Humanitarian Intervention

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Content type: Encyclopedia entries
Product: Max Planck Encyclopedia of Public International Law [MPEPIL]
Article last updated: May 2011

Subject(s):

Humanitarian intervention — Armed attack — Armed conflict — Conduct of hostilities — Civil and political rights — Gross violations

Published under the auspices of the Max Planck Foundation for International Peace and the Rule of Law under the direction of Rüdiger Wolfrum.

A. Concept and Terminology

1 Intervention has been characterized as one of the ‘vaguest branches of international law’ and one whose study may leave ‘the impression that intervention may be anything from a speech of Lord Palmerston’s in the House of Commons to the partition of Poland’ (PH Winfield ‘The History of Intervention in International Law’ [1922] 3 BYIL 130). Its limitation to ‘humanitarian intervention’ does little to facilitate greater precision.

2 At the outset, one might distinguish between forcible and non-forcible ‘humanitarian’ intervention. There are non-forcible actions, such as the provision of humanitarian aid (food, medicine, and the like), that could constitute ‘humanitarian intervention’. Since, however, intervention in its classical incarnation is generally considered to involve the use of force, these non-forcible actions are better described as ‘humanitarian assistance’ (→ *Humanitarian Assistance in Cases of Emergency*; → *Intervention, Prohibition of*). Humanitarian intervention can then be loosely defined as a threat or use of armed force against another State that is motivated by humanitarian considerations. This broad definition is not technical and does not imply any distinct legal justification for the forcible action. Many legal justifications for the use of force may involve a humanitarian component or motivation: for example, authorization by the Security Council, → *self-defence*, the protection of nationals abroad (itself connected to self-defence arguments), and armed action upon invitation or with the consent of the target State (→ *Intervention by Invitation*).

3 ‘Humanitarian intervention’ also has a narrower meaning as an autonomous justification for the use of armed force in another State distinct from other legal justifications. Humanitarian intervention in this narrower sense can be defined as the use of force to protect people in another State from → *gross and systematic human rights violations* committed against them, or more generally to avert a humanitarian catastrophe, when the target State is unwilling or unable to act. This is still a broad definition, which could be applied to almost any instance of use of military force that has been claimed to have a humanitarian objective or to have been based on humanitarian considerations. The term is not one of art, however: it does not appear in any international treaties; and it cannot be said that its boundaries are yet clearly delineated.

1. Historical Antecedents

4 Humanitarian intervention as a specifically legal justification for the use of force dates back at least as far as Grotius and his argument that war can be undertaken as punishment of the ‘wicked’ (as long as the punisher’s hands are clean), as well as on behalf of the oppressed. Alberico Gentili had made similar arguments earlier, though his focus was more on moral than on legal duties (Chesterman 14). Later, Emmerich de Vattel accepted an exceptional right to intervene in support of the oppressed when they themselves revolt against their oppressive government, though he rejected any right of intervention or interference in the domestic affairs of another State in other circumstances.

5 In the pre-UN Charter era, there was no established → *State practice* of reliance upon a right of humanitarian intervention to justify the use of force—though then, as now, academic commentators wrote in support of the concept. Interventions by the Great Powers in the moribund Ottoman Empire in the 19th century for the protection of that Empire’s Christian and Jewish populations have often been claimed by jurists to be instances of humanitarian intervention. However, even in those cases where armed force was actually used, as in the naval battle of Navarino in 1827 in support of the Greek rebellion or in the French occupation of Lebanon and Syria (at the time, parts of the Ottoman Empire) in 1860–61, the legal justifications relied on by the intervening States, when any were offered, referred to treaty obligations of the Ottoman Empire, to consent to the intervention, and to the protection of trade interests, the prevention of → *piracy*, and so forth. Even the US

intervention in Cuba during the latter's war with Spain in 1898, described sometimes as genuine humanitarian intervention, was justified by the US on the basis of protection of US citizens and property in Cuba, the protection of US commercial interests, and even self-defence, along with a somewhat perfunctory reference in President McKinley's war message to the 'large dictates of humanity'.

6 History casts a heavy shadow over any intervention claimed to be 'humanitarian'. In the pre-Charter period, there are strong connections between any type of forcible intervention with a (proclaimed) humanitarian aim and, on the other hand, the colonialist enterprise (see N Krisch 'Legality, Morality and the Dilemma of Humanitarian Intervention after Kosovo' [2002] 13 EJIL 330–1 with further references). The US intervention in 1898, for example, led to Cuba becoming a US protectorate (→ *Protectorates and Protected States*). In all instances of forcible intervention during this period, humanitarian considerations were, if present at all, commingled with numerous other less laudable considerations, and were never exclusively or explicitly relied on as sufficient legal justifications in themselves.

2. Modern Concept

7 The establishment of a system of → *collective security* under the UN Charter radically changed the framework within which humanitarian intervention could be invoked and discussed. The UN has the power to intervene, including for humanitarian purposes, in any Member State under Chapter VII UN Charter. The reservation of domestic jurisdiction of Art 2 (7) UN Charter does not apply in such a situation. The invocation of Chapter VII powers of the UN Security Council is, to be sure, limited by Art. 39 UN Charter to situations which constitute a threat to the peace, a breach of the peace, or an act of → *aggression* (→ *Peace, Breach of*; → *Peace, Threat to*). UN practice, however, particularly during the 1990s, has established that even internal situations related to widespread violations of human rights or to the existence of a more broadly understood humanitarian crisis, may constitute 'threats to the peace'. In support of this practice reference is often made to (less and less obvious) transboundary effects such as refugee flows or, more generally, the 'destabilization of the region'.

8 This type of collective humanitarian intervention (on which see further paras 15–22 below), is juxtaposed to unilateral humanitarian intervention, ie intervention by one or more States in another State, acting alone or through an international organization other than the UN, on the basis of humanitarian considerations but on their own authority. Even intervention by a group of States (or an international organization) is unilateral in this sense when it takes place without proper authorization by the UN Security Council, to which the UN Charter gives the monopoly on the right to authorize the use of force (with the exception of the right of self-defence, which is limited *ratione materiae* and *ratione temporis*). 'Unilateral' here is not the antonym of 'multilateral'. Intervention by a group of States or an international organization on its own authority is literally multilateral, not unilateral; but the legally significant point is that it is not collective because it does not take place in accordance with the procedure the UN Charter has established for this purpose.

9 The main focus of this discussion of humanitarian intervention as a legal concept justifying the use of armed force is on such unilateral (including multilateral but not collective) humanitarian intervention. Collective humanitarian intervention is discussed below only incidentally, while other justifications for the use of armed force that may involve humanitarian motives but have an independent justificatory ambit, are not discussed. Such justifications include the 'protection of nationals abroad', a legal category that is sometimes called 'humanitarian intervention *stricto sensu*' but is often considered as a sub-species of self-defence; as well as the concept of intervention in defence of democracy ('pro-democratic intervention'), a fluid legal category which could perhaps be characterized as humanitarian intervention (to the extent to which it is accepted that the right to

democracy is an internationally protected human right, against the violation of which intervention takes place; see also → *Democracy, Right to, International Protection*).

B. Legality and Status in Customary Law

10 The starting point in considering the legality of any allegedly humanitarian intervention today must be the principles of the UN Charter. The Charter establishes the sovereign equality of States (Art. 2 (1); → *States, Sovereign Equality*); the obligation to settle disputes peacefully (Art. 2 (3); → *Peaceful Settlement of International Disputes*); the prohibition of the use of force (Art. 2 (4); → *Use of Force, Prohibition of*); and the principle of non-intervention by the UN in the domestic jurisdiction of States (Art. 2 (7)). These principles were reiterated and developed in the → *Friendly Relations Declaration (1970)*. For any humanitarian intervention to be justified under international law, it must be in accordance with these principles or come within an established exception to their application.

11 Since the use of force against a State, even on humanitarian grounds, prima facie violates the prohibition of the use of force in Art. 2 (4) UN Charter, it must, in principle, either be shown that such use of force is not contrary to the provision, or that it comes within one of the two established exceptions to the prohibition, namely authorization by the Security Council under Chapter VII UN Charter, or self-defence under Art. 51 UN Charter. If this is not the case, then the argument for the legality of humanitarian intervention must rest on a demonstration that a further exception to the prohibition of the use of force has emerged as a matter of customary international law in such a way as to modify the effect of the prohibition in Art. 2 (4) UN Charter.

1. The Scope of the Prohibition of the Use of Force

12 Art. 2 (4) UN Charter prohibits 'the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. Does humanitarian intervention actually fall within the scope of this prohibition? The UK argued in the → *Corfu Channel Case* that only force directed against the territorial integrity and/or political independence of a State is prohibited by Art. 2 (4), and that very limited uses of force for narrow purposes do not have this characteristic (→ *Territorial Integrity and Political Independence*). Similarly, an argument has been advanced that a use of force that is consistent with the purposes of the UN (Art. 1 UN Charter), one of which is the promotion of → *human rights* (Arts 1 (3); 55 (c) and 56 UN Charter), is *ipso facto* not prohibited under Art. 2 (4) UN Charter (→ *United Nations, Purposes and Principles*). In this narrow reading of Art. 2 (4), humanitarian intervention would not offend the territorial integrity or political independence of the target State, because the intervening State withdraws immediately upon the aversion of the humanitarian catastrophe that provoked the intervention, and does not in any way undermine or attack the government of the target State. Further, the reference to the 'purposes' of the UN in Art. 2 (4) UN Charter is read so as to qualify and limit the scope of the prohibition of the use of force, with the result that humanitarian intervention is permissible because, in aiming at the prevention of massive human rights violations, it advances the purposes of the United Nations.

13 The *travaux préparatoires* of the UN Charter, however, establish clearly that the expressions 'territorial integrity', 'political independence', and 'in any other manner inconsistent with the purposes of the United Nations' were not meant as qualifications of the scope of the prohibition in Art. 2 (4) UN Charter, but rather as reinforcements of the prohibition, aimed at assuring smaller and less powerful States that the use of force, for whatever reason, was absolutely prohibited. This was confirmed by the → *International Court of Justice (ICJ)* in the *Corfu Channel Case*, where a British argument that its actions in forcibly sweeping Albanian waters for mines did not violate the territorial integrity and

sovereignty of Albania was rejected, the UK intervention being declared to be a 'manifestation of a policy of force' (at 35). In the → *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)*, the ICJ reaffirmed the absolute prohibition of forcible intervention, and stated that 'the use of force could not be the appropriate method to monitor or ensure … respect' for human rights (at para. 268). The UN-authorized use of force for arguably humanitarian purposes (the protection of civilians) in Libya and → *Côte d'Ivoire* in 2011 demonstrates that for the humanitarian purpose to be achieved, armed force will usually have to be targeted against a ruling regime (see further paras 15–22 below).

14 Most importantly, the narrow interpretation of Art. 2 (4) UN Charter is inimical to the purpose and structure of an organization intended to maintain international peace and security through the establishment of a collective security system. Oscar Schachter famously wrote that the narrow interpretation of Art. 2 (4) UN Charter requires an 'Orwellian construction' (at 649) of the provision's terms. The better view is that any use of force, irrespective of its—humanitarian or otherwise laudable—motivation, is caught by the prohibition of Art. 2 (4) UN Charter and must be justified on the basis of an accepted exception.

2. The Traditional Exceptions to the Prohibition of the Use of Force

(a) Authorization by the Security Council under Chapter VII UN Charter

15 What has been called 'Security Council-authorized collective humanitarian intervention' (Franck [2002] 136–7) or simply 'collective humanitarian intervention' is nothing but the use of military force authorized by the Security Council under Chapter VII UN Charter for the maintenance or restoration of international peace and security, in circumstances where there is a humanitarian aspect to the Council's aims. Security Council practice since 1990 has extended the interpretation of 'threat to the peace', to the point that it is now accepted that egregious and widespread human rights violations within a single State, along with purely internal armed conflicts, can constitute such a threat. This was a 'settled practice' already in 1995, according to the → *International Criminal Tribunal for the Former Yugoslavia (ICTY)* in *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* IT-94-1-AR72 [2 October 1995] para. 30). Such violations or internal armed conflicts may result in a humanitarian crisis, and may create refugee flows, destabilizing the region and risking armed responses by neighbouring States. But even beyond these transboundary effects, the rise of human rights during the last century, and the concomitant shrinking of the → *domaine réservé* of domestic jurisdiction, has led the Security Council to acknowledge that purely internal situations may qualify as threats to the peace, even if the risk of serious transboundary consequences is marginal. In such circumstances, the Security Council may authorize States to take forcible measures to stop the human rights violations and avert or put an end to the humanitarian crisis. The use of force then can be seen as having a 'humanitarian purpose'; and the intervention of the international community as represented by the States willing to heed the Security Council's call to arms becomes a 'humanitarian intervention', but a collective one.

16 There are numerous examples of UN-authorized armed interventions that have been characterized as 'humanitarian' by jurists. They include the UN-authorized interventions in Somalia (UNSC Res 794 [1992] [3 December 1992] SCOR 47th Year 63 Haiti (UNSC Res 940 [1994] [31 July 1994] SCOR 49th Year 51); Rwanda (UNSC Res 929 [1994] [22 June 1994] SCOR 49th Year 10); Bosnia and Herzegovina (UNSC Res 836 [1993] [4 June 1993] SCOR 48th Year 13; Res 1031 [1995] [15 December 1995] SCOR 50th Year 18; Res 1088 [1996] [12 December 1996] SCOR 51st Year 42); Albania (Res 1101 [1997] [28 March 1997] 52nd Year 58); and East Timor (UNSC Res 1264 [1999] [15 September 1999] SCOR 54th Year 128). In each of these cases, the Security Council authorized the use of 'all necessary

means' to ensure delivery of humanitarian assistance (but not—initially at least—to assist any warring parties in an internal conflict), or to monitor the implementation of a → *ceasefire* or peace agreement.

17 In April 2011, the Secretary-General of the UN instructed the UN Operation in Côte d'Ivoire ('UNOCI'), and the French forces supporting it, to use force in order to prevent the use of heavy weapons against the civilian population in Abidjan by one of the parties to the conflict there. This was pursuant to authorizations by the Security Council to UNOCI and the French forces to use 'all necessary means' to protect civilians 'under imminent threat of physical violence' in UN Security Council Resolution 1933 of 30 June 2010 (UN Doc S/RES/1933 at paras 16–17), Resolution 1975 of 30 March 2011 (UN Doc S/RES/1975 at para. 6), Resolution 1739 of 10 January 2007 (SCOR [1 August 2006–31 July 2007] 208 at para. 8), and Resolution 1962 of 20 December 2010 (UN Doc S/RES/1962 at para. 17) respectively. The Secretary-General stated that the military operation undertaken by UNOCI was not in support of any party to the conflict, but rather was action in self-defence to protect civilians, in accordance with UNOCI's mandate (UN Doc SG/SM/13494 of 4 April 2011), even though the attacks were directed primarily against one party to the internal conflict. The authorization to use force in Libya by virtue of UN Security Council Resolution 1973 of 17 March 2011 (UN Doc S/RES/1973) was meant to ensure the protection of 'civilians and civilian populated areas under threat of attack' (at para. 4), but again force was employed against one of the sides to the conflict. While questions may emerge as to the scope of the authorization and the specific measures and targets covered, this is a matter of interpretation of the objective set by the Security Council. The important point for present purposes is that the use of force for arguably humanitarian reasons has been explicitly authorized by the Security Council in all instances described above.

18 There are also a number of cases in which force was argued to have been authorized by the Council, either implicitly or retrospectively, in humanitarian contexts. The US, the UK, and France intervened in Iraq in 1991 to alleviate the suffering of Kurdish (and subsequently also Shia) populations that were being oppressed by Baghdad. They intervened first by the establishment of safe havens and then by the introduction of no-fly zones over the north (and subsequently also the south) of the country (→ *Iraq, Non-Fly Zones*). These no-fly zones were kept in place until the 2003 invasion of Iraq (→ *Iraq, Invasion of [2003]*), though France withdrew from their enforcement in 1998. The intervening States relied primarily on UN Security Council Resolution 688 of 5 April 1991, 'in support of' which action was taken. The authorization of UN Member States to use force in order to implement Security Council Resolutions 660 (1990) et seq and to restore peace and security in the area in UN Security Council Resolution 678 of 29 November 1990 (SCOR 45th Year 27), following Iraq's invasion of Kuwait, had already ceased in accordance with UN Security Council Resolution 687 of 3 April 1991 (at paras 1 and 33). The argument in support of the establishment of safe havens and no-fly zones was that Security Council Resolution 688, though it was not adopted under Chapter VII UN Charter and did not include the shibboleth 'all necessary means', had implicitly authorized the use of force for the limited purpose of protecting the Kurds and Shi'ites in Iraq.

19 Along similar lines, it was argued with respect to the → *North Atlantic Treaty Organization (NATO)* intervention in → *Kosovo* that the NATO bombardments could be justified on the basis of UN Security Council Resolution 1199 of 23 September 1998 (SCOR 53rd Year 13), para. 16 of which provided that the Council would consider additional measures if the ones provided for in UN Security Council Resolution 1160 of 31 March 1998 (SCOR 53rd Year 10) did not lead to the desired results such as the defeat of violence and → *terrorism*. France, among other intervening States, considered that the use of force had been implicitly authorized by Security Council Resolution 1199 and Resolution 1203 of 24 October 1998 (SCOR 53rd Year 15) when further breaches of measures provided for in

Security Council Resolutions did occur. Another argument considered that the Security Council implicitly and retrospectively authorized the use of force against the (then) Federal Republic of Yugoslavia ('FRY') because it did not condemn the threat of force by NATO that led to the conclusion of agreements between the FRY and NATO and the → *Organization for Security and Co-operation in Europe (OSCE)* on verification in 1998, but rather endorsed these agreements (UNSC Res 1203). These arguments have caused much controversy in the literature.

20 With respect to potential *ex post facto* Security Council authorizations (or 'ratifications'), the → *Economic Community of West African States (ECOWAS)* interventions in → *Liberia* and → *Sierra Leone* through the Economic Community of West African States Monitoring Group ('ECOMOG') between 1990 and 1999, which were said to have essentially humanitarian aims, were 'commended' by the Council, while limited authorization to undertake visit and search of ships (→ *Ships, Visit and Search*) to enforce embargoes was granted when armed operations were already under way. This, it was argued by some (but disputed by others), amounted to *ex post facto* authorization of ECOWAS action. Similarly, French action in the Central African Republic in 1997 was approved and further authorized by the Security Council. These instances are perhaps enough to establish the possibility that the Security Council may retroactively authorize, validate, or ratify forcible action, even though significant reservations remain, for example with respect to the right of self-defence of the target State against the use of force that is, at the time, illegal, but is then retroactively authorized by the Security Council.

21 Conversely, no *ex post facto* authorization can be claimed to have been given through UN Security Council Resolution 1244 of 10 June 1999 (SCOR 54th Year 32), which established an international civilian and military presence in Kosovo following the NATO bombing campaign. It is one thing to accept the status quo based on a pragmatic attitude towards the situation on the ground, which is what 1244 actually did, and another to endorse an action explicitly, as the Council arguably did with respect to the ECOWAS interventions in Liberia and Sierra Leone (by 'commending' ECOWAS and ECOMOG for their 'efforts'). Some have argued that the mere absence of condemnation by the Council serves as some form of retrospective authorization. This pushes an already fragile argument on *ex post facto* authorization to breaking point. It is very difficult to establish the meaning of and motives for an omission with any semblance of certainty. The failure of the draft resolution that would have condemned the NATO action in Kosovo serves as a pertinent example: while some commentators rushed to consider this as an implicit *ex post facto* authorization of NATO, others pointed to the reasons put forward by States for rejecting the draft resolution, namely their uneasiness at the resolution being unbalanced, favouring the Serbs and seemingly lending support to the admittedly oppressive regime of Milošević.

22 In any event, forcible action authorized (even if *ex post facto*) by the Security Council under Chapter VII UN Charter, would constitute collective enforcement action that is legal under the UN Charter and international law as a recognized exception to the prohibition of the use of force. It would not constitute justified unilateral humanitarian intervention, or support the right to engage in unilateral humanitarian intervention.

(b) Use of Force in Self-Defence

23 Humanitarian intervention in order to alleviate the suffering of a local population cannot, without more, be justified as self-defence. Self-defence under Art. 51 UN Charter requires that an → *armed attack* occur against a State. In most cases, widespread violations of human rights will not reach the gravity threshold of an armed attack. Even if the oppression does reach the threshold of an armed attack, however, there will be no armed attack against a State, but at most an armed attack against the population of the State by or with the support or inaction of State authorities. The right to self-defence under

international law vests in States and not in sub-State entities such as the local population. Moreover, the oppression will, *ex hypothesi*, not emanate from another State, but will be by the government upon its own people.

24 There have been proposals within the North Atlantic Assembly to extend the right of self-defence to cover the 'defence of common interests and values, including when the latter are threatened by humanitarian catastrophes, crimes against humanity, and war crimes' (North Atlantic Assembly Resolution 283 para. 15 (e)), but international law certainly does not yet extend so far, nor does it seem to be moving in this direction. It has also been argued that the right of (collective) self-defence should perhaps cover not just attacks on States, but attacks on populations as well, since defence of a population is as much warranted as the defence of a political structure (Henkin 833). But these suggestions stretch the interpretation of Art. 51 UN Charter far beyond breaking point and lack any foundation in the practice and *opinio iuris* of States. Defending its intervention in East Pakistan (later Bangladesh) in 1971, India argued before the UN General Assembly that the influx of millions of East Bengali → *refugees* fleeing Pakistani repression amounted to 'civil aggression' comparable to an armed attack, but this—along with all other justifications put forward by India—was overwhelmingly rejected by the General Assembly, which called for the immediate cessation of the hostilities and for the withdrawal of → *armed forces*.

25 'Humanitarian' interventions have been justified on the basis of the right of self-defence under Art. 51 UN Charter. But this has been in cases where the State resorting to force could claim to have suffered an armed attack in the traditional sense by action of the target State. This was the justification of Tanzania for its intervention in Uganda in 1979. That intervention toppled the regime of Idi Amin, which had an atrocious human rights record; but Tanzania's legal justification of self-defence did not refer to that atrocious record or to the dire humanitarian situation in Uganda, but rather remained within the traditional paradigm. The same is true of the justification put forward by Vietnam for its 1978 intervention in Democratic Kampuchea (Cambodia), which brought an end to the violent and abusive Khmer Rouge regime (→ *Cambodia Conflicts [Kampuchea]*). In both of these cases, humanitarian concerns were commingled with the official justification of the use of armed force as self-defence. Humanitarian considerations, in the absence of an armed attack against the intervening State or (in the case of collective self-defence) its allies, cannot in itself justify a use of force as an exercise of the right of self-defence. Further, the use of force in self-defence must in any event be limited to countering the armed attack and may not extend to → *regime change* in the target State.

(c) A New Exception Allowing Forcible Unilateral Humanitarian Intervention?

26 In view of the difficulty of fitting humanitarian intervention undertaken in the absence of Security Council authorization or of an armed attack against a State within the traditional exceptions of the prohibition of the use of force, arguments have been put forward that an additional, new exception may have emerged to the prohibition of the use of force. This would have to be an exception carved out through subsequent practice of UN Member States resulting in a new interpretation of the relevant Charter provisions (cf Art. 31 (3) (b) → *Vienna Convention on the Law of Treaties [1969]*; 'VCLT'), or possibly through the emergence of a new customary rule (supervening custom). The 'reinterpretation' might, for example, require the reference to territorial integrity and political independence in Art. 2 (4) UN Charter to be read as qualifying the prohibition on the threat or use of force, in the manner described above (where it was rejected as a correct reading of the Charter as originally drafted). Such a 'reinterpretation', it might be said, is not an 'amendment' of the Charter, which would have to follow Arts 108 and 109 UN Charter. The alleged new rule would bring about a qualification of the clear provisions of Art. 2 (4) UN Charter as currently interpreted, and thus would require that the membership of the UN accept this

reinterpretation of the Charter, evidenced through the widespread (if not complete) support of the UN Member States.

27 If the argument were not based on a 'reinterpretation' of the Charter, it would have to emerge as a new rule of → *customary international law* through the practice and *opinio iuris* of States. But when cast as an exception to the prohibition of the use of force, which has achieved the status of → *ius cogens* (at least in its core, ie the prohibition of aggression), the new customary law exception to the prohibition would have to achieve the same status, making the requirements for its emergence (assuming it to be logically and legally possible) even more exacting than those for an ordinary rule of customary international law (cf Art. 53 VCLT).

28 A number of instances of practice since 1945 have been invoked by authors—and to a lesser extent by States—as evidence of a general practice of the assertion of a unilateral right to intervene to avert or put an end to a humanitarian crisis or to widespread violations of human rights. The instances commonly cited include, among others, the Indian intervention in East Pakistan (Bangladesh) in 1971; the Tanzanian intervention in Uganda in 1978; the Vietnamese intervention in Democratic Kampuchea in 1978; the French intervention in the Central African Empire (later the Central African Republic) in 1979; the US interventions in → *Grenada* (1983) and Panama (1989); the ECOWAS/ECOMOG interventions in Liberia (1990) and Sierra Leone (1997); the US, UK, and French intervention in Iraq to protect Kurdish and Shia populations from 1991 to 2003 (France intervening until 1998); the interventions in Somalia (1992); Rwanda (1994); and East Timor (1999); and of course the NATO intervention in Kosovo in 1999.

29 In order to support the argument that a new rule of customary international law has emerged, it would be necessary that States made claims that these instances of the use of force were lawful because of the doctrine of humanitarian intervention. The ICJ asserted in the *Military and Paramilitary Activities in and against Nicaragua Case* that no one has the 'authority to ascribe to States legal views which they do not themselves advance' (at para. 207). States may, nonetheless, act in the belief that they are entitled to do so, and only later articulate the precise justification for their action. But such practice is limited. No *opinio iuris* in favour of a new customary law exception to the Charter prohibition can be deduced from State action authorized by the Security Council, such as the interventions in Somalia, Rwanda, East Timor, and arguably the ECOWAS/ECOMOG interventions in Liberia and Sierra Leone (which were explicitly condoned, and at least arguably in part explicitly authorized, by the Security Council). Only instances of unauthorized intervention could provide evidence of *opinio iuris* in favour of a new exception allowing unilateral humanitarian intervention. But again, in none of the instances above did the intervening States argue that their actions were justified by a rule of customary international law that allows intervention on humanitarian grounds. In the interventions of India in East Pakistan, Tanzania in Uganda, and Vietnam in Cambodia, the intervening States claimed to have been acting in self-defence in response to border incursions and other acts or threats of force; and even then the response of the international community was far from unequivocal acceptance of the interventions. It rather ranged from strong condemnation (Vietnam) to mere silence (Tanzania).

30 The use of force in Iraq to establish safe havens and no-fly zones in 1991–92 was argued to have been 'in support of' (and thus implicitly authorized by) UN Security Council Resolution 688; while the use of force to enforce the no-fly zones in 1993 was claimed by the US to be based on the right of self-defence against threats of attacking coalition aircraft patrolling the zones. These justifications should be seen as distinct: an argument based on the right of self-defence of Allied aircraft patrolling the no-fly zones cannot itself justify the establishment of the zones. The argument is circular: no-fly zones themselves imply a threat

to use force, which must be justified. France combined the argument of implicit authorization with a claim to be responding to violations of UN Security Council Resolution 687; and the UK initially enunciated a free-standing right of humanitarian intervention, but then modified this claim by combining it with the argument that aircraft patrolling the no-fly zones had the right to use force to defend themselves against any attack (which is a distinct matter, as explained earlier).

31 In other cases of use of force, such as those of the US in Grenada and Panama, the justifications ranged from action to rescue nationals abroad, to invitation by the legitimate government, to action for the restoration of democracy. In all these instances there were condemnatory resolutions passed in the UN General Assembly. Even when humanitarian intervention was explicitly claimed as a justification, it was never the sole justification but was always combined with a universally accepted exception to the prohibition on the use of force, such as self-defence or authorization by the Security Council.

32 The question arises whether, irrespective of the legal position prior to 1999, the NATO intervention in the (then) FRY may have provided at least part of the requisite State practice and *opinio iuris* for the emergence of a customary exception from the prohibition of the use of force along the lines of 'humanitarian intervention'. This seems unlikely. Some of the States participating in the intervention expressly denied that they considered the Kosovo campaign to be an instance where they had the right to act as they did under international law. Importantly, the German Foreign Minister stated before the Federal Parliament on 16 October 1998 that the NATO decision on air strikes against the FRY 'must not become a precedent', while the denial of precedential value to the Kosovo intervention was the major theme in the German parliamentary debate (Simma 13 and 20). Belgium stated in the UN General Assembly on 26 September 1999 that UN Security Council Resolution 1244 had achieved 'a return to legality' (Brownlie [2000] 908) and that it hoped that resort to force without Security Council authorization would not become a precedent (White 37). US arguments on the legality of the Kosovo intervention did not espouse any clear doctrine of humanitarian intervention, but rather relied—when referring to such humanitarian intervention—on a mixture of circumstances and principle in order to 'qualify any universalist theory or wide-ranging rule that might prove less attractive in other hands' (Henkin 829). This connects well with the German and other denials of the precedential value of the Kosovo intervention, and highlights the lack of any *opinio iuris* with regard to a right to unilateral humanitarian intervention.

33 The response of other, non-NATO, States to arguments that there was a legal basis for the Kosovo bombing campaign and for a right of humanitarian intervention was overwhelmingly negative. The → *Non-Aligned Movement (NAM)*, numbering well over half of the Member States of the UN, unequivocally condemned the use of force against the (then) FRY, as did many other States, some of which are nuclear powers. In these circumstances, no right of unilateral forcible humanitarian intervention can be said to have emerged as a rule of customary international law.

34 Some authors have argued that in all of the instances mentioned above, humanitarian objectives were the motives for action, and thus irrespective of the legal justifications articulated by the acting States, the instances constitute clear State practice in favour of a right of humanitarian intervention. Such a view, however, runs counter to explicit and clear statements of the ICJ on the formation of custom, which requires both practice and *opinio iuris*. Motives are not the same as reasons; and the requirement for *opinio iuris* looks to the latter. And while action by a State coupled with silence on its part as to its legal justification may be presumed to be accompanied by *opinio iuris* to the effect that its action is lawful on some basis or other, the same cannot be said when the State rebuts the presumption of *opinio iuris* in a specific case or elects to base its action on some legal bases to the

exclusion of others. The latter, excluded, bases cannot carry the *opinio iuris* of the State. The fact that intervening States have been so reluctant to rely explicitly on a right of humanitarian intervention means that there is great difficulty in finding any *opinio iuris* that can properly be counted towards the establishment of a right of humanitarian intervention.

35 Post-Kosovo practice does not reveal any reliance on an alleged right of humanitarian intervention. With respect to the 2011 crisis in Libya, it is telling that force was only used to protect civilians after the UN Security Council adopted Resolution 1973, in which it authorized the use of 'all necessary means' by UN Member States to protect Libyan 'civilians and civilian populated areas under threat of attack' (at para. 4) and to enforce a no-fly zone (at para. 8). In the run-up to the Resolution's adoption, numerous States, including the US, the UK, and NATO Member States collectively, underlined the need for Security Council authorization before any armed force could be used in Libya.

3. The Issue of 'Uniting for Peace'

36 The lack of Security Council authorization cannot be the final word on the issue of legality of an intervention on humanitarian grounds, even if no right of unilateral humanitarian intervention has emerged by way of customary international law. As → *Certain Expenses of the United Nations (Advisory Opinion)* and the → *Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)* have confirmed, the Council has *primary* but not *exclusive* responsibility for the maintenance or restoration of international peace and security, which may be threatened by humanitarian catastrophes. The UN General Assembly has devised a procedure through which to respond to threats to the peace when the Security Council cannot act because of the use of the → *veto*. This is the procedure established under the → *Uniting for Peace Resolution (1950)*. In the event that the Security Council cannot act, States arguing in favour of humanitarian intervention may take the issue to the General Assembly, as in fact they should before even considering unilateral action (White 28–9 and 38–41). Many States have expressed their preference for some form of UN response to a humanitarian crisis as opposed to allowing unilateral action.

37 The position of NATO that it needs to 'stand ready to act should the UN Security Council be prevented from discharging its purpose of maintaining international peace and security' (North Atlantic Assembly Resolution 283 para. 15 (d)) is, accordingly, questionable without further qualification. One major reservation relates to whether and when the Security Council is indeed 'prevented from discharging' its duties: a decision of the Security Council not to act cannot, without more, be qualified as the Council being 'unable' to act; nor can the fact that a resolution in support of action fails to command the necessary majority in a vote within the Council. Even to establish the premise, further evidence is needed that the Security Council cannot act because of the recalcitrant stance of a permanent member, and not merely because there is no agreement as to the use of force in a particular instance. Indeed, the non-authorization of the use of force may be a clear instance of the Council actually discharging its primary responsibility, rather than of it being prevented from doing so. And even if it is considered that the Council is being prevented from acting, UN law allows for an institutional solution: recourse may be had to the General Assembly in an attempt to garner support by two-thirds of its members under the Uniting for Peace procedure. Indeed the language of the NATO resolution itself comes close to that of the Uniting for Peace resolution (Simma 17).

C. Conditions for Recourse to Humanitarian Intervention

38 Since no right of unilateral humanitarian intervention can be grounded in positive international law, much ink has been spilled in the elaboration of the conditions for recourse to unilateral humanitarian intervention as the basis of a right *de lege ferenda.* Two issues are intertwined in the concept of a right of humanitarian intervention as *lex ferenda*: the substantive question regarding the conditions or criteria which allow the use of force without authorization by the Security Council or the consent of the target State; and the procedural question of the manner in which it is to be determined that these conditions or criteria are actually met. Even though the substantive criteria have much more prominence in literature, and even though the two issues have tended to be locked together, these are distinct.

1. The Substantive Criteria

39 There can be no definitive statement or authoritative decision on the conditions that must be present for the use of force to qualify as an exercise of a putative right of humanitarian intervention; but there are a number of conditions that are commonly asserted in the writings of various publicists and by the few States to have exceptionally explicitly referred to a right (whether legal or moral) of humanitarian intervention. These include: a) the existence of a humanitarian 'emergency' or 'disaster' or 'crisis' or 'catastrophe' or 'necessity' or 'tragedy', usually related to the widespread and gross or egregious violation of human rights of (a part of) the population of a State or to the commission of grave international crimes; b) the inability or unwillingness of the territorial State to act to address the situation; c) the exhaustion of all other realistically possible remedies, including all peaceful remedies and recourse to the UN Security Council (and arguably also the UN General Assembly under the 'Uniting for Peace' procedure), which are unwilling or unable to act; d) the acceptance of limitations (both in scope and in time) upon the use of force (as the necessary and sole available course of action), confining it to strictly humanitarian objectives that must be expected to do more harm than good, respecting the principle of → *proportionality*. To these, some add a preference towards multilateral (rather than unilateral, and as second best to collective) action, as well as towards the (relative) disinterestedness of the intervening States and/or organizations.

40 These substantive criteria, however, do not address the most important aspect of recourse to force for humanitarian objectives: namely who is to decide on the fulfilment of the substantive criteria in any given case.

2. The Procedure for Determination

41 Even proponents of a unilateral 'last resort' right to humanitarian intervention accept that 'the existence of authoritative and impartial acceptance of the existence of [the substantive conditions] is obviously of great importance' (Brownlie [2000] 931). Reliance has been put by some on objective determinations of an 'impending humanitarian catastrophe' made by the Security Council in resolutions adopted under Chapter VII, finding the humanitarian situation on the ground to constitute a 'threat to international peace and security' under Art. 39 UN Charter (see eg the statement by the UK Secretary of State for Defence in the House of Commons on 25 March 1999, Hansard HC vol 328, cols 616–617). While this addresses what is most commonly given as the first condition, that of the existence of a humanitarian catastrophe, it does not refer to the determination of any of the other conditions, such as those referring to the exhaustion of all other non-forcible avenues and the necessity for and proportionality of the force used.

42 Even the determination by the Security Council of the fulfilment of the first substantive condition, that of a humanitarian emergency or of a widespread and egregious violation of human rights, appears unlikely to be an easy matter. Clearly, once the threshold for military action is moved from the actual authorization of the use of force to the determination of a threat to the peace (or substantively to the existence of a humanitarian emergency), the member(s) of the Council that would have blocked the authorization of force could block the relevant determination instead. As such, the procedural problem of determination of the existence of substantive conditions may be very difficult to resolve, although the possibility of passing to others the responsibility for engaging in the actual uses of force might induce a measure of increased flexibility in the Council. The only other way out would be to admit the unilateral power of determination by any State, or perhaps by other regional or international organizations, though that step might be thought to encroach too far upon the prohibition on the use of force.

3. Criteria for Toleration

43 The attempt to use these criteria to guide States in their practice, so as to eventually establish a customary exception to the prohibition of the use of force allowing humanitarian intervention, has not yet borne fruit. All of the instances of humanitarian intervention claimed so far would fail on at least one of these criteria; and States do not seem any less reluctant to assert such a right today than they were when no clear criteria had been set out.

44 The elaboration of the criteria can be useful, however: not in order to establish a right of humanitarian intervention, but rather to guide States in their responses to any violations for purportedly humanitarian reasons of the prohibition on the use of force. The responses of States to such violations have varied considerably, some allegedly ‘humanitarian interventions’ being met with benevolent silence, others with stern condemnation. It has thus been argued that unilateral recourse to force for humanitarian reasons remains unlawful but may be ‘tolerated’, ‘mitigated’, or ‘excused’ by the ‘international community’, in the sense that a great majority of States will elect not to respond to what could be called —and the actors consider to be—an ‘efficient breach’.

D. Responsibility to Protect

45 In the aftermath of the Kosovo crisis, some commentators and some governments took the position that if no right of unilateral humanitarian intervention existed in positive law, the law should be developed to respond to the terrible dilemma of human suffering amidst inaction on the part of the international community, and to establish such a right. A Canadian initiative led to the establishment of an ‘International Commission on Intervention and State Sovereignty’, which produced a report on the → *responsibility to protect*, with the aim of finding a balance between the wish to respond effectively to humanitarian crises and the maintenance of a robust legal framework for such responses.

46 The report mostly confirmed the non-admissibility of unilateral humanitarian intervention under current international law, even if it sometimes employed language that appears equivocal. When the concept of the ‘responsibility to protect’ (or ‘R2P’ as it is irritatingly known) was put before States during the 60th anniversary of the United Nations in 2005, the General Assembly confirmed the traditional approach to the use of force for humanitarian purposes, subjecting it to Chapter VII powers of the Security Council and making no reference to a unilateral right of humanitarian intervention (2005 World Summit Outcome para. 139). This confirms the continued reluctance of States to accept a right of

humanitarian intervention outside the confines of the UN Charter and of the procedures for collective response established therein.

E. Evaluation

47 There is no denying that widespread and egregious violations of human rights and of international humanitarian law are no longer within the 'exclusive' domestic jurisdiction of States but constitute a matter of concern of the international community as a whole. They require corrective action by that community, through the procedures it has established to this end. The question of what can be done when the primary vehicle for such action, the UN Security Council, appears unwilling or unable to act, poses itself with great force in the face of human suffering. It appears, however, that it is the unwillingness of States to commit the material and financial resources required for intervention, as well as their politically-motivated reluctance to meddle in certain situations, rather than the problematic constitutional structure of the UN, which prevents intervention in most cases. What has also become evident through the responses to the instances of alleged humanitarian intervention that have occurred since the establishment of the UN, is that States are not willing to discard the prohibition of the use of force and the collective machinery of the UN in favour of a right of unilateral humanitarian intervention. In the rare event where there is a humanitarian emergency, and where most States agree that intervention is needed but the UN is unable to act (due to recalcitrant vetoes or narrowly failing the two-thirds majority required for General Assembly action), States may be willing to accept humanitarian considerations in mitigation of the occasional violation of the prohibition of the use of force and limit their response accordingly.

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