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Note on humanitarian intervention

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1. Owing to widespread atrocities witnessed in the last decade of the twentieth century, and in particular those associated with the NATO intervention in Kosovo, the issue of humanitarian intervention has been thrust into the political and doctrinal limelight.¹ In the legal sense, humanitarian intervention is one form of foreign forcible intervention.² It may be defined as the use of force in order to stop or oppose massive violations of the most fundamental human rights (especially mass murder and genocide) in a third State, provided that the victims are not nationals of the intervening State and there is no legal authorization given by a competent international organization,³ such as, in particular, the United Nations by means of the Security Council.⁴ Such humanitarian intervention need not take the form of action by a single intervening State; but it must be unilateral. Thus, if several States pool their military resources together to intervene in a foreign territory, that constitutes a collective intervention. However, the intervention is unilateral, in that it is coercive action taken by some States acting as would do a single subject. Moreover, humanitarian intervention takes place only insofar as no consent is given by the third State. If consent is given, there is no need legally to invoke the concept of humanitarian intervention; rather, it will be intervention by invitation.

Alternatively, if the intervening State or group of States are covered by a mandate given to them by the international community through its authorized bodies (foremost of which would be the Security Council), it is again inappropriate, in legal terms, to raise the question of humanitarian intervention. The reason for this is that in such a case the States concerned hold legal title for their action, such title being vested in an enforcement

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action delegated to them. Given, then, that there is legal title to intervene, there is no necessity to draw upon the controversial doctrine of humanitarian intervention. As to their object, such actions may well be labelled "humanitarian intervention," but as a legal entitlement, this use of the term is misleading and should be avoided.

To sum up, it may be said that two types of volition or consent override the concept of humanitarian intervention: one from below, namely that of the State on whose territory action is to take place; and one from above, namely that of the competent organ of an international organization. Humanitarian intervention consequently consists of forcible intervention at the interstate level, undertaken without any other justification rooted in a legally-binding expression of will.

Viewed from another perspective, humanitarian intervention must also be distinguished from what is sometimes called "*intervention d'humanité*", i.e. forcible intervention in order to protect one's own nationals abroad if they are in a situation of imminent peril jeopardizing life or limb (but not property);⁵ the archetypal example is that of nationals taken hostage abroad, with the local government either unwilling or unable to act. In such cases, the intervening State takes such action on behalf of its own citizens, there being a close link between it and the persons it intends to protect. In the case of humanitarian intervention, however, a State or group of States always intervenes for the benefit of foreign individuals, at least purportedly on account of the alleged commission of cruelties that shock the human conscience. The bond of citizenship is thus dispensed with, and the act of humanitarian intervention is instead based on fundamental humanitarian values of the international community, i.e. the international public order. Consequently, humanitarian intervention can be compared intellectually to

¹ See e.g. F. R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd ed., Irvington-on-Hudson, New York, 1997.

² On the different forms of intervention, see L. Oppenheim, in R. Jennings and A. Watts (eds), *International Law*, 9th ed., London, 1992, p. 427ff.

³ Such an authorization may be given by a regional organization or agency subject to the authorization of the UN Security Council: Article 53 of the UN Charter. See G. Ress, "Article 53 of the Charter", in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, Oxford, 1995, p. 722ff.

⁴ On the concept of humanitarian intervention, see e.g. U. Beyerlin, "Humanitarian intervention", *EPIL*, Vol. II (E-I), (1995), p. 926ff.

⁵ See Randelzhofer, "Article 2(4)", in Simma, *op. cit.* (note 3), p. 123-126. On terminology, see also J. Salmon (ed.), *Dictionnaire de droit international public*, Brussels, 2001, p. 610.

the principle of universal jurisdiction in criminal matters, whereas the *intervention d'humanité* can be compared to the principle of passive personality.⁶ Finally, it should be noted that humanitarian intervention has to do only with intervention based on the use of armed force. Peaceful intervention, for instance through protests, diplomatic notes or certain types of counter-measures, does not come within its ambit. The reason is that such peaceful intervention is lawful in itself, as the Institute of International Law recalled in its celebrated resolution on "the protection of human rights and the principle of non-intervention in internal affairs of States" adopted at the 1989 Session in Santiago de Compostela.⁷ As there is already a proscribed entitlement to act in international law, no need arises for a separate entitlement under humanitarian intervention.

2. Acts of humanitarian intervention were a frequent occurrence in the nineteenth century. There is little doubt that a permissive custom of intervention existed at the time, condoned by the powers in Europe and thus rooted in the *jus publicum europaeum*. It is important to recall that customary law of the nineteenth century was not the democratic concept it is today, premised as it now is on universal practice (or at least tolerance) and a correspondingly universal *opinio juris*, but was an elitist notion. The great powers of Europe had a special weight, and if they decided to have a matter regulated in a certain way, this in itself largely counted as the customary position. Thus J. C. Bluntschli, a liberal nineteenth-century author, reminds us that international law is produced by a kind of "legislation," and especially by the decisions taken at the Congresses frequently held at that time: "When the

⁶ On these principles of criminal jurisdiction, see e.g. Oppenheim, *op. cit.* (note 2), pp. 469-472.

⁷ See *Yearbook of the Institute of International Law, Resolutions, 1957-1991*, Paris, 1992, Articles 1 and 2, p. 209. See in particular Article 2(2): "Without prejudice to the functions and powers which the Charter attributes to the organs of the United Nations in the case of violation of obligations assumed by the members of the Organization, States, acting individually or collectively, are entitled to take diplomatic, economic and other measures towards any other State which has violated the obligation set forth in Article 1 [respect for human rights], provided such measures are permitted under international law and do not involve the use of armed force in violation of the Charter of the United Nations. These measures cannot be considered an unlawful intervention in the internal affairs of that State". It can be seen that the use of force is not generally prohibited, but only that force which would be "contrary to the Charter of the United Nations". As the exception with regard to the powers of the Security Council is stated at the very beginning, it may be wondered whether the Institute intended by this formulation to leave open the issue of humanitarian intervention. This seems probable.

States, assembled in general European Congress, are in agreement regarding certain measures, such measures become obligatory for all the European States.⁸” Since such congresses were dominated by the European powers, they had a pre-eminent role in shaping the norms of international legality.

Among the instances of humanitarian intervention noted, there was the intervention by France and Britain in Greece in 1827 “in order to stop the shedding of blood and mischiefs by the Turks”; that of France and Britain in 1856 in the Kingdom of the Two Sicilies following a series of politically motivated arrests and alleged cruel and arbitrary treatment of the political prisoners concerned; the intervention of Britain, France, Austria, Prussia and Russia in Syria after the massacre in 1860 of some six thousand Christian Maronites by Syrian Druses; and the intervention by European powers in Crete (1866), Bosnia (1875), Bulgaria (1877) and Macedonia (1887) against persecutions committed by the Turks. Even outside the European continent, humanitarian grounds were cited to justify intervention, for example that by the United States in Cuba in 1898.⁹ It would be a mistake to think that each of these interventions was exclusively dictated by ulterior motives concealed behind a cynical façade of magnanimous words. It is true that they were never undertaken for purely unselfish reasons, but that should come as no surprise. It is also true that they were predicated on the protection of Christians, and were thus selective.¹⁰ However, some interventions also corresponded, at least in part, to genuine humanitarian concerns. They were rooted in an ideological mindset, extensively shared in the nineteenth century, that was centred upon humanitarian values. This was part and parcel of the concept, widely held at that time, of “civilized nations”, of which subsequent testimony is found in Article 38(1)(c) of the Statute of the International Court of Justice. The ideal of civilization on which

8 J. C. Bluntschli, *Le droit international codifié*, Paris, 1870, p. 101 (Article 110): “Lorsque les Etats rassemblés en congrès général européen sont d'accord sur certaines dispositions, celles-ci deviennent obligatoires pour tous les Etats européens”. See also Article 12, *ibid.*, p. 56.

9 On that practice, see W. G. Grewe, “The epochs of international law”, Berlin / New York, 2000, p. 489ff and A. Rougier, “La théorie de l'intervention d'humanité”, *Revue générale de droit international public*, Vol. 17 (1910), p. 472ff. For a discussion of humanitarian intervention in the old textbooks of international law, see the overview given by L. Oppenheim in F. Roxburgh (ed.), *International Law*, 3rd ed., Vol. I, London, 1920, p. 221. See also, in particular, E. C. Stowell, *Intervention*, Washington D.C., 1921 and *International Law*, New York, 1931, p. 349ff., and P. Fauchille, *Traité de droit international public*, Vol. I, Paris, 1922, p. 570ff.

10 Diplomatic interventions were, however, also undertaken on behalf of Jews, e.g. those in Rumania. See Rougier, *op. cit.* (note 9), p. 476ff.

Europe prided itself had given rise to the fight to overcome slavery and found a kind of natural outlet in the field of humanitarian intervention. This humanitarian ideology can be traced back to the notion of civic liberalism and of the rule of law, to which the nineteenth century attached paramount importance.¹¹

By the end of the nineteenth century, doctrinal backing for humanitarian intervention was split. Anglo-Saxon writers generally supported humanitarian intervention by invoking natural law precepts, citing E.S. Creasy,¹² W.E. Hall,¹³ H. Wheaton¹⁴ or T.J. Lawrence¹⁵. Continental writers, on the other hand, had started to contest the principle as incompatible with positive international law and the equality of States; such was the position of P. Pradier-Fodéré,¹⁶ A.W. Heffter,¹⁷ F. von Liszt¹⁸ and authors T. Funck-Brentano and A. Sorel.¹⁹ Other authors believed that humanitarian intervention could not “be called legally right, but [could] be morally justifiable and even commendable”; it was thought to be an act of policy above and beyond the domain of law.²⁰ Others, like E. Arntz, thought that humanitarian intervention should be admissible, but that it should not be exercised unilaterally; rather, such a right should only be exercised in the name of all humanity, presupposing a collective decision by all States except the tortfeasor, or at least by the greatest possible number of civilized States.²¹ This

¹¹ Thus, Grewe *op. cit.* (note 9), p. 490, writes: “This development [towards humanitarian intervention] was consistent with the intrinsic formative rules of the age. The humanitarian idea belonged to the moral and ideological substance of the society of civilized nations. The ‘international law’ of the ‘civilised nations’ rested upon a spiritual base of which esteem of human life was an integral part. The introduction of humanitarianism into international law brought about a linkage between international law and the general constitutional concepts of civic liberalism. The ‘droits humains’ (‘human rights’) that were entrusted to international law were the most basic of the basic rights; they were those general human rights that were considered particularly fundamental and indispensable: the rights to life, to liberty and to the rule of law”.

¹² *First Platform of International Law*, London, 1876, p. 297.

¹³ *International Law*, Oxford, 1880, p. 247.

¹⁴ *Elements of International Law*, London, 1836, section 69.

¹⁵ *The Principles of International Law*, 5th ed., London, 1913, section 66. See also Stowell, *op. cit.* (note 9).

¹⁶ *Traité de droit international public européen et américain*, Vol. I, Paris, 1885, p. 663.

¹⁷ *Le droit international de l'Europe*, Berlin / Paris, 1883, p. 113.

¹⁸ *Das Völkerrecht*, Berlin, 1898, p. 122.

¹⁹ *Précis du droit des gens*, Paris, 1877, p. 223.

²⁰ C. H. Stockton, *Outlines of International Law*, New York / Chicago / Boston, 1914, p. 100.

²¹ See E. Nys, *Le droit international*, Vol. II, Brussels, 1912, p.232, quoting Arntz. See also, e.g. W. E. Hall in P. Higgins (ed.), *A Treatise on International Law*, 8th ed., Oxford, 1924, p. 344.

position is predicated on the idea of minimizing the dangers of abuse to which humanitarian intervention is prone.

3. The adoption of the Charter of the United Nations and in particular of its Articles 2(4)²² (member States to refrain from the threat or use of force) and 51²³ (member States' right to self-defence in the event of armed attack) profoundly altered the situation. The custom of humanitarian intervention, if it could still be considered a valid practice, was now abrogated. In effect, the Charter shuts the loophole through which humanitarian intervention could still have passed: it contains a general prohibition on the use of force, while permitting self-defence in the event of an armed attack. Just what that means was the subject of debate throughout the Cold War, but it was never suggested that humanitarian intervention could be invoked on the basis of Article 51 — as evidently it could not. It is almost inconceivable that an intervening State seeking to redress a situation by humanitarian intervention would be responding in self-defence to "armed attack," nor is there likely to have been an infringement of its subjective rights (unless rights *erga omnes* are claimed). Practice after 1945, during the Cold War, was very sparse. Consequently, no new custom can be said to have arisen, especially as when instances of humanitarian intervention did take place, the accompanying protests and condemnations by third States were vociferous. This was understandable in a world divided between two opposing spheres of influence. There do not seem to have been more than three cases of humanitarian intervention proper during that time. India justified its military intervention in Bangladesh in 1971-2 in part on humanitarian grounds;²⁴ likewise, the invasion of Uganda by Tanzanian troops to free the country

²² "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".

²³ "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".

²⁴ See *Review of the International Commission of Jurists*, June 1972, p. 57ff. See also T. Franck and N. Rodley, "After Bangladesh: The law of humanitarian intervention by armed force", *American Journal of International Law*, Vol. 67, 1973, p. 275ff.; Teson, *op. cit.* (note 1), p. 200ff.

from the regime of the dictator Idi Amin is a second example.²⁵ Finally, there is the example of the invasion of Cambodia by Vietnamese troops aimed at eliminating the Khmer Rouge regime.²⁶ This latter case aroused considerable protest, although the unparalleled massacres perpetrated by the Khmer Rouge were not generally known at the time.

In the 1990s, interventions for humanitarian reasons increasingly took place under the auspices of the United Nations. Examples include the operations in Somalia²⁷ and East Timor.²⁸ At the same time, several doctrines stating a duty of humanitarian action were put forward under the names of “*devoir d’ingérence*” or “forcible humanitarian assistance”. In this connection the Frenchman B. Kouchner and his compatriot M. Bettati, a professor of international law, took the lead.²⁹ The question of humanitarian action came to the fore when NATO intervened in Kosovo in 1999. To some extent, the NATO intervention was the last in a sequence of events for which the gradual weakening of the defence of sovereignty with which States could still oppose intervention had long paved the way. Moreover, the fact that — for the first time — humanitarian intervention was not directed against a Third World State undermined the resistance to intervention traditionally shown by such States. Also the Arab world, owing to its religious solidarity with the Kosovars, was generally in favour of the intervention, which may thus be said to have been backed for the first time by an appreciable segment of the international community, even if strong opposition was still voiced (which, it should be noted was sufficient to cast

²⁵ See S. K. Chatterjee, “Some legal problems of support role in international law: Tanzania and Uganda”, *International and Comparative Law Quarterly*, Vol. 30, 1981, p. 755ff.; Teson *op. cit.* (note 1), p. 159ff.

²⁶ See G. Klintonworth, *Vietnam’s Intervention in Cambodia in International Law*, Canberra, 1989; M. Leifer, “Vietnam’s intervention in Kampuchea: The rights of State v. the rights of people”, in I. Forbes and M. Hoffmann (eds), *Political Theory, International Relations and the Ethics of Intervention*, Basingstoke, 1993, p. 145ff.

²⁷ See United Nations, *The United Nations and Somalia, 1992-1996*, New York, 1996, United Nations Publication, sales no. E.96.I.8. For the “humanitarian intervention” aspect, see e.g. R. E. Gordon, “Humanitarian intervention by the United Nations: Iraq, Somalia and Haiti”, *Texas International Law Journal*, Vol. 31, 1996, p. 43ff.

²⁸ See e.g. G. Cahin, “L’action internationale au Timor oriental”, *AFDI*, Vol. 46, 2000, p. 139ff.; M. Rothert, “United Nations intervention in East Timor”, *Columbia Journal of Transnational Law*, Vol. 39, 2000, p. 257ff.

²⁹ M. Bettati and B. Kouchner, *Le devoir d’ingérence: peut-on les laisser mourir?*, Paris, 1987. See also P. Legros and M. Libert, *L’exigence humanitaire: le devoir d’ingérence*, Paris, 2000.

doubt on any new permissive custom).³⁰ A legal answer is more necessary than ever to the old question about the lawfulness of such interventions.

4. The essential arguments of the proponents of the doctrine of humanitarian intervention and its opponents are centred on the Charter of the United Nations. In the opponents' opinion,³¹ the Charter has made a clear policy choice that the use of force by individual States is prohibited, in view of the disastrous results that unbridled force produces when left to the States *uti singuli*; it makes an exception only for self-defence. Thus, humanitarian intervention by individual States is prohibited under the Charter. As a practical argument, they add that any contrary solution would give rise to grave abuse, to political bias and selectivity, and to a policy of unilateral interventionism by the great powers, utilizing the law as they see fit. The proponents of intervention put forward two types of arguments. The first are of a technical nature. It is claimed that humanitarian intervention is directed at neither the territorial integrity nor the political independence of the targeted State, and thus is not inconsistent with Article 2(4).³² Moreover, they argue that the Charter is not an instrument protecting a single value, that of peace at all costs, but that it has in fact several purposes to which it gives expression. One of its fundamental values, they say, is the prohibition of the use of force; but another is the protection of fundamental human rights. It can be added that the protection of human rights has, since 1945, increasingly become a concern of the United Nations, today viewed as one of the core elements of the international legal order. Thus, in cases of grave conflict between the maintenance of peace and respect for human rights, i.e. when there are egregious violations of individual rights and massive

³⁰ See especially the *Ministerial Declaration of the Meeting of Foreign Ministers of the Group of 77*, New York, 24 September 1999, <<http://www.g77.org/Docs/decl1999.html>>. The Ministers stressed the need to maintain clear distinctions between humanitarian assistance and other activities of the United Nations. They rejected the so-called right of humanitarian intervention, which had no basis in the UN Charter or in international law".

³¹ See e.g. I. Brownlie, "Humanitarian intervention", in J.N. Moore (ed.), *Law and Civil War in the Modern World*, Baltimore / London, 1974, p. 217ff.; I. Brownlie, "Thoughts on the kind-hearted gunmen", in: R. Lillich (ed.), *Humanitarian Intervention and the United Nations*, Charlottesville, 1973, p. 139ff.; Randelzhofer, *op. cit.* (note 5), p. 124, with numerous references; G. Abi-Saab, "Cours général de droit international public", *RCADI*, Vol. 207, 1987-VII, p. 374-5.

³² See e.g. M. Reisman and M. McDougal, "Humanitarian intervention to protect the Ibos", in R. B. Lillich (ed.), *Humanitarian Intervention and the United Nations*, Charlottesville, 1973, p. 177.

cruelties, the proponents hold that sovereignty and non-recourse to force have to yield to humanitarian imperatives. In other words, there is a duty, at least in the most extreme cases, to strike a balance between “conflict-minimization and [the] protection of human rights.”³³ Finally, they add a practical argument which has emotional and moral overtones and is thus perhaps all the more compelling: “must the international community stand idly by while millions of human beings are being massacred just because in the Security Council a permanent member holds its protective hand over the culprit?”³⁴

These types of arguments were reproduced, with all due variations and adaptations, with regard to the intervention in Kosovo. Some authors took a negative stance, either generally or at least vis-à-vis that particular case. They include Charney,³⁵ Valticos³⁶ and Nolte³⁷. Others, such as Reisman,³⁸ Wedgwood,³⁹ Hilpold,⁴⁰ Köck,⁴¹ Picone,⁴² Simma⁴³ and Weckel⁴⁴ conceded

³³ See e.g. J. P. Fonteyne, “The customary international law doctrine of humanitarian intervention: Its current validity under the UN Charter”, *California Western International Law Journal*, Vol. 4, 1974, pp. 203ff. and 255. See also, more recently, C. Tomuschat, “General course on public international law”, *RCADI*, Vol. 281, 1999, p. 224-6, part c. p. 224. It may also be recalled that the ICJ, in the *Nicaragua* case (1986), rejected the justification offered by the United States for its intervention in that region, namely, *inter alia*, for the protection of human rights: *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, pp. 134-5. The Court said in substance that unilateral use of force is not admissible for the protection of human rights. As this was no extreme case and no argument of humanitarian intervention had been made, the Court just reaffirmed the general rules, based on the protection of territorial integrity. No certain inferences can be gained on the problem of humanitarian intervention by that *dictum*.

³⁴ See Tomuschat, *loc. cit.* (note 33).

³⁵ J. I. Charney, “Anticipatory humanitarian intervention in Kosovo”, *American Journal of International Law*, Vol. 93, 1999, p. 834ff.

³⁶ N. Valticos, “Les droits de l’homme, le droit international et l’intervention militaire en Yougoslavie”, *RGDIP*, Vol. 104, 2000, p. 5ff.

³⁷ G. Nolte, “Kosovo und Konstitutionalisierung: Zur humanitären Intervention der NATO-Staaten”, *ZaöRV*, Vol. 59, 1999, p. 941ff.

³⁸ W. M. Reisman, “Kosovo’s antinomies”, *American Journal of International Law*, Vol. 93, 1999, pp. 860-62.

³⁹ R. Wedgwood, “NATO’s campaign in Yugoslavia”, *American Journal of International Law*, Vol. 93, 1999, p. 828ff.

⁴⁰ P. Hilpold, “Sezession und humanitäre Intervention: Völkerrechtliche Instrumente zur Bewältigung innerstaatlicher Konflikte”, *AJPIL*, Vol. 54, 1999, p. 529ff.

⁴¹ H. F. Köck, “Legalität und Legitimität der Anwendung militärischer Gewalt”, *AJPIL*, Vol. 54, 1999, p. 133ff.

⁴² P. Picone, “La guerra del Kosovo e il diritto internazionale generale”, *Rivista di diritto internazionale*, Vol. 83, 2000, p. 309ff.

⁴³ B. Simma, “NATO, the UN and the use of force: Legal aspects”, *European Journal of International Law*, Vol. 10, 1999, p. 1ff.

⁴⁴ P. Weckel, “L’emploi de la force contre la Yougoslavie ou la Charte fissurée”, *RGDIP*, Vol. 104, 2000, p. 19ff.

that the action was lawful, the last two authors with the most restraint. Others, including Cassese,⁴⁵ Currie⁴⁶ and Henkin, went further and saw in the new practice an emergent norm of customary international law.⁴⁷

5. The problem of humanitarian intervention is that, to a certain extent, it contraposes two legal absolutes: peace, and fundamental humanitarian imperatives. On both sides, the highest values of international law are at stake. Thus, adjustment proves to be a legal and human conundrum.

On the one hand, there is the danger of opening ever wider the door to the unilateral use of force by States. Experience has proved that this is conducive neither to peace nor to justice. International law had long sought to expunge that unilateral use of force, until success was finally achieved by the Covenant of the League of Nations, spurred by the recognition that such use of force had plunged the world into anarchy and disaster. To allow a return to the unilateral use of force — initially for good causes, but increasingly for more dubious actions once the constraints are lifted — is to some extent to turn back the clock of the law toward anarchy and brute force, without the certainty of lessening human suffering. Moreover, that use of force is prone to abuse, to political bias, to selectivity and to the power politics of whichever States are dominant at a given time. In the final analysis, this brings us back to a problematic dimension in the exercise of private justice⁴⁸.

Conversely, is it possible for the law to command States to abstain from action (if the Security Council takes none) when the most extensive crimes are perpetrated, as when the Khmer Rouge were at work in Cambodia exterminating between 25 and 33 per cent of the country's population? It seems unlikely that the law could have much success in ordering restraint. The facts, normally in alliance with moral principles, will brush it aside. The

⁴⁵ A. Cassese, "Ex iniuria ius non oritur: Are we moving towards international legitimation of forcible humanitarian countermeasures in the world community?", *European Journal of International Law*, Vol. 10, 1999, p. 23ff. A. Cassese, "A follow-up: Forcible humanitarian countermeasures and *opinio necessitatis*", *European Journal of International Law*, Vol. 10, 1999, p. 791ff.

⁴⁶ J. Currie, "NATO's humanitarian intervention in Kosovo: Making or breaking international law?", *CYIL*, Vol. 36, 1998, p. 303ff.

⁴⁷ L. Henkin, "Kosovo and the law of humanitarian intervention", *American Journal of International Law*, Vol. 93, 1999, p. 824ff.

⁴⁸ See R. Kolb, "Du droit international des Etats et du droit international des hommes", *Revue africaine de droit international et de droit comparé*, Vol. 12, 2000, p. 226ff. and 232-5.

letter of a law that ordains respect for a territorial sovereignty being used to cloak reprehensible crimes will be discounted.

6. The question at this stage is how can the law, in terms of positive rules, reconcile such apparently exclusive imperatives? Admittedly, it may be argued that the conflict between them should always be resolved in favour of humanitarian principles, especially as humanitarian intervention presupposes egregious violations that should be exceptional events in the field of international law. But that, it is submitted, is an overly simplistic analysis. A glance at the events of the last ten years shows that such a pattern of violence yields no simple answer. The conflict between the two principles is real and omnipresent, not an exceptional occurrence.

a) The *International Commission on Intervention and State Sovereignty*, created after the Kosovo intervention under the aegis of the Canadian government and a group of private foundations in response to appeals by Mr Kofi Annan, Secretary-General of the United Nations, produced a detailed Report⁴⁹ on humanitarian intervention entitled “The Responsibility to Protect”. It contains important passages devoted to humanitarian intervention (a term rejected by the Commission⁵⁰). The Commission thought it possible to reach some conciliation between the supreme principles at variance. It tried to curb as much as possible unilateral interventions by States by setting the threshold for such action as high as possible. Thus, the starting point of its analysis is the presumption that the principle of non-intervention prevails, and that each exception to it must be justified according to the strict terms adopted in the Report.⁵¹ This position reflects the state of international law.

The Commission then goes on to state the conditions under which the interests of protection prevail. Its approach is multi-faceted, based as it is on the cumulative interplay of seven criteria reminiscent of legal theories with great pedigree. According to the Commission, for an intervention to be lawful there must be: (1) a just cause; (2) the right intention (*recta intentio*);

⁴⁹ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, International Development Centre, Canada, December 2001, also available at: <http://www.iciss-ciise.gc.ca/report-e.asp>.

⁵⁰ *Ibid.*, § 2.28-2.33.

⁵¹ *Ibid.*, § 4.11.

(3) a situation of last recourse (*ultima ratio*); (4) respect for the principle of proportionality; (5) reasonable prospects of success; (6) a prior request for authorization by the Security Council of the action.⁵² Many of these principles are reminiscent not only of the doctrine of just war (*bellum iustum*),⁵³ but also and more conspicuously of the conditions elaborated by legal doctrine for even more extreme situations of the fight against an established legal order, i.e. the so-called right of resistance (*jus resistendi*).⁵⁴ In particular, the condition of “reasonable prospects of success” flows directly from there.

As for the just cause, it is clearly stated that only a grave and irreparable harm for human beings, i.e. considerable losses of human lives (actual or expected) or ethnic cleansing on a large scale can give rise to a right of military intervention.⁵⁵ The two elements of loss of lives and ethnic cleansing are

⁵² *Ibid.*, Basic Principles, p. XII, Articles 1-3. For a commentary on these criteria, see § 4.18ff. of the Report.

⁵³ See on this concept, *inter alia*: (1) on the Greco-Roman period: S. Clavadetscher-Thürlemann, *Polemos dikaios und bellum iustum: Versuch einer Ideengeschichte*, Zurich, 1985; M. Mantovani, *Bellum iustum: Die Idee des gerechten Krieges in der römischen Kaiserzeit*, Berne / Frankfurt-am-Main, 1990; S. Albert, *Bellum iustum: Die Theorie des gerechten Krieges und ihre praktische Bedeutung für die auswärtigen Auseinandersetzungen Roms in republikanischer Zeit*, Lassleben, 1980; H. Hausmaninger, “*Bellum iustum und iusta causa belli* im älteren römischen Recht”, *Oesterreichische Zeitschrift für öffentliches Recht*, 1961, Vol. 11, p. 335ff.

(2) On the Middle Ages, see: F. H. Russell, *The Just War in the Middle Ages*, Cambridge / London, 1975; G. Hubrecht, “La guerre juste dans la doctrine chrétienne, des origines au milieu du XVI^e siècle”, *Recueil de la Société Jean Bodin*, 1961, Vol. 15, p. 107ff.; J. Salvioli, *Le concept de guerre juste d’après les écrivains antérieurs à Grotius*, 2nd. ed., Paris, 1918; A. Vanderpol, *La doctrine scolastique du droit de la guerre*, Paris, 1925, p. 28ff.; A. Vanderpol, *Le droit de la guerre d’après les théologiens et les canonistes du Moyen Âge*, Paris / Brussels, 1911; G. Beesterm-Iller, *Thomas von Aquin und der gerechte Krieg: Friedensethik im theologischen Kontext der Summa Theologicae*, Cologne, 1990.

(3) In general, see: P. Haggenmacher, *Grotius et la doctrine de la guerre juste*, Paris, 1983, pp. 25off. and 597ff.; P. Haggenmacher, “Mutations du concept de guerre juste de Grotius à Kant”, *Cahiers de philosophie politique et juridique*, No. 10, 1986, pp. 117-122; J. B. Elshtain, *The Just War Theory*, Oxford / Cambridge (Massachusetts), 1992; R. Regout, *La doctrine de la guerre juste de Saint Augustin à nos jours*, Paris, 1935; D. Beaufort, *La guerre comme instrument de secours ou de punition*, The Hague, 1933; M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2nd ed., New York, 199; Y. de la Brière, *Le droit de juste guerre*, Paris, 1938; G. I. A. D. Draper, “The just war doctrine”, *Yale Law Journal*, Vol. 86, 1978, p. 370ff.; K. Szetelnicki, *Bellum iustum in der katholischen Tradition*, Fribourg, 1992.

(4) On the relationship with doctrines of other religions or ideologies, see: J. Kelsay and J. T. Johnson, *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Tradition*, New York / London, 1991; R. Steinweg, *Der gerechte Krieg: Christentum, Islam, Marxismus*, Frankfurt-am-Main, 1980.

⁵⁴ See the different contributions in A. Kaufmann and L. E. Backmann (eds), *Widerstandsrecht*, Darmstadt, 1972.

⁵⁵ Report, *op. cit.* (note 49), quoted Article 1, and § 4.18ff.

in the alternative. This does not mean that ethnic cleansing does not entail loss of life; it simply means that such cleansing induced by forced expulsions or rapes may be sufficient.⁵⁶ The element common to them is that the loss of life or other misdeeds must be perpetrated on a large scale. The Commission adds a list of situations covered by the two aforementioned headings.⁵⁷ It also points out that it resisted the temptation to identify violations of human rights which do not reach the level of outright killing or ethnic cleansing, as a legitimate cause for intervention.⁵⁸ This would in fact have meant opening the door too widely. On the other hand, it must be noted that the Commission does leave open the possibility of some preventive intervention (“actual or expected losses”), which is quite problematic from all points of view. The often very delicate question of evidence is addressed by the Commission in a balanced manner.⁵⁹

As for the “right intention”⁶⁰ the Commission stresses that the essential aim of the intervention must be to halt or avert human suffering. Other aims, e.g. to support a claim of self-determination are not legitimate (at least if they are the prime motivation). Here the well-known legal problems of the primary and secondary causes and their relationship may arise: must the

⁵⁶ *Ibid.*, § 4.19.

⁵⁷ *Ibid.*, § 4.20: “It is important to make clear both what these two conditions include and what they exclude. In the Commission’s view, these conditions would typically *include* the following types of conscience-shocking situation:

- those actions defined by the framework of the 1948 Genocide Convention that involve threats to or actual loss of life on a large-scale;
- the threat or occurrence of large scale loss of life, whether the product of genocidal intent or not, and whether or not involving state action;
- different manifestations of ‘ethnic cleansing’, including the systematic killing of members of a particular group in order to diminish or eliminate their presence in a particular area; the systematic physical removal of members of a particular group from a particular geographical area; acts of terror designed to force people to flee; and the systematic rape for political purposes of women of a particular group (either as another form of terrorism, or as a means of changing the ethnic composition of that group);
- those crimes against humanity and violations of the laws of war, as defined in the Geneva Conventions and Additional Protocols and elsewhere, which involve large scale killing or ethnic cleansing;
- situations of state collapse and the resultant exposure of the population to mass starvation and/or civil war; and
- overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened.”

⁵⁸ *Ibid.*, § 4.25.

⁵⁹ *Ibid.*, § 4.28-4.31.

⁶⁰ *Ibid.*, quoted Article 2.A., and § 4.33-4.36.

humanitarian cause be the sole cause; must it only be controlling; must it only be present? The Commission underlines that one of the best ways to meet the criterion of “right intention” is to avoid unilateralism and to proceed by collective and multilateral interventions.

Further, the intervention must be the last recourse,⁶¹ i.e. all diplomatic and other non-military means must previously have been explored. It is not necessary for all ways to have been actually tried and proved unsuccessful; it is, however, necessary to establish there were reasonable grounds for believing that, in the circumstances, the measure, if attempted, would not have been successful, e.g., by reason of lack of time.

Moreover, the intervention must be proportionate in scope, duration and intensity to the humanitarian aim pursued, which means that the force used must be the minimum necessary to accomplish the aim.⁶² The Commission adds that all the rules of international humanitarian law (law of armed conflict) must be respected during such interventions.

Finally, the criterion of reasonable prospects of success of the operation calls for some comment.⁶³ The underlying idea is that in order to justify the intervention, there must appear to be a reasonable likelihood of it bringing about a cessation or alleviation of the atrocities it is intended to address. There can be no legitimate intervention if its most probable outcome is only to aggravate the conflict or to extend it more widely. In such a case, the overall assessment is that the operation does not fulfil its aim and that there is more usefulness in not undertaking it than in undertaking it. This is in fact an aspect of proportionality: the measure taken must seem able to produce the result aimed at — a claim which cannot be made of a humanitarian intervention which risks tangibly worsening the situation (or at least not improving it).

The Commission must be praised for its intellectual endeavour to handle the difficult matter it was confronted with. It produced a report that is as balanced as possible between the two supreme conflicting imperatives in this field, namely peace and justice. However, it can clearly be seen that most of the criteria propounded by the Commission are open-ended and call for a contextual interpretation for which quite a lot of leeway is left. It is not

⁶¹ *Ibid.*, quoted Article 2.B., and § 4.37-4.38.

⁶² *Ibid.*, quoted Article 2.C., and § 4.39-4.40.

⁶³ *Ibid.*, quoted Article 2.D., and § 4.41-4.43.

suggested that this is a fault; rather, it lies in the nature of things. But the result is that single States will be able to argue such interventions on the basis of the proposed criteria with some flexibility, their application and interpretation of the criteria then being left to some extent to good faith. The danger that the scope of intervention may be broadened by subsequent generous political interpretations of such criteria cannot be avoided. Moreover, in the category of “extreme necessity” the conflict between the two absolutes, peace and justice, seems to be giving way to a sort of predetermined priority of the one over the other, of justice over peace. This course is certainly a possible one, and if there were less political struggle in the world it would be highly recommendable (but then there would probably also be no massacres prompting recourse to humanitarian interventions); one might add here that, as has very rightly been said, in the final analysis only justice is the basis for a lasting peaceful order and life.⁶⁴ It may, however, be asked whether there is no other means of normative distribution between the two main principles involved, namely one whereby any fixed and *a priori* rule or exception in this particular field could be avoided. Such a course is not without its own pitfalls, but it might be worth trying to pursue it, at least on a tentative basis.

b) It is accordingly suggested by the present author that the law should not necessarily aim to give *a priori* a sufficient answer to such cases of the conflict of absolutes. This is not meant to say that the law has no answer; but simply that no answer in the form of rule and exception must be given. Otherwise, the conflict would already have been decided in favour of one of the “absolute” elements to the detriment of the other, at least in certain contexts. But that is precisely what must be avoided, since in that case one absolute would *a priori* be given less weight vis-à-vis the other in certain circumstances, with all the consequences that would entail in the real world with its dangers, snares and abuses. It rather seems that recourse should be had to the modern legal philosophy concept of “action under risk.”⁶⁵ There are an increasing number of situations in which humankind has to act, but without being able to be sure that the conditions for action are properly met (or indeed that it is correct). Action is then taken, but it is taken under risk.

⁶⁴ See e.g. L. Legaz y Lacambra, *Rechtsphilosophie*, Neuwied / Berlin, 1965, p. 770.

⁶⁵ See e.g. A. Kaufmann, *Rechtsphilosophie*, 2nd ed., Munich, 1997, p. 301ff.

That concept, applied to our problem, could lead to the following conclusions. International law does not regulate the conflict between the use of force and fundamental humanitarian values *a priori* in a conclusive manner. The dangers of unleashed force justify a presumption that unilateral humanitarian intervention is prohibited, if only to keep the threshold high. Action is not, however, altogether excluded. If it is taken, it incurs personal moral and legal risk. Then, if other States of the international community generally accept that there was a valid case for humanitarian intervention, the action will be condoned *ex post* by way of acquiescence. The General Assembly of the United Nations can be particularly instrumental to this effect. The intervention, when made, is thus devoid of any definitively established legal entitlement (since there is a presumption of unlawfulness); its legality remains pending and has to be determined conclusively at a later stage. It may be regularized *post hoc* (or not) according to the reactions of the other States or possibly of other players on the international stage.⁶⁶

Practically speaking, the intervention would in any case have to respect the conditions outlined by the "Commission on Intervention and State Sovereignty" if it ever wants to have a good chance of being accepted by the community at large. But these conditions leave too much space to be conclusive in themselves; the action remains under risk.

It is not suggested that this solution is either completely satisfactory or without its own shortcomings. However, it can perhaps be said to come closest to striking a satisfactory balance between the two sets of legal values, both of which we want to preserve as sacrosanct, namely *pax et iustitia*.

⁶⁶ This *ex post facto* approach could obviously result in some corollary difficulties. Thus, for example, it could become difficult to determine at any given moment if a crime of aggression has been committed, since the constitutive elements of the crime, in particular the unlawfulness of the use of force, could materialize only after some time. Different solutions could be thought of: (1) In the case of a real humanitarian motivation (eventually to be determined by a tribunal) no crime of aggression could be committed because of the absence of a particular element of the *mens rea* required for being held guilty. A subjective intent at acting for the salvaging of populations would thus *eo ipso* wipe out the crime. (2) Or: the humanitarian motive does not preclude a condemnation for aggression if it turns out to have been an unlawful use of force, but it can be taken as a ground for mitigation. The determination of the crime would then remain itself floating, as a sort of *hereditas iacens*, as long as the final regularization or rejection of the acts by the international community has not taken place. This course may obviously pose particular problems with respect to the requirement of criminal law that the prohibited behaviour be sufficiently clear and predictable in advance. *Mutatis mutandis*, similar reflections would have to be advanced for questions of international responsibility (which may also differ according to specific recognitions of illegality or illegality by third States).