

Humanitarian Intervention and State Responsibility

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Abstract

The relationship of state responsibility and humanitarian intervention has not attracted enough attention. Humanitarian intervention is a reaction to systematic violations of fundamental human rights, which are protected by general international law and are also rules of *jus cogens*. As a result humanitarian intervention is not a violation of the rule of non-intervention. Nevertheless current state of international law considers humanitarian intervention to be a violation of the rule on prohibition of the use of force, as contained in the UN Charter. Therefore the examination of humanitarian intervention within circumstances precluding wrongfulness is of particular relevance. It is argued that humanitarian intervention can be, under strict conditions, legal as a circumstance precluding wrongfulness, namely necessity. Some examples of state practice are given in support of this conclusion.

1. Introduction

Much has been written about humanitarian intervention.¹ It is not the intention of the present paper to repeat some of the ideas and arguments or to add one more piece to the discussion of whether there is a right to humanitarian intervention in international law. Rather, this article will try to address a slightly different issue which, in the view of the author, has not attracted enough attention: that is the relationship between state responsibility and humanitarian intervention. The topic will be discussed from both angles – the responsibility of the target state and the responsibility of the intervening state(s). Attention will be also given to the report of the International Commission on Intervention and State Sovereignty - The Responsibility to Protect which was published in 2001.² The Report reiterated that the primary responsibility of any state is to protect its own citizens, but in cases where the state is unable or unwilling to do so the Commission introduced a novel approach which requires that responsibility must be borne by the international community. The Report also includes one of the most recent and authoritative set of criteria on the subject; the use of which would trigger the possibility of humanitarian intervention.

To begin with it is necessary to define humanitarian intervention. Without any extensive discussion we can, for the purpose of this article, define humanitarian intervention as 'threat or use of armed force by a state (or group of states) against another state without its consent and without authorisation by the Security Council for the purpose of protecting the

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¹ See, for example, Gray, *International Law and the Use of Force*, 2nd edn (Oxford: Oxford University Press, 2004) at Chapter 2 and references therein. For an overview of the current diverse views on the legality of humanitarian intervention see Rogers, 'Humanitarian Intervention and International Law', (2004) 27 *Harvard Journal of Law and Public Policy* 725.

² Available at: <http://www.iciss.ca/report-en.asp>.

population of the target state from widespread and systematic violations of fundamental human rights'.³

A. Historical Perspective

Humanitarian intervention is by no means a novel concept. The idea can be found in the writings of the fathers of international law. Hugo Grotius, in his book *De Jure Belli ac Pacis*, stated:

Though it is a rule established by the laws of nature and of social order, and a rule confirmed by all the records of history, that every sovereign is supreme judge in his own kingdom and over his own subjects, in whose disputes no foreign power can justly interfere. Yet where a Busiris, a Phalaris or a Thracian Diomede provoke their people to despair and resistance by unheard of cruelties, having themselves abandoned all the laws of nature, they lose the rights of independent sovereigns, and can no longer claim the privilege of the law of nations.⁴

In this instance, according to Grotius, the giving of assistance to the oppressed of one state by another sovereign will be justified. Similarly, about 25 years earlier, Gentili noted: 'Look you, if men clearly sin against the laws of nature and of mankind, I believe that anyone whatsoever may check such men by force of arms.'⁵ Grotius had already addressed the issue that the institute of justified intervention for protecting the rights of the oppressed could be abused for other purposes, however he insisted that the possibility of abuse does not mean that such a right should not exist.⁶

Nevertheless, it is a disputed fact as to whether any right to a humanitarian intervention existed prior to World War One (WWI) or in the pre-1945 era. Many examples of state practice in the 19th century have been given⁷ and some argue that such a right existed.⁸ However, Brownlie does not speak about right but doctrine and concludes that even if any such doctrine existed, it did not survive after WWI.⁹ In any case, this author's view is that any significance of pre-WWI practice is limited. At that time international law treated the use of force as a legal means to which states had a right to resort. After WWI the rule concerning the use of force was going through a process of transformation that culminated in the strong

³ For a similar definition see Rogers, *supra* n.1 at 730; and Kritsiotis, 'Reappraising Policy Objections to Humanitarian Intervention', (1998) 19 *Michigan Journal of International Law* 1005.

⁴ Grotius, *De Jure Belli ac Pacis*, Book II, Chapter 25, § 8. Available at: http://www.constitution.org/gro/djbp_225.htm.

⁵ Gentili, *De jure belli libri tres*, vol. 2. as cited in Toope, 'Does International Law Impose a Duty upon the United Nations to Prevent Genocide?', (2000-2001) 46 *McGill Law Journal* 187 at 189.

⁶ 'But pretexts of that kind cannot always be allowed, they may often be used as the cover of ambitious designs. But right does not necessarily lose its nature from being in the hands of wicked men. The sea still continues a channel of lawful intercourse, though sometimes navigated by pirates, and swords are still instruments of defence, though sometimes wielded by robbers or assassins.' Grotius, *supra* n. 4.

⁷ See generally Scheffer, 'Toward a Modern Doctrine of Humanitarian Intervention', (1991-1992) 23 *University of Toledo Law Review* 253.

⁸ See, for example, Merriam, 'Kosovo and the Law of Humanitarian Intervention', (2001) 33 *Case Western Reserve Journal of International Law* 111; and Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963) at 338: 'By the end of the nineteenth century the majority of publicists admitted that a right of humanitarian intervention (*l'intervention d'humanité*) existed.'

⁹ Brownlie, *Principles of Public International Law*, 6th edn (Oxford: Oxford University Press, 2003) at 710.

renunciation of its use in the UN Charter.¹⁰ Therefore, any study of humanitarian intervention should treat pre-1945 examples with great caution.

B. UN Charter and the Use of Force

The end of World War Two (WWII) and the establishment of the United Nations (UN) was a fundamental landmark in the system of collective security. By the end of WWII, at the conference in San Francisco, the UN Charter, as a basic document of the planet's order, was signed on 26 June 1945.¹¹ The Charter includes a general provision on the prohibition of use of force in Article 2(4) that reads:

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.

At times, the wording of the provision has led to disputes about its interpretation, especially concerning the extent to which the use of force that is not 'against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations,' is allowed. Even though some commentators have suggested such a reading of the provision, states have rarely relied upon it.¹²

In the context of humanitarian intervention one argument could be that the use of force for halting or preventing widespread or systematic violations of fundamental human rights is not inconsistent with the purposes of the UN. On the contrary, its aim instead is to fulfil one of the purposes of the UN: promoting and encouraging respect for human rights and for fundamental freedoms.¹³ Furthermore, humanitarian intervention does not violate the territorial integrity or political independence of the target state.

Nevertheless, the largely prevailing interpretation of the Article is that it prohibits all use of force except for the two exceptions¹⁴ present in the Charter: self-defence (Article 51) and action by the Security Council (Article 42). This conclusion is reached by the teleological and historical interpretation of the provision and is reiterated by the state practice.¹⁵ Therefore, as a premise, this article considers that currently humanitarian intervention is considered to be a violation of the rule on prohibition of the use of force.¹⁶

¹⁰ See the 1928 Kellogg-Briand Pact, which at the outbreak of WWII had 63 ratifications, a huge majority of states at that time. (Higgins, *Problems and Process* (Oxford: Clarendon Press, 1994) at 238).

¹¹ It is often forgotten that the conference started on 25 April 1945, that is at the time of continuing heavy fighting in Europe and the Charter was signed at the time when WW II was far from over. The capitulation of Japan came almost two months later.

¹² Such reading was suggested for example by Perkins, 'The Right of Counter-Intervention', (1987) 17 *Georgia Journal of International and Comparative Law* 171. For examples of state practice see Gray, *supra* n. 1 at 30.

¹³ Article 1(3), UN Charter.

¹⁴ So called clauses of enemy state (Articles 53 and 107, UN Charter) are not considered here as they are outdated and are meant to be deleted (see Outcome of the 2005 World Summit, 24 October 2005, A/RES/60/1, at para. 177).

¹⁵ In this sense a comprehensive analysis of the interpretation of the provision was made by Barinka, 'Status humanitární intervence v mezinárodním právu' (2003) *Právník* 9.

¹⁶ The legality of humanitarian intervention has been rejected by a number of authors including Brownlie (Brownlie, *supra* n. 9 at 710-12), Hilpold (Hilpold, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?' (2001) 12 *European Journal of International Law* 437); and in the context of intervention in Kosovo Simma (Simma, 'NATO, the UN and the Use of Force: Legal Aspects', (1999) 10 *European Journal of International Law* 1); Cassese (Cassese, 'Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', (1999) 10 *European*

Another important issue for our discussion is whether Article 2(4) is a peremptory norm of international law. It is a prevailing opinion that the prohibition on the use of force in customary law is a rule of *jus cogens*. Simma considers that this customary rule is identical to Article 2(4).¹⁷ In 1966, the International Law Commission (ILC), in its commentary to Article 50 of the Draft Articles on the Law of Treaties, stated that: ‘the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*.’¹⁸ In 2001, in their list of peremptory norms featured in the Commentary to Article 26 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, the ILC included a prohibition on aggression, which was, however, without reference to the UN Charter.¹⁹ The crucial issue is then whether the peremptory customary norm is indeed identical to the current interpretation of Article 2(4). For example, Randelzhofer reiterates the *jus cogens* character of the prohibition of the use of force, yet asserts that it is by no means identical to Article 2(4): ‘...it is right to say, therefore, that the prohibition of the use of force under customary international law has a much smaller scope than that laid down in the UN Charter’.²⁰

2. Fundamental Human Rights in International Law

The objective of humanitarian intervention is to prevent or halt widespread or systematic violations of fundamental human rights. Therefore, what is meant by ‘fundamental human rights’ and ‘widespread or systematic violations’ needs to be determined. Notwithstanding the condemnable nature of violations of rights such as freedom of movement and freedom of expression, it is hard to imagine that the use of armed force would halt these violations. Even though these rights are also protected by relevant international rules, they do not directly violate life or the physical integrity of humans. It is large-scale threats to human life or physical integrity that are most often cited as being the threshold for humanitarian intervention²¹ the best examples including the right to life and the prohibitions on torture and slavery. If the objective of humanitarian intervention is to avert humanitarian catastrophe, then it is necessary that it be limited to these fundamental human rights while at the same time fulfilling a second condition that these violations must be widespread or systematic.

Widespread and systematic violations of fundamental human rights have already been established as crimes in international law, namely as genocide and crimes against humanity.²² The content of crimes against humanity includes aspects of many fundamental human rights such as the right to life and prohibitions on torture, apartheid and slavery. An essential element of a crime against humanity is that the violations must be widespread or systematic.

Journal of International Law 23); and Charney (Charney, ‘Anticipatory Humanitarian Intervention in Kosovo’, (1999) 93 *American Journal of International Law* 834).

¹⁷ Simma, *ibid.* at 3.

¹⁸ ILC Yearbook, 1966-II at 247.

¹⁹ Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.2, November 2001.

²⁰ Randelzhofer, ‘Article 2(4)’, in Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd edn (Oxford: Oxford University Press, 2002) at 134. See the whole discussion of the prohibition on the use of force under customary international law there.

²¹ See, for example, Merriam, *supra* n. 8 at 131.

²² Genocide can be seen as an aggravated form of crime against humanity. At the Nuremberg trial genocide was prosecuted as a crime against humanity. See Schabas, *An Introduction to the International Criminal Court*, 2nd edn (Cambridge: Cambridge University Press, 2004) at 37. For a closer analysis and development of crimes against humanity see for example *ibid.* Compare also the statutes of the ICTY, International Criminal Tribunal for Rwanda (ICTR) and Rome Statute of the ICC.

A common feature of these fundamental human rights is that they are protected by general international law and they are also rules of *jus cogens*. This feature of their nature has been addressed a few times by the ILC. Recently, in their Commentary to Article 26 of the draft Articles on the Responsibility of States, the ILC listed the following peremptory norms of international law as being internationally accepted and recognised as peremptory norms: the prohibitions on genocide, slavery, racial discrimination, crimes against humanity and torture.

The nature of these norms as *jus cogens* has also been recognised by the international courts. For example the International Criminal Tribunal for the former Yugoslavia (ICTY), in the *Furundzija* judgment, declared that the prohibition on torture is a rule of *jus cogens*.²³ The International Court of Justice (ICJ) itself has thus far avoided undertaking the task of proclaiming any rule of international law as being *jus cogens*.²⁴ Yet, the ICJ has, at many times, used the concept of *erga omnes* obligations. It appears for the first time in the eminent *obiter dictum* of the *Barcelona Traction Case*:

An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.²⁵

The concept of *erga omnes* obligations essentially means that all states have a legal interest in compliance with the obligation. Even though the relationship between *jus cogens* norms and *erga omnes* obligations is not yet clear, the ILC is so far satisfied with the contention that 'there is a substantial overlap between them.'²⁶ Tams goes further and asserts that: 'obligations deriving from substantive peremptory norms are valid *erga omnes*'.²⁷ Yet, for the purposes of this article it is enough to hold that the above mentioned *jus cogens* human rights give also rise to obligations *erga omnes*.

Accordingly, humanitarian intervention should be understood narrowly as a reaction to an occurrence of the crime of genocide or crimes against humanity. Only this category fulfils the condition of widespread and systematic violations of fundamental human rights that can justify the use of armed force.²⁸

²³ *Prosecutor v Anto Furundzija*, IT-95-17/1-T (1998) at para. 153.

²⁴ This article was submitted before the judgment of the ICJ in *Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, Judgment, 3 February 2006, where in para. 64 it recognised that the prohibition of genocide is a *jus cogens* norm.

²⁵ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Merits, Judgment, 5 February 1970, ICJ Reports 1970, 3, para. 33.

²⁶ Commentary to Articles on State Responsibility, Part Two, Chapter III, para. 7, *supra* n. 19. For the relationship between obligations *erga omnes* and *jus cogens* norms see Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford: Clarendon Press, 1997).

²⁷ Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005) at 151.

²⁸ Crimes against humanity as a criterion for humanitarian intervention is mentioned for example by Cassese, *supra* n. 16.

3. Humanitarian Intervention and State Sovereignty

The principle of state sovereignty is one of the main building blocks of current international law. One of its applications is the principle of non-intervention by one state in the internal or external affairs of any other state. This rule is part of customary international law.²⁹ It was reflected and elaborated on in the General Assembly's Principles of International Law Concerning Friendly Relations and Co-operation Amongst States in Accordance with the Charter of the United Nations in 1970.³⁰ The principle of non-intervention in the Declaration reads:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

The crucial question is whether humanitarian intervention constitutes interference in the internal or external affairs of the target state. As the ICJ stated in the *Nicaragua* case:

... [T]he principle [of non-intervention] forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. ... Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.³¹

In current international law state sovereignty is not absolute. On the contrary, international law, itself, limits the sovereignty of a state. First of all the freedom of a state to act is limited by customary international law, by which states are bound. Naturally states can exclude the application of a particular customary rule on themselves, either by treaty as to an application between parties to the treaty or under certain circumstances when the principle of 'persistent objector' could be applicable.³² However, norms of customary international law predominantly do not interfere in the internal affairs of a state and are concerned instead with inter-state relations. Nevertheless, one exception is the customary rules for the protection of human rights. These directly place limits on the conduct of a state within its own jurisdiction. Moreover, some of these norms, as we have seen, are rules of *jus cogens*. *Jus cogens* norms directly bind states as subjects of international law and it is not possible to contractually deviate from them.³³ The application of *jus cogens* norms cannot be suspended even in the case of armed conflict or 'in time of public emergency which threatens the life of the nation'.³⁴

²⁹ See Shaw, *International Law*, 5th edn (Cambridge: Cambridge University Press, 2003) at 1039. See also the judgement of the ICJ in *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States)*, Merits, Judgment, 27 June 1986, ICJ Reports 1986, 14, at para. 202 onwards.

³⁰ GA Res. 2625 (XXV), 24 October 1970.

³¹ *Military and Paramilitary Activities In and Against Nicaragua*, supra n. 28 at para. 205.

³² See ICJ judgment in the *Fisheries Case (United Kingdom v Norway)*, Merits, Judgment, 18 December 1951, ICJ Reports 1951, 130.

³³ See Article 53, Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

³⁴ See Common Article 3 to the Geneva Conventions on Humanitarian Law (e.g. Convention (IV) Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287) and Article 4 of the International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

The relationship between state sovereignty and protection of human rights has undergone considerable transformation. Before 1945 human rights were seen as an internal affair of states.³⁵ This view could not change overnight and this is mirrored in the mild language of the UN Charter on this issue, which does not contain any specific human rights obligations. Nevertheless the Charter is not completely silent on this topic, Article 1(3) of the Charter asserts that a purpose of the UN is ‘promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’. Articles 55 and 56 of the Charter can also be deemed as human rights provisions.³⁶ Even though these Articles may have been intended to be mere programmatic declarations, they are nevertheless now interpreted as being obligations that can attract state responsibility if violated. Brownlie has affirmed that in the case of a gross violation of Article 56 state responsibility arises.³⁷ Similarly, Riedel has stated: ‘There is a wide consensus today that the article [55] legally obligates ... member States to respect and protect human rights.’³⁸ Also the ICJ opinion in the case of *Legal Consequences for States of the Continued Presence of South Africa in Namibia* is often cited: ‘...denial of fundamental human rights is a flagrant violation of the purpose and principles of the Charter.’³⁹

The protection of human rights after WWII has underwent rapid development and has shifted the understanding of state sovereignty. This shift is not only the belief of the commentators of international law,⁴⁰ but it is also present in practice of states or other actors in the field of international law. For example, Kofi Annan, at the occasion of receiving the Nobel Peace Prize in 2001, said: ‘The sovereignty of States must no longer be used as a shield

³⁵ See Harris: ‘[Before 1945] the treatment of nationals was regarded as being within the domestic jurisdiction of sovereign states.’, Harris, *Cases and Materials on International law*, 6th edn (London: Sweet & Maxwell, 2004) at 654; and Nowak: ‘Up until the Second World War, international law did not regulate how sovereign states should treat their citizens or subjects’, Nowak, *Introduction to the International Human Rights Regime* (Leiden: M. Nijhoff, 2003) at 21.

³⁶ Article 55 reads:

- ...the United Nations shall promote:
 - a. higher standards of living, full employment, and conditions of economic and social progress and development;
 - b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
 - c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56 reads:

All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.’

³⁷ Brownlie, supra n. 9 at 531.

³⁸ Riedel, ‘Article 55(c)’ in Simma, supra n. 20 at 920.

³⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, at para 131.

⁴⁰ See for example. Brunnée and Toope: ‘It seems to be the case, however, that the boundaries of State sovereignty have come to be redrawn by human rights.’ (Brunnée and Toope, ‘The Use of Force: International Law After Iraq’, (2004) 53 *International and Comparative Law Quarterly* 785 at 796) or Shaw, supra n.28 at 254: ‘The basic rule of international law providing that states have no right to encroach upon the preserve of other states’ internal affairs ... has, however, been subject to a process of reinterpretation in the human rights field.’ Furthermore, see Teson: ‘The content and purpose of state sovereignty have undergone profound changes since 1945, and more dramatically since 1989. Human beings have claims against their own states and governments that the international community cannot merely ignore.’, Teson, ‘Collective Humanitarian Intervention’, (1996) 17 *Michigan Journal of International Law* 323 at 336.

for gross violations of human rights.’⁴¹ Also, the Netherlands’ Ambassador to the Security Council, in the discussion of drafting Resolution 1244 in 1999, stated:

The Charter, to be sure, is much more specific on respect for sovereignty than on respect for human rights, but since the day it was drafted the world has witnessed a gradual shift in that balance, making respect for human rights more mandatory and respect for sovereignty less absolute. Today, we regard it as a generally accepted rule of international law that no sovereign State has the right to terrorize its own citizens. Only if that shift is a reality can we explain how on 26 March the Russian-Chinese draft resolution branding the NATO air strikes a violation of the Charter could be so decisively rejected by 12 votes to 3.⁴²

It is clear that those rules mentioned in the previous section, that is the *jus cogens* norms for the protection of human rights, directly circumscribe state sovereignty. No state can under any circumstances, perpetrate genocide, apartheid, slavery, torture or crimes against humanity. Another aspect of these *jus cogens* norms, that has been previously mentioned, is that they give rise to obligations *erga omnes*, which means that all states have a legal interest in their protection. For these reasons, the perpetration of these crimes can no longer be regarded as an ‘internal affair’ of a state. On the contrary, perpetration of these acts is internationally relevant conduct that violates international law and if the acts are attributable to the state, its responsibility under international law arises. The protection of fundamental human rights has therefore been ‘internationalised’ and so removed from the free conduct of a state. In light of this, humanitarian intervention can hardly be seen as an intervention in the internal affairs of a state. Humanitarian intervention to stop grave violations of fundamental human rights is thus not a wrongful intervention. Consequently, no violation of the rule of non-intervention occurs.

4. Humanitarian Intervention and Circumstances Precluding Wrongfulness

Even though humanitarian intervention does not violate the principle of non-intervention, it is still an illegal use of force. However, in international law, as in municipal legal systems, special circumstances are recognised when a normally illegal act is justified and therefore it would be unjust to invoke the responsibility of the perpetrator. Circumstances precluding wrongfulness are part of customary international law which has recently been codified by the work of the ILC. In 2001 it adopted the Draft Articles on Responsibility of States for Internationally Wrongful Acts (‘Articles’) that have been adopted by a General Assembly Resolution.⁴³ With regard to humanitarian intervention two circumstances precluding wrongfulness could be suggested – countermeasures and necessity.

A. Countermeasures

Widespread or systematic violations of fundamental human rights are clearly, as we have seen, illegal acts and consequently bring about the international responsibility of that state. According to Article 48 of the Articles every state can claim cessation of the internationally wrongful act and assurances and guarantees of non-repetition if the obligation breached is

⁴¹ See: <http://nobelprize.org/peace/laureates/2001/annan-lecture.html>.

⁴² Verbatim Records, 10 June 1999, S/PV.4011.

⁴³ GA Res, 12 December 2001, A/RES/56/83.

owed to the international community as a whole (that is an *erga omnes* obligation). This is exactly the case with the human rights obligations that we are concerned with. However, what happens when the responsible state does not fulfil this secondary obligation to cease the wrongful act? Can any state then resort to countermeasures?

The Articles are deliberately silent on this point.⁴⁴ In the commentary to the Articles the ILC lists some examples when states other than those individually injured have resorted to countermeasures. Nevertheless, in the opinion of the ILC, 'practice on this subject is limited and rather embryonic'.⁴⁵ Therefore the ILC left 'the resolution of the matter to the further development of international law'.⁴⁶ In cases of widespread violations of human rights some commentators argue that there exists a right to countermeasures by any state. For example, Cassese argues:

Second, the concept is now commonly accepted that obligations to respect human rights are *erga omnes* and, correlatively, any state, individually or collectively, has the right to take steps (admittedly, short of force) to attain such respect.

Third, the idea is emerging in the international community that large-scale and systematic atrocities may give rise to an aggravated form of state responsibility, to which other states or international organizations may be entitled to respond by resorting to countermeasures other than those contemplated for delictual responsibility.⁴⁷

In the case of humanitarian catastrophe, some states may also argue that even though the obligation breached is *erga omnes*, they are specifically affected by it. For example, it may be that the situation triggered a large scale influx of refugees into neighbouring states, as was the case during the Kosovo crisis, prior to NATO intervention. It is estimated that 90,000 refugees fled to Albania and Macedonia.⁴⁸ Another example is the two million refugees who fled from Rwanda into the neighbouring states of Tanzania, Burundi and the Democratic Republic of Congo in 1994 destabilising the whole region.⁴⁹ The Articles deal with this issue in Article 42(b), according to which a state can invoke the responsibility of another state in the same way as an injured state if the obligation was *erga omnes* and the breach specially affects that state. Then the state can take countermeasures in accordance with the respective provisions. However, in the commentary the ILC notes:

Subparagraph (b) (i) does not define the nature or extent of the special impact that a State must have sustained in order to be considered injured. This will have to be assessed on a case by case basis, having regard to the object and purpose of the *primary obligation* breached and the facts of each case. For a State to be considered injured it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed.⁵⁰ (emphasis added)

⁴⁴ See Article 54.

⁴⁵ Commentary to Article 54, para. 3, *supra* n. 19.

⁴⁶ *Ibid.* at para. 6.

⁴⁷ Despite using terminology that reflects the first draft of the Articles adopted by the ILC after the first reading in 1996 that talked about state crimes it is still a valid comment. Cassese, *supra* n. 16 at 26.

⁴⁸ International Commission on Intervention and State Sovereignty, 'Background Research, Section B: Past Humanitarian Interventions', 2001 at 113. Available at: http://www.iciss.ca/02_Section_B-en.asp

⁴⁹ See: <http://www.refugeesinternational.org/content/country/detail/2913/>

⁵⁰ Commentary to Article 42, para.12, *supra* n.19.

In the author's view, the influx of refugees as a consequence of the large scale violations of human rights means that neighbouring states are specially affected in comparison to other states. Yet, the states are not specially affected by the breach of the primary obligation. No special interests of the neighbouring states are affected by the breaches of human rights norms. In this sense, the neighbouring states are affected just in the same way as any other state. It is only one of the consequences of the breach of the primary obligation that causes the neighbouring states to be specially affected.

In any case, the whole issue of humanitarian intervention as a lawful countermeasure is problematic because countermeasures involving the use of force are expressly prohibited. The Articles make it clear in Article 50(1)(a):

Countermeasures shall not affect:

(a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; ...

The prohibition on the use of forcible countermeasures is deeply embodied in international law.⁵¹ Historically, armed reprisals and other means of forcible self-help were often used by powerful states against weaker states. This was a matter of international concern and was one of the issues explicitly addressed in the post-WWII world order. The ICJ in the *Corfu Channel* case made clear in 1949 the change in the law on this subject: 'The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law.'⁵² Therefore, even given that other conditions of countermeasures, most notably proportionality, would be satisfied, the non-justification of humanitarian intervention as a countermeasure rests upon the fact that it is still a use of force which is prohibited by the UN Charter. Furthermore, it is the author's view, countermeasures are not the best suited justification for humanitarian intervention. First of all countermeasures are responsive and as such violations have to have occurred. Another problem is that the very rationale of countermeasures is to compel the violating state to abide by international law. However, in the case of humanitarian intervention it is rather that the intervening state steps in and stops the violation of international rules by oneself. 'This does not make sense.'

B. Necessity

Another circumstance precluding wrongfulness that should be assessed in this context is necessity as set out in Article 25 of the Articles. In this context, a state acting in violation of an international obligation will not attract state responsibility if that act was the only way to safeguard an essential interest against a grave and imminent peril. Necessity has some similarities with humanitarian intervention. There is some fear of its abuse and it is seen as an extraordinary measure for which very strict conditions of application are set.⁵³ The very wording of the provision tells us that necessity, rather than being a rule in itself, is in fact a very limited exception available only in the most extraordinary situations.⁵⁴ The basic conditions can be listed as follows: a) safeguarding an essential interest; b) grave and

⁵¹ See also GA Res. 2625 (XXV), 24 October 1970, first principle, para. 6. Reference

⁵² *Corfu Channel (United Kingdom v Albania)*, Merits, ICJ Reports 1949, 4 at 35.

⁵³ See Commentary to Article 25 of the Articles, supra n.19.

⁵⁴ Note the negative wording of the Article: 'Necessity may not be invoked ... unless ...'.

imminent peril to this interest; c) is the only way to safeguard the interest; and d) the act does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.⁵⁵

According to condition a) halting or averting widespread violations of fundamental human rights is an essential interest of the whole international community. It is not necessary, as the ILC states in its commentary, that the essential interest is of an individual state. It also extends to a particular interest of the international community as a whole.

Meeting condition b) will probably be the most questionable because it involves an assessment of the facts as to whether genocide or crimes against humanity have been perpetrated or are really imminent. In the *Gabčíkovo-Nagymaros project* case the ICJ held that 'the State concerned is not the sole judge of whether those conditions have been met.'⁵⁶ This is particularly true when assessing the imminence and graveness of the threat.⁵⁷ The crucial question is who will assess the facts. In the decentralised system of international law this will have to be assessed by other states, including and probably primarily, by the intervening states. This is far from ideal, as it is especially at this moment where the principle of humanitarian intervention might be abused. Yet it is clear that the situation will be easier to assess if those crimes have already been perpetrated rather than when considering if they are imminent. If there is credible evidence that the crimes are being, or have been, committed, then it is clear that there is an imminent peril to the interest as the crimes are then continuous.

Condition c) can be reformulated to be understood that humanitarian intervention must always be a last resort, when all other means have failed or are ineffective. In the case of humanitarian intervention this will probably include a procedural obligation to seek authorisation from the Security Council first. This is the very rationale of this condition - that it is always preferable to pursue the objective by legal means (use of force authorised by the Security Council under Chapter VII) if any are available, than to carry out an illegal act - the unilateral use of force.

Condition d) is another formulation of the principle of proportionality. As such, the consequences of the humanitarian intervention cannot be as serious or even more serious as those which it should be averting.⁵⁸

⁵⁵ See ILC Commentary to Article 25 and the ICJ judgment in the *Gabčíkovo-Nagymaros Project* case (*Gabčíkovo-Nagymaros (Hungary v Slovakia)*), Merits, Judgment, 25 September 1997, ICJ Reports 1997, 7), where the Court in para. 52 said that these 'conditions reflect customary international law'.

⁵⁶ Para. 51, *Gabčíkovo-Nagymaros*, *ibid*.

⁵⁷ For interpretation of the 'grave and imminent peril' see *Gabčíkovo-Nagymaros project* *ibid* at para. 54:

The Court considers, however, that, serious though these uncertainties might have been they could not, alone, establish the objective existence of a 'peril' in the sense of a component element of a state of necessity. The word 'peril' certainly evokes the idea of 'risk'; that is precisely what distinguishes 'peril' from material damage. But a state of necessity could not exist without a 'peril' duly established at the relevant point in time; the mere apprehension of a possible 'peril' could not suffice in that respect. It could moreover hardly be otherwise, when the 'peril' constituting the state of necessity has at the same time to be 'grave' and 'imminent'. 'Imminence' is synonymous with 'immediacy' or 'proximity' and goes far beyond the concept of 'possibility'. As the International Law Commission emphasized in its commentary, the 'extremely grave and imminent' peril must 'have been a threat to the interest at the actual time' (Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 49, para. 33). That does not exclude, in the view of the Court, that a 'peril' appearing in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.

⁵⁸ See also para. 17 of ILC Commentary to Article 25 of the Articles, *supra* n.19.

In comparison to countermeasures, humanitarian intervention invoked by necessity would allow, under strict conditions, not only a reaction to ongoing gross human rights violations but also to those that are imminent. This stresses the protective rather than reactive rationale of humanitarian intervention. Most of the conditions that apply to invoking necessity are the same or very similar to the conditions that are usually listed for humanitarian intervention (see below the report 'Responsibility to Protect'). On the other hand, invoking circumstances precluding wrongfulness has, according to the ILC, another common condition, they cannot be invoked if the obligation breached is a peremptory norm of general international law.⁵⁹ Therefore in the case of humanitarian intervention we are back to the crucial question of whether the current prevailing interpretation of Article 2(4) of the UN Charter is identical to the corresponding peremptory norms of general international law. If this is the case then it seems that necessity as a circumstance precluding wrongfulness could not be invoked in the case of humanitarian intervention.

Yet, even if the general rule is that no circumstances can justify the breach of a peremptory norm of international law there may still be an exception to this rule in regard to humanitarian intervention.⁶⁰ It is the author's view that there are examples of state practice that could establish such an exception. Many cases, which on their facts are *prima facie* humanitarian intervention, escape international condemnation even though they are not perceived to be in conformity with international rules regulating the use of force. This can be interpreted as acknowledgment that there were exceptional circumstances that justified the use of force, in other words that a state of necessity justified the action.

The ILC, in its Commentary cites one example when states invoked the plea of necessity to excuse humanitarian intervention: 'In 1960 Belgium invoked necessity to justify its military intervention in the Congo.'⁶¹ The intervention in Congo was strongly condemned by African and Communist states. The Communist states generally were strongly opposed to any intervention whatsoever and they obviously could not agree to any intervention on the basis of violations of human rights given their own poor human rights records. When in 1978 Communist Vietnam intervened in Cambodia, stopping the mass atrocities there, the Communist bloc simply, and ridiculously, denied that any intervention had occurred.⁶² On the whole the Cold War examples are generally bitterly affected by the antagonism between Western countries and Communist countries at the time. The opinions of states concerning such intervention depended not so much upon the actual situation but more upon who was the invader and who was the target state, as demonstrated by the invasions into Congo and Cambodia.

Other Cold War examples are heavily influenced by the lip service intervening states paid to the only generally accepted exception to the prohibition on the use of force: self-defence, which at times can seem more comical than to be a serious legal justification. For example, India in 1971 justified its invasion to East Pakistan⁶³ by self-defence, as 'the influx of 10 million refugees amounted to 'refugee aggression' and represented such an intolerable

⁵⁹ Article 26 of the Articles.

⁶⁰ See also Johnstone, who discusses the ambiguity of the Articles on this issue: 'The ILC seems to suggest that the plea of necessity cannot be invoked to justify humanitarian intervention, but on closer reading really says that the question is 'not covered' by Article 25.', Johnstone, 'The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism', (2005) 43 *Columbia Journal of Transnational Law* 337 at 348.

⁶¹ Para. 20 of ILC Commentary to Article 25 of the draft Articles, *supra* n.19.

⁶² *Supra* n. 47 at 58. See generally Bazzyler, 'Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia', (1987) 23 *Stanford Journal of International Law* 547.

⁶³ For legal examination of the conflict see generally Franck and Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force', (1973) 67 *American Journal of International Law* 275.

burden that it constituted a kind of 'constructive' attack.'⁶⁴ However, India also made claims that its principal objective was to stop gross human rights violations in East Pakistan. The Indian representative at the Security Council said 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.'⁶⁵ Nevertheless, even though the support of the international community was divided between India and Pakistan concerning the conflict as a whole, the issue was addressed by a Resolution of the General Assembly and both parties were called upon to cease hostilities. The reason behind the conflict was not discussed and India was not expressly condemned.⁶⁶

The same position was taken by Tanzania after its invasion of Uganda in 1979. Tanzania claimed that it had acted in self-defence. Uganda's regime led by Idi Amin was believed to be one of the most ruthless in the world. By the time he was overthrown in April 1979, the government of President Idi Amin was believed to have been responsible for the murder of 'at least 100,000 and possibly as many as half a million people'.⁶⁷ By 1977 'the violence had become almost random',⁶⁸ and the invasion was not condemned by the UN or other states. The only exception was some African states which had substantial Muslim populations.⁶⁹ Admittedly, there was some case for self-defence as there were some border skirmishes between Ugandan and Tanzanian forces and Idi Amin also had declared an intention to annex part of Tanzanian territory, which he unsuccessfully tried to do, but later repudiated the idea.⁷⁰ Yet, the use of force by Tanzania resulted in deep penetration into the whole territory of Uganda and the complete overthrow of the Ugandan regime. In this case the question to ask is whether, if it were not for the humanitarian aspect of the intervention, such an arguably disproportionate use of force in self-defence would be left without condemnation by the international community.⁷¹ In response Hassan has noted: 'African leaders... have refused to condemn publicly this military aggression: they are silently thankful that Amin's barbaric rule has ended'.⁷²

After the end of the Cold War further examples of armed intervention, which could be labelled as humanitarian and that did not attract universal condemnation, can be traced. The intervention by ECOWAS in Liberia in 1990, aimed to forestall the country from descending further into anarchy due to its civil war, did not have any clear legal grounds,⁷³ yet it did not attract any international condemnation. On the contrary on 22 January 1991, five months after the intervening forces landed in Liberia, a note from the President of the Security Council stated that: 'The members of the Security Council commend the efforts made by the ECOWAS Heads of State and Government to promote peace and normalcy in Liberia. ... [and] calls upon the parties to the conflict ... to co-operate fully with ECOWAS to restore peace and normalcy in Liberia.'⁷⁴ Ofodile has commented that the '[Security Council] found itself in a very difficult position. To have approved ECOWAS' action enthusiastically would have set a dangerous precedent, and to condemn it would have led to a further breakdown of

⁶⁴ Supra n. 47 at 55.

⁶⁵ Ibid.

⁶⁶ GA Res. 2793 (XXVI), 7 December 1970.

⁶⁷ Supra n. 47 at 61.

⁶⁸ Ibid.

⁶⁹ Ibid. at 62.

⁷⁰ See Hassan, 'Realpolitik in International Law: After Tanzanian Ugandan Conflict: Humanitarian Intervention Reexamined', (1980-81) 17 *Willamette Law Review* 859 at 865 et seq..

⁷¹ Hassan concludes that the invasion could not be justified in terms of self-defence as it did not meet the proportionality test, *ibid.* at 910.

⁷² Ibid. at 866.

⁷³ Supra n. 47 at 81: 'The legal basis for ECOWAS's intervention in Liberia was dubious.'

⁷⁴ 22 January 1991, S/22133.

law and order in Liberia.’⁷⁵ So it seems that even though the legality of the intervention was at best questionable. Rather, it was not condemned and it was acknowledged that exceptional circumstances existed that did not permit it to be labelled as simply illegal. This closely resembles a state of necessity.

Another case in point is the Allied intervention in Northern Iraq in 1991 to stop the plight of the Kurdish population which was being targeted by Iraqi forces. The intervening states did not put forward any explicit legal justification for this intervention,⁷⁶ but it has been suggested that Security Council Resolution 688 can be read as implying Security Council authorisation. Resolution 688 condemned the repression of the civilian population in Iraq and demanded that Iraq immediately ends this action. However the resolution did not include any authorisation for the use of force.⁷⁷ Nevertheless, operation ‘Provide Comfort’ was not condemned by the Security Council or the General Assembly.⁷⁸ Subsequent no-fly zones, which were proclaimed and patrolled by Allied aircraft in northern Iraq, were also set up without any express authorisation by the Security Council. The UK argued that the no-fly zones were ‘justified under international law in response to a situation of overwhelming humanitarian necessity’.⁷⁹

Probably the best example of states *de facto* invoking necessity as their justification for humanitarian intervention is the NATO action in Kosovo in 1999. In a Security Council debate on 24 March 1999 both the USA and UK, while not giving any clear legal justification, tried to justify the action in terms of averting imminent humanitarian catastrophe. The American representative stated: ‘... we believe that the action by NATO is justified and necessary to stop the violence and prevent an even greater humanitarian disaster...’.⁸⁰ The UK representative was even more explicit:

The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. Under present circumstances in Kosovo, there is convincing evidence that such a catastrophe is imminent. ... Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable.⁸¹

It is the author’s opinion that this is a clear invocation of a state of necessity despite it not being expressly mentioned. The intervention was, however, criticised by some states, most notably Russia, China and India and on 26 March 1999 a draft resolution in the Security Council condemning the action was rejected by 12 votes to 3 (China, Russia and Namibia). Overall, the Kosovo intervention was commended by a majority of states as an exceptional measure. In this context Kritsiotis notes: ‘In the main, a clear consensus does appear to have taken shape among a broad cross-section of States, and it is a consensus which favoured an armed response to halt, or at least alleviate, the humanitarian catastrophe at the heart of the

⁷⁵ Ofofiele, ‘The Legality of ECOWAS Intervention in Liberia’, (1994) 32 *Columbia Journal of Transnational Law* 381 at 414.

⁷⁶ Gray, *supra* n.1 at 34.

⁷⁷ See generally Malanczuk, ‘The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War’, (1991) 2 *European Journal of International Law* 114.

⁷⁸ Gray, *supra* n. 1 at 34.

⁷⁹ Shaw, *supra* n. 28 at 1046.

⁸⁰ In Harris, *supra* n. 34 at 953.

⁸¹ *Ibid.* at 954.

conflict raging in Kosovo.’⁸² An overview of the reactions of states to the Kosovo intervention has been prepared by Johnstone who concludes:

... that posture [that the intervention was ‘illegal but excusable’] can also be inferred from the response of the Non-Aligned Movement. At the time of the intervention in March 1999, the NAM refrained from directly condemning the action despite the efforts of South Africa, as chair, to get it to do so. ... The inference is that the NAM viewed the Kosovo intervention as illegal, but was prepared to excuse it at the time, while reaffirming the prohibition against use of force at the first appropriate opportunity. Statements of the Rio Group and various Islamic countries can be read in the same way.⁸³

These examples demonstrate that some interventions, which on the facts could be said to be humanitarian, did not always attract universal condemnation. Some could even be said to prove that intervening states used the language of necessity to justify their intervention. The examples can be interpreted as giving authority to allow the invocation of a state of necessity for violations of the prohibition on the use of force in response to widespread or systematic violations of fundamental human rights. Naturally, one must always be careful when drawing a conclusion with regards to customary norms which emerge from the omissions and inaction of states, as there could be a variety of reasons why they did not act in a particular way.⁸⁴ Nevertheless, when it comes to the prohibition on the use of force as a fundamental norm in international law it can be expected that states and international organisations will condemn the use of force if they think that it was in breach of that rule. Furthermore, non-action could serve as evidence of state practice due to the nature of the rule itself. It is actually state action which is required for the intervening states to claim state responsibility. This responsibility will not be claimed if states think that there is a circumstance precluding the wrongfulness of their act of intervention. The failure to condemn could be thus interpreted as an acknowledgement of the fact that the use of force could be justified by special circumstances, even though no clear legal norm exists permitting the particular use of force that would otherwise be illegal.

Yet, a special problem still arises if we consider the current interpretation of Article 2(4) of the Charter as being identical with a *jus cogens* norm. The issue then is whether this primary *jus cogens* norm can *de facto* be altered by a secondary norm that is not of a peremptory character (necessity). In the author’s view although generally this is not attainable it could be the case in the present situation. The state of necessity is itself caused by a violation of peremptory norms of international law. Therefore its basis has the same level as would the obligation violated by the state invoking necessity.

5. Report of the International Commission on Intervention and State Sovereignty

⁸² Kritsiotis, ‘The Kosovo Crisis and Nato’s Application of Armed Force against the Federal Republic of Yugoslavia’, (2000) 49 *International and Comparative Law Quarterly* 330 at 358.

⁸³ Johnstone, *supra* n. 59.

⁸⁴ See Gray, *supra* n. 1 at 20 who discusses the significance of the failure to condemn particular use of force as an evidence of legality: ‘Is failure to condemn evidence of legality? Not necessarily so, for there are many reasons for a failure to condemn.’

Kofi Annan in his Millennium Report, 'We the Peoples', expressed his views on humanitarian intervention.⁸⁵ He held that state sovereignty should not shield grave violations of human rights:

But to the critics [of humanitarian intervention] I would pose this question: if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?

We confront a real dilemma. Few would disagree that both the defence of humanity and the defence of sovereignty are principles that must be supported. Alas, that does not tell us which principle should prevail when they are in conflict.⁸⁶

As a reaction to this report Canada established an independent commission of experts that would research the relationship between state sovereignty and intervention. The International Commission on Intervention and State Sovereignty ('the Commission') was established in September 2000 and finished its work in December 2001.⁸⁷ It produced a final report called 'The Responsibility to Protect'.⁸⁸ The report is based on the principle of international responsibility for the protection of people against serious harm. The Commission thus tried to replace the 'right to humanitarian intervention' with a 'responsibility to protect,' considering it not a simple change of terminology but rather a change of the concept as a whole. The Commission strived to change the whole discourse and perception of humanitarian intervention by moving away from focus on the intervention to protection of the people in need. The report argues that responsibility to protect lies within the state itself and is inherent in the notion of state sovereignty. International responsibility emerges once the state is unwilling or unable to halt or avert the situation where its 'population is suffering serious harm, as a result of internal war, insurgency, repression or state failure'.⁸⁹ At this point the 'principle of non-intervention yields to the international responsibility to protect'.⁹⁰

The Commission found basis for international responsibility in four sources: a) obligations inherent in the concept of sovereignty; b) the responsibility of the Security Council, under Article 24 of the UN Charter, for the maintenance of international peace and security; c) specific legal obligations under human rights and humanitarian law; and d) the developing practice of states, regional organisations and the Security Council itself.⁹¹ As such, the responsibility to protect embraces three specific responsibilities: the responsibility to prevent; the responsibility to react; and the responsibility to rebuild. This article will briefly discuss the responsibility to react, as set out in the report, which includes principles that should be used to guide armed intervention.

A. Armed intervention

⁸⁵ Annan, *We the Peoples* (New York: United Nations, 2000).

⁸⁶ *Ibid.* at 48.

⁸⁷ Available at: <http://www.iciss.ca/>.

⁸⁸ The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty, December 2001 (hereafter 'The Responsibility to Protect'). For a critical analysis see Levitt, 'The Responsibility to Protect: A Beaver without a Dam?', (2003) 25 *Michigan Journal of International Law* 153.

⁸⁹ The Responsibility to Protect at XI.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

When preventive mechanisms fail, the international community, according to the Commission, has 'to react to situations of compelling need for human protection'.⁹² The Commission, in its report, stressed that the means chosen must be as non-intrusive as possible. Political, economic or judicial measures will thus always have precedence before military action, which nevertheless might be necessary in extreme cases. However, there must be strict conditions for the use of force, in order for it to be justifiable the circumstances must be grave.⁹³ According to the opinions of the states that the Commission consulted, the circumstances will be grave in cases of violence which genuinely 'shock the conscience of mankind', or which present a clear and present danger to international security.⁹⁴ The Commission also concluded on the right of intervention. During its consultations with states', even those states who mostly opposed any interference with state sovereignty recognised that exceptions must exist for certain kinds of emergencies.⁹⁵ The Commission then went on to formulate the criteria for humanitarian intervention. They grouped the conditions into six criteria: i) right authority, ii) just cause, iii) right intention, iv) last resort, v) proportional means; and vi) reasonable prospects.⁹⁶

i) Right authority

This condition deals with the issue of who has the authority to determine that humanitarian intervention should be taken. The Commission made absolutely clear that the intervention should have authorisation from the Security Council. The Commission considered that 'Security Council authorisation must in all cases be sought prior to any military intervention action being carried out'.⁹⁷ On the other hand, the Commission expressed doubts about the approach the Security Council has to the responsibility to protect and especially the usage of the right of veto of the permanent members. The Commission mentioned the General Assembly, under the 'Uniting for Peace' procedure,⁹⁸ as another body that could authorise an intervention. This is a procedure established at the beginning of the Cold War under which the General Assembly would take over the responsibility for international peace and security in cases where the Security Council is in dead-lock.⁹⁹ In such case the General Assembly may make a determination of the existence of a threat to the peace, breach of the peace, or act of aggression and to recommend to its members to take action, including the use of force if necessary.¹⁰⁰

As another possibility the Commission considered actions taken by a regional organisation, within its borders, according to Article 52 of the UN Charter. However, according to Article 53 of the UN Charter 'no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security

⁹² Ibid. at 29.

⁹³ Ibid. at 29.

⁹⁴ Ibid. at 31.

⁹⁵ Ibid. at 31.

⁹⁶ There have been many other attempts to formulate such criteria. For example, in 1974 the International Law Association formulated 12 conditions for humanitarian intervention (see Hilpold, *supra* n.16). In more recent works of criteria can be found in Charney, *supra* n. 16; Cassese, *supra* n. 16 ; and Merriam, *supra* n. 8.

⁹⁷ The Responsibility to Protect at 50.

⁹⁸ GA Res. 377 (V), 3 November 1950.

⁹⁹ See Gray, *supra* n. 1 at 200.

¹⁰⁰ It is interesting to note that the Commission did not comment on the legality of such an action but only mentioned its legitimacy when it has the support of over two thirds of the members of the UN (majority necessary to pass a resolution in the General Assembly).

Council'. Yet the Commission admitted that in practice such actions have been taken without such authorisation. As examples the Commission noted the interventions by ECOWAS in Liberia (1992) and Sierra Leone (1997).¹⁰¹ These interventions were *ex post facto* approved by the Security Council. Even though from these isolated incidents a new customary norm can hardly be drawn, the Commission still saw a 'certain leeway for future action in this regard'.¹⁰²

In its conclusion the Commission discussed the issue of what to do in cases when both UN bodies and regional organisations fail to act in 'conscience-shocking situations crying out for action'.¹⁰³ It considered that a scenario where a coalition of willing states intervenes cannot be ruled out. Even though the Commission did not confirm the legality of such an action, it noted that if the operation is successful it might be approved by the world public opinion and 'may have enduringly serious consequences for the stature and credibility of the UN itself'.¹⁰⁴

ii) Just cause

The Commission defines two set of circumstances that would justify military intervention:

- a) large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
- b) large scale 'ethnic cleansing', actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.¹⁰⁵

The circumstances are characterised by certain features. First, the violations must be 'large scale' and not just isolated incidents. The Commission emphasised that just cause includes also anticipatory action.¹⁰⁶ It also stated that 'just cause' can emerge not only from state action, but also from state omissions (no matter if intentional or if the authorities are unable to deal with the situation) by which it violates its obligation to protect.

Besides large scale loss of life the Commission chose to fully use the fixed term 'ethnic cleansing'.¹⁰⁷ The Commission limited just cause to loss of life or some means of ethnic cleansing. It thus left aside certain other forms of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. For example imposing measures intended to prevent births¹⁰⁸ or causing serious bodily or mental harm to members of the group,¹⁰⁹ which, unless they come under the terror of ethnic cleansing, would not be just cause according to the Commission. Similarly, torture as a crime against humanity

¹⁰¹ The Responsibility to Protect at 48.

¹⁰² Ibid. at 54.

¹⁰³ Ibid. at 55.

¹⁰⁴ Ibid. at 55.

¹⁰⁵ Ibid. at 32.

¹⁰⁶ 'Without this possibility of anticipatory action, the international community would be placed in the morally untenable position of being required to wait until genocide begins, before being able to take action to stop it.' Ibid. at 33.

¹⁰⁷ The term entered the international arena in the context of the conflict in the former Yugoslavia in 1990s. It has its origins in the Serb-Croatian term '*etničko čišćenje*'. Ethnic cleansing was first mentioned and condemned in General Assembly Resolution 46/242, 25 August 1992, A/RES/46/242, which declared it as a 'grave and serious violation of international humanitarian law'. For details see Petrovic, 'Ethnic Cleansing An Attempt at Methodology', (1994) 5 *European Journal of International Law* 1.

¹⁰⁸ Article 2(d) of the Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277.

¹⁰⁹ Ibid., Article 2(b).

would also not be considered a just cause according to the definition. This raised the question of whether the circumstances are not too restrictive. Widespread and systematic acts of torture can no less ‘shock the conscience of mankind’ than large scale killing. Practically, it would be better to express just cause in more deep rooted terms such as crimes against humanity, which has a much clearer content, not least now due to the case law of the ICTY and the ICTR and in the future hopefully the International Criminal Court (ICC).

The remaining four criteria are more straightforward. ‘Right intention’ means that the primary objective of the intervention must be to ‘halt or avert human suffering’.¹¹⁰ Therefore the Commission acknowledged that intervening states may have other motives but nevertheless the primary concern must be humanitarian. ‘Last resort’ means that armed force can be used only if all other means have failed. However, the Commission recognised that this condition could sometimes hamper the whole objective of the action as there may not be time to make sure that all other means have not worked. This criterion thus means ‘that there must be reasonable grounds for believing that, in all the circumstances, if the measure had been attempted it would not have succeeded’.¹¹¹ ‘Proportional means’ is the classic requirement of proportionality. Yet, it raises the interesting question of whether humanitarian intervention can have as its aim a change of regime in the target state. The Commission is of an opinion that in specific cases, when it ‘is strictly necessary to accomplish the purpose of the intervention’,¹¹² it could satisfy the criterion of proportionality. The last condition of reasonable prospects is closely linked to the idea of proportionality. It means that humanitarian intervention cannot be resorted to when the chances of success are low and the intervention would bring about prolonged conflict. The concern here is that such a humanitarian intervention could bring more suffering than it tries to remedy.

B. Follow-Up to the Report

The conclusions of the Report were integrated in the Report of the UN Secretary-General’s High Level Panel on Threats, Challenges and Change – ‘A more secured world: Our shared responsibility’ in December 2004.¹¹³ The Report noted that:

There is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community. ... Force, if it needs to be used, should be deployed as a last resort.¹¹⁴

However, the authority to authorise use of force lies with the Security Council.¹¹⁵

These ideas were subsequently adopted by Kofi Annan’s report ‘In Larger Freedom’,¹¹⁶ which served as a discussion paper and proposal for reform in the 2005 World

¹¹⁰ The Responsibility to Protect at 35.

¹¹¹ Ibid. at 36.

¹¹² Ibid. at 37.

¹¹³ 2 December 2004, A/59/565.

¹¹⁴ Ibid. at para. 201.

¹¹⁵ ‘We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent’, *ibid.* at para. 202.

¹¹⁶ Available at: <http://www.un.org/largerfreedom/>.

Summit. The outcome of the Summit in September is however very cautious on this issue. The final document of the Summit¹¹⁷ acknowledged the responsibility of states to protect their population. However, when it comes to the responsibility of other states it merely stated:

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.¹¹⁸

C. Comments on the Report

The Commission approached the idea of humanitarian intervention from a completely different perspective – not as a right but rather as an obligation. The concept is much broader than just a humanitarian intervention, it also includes the responsibility to prevent other means of reaction and the responsibility to rebuild. However it proved to be quite controversial, the concept itself is not entirely new. In 1991 the UN General Secretary Javier Pérez de Cuéllar in his report for the General Assembly stated:

It is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity. ...What is involved is not the right of intervention but the collective obligations of States to bring relief and redress in human rights emergencies.¹¹⁹

The Commission claimed that such an obligation is emerging:

While there is not yet a sufficiently strong basis to claim the emergence of a new principle of customary international law, growing state and regional organisation practice as well as Security Council precedent suggest an emerging guiding principle – which in the Commission's view could properly be termed 'the responsibility to protect'.¹²⁰

The move from a right towards a responsibility proved not be tactical though. States did not welcome the Report with great enthusiasm. They are obviously very careful when accepting any new obligation, especially in an area as sensitive as human rights violations in other states. Rather states would prefer to continue to resolve every situation on a case by

¹¹⁷ 24 October 2005, A/RES/60/1.

¹¹⁸ Ibid., at para. 139.

¹¹⁹ Report of the Secretary-General on the Work of the Organization, September 1991, A/46/1 at 5.

¹²⁰ The Responsibility to Protect at 15.

case basis.¹²¹ Judging from the reaction of states it is doubtful if it is really the case that such a rule is emerging. The conclusions of the 2005 World Summit include the concept, however only with regard to the Security Council. Moreover, it is stressed that the responsibility will be used on an individual basis. States have thus not accepted any formal obligation, even through the Security Council. It is also far from clear with whom the responsibility should lie. The Report talks interchangeably about a 'broader community of states',¹²² and an 'international community of states'.¹²³ However, it primarily discusses the responsibility of the UN to act. It seems that the Commission places the responsibility primarily on international organisations, most of all the UN and specifically the Security Council.

If the responsibility to protect should emerge as a new legal obligation its outline must be much clearer. Who is to be the bearer of such an obligation? Is it only the UN? Is it other multilateral organisations such as the OSCE or OAS? Or is it each and every state? As regards the responsibility to react the Commission views this, primarily, as the obligation of the UN, specifically the Security Council.¹²⁴ The Report of the High Level Panel on Threats blurs the issue even further. First, it uses another term – 'international community' – as regards to who is the bearer of the responsibility to protect; and second such responsibility is exercisable by the Security Council. This further raises the point of whether this responsibility is perceived as an emerging clear legal obligation or rather just a political commitment.

6. Conclusion

This article attempts to provide an overview of different issues that arise from the relationship between humanitarian intervention and state responsibility. First, it was argued that the responsibility of the target state will arise for a violation of peremptory human rights norms. Second, it was contended that humanitarian intervention is not a violation of the customary rule of non-intervention into the affairs of the target state or its sovereignty. However, even though the international community might still be operating roughly under the Westphalian system, which acknowledges the sovereignty of states,¹²⁵ it is no longer absolute. Fundamental human rights, which are at issue in humanitarian intervention, represent one such limit to the sovereign jurisdiction of any state. If humanitarian intervention were illegal under international law then, in these extreme situations, the law is in direct conflict with the principles it itself proclaims, such as humanity, dignity and the worth of the human person. As Cassese noted in relation to NATO intervention in Kosovo: '...from an *ethical* viewpoint resort to armed force was justified. Nevertheless, as a legal scholar I cannot avoid observing in the same breath that this moral action is *contrary to current international law*.'¹²⁶ One also cannot satisfy oneself with a strict formalistic reading of the UN Charter. One has to bear in mind that the UN Charter is a product of its time where the international law of human rights

¹²¹ MacFarlane, Thielking and Weiss, 'The Responsibility to Protect: Is Anyone Interested in Humanitarian Intervention?', (2004) 25 *Third World Quarterly* 977 at 983.

¹²² The Responsibility to Protect at 17.

¹²³ Ibid. at XI.

¹²⁴ '...if the Security Council fails to discharge its responsibility in conscience-shocking situations crying out for action,...', ibid. at 55.

¹²⁵ Plainly put, with regard to the issue that was central in 17th century, in the saying: *cuius regio, eius religio* (whose rule, his religion).

¹²⁶ Cassese, *supra* n. 16 at 25. (emphasis in the original)

was only just emerging. No legal system, including the international, can remain static.¹²⁷ The enhanced protection of human rights is exactly an issue that challenges some of the traditional principles of international law such as state sovereignty. In order that the whole system of international law be coherent, all these principles, including state sovereignty, should be reinterpreted to be consistent with other rules of the same system, such as the effective protection of human rights.

As argued, there is an emerging principle that humanitarian intervention is not justified only ethically but also legally under the state of necessity as a circumstance precluding wrongfulness. If all the strict conditions of invoking necessity are met, which under pure humanitarian intervention they are, then it will not be an illegal act attracting the responsibility of intervening states. This view is supported by the examples of state practice outlined above. The justification of humanitarian intervention under the state of necessity has another advantage compared to attempts to establish a right of humanitarian intervention as another exception to the prohibition of the use of force, which might be of a peremptory character. In that case Humanitarian intervention under circumstances precluding wrongfulness is not faced with the obstacle of changing a *jus cogens* norm.

The usual objection to humanitarian intervention is that it could be abused. This is also obvious if we think of humanitarian intervention in terms of necessity. The crucial issue is who will decide that a state of necessity exists. This is clearly a legal question, yet due to the nature of this legal concept, even in municipal law, a state of necessity is most often decided *ex post facto*.¹²⁸ This is also unequivocally true in international law. Although one can imagine some kind of preliminary special procedure when the ICJ or the ICC could decide on the existence of a state of necessity this possibility does not currently exist. In international law, it is states who are the primary interpreters of the law and this is so, even in this case. Of course this state of affairs is far from ideal and the circumstances could easily be abused. However is the possibility of the abuse of a right to humanitarian intervention a good enough reason for not having the right? This is hardly convincing, as such approach would mean that we could get rid of all rights, as they are all susceptible to abuse. A better solution is to set clear and unambiguous limits to rights in order to minimise the possibility of their abuse.¹²⁹

The whole issue of the permissibility of humanitarian intervention is closely linked to the fundamental question of the purpose of international law.¹³⁰ Is it just a set of formal rules that must be applied no matter what the outcome, or does international law pursue some instrumentalist objective? An example could be the principle of justice, which clearly has an

¹²⁷ See Higgins who asserts that: 'To rely merely on accumulated past decisions (rules) when the context in which they were articulated has changed – and indeed when their content is often unclear – is to ensure that international law will not be able to contribute to today's problems and, further, that it will be disobeyed for that reason', Higgins, *supra* n. 10 at 3.

¹²⁸ Nevertheless, some examples of preliminary procedures required by a state of necessity or urgency are known. One example could be that in most jurisdictions courts are entitled to authorise the immediate taking of a child into custodial care if conditions in the family of the child are so serious that its life is threatened.

¹²⁹ See also Franck who argues that:

Violations are a problem, of course, but they are not the problem. Rather, the problem is procedural. It is how to separate the sheep of genuine humanitarian rescue from the goats of opportunistic political self-aggrandizement. It is how to allow some, but not others, to take unauthorized action in extremis: how to allow some, but without thereby allowing all. It is a problem common to the law: a problem of line-drawing, of process.

Franck, 'Humanitarian and Other Interventions', (2005) 43 *Columbia Journal of Transnational Law* 321 at 326.

¹³⁰ See, generally, Koskeniemi, 'What is International Law For?', in Evans (ed.), *International Law* (Oxford: Oxford University Press, 2004) 89; and Higgins, *supra* n. 10 at Chapter 1.

ethical value. Another could simply be humanism. If international law, in a positivist sense, is a creation of humans, it would be only logical if it served the objective of a better life for all humans. This is an issue that is interwoven with the developing international personality of the individual, which could signal a shift from Hegel's system of international relations based on abstract entities (that is states) to the Kantian model which is more oriented towards a community of people.¹³¹

¹³¹ See Hilpold, *supra* n.16 at 437.