervention does often puts constrains upon or remove the authorities from power, as was the case in Afghanistan and Iraq, and partly in Kosovo as well. The role of intervening states in discussions is most important during the input phase of a war, during the process of authorisation and is rather low during the output phase of the war. The international community exists of jurists, humanitarian organisations and international organisations like the UN. Both humanitarian organizations and the UN were very reluctant to express themselves during the input phase. Humanitarian organisations were keen on their neutral position in the conflict. (I)NGOs played an important role in the throughput and output phase of the intervention. The UN was not officially involved, regarding the cases in Kosovo and Afghanistan. The UN did not authorise nor disapprove these interventions. Three countries supported a resolution to condemn the intervention, but found no other allies within the UN General Assembly. Since the UN gave no reaction at all, it was neither involved in the debate about the acceptability of the war, based on the *ius ad bellum* criteria. The UN did authorise all interventions in a later stage. The NATO was important regarding the international military role. The NATO member states decided to intervene in Kosovo together (NATO treaty, Article 5). Although UN legitimacy would have been a better start in the debate about legitimacy, the collective decision-making in the NATO influenced it positively as well. Jurists had a clear role in the debate about the lawfulness of authorisation. Most jurists agreed on an intervention in Kosovo, since it stopped the development of a humanitarian disaster. Jurists differed in opinion about Afghanistan and Iraq. Especially Iraq divided the jurists in two sides: the ones who argued the intervention was lawfully authorised and the ones that disagreed with this.

The goal of this study was to investigate the way in which the public debate about legitimation develops before, during and after the military intervention without a 'clear' UN approval (main question). It has become clear that the way of acting, the involved actors and the public debate strongly depend on the moment in the policy cycles. This will cause a different focus within the development of legitimacy, which will be influenced by various indicators and processes in each stage of the policy cycles. The difference between the criteria of *ius ad bellum* and *ius in bello* is a difference between intention and execution. The humanitarian function of an intervention was strongly emphasised during the stage of decision-making of all cases. Highlighting this kind of goals will enhance the input legitimacy. However, these goals cannot be evaluated until the last stages of the war, when the main battles have been fought and reconstruction tasks gain attention. Between good intentions

and peaceful outcomes is always a stage of fighting. This stage gains more attention when the public debate focuses on the use of violence and civil casualties. The different characteristics of the stages of the policy cycle cause an impassable boundary between the underlined intensions and the slow progress in practice. A fast decrease in legitimacy after the start of the intervention could be avoided by a more realistic idea of an intervention at the start. This can be done in a positive manner, by not only focusing on the long-term goals of the output – *ius post bellum* – phase, but also by showing the short-term goals of the throughput – *ius in bello* – phase. These short-term goals could be formulated positively, by emphasising the importance of a 'clean' war in the public debate.

In all three cases – Kosovo, Afghanistan and Iraq – there has been a fast transfer of power from the intervening states to the new (interim) government of the intervened country. The role and jurisdiction of intervening states changed during this process. Although the former intervening country might still be involved in stabilisation and reconstruction tasks, for example by invitation of the new (interim) government, it has no official responsibility anymore, which was based on the function of occupying power. The Just War theory has as a principle that a country should be reconstructed at least to pre-war level. When the power is transferred shortly after intervention, one has to accept that the means to enhance the country's situation may become less available or effective, therefore limiting the possibilities to fulfil the demands of the Just War theory. This will leave a 'moral guilt', when the ethics of a society are defined by the Just War theory – as is the case in present times. This moral guilt may play a negative role in debates about legitimacy of an intervention.

10 Recommendations

1. *Put less emphasis on* ius post bellum *arguments during the phase of decision-making about military intervention.*

   Although underlining these criteria will enhance the development of legitimacy, especially in the European Union, these goals focus on the long-term and can only be reached after a phase of fighting. The full realisation of the goals might even take extensive action over a longer period during the reconstruction tasks at the end of the war, causing a huge contrast between the phase of decision-making (input) and the phase of fighting (throughput). More focus on subgoals and more attention to criteria indicating a 'clean' war might be more attractive on long term.

2. *Acknowledge that a quick transfer of power to the new (interim) government of the intervened country means that the intervening state loses some of its tasks and responsibility.*

   This may make it harder to reach the *ius post bellum* criteria, while non-state actors will remind the state to its old intentions formulated in the input phase of an intervention. It is not intended to give an advice about the speed of the process of transfer – political and strategic reasoning have an own role in this decision – but it changes the debate on the development of legitimacy and it is important to acknowledge this.

3. *Use the Just War criteria in the public debate, also in the phases of executing policy decisions (ius in bello and ius post bellum).*

   Just War criteria were used extensively by the involved actors during the input phase. However, the political and military actors were less able to use these criteria during the phases of fighting (throughput) and reconstruction (output). This is partly caused by changing tasks and responsibilities. Especially the military actors in the public debate would have to put more emphasis on the ethical 'why-question' and less on the practical 'how-question', to fit communication to the demands of the Just War thinking, which argumentation is dominant in present times.

11 Summary

This study evaluates the debate about legitimacy of military intervention before, during and after military intervention. Lawfulness depends on a decent process of authorisation, while acceptability depends on the values and norms within a society, which are reflected – in present times – by the *Just War* theory.

Military interventions are divided in an input, throughput and output phase. Lawful authorisation is important in every phase, as is the Just War theory. The political actors turn out to be the major actors during the input phase, emphasising the good intentions and peaceful ends. The role of development organisations turned out to be most important during the throughput and output phases. The limited role of the political actors during these phases can be explained because some of their responsibilities were – at least during the recent wars Kosovo, Afghanistan and Iraq – transferred to the new (interim) governments of the intervened countries rather quickly.

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