

**The Use of Force
in International Relations
Challenges to Collective Security**

Edited

by Hans Köchler

Vienna 2006

Papers prepared for the International Roundtable Conference on "The Use of Force in International Relations: Challenges to Collective Security" organized by the International Progress Organization in co-operation with the Department of Philosophy at the University of Innsbruck (Austria) on 22 June 2005.

Editorial team: Nathan Harstad, Andreas Oberprantacher, Christoph Wurnitsch.

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A-1010 Vienna, Kohlmarkt 4, Austria

ISBN 3-900704-23-6

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Produced by MG-Studio, 3434 Wilfersdorf, Austria

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Lyal S. Sunga

The Role of Humanitarian Intervention in International Peace and Security: Guarantee or Threat?*

1. Introduction

The global instant media today beams graphic images of extreme violations from faraway places to our personal attention like never before. Big corporate media conglomerates like CNN, BBC, TV5, Deutsche Welle, and others, transcend national frontiers with a potent combination of radio, television and internet, drawing upon extensive in-country contacts built up over decades of reporting. The rise and professionalization of independent and impartial non-governmental human rights organizations around the globe have made it more difficult for governments to conceal or deny serious violations of human dignity in such places as Darfur, the Democratic Republic of Congo, and even in highly secretive countries like Myanmar and North Korea.

Increased interdependence among peoples and governments in an age of globalization really has made the world a smaller place. With intensified social, economic and political interdependence, issues of human rights become known more quickly and more widely than ever before. Globalization has been aiding consolidation in the norms and implementation of international human rights law over the last few decades to the point that governments have largely given up claiming that human rights issues are no one's business but their own. Even China and Russia, which during the Cold War had so often rejected any mention of human rights issues pertaining to them as unwelcome intrusions into

* I wish to thank Dr. Ilaria Bottigiero for her very kind and helpful assistance on this article.

their sovereign affairs, these days sound much like other governments in the way they reply to allegations of human rights violations. Like other countries, they may deny human rights abuse, but generally they do so without seeking to dismiss either the legitimacy or application of international human rights standards to them altogether. The increased reach and universality of international human rights standards signal not only wider recognition that serious violations of human rights and humanitarian law constitute the legitimate concern of everyone on the planet, but also that they deserve an immediate and effective response from the international community.

Yet, despite consolidation in human rights norms and implementation since 1945 at United Nations, regional and domestic levels, the collective security framework has intervened promptly and effectively to stop or prevent serious or systematic human rights violations only in very few cases. Collective security proved wholly ineffective to stop or prevent massive violations of human rights in Cambodia, Rwanda, Somalia, and in many other places.

Where UN or regional collective security frameworks have not intervened to stop extreme violations, is it not blatantly immoral, perhaps even illegal, for foreign states to stand by and do nothing while a government annihilates its own citizens? This question naturally leads us to consider the so-called "doctrine of humanitarian intervention" which was originally invoked by certain governments to protect Christian minorities against the Ottoman Porte's atrocities. From time to time since the 19th century, states have invoked "humanity," "human rights" or cognate considerations, to justify military intervention in foreign territory to protect subjects from the abuse of their own government. Intervening states have contended that in these kinds of situations, there is at least a moral obligation, and if not a legal obligation at least permission under international law, to carry out a short-term, measured and proportional armed intervention to halt serious violations and prevent future atrocities.

Some scholars have insisted that international law permits a state to take military action on humanitarian grounds outside UN or regional collective security authorization. However, the reality has been that governments rarely if ever decide to involve themselves in military action – which always risks incurring high costs in lives and treasure – unless

their own interests are directly at stake. How else to explain why the world stood by and watched as Hutu militia slaughtered around one million – mainly Tutsi civilian men, women and children – in the small central African state of Rwanda which has no oil and lies outside the strategic interests of the major powers? What a stark contrast to the spectacle of many governments, led by the United States, scrambling to attack oil-rich Iraq and remove anti-Western Saddam Hussein from power, spending billions and billions of dollars in the process and sacrificing the lives of thousands of soldiers and civilians! When "weapons of mass destruction," "imminent threat of attack," and "Iraqi support for Al Qaeda and 9-11" quickly proved to be hollow pretexts, the Bush administration's justifications for military intervention shifted just as quickly to "democracy and human rights in the Middle East."¹

The practical dilemma is that innocent lives must be spared from cruelty and violence, but in an international state system where sovereign equality, political independence and non-intervention feature as cardinal principles, and realpolitik remains the driving force behind the foreign policies of all governments, we must consider whether humanitarian intervention represents a guarantee of international peace and security, or in contrast, a threat to it. The dilemmas surrounding humanitarian intervention are not new, but they have become even sharper with the crisis in the legitimacy of the UN, and the urgency with which UN reform efforts will have to come up with effective means to prevent genocide and other mass, systematic or widespread violations of human dignity.

We therefore first define "humanitarian intervention," distinguishing the doctrine in its classic sense from enforcement action taken through UN or regional collective security organs, and we trace its historical origins and development in international diplomacy, highlighting the essential condition of the absence of self-interest on the part of the intervening state. Next, we consider whether the establishment and operation of the UN system of collective security leaves any room for humanitarian intervention to be launched by a state unilaterally, or by states acting jointly, outside the UN or regional collective security framework. We then turn to the issue as to whether inaction on the part of the UN or a regional

¹ See Lyal S.-Sunga, "Can International Humanitarian Law Play an Effective Role in Occupied Iraq?," in: *The Indian Society of International Law Year Book of International Humanitarian and Refugee Law*, Vol. II (2003), pp. 1–21.

collective security framework in the face of serious violations of human rights or humanitarian law can be taken to *authorize* humanitarian intervention. Next, we take account of the UN General Assembly's recent consideration of a "duty to protect," and finally we consider whether humanitarian intervention represents a guarantee of, or in contrast, a threat to; international peace and security.

2. The origins and development of the classic doctrine of humanitarian intervention

It is essential to distinguish very clearly between collective security under established UN or regional frameworks such as "peace keeping" or "peace enforcement" or other similar blue helmet operations on the one hand, which are *multilateral* in character, and "humanitarian intervention" in its more classic sense on the other hand which developed well before 1945 and which involves the *unilateral* or joint use of armed force by a state or states against another state on such grounds as "humanity," "democracy" or "human rights."

Suppose state A perpetrates serious violations of human rights or humanitarian law against its own citizens on a persistent, systematic or widespread basis. Proponents of the classic "doctrine of humanitarian intervention" argue that customary international law authorizes another state (state B) to take military action in the territory of state A, without state A's consent, to protect state A's nationals.²

Humanitarian intervention thus entails the intervening state's *unilateral* appreciation of the factual situation as well as its own evaluation as to whether it has legal grounds to take military action against a state committing or tolerating serious violations in its own territory. The doctrine of humanitarian intervention presupposes an exception to the general prohibition on the use of force in international relations. Humanitarian intervention should not be confused with a state's use of military force

² See Louis A. Ruggier, "La théorie de l'intervention d'humanité," in: *Revue générale de Droit International Public*, Vol. 17, No. 1 (1910), p. 468; Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*. New York: Banks, 1915; and Ellery C. Stowell, *International Law. A Restatement of Principles in Conformity with Actual Practice*. New York: Holt, 1931 for classic formulations of "humanitarian intervention."

to protect its *own* nationals which classic international law recognizes as a possible ground for military intervention – perhaps as a form of the inherent customary right of self-defense.³ For military intervention to have a genuinely humanitarian character, the intervening state must not act out of any element of self-interest and therefore the beneficiaries of intervention must *not* be nationals of the intervening state.

The notion of humanitarian intervention derives support from the just war doctrine. As early as the fifth century A.D., St. Augustine advocated the notion of the just war⁴ and enunciated certain limiting criteria that were developed further by St. Thomas Aquinas in the late 1200s.⁵ Grotius argued in his treatises on the laws of war and peace published in 1625⁶ that the legality of the use of force in international relations depended on the justness of the cause for which war was waged. In his natural law theory, Grotius considered that the cause must be serious enough to warrant the use of force in the first place and that force could be used only to the extent it was matched by the justness of the cause. In addition, all other means should have been exhausted before resort was made to war to vindicate the state's moral rights. The Spanish

³ The right of a state to protect the rights of its nationals was affirmed in the *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, PCIJ Series A, No. 2, 1924, p. 12. The international law relating to the diplomatic protection of aliens and the development of the international minimum standard of treatment also reflect the well settled principle of a state's interest in the protection of its nationals beyond the territory of the state. See e.g. the *Hopkins Case*, Reports of International Arbitral Awards, 1927. See also the *Neer Claim (US v. Mexico)*, 4 Reports of International Arbitral Awards 60, 1926; the *Roberts Claim (US v. Mexico)*, 4 Reports of International Arbitral Awards, 1926; and the *Janes Claim (US v. Mexico)*, 4 Reports of International Arbitral Awards 82, 1926. See also Derek W. Bowett, "The Use of Force for the Protection of Nationals Abroad," in: Antonio Cassese (ed.), *The Current Legal Regulation of the Use of Force*. Dordrecht: Kluwer Academic Publishers, 1986, p. 49.

⁴ Augustine, *The City of God against the Pagans*, 7 vols. Edited and translated by George E. McCracken. The Loeb Classical Library. Cambridge, Mass.: Harvard University Press, 1957–1972.

⁵ First, war has to be waged not by a private individual, but under the authority of a sovereign. Second, the cause of the war has to be just, for example to restore something unjustly taken, or to exact amends for wrongdoing. Third, the belligerents have to have a just intention in resorting to the use of force, not for some unjust cause. See Thomas Aquinas, *Treatise on Law*. Translated, with Introduction, Notes, and Glossary, by Richard J. Regan. Indianapolis: Hackett Publishing, 2000, Part II, Question 40.

⁶ Hugo Grotius, *De jure belli ac pacis libri tres*. Oxford: Clarendon Press, 1925, Book II, chapter II.

theologian⁷ de Vitoria also invoked the just war doctrine to justify the brutal suppression of indigenous populations as Spain invaded the New World.⁸ In practical terms, the just war doctrine left states with virtually unfettered freedom to decide the grounds upon which they would wage war and to justify their action accordingly. In so doing, the doctrine reflected the prevailing realpolitik in which collective security was absent and inter-state relations were governed mainly by self-interest and raw power.⁹

Although prior to the establishment of the League of Nations following World War I, states were largely free to make war as they saw fit, the chances of actually succeeding at war have always involved complex factors. Often, military success over the medium to longer term depends not just on military might and battlefield tactics, but on grand strategy as well as political alliances forged at home and abroad. In order to secure and maintain the provision of public funds and personnel to follow through on a sustained military campaign,¹⁰ often a government has to maintain public support by arguing the legitimacy of its actions on the basis of law and politics. It was in this connection that the term "humanitarian intervention" gained currency in the 19th century.

Certain scholars began to refer to "humanitarian intervention" with respect to joint military action taken by the Triple Entente Powers

⁷ See James B. Scott, *The Spanish Conception of International Law and of Sanctions*. Pamphlet Series of the Carnegie Endowment for International Peace, Division of International Law, 54. Washington: William S. Hein & Co., 2000, and James B. Scott, *The Spanish Origin of International Law*. Washington: Georgetown University Press, 1928 (on de Vitoria and Suarez).

⁸ As Yoram Dinstein put it: "[...] in addressing Spain's war against the 'Indians' in the New World [Vitoria] upheld the justice of that war on the made-to-measure excuse that the Indians had violated the Spaniards' right to travel freely, to carry out trade, and to propagate Christianity" in: Yoram Dinstein, "Comments on War," in: *Harvard Journal of Law and Public Policy*, Vol. 27, No. 3 (Summer 2004), p. 877.

⁹ See generally Joseph C. Sweeney, "The Just War Ethic in International Law," in: *Forham International Law Journal*, Vol. 27, No. 6 (June 2004), pp. 1865-1903.
¹⁰ See generally Paul Kennedy's approach in: Paul Kennedy, *The Rise and Fall of the Great Powers: Economic Change and Military Conflict from 1500 to 2000*. New York: Random House, 1987, although Kennedy's account of the relative rise and decline of states has been criticized for overemphasizing the importance of material factors. See e.g. Henry R. Nau, "Why 'The Rise and Fall of the Great Powers' was Wrong," in: *Review of International Studies*, Vol. 27, No. 4 (October 2001), pp. 579-592.

(France, Great Britain and Russia) in 1829 to protect people under Ottoman rule. To justify their invasion at the time, the Triple Entente invoked the "laws of humanity," and relied on the 1827 Treaty of London for the Pacification of Greece.¹¹ The preamble to the Treaty refers to "the sentiments of humanity" in order to pressure the Porte to relinquish control over Greek lands and to recognize Greek independence. The Porte's refusal led to the Battle of Navarino where the Allied Powers prevailed over Turkish-Egyptian naval forces, although further fighting between Russia and the Ottoman Empire continued for some time afterwards.

The further weakening of the Ottoman Empire emboldened Christian minorities to revolt, which in turn spurred severe reactions from the Porte, including large-scale massacres. The Triple Entente felt compelled to invade militarily yet again, ostensibly to protect its Christian co-religionists, but also to gain strategic influence and to expand its sphere of territorial control. In July 1840, Austria, Britain, Prussia, and Russia, concluded the London Treaty,¹² which this time placed these European powers on the side of the Porte to arrange the peace after battles with French-allied, pro-Egyptian forces which were trying to secure Syrian and Egyptian secession from the Ottoman Empire.

Similarly, humanitarian intervention seemed to have played a major part in the Crimean War (1853-1856) involving Britain, France and the Ottoman Porte, which broke out after Russia demanded better treatment for Orthodox subjects in Ottoman territory as well as certain privileges for Orthodox and Roman Catholic Churches in Palestine. The Treaty of Paris,¹³ ending the Crimean War, guaranteed that Russia would relinquish her claim to be the rightful protector of Christian subjects of the Ottoman Empire. However, in 1876, when the Porte massacred perhaps fifteen thousand Christian subjects in the Bulgarian Uprising, Russia once again invaded Turkey in 1877 to back the Serbs and Montenegrins

¹¹ Adopted on 6 July 1827 between Great Britain, France, and Russia in London. In the Preamble to the Treaty, these Powers indicate that: "They have resolved to combine their efforts, and to regulate the operation thereof, by a formal Treaty, for the object of re-establishing peace between the contending parties; by means of an arrangement called for, no less by sentiments of humanity, than by interests for the tranquility of Europe."

¹² Adopted on 15 July 1840.

¹³ Signed on 30 March 1856 in Paris, between France, Great Britain, Sardinia-Piedmont, the Sublime Porte and Russia.

in a bid to end Ottoman control. Yet another threat to the integrity of the Ottoman Empire came from independence-minded Christian Armenian minorities living under the Porte's rule. When Armenian revolutionaries began to call for an end to the Sultan's rule in 1894, the Sultan retaliated by launching a campaign of massacres of civilians, mass rape and the destruction of entire Armenian villages. By the next year, public outrage pushed the governments of Britain, France and Russia to press the Porte for a commission of inquiry, but this was never carried out.¹⁴ The turn of the Porte as well as a stream of protestations from major European powers denouncing the Sultan's indiscriminate slaughter of men, women and children in troubled parts of the Empire. For example, the Triple Entente denounced Turkey's genocidal massacres of Armenian subjects in 1915 as "crimes against humanity and civilization."¹⁵

Given the extreme character of the atrocities and the large number of victims involved, it should not be surprising that European powers condemned the Ottoman Empire for its cruelty in these sorts of terms. However, the invocations of "crimes of humanity and civilization" and similar phrases must strike one as rather hollow if we recall the brutal system. As Professor Köchler rightly remarks:

"Far from qualifying as disinterested *actio popularis*, humanitarian intervention in its actual practice in the 19th century was dictated by the geopolitical interests of the then European powers. Those powers, in the course of their own colonial rule, violated each and every

¹⁴ Lord Kinross, *The Ottoman Centuries: The Rise and Fall of the Turkish Empire*. New York: Morrow Quill, 1977, p. 558.

¹⁵ See U.N. War Crimes Commission, *History of the United Nations War Crimes Commission*. London: His Majesty's Stationery Office, 1948, p. 35 which quotes the Declaration of Britain, France and Russia as follows: "En présence de ces nouveaux crimes de la Turquie contre l'humanité et la civilisation, les Gouvernements alliés font savoir publiquement à la Sublime Porte qu'ils tiendront personnellement responsables des dits crimes tous les membres du Gouvernement ottoman ainsi que ceux de ces agents qui se trouveraient impliqués dans de pareils massacres." See generally M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*. Second Revised Edition. The Hague/Boston: Kluwer Law International, 1999.

humanitarian principle they proclaimed to uphold and resolved to enforce *vis-à-vis* the Sublime Porte."¹⁶

As we shall see, the use and abuse of humanitarian justifications were eventually to take an even more shocking and consequential form during the inter-war years.

It was only after the First World War and the establishment of the League of Nations in 1919 that the international community began to distinguish the use of force according to the reasons for its deployment. Resort to force "short of war" for self-defence, for reprisal in respect of injury suffered, to rescue or protect nationals abroad, or for general "humanitarian purposes," acquired greater legitimacy in the context of the League of Nations collective security framework than attempts to grab territory and subjugate peoples. In this context, the Covenant of the League of Nations set out the procedures to avoid war or to reach pacific settlement of disputes if war did break out.¹⁷

Fresh hope for addressing minority discontent and preserving peace and security through international law came with the establishment of the League of Nations and more effective legal protection of the rights of ethnic, linguistic, racial and religious minorities. In a series of peace treaties concluded after the First World War, Austria, Bulgaria, Czechoslovakia, Greece, Hungary, Poland, Romania, and Yugoslavia had to recognize the legal equality of all minorities and to ensure effective imple-

¹⁶ See Hans Köchler, *The Concept of Humanitarian Intervention in the Context of Modern Power Politics: Is the Revival of the Doctrine of "Just War" Compatible with the International Rule of Law?* Studies in International Relations, XXVI. Vienna: International Progress Organization, 2001, p. 9.

¹⁷ Articles 11, 12, 13 and 15 of the Covenant limit the right of a state to wage war and oblige parties to refer the dispute to the League for arbitration, judicial settlement, or to the League Council. Members of the League of Nations were required not to use force until three months after the adjudicative body in question had reported back on the matter. A violation of the Covenant's procedures would place the state in the position of having "committed an act of war against all other members of the League" and expose the offending state to economic or military sanctions from the other members pursuant to Article 16. Moreover, by Article 10, members of the League were barred from recognizing ill-gotten gains from aggression. However, under the League of Nations Covenant, war was not prohibited. It was only subject to certain procedural restrictions. See the Covenant of the League of Nations, adopted on 28 June 1919 in Paris, entered into force on 10 January 1920.

mentation of linguistic, social, political and religious rights, as evidenced by the relevant jurisprudence of the Permanent Court of International Justice.¹⁸ Also, the Council of the League of Nations ensured autonomy successfully for the Swedish-speaking people of the Åland Islands under Finnish rule, together with neutrality and demilitarization which, since 1921, has effectively guaranteed the peace there.¹⁹

Although not explicitly reflected in any international legal instrument of this period, the dichotomy between "legitimate" and "illegitimate" use of force was well accepted by the time the Kellogg-Briand Pact was adopted in 1928. Although international military tribunals at Nuremberg and Tokyo were eventually to make much of the Kellogg-Briand Pact as the first treaty ever prohibiting war in general as an instrument of national policy, from a legal point of view, the Pact's significance must be considered to be very limited. In Article I of the Pact, the States Parties condemn "recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another," and in Article II the States Parties agree that "the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means." Then there is only Article III which concerns procedures for deposition of instruments of ratification and

¹⁸ See the following decisions of the Permanent Court of International Justice relating to minority rights issues: Questions relating to Settlers of German Origin in Poland, *PCIJ Series B*, No. 6, 1923; Question concerning the Acquisition of Polish Nationality, *PCIJ Series B*, No. 7, 1923; Exchange of Greek and Turkish Populations (Lausanne Convention VI, 30 January 1923, Article 2), *PCIJ Series B*, No. 10, 1925; Rights of Minorities in Upper Silesia (Minority Schools), *PCIJ Series A*, No. 15, 1928; Access to German Minority Schools in Upper Silesia, *PCIJ Series A/B*, No. 40, 1931; Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, *PCIJ Series A/B*, No. 44, 1932; Case concerning the Polish Agrarian Reform and the German Minority, *PCIJ Series A/B*, No. 60, 1933; Minority Schools in Albania, *PCIJ Series A/B*, No. 64, 1935.

¹⁹ Finland and Sweden are bound to observe the agreement reached under the auspices of the Council of the League of Nations which granted Finland sovereignty over the Ålands with the obligation to guarantee the population full right to practice their Swedish language, self-government, culture and local traditions. See further Markku Suksi, "The Protection of the Rights of Minorities by Means of Autonomy: The Cases of the Åland Islands and Kosovo," in: Zellm A. Skurbaty (ed.): *Beyond a One-Dimensional State: An Emerging Right to Autonomy?* Leiden/Boston: Martinus Nijhoff Publishers, 2005, pp. 379-399.

entry into force of the treaty. There is no definition of war or any indication as to which possible exceptions to its prohibition might be lawful, the most obvious example being self-defence. The Pact's omission even to mention the inherent right of every state to use force to defend itself makes the Pact's legal value rather dubious.²⁰

The risk that minority rights might be misused to attack the territorial and political integrity of foreign states became reality soon after the Nazi government came to power in 1933. In a series of highly inflammatory radio broadcasts, Hitler screamed with indignation that German minorities were being shamefully persecuted in foreign lands and that the Nazi government had to intervene to protect the honour of the greater German Volk.²¹ Minority rights proved to be a useful tool²² for stealing

²⁰ From the *travaux préparatoires*, the drafters of the Pact seem to have considered that recourse to armed force for the sole purpose of self-defence would not be prohibited. In any case, the Kellogg-Briand Pact proved ineffective for the prevention of Italian aggression against Ethiopia, Japanese aggression against Manchuria or Nazi aggression in Europe.

²¹ See e.g. Hitler's speech to the *Reichstag*, Berlin, 23 March 1933, where he proclaimed that "We have particularly at heart the fate of the Germans living beyond the frontiers of Germany who are allied with us in speech, culture, and customs and have to make a hard fight to retain these values. The national Government is resolved to use all the means at its disposal to support the rights internationally guaranteed to the German minorities;" and to the *Reichstag*, Berlin, 20 January 1937, complaining that: "the revolutionizing of Spain has driven 15,000 Germans from the country and done great harm to our commerce. Should this revolutionizing of Spain spread to other European countries the damage would be increased [...]" and that "it would be profitable to European peace as a whole if, in the treatment of the nationalities who are forced to live as minorities within other nations, mutual consideration were shown for national honor and consciousness. This would lead to a decisive lessening of tension between the nations who are forced to live side by side and whose State frontiers are not identical with the frontiers of the people." For the transcriptions of Hitler's speeches in general see *The Speeches of Adolf Hitler, April 1922-August 1939: An English Translation of Representative Passages, arranged under subjects and edited by Norman H. Baynes*. New York: Gordon Press, 1981; and Max Domanus (ed.), *Hitler: Speeches and Proclamations, 1932-1945*. 4 vols. (Trans. Mary Fran Gilbert) Wauconda, IL, USA: Bolchazy-Carducci, 1990-1997.

²² In his speech at the Berlin Sportpalast of 5 October 1938, Hitler declared that: "I am proud of my German people! I hope that in a few days the problem of the Sudeten Germans will be finally solved. By October 10 we shall have occupied all the areas which belong to us. Thus one of Europe's most serious crises will be ended, and all of us, not only in Germany but those far beyond our frontiers, will then in this year for the first time really rejoice at the Christmas festival. It should for us all be a true Festival of

the Sudetenland from Czechoslovakia where ethnic Germans were concentrated,²³ to rally domestic opinion behind reuniting the Saar including the city of Saarbrücken with Germany²⁴ and to pretend that Poland had first attacked Germany and not the other way around.²⁵

Hitler's manipulation of minority rights provided a lesson that was not lost on the drafters of the Charter of the United Nations and of the Universal Declaration of Human Rights. It explains the virtual absence of minority rights in international human rights instruments adopted since 1945 which lean heavily instead towards individualistic human rights guarantees. Neither was the lesson lost on many scholars who over the years have expressed their deep skepticism over the use of military intervention purportedly for humanitarian ends, citing not only its controversial pedigree in major power intervention against Turkey

Peace[...]” and “I have seen here whole villages undernourished, whole towns reduced to ruin.”

²³ See further Igor Lukes, *Czechoslovakia between Stalin and Hitler: The Diplomacy of Edward Beneš in the 1930s*. New York: Oxford University Press, 1996; and John F. Kennedy, *Why England Slept (1940)*. New York: Wilfred Funk, Inc., 1961.

²⁴ In his speech of 9 October 1938, Hitler proclaimed that: “Nevertheless, we are especially happy that this task of the year 1938 of again joining 10,000,000 Germans and about 110,000 square kilometers to the Reich could be accomplished in peace.” Saarbrücken had been taken by French forces on 7 September 1939, after the Saar had been taken back by Germany on 1 March 1935 following the League of Nations Council's decision on 17 January 1935 that the Saar Valley should rejoin Germany.

²⁵ In his speech at Danzig on 19 September 1938, Hitler justified his invasion of Poland on the grounds that Poland “was a State built on force and governed by the truncheons of the police and the military. The fate of Germans in this State was horrible. There is a difference whether a people of lower cultural value has the misfortune to be governed by a culturally significant people or whether a people of high cultural significance has forced upon it the tragic fate of being oppressed by an inferior. [...] The world, which immediately sheds tears when Germany expels a Polish Jew who only a few decades ago came to Germany, remained dumb and deaf toward the misery of those who, numbering not thousands but millions, were forced to leave their home country on account of Versailles – that is, if these unfortunates were Germans. What was for us and also for me most depressing was the fact that we had to suffer all this from a State which was far inferior to us; for, after all, Germany is a Great Power, even though madmen believed the vital rights of a great nation could be wiped out by a crazy treaty or by dictation.” He repeated similar arguments at the Reichstag, Berlin, on 6 October 1939.

and Hitler's misuse of it during the 1930s, but also its dubious invocation since 1945 as well.²⁶

Before considering post-1945 instances that have been claimed to exemplify genuine cases of humanitarian intervention, it is essential first to lay out the UN Charter framework governing the use of force in international relations in order to position the issue of humanitarian intervention within its current normative and institutional context.

3. Does the Charter of the United Nations allow for humanitarian intervention?

a. The general prohibition of the use of force and Article 2(4) of the UN Charter

Moving from diplomatic history and scholarly comment on the doctrine of humanitarian intervention, can we say that current international law allows for the use of force for humanitarian purposes outside UN or regional frameworks for collective security? If so, could we go even further to say that there is an actual right to use force under such circumstances to protect human rights and perhaps prevent major human suffering caused by human rights and humanitarian law violations?

In reaction to the devastation of the Second World War – a clear case of aggressive war – the Allied Powers established the UN with the primary purpose of maintaining international peace and security and to suppress “acts of aggression or other breaches of the peace” (Article 1). Article 2(4) of the Charter provides that: “all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” The current legal debate centers around the proper interpretation of Article 2(4) of the UN Charter and its relationship to relevant customary international norms on the use of force because, as the International Court of Justice held in the *Nicaragua Case*, although the content of the Charter

²⁶ See e.g., Thomas M. Franck and Nigel S. Rodley, “After Bangladesh: The Law of Humanitarian Intervention by Military Force,” in: *American Journal of International Law*, Vol. 67 (1973), pp. 275–305; and Antonio Tanca, *Foreign Armed Intervention in Internal Conflict*. Leiden/Boston: Martinus Nijhoff Publishers, 1993, p. 115.

and customary norms on the use of force overlap to a great extent, they are not identical, and even if they were, they maintain a separate existence.²⁷ The Court found that substantial agreement was evident between the parties as to the customary law status of the prohibition on the use of force as per Article 2(4) of the UN Charter²⁸ and not only that, but that this prohibition formed part of *jus cogens*²⁹ and it therefore overrode all other contrary norms of lesser status.³⁰

We have seen that state practice provides weak support for the doctrine of humanitarian intervention. The clear presence of self-interest in the few instances where humanitarian intervention has been claimed as the grounds for the deployment of military force, casts doubt on the existence of a customary legal norm allowing for it. Nevertheless, we must also consider whether in any case the UN Charter might possibly allow for humanitarian intervention. So the question for us becomes whether the UN Charter, in particular Article 2(4) prohibiting the use of force, allows any space for a legitimate use of military intervention on humanitarian grounds.

²⁷ As the ICJ observed, a norm of customary international law, in contrast to a norm of identical content in treaty law, cannot be suspended on grounds that the other party has not observed it. Also, the methods of interpretation and application of treaty law, as opposed to customary law, are different: *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), *ICJ Reports*, Judgement of 27 June 1986, at paras 177–178. Some authors pose the question in a somewhat different manner: Beckman, for example, asks whether international law provides for “a right or a duty to ensure implementation” of human rights and humanitarian law through armed intervention: *op. cit.*, p. 75.

²⁸ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), *ICJ Reports*, Judgement of 27 June 1986, at paras. 184–189.

²⁹ See Article 53 of the Convention on the Law of Treaties, signed at Vienna on 23 May 1969, entered into force on 27 January 1980, which affirms that: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

³⁰ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), *ICJ Reports*, Judgement of 27 June 1986, at para 190.

b. Does humanitarian intervention figure as an exception to Article 2(4)?

Some commentators have argued that humanitarian intervention outside the UN system or other collective security apparatus, is authorized by general international law as an exception to the peremptory prohibition of the use of force, or at least that, a rule of customary international law to that effect is currently developing.³¹ On the other hand, many empirically-based examinations have reached the opposite conclusion.³² Scholarly opinion on this issue runs in opposite directions.

In considering possible exceptions to the UN Charter prohibition of the use of force arising from customary international law or from other sources, it is essential to recall the UN General Assembly’s Declaration on Friendly Relations³³ as well as its Definition of Aggression³⁴ which distinguish legitimate from illegitimate uses of force in international relations. In particular, the Declaration proclaims in paragraph 1 that:

“Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues;”

³¹ See e.g., Will D. Verwey, “Humanitarian Intervention,” in: Antonio Cassese (ed.), *op. cit.*, pp. 60–66; and Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*. New York: Transnational Publishers, 1988, p. 272; Jean-Pierre Fonteyne, “The Customary International Law Doctrine of Humanitarian Interventions: Its Current Validity Under the United Nations Charter,” in: *California Western International Law Journal*, Vol. 4 (1974), pp. 203–270.

³² See e.g., Tanca, *op. cit.*, p. 115. See also Martin Dixon, *Textbook on International Law*, 2nd edition. London: Blackstone Press, 1993, p. 309, arguing that “humanitarian intervention runs directly counter to the whole purpose of Art. 2(4) and many General Assembly resolutions adopted in the last 50 years.”

³³ “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,” Resolution 2625 (1970), adopted by the General Assembly during its 25th session, 24 October 1970, adopted without a vote.

³⁴ “Definition of Aggression,” Resolution 3314 (1974), adopted by the General Assembly during its 29th session, 14 December 1974, Supp. 21, adopted without a vote.

and moreover that:

“A war of aggression constitutes a crime against the peace, for which there is responsibility under international law.”

The Declaration also rules out the legality of military occupation and recognizes an obligation *erga omnes* on all states not to recognize illegally obtained gains from such acquisition. Also, the Declaration underlines that: “No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Further, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.” The Declaration reiterates that the “territorial integrity and political independence of the State are inviolable.” Despite the affirmation of these and other principles relating to the sovereign equality of states, the Declaration does not specifically rule out humanitarian intervention or contain pertinent language leaning one way or the other.

The General Assembly’s Definition of Aggression provides clearer guidance with regard to the inadmissibility of military intervention purportedly on humanitarian or other similar grounds. It defines aggression as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations” and lists in paragraph 3 a number of prohibited acts.³⁵ Paragraph 5 of the resolution states specifically that: “No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.” More recently, General Assembly resolution 42/22³⁶ which approved the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations affirms the ban on the use of force and the principle

³⁵ Paragraph 3 of General Assembly resolution 3314 is reproduced on p. 168 below.

³⁶ “Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations,” Resolution 42/22 (1987), adopted by the General Assembly during its 42nd session, 18 November 1987, adopted without a vote.

that: “No consideration of whatever nature may be invoked to warrant resorting to the threat or use of force in violation of the Charter.” Also, paragraph 28 declares that states should assist the Security Council to settle crisis situations and regional conflicts and facilitate the Council to carry out its responsibilities to address potential threats to international peace and security. The Assembly resolutions discussed above evince the international community’s view that the prohibition of the use of force must admit only the narrowest of exceptions.

At this juncture, the critical question that remains as regards the proper textual interpretation of Article 2(4) is whether Article 2(4) prohibits force *only* where it infringes the territorial integrity or political independence of any state; or rather *in any other manner* inconsistent with the Purposes of the UN (including self-defense). Aside from the obvious case of self-defense as per Article 51 of the UN Charter,³⁷ whether we apply a wide or narrow interpretation to Article 2(4) conditions our view of the legality of humanitarian intervention. If the exceptions are read broadly, states would be allowed rather broad discretion to claim that their resort to force in a particular instance did not breach Article 2(4) because it served one of the purposes of the UN as outlined in Article 1 of the UN Charter. However, Article 1 of the UN Charter is so broad that states would be provided *expansive* legal authority to take unilateral forcible action, for example, “to maintain international peace and security,” or to suppress “acts of aggression or other breaches of the peace,” or to take “measures to strengthen universal peace” or to “achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character” or to promote or encourage “respect for human rights and for fundamental freedoms.” In other words, if we were to read Article 2(4) to allow any state to use force in pursuit of a purpose of the United Nations, in effect this would leave the more powerful states a free hand to decide, on the basis of their own subjective

³⁷ Article 51 of the UN Charter reads: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

interpretations of these broad purposes, whether they had a legal right to deploy armed force or not in a given instance.

Yet, this would violate the very *raison d'être* of the UN Charter which is to maintain international peace through an effective system of *collective security* rather than by allowing states to deploy force according to unilateral considerations. We must therefore adopt the view that the last part of Article 2(4) is meant only to reinforce the general prohibition of the use of force and to reaffirm that states are authorized to use force only in cases of self-defence.

Thus, a plain reading of Article 2(4) does not support the notion of the legality of unilateral military intervention for humanitarian considerations. In case Article 2(4) is not sufficiently clear in itself, General Assembly resolutions 2625, 3314 and 42/22 reflect the international community's view that Article 2(4)'s prohibition of the use of force in international relations must be interpreted broadly and exceptions to this prohibition have to be read very narrowly.

Similarly, military invasion cannot be excused by appealing to the need to foster democracy, human rights and the rule of law in a country, as has been claimed by the Bush administration with regard to its 2003 invasion of Iraq. In this connection, it is valuable to recall Oscar Schachter's warning back in 1991 that:

"The idea that armed invasions could make the world 'safe for democracy' has had little appeal to governments. Memories of past invasions and seizure of power in the name of self-determination and freedom are still fresh in many parts of the world."³⁸

³⁸ Oscar Schachter, *International Law in Theory and Practice*. Dordrecht/Boston: M. Nijhoff Publishers, 1991, p. 123.

Others, such as Farer, Nafziger³⁹ and Doswald-Beck⁴⁰ have taken a similar line.

Returning to the Nicaragua Case, the International Court of Justice emphasized that:

"The use of force could not be the appropriate method to monitor or ensure ... respect for [human rights]. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the *contras*."⁴¹

The ICJ went on to hold there was no general right of intervention and that intervention violated the prohibition of the use of force in international relations.⁴²

In sum, the unilateral exercise of military intervention on humanitarian or moral grounds constitutes a breach of Article 2(4) of the UN Charter.⁴³ While scholarly opinion has been divided over the legality of humanitarian intervention, as we have seen, the International Court of Justice Judgement in the *Nicaragua Case* is clear that military intervention on humanitarian or other similar grounds constitutes a violation of international law.

³⁹ Tom J. Farer, "Human Rights in Law's Empire: the Jurisprudence War," in: *American Journal of International Law*, Vol. 85, No. 1 (1991), pp. 117-127, at 117; and James A. R. Nafziger, "Self-Determination and Humanitarian Intervention in a Community of Power," in: *Denver Journal of International Law and Policy*, Vol. 20, No. 1 (1991), pp. 9-39.

⁴⁰ Louise Doswald-Beck, "The Legal Validity of Military Intervention by Invitation of the Government," in: *British Yearbook of International Law*, Vol. 56 (1985), pp. 189-252, at 207.

⁴¹ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*), *ICJ Reports*, Judgement of 27 June 1986. *Loc. cit.*, at para. 209.

⁴³ See Natalino Ronzitti, "Use of Force, Jus Cogens and State Consent," in: Antonio Cassese (ed.), *op. cit.*, pp. 147-166 at 155, who also concludes, following a consideration of a number of cases in history that have been put forward as instances of "humanitarian intervention," that such interventions were, in fact, unlawful. See also Thomas Franck and Nigel Rodley, *op. cit.*

To further round out the picture, and given the fact that some scholars have argued that there may be *developing* in customary international law a norm allowing for humanitarian intervention, we next must review post-1945 cases to consider whether state practice might lend support for this view.

c. Possible cases of humanitarian intervention since 1945

Indian intervention in East Pakistan

Perhaps the most plausible candidate for genuine humanitarian intervention can be found in India's invasion of East Pakistan to liberate its people from West Pakistan's domination. Pakistan was originally established by partition on 15 August 1947 from greater India. It comprised two separate territories: West Pakistan, populated mainly by Shi'a, Urdu-speaking Muslims, and East Pakistan, populated mainly by Sunni, Bengali-speaking Muslims. East and West Pakistan were separated by over 1,400 kilometers of Indian and Nepalese territory in between. Initially called the "East Bengal" province of Pakistan, the territory's autonomy was reduced in 1955 and it was renamed "East Pakistan" on 7 October 1958.

On 13 November 1970, a major cyclone hit East Pakistan, taking the lives of an estimated 300,000 to 500,000 people. The government's failure to provide effective humanitarian relief during and following the disaster boosted the Bengali separatist movement and strengthened political support for the Awami League, which had been established in 1949 on a platform of East Pakistani independence from West Pakistan. Elections were held in December 1970 and the Awami League, under the leadership of Sheikh Mujibur Rahman, who had campaigned on increased political autonomy from Islamabad, won a large majority of seats over the incumbent Pakistan People's Party. Islamabad refused to recognize the election results and rioting broke out. Islamabad rejected a proposal put forward by the new government in Dhaka to convene a first meeting of an independent assembly.

In late February 1971, Pakistani President Yahya Khan deployed troops to East Pakistan to quell the riots. Sheikh Mujibur Rahman was arrested, imprisoned and taken to West Pakistan. On 25 March 1971,

the Pakistani government launched a vicious campaign of systematic massacres, killing some 7,000 persons in one night. On the evening of 26 March 1971, Major Ziaur Rahman broadcast a message over a rebel-held radio station declaring the independence of the People's Republic of Bangladesh and calling upon all Bengalis to resist West Pakistan's armed occupation.⁴⁴

In the ensuing civil war that was to last until December 1971, Pakistani soldiers slaughtered around one million civilians. Perhaps half a million women were raped. Soldiers and commanders seem to have been under orders to perpetrate massacres, assassinations of political leaders and intellectuals, mass rape, systematic torture, forced disappearances and summary or arbitrary executions, in order to regain control over the country by sheer force and intimidation. Around 10 million refugees fled Bangladesh for India.⁴⁵

Despite the very high number of atrocities that were being reported at the time, the UN Security Council was far from considering any sort of collective security action itself to stop the gross violations being committed by Pakistani soldiers. The USSR's opposing vote prevented the Security Council from declaring the situation a threat to international peace and security. Worse, U.S. foreign policy was tilted strongly in favour of General Yahya Khan's government of Pakistan. President Richard Nixon and Secretary of State Henry Kissinger seemed personally very wary of the threat India might have posed to Pakistan's long-term geo-strategic security.⁴⁶ However, the high intensity of the violence being perpetrated by Pakistani forces impelled the Consul-General of the

⁴⁴ Although it can be claimed that an earlier radio broadcast made on 25 March 1971 declaring Bangladesh's independence represents the first official such declaration, the Proclamation of Independence, signed on 10 April 1971 by Professor Yusuf Ali, "Duty Constituted Potentiary, By and Under the Authority of the Constituent Assembly of Bangladesh," in Mujibnagar, Bangladesh, states the proclamation of independence shall be deemed to have come into effect on 26 March 1971.

⁴⁵ See Subrata R. Chowdhury, *The Genesis of Bangladesh: A Study in International Legal Norms and Permissive Conscience*. London: Asia Publishing House, 1972; and Mohammed Ayoob and K. Subrahmanyam, *The Liberation War*. New Delhi: S. Chand, 1972.

⁴⁶ See Louis J. Smith (ed.), *Foreign Relations of the United States, 1969-1976*, Vol. XI: *South Asia Crisis, 1971*. Washington: Department of State Publication 11199, 2005.

United States in Dhaka, Mr. Archer Blood, to express his strong dissent over official American inaction on East Pakistan, in a confidential telegram to the State Department in Washington that has recently been declassified.⁴⁷

After months of complete inaction on the part of the UN and the international community at large, India decided to support Bangladesh and, on 3 December 1971, India sent troops into East Pakistan to put a stop to the violations. The Indian Ambassador to the UN assured the world that "We have on this particular occasion absolutely nothing but the purest of motives and the purest of intentions: to rescue the people of East Bengal from what they are suffering"⁴⁸ and on 6 December, India recognized Bangladesh. On the same day, the Security Council failed to reach agreement to address the extremely serious situation in the territory, adopting instead resolution 303⁴⁹ which acknowledged that the lack of unanimity among the Council's permanent members had "prevented it from exercising its primary responsibility for the maintenance of international peace and security" and finally referred the matter to the

General Assembly as provided for in the Uniting for Peace resolution.⁵⁰ Following its consideration of the issue on 4, 5 and 6 December, the General Assembly adopted resolution 2790 to coordinate international assistance, relief and repatriation efforts with regard to the refugees in Indian territory.⁵¹ The Assembly also adopted resolution 2793⁵² expressing its grave concern over the hostilities that had broken out between India and Pakistan, and qualifying the situation as "an immediate threat to international peace and security." Resolution 2793 also called for an immediate cease-fire, urged that all measures be taken to protect the lives of the civilian population, encouraged all states to cooperate with the Secretary-General to provide assistance to refugees, and called upon the Security Council "to take appropriate action." A cease-fire was declared, and the Pakistani Army signed an instrument of surrender on 16 December 1971. Around this time, the U.S. dispatched the aircraft carrier Enterprise so as to indicate American resolve to limit India's action in Bangladesh.⁵³ Despite the cease-fire in place and Pakistan's surrender, sporadic fighting continued and on 21 December the Security Council

⁵⁰ "Uniting for Peace," Resolution 377 (1950), adopted by the General Assembly during its 5th session, 3 November 1950. The resolution resolves that "if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures [...]" and that such emergency Assembly session shall be convened within twenty-four hours on the vote of any seven Council members, or of a request from a majority of UN members. According to the Uniting for Peace resolution procedures, as spelt out in its Annex, the addition of an agenda item during an emergency special session requires a two-thirds majority of the members present and voting.

⁵¹ See "United Nations Assistance to East Pakistan Refugees through the United Nations Focal Point and United Nations Humanitarian Assistance to East Pakistan," Resolution 2790 (1971), adopted by the General Assembly during its 26th session, 6 December 1971.

⁵² See "Question Considered by the Security Council at its 1606th, 1607th and 1608th meetings on 4, 5 and 6 December 1971," Resolution 2793 (1971), adopted by the General Assembly during its 26th session, 7 December 1971.

⁵³ See Louis J. Smith (ed.), *op. cit.*, p. 816, footnote 2 concerning the Press Statement of Secretary of Defense Melvin Laird in *VI Public Statements of Secretary of Defense Laird* (1971) at 2262-2274.

⁴⁷ See United States Consulate (Dacca) Cable, "Dissent from U.S. Policy Toward East Pakistan" of 6 April 1971 (Confidential), signed by 19 Department of State officials. Source: RG 59, SN 70-73 Pol and Def. From: Pol Pak-U.S. To: Pol 17-1 Pak-U.S. Box 2535; for an interesting discussion of Kissinger's role as advisor to President Nixon and the U.S. attitude towards Pakistan and India at the time of the secession of East Pakistan see Steven Feldstein, "Applying the Rome Statute of the International Criminal Court: A Case Study of Henry Kissinger," in: *California Law Review*, Vol. 92, No. 6 (December 2004), pp. 1663-1727.

⁴⁸ UN Document S/PV.1606, 6 December 1971 at 17-18.

⁴⁹ "The situation in the India/Pakistan subcontinent," Resolution 303 (1971), adopted by the Security Council at its 1608th meeting, 6 December 1971, by 11 votes to none, with France, Poland, the Union of Soviet Socialist Republics, and the United Kingdom abstaining.

felt it necessary to adopt resolution 307⁵⁴ reiterating its demand for a durable cease-fire until the withdrawal of foreign armed forces could be completed, calling for full compliance with the Geneva Conventions of 1949, and deciding to remain seized of the matter.⁵⁵

India's actions were widely hailed for having prevented further bloodshed of defenseless Bengalis against brutal massacres, torture and rape. Moreover, India did not maintain its forces on Bangladeshi territory for any longer than necessary to ensure an end to the conflict and the resumption of peace. Nor did India attempt to acquire territory from its intervention. Arguably, India resorted to military intervention at some risk to its own security – a risk that in fact materialized with Pakistan's bombardment of Indian airfields close to India's border with West Pakistan on 3 December 1971.

On the face of it, India's military intervention in East Pakistan, despite considerable skepticism on the part of many UN member states at the time, and despite certain obvious strategic advantages to Indian security, seems to have been carried out for humanitarian motives rather than for raw territorial or political gain. However, it has to be admitted that India's actions, in addition to helping the people of Bangladesh in their hour of dire need, also served India's own self-interests well. India's intervention weakened Pakistan's political security and enhanced its own. It also stemmed the tide of refugees from East Pakistan to India which in itself represented not only a looming financial and logistical burden to India, but also a source of potential instability for the region in the future. It has to be recalled also that during the crisis, India shifted the reasons it gave for its deployment of armed forces into East Pakistan from "humanitarian intervention" to "self-defence." The *shift* in India's officially stated policy away from humanitarian intervention naturally undermines the

⁵⁴ "The Situation in the India/Pakistan Subcontinent," Resolution 307 (1971), adopted by the Security Council at its 1621st meeting, 21 December 1971, with 13 votes in favour, none against, and Poland and the Union of Soviet Socialist Republics abstaining.
⁵⁵ On 22 February 1974 Pakistan recognized the independence of Bangladesh and by 2 July 1972 the President of Pakistan and the Prime Minister of India felt able to normalize relations with the signing of an agreement in Simla that recognized an end to the conflict. By April 1974, the repatriation of remaining prisoners of war to their respective countries of origin was put into effect. See *Agreement on the Repatriation of Prisoners of War and Civilian Internees*, signed on 9 April 1974 in New Delhi.

claim that India's actions were taken solely and purely for humanitarian considerations.⁵⁶

In any case, the question for us is not so much whether India's action in East Pakistan is laudable from a moral and political point of view, but whether such action could serve as an example of genuine humanitarian intervention to support legal recognition of such action in the future. Here, the thoughts of Franck and Rodley, writing in the American Journal of International Law, can be recalled to the effect that the "Bangladesh case ... does not constitute the basis for a definable, workable, or desirable new rule of law which, in the future, would make certain kinds of unilateral military interventions permissible."⁵⁷ Their arguments against legitimizing humanitarian intervention as an exception to the Article 2(4) prohibition of the use of force were based on the likelihood that such legitimization would open the door to subjective interpretation and abuse in the future. India's military intervention does not seem sufficiently clear of self-interest as to qualify it as purely humanitarian in character or to justify rewriting the basic prohibition of the use of force in international relations to accommodate such cases. Finally, the risk that military intervention can quickly escalate was amply demonstrated by Pakistan's December 1971 attack on Indian territory which, fortunately, did not lead to full-scale war.

Tanzanian intervention in Uganda

Another plausible example of humanitarian intervention can be found in Tanzania's use of military force to overthrow the repressive dictatorship of Uganda's President Idi Amin. Tanzania brought a halt to widespread and systematic violations of human rights but, as in the case of the Indian intervention in East Pakistan, Tanzania did not claim to have acted on the basis of humanitarian considerations, but rather out of self-defence to thwart Amin's drive to annex Tanzania's Kagera region.

In terms of historical background, following Uganda's independence from Britain on 9 October 1962,⁵⁸ Milton Obote became Prime Minister, but on 9 October 1963 he abolished the Constitution and declared

⁵⁶ On this point see generally Fernando R. Tesón, *op. cit.*

⁵⁷ Thomas Franck and Nigel Rodley, *op. cit.*, p. 276.

⁵⁸ Self-government had already been granted by Great Britain on 1 March 1962.

Uganda a Republic. By 1967, he abolished the traditional ruling kingdoms,⁵⁹ including Buganda which had existed since around 1300 A.D.⁶⁰ and which had enjoyed a high degree of autonomy under Schedule 1 of the 1962 Constitution of Uganda.⁶¹

On 25 January 1971, while Obote was attending a meeting of the Heads of State of the Commonwealth in Singapore, Major General Idi Amin seized the opportunity to overthrow the government. Obote sought safe haven in Tanzania from where he managed to marshal enough support from the Acholi and Lango ethnic groups of Uganda to invade the country from Tanzania in 1972. Obote's attempt to regain power failed on this occasion and Idi Amin reacted by attacking several towns and villages in Tanzania. He then decided to purge Acholi and Lango officers from the Ugandan armed forces, which not surprisingly stirred up further ethnic unrest throughout the country.

During his rule, Idi Amin seemed to exhibit progressively paranoid tendencies. He suspended human rights and intensified the brutal persecution of certain tribal and ethnic groups whom he considered a threat to his power. By the time he was driven from power, some 300 to 400 thousand persons had been killed.⁶² On 4 August 1972 Amin announced in a public speech that all Asian non-citizens in Uganda, which included many born in Uganda, had 90 days to leave or face expulsion. Between 60,000 and 80,000 persons of mainly Indian origin were given the ultimatum to leave. Many held British passports, but in other cases their Ugandan nationality had been revoked, and because they did not benefit from any other nationality, they became stateless persons. Some 60 to 70 thousand fled to the United Kingdom, Canada,

⁵⁹ The Kingdoms of Uganda were abolished on 8 September 1967.

⁶⁰ Buganda did not regain its legal status as a recognized kingdom until 24 July 1993.

⁶¹ See further the Buganda Agreement, 1900, adopted after the establishment of the British Protectorate over Buganda, concluded on 11 April 1894, effective 18 June 1894. Britain gained effective control over the rest of Uganda in two steps: in 1896 and 1902. Uganda became a British colony on 1 April 1905.

⁶² See Michael J. Bazylar, "Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia," in: *Stanford Journal of International Law*, Vol. 23, No. 2 (1987), pp. 547-619, at 571.

the United States and elsewhere, while those who remained in Uganda were dispersed from city to rural areas.⁶³

On 12 October 1978, Uganda invaded Tanzania in a bid to annex the Kagera region. However, in February 1979, Tanzania counter-attacked with the help of Ugandan insurgents, successfully took control of Kampala and installed Obote as President. Idi Amin was forced to flee Uganda on 13 April 1979. After several months of occupation, Tanzanian forces withdrew from Uganda.

Tanzania's invasion of Uganda to overthrow Idi Amin has been characterized by many scholars as a possible case of humanitarian intervention because Tanzania did not seem motivated mainly by self-interest in the sense that it only used force once it had been attacked by Uganda and, more importantly, it put an end to a murderous regime that had terrorized the population and killed thousands.⁶⁴

As in the case of India's intervention in Bangladesh, however, although humanitarian considerations may have played an important role in the intervening government's calculus to invade, security considerations seemed to have been paramount. Second, Tanzania, like India, definitely benefited from the intervention by enhancing its own position in the region. Third, like India, Tanzania claimed to have acted on the basis of self-defence – an entirely distinct ground from a legal point of view that cannot be confused with humanitarian intervention. Tanzania's own stated motives for its deployment of military force undercut the proposition that the government of Tanzania acted out of humanitarian considerations, and also undermine the claim that a norm allowing for humanitarian intervention has been emerging since 1945.

Vietnamese intervention in Cambodia

From the time of the fall of the great Khmer Empire in the year 1340 until 1845, Cambodia remained a vassal state under Siam, except for

⁶³ See Andrew Field, "The Legality of Humanitarian Intervention and the Use of Force in the Absence of United Nations Authority," in: *Monash University Law Review*, Vol. 26 (2000), pp. 339-361, at 339.

⁶⁴ See Oji U. Umozurike, "Tanzania's Intervention in Uganda," in: *Archiv des Völkerrechts*, Vol. 20, No. 3 (1982), pp. 301-313.

certain periods, under Vietnam. From 1846 until 1863, Cambodia was ruled under the joint suzerainty of both Siam and Vietnam. On 11 August 1863 France took control of Cambodia as a French Protectorate, and by 17 October 1887, as part of French Indochina. During the Second World War, Cambodia was ruled by the Vichy-controlled French government and, for a brief time, was occupied by Japan. Cambodia proclaimed its independence on 18 March 1945. However, Charles de Gaulle considered that France could play an important "civilizing mission" in Indochina and he tried to introduce political parties and a democratic electoral system. France also maintained military bases on Cambodian territory.

In 1951, nationalist elements began to agitate for complete Cambodian independence from France and the withdrawal of all French troops from Cambodian soil. Meanwhile, King Sihanouk pressured France to grant greater independence to Cambodia, including control over the police and the courts, or risk further radicalizing the independence movement. The government of France finally granted Cambodia full independence on 9 November 1953. On 7 May 1954, Vietnamese forces under General Nguyen Giap won a decisive victory over France at the historic battle of Dien Bien Phu, Vietnam, driving the French out of Indochina altogether.

King Norodom Sihanouk stayed in power until a U.S.-backed military coup led by General Lon Nol seized power on 18 March 1970. At various points in time during the war between North and South Vietnam, South Vietnamese troops attacked Communist bases in Cambodia and committed atrocities against villagers suspected of lending support to the Viet Cong. As a result, Cambodian public support shifted towards the Khmer Rouge which over the next few years increased its control over parts of Cambodia. In reaction, Lon Nol used increasingly oppressive tactics, further alienating the Cambodian general public and strengthening the Khmer Rouge which began shelling the main Cambodian cities from 1973.

In April 1975, the Khmer Rouge – led by Pol Pot and backed by North Vietnam and China – gained control over Phnom Penh and then over the entire country. The Khmer Rouge tried to eliminate all social classes and forced all city residents to relocate to the countryside to work

in the rice paddies. In addition, the Khmer Rouge went about eliminating markets, money, banks, as well as all symbols of Cambodian culture, history and religion. The Khmer Rouge also dismantled all communications and transportation links with the outside world as well as within Cambodia itself, including radio, television, flights, and telecommunications.⁶⁵ Hundreds of thousands from the elite and educated classes were tortured or massacred. Thousands more died from starvation and disease. By the time the Khmer Rouge regime was eventually overthrown, some 2 or 3 million Cambodians had been killed – roughly a quarter or a third of the entire Cambodian population.

Following a series of border clashes, Vietnam invaded Cambodia on 25 December 1978, taking control of Phnom Penh on 7 January 1979. The government of Vietnam changed the name of the country to People's Republic of Kampuchea and installed a puppet government, forcing Pol Pot and the Khmer Rouge to hide in the thickly forested areas along the Thai frontier. In 1981, the Vietnamese-backed Kampuchean People's Revolutionary Party took power in elections but failed to gain recognition from the international community. The Khmer Rouge government-in-exile continued to be recognized officially by China and the United States – both of whom feared an expanded Soviet influence in Southeast Asia – and continued to represent Kampuchea at the United Nations.⁶⁶ It was not until 1989 that Vietnam, under pressure from the Soviet Union, ended its occupation of Cambodia, which led to the signing of the Comprehensive Political Settlement of the Cambodia Conflict in 1991.⁶⁷

The fact that Vietnam drove a regime from power that was responsible for crimes against humanity that rank among this century's worst in scale, character and intensity, seems to have played a small role compared to Vietnam's political self-interest in strengthening the

⁶⁵ See Scott Luffglass, "Crossroads in Cambodia: The United Nations' Responsibility to Withdraw Involvement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge," in: *Virginia Law Review*, Vol. 90, No. 3 (May 2004), pp. 893-964, Chapter I: "Background of the Khmer Rouge Regime."

⁶⁶ See Carol Umhoefer, "Towards a UN-Sponsored Cambodian Solution," in: *Harvard International Law Journal*, Vol. 32, No. 1 (Winter 1991), pp. 275-285.

⁶⁷ *Comprehensive Political Settlement of the Cambodia Conflict*, signed on 23 October 1991 in Paris.

Soviet Union's hand in the area and counterbalancing China's presence in the region. Like India and Tanzania, Vietnam did not put forward humanitarian considerations as its reasons for invading and occupying Cambodia, but instead self-defence. Moreover, if Vietnam had wished to intervene on humanitarian grounds to prevent the massive atrocities being perpetrated by the Khmer Rouge against the entire population of Cambodia, it could have done so much earlier in time. Not only that, but Vietnam occupied Cambodia until the Soviet Union pressured it to withdraw, mainly because of the cost and difficulty in controlling foreign territory. If Vietnam's intentions were humanitarian in character, it could have invited the UN to monitor the human rights situation and bring peace to the country, but instead, Vietnam sought to exercise control over Cambodia. Once we look beyond the fact that Vietnam's military intervention in Cambodia ended a period of great suffering for the Cambodian people and led to a lasting peace, we again find that realpolitik dwarfs humanitarian considerations to the point that Vietnam did not even bother to offer "humanitarian intervention" as a pretext.

4. Can UN or regional collective security inaction authorize unilateral humanitarian intervention?

As discussed above, the doctrine of humanitarian intervention, from its just war beginnings, through its development in the context of major power intervention against the Ottoman Porte, to its extreme misuse by Hitler, has been so open to manipulation that its legitimacy has been uncertain at best. In our review of the military interventions of India in East Pakistan, Tanzania in Uganda and Vietnam in Kampuchea, we found that, although the intervening state brought down regimes that were perpetrating horrific crimes against their own people, the intervening state's motives were not clear of self-interest. Self-interest on the part of the intervening state negates the argument that the deployment of military force in these cases was motivated entirely by humanitarian considerations.

Yet, the fact that the cases we have discussed do not qualify as genuine humanitarian interventions does not necessarily mean that in principle *all* cases of unilateral state humanitarian intervention outside UN or regional collective security frameworks are *a priori* invalid. One could imagine the possibility that a state decides reluctantly to intervene

militarily in the territory of another state *purely* out of compassion for people who are about to be slaughtered by their own government because collective security avenues seem completely blocked. In such cases, could UN or regional collective security inaction to halt or prevent ongoing severe violations of human rights and/or humanitarian law, authorize a state or states to undertake humanitarian intervention?

We must first recall that Article 39 of the Charter of the United Nations confers upon the Security Council the authority and, in fact, the mandatory obligation to "determine the existence of any threat to the peace, breach of the peace, or act of aggression." The Article further states that the Council "shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." The Council enjoys wide authority to decide which measures shall be taken: complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations (Article 41); or, if these prove inadequate, even:

"such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." (Art. 42)

Furthermore, Security Council resolutions adopted under Chapter VII of the Charter legally bind all UN member states by virtue of Article 24 which confers on the Council primary responsibility for the maintenance of international peace and security. By Article 24, member states also "agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." In addition, under Article 25: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." To make all this work, under Article 43 of the Charter, all UN member states are supposed to make armed forces, assistance and facilities including rights of passage, available to the Security Council in order to contribute to the maintenance of international peace and security.⁶⁸

⁶⁸ Article 43 envisages the conclusion of special agreements between UN member states

As we know however, the willingness of UN member states to extend this essential form of cooperation to the Council evaporated with the onset of the Cold War, leaving the Council without the practical means to prevent or halt ongoing violence or to restore international peace and security in many instances.

In order to take action under Chapter VII, the Security Council must first adopt a resolution – a procedure that requires nine affirmative votes out of the fifteen Council members, including the concurring votes of the five permanent members, China, France, Russia, the United Kingdom and the United States. In effect, each of the permanent members maintains the power to veto any draft resolution of the Security Council by voting against its adoption, and it can thereby block any of the measures contemplated under Articles 39, 41 and 42 in particular instances. During the Cold War, the UN's wide authority to intervene in emergency cases to stop political violence that amounted to a threat to or breach of international security, was rendered almost completely useless because of perennial stalemate among the veto-wielding Council members. Thus, the dream of effective collective security through the UN was repeatedly sacrificed for the sake of bitter ideological warfare, cynical political alliances, and the twin dogmas of state sovereignty and non-intervention in internal affairs – as if wholesale slaughter was not a matter of legitimate international legal concern and action.

Because the Security Council could not maintain international peace and security in the way the drafters of the Charter had originally intended, yet the imperative to halt and prevent serious violence still remained, the Council has had to delegate certain of its powers to the General Assembly as in the Uniting for Peace resolution of 1950, to regional arrangements such as the North Atlantic Treaty Organization, for example, as regards the establishment of safe areas in and around the

and the Security Council to make sure the Council has as its disposal all necessary means to undertake its peace and security responsibilities. Article 43 further provides that these agreements, which should make clear the number and type of forces, degree of readiness, general location as well as the kind of facilities and assistance to be provided, shall be concluded as soon as possible on the initiative of the Security Council.

Republic of Bosnia and Herzegovina in 1993⁶⁹ or, arguably with regard to Kosovo,⁷⁰ or in some cases to UN member states as in the cases of Korea in 1950,⁷¹ and Iraq in 1990.⁷²

⁶⁹ See "Bosnia and Herzegovina," Resolution 836 (1993), adopted by the Security Council at its 3228th meeting, 4 June 1993, which reiterates the Council's "alarm at the grave and intolerable situation in the Republic of Bosnia and Herzegovina arising from serious violations of international humanitarian law" including "ethnic cleansing" and in paragraph 8 calls upon "Member States to contribute forces, including logistic support, to facilitate the implementation of the provisions regarding the safe areas" and in paragraph 10 decides that "Member States, acting nationally or through regional organizations or arrangements, may take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary measures, through the use of air power, in and around the safe areas in the Republic of Bosnia and Herzegovina, to support UNPROFOR in the performance of its mandate [...]."

⁷⁰ "On the situation relating Kosovo," Resolution 1244 (1999), adopted by the Security Council at its 4011th meeting, 10 June 1999, under Chapter VII of the UN Charter establishes an international security presence to protect Kosovars from Serbian atrocities and in paragraph 4 of Annex 2 states that: "The international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control and authorized to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees." See also "On the Situation in Kosovo (FRY)," Resolution 1199 (1998), adopted by the Security Council at its 3930th meeting, 23 September 1998, which expresses the Council's grave concern over "the recent intense fighting in Kosovo and in particular the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties and, according to the estimate of the Secretary-General, the displacement of over 230,000 persons from their homes" as well as a large number of internally displaced persons, some 50,000 of whom were without shelter and basic necessities.

⁷¹ "Complaint of aggression upon the Republic of Korea," Resolution 83 (1950), adopted by the Security Council at its 474th meeting, 27 June 1950, determined "that the armed attack upon the Republic of Korea by forces from North Korea constitutes a breach of the peace" and recommends "that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area." "Complaint of aggression upon the Republic of Korea," Resolution 84 (1950), adopted by the Security Council at its 476th meeting, 7 July 1950, notes the assistance that member states have provided to the UN pursuant to resolution 83 and recommends that all members provide military forces and other assistance "to a unified command under the United States of America."

⁷² "Iraq-Kuwait," Resolution 678 (1990), adopted by the Security Council at its 2693rd meeting, 29 November 1990, with 12 votes in favour, 2 against (Cuba and Yemen), and China abstaining. In paragraph 2 the Resolution authorizes member states "to use all necessary means to uphold and implement resolution 660 and all subsequent relevant

The main point is that states do not enjoy the legal authority to interpret an implied Security Council delegation of its Chapter VII powers in a given instance. Writing in 1998, Sarooshi observed that:

“... the Council has attempted to deal with humanitarian crises by using the common technique of delegating its Chapter VII powers to Member states to carry out and command military enforcement action in order to achieve a variety of objectives. For this to occur, the Council needs to link gross violations of human rights occurring within a country to a threat to, or breach of, international peace and security. In other words, the Council must make an Article 39 determination: a necessary prerequisite for the Council to be able to use or even delegate its Chapter VII powers.”⁷³

The above requirement remains essential because it carries with it the procedural faculty whereby any one of the five Council's permanent members can veto a resolution to this effect. Secondly, the Security Council cannot delegate or authorize military action without limitation because the Council itself does not have this power and must remain at all times within the legal bounds set by the UN Charter.⁷⁴

It follows that Security Council inaction cannot by itself authorize UN member states to undertake humanitarian intervention. To the contrary, for there to be a delegation of Chapter VII powers to a UN member state, or an authorization to take certain action pursuant to a Security Council power or function, there must first be action by the Security Council including first and foremost a determination according to Article 39 that the situation at hand constitutes a threat to or breach of international peace and security. This determination has to be reached according to UN Charter procedure which includes the non-use of veto by a permanent member. The humanitarian situation must be so grave

resolutions and to restore international peace and security in the area” and “requests all States to provide appropriate support.” “Iraq-Kuwait,” Resolution 660 (1990), adopted by the Security Council at its 2932nd meeting, 2 August 1990, calls for the immediate and unconditional withdrawal of all Iraqi forces from the territory of Kuwait.

⁷³ Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of Its Chapter VII Powers*. Oxford: Oxford University Press, 1999, p. 211.

⁷⁴ See loc. cit., p. 34 et. seq. on the limits of Security Council delegation of its Chapter VII powers in terms of general principles of international law.

that the Council considers it to constitute or involve a threat to or breach of international peace and security. Without this determination, a state lacks legal authority to claim that its deployment of military force constitutes genuine humanitarian intervention in line with the interests of the international community as a whole.

5. On a “responsibility to protect”

To this point, we have traced the origin and development of the doctrine of humanitarian intervention. We have also shown that the adoption of the UN Charter prohibition of force under Article 2(4) and the establishment of the collective security system of the UN leave no room for a state or states acting jointly to use military force on humanitarian grounds unless there has been explicit delegation or authorization from the UN Security Council. The international community's reluctance to accept state use of force unless it comes within either “the inherent right of individual or collective self-defense if an armed attack occurs”⁷⁵ or duty authorized collective security action, stems from general recognition that the unilateral use of force *always* remains inherently suspect and must be justified by clear and unambiguous grounds. In our increasingly interdependent world the use of force even on such grounds as the “protection of nationals” or “pre-emptive attack” – which arguably claimed some acceptance in pre-UN Charter international law – has become increasingly difficult to justify.

The central problem remains unsolved however. What can states lawfully do to prevent or halt a foreign government from slaughtering its own subjects when collective security has failed? Surely, the international legal principles of the sovereign equality of all states under international law, non-intervention and the territorial integrity and political independence of all states – cardinal though they are – cannot override the rights of large numbers of people not to be subject to genocide, torture, mass murder, or other extremely severe violations of human rights or humanitarian law.

UN Secretary-General Kofi Annan underlined the dilemma at the 1999 session of the General Assembly:

⁷⁵ As per Article 51 of the Charter of the United Nations.

"To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask – not in the context of Kosovo – but in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?"⁷⁶

However, the Secretary-General cautioned that while "the world cannot stand aside when gross and systematic violations of human rights are taking place" so also must intervention, if it can be used, "be based on legitimate and universal principles." He concluded his speech to the Assembly with a challenge to the world community to move towards humanitarian intervention to "protect civilians from wholesale slaughter."⁷⁷

Taking up the Secretary-General's challenge, the government of Canada commissioned a study on how best to solve the dilemma of sovereignty versus humanitarianism and published a report in December 2001 entitled "The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty."⁷⁸ In its chapter entitled "When the Security Council Fails to Act," the Commission went so far as to recommend that where the Security Council and regional arrangements were blocked or took no action:

"Military intervention to protect endangered human lives should and will occur only as a last resort, after the failure of other measures to achieve satisfactory results. Inevitably, it will be part of a broader political strategy directed towards persuading the targeted state to cooperate with international efforts."⁷⁹

⁷⁶ See "Secretary-General Presents His Annual Report to General Assembly." United Nations, Press Release, SG/SM/7136, GA/9596, 20 September 1999.

⁷⁷ *Ibid.*

⁷⁸ *The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty.* Ottawa: International Development Research Centre, 2001.

⁷⁹ See loc. cit., at paragraph 7.2.

The Commission Report proceeded to classify and characterize various sorts of deployment of armed force, and then, rather surprisingly, dwelt on a range of operational considerations, logistical questions and issues of military tactics – lending the impression that it had accorded scant regard for the basic principles of state sovereignty and non-intervention.

In response to this Report, the Secretary-General issued the Report of the High Level Panel on Threats, Challenges and Change, which acknowledged:

"Collective security institutions have proved particularly poor at meeting the challenge posed by large-scale, gross human rights abuses and genocide. This is a normative challenge to the United Nations: the concept of State and international responsibility to protect civilians from the effects of war and human rights abuses has yet to truly overcome the tension between the competing claims of sovereign inviolability and the right to intervene. It is also an operational challenge: the challenge of stopping a Government from killing its own civilians requires considerable military deployment capacity."⁸⁰

However, the High Level Panel's Report concentrates on improving the existing collective security system through major UN reform efforts, rather than to open the door to unilateral military action by states.

Part 3 of the High Level Panel's Report proposes that the Security Council should adopt five criteria to determine when to intervene, namely: "seriousness of threat," "proper purpose," "last resort," "proportional means" and "balance of consequences."⁸¹ The Panel recognized that Article 51 of the Charter should not be rewritten or reinterpreted and elaborated on the five criteria as follows:

"(a) *Seriousness of threat.* Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force? In the case of internal threats, does

⁸⁰ "A more secure world: Our shared responsibility. Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change," United Nations, 2004, at <http://www.un.org/secureworld/>, Part 1, paragraph 36.

⁸¹ See loc. cit., Part 3 on "Collective Security and the Use of Force."

it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?

(b) *Proper purpose.* Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?

(c) *Last resort.* Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?

(d) *Proportional means.* Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?

(e) *Balance of consequences.* Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?⁸²

The Panel acknowledged that undermining the international norm against intervention would provide license to any or all states to deploy armed force wherever and whenever such state considered that there existed a sufficiently serious threat as to give rise to a "proper purpose" to intervene. Recognizing that the Security Council had not fulfilled its international peace and security responsibilities adequately, the Panel urged that the Council be enlarged to take account of the increase in UN membership since 1945, to maximize world participation in supporting its decisions, and to help repair the Council's weak legitimacy and that of the UN as a whole.

6. The role of humanitarian intervention in international peace and security: guarantee or threat?

Ultimately, the dilemma between state sovereignty and non-intervention on the one hand, versus the imperative to halt particularly egregious

⁸² Loc. cit., at paragraph 207.

violations of human dignity on the other, reflects the tension between power and law. If there is indeed a right to exercise unilateral military intervention on humanitarian grounds, outside the collective security organs of the UN or regional arrangements, then we must admit this faculty for all states, not just for some. But, would the governments and peoples of the United States or the United Kingdom really welcome the prospect of North Korea, Libya, Iran or the Democratic Republic of Congo deciding to intervene militarily in the territory of another state, purportedly on humanitarian grounds? Or, is humanitarian intervention meant only for the rich and powerful states against smaller, weaker states, as practice suggests?

In principle, if humanitarian intervention outside the collective security system reflects power politics at the expense of the international rule of law and the sovereign equality of states, it should have no place in international law. While stopping or preventing a government from perpetrating gross and systematic violations of human dignity against its people has to be lauded, the state use of military intervention outside the auspices of collective security arrangements represents a counter-productive development. War inevitably involves a very high cost of human suffering and, despite what intervening governments like to claim, it remains objectively difficult to avoid large numbers of civilian casualties. If military use must be deployed, it should be done according to international law and in such a way as to garner maximum support from the international community at large. This means that collective security avenues must be used, and if they do not function, they must be reformed because to legitimize the unilateral use of force in international relations is to open the prospects of a veritable free-for-all where "might makes right." Unilateral humanitarian intervention constitutes a threat to international peace and security and cannot therefore be its guarantor.