

The Human Rights Dimensions of International Peace and Security: Humanitarian Intervention after 9/11

By Stefan Kirchner

A. INTRODUCTION: HUMAN RIGHTS IN FOREIGN POLICY AND INTERNATIONAL RELATIONS

I. Shifting emphasis after 9 / 11 ?

Some two years after the terrorist attacks in the United States, the international community remains focused on the war against terrorism. Yet some other pressing issues of international law which enjoyed greater attention before the September 11, 2001, terrorist attacks remain unsolved. One core example is the question of Humanitarian Intervention (HI), which remained on the cutting edge of international legal discussion between the 1999 Kosovo War and the 2001 terrorist attacks. Yet the question has not become irrelevant as the situations in the Congolese Bunia Region and in Liberia show in a rather dramatic fashion. The reasoning behind the US-led wars in Afghanistan and Iraq, as well as the continuing tensions between the US and states such as Iran, North Korea or Cuba, go beyond the threat of terrorism and weapons of mass destruction (WMD) and include Human Rights concerns as well. The idea of Human Rights has become a key factor in international policy-making and is here to stay. But while human rights concerns have been cited as one justification for going to war in Yugoslavia, Afghanistan and Iraq, the same concerns have led to calls for restraint in the use of force. The question is which impact Human Rights notions have on international peace and security.

II. Human Rights as a concern in international relations

Since 1945 the growth of a language and practice of universal Human Rights has increasingly become a matter of concern in international relations and the idea of Human Rights shaped the international community and its “moral imagination”¹ more than anything else after World War

¹ Michael Ignatieff, *The Warrior's Honor: Ethnic War and the Modern Conscience*, 1st ed., New York: Metropolitan, 1997, p.8.

II . The impact of the inclusion of Human Rights in International Law is second only to the *ius cogens* prohibition of the use of force in terms of the importance in the context of the development of international law in the 20th century. International politics reflect this change: Economic co-operation, e.g. between the EU and third nations, is used to exercise pressure in favour of human rights; international organisations such as the UN, OSCE or EU, which originated from security or economic interests, have become platforms for the promotion of human rights, etc. Yet there remain obstacles on the road to both enduring international peace and security and universal respect for human rights.

III. Obstacles on the Road to enduring International Peace and Security and Universal Respect for Human Rights

Universalism, for one, is often seen as a western tradition,² based on liberalism³ - while the practice of human rights (or, more often, of human rights violations) reflects a realist world.⁴ The Universalist approach is therefore often criticised in favour of a so-called relativist approach which is based on the idea that human rights are not universal but rather dependent on the society in which an individual lives,⁵ based on different moral and ethical standards in different cultural environments.⁶ From the relativist point of view, the fact that there has always been a multitude of cultures prevents the existence of universal human rights,⁷ applicable to everyone on the basis that one is a human being. Although one can admit that in certain circumstances, some human rights are more important than others,⁸ the consequences of the acceptance of cultural relativism in the field of human rights could be so far-reaching as to create a shield which would serve the interests of the powerful⁹ and allow even for violations of human rights with the “defence” that the culture in question does not “know” the human right violated in the individual case. Given that the criticism against western “imperialism” could be directed against “western”

² David Rieff, *The Humanitarian Illusion*, in: *The New Republic*, March 16, 1998, p. 28.

³ David P. Forsythe, *Human Rights in International Relations*, 1st ed., Cambridge: Cambridge University Press, 2000, p. 217, hereinafter: Forsythe.

⁴ *ibid.*

⁵ Alison Dundes Renteln, *International Human Rights: Universalism Versus Relativism*, 1st ed., Newbury Park: Sage, 1990; Fernando R. Tesón, *International Human Rights and Cultural Relativism*, *Virginia Journal of International Law* 25 (1985), pp. 870 et seq.

⁶ R. John Vincent, *Human Rights and International Relations*, 1st ed., Cambridge: Cambridge University Press, 1986, p. 37.

⁷ *ibid.*

⁸ cf. Peter René Baehr, *The Role of Human Rights in Foreign Policy*, 2nd ed., Basingstoke: Macmillan, 1996, p. 14, hereinafter: Baehr.

⁹ Rhoda E. Howard, *Human Rights in Commonwealth Africa*, 1st ed., Totowa, New Jersey: Rowman & Littlefield, 1986, p.17.

human rights as well, *Donnelly's* idea of “weak cultural relativism”¹⁰ might prove useful: *Donnelly* considers culture to be an important source of the validity of a moral right or a moral rule; it serves in his view as a check on potential excesses of universalism,¹¹ or in other words aims at preventing the “imperialistic” aspect of human rights, the disrespect for local cultures.

Nevertheless may certain core rights not be harmed? In line with this is the emergence of regional Human Rights instruments which have been very successful, most of all of course the court in Strasbourg, and the fact that these truly universal human rights have found their place in the Universal Declaration of Human Rights. After all, not only did the UDHR not receive any votes against in 1948¹² but has been reaffirmed in Teheran (1968) and Vienna (1993), while it is up to all states to ratify any Human Rights instruments which go further.

IV. Sovereignty and Human Rights

The second obstacle between the status quo and both universal respect for human rights and international peace and sovereignty is posed by the sovereignty of states. The concept of state sovereignty has been the cornerstone of International Law since the Peace of Westphalia¹³ and has been codified in Art. 2 (1) UN Charter. But now, the relation between Human Rights and Sovereignty is shifting¹⁴ to the effect that no government can hide human rights violations behind a veil of state sovereignty.

The term sovereignty has deep historic roots and has had a large number of different meanings during the course of the last centuries, depending on the context in which it was used and by whom it was used and there is probably no conception the meaning which is more controversial. A minimum consensus offered for the purposes of this paper could be that we understand sover-

¹⁰ Rhoda E. Howard, *Cultural Absolutism and the Nostalgia for Community*, *Human Rights Quarterly*, 15 (1993), pp. 315 – 338.

¹¹ *ibid.*

¹² The then Soviet Union and five of its satellite states as well as Saudi-Arabia and South Africa abstained. The Communist states abstained since, in the words of the soviet delegate *Andrej Vishinskij* there were no human rights beyond the sovereignty of states, UN General Assembly, Official Records, 183rd Plenary Meeting, 10 December 1948, which will be the next issue to be dealt with in this paper. Saudi-Arabia abstained since Muslims are not allowed to change their faith and Saudi-Arabia rejected the idea that the freedom of religion includes a right to change one's religion, Baehr, p. 17.

¹³ Hence the term „Westphalian system of international law“ for the current / old international legal system.

¹⁴ (Then Netherlands Foreign Minister) Jozias van Aartsen, *Shifting Emphasis*, Address to the 54th Session of the General Assembly, 24 September 1999, p. 4.

eignty as the exclusive¹⁵ power to govern a state's people and territory within the limits set by international law.¹⁶ Although sovereignty remains a cornerstone of international law, the developments since the end of World War II have shown that “the traditional balance between sovereignty and human rights [...] is shifting”¹⁷ in favour of Human Rights, which has led to calls for a reform of international law to enable the international community to take effective action in case a state violates Human Rights on a massive scale and to end the function of state sovereignty as a veil under which such violations can be hidden.¹⁸ This even extends to the suggestion that we abandon the legal idea of sovereignty altogether given the fact that the concept is so vulnerable to abuse.¹⁹ In this light, the term “sovereignty” needs to be redefined at least, as it has been so often in the last centuries.²⁰ It is especially the 19th century notion of “absolute sovereignty”,²¹ stemming from the era of legal positivism, which seems to be hardly reconcilable with Human Rights and international law in general. Nevertheless, is the complete abandonment²² of the idea of sovereignty as useless as the promotion of absolute sovereignty, since the idea of equal sovereignty as laid down in Art. 2 (1) UN Charter is of great practical importance as “the basic constitutional doctrine”²³ of international law. The right which follows from international law has its limits in international law as well.²⁴ Limits with regard to international peace and security were already imposed on the sovereignty of states which were parties to the 1928 Briand-Kellogg-Pact or the 1933 Saavedra-Lamas-Treaty;²⁵ and since 1945, these limits include obligations with regard to Human Rights as well.²⁶ States are free to accept obligations from Hu-

¹⁵ i.e. prohibiting intervention.

¹⁶ cf. Ian Brownlie, *Principles of Public International Law*, 5th ed., Oxford: Oxford University Press, 1998, p. 289, hereinafter: Brownlie; Cees Flinterman, *Soevereiniteit en de rechten van de mens, Inaugurele rede ter gelegenheid van de aanvaarding van het ambt van hoogleraar rechten van de mens an de Universiteit Utrecht*, 19 January 2000, II Soevereiniteit, available online at <http://www2.law.uu.nl/sim/publ/flinterman/index2.asp> (last visited 22 April 2003), hereinafter: Flinterman II.

¹⁷ van Aartsen, *op. cit.*, p. 4.

¹⁸ cf. Joszias van Aartsen, *Cutting Edge*, in: Gemeente 's Gravenhage (ed.), *Speeches at the Ceremonial Opening, Centennial of the First International Peace Conference*, Peace Palace, The Hague, 18 May 1999, 1st ed., Gemeente 's Gravenhage, The Hague, 1999, pp. 3 - 7.

¹⁹ Clarence Wilfried Jenks, *A New World of Law ? - A study of the creative imagination of international law*, 1st ed., London: Longmans, 1969, p. 131, hereinafter: Jenks.

²⁰ Helmut Steinberger, *Sovereignty*, in: Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law (EPIL)*, Installment 10, (1987), pp. 397 - 418 at p. 397.

²¹ One of the last scholars to support *absolute sovereignty* seems to be Jean Pierre Adrien François, *Grondlijnen van het volkenrecht*, 3rd ed., Zwolle: Tjeenk Willink, 1967, p. 92, hereinafter: François.

²² Jenks, p. 131.

²³ Brownlie, p. 289.

²⁴ *ibid.*; Flinterman II, <http://www2.law.uu.nl/sim/publ/flinterman/index2.asp> (last visited 22 April 2003); François, p. 94; Briery, *The Law of Nations*, 6th ed., Oxford: Oxford University Press, 1963, pp. 45 et seq.

²⁵ cf. Sebastian Heselhaus, *Völkerrechtliche Grundfragen im Zusammenhang mit dem Kosovo-Konflikt*, in: JA 1999, pp. 984 - 992, at p. 985.

²⁶ *Case of Bulgaria, Hungary and Romania, Advisory Opinion*, ICJ Reports 1950, p. 601.

man Rights treaties, to ratify them or not, or to make reservations.²⁷ However, once they have accepted certain obligations, they give away a certain part of their sovereignty.²⁸ With regard to obligations of customary international law or *ius cogens*, states are limited in their sovereignty in accordance with general international law as well. UN General Assembly Resolutions, which in principle are considered to be non-binding or so called "soft law", can also limit the sovereignty of states, since they may sometimes have normative value²⁹ and can serve as evidence for the existence of a norm or the emergence of an *opinio iuris*.³⁰ Therefore the idea of sovereignty as it is used today does not need to be abandoned, but it needs to be defined in a manner which is acceptable universally - exclusive³¹ power to govern a state's people and territory within the limits set by international law³² - and then applied consistently.

Closely related to Art. 2 (1) UN Charter is the non-intervention rule of Art. 2 (7) UN Charter. Art. 2 (7) UN Charter prohibits measures which do not respect the sovereignty of the targeted state and to bend the will of the state in question in order to force it to act in a certain measure against its will.³³ While there are numerous ways for states to take measures short of a violation of Art. 2 (7) of the UN Charter to express their concern for Human Rights, it will be the more far-reaching measures which infringe upon the sovereignty of states violating Human Rights that cause tensions between, on the one hand, international peace and security, which are supported by Art. 2 (1) and 2 (7) UN Charter, and Human Rights on the other.

B. THE FIRST DIMENSION - PEACE AS A PREREQUISITE FOR THE COMPLETE ENJOYMENT OF ALL HUMAN RIGHTS

As a starting point, we can assume that peace will always remain a prerequisite for the complete

²⁷ Cees Flinterman, *Soevereiniteit en de rechten van de mens, Inaugurale rede ter gelegenheid van de aanvaarding van het ambt van hoogleraar rechten van de mens an de Universiteit Utrecht*, 19 January 2000, III Soevereiniteit en de rechten van de mens, available online at <http://www2.law.uu.nl/sim/publ/flinterman/index3.asp> (last visited 22 April 2003), hereinafter: Flinterman III.

²⁸ *Case of Bulgaria, Hungary and Romania, Advisory Opinion*, ICJ Reports 1950, p. 601. An interesting term to describe the result of this giving away of sovereignty has been used by Barents / Brinkhorst in relation to EU Law, when they describe the EU members as "semi-sovereign", René Barents / Laurens Jan Brinkhorst, *Grondlijnen van Europees Recht*, 10th ed., Deventer: W. E. J. Tjeenk Willink, 2001, pp. 561 et seq. The fact that the "loss" of sovereignty is always based on the states' will is reflected by those International Human Rights Documents which allow the parties to withdraw, cf. Art. 58 ECHR.

²⁹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 8 July 1996, ICJ Reports 1996, para. 71.

³⁰ *ibid.*

³¹ i.e. prohibiting intervention.

³² cf. Brownlie, p. 289; Flinterman II, <http://www2.law.uu.nl/sim/publ/flinterman/index2.asp>.

enjoyment of all human rights, since international peace and security, as have already been accepted in the UN Charter, are interdependent.³⁴ This fact, as simple as it might be, is also reflected in many human rights documents, which more often than not will limit their own scope of applicability in times of armed conflict. While there is no reference to the temporary suspension of rights in the Universal Declaration nor in the ICESCR, Article 4 ICCPR provides that, “in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the [parties to the ICCPR] may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”,³⁵ although no derogation from articles 6,³⁶ 7,³⁷ 8 (paras. 1³⁸ and 2³⁹), 11,⁴⁰ 15,⁴¹ 16⁴² and 18⁴³ may be made.⁴⁴ Similar regulations are contained in Art. 15 ECHR and most if not all national human rights guarantees and the role of peace for the enjoyment of Human Rights has also been recognised by the international community in the preambles of the Proclamation of Teheran⁴⁵ and CERD⁴⁶ respectively. Therefore we can conclude that peace indeed is necessary, both from a practical as well as from a legal point of view, for the full enjoyment of Human Rights and it is not a coincidence that major developments in the field of international human rights law came only after major wars which also included the most massive violations of human rights:⁴⁷ Human Rights became an issue of international law only after World War II and the International Criminal Court would not have been possible without the work of the ICTY and ICTR. This development was summed up by the UN’s Human Rights

³³ Georges Michel Abi-Saab, *Some Thoughts on the Principle of Non-Intervention*, in: Karel C. Wellens (ed.), *International Law: Theory and Practice - Essays in honour of Eric Suy*, 1st ed., The Hague, Boston, London: Nijhoff, 1998, pp. 225 - 235, at pp. 228 et seq.

³⁴ cf. Flinterman III, <http://www2.law.uu.nl/sim/publ/flinterman/index3.asp> (last visited 22 April 2003).

³⁵ Art. 4 (1) ICCPR.

³⁶ Right to Life.

³⁷ Prohibition of torture and cruel, inhuman or degrading treatment or punishment and of medical examination against the will of the victim.

³⁸ Prohibition of slavery.

³⁹ Prohibition of servitude.

⁴⁰ No one shall be held captive only for not being able to fulfil a contractual obligation.

⁴¹ Nulla poena sine lege.

⁴² Everyone shall have the right to recognition everywhere as a person before the law.

⁴³ Freedom of thought, conscience and religion.

⁴⁴ Art. 4 (2) ICCPR.

⁴⁵ *Human Rights – A Compilation of International Instruments* (UN Publication, Sales No. E.78.XIV.2), pp. 18 et seq.

⁴⁶ International Convention on the Elimination of All Forms of Racial Discrimination, General Assembly Resolution 2106 A (XX).

⁴⁷ Although not all conflicts have had this effect.

Commission when it stated that “everyone has the *right*⁴⁸ to live in conditions of international peace and security“,⁴⁹ thus establishing a right to peace, which was confirmed later in UN General Assembly's Declaration on the Preparation of Societies for Life in Peace.⁵⁰

C. THE SECOND DIMENSION - THE PROBLEM: MASSIVE VIOLATIONS OF HUMAN RIGHTS AS A THREAT TO INTL PEACE AND SECURITY

While peace is a prerequisite for the enjoyment of all human rights, the lack of the latter can also lead to a serious threat to international peace and security.⁵¹ Although the relationship between gross violations of human rights and international peace and security has already been recognised in the Universal Declaration of Human Rights⁵² as well as the Friendly Relations Declaration,⁵³ it has only been dealt with in more specific terms by the UN for little more than 20 years. In 1981 the Sub-Commission decided to include into the then-provisional agenda for the planned 35th session an item entitled “The effects of gross violations of human rights on international peace and security”.⁵⁴ The UN Secretary General confirmed this connection in the Annual Report on the work of the Organisation to the 36th session of the General Assembly when he stated that “in the absence of respect for human rights, peace and development lose much of their meaning”⁵⁵ and that “the interdependence between human rights, peace and development means that freedom from fear and want belong as much to the heart of the concept of human rights as political freedoms. This same interdependence assumes and requires that the wider recognition and acceptance of the human factor be made the central theme in all human endeavours.”⁵⁶

In a number of recent cases, the UN came to the conclusion that massive and large violations of Human Rights did constitute such a threat to international peace and security, such as in Kos-

⁴⁸ Emphasis added by the author.

⁴⁹ UN Human Rights Commission Res. 5 (XXXII), 27 February 1976.

⁵⁰ UN General Assembly Resolution 33 / 73.

⁵¹ cf. already the 1979 Report on the right to development submitted by the UN Secretary General to the Commission on Human Rights, E/CN.4/1334, para. 133.

⁵² The UDHR proclaims that „recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.“

⁵³ The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 October 1970, states in its third operative paragraph that international peace must be “founded upon freedom, equality, justice and respect for fundamental human rights“.

⁵⁴ As quoted in the Note by the Secretary-General, E/CN.4/Sub.2/1982/18 (9 June 1982).

⁵⁵ Official Record of the General Assembly, 36th Session, Supplement No. 1 (A/36/1), section VIII.

⁵⁶ Official Record of the General Assembly, 36th Session, Supplement No. 6 (A/33/6/Rev.1), Vol. I, Ch. 9.

ovo,⁵⁷ although very often massive violations of Human Rights and / or International Humanitarian Law go hand in hand with (internal) armed conflicts, both creating a situation which can pose a threat to international peace and security, such as in Sierra Leone⁵⁸ and Eastern Congo (then Zaire).⁵⁹ The question before us is how the international community can respond to these threats effectively.

D. THE THIRD DIMENSION - THE RESPONSE: THE USE OF FORCE AGAINST OTHER STATES FOR THE PROTECTION OF HUMAN RIGHTS

I. Introduction: The General Prohibition to the Use of Armed Force

After having seen examples that the impact massive HR violations can have on international peace and security, the question arises how to respond to this challenge, especially in cases in which other solutions have turned out to be ineffective⁶⁰ and under which conditions the international community can use force for the purpose of the protection of human rights. The use of force in international relations is prohibited by Art. 2 (4) UN Charter and a rule of customary law with the status of *ius cogens*⁶¹ has the same effect.

II. Current possibilities for responses to atrocities

1. UN Security Council: Chapter VII

While Art. 51 UN Charter (self-defence) would only be applicable in case of an armed attack, the so called *enemy state* rule (Art. 53 UN Charter) nowadays has become obsolete, since the “enemy states” joined the UN themselves and is also incompatible with the cornerstone of International Law, the sovereign equality of nations (Art. 2 (1) UN Charter). Therefore the most likely option to deal with massive violations of human rights are measures according to Chapter VII UN Charter. Under Chapter VII of the Charter, the UN Security Council may take action with respect to threats to international peace and security. For example can the UN Security

⁵⁷ UN Security Council Res. 1244 (1999).

⁵⁸ UN Security Council Res. 1315 (2000).

⁵⁹ UN Security Council Res. 1078 (1996).

⁶⁰ For example has the first case in relation to the massive Human Rights violations in Chechnya been brought to Strasbourg only in 2003.

⁶¹ On the relation between Art. 2 (4) UN Charter and the *ius cogens* norm see Heselhaus, JA 1999, pp. 984 et seq. at p. 988; *Military and paramilitary activities in and against Nicaragua*, ICJ 1986, pp. 14 et seq. at p. 100.

Council adopt economic or diplomatic sanctions,⁶² as happened with regard to South Africa, Yugoslavia and Iraq or allow for military action if necessary.⁶³ Among the most prominent measures were the establishment of the ICTY and the ICTR. In taking measures under Chapter VII, the UN Security Council is not limited by Art. 2 (7) of the Charter. As we have seen above, massive violations of Human Rights can amount to such a threat and therefore enable the UN Security Council to take action according to Chapter VII. But the effectiveness of this possibility is limited severely due to the decision-making process of the UN Security Council: Unless deciding on procedural questions, a decision by the Security Council requires nine votes in favour, including the votes of all permanent members. In the past the permanent members have used this to avoid that action is taken against them or their allies. Therefore it is unlikely that the Council will be able to take action under Chapter VII with regard to Chechnya or Tibet.

2. UN General Assembly: *Uniting for Peace*

A solution to this problem can be found in the Charter itself as well: Art. 24 (1) UN Charter states that the *primary* competency for the protection of international peace and security rests with the UN Security Council. Therefore the UN Security Council is the first and foremost, but not the only organ to deal with threats to international peace and security. It could be argued that in case the Council fails to act the competency transferred to the Council falls back to the member states, but Art. 24 (1) UN Charter also names the aim of the prominent role given to the Council, which is to ensure the effectiveness of the UN. Therefore before the states can take action, other UN organs are called upon by virtue of Art. 24 (1) of the UN Charter to take actions aimed at the protection of international peace and security. Specifically, the UN General Assembly can take this role under Art. 12 (1) UN Charter after the Council has failed to do so effectively. The first time it did so was in UN General Assembly Resolution 377 ("Uniting for peace"). Recent discussions in the weeks before the 2003 Gulf War on a new Uniting for Peace resolution aimed at the prevention of the war indicates that the Assembly also plays a role in the protection of international peace and security. Although this role is only a secondary one as compared to the one taken by the Security Council, the Assembly is enabled to act under Art. 24 (1), Art. 1 (1), Art. 12 (1) in cases in which the Council fails to fulfil its duty of protecting international peace and security.

⁶² Art. 41 UN Charter allows economic or other non-military measures.

⁶³ Art. 42 UN Charter.

Unfortunately this approach has not yet gained widespread acceptance, despite the recent discussions, so that more often than not the Assembly is unlikely to act in cases in which the Council failed to take action against massive violations of Human Rights which constitute a threat to international peace and security. This inaction is to a certain degree also caused by the fact that the majority of members of the Assembly are smaller states with a colonial past which are traditionally weary of any outside intervention, while at the same time respect for Human Rights is at an overall low level in most UN member nations. Therefore an alternative to UN (in-)action will be needed in cases in which massive violations of Human Rights remain unaddressed.

We will now examine who, how and under which conditions measures can be taken to protect Human Rights. In doing this, we will concentrate on the use of force as a tool for the protection of Human Rights.

III. The emerging concept of Humanitarian Intervention outside the UN framework - Legal, Moral and Political Considerations

The most controversial of all responses to massive violations of Human Rights is at the same time the one which has the largest implications for international peace and security and which therefore requires a closer look: Humanitarian Intervention outside the framework of the United Nations.

1. Introduction

a) Defining "Humanitarian Intervention"

The term Humanitarian Intervention has a broad as well as a narrow meaning. In the broad meaning, Humanitarian Intervention is understood as a coercive action by states involving the use of armed force in another state without the consent of the latter for the purpose of preventing or putting to a halt gross and systematic violations of human rights and international humanitarian law. In a more narrow sense, Humanitarian Intervention is understood as measures such as described above taken *outside* the framework of the United Nations. In order to avoid confusion, in this article the term "humanitarian intervention" will be used only for the latter, while other measures which are taken within the UN framework for the purpose of enforcing Human Rights obligations of states will be labelled according to the legal basis, e.g. as "Chapter VII measures",

“Uniting for peace measures” etc. When talking about Humanitarian intervention, the term Human Rights obligations as well as Human Rights are - for the purpose of better readability - also meant to include obligations under International Humanitarian Law.

b) Humanitarian Intervention in the past and today

Although the doctrine of Humanitarian Intervention has received a lot of attention in the aftermath of the Kosovo Crisis and NATO’s war against Yugoslavia, the idea itself is much older and goes indeed back to one of the founding fathers of International Law, *Hugo de Groot*, better known as *Hugo Grotius* (1583 - 1645). Already at the beginning of the 17th century, *Grotius* advocated a right of states to intervene abroad if the latter state’s treatment of its own citizens would shock the conscience of mankind.⁶⁴ He aspired to regulate international relations by introducing new political and moral standards, including respect for international treaties and the sovereignty of states (to which we will return later) as well as by refining the Just War doctrine put forward by Saint Augustine. According to *Grotius*, citizens had the right to revolution in extreme cases of tyranny. While these rights were to be exercised first and foremost by the citizens of the nation in question, other states were allowed to support the suppressed citizens if the latter asked the foreign power for help. *Grotius’* defence of Humanitarian Intervention was linked to the doctrine of legitimate resistance to repression. *Grotius’* idea was aided by the fact that at that time, international law of course did not yet incorporate an absolute prohibition of the use of force as modern day international law has known since the Briand-Kellog-Pact and now in Art. 2 (4) UN Charter as well as in *ius cogens*. The ideas put forward by *Grotius* were supported by the majority of legal scholars until the end of the 19th century.⁶⁵

⁶⁴ So cited by Flinterman, *Soevereiniteit en de rechten van de mens, Inaugurele rede ter gelegenheid van de aanvaarding van het ambt van hoogleraar rechten van de mens aan de Universiteit Utrecht*, 19 January 2000, 1st ed. Netherlands Institute for Human Rights (SIM), Utrecht, 2000, also available online at <http://www2.law.uu.nl/sim/publ/flinterman/index1.asp>, apparently expressing this position of *Grotius* in *Lauterpacht's* words.

⁶⁵ Danish Institute of International Affairs (DUPI), *Humanitær intervention. Retlige og politiske aspekter* (Humanitarian Intervention, Legal and Political Aspects), 1st ed., DUPI, København, 1999, hereinafter: DUPI.

The 19th century saw a number of interventions allegedly for humanitarian purposes. Nevertheless, as little as a system of Human Rights protection was part of international law by then, these interventions were more often than not based on state interests and not on the interest of the people the intervening states claimed to help.⁶⁶ The only possible exception is offered by *Brownlie*,⁶⁷ who cites the 1860 / 1861 intervention in Syria.

Turkey was the target of early multilateral Humanitarian Interventions before 1945, when the UK, France and Russia intervened in Greece in 1827 - 1830 to stop the Turkish massacres and the suppression of the civilian Greek population, France intervened in Lebanon in 1860 - 1861 to stop the Turkish supported Druse massacres of the Christian Maronites. Austria, France, Italy, Prussia and Russia intervened in Crete in 1866 - 1868 to protect the Christian population which had been oppressed by the Turks. The European powers collectively intervened in the Balkans in 1875 - 1878 in support of the insurrectionist Christians in Bosnia, Herzegovina and Bulgaria, who had been subjected to massacres under Turkish misrule and when the European powers intervened in Turkey in 1903 - 1908 to protect the oppressed Christian Macedonian population.

It is to be noted that not Human Rights considerations but more fundamental religious differences between the European powers and the then Ottoman Empire were the underlying reason for intervention by the West. Also other alleged Humanitarian Interventions were more than questionable from a legal point of view - we will deal with these and other examples of Humanitarian Interventions after 1945 below.

In the 20th century the idea of humanitarian intervention lost ground among scholars of international law. After World War I the legitimate use of force was reduced to cases of self-defence and the protection of international peace and security. As we have seen above, this is still true today and the UN Security Council has the opportunity of protecting human rights through Chapter VII measures which initially were meant "only" for the protection of international peace and security, especially since massive, systematic and large scale violations of Human Rights have the potential to pose a threat to international peace and security, especially in cases in which we have to deal with a large number of refugees, ethnicity-related Human Rights violations (as in Kosovo) and the involvement of neighbouring nations (as in the Congo War).

⁶⁶ Sean D. Murphy, *Humanitarian Intervention: The United Nations in an evolving World Order*, 1st ed., Philadelphia: University of Pennsylvania Press, 1996, pp. 33 et seq.

⁶⁷ Ian Brownlie, *International Law and the Use of Force by States*, 1st ed., Oxford: Clarendon Press, 1963, p. 340,

During the Cold War, at a time when the Security Council was likely to be deadlocked due to the fact that both the U.S. and the Soviet Union still have a right to veto, the question at hand did not occur since there was neither the will nor the possibilities to intervene collectively for humanitarian purposes, especially with regard to countries in the sphere of influence of one or the other side in the Cold War. The fear of a Third World War⁶⁸ at this time prevented a forceful protection of Human Rights. Moreover the majority of the UN members, which by the 1960s consisted of non-western nations and former colonies, considered the notion of Humanitarian Intervention to be a relic of colonialism and violation for the fundamental doctrine of the sovereign equality of states, leading to the silence of many nations in the face of the massive human rights violations of the time. Although there was some discussion among legal scholars, e.g. in the International Law Association (ILA), during the 1970s, this did not change the legal situation due to the political deadlock caused by the Cold War. This in turn led the international community to be silent and not to react to major massive and systematic Human Rights violations, e.g. in Tibet (since the 1950s), East Pakistan / Bangladesh (1971), Biafra (1967 - 1970), Sudan (1956 - 1972, since 1983), East Timor (1965, 1975 until recently), Uganda (1971 - 1979), Cambodia (1975 - 1979) and Iraq since the beginning of the rule of Saddam Hussein until 2003.

Only after the Cold War came to an end with the peaceful revolutions of 1989 was the idea of a forceful protection of Human Rights was able to gain ground again. In other words, with the threat of an all-out war between East and West removed, the apparently “lesser” problem of Human Rights could gain some more importance, although the involvement with Human Rights never matched the involvement with the Cold War on neither side. Nevertheless, in the 1990s it became possible for the first time in modern history for the international community to take joint action for the protection of international peace and security as well as for Human Rights. It could be concluded that the old Jewish saying “*Above all, peace*” holds a truth which has recognised during the Cold War. But even after the end of the Cold War, Humanitarian Intervention did not gain widespread support immediately, although many massive Human Rights violations remained unaddressed by the international community, because the powers which were able to act lacked the willingness to take casualties, especially after the U.S. disaster in Somalia.⁶⁹

hereinafter: Brownlie (1963).

⁶⁸ DUPI, p 12.

⁶⁹ *ibid.*, p. 37.

Another reason for the failure of the international community to multilaterally employ force after the UN system had failed are the weak capabilities of regional organisations. The EU for example took over the Mission in Macedonia only on 31 March 2003, the EU's first-ever operation of this kind; CIS forces in Georgia and (especially the Nigerian) ECOWAS forces in Sierra Leone have not exactly gained a reputation as impartial defenders of Human Rights.⁷⁰ Neither the African Union, the Arab League nor ASEAN nor APEC have developed significant military and peacekeeping capabilities.⁷¹

Currently only NATO, EU and ECOWAS (albeit the latter two only to a much lesser extent) have the ability to enforce Human Rights multilaterally outside the UN framework. In the long run, this ability will be compromised seriously if the ECOWAS forces do not become more professional, especially (but not only⁷²) with regard to respecting International Humanitarian Law themselves, and the European nations do not increase military spending to ensure the ability to usefully co-operate with other, in particular the US, forces. There is also continuing lack of consensus on the legality and political feasibility of military intervention outside the established UN system, as well as on the scope of state sovereignty in the modern system of international law. A decision by the ICJ on the Yugoslavian Cases will obviously remove this obstacle but nevertheless could also bring an end to the discussion insofar as Humanitarian Intervention is deemed irreconcilable with international law, especially with Art. 2 (4). Although the decision is only binding upon the parties,⁷³ the Court's history has shown a *de facto* doctrine of precedent or *stare decisis et quieta non movere*⁷⁴ and a protection of the state's traditional status in international law at the cost of Human Rights protection would be in line with the Court's decision in *Congo v. Belgium*.⁷⁵

*c) Political and Legal Considerations on Humanitarian Intervention
de lege lata and de lege ferenda*

⁷⁰ DUPI, p. 38.

⁷¹ *ibid.*

⁷² One only needs to recall the Freetown Airport Incident, where Nigerian Forces attacked British Forces which had just arrived for the purpose of bringing U.K. citizens to safety.

⁷³ Art. 59 ICJ-Statute.

⁷⁴ Pieter H. F. Bekker, *ASIL Insights: World Court Consular Notification and Death Penalty Challenge Revisited: Mexico v. United States*, in: ASIL Newsletter January / February 2003, pp. 1 - 11, at p. 6.

⁷⁵ *Arrest Warrant of 11 April 2000*, ICJ Reports 2002, available online at <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> (last visited 23 April 2003).

De lege lata we find in the area of international law an asymmetry between the means of enforcement and the potential for violations. While the UN Security Council's enforcement authority is limited by the veto power of the Security Council's five permanent members (Art. 2.7 UN Charter), violators of International Human Rights Law and rules of International Humanitarian Law are often protected by the high standards of international law concerning state sovereignty, immunity and the prohibition of the use of force, whereas enforcement action against them is dependent on political organs and conditions and they need not accept compulsory jurisdiction. But despite all its deficiencies, international law contributes to neutralise the element of unpredictability otherwise characteristic for international politics.⁷⁶ After all, law is the presence of the social past, an organising of the social present as well as the conditioning of the social future.⁷⁷

The past is represented by the doctrine of state sovereignty which in the present helps to avoid armed conflicts while the conditioning of the social future can be seen in the inclusion of Human Rights aspects in international law throughout the UN era. Consequently the discussion on Humanitarian Intervention, which due to the imperfections of present day international law, needs to be *de lege ferenda* and is of a legal-political nature, stemming from the political and moral outlook on possible responses to massive and systematic violations of HR. Although a political question is at the beginning of the discussion on the legality of the use of force for the benefit of the enforcement of HR, a clear distinction has to be made between legal and political (or moral) justifications of intervention as had been done by the ICJ in the 1986 decision in the Nicaragua Case.⁷⁸

2. Political and moral aspects of Humanitarian Intervention

There are a number of ways in which humanitarian intervention could be legitimate⁷⁹ which we will look at briefly before addressing the legality of Humanitarian intervention under current international law. Among the reasons brought forward most often are Saint Augustine's Just War doctrine;⁸⁰ the doctrine of necessity; the idea that humanitarian intervention, although illegal,

⁷⁶ DUPI, p. 21.

⁷⁷ *ibid.*

⁷⁸ *Military and paramilitary in and against Nicaragua*, ICJ Reports 1986, paras. 207 et seq.

⁷⁹ Legitimate in the sense of moral, not necessarily legal, legitimacy.

⁸⁰ Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd ed., Irvington-on-Hudson: Transnational Publishers, 1997, p. 314; Reisman / McDougal, *Humanitarian Intervention to protect the Ibos*, in: Richard B. Lillich (ed.), *Humanitarian Intervention and the United Nations - Proceedings of a conference sponsored by Procedural Aspects of International Law Institute and Carnegie Endowment for International Peace*,

still constitutes the lesser wrong compared to massive violations of Human Rights; and that the core of state sovereignty and the state's very existence are not threatened by Humanitarian Intervention.⁸¹ There is also the notion that humanitarian intervention might increase the observance of human rights in weak states⁸² - but only because of the fear of punishment. Which value can such a forced "respect" for human rights have? In the long run it might even lead to what one could call the "Versailles" effect:⁸³ the resistance against the fact that "foreign" values are imposed on a society is associated with the values themselves, leading in turn to a resistance against the values, in this case human rights.

And is the international community under a moral or ethical obligation to intervene in such cases to begin with? If yes, which would be the proper source of moral concern? Naturalists claim that morally binding international norms are an inherent feature of the world,⁸⁴ while consensualist theories contend that the moral authority of the rules of international law is based on the consent, explicit or implicit, of the governed – that is, states.⁸⁵ A look at the sources of international law⁸⁶ shows that international law in fact supports the latter idea, since all rules⁸⁷ of international law are in one way or the other based on the will of the subjects of international law - treaties, which require the explicit consent of states; customary international law, which requires state practice and *opinio iuris*; and decisions, which require that states allow themselves to be brought to

held in *Charlottesville on March 11-12, 1972*, 1st ed., Charlottesville: University Press of Virginia, 1973, pp. 168 et seq.

⁸¹ If this would be the case, the interesting question could arise whether a state which violates Human Rights and thereby becomes the target of a humanitarian intervention is allowed to use nuclear weapons if it becomes apparent that the intervention would lead to the end of this state as such., cf. *Legality of the Threat or use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996. E.g. it is known that in 1995, Bosnian Serb leader *Radovan Karadzic* paid US\$ 6 million for what he thought was a nuclear weapon, with another \$60 million promised to the arms suppliers. Fortunately the nuclear weapon was a fake, but the incident proves that the Bosnian Serbs were in the market for a nuclear weapon. Chris Hedges, *An Old Tale of Swindle Resurfaces in Bosnia*, N.Y. TIMES, Dec. 14, 1997, at A5. Chechen forces did in fact acquire nuclear material and used it: In November of 1995, Chechen guerrilla leader *Shamyl Basayev* informed Russia's NTV television that four cases of cesium had been hidden around Moscow. NTV found a case in Ismailovo Park containing thirty-two kilograms of caesium-137, (Gavin Cameron, *Nuclear Terrorism: A Real Threat?*, 8 *Jane's Intelligence Review* 1996, pp. 422 et seq. at p. 425) such material could be mated to a conventional explosive to create poisonous fallout. In another incident, a Moscow businessman was killed when Russian Mafia operatives placed gamma-ray emitting pellets in his office.(*ibid.*) On other related questions of terrorism employing the use of weapons of mass destruction and e.g. alleged Red Army Faction (RAF, a.k.a. the Baader-Meinhof-Group) attempts to steal a nuclear warhead from a U.S. Army facility in Giessen, Germany, cf. Barry L. Rothberg, *Averting Armageddon: Preventing Nuclear Terrorism in the United States*, 8 *Duke J. of Comp. & Int'l L.* 1997, pp. 79 - 134.

⁸² DUPI, p. 100.

⁸³ Named after the German resistance against the Treaty of Versailles which was played an important role in the creation of the economic and political conditions which helped Hitler to get to power.

⁸⁴ cf. Holzgreffe, p. 19.

⁸⁵ *ibid.*

⁸⁶ Art. 38 ICJ-Statute

⁸⁷ Art. 38 ICJS also refers to the writings of the top scholars of international law, however such writings and teachings are only supplementary, Art. 38 (1) (d) ICJ-Statute.

court.⁸⁸ We will keep this in mind when we address the question of how international law can help in reconciling the need for peace with the need for an effective and, if necessary, forceful enforcement of Human Rights. But there are also political dangers associated with humanitarian intervention, such as the danger that the international legal order might be jeopardised⁸⁹ and the risk of abuse, especially in cases in which powerful states intervene against weak ones, to name only a few.⁹⁰

At this point it is necessary to make clear that although humanitarian intervention might be desirable in certain cases and extremely dangerous in others, the moral, philosophical or political considerations have to stand back when we examine the *legality* of humanitarian intervention under current international law. Nevertheless, this does not mean that the question of legality is completely separated from morality, philosophy and politics. To the contrary: those elements played and continue to play an important factor in the creation of international law. But after the law has come into existence it has to be the sole yardstick by which to measure the legality of the use of armed force without the consent of either the United Nations Security Council or the General Assembly for the purpose of protecting the human rights of people living within the boundaries of the target state.

3. The legality of Humanitarian Intervention under current International Law

a) State sovereignty and Art. 2 (4) UN Charter

From a legal perspective the situation *de lege lata* seems to be clear at least for cases dealt with outside the UN framework since Art. 2 (4) UN Charter protects the sovereign equality of states (Art. 2 (1) UN Charter) effectively, but the idea of Humanitarian Intervention has gained weight at the cost of the classical and highly prohibitive interpretation of state sovereignty under the Westphalian System of International Law. The latter has apparently changed substantially since the end of World War II with the arrival individuals as beneficiaries (although not yet as subjects) of international law, with an ever-increasing role of international organisations both on a global and a regional scale as well as more and more restrictions on the idea of state sovereignty. Therefore the idea of a robust enforcement of Human Rights obligations is a logical consequence

⁸⁸ cf. Art. 36 ICJ-Statute.

⁸⁹ Therefore we will later search for ways to legalise humanitarian intervention through legal reform.

⁹⁰ DUPI, pp. 101 et seq.

of the advent of Human Rights in international law.⁹¹ With every international rule regarding Human Rights which is applicable to a state, the state in question loses a bit of her originally unlimited sovereignty, mostly by giving it away when concluding an international treaty. Accordingly, Human Rights have become “a valid consideration in international relations” (*Max van der Stoel*) as well.⁹²

State sovereignty remains a cornerstone of international law and international relations,⁹³ but to a growing degree the classical, Westphalian, perception of state sovereignty is challenged by the rule that the legitimacy of the exercise of the rights which are based on state sovereignty is dependent on the respect for Human Rights and for the principle of representation and democracy.⁹⁴ This is not an abrupt change, since the idea of state sovereignty been changed time and again throughout the last four centuries. By now, sovereignty is no longer the veil under which the acts of states against their own citizens are hidden from the view of the world.

When it comes to individual responsibility for Human Rights violations, the development has advanced about as far as with regard to the use of armed force for Human Rights protection: While Chapter VII of the UN Charter can serve as a legal basis both for international courts (as in Yugoslavia and Rwanda) as well as for interventions, the criminal law equivalent to Humanitarian Intervention would be the prosecution of state dignitaries by foreign courts for violations of Human Rights and war crimes. In *Congo v. Belgium* the ICJ has slowed down the development in this field while in the Kosovo War Cases brought by then Socialist Federal Republic of Yugoslavia⁹⁵ are still pending at the Court in The Hague.

b) Justification under already existing rules of international law ?

aa) Justification under the UN Charter ?

⁹¹ DUPI, p. 17.

⁹² DUPI, *ibid.*, speaks of individuals as subjects of international relations which is a somewhat poor choice of words since it might lead readers to belief that individuals have now become full subjects of international law as well, which is not the case.

⁹³ DUPI, p. 17.

⁹⁴ *ibid.*

⁹⁵ Which has been replaced by the Federal Republic of Yugoslavia, which in turn has been replaced in 2003 by the Federation of Serbia and Montenegro. Although Serbia & Montenegro has less powers than many international organisations or the EU, namely only foreign and security competencies, the competencies of the Federation Government include the Federation's foreign relations and therefore also the case in The Hague so that Serbia & Montenegro has replaced the F.R.Y. which had replaced the F.S.R.Y. as a party in the cases.

De lege lata Art. 2 (4) UNCH prohibits the use of force in international relations. But international law also provides for a number of exceptions, e.g. the armed assistance with another nation if that nation's lawful government requests such assistance. From a legal point of view, this exercise of authority by another state within the boundaries of the requesting nation is similar to cases in which one state agrees to the exercise of authority by another within her borders, an example of which, although on a small scale, was the German anti-terrorism action in Somalia in 1977, which was approved by the then Somali government. But traditionally such a request has not been relevant in the classical case of Humanitarian Intervention when a humanitarian disaster is caused by Human Rights violations perpetrated by the government itself. Moreover, a governmental request is unlikely in such cases, not to mention cases in which the government broke down due to internal conflict.⁹⁶ In state practice, military action has been taken on many occasions in order to protect the citizens of the intervening state,⁹⁷ e.g. by Germany in Albania in Operation *Libelle*; and by France in several of her former colonies whenever French citizens were deemed to be endangered. The legality of such action is often considered to be in violation of Art. 2 (4) UN Charter,⁹⁸ by some to be compatible with Art. 51 UN Charter.⁹⁹ The question which remains is whether or not Humanitarian Intervention outside the scope of Chapter VII of the UN Charter and Art. 51 UN Charter can be legal under international law.

At first sight, this might appear not to be the case, if we restrict our examination of the issue strictly to the UN Charter.¹⁰⁰ Even if there had been a right to Humanitarian Intervention under customary international law prior to the establishment of the UN Charter, this right did not survive the creation of the UN Charter¹⁰¹ since it was not included in the exceptions to Art. 2 (4) UN Charter accepted within the UN Charter.¹⁰² Also the *travaux préparatoires*¹⁰³ to Art. 2 (4), the preamble as well as the spirit of the entire UN Charter when read in the historical context argue against such an "unwritten exception" to the general prohibition of the use of force in interna-

⁹⁶ DUPI, p. 80.

⁹⁷ The right of forcible self-help by states to protect nationals and property abroad was well established before 1945, cf. International Law Association, Yearbook 1970, p. 635.

⁹⁸ Albrecht Randelzhofer, *Art. 2 (4)*, in: Bruno Simma (ed.), *The Charter of The United Nations - A commentary*, 1st ed., Oxford: Oxford University Press, 1995, pp. 124 et seq.

⁹⁹ DUPI, p. 81.

¹⁰⁰ Randelzhofer, *op. cit.*, pp. 118, 124; Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed., London: Routledge, 1997, p. 27; Murphy, p. 358; Oscar Schachter, *International Law in Theory and Practice*, 1st ed., Dordrecht: Nijhoff, 1991, p. 128.

¹⁰¹ Malanczuk, p. 27; Brownlie (1963), p. 342.

¹⁰² International Law Association, Yearbook 1970, p. 636.

¹⁰³ Brownlie (1963), pp. 365 et seq.

tional relations.¹⁰⁴ It is more plausible to assume that there had been no rule of customary international law to the effect that Humanitarian Intervention is legal, given the fact that international law took into consideration Human Rights questions only after the Holocaust. It might nevertheless be argued that Humanitarian Intervention, although not covered by an accepted exception to the rule, does not violate Art. 2 (4) since Humanitarian Intervention is not directed against either the territorial integrity or the political independence of another nation and is not inconsistent with the purposes and principles of the UN Charter either, but rather in conformity with one of the fundamental principles of the UN, the promotion of the respect for Human Rights in Art. 1 (3).¹⁰⁵ However, this reasoning is flawed and avoids the problem rather than solving it since Art. 1 (3) speaks only of the promotion of respect for Human Rights and provides furthermore that the solution of international disputes is one of the key purposes of the UN.¹⁰⁶ Given the fundamental character of Art. 2 (4) UN Charter, such a “balancing between general purposes of the Charter and the prohibition of the use of force”¹⁰⁷ is not possible. Another view, the so called “link theory”,¹⁰⁸ holds that Humanitarian Intervention is not incompatible with Art. 2 (4) insofar as it is based only on a subsidiary responsibility of the Member States for the maintenance of international peace and security which applies when the Security Council is unable to fulfil its responsibilities under Chapter VII and Art 24.¹⁰⁹ But Art. 24 refers to other UN organs, especially to the UN General Assembly and not to the UN’s member states.¹¹⁰ Moreover, this approach implies that the failure of the UN Security Council has changed the circumstances from when the UN Charter was created and that therefore the Charter must be regarded as partly suspended,¹¹¹ is legally unsound¹¹² and does not reflect the importance the UN Security Council has achieved after 1990. Moreover, this approach contrasts starkly with the situation during the Cold War when the UN was caught in a deadlock often enough without any party to a dispute arguing in favour of a (partial) suspension of the Charter. Finally, such an approach does not take into account the importance of Art. 2 (4), which has been stressed by the ICJ repeatedly.

¹⁰⁴ DUPI, p. 81.

¹⁰⁵ Brownlie (1963), pp. 365 et seq.

¹⁰⁶ DUPI, p. 82.

¹⁰⁷ *ibid.*

¹⁰⁸ First developed by Philip C. Jessup, *A Modern Law of Nations: An introduction*, 1st ed., New York: Macmillan, 1948, pp. 170 et seq., the theory was restated by Richard B. Lillich, *Forcible Self-help by States to Protect Human Rights*, Iowa Law

Review, 53 (1967) 344 – 351.

¹⁰⁹ DUPI, p. 82.

¹¹⁰ Jost Delbrück, *Art. 24*, in: Simma (ed.), *op. cit.*, pp. 400 et seq.

¹¹¹ According to customary international law as codified in Art. 62 of the Vienna Convention on the Law of Treaties, a *clausula rebus sic stantibus* may in exceptional cases have the effect of suspending or even terminating a treaty. This modality obviously is not relevant with regard to a, often subjective, assessment that the UN Security Council has not been effective and – if taken seriously – would mean the end of all international organisations.

bb) The position of the International Court of Justice

In practice, the ICJ favours a broad interpretation of Art. 2 (4), e.g. in the Corfu Channel case, in which the ICJ held that defects of international organisations, such as described above, cannot serve as a justification for interventions.¹¹³ While this 1949 judgement might still have been largely influenced by the fresh memory of World War II, the ICJ stuck to its line later as well, when the judges had to deal with the US operations in Nicaragua. In the 1986 Nicaragua decision the ICJ reaffirmed the general character of the prohibition of the use of force¹¹⁴ and its independence from the institutional structures of the UN (and the deficiencies this structure may have).¹¹⁵

Therefore at first sight the outcome of the Yugoslavian cases seems to be clearly against the NATO members, but it also has to be taken into account that neither in the Corfu Channel, nor in Nicaragua do we find truly humanitarian reasons for the action undertaken by the UK and the US respectively. The UK intervened in the Corfu Channel after two UK ships had been sunk there by Albanian mines. In the Nicaragua Case, the ICJ held that “while the United States might form its own appraisal of the situation as to respect for Human Rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect”¹¹⁶ and thereby implicitly denied a right to Humanitarian Intervention outside the UN Charter.

Nevertheless, the ICJ might decide differently in the current Yugoslavian cases since the earlier judgements are only binding on the parties before the court,¹¹⁷ although *in praxi* the ICJ tends to follow its precedents, and because in the case of the Kosovo War the “good intentions” of the intervening parties with regard to the protection of Human Rights are more credible than in the Nicaragua case.

One more reason to allow Humanitarian Interventions nowadays is the fact that the threat of the Cold War turning into a “hot” global conflict, which was the main reason why the international community was critical of the idea of Humanitarian Intervention before 1990, has now been re-

¹¹² cf. DUPI, p. 82.

¹¹³ *Corfu Channel Case*, ICJ Reports 1949, p. 35.

¹¹⁴ *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986, para. 188.

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*, para. 268.

moved. Nevertheless, the ICJ did stand firm when it held in the Nuclear Weapons Case that only the UN Charter contains valid exceptions to Art. 2 (4), Art. 51 and Art.42.¹¹⁸

cc) The concept of reprisals as legal ground for a justification of Humanitarian Interventions under international law

International law recognises that special circumstances may temper the wrongfulness of acts which, were it not for these special circumstances, like an earlier violation of international law by another state, are not compatible with international law. Such acts are legitimate as so-called reprisals or countermeasures. Gross and systematic Human Rights violations by one government can be regarded as a violation against the other parties of the relevant Human Rights Conventions,¹¹⁹ so the question arises whether or not unauthorised Humanitarian Intervention can be justified as such a reprisal. This is not the case since states have a “duty to refrain from acts of reprisals including the use of force”.¹²⁰

dd) A "state of necessity" as the justification for Humanitarian Intervention

But international law isaced with more circumstances which may temper the wrongfulness of acts which otherwise would not be in conformity with international law:¹²¹ Apart from reprisals, these are self-defence; *force majeure*; distress; consent; and a state of necessity. The latter might serve as a justification in cases of Humanitarian Intervention and therefore merits further examination. First and foremost it has to be noted that the ICJ accepts the doctrine of necessity only on an exceptional basis,¹²² based on customary law which is reflected in the ILC Draft.¹²³ According to Art. 33 (1) of the ILC Draft, a state of necessity may only be invoked as a justification if the act in question was “the only means of safeguarding an essential interest of the State against a grave and imminent peril” and “did not seriously impair an essential interest” of the targeted state. It is questionable whether Humanitarian Interventions fulfil these requirements. First of all, it is not necessarily the interest of the intervening state(s) or their security which is at stake; second, HI will always impair the interests of the targeted state with regard to its security and terri-

¹¹⁷ Art. 59 ICJ-Statute.

¹¹⁸ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, para. 38.

¹¹⁹ DUPI, p. 85.

¹²⁰ 1970 UNGA Friendly Relations Declaration; ILC Draft Articles on state responsibility, Art. 50.

¹²¹ Art. 29 - 34 ILC Draft Articles on state responsibility.

¹²² *Case concerning the Gabčíkovo-Nagymaros Project*, ICJ Reports 1997, para. 50 – 58.

¹²³ *ibid.*

torial integrity.¹²⁴ Finally, Art. 33 (2) of the ILC Draft rules out a justification by necessity in case the rule broken by the intervention is laid down in a treaty which excludes recourse to the justification of necessity or if the rule in question is a rule of *ius cogens*. The prohibition against the use of force is not only laid down in Art. 2 (4) UN Charter - it is also considered a peremptory rule of international law.¹²⁵

With regard to the question of whether or not the UN Charter also constitutes a treaty within the meaning of Art. 33 (2) of the ILC Draft, the ILC refers to Art. 2 (4) UN Charter but leaves the final decision to other UN organs.¹²⁶ Such a decision apparently has already been made by the ICJ in the Corfu Channel Case (and later repeated in the Nicaragua decision¹²⁷) to the effect that, in order to avoid abuse by powerful states, the use of force cannot be justified by a state of necessity.¹²⁸ Also state practice after World War II indicates that many states are wary of opening a door which would lead to a path on which a doctrine legalising Humanitarian Intervention under international law would be prone to abuse by a small number of (militarily) powerful nations. No case of self-declared Humanitarian Intervention after World War II was justified by the intervening nations on the grounds of necessity but rather on the basis of self-defence:¹²⁹

ee) Customary Law: Humanitarian Intervention in state practice after 1945

Therefore, since all other reasonable avenues have failed to provide a justification for Humanitarian Interventions, the only possible legal justification for unauthorised Humanitarian Interventions is the assumption that there has come into effect after 1945 a right of Humanitarian Intervention as a rule of customary international law.¹³⁰ This would require state practice and corresponding *opinio iuris*, both of which would require considerable consistency as well as general acceptance from a vast majority of states within the international community.¹³¹ To find out whether state practice after 1945 might have established a right to unauthorised Humanitarian Intervention as a norm of customary international law, we will now examine interventions (state

¹²⁴ DUPI, pp. 85 et seq.

¹²⁵ Jochen Abraham Frowein, *Ius cogens*, in: R. Bernhardt (ed.), *Encyclopedia of Public International Law (EPIL)* 7 (1984), p. 329.

¹²⁶ DUPI, p. 86.

¹²⁷ *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986, para. 203.

¹²⁸ *Corfu Channel Case*, ICJ Reports 1949, p. 35.

¹²⁹ Report of the International Law Commission (ILC), Draft Articles on State Responsibility, 1980, GAOR 35th Session, Supplement No. 10 (A/35/10), p. 96.

¹³⁰ DUPI, p. 87.

¹³¹ *ibid.*

practice) after 1945 in which a right to Humanitarian Intervention has been invoked (*opinio iuris*) and the response of the international community to such interventions and claims, as well as expressions of the legal opinion of the global community on Humanitarian Intervention.

In November 1971, India intervened in East Pakistan where large-scale human rights violations had been committed forcing 10 million people to flee to India. India defeated the Pakistani forces and played an active role in the establishment of the independent state of Bangladesh. Although the intervention seems to have been motivated by humanitarian concerns as well as concerns for the regional balance of power between Pakistan and India, India did not invoke the doctrine of Humanitarian Intervention as justification for the intervention. While the Security Council was paralysed, the General Assembly criticised the intervention. Viet Nam, to the contrary, invoked the doctrine of Humanitarian Intervention to justify the December 1978 / 1979 invasion of Cambodia and the overthrow of the Khmer Rouge regime as well as the installation of a new (pro-Vietnamese) government. While the atrocities committed by the Khmer Rouge are uncontested, not the genocide but a number of border incidents seem to have been Viet Nam's motivation to enter Cambodia.¹³² The western world criticised Viet Nam and rejected the Humanitarian Intervention claim while the then-Soviet Union used her veto right to block a decision by the Security Council.¹³³

In 1979 France also intervened in the Central African Republic to end the atrocities committed by President Bokassa, who had ousted President Dacko, while Bokassa was abroad. France's intervention did not receive notable resistance inside the country and only few other states criticised it.¹³⁴ In the same year, Tanzania intervened in Uganda, forced Idi Amin to leave Kampala and installed a new government. Similar to the East Pakistan intervention by India, Tanzania's motivation was not purely humanitarian in nature but was also based on a border dispute concerning the Tanzanian Kagera region which had been conquered by Idi Amin's forces and Tanzania consequently did not invoke the doctrine of Humanitarian intervention. Only a few states criticised the intervention.¹³⁵

Apart from state practice, *opinio iuris* plays an important role in the formation of customary international law and while we have already seen some examples of *opinio iuris* in relation to

¹³² *ibid.*, pp. 88 et seq.

¹³³ *ibid.*, p.89.

¹³⁴ *ibid.*

individual cases of intervention, there has also been a number of multilateral declarations on the question of the prohibition of the use of force and the principle of non-intervention. The UN General Assembly's 1970 *Friendly Relations Declaration* as well as the ICJ's decision in the *Nicaragua* case¹³⁶ reaffirm that there are no exceptions to Art. 2 (4) outside the Charter itself. The 1975 CSCE Helsinki Final Act repeats this statement and includes a reference to the principle of non-intervention, aiming at avoiding an all-out war between the two blocs, triggered by one side's intervention in a state of the other bloc.

Consequently we see that the state practice during the Cold War does not support the idea of Humanitarian Intervention being legalised through customary international law but to the contrary that the idea of 'lawful' but unauthorised Humanitarian Intervention has at best been met with scepticism by the international community. This could have changed in the years after the Cold War,¹³⁷ since the threat of a global war in response to a humanitarian intervention has been reduced significantly since the fall of the Iron Curtain. After the deadlock caused by the Cold War was removed, the UN could truly begin its work, making the 1990s - despite all the shortcomings which are to be expected of an international organisation which includes so many undemocratic regimes as the UN does - the decade of the UN, which was able to take action with regard to Iraq (1990 - 1991), Bosnia, Somalia, Rwanda,¹³⁸ Kosovo and East Timor.¹³⁹ For the purposes of this article, however, these interventions are in so far irrelevant, as they were all executed with a UN mandate. More controversial were the interventions, including the establishment of no-fly zones¹⁴⁰ in Iraq in the wake of the Second Gulf War 1991, which were not exactly covered under earlier UN resolutions,¹⁴¹ but nevertheless paved the way for further Hu-

¹³⁵ *ibid.*, p. 89.

¹³⁶ *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986.

¹³⁷ Although it has to be noted that the United Nations were extremely successful after the end of the Cold War and has gained international respect, which could also imply greater respect for international law. At the same time the UN's failures in the field of the forceful protection of HR, e.g. in Rwanda or Srebrenica have to be taken into account, so that the fact that the UN was relatively successful in the 1990s cannot imply the illegality of Humanitarian Intervention.

¹³⁸ Although the latter three are not exactly the best examples for UN work.

¹³⁹ The independence of East Timor and its membership in the UN are most likely the greatest success in the history of the UN yet, even if the tiny nation has by far not received the same attention as have other "hotspots", certainly also due to its geographical situation: The UN, with the help of especially Australia, ended a 25 year occupation as well as massive and systematic Human Rights violations, leading to East Timor's regaining of its independence it had lost shortly after the withdrawal of the former colonial power Portugal.

¹⁴⁰ The Northern No-Fly zone was created in April 1991 to protect humanitarian relief work which had become necessary in response to Saddam Hussein's campaign against the Kurdish minority in Northern Iraq, which had been condemned in UNSC Res. 688 (1991). UNSC Res. 688 (1991) also ordered Iraq to allow humanitarian relief agencies to work in the affected areas and the U.S. established a no-fly zone to protect the relief workers, although Res. 688 did not provide for such a measure but only for an international peace force including thousands of troops from 13 countries, cf. DUPI, p. 91.

¹⁴¹ For both No-Fly zones, although UN SC Res. 688 did not provide for no-fly zones *expressis verbis*, the "military

manitarian Interventions,¹⁴² as well as the intervention by ECOWAS in Liberia, 1990, and by NATO in Kosovo, 1999, both of which were subsequently endorsed by the UN.¹⁴³ The 1999 NATO intervention against Yugoslavia drew heavy criticism from Russia and China but was subsequently endorsed by the UN. In an address to the UN Commission on Human Rights, UN Secretary General *Kofi Annan* said, that “for the mass murderers, the ‘ethnic cleansers’, those guilty of gross and shocking violations of Human Rights, impunity is not acceptable. The United Nations will never be their refuge, its Charter never be the source of comfort or justification. [...] Emerging slowly, but I believe surely, is an international norm against the violent repression of minorities that will and must take precedence over concerns of State sovereignty.”¹⁴⁴ Since this norm is “emerging slowly”, it can only have the form of customary international law and we will need to continue our examination in order to find out whether this norm is still in the process of becoming a rule of customary international law, whether this emergence has come to a halt after 1999 or if there is already a rule of customary international law to the effect that Humanitarian Intervention is legal. With regard to NATO’s intervention, it would seem to have been illegal, since the rule allowing for HI was still an emerging one, when NATO took action against the regime of Slobodan Milosevic One might very well come to the conclusion that the International Court of Justice, given its past stance on the legality of the use of force, might rule in favour of Yugoslavia. Consequently, for the time being, there is no customary international law to the effect that Humanitarian Intervention without the approval of the United Nations would be legal.

ff) Conclusion: The need for legal reform

While unauthorised humanitarian intervention *de lege lata* remains in conflict with Art. 2 (4) and Art. 2 (7) of the UN Charter, there *ought* to be a possibility for willing states to help those oppressed by their governments even if the UN fails to take action.

While the UN Security Council can be blocked by the powerful, the UN General Assembly is dominated by the less known violators. It is uncontested that the Human Rights situation in Tibet is at best appalling. Nevertheless, the UN Security Council will never be in a position to take adequate action against the People’s Republic of China due to the fact that China can veto any

interventions [...] were regarded by the world community as *somehow emanating* from the authority of the Security Council." DUPI, p. 92 - author's emphasis.

¹⁴² cf. the 16 July 1991 declaration at the G 7 summit in London.

¹⁴³ for Liberia see UNSC Res. 788 (1992); for Kosovo see., UNSC Res. 1244 (1999) operative para. 7.

¹⁴⁴ Press Release SG/SM/6949, 7 April 1999.

proposal brought before the Security Council according to Art. 27. The same is true for the General Assembly which is dominated by smaller nations, many of which are former colonies fearful of foreign intervention and the majority of which are undemocratic. After all, most nations *do* violate human rights and too many of them still maintain the old idea of basically unlimited state sovereignty. While the Non-aligned Movement (NAM) basically provided a safe haven for states unwilling or unable to choose sides during the cold war, the NAM's role has changed considerably after 9/11. During recent months the non-aligned states have reaffirmed the importance of the sovereign equality of states under international law.¹⁴⁵ The NAM thereby has not only defended states' legitimate interests in their sovereignty, it also dealt a severe blow to the protection of Human Rights on a global level. Although the term non-aligned is often associated with states such as Switzerland, Austria, Sweden or Finland, many non-aligned nations violate human rights on a regular basis. Sovereignty must not become again the veil under which to cover all kinds of abuses of human rights. Therefore the very states which violate human rights on a large scale, like China or Russia or the community of smaller states are in a position to block any legal attempts to intervene militarily. Since the very same states can also block legal reform *within* the UN framework, a solution has to be found without the need to go through the UN's decision-making process.¹⁴⁶

This solution could come in the form of a new rule of customary international law allowing for humanitarian intervention. As we have seen so far, such a rule does not yet exist *de lege lata* but is desirable *de lege ferenda* and has already been described by UN Secretary General *Kofi Annan* as an emerging rule of international law. Some of the newer, and truly humanitarian, interventions mentioned might serve as starting points for a legal reform. Especially the interventions in Liberia and Kosovo brought the issue to the attention of the community of scholars of international law.

4. *The emerging concept of Humanitarian Intervention: criteria for the legality of Humanitarian*

¹⁴⁵ The best example probably being the 2003 NAM meeting in Malaysia.

¹⁴⁶ Of course an effective solution should be sought within the UN framework first but if this, as outlined above, turn out to be an impossible task, the way described here leaves the only option to reach the necessary legal reform.

Intervention

a) The need for criteria and the possibility to find them

Keeping in mind the developments since the ECOWAS intervention in Liberia and the quote of UN Secretary General Kofi Annan cited above, Humanitarian Intervention remains an emerging concept of international law, which one day might result in a rule to the effect that Humanitarian Intervention is legal under certain well defined circumstances and if certain requirements are met. Especially the question which criteria have to be met for a humanitarian intervention to be lawful under international law *de lege ferenda*. If formalised, such criteria can tend towards establishing a doctrine of legal humanitarian intervention¹⁴⁷ or at least can serve as guidelines for a reform of the international law of humanitarian intervention. But some scholars also consider the formalisation of such criteria undesirable to begin with, since they would remain “vague” and therefore the risk of abuse is unavoidable. Consequently humanitarian intervention should remain illegal in general but should not be condemned by the international community on a case-by-case basis.¹⁴⁸ This strategy would at best create some kind of “emergency exit” from the constraints of international law. But what is the value of the legal system one does not have to respect *at any given time* ? Similar to justifications or other in domestic (criminal) legal systems, a right to humanitarian intervention has to be an inherent part of international law, not a case in which international law (or at least the core rules now embodied in Art. 2 (4) and Art. 2 (7)) is not applicable at all. But as much as there is resistance to the idea of a legal form of humanitarian intervention outside the framework of the United Nations, there is “too much variance in the conditions under which such interventions” would be legal.¹⁴⁹ Furthermore is it very unlikely that developing nations or notorious human rights violators such as Russia or China would accept such a set of criteria.¹⁵⁰ Even earlier attempts by the International Law Association’s Committee on Human Rights and its Sub-Committee on the international protection of Human Rights through general international law to come up with a widely acceptable set of criteria failed. Although a list of criteria had been created,¹⁵¹ it was subsequently given up because not even the Sub-Committee members could agree on rules on humanitarian intervention based on the criteria

¹⁴⁷ DUPI, p. 104.

¹⁴⁸ Schachter, p. 126.

¹⁴⁹ Murphy, p. 386.

¹⁵⁰ DUPI, p. 105. There fn. 8

¹⁵¹ International Law Association Report 1974, p. 219.

put forward by the Sub-Committee.¹⁵² It must be noted that the International Law Association's work was conducted in the 1960s and 1970s and that a lot has changed since then which could make a wider acceptance of the idea of legalising humanitarian intervention easier. Not only has the threat of a global war between the superpowers triggered by a smaller intervention been removed with the end of the Cold War, respect for human rights has increased steadily since the adoption of the ICCPR and the ICESCR, a respect which is reflected in a wide range of new global and regional conventions, protocols and enforcement mechanisms. We have also seen cases of humanitarian intervention (almost) free of elements of abuse, such as by ECOWAS as in Liberia or by NATO in Kosovo. Therefore it might not be impossible that the international community will, at some point in the future (albeit not yet in the foreseeable future), be able to agree to criteria under which humanitarian intervention outside the UN framework is acceptable.

b) Massive and systematic Human Rights violations

The starting point for any humanitarian intervention are gross, massive and systematic violations of human rights, which, in the words of *Lauterpacht*, “shock the conscience of mankind”¹⁵³ and which are either carried out or not prevented by the government. In order to avoid abuse, this definition needs more precision. Although it is plausible to regard the ousting of a democratically elected government like in Haiti as a threat to international peace and security within the meaning of Art. 39 and therefore as sufficient in order to ask for measures to be taken under Chapter VII,¹⁵⁴ it must be kept in mind that unauthorised humanitarian intervention lacks the legitimacy and acceptance of UN Security Council measures under Chapter VII and therefore should be a last resort. This *ultima ratio* function requires a certain degree of limitation, also with respect to Art. 2.4. A solution suggested by the Danish Institute for International Affairs¹⁵⁵ takes up the definition of “the most serious crimes of concern to the international community as a whole” for which there is individual criminal responsibility under international law.¹⁵⁶ According to Art. 5 of the Rome Statute, these are genocide, war crimes and crimes against humanity.

aa) Genocide

¹⁵² International Law Association Report 1972, pp. 609 et seq.; International Law Association Report 1974, p. 220; International Law Association Report 1976, pp. 519, 521 et seq.

¹⁵³ Quoted in DUPI, p. 106.

¹⁵⁴ UNSC Res. 940 (1994).

¹⁵⁵ DUPI, p. 107.

If there is one crime capable of shocking the conscience of mankind as a whole¹⁵⁷ it is genocide. Outlawed after the Holocaust in customary law, *ius cogens* and the Genocide Convention, genocide is defined¹⁵⁸ as acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such by killing; causing serious bodily or mental harm; deliberately inflicting conditions of life calculated to bring about the groups physical destruction, including birth control and the forcible transfer of children.

bb) Crimes against humanity

Crimes are considered crimes against humanity when they are committed as part of a widespread or systematic attack against the civilian population. Crimes against humanity in such circumstances can include murder, extermination, enslavement, deportation, imprisonment, torture, rape as well as persecutions on political, ethnic and racial grounds as well as other inhuman acts.¹⁵⁹

cc) War crimes

War crimes and other serious violations of international humanitarian law include systematic and large-scale violence to the life, health and physical and mental well-being of persons in times of war, e.g. murder, torture, corporal punishment, terrorism, hostage-taking, humiliating and degrading treatment, rape, forced prostitution, indecent assault or pillage.

dd) Feasibility of a wide acceptance of the "Article 5 solution"

Although acceptance of the Rome Statute is not universal, it is widespread enough to consider Art. 5 of the Statute to be acceptable by the overwhelming majority of nations, especially when one takes into account that Art. 5 repeats ideas which can already be found elsewhere and only adds the criminal law aspect which was earlier established in Nuremberg. A problem arises when we ask who should make the assessment that violations of this magnitude are indeed un-

¹⁵⁶ *ibid.*

¹⁵⁷ Although mankind's collective conscience seems to be very hard to shock in an age in which the world's attention neglects the greater part of our planet. On 6 April 2003 at least 966 civilians were killed in an attack in the Democratic Republic of Congo (<http://www.n-tv.de>, last visited 7 April 2003), a fact that remained widely unnoticed by the general public in Western countries.

¹⁵⁸ cf. Art. 5 ICC Statute.

¹⁵⁹ DUPI, p. 107.

folding. At the ICTY, the ICTR and the ICC, we find prosecutors and judges, but when it comes to unauthorised humanitarian intervention, the intervening states (which actually place themselves in the position of the judges, only with the difference that they resort to the use of force instead of a penalty under international criminal law) will have to make this assessment. Keep in mind that unauthorised humanitarian intervention can only be *ultima ratio* and therefore the UN organs have already failed to take action. Nevertheless would prior UN statements be able to enhance the legitimacy of the intervention, as would reports from (regional) international organisations or independent human rights NGOs.¹⁶⁰ Subsequent recourse to the UN, e.g. the ICJ, for confirmation of the assessment made could be envisaged.¹⁶¹

ee) Effectiveness of the Article 5 - solution

The question needs to be asked whether the definition provided by Art. 5 of the Rome Statute is sufficient to protect Human Rights. Here it must be kept in mind the Art. 5 serves as the basis for the determination of individual guilt in a criminal law case and therefore a very high degree of legal certainty and detail is required. Although one might argue that there are cases short of genocide, crimes against humanity or serious violations of International Humanitarian Law which call for Humanitarian Intervention, it has to be kept in mind that the use of force can only be *ultima ratio* and that a right to use force outside the UN framework can only have a chance of becoming a rule of customary international law if a sufficient number of states endorse it. Therefore Humanitarian Intervention should only be considered for violations of Human Rights which are universally recognised (hence “shock the conscience of mankind” – emphasis on mankind). As we have seen before, there are only few universally agreed Human Rights which have made it both to *ius cogens* and / or Art. 5 of the Rome Statute. Therefore the crimes listed in Art. 5 indicate a minimum consensus, which is shared by a large number of nations which have ratified the Statute.

ff) Conclusion

¹⁶⁰ *ibid.*

¹⁶¹ *ibid.*

Therefore, in the interest of certainty and acceptability, a reference to Art. 5 of the ICC Statute might be acceptable. There will be many cases in which massive human rights violations will not reach the level described in Art. 5, but the chance of finding nations able and willing to use force to defend Human Rights will be larger if the legal situation is clear and the Human Rights violations are of a magnitude which truly “shock[s] the conscience of mankind”, to repeat the famous *Lauterpacht* quote.

c) Failure of peaceful means of Human Rights enforcement

First of all, Art. 33 (1) of the UN Charter demands that all peaceful remedies must have been exhausted before the use of force can be commenced.¹⁶²

d) Failure of the UN Security Council

This exhaustion of peaceful means also of course includes the UN Security Council. Inaction on the part of the UN Security Council is generally accepted as an indispensable condition for the legality of unauthorised humanitarian intervention,¹⁶³ which already follows from the UN Security Council’s leading role¹⁶⁴ in resolving international crises through the use of force. In the light of the UN Security Council discussions in the days and weeks before the 2003 Third Gulf War began, the question arises whether or not the Security Council has to be actually asked to take action if it seems to be clear that it will not endorse military action for the protection of Human Rights. Although this could be seen as a waste of time, this is indeed the case, since all other measures, including measures according to Chapter VII of the UN Charter, need to be explored before states can resort to the *ultima ratio* of humanitarian intervention. In particular, Art. 12 (1) of the UN Charter requires the UN Security Council to take the lead in matters mandated to it by the UN Charter.

e) Failure of the UN General Assembly to act

¹⁶² International Law Association, as quoted in DUPI, p. 109.

¹⁶³ DUPI, p. 108.

¹⁶⁴ Art. 24 (1) UN Charter.

Furthermore the UN General Assembly must have failed to take the action necessary to protect Human Rights, as has already been outlined above.

f) Multilateralism and state interests

But even then the question remains, whether or not humanitarian intervention should be multi-lateral or if it can be unilateral as well. And even if action is taken multilaterally, should it be through an already existing (regional) international organisation or could action taken by an ad hoc coalition of the willing legal as well? The latter as well as unilateral action will always remain much more open to abuse than action undertaken after a clearly defined decision-making process within a larger organisation. Keeping in mind that we are discussing possibilities for the emergence of future customary international law allowing for humanitarian intervention, we have to look again at state practice and *opinio iuris*, especially at the two recent and widely accepted interventions, in Liberia (1990) and Kosovo (1999). In both cases did regional organisations take the task of enforcing human rights and both cases differ significantly from earlier interventions of an allegedly humanitarian nature. Therefore we can conclude that it is likely that a future rule of customary international law allowing for Humanitarian Intervention outside the UN framework will require that action is taken by another international organisation. *De lege lata* intervention does not gain in legality due to the fact that a regional organisation organised it, but when it comes to building a future rule of *customary* international law, “intervention by a regional organisation is preferred to one by a group of states or an individual state”,¹⁶⁵ given the reduced danger of an abuse of the intervention by the intervening party or parties.

The events of 9 / 11 and the subsequent wars in Afghanistan and Iraq confirm this argument (although it might be thought that the idea of Humanitarian Intervention has lost relevance in the post 9 / 11 world): While the action against the Taliban and Al Qaeda was the result of a multi-lateral effort which culminated in the creation of a stabile government and the first democratic structures in Afghanistan, the unilateral US/UK war against Iraq clearly lacked any international legitimacy and might lead to an abuse of the trust of the international community with the creation of an undemocratic foreign military regime in Iraq. The intervention should be free of any doubts with regard to the interests of the intervenor. Although an intervenor might improve the situation of the people, the intervention should happen only on behalf of the people. Unfortu-

¹⁶⁵ International Law Association as quoted in DUPI, p. 109.

nately this is currently not the case. How else, if not with the lack of interest (and with fear of a larger conflict) is it to be explained that there have been no attempts by the world's powerful alliances to intervene in Chechnya, Tibet, the Democratic Republic of Congo, Central Africa,¹⁶⁶ Northern Ireland, Colombia,¹⁶⁷ Zimbabwe, Aceh, Molukku, North Korea, Uzbekistan, Belarus, Saudi Arabia, Libya, Algeria, Morocco, Tunisia or Egypt, to name just a few examples.

g) Respect for Human Rights and International Humanitarian Law

The potential of abuse mentioned above brings us to the next requirement for the legality of humanitarian intervention: The intervenors must themselves respect and promote Human Rights and International Humanitarian Law. In particular, the intervenors should only use the force which is necessary and proportionate¹⁶⁸ to – in the long run – “do more good than harm”.¹⁶⁹

5. Conclusions

Whether or not such a rule of customary international law which allows for unauthorised Humanitarian Intervention is actually emerging, as UN Secretary General *Kofi Annan* suggested in 1999, only time will tell, but unless universal respect for HR is accomplished – while as we have seen earlier, remains in doubt while the decision-making process in the UN is unchanged, this might be the only feasible option to reconcile international peace and security with the need for respect for human rights.

IV. Conclusion: A seven-step proposal for a general procedure of Human Rights enforcement

Keeping in mind the principle of subsidiarity¹⁷⁰ which should always govern the use of force in international relations, the above findings suggest the following procedure for the enforcement of human rights under international law. Enforcement should begin on a national level (step 1). In accordance with the rule that local remedies need to be exhausted before a claim is brought on an international level, this approach not only takes note of the states' sovereignty but also of the

¹⁶⁶ The coup d'état on the weekend before the outbreak of armed hostilities in Iraq was basically not noticed by the world community except for the fact that in a UN press conference it coup was regretted.

¹⁶⁷ The U.S. (para-)military operations in Colombia and the Nicaragua-style support for armed groups in Bolivia through the US embassy in Sucre are directed against the international drug trade and therefore do not serve the interest of the local population but of the U.S. as the main destination for drugs from Latin America.

¹⁶⁸ DUPI, pp. 109 et seq.

¹⁶⁹ cf. Holzgrefe, p. 20.

¹⁷⁰ cf. Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, AJIL 2003, pp. 38 - 79.

fact that a local solution is more accessible for the victims and therefore can also be more effective than a solution which forces the victim to address a court or commission in an other country. Only if such an opportunity does not exist or would be obviously ineffective¹⁷¹ or if all domestic remedies have been exhausted without success should one consider enforcement on a regional level (step 2). At this level courts and commissions can still take into account regional considerations. Such a prominent role for local and regional bodies should make the proposed system more acceptable for supporters of the idea of relativist human rights, similar to the subsidiarity rule in Art. 1, sentence 2; and Art. 17 (1) (a) of the ICC Statute. If such an opportunity does not exist or would be obviously ineffective, or if all regional remedies have been exhausted without success, enforcement should be moved to the global level (step 3). Here the Enforcement procedures under (a) the relevant Convention (ICCPR, ICESCR, CERD, CEDAW etc.) or (b) the UDHR should be used primarily to ensure that the deciding body is as competent as possible to deal with the matter. With regard to international and regional bodies which do not accept cases which have been brought before other bodies earlier,¹⁷² this needs to be examined. We need to determine whether or not this rule can be changed through additional protocols or if, depending on the instruments provided for in the applicable instruments, the simultaneous use of regional and global bodies should be considered, in order to ensure a maximum number of fora for the victims. In cases of massive violations of Human Rights, which cannot be remedied through the means outlined so far and which pose a threat to international peace and security, the UN Security Council is to be seized with the matter and should take action according to Art. 41 of the UN Charter (step 4). If this should prove ineffective or the UN Security Council is convinced that such measures would be ineffective,¹⁷³ measures under Art. 42 UN Charter should be considered (step 5). If the UN Security Council fails to act in order to bring an end to the violations, the UN General Assembly can take measures similar to the “Uniting for Peace” Resolution (step 6). Only if the Assembly fails to act as well, can international organisations employ armed force as a last resort to end massive human rights violations, provided that the violations amount to a crime as defined by Art. 5 f the Rome Statute and the action taken by the intervening organisations solely aimed at the protection of Human Rights and International Humanitarian Law (step 7).

¹⁷¹ A guide could be the ECtHR decisions in *Ertak v. Turkey* (9 May 2000, Application No. 00020764/92, HUDOC No. REF0002235, para. 121), *Kurt v. Turkey*, (25 May 1998, Application No. 00024276/94, HUDOC No. REF00000931, para. 83) and *Çakici v. Turkey*, (8 July 1999, Application No. 00023657/94, HUDOC No. REF00001090, para. 80.)

¹⁷² cf. e.g. (Art. 35 (2) (b) ECHR).

E. CONCLUSIONS

Therefore we have to conclude that human rights and international peace and security¹⁷⁴ are interrelated and interdependent and that the fostering of one promotes the enhancement of the other and that the needs for universal respect for Human Rights and Peace respectively can be reconciled under international law, if the use of force remains the last resort in the protection of human rights. To improve the current situation, the degree of legal certainty needs to be increased to make sure that regional international organisations, such as the EU, ECOWAS or NATO which wish to act in case the UN (that is, both the Security Council and the General Assembly) fails to take action can do so legally while at the same time making sure that the *ius cogens* prohibition of the use of force is not undermined. Since the chances for a codification of such measures outside the UN framework or even an amendment of the UN Charter appear slim at best, a solution could be found in the creation of a rule of customary international law allowing for such action. The ECOWAS and NATO actions in the 1990s could have been the starting point for a development which could lead to such a rule. The expected ICJ decision on the 1999 NATO intervention in Kosovo will be a landmark which might be decisive for this development as has been the Congo v. Belgium decision on the question of immunity. International law has often been criticised for the lack of effective enforcement mechanisms and violations of international human rights law have a much more far reaching effect than any other violations of international law. Effectively protecting Human Rights under the conditions set by the Westphalian system of international law and overcoming the problems posed by the complex relations between international peace and security on one hand and human rights on the other will remain *the* challenge for international law in the 21st century like the prevention of war was during the 20th century, itself a challenge not yet met successfully.

¹⁷³ cf. Art. 42 UN Charter.

¹⁷⁴ One might want to include international development as well, cf. UN Doc. ST/HR/SER.A.10, p. 13.