THE SO-CALLED ‘RIGHT’ OF HUMANITARIAN INTERVENTION

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Humanitarian intervention, a long-standing issue in international legal writing and in state practice, has become a major focus of international legal thinking and military action. Since the early 1990s, there have been new and unexpected elements in the practice of intervention, in its authorization, and in debates about it. Action by outside military forces in several territories – northern Iraq, Somalia, Haiti and Kosovo – has provoked questions about whether there is a right of humanitarian intervention. In addition, the debate on the subject has been spurred by the strong sense that there were crises (most notably, the genocide in Rwanda in 1994) in which the international community should have intervened promptly but failed to do so.

The post-Cold War international debate, which is the central concern here, has revolved around a question that has been discussed for centuries by international lawyers: Is there a right of humanitarian intervention in international law? My conclusion, which follows from an examination of the cases for and against such a right, is that there is not at present a one-word general answer to this seemingly clear question. Nor is there any chance of such an answer emerging in the near future. What international law can offer, as this survey seeks to demonstrate, is competing principles, structures and criteria for legitimate decision-making, evidence of an emerging custom, and a long perspective on a question of contemporary urgency. Law may point to a particular answer in a particular situation, but should not be expected to provide a general answer applicable to a wide range of cases. Indeed, it is questionable whether humanitarian intervention should be conceived of in terms of a ‘right’.

Although the question of humanitarian intervention is a perennial one in international relations, post-Cold War international practice and debate contain significant new elements. One is the way in which many interventions have been, at least partly, a response to persistent violations of international humanitarian law. This body of law, also known by the older terms ‘law of armed conflict’, ‘law of war’ and ‘jus in bello’, has traditionally been viewed as being confined to governing the conduct of belligerents in armed conflicts, and as entirely separate from the
question of the legitimacy of the resort to force in the first place – the *jus ad bellum*. If humanitarian intervention in response to violations of international humanitarian law becomes a regular international practice, or an accepted doctrine in international law, this will have implications for the traditional view of international humanitarian law as entirely separate from the *jus ad bellum*.

Another important new element in the post-Cold War consideration of humanitarian intervention concerns authorization. Debate and practice since 1990 has concentrated attention on the question of which of three different types of body can legitimately authorize such intervention:

1. The one global political institution of general competence, namely, the United Nations, and in particular the UN Security Council;
2. Regional international bodies of many different types, including the Economic Community of West African States (ECOWAS), the North Atlantic Treaty Organisation (NATO), and the Organization of American States (OAS); and
3. Individual states and groups of states acting *ad hoc*.

The nature of the authorization of a military operation undoubtedly affects perceptions of the legitimacy of that operation. In particular, authorization by the UN Security Council has important legal and practical consequences. Much of the debate has been about whether there is a right of humanitarian intervention in those cases in which the UN Security Council, even though it may have formally recognized the gravity and urgency of a threat, is unable to reach agreement on specific military action. Do regional bodies, or individual states, have any right to act in such circumstances? However, as debates in the UN General Assembly in 1999 and 2000 have shown, the international community is not yet at a point where there is agreement on the general principle of a right of humanitarian intervention even with Security Council blessing.

This survey draws on the distinct disciplinary threads of International Relations on the one hand and International Law on the other. It is in seven sections. The first attempts to set out the core meaning of the term ‘humanitarian intervention’ and discusses briefly how it relates to its apparent opposite, the principle of non-intervention. The second summarises relevant provisions and authoritative interpretations of the UN Charter, and glances at some UN practice in the Cold War years. The third examines the pressures and events since 1990 which have resulted in humanitarian considerations being cited so often as a basis for military action, and lists examples of such action, not all of which can be classed as humanitarian interventions. The fourth and fifth sections present, respectively, the main arguments for a right of humanitarian intervention, and against such a right, and discuss each argument briefly. The sixth section considers the criteria which are often advanced as a possible basis for evaluating the legality of particular interventions. The seventh and last section concludes that while there is no prospect of getting general agreement that there is a right of such intervention, many of the substantive issues raised can be (and in some cases are being) taken forward in other ways.
1. ‘HUMANITARIAN INTERVENTION’ AND THE NORM OF NON-INTERVENTION

1.1 Definition of ‘humanitarian intervention’

‘Humanitarian intervention’, in its classical sense, may be defined as coercive action by one or more states involving the use of armed force in another state without the consent of its authorities, and with the purpose of preventing widespread suffering or death among the inhabitants. Some definitions of recent decades have encompassed certain elaborations, but do not fundamentally change the classical definition.

Confusingly, in the 1990s the term has sometimes been used, especially by some relief agencies, with a much broader and less precise meaning: major humanitarian action in an emergency situation, not necessarily involving use of armed force, and not necessarily against the will of the government. Some writers have used it in both senses. The following discussion adheres to the classical meaning of the term as outlined above.

Even sticking firmly to the classical definition, a wide variety of situations can be covered by this one term. Central to the very idea of humanitarian intervention is the actual protection of threatened civilians, which seems to presuppose the deployment of foreign troops in a territory. However, in practice, if such entry of troops is opposed by the armed forces of the target state, such a form of humanitarian intervention may not be realizable, at least in the short term. There are enormous differences between, say, the UN-authorized entry of troops into a country that has fallen into anarchy (Somalia in 1992) and a bombing campaign that is not authorized by the UN, is waged against the functioning government of a functioning state, and cannot in the short term protect the threatened inhabitants (the NATO campaign over Kosovo in March-June 1999). The Kosovo events, like a number of other episodes considered in this article, also fall within another, older, category: ‘war’. It is indeed a question whether a coercive military campaign conducted from outside, even if its purpose is to prepare the way for a later entry of


4. See e.g., the definition of humanitarian intervention contained in a report commissioned by the Danish government in January 1999 and completed in October 1999, Humanitarian Intervention: Legal and Political Aspects (Copenhagen, Danish Institute of International Affairs 1999) p. 11. Here such intervention is defined as ‘coercive action by states involving the use of armed force in another state without the consent of its government, with or without authorisation from the United Nations Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law’.

5. ‘Humanitarian intervention’ is viewed in both these senses in J. Harriss, ed., The Politics of Humanitarian Intervention (London, Pinter for the Save the Children Fund 1995) e.g., at pp. xi, 2-3, 8-9, etc.
ground forces into the territory where atrocities have occurred, can properly be considered under the heading of 'humanitarian intervention'. There are bound to be reservations about any stretching of the meaning of the term to encompass such a case. However, the case of Kosovo since 1999 features extensively in this article because (1) at least three of the five stated objectives of the NATO operation reflected core purposes of humanitarian intervention; and (2) the 1999 NATO campaign has become a central issue in international debates about a possible right of humanitarian intervention.

The sheer variety of forms that ‘humanitarian intervention’ can take, and of the legal and factual circumstances involved in different cases, illustrates a central conclusion of this article: the category of ‘humanitarian intervention’ is inherently open to contestation, and overlaps with other categories. Discussing the issue of humanitarian intervention in general terms, and trying to devise some general principles of international law in relation to it, may be a necessary exercise in view of the frequency with which the issue arises in contemporary international relations. However, the difficulty of reaching convincing generalizations about the subject, and generally applicable legal principles, needs to be appreciated.

1.2 The principle of non-intervention

The idea of humanitarian intervention in its classical sense involves a violation, in exceptional circumstances, of the principle of non-intervention. The non-intervention rule – the prohibition of military incursions into states without the consent of the government – is often criticized, but it does have a serious moral basis. Non-intervention provides a clear rule for limiting the uses of armed force, and reducing the risk of war between the armies of different states. It involves respect for different societies, with their different religions, cultures, economic systems, and political arrangements. It acts as a brake on the territorial, imperial, and crusading ambitions of states.

The actual observance of the non-intervention rule has been very imperfect. States have circumvented or violated it on many occasions and for many reasons, including the protection of nationals, support for opposition groups, the prevention of changes to the balance of power, and counter-intervention in response to another

6. The five objectives which President Slobodan Milošević was required to accept on behalf of the Federal Republic of Yugoslavia, and which were set out in the Statement on Kosovo issued by the NATO summit in Washington DC on 23-24 April 1999, were: a verifiable cessation of all combat activities and killings; withdrawal of Serb military, police and paramilitary forces from Kosovo; the deployment of an international military force; the return of all refugees and unimpeded access for humanitarian aid; and a political framework for Kosovo building on the Rambouillet accords. The first, third and fourth are those most clearly encompassed within the purposes of humanitarian intervention as defined in this paper.

state which is deemed to have intervened first. Yet the rule has not collapsed: evidence, perhaps, that a robust rule can outlive its occasional violation. It has not served badly as an ordering principle of international relations.

Humanitarian intervention is sometimes presented as the antithesis of non-intervention; and its practice in the 1990s has been cited as evidence that the world is moving decisively beyond what are seen as old-fashioned ideas of the sovereignty and inviolability of states. However, an occasional practice and justification of humanitarian intervention should not necessarily be seen as a threat to the whole principle of non-intervention.

2. UN CHARTER, DOCTRINE AND PRACTICE TO 1990

The UN Charter is the starting point for an evaluation of the legality of particular uses of force, but it is not necessarily the sole basis for such an exercise. Although it is a key foundational document of the post-1945 international legal system, the UN Charter has not completely superseded the body of general international law relating to the use of force: that is still a relevant, and still developing, body of law, and the doctrine of humanitarian intervention has a place in it, albeit a contested one. The Charter co-exists with elements of treaty and customary law that are independent of it, and that in many cases are older than it is. The Charter implicitly recognizes this principle when it refers in Article 51 to ‘the inherent right of individual or collective self-defence’: it does not create that right, but simply notes its existence. Inasmuch as certain issues are not addressed in the Charter, or the Charter system concerning the use of force has failed to operate exactly as laid down, there has to be some scope for reliance on other sources of law.

2.1 Provisions of the UN Charter

Nowhere does the Charter address directly the question of humanitarian intervention, whether under UN auspices or by states acting independently. The Charter does set forth a number of purposes and rules which are germane to humanitarian intervention, but some of these conflict with others.

The Charter is widely seen as fundamentally non-interventionist in its approach. Taken as a whole, the Charter essentially limits the right of states to use force internationally to cases of (1) individual or collective self-defence, and (2) assistance in UN-authorized or controlled military operations. The strongest and most frequently-cited prohibitions on intervention are those in Article 2. Article 2(4) states: ‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.’ Article

2(7) states: ‘Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.’ At the very least, these provisions create a strong presumption against forcible military interventions by member states.

Notwithstanding the strong presumption against the use of force, there are three possible bases for the view that the Charter can be seen as leaving some scope for humanitarian intervention.

The first way in which the Charter may leave scope for humanitarian intervention arises from its references to fundamental human rights, which are proclaimed to be central purposes of the United Nations in the Preamble and in Article 1. The UN includes in its purposes, in Article 1(2): ‘To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;’ and in Article 2(3): ‘To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion’. These provisions inevitably raise the question, not addressed directly in the Charter, of what should be done if the most fundamental human rights and humanitarian norms are openly flouted within a state. These clear enunciations of the UN’s purposes must also have some effect on how to interpret the final phrase of the above-quoted Charter Article 2(4), with its prohibition on the threat or use of force by member states ‘against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’.

The second way in which the Charter may leave scope for humanitarian intervention concerns the possibility of such intervention under UN Security Council auspices. In general, Chapter VII of the Charter is much less restrictive than had been the equivalent provisions of the Covenant of the League of Nations (1919) about the circumstances in which international military action can be authorized. Under Article 39 the Security Council can take action in cases deemed to constitute a ‘threat to the peace, breach of the peace, or act of aggression’: in practice, humanitarian crises within states can encompass or coincide with any or all of these threats. Articles 42 and 51 leave the Security Council a wide range of discretion as regards the type of military action that it can take. In addition, the above-quoted Article 2(7) implicitly recognizes the possibility that the Security Council could authorize enforcement measures partially or wholly within a sovereign state. Article 25 places member states under an obligation ‘to accept and carry out the decisions of the Security Council in accordance with the present Charter’. These

9. In addition, the Charter’s Chapter IX, on ‘International Economic and Social Co-operation’, contains in Article 56 a pledge by members to ‘take joint and separate action’ to achieve, inter alia, universal observance of human rights. However, it has never been suggested that this legitimizes military action.
provisions, particularly those in Chapter VII, suggest that in certain circumstances the Security Council may be within its powers in authorizing intervention in a state on humanitarian grounds; but they are far from suggesting that states have such a right in the absence of Security Council authorization.

The third way in which the Charter might, at least in theory, be considered to leave some scope for humanitarian intervention is in Chapter VIII, on regional arrangements. Article 52(1) states: ‘Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.’ However, apart from the general legitimacy they give to such bodies, the Charter provisions for regional arrangements are not a promising basis for justifying humanitarian intervention. This is mainly because Article 53 specifies that ‘no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council’. In other words, any such enforcement action would require nine positive votes in the Security Council, and even then the veto could be applied. In practice, this provision of Article 53 has seldom been invoked, and has proved to be of limited importance. This is partly because various military alliances, including NATO, have stressed their identity as mutual defence organizations under Article 51 of the Charter (which is part of Chapter VII), rather than as regional arrangements under Chapter VIII. In addition, certain regional bodies have in certain instances taken military action without obtaining Security Council authorization, generally preferring instead to justify their action in terms of self-defence under Article 51. Even in the relatively few instances in which an organization has accepted its status as a regional arrangement, the definition of ‘enforcement action’ has been whittled down. In strict legal terms, the provisions of Chapter VIII could provide little more than one additional legal buttress for a humanitarian intervention that in any case had the support of the UN Security Council.

It is not surprising that authoritative expositions of the UN Charter have reached different conclusions on humanitarian intervention. The impressive commentary edited by Bruno Simma contains an entry by Karl Doehring who, after stating that ‘[t]he overwhelming view in international law inclines towards a rejection of humanitarian intervention,’ goes on to take a sympathetic view of the lawfulness under the Charter of humanitarian intervention, especially in cases where the right of self-determination is involved. However, in the same volume, Albrecht

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10. See the excellent expositions of these issues by M. Akehurst, ‘Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States’, 42 BYIL (1967) esp. at pp. 179-182; and by Dr G. Ress in his analysis of UN Charter Article 53(1), clause 2, phrase 1 in B. Simma, ed., The Charter of the United Nations: A Commentary (Oxford, Oxford University Press 1994), pp. 732-735. Both studies refer to a number of cases in which regional bodies have taken action without specifically referring the matter to the UN Security Council.

11. The role of regional bodies in providing authorization for humanitarian intervention is discussed further below, in section 6.4.2.

Randelzhofer takes a more absolutist view, concluding: ‘Under the UN Charter, forcible humanitarian intervention can no longer, therefore, be considered lawful.’

2.2 UN documents interpreting the Charter provisions

During the years between 1945 and the end of the Cold War, the main UN documents codifying issues relating to the lawfulness of the use of force did not address the matter of humanitarian intervention. Their general thrust was strongly in favour of non-intervention. In December 1965, the UN General Assembly adopted its first detailed formulation of the principle of non-intervention, the ‘Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States’. This included the following statements:

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

5. Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.

This passage of the Declaration, like similar passages in subsequent UN declarations, may have left a small opening for humanitarian intervention by its apparent assumption that intervention is ‘against the personality of the State or against its political, economic and cultural elements’. What if an action is none of these things, but is simply intended to protect a vulnerable section of the population? This is a thin straw at which to clutch: a more useful one would emerge within five years.

In October 1970, the General Assembly adopted the ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations’. The most compre-
hensive and authoritative of the elaborations of the Charter provisions relating to peace and security, the Declaration on Friendly Relations reiterated the above-quoted formulations of a fundamentally non-interventionist character, even strengthening them by saying: 'No state or group of States has the right to intervene ...'. However, it went on to address the right of self-determination in such terms as to suggest a right to assist at least some peoples seeking self-determination:

'Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter ...'

Every State has the duty to refrain from any forcible action which deprives peoples referred to above ... of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.'

This statement has many limitations. (1) There is much scope for debate about what constitutes a ‘people’, and which peoples might be considered appropriate candidates for self-determination. The document appears to confine its concern to self-determination struggles in colonial territories. (2) The statement was counter-balanced by a strong reaffirmation of the territorial integrity of sovereign and independent states. (3) It was left unclear what forms of support peoples seeking self-determination are entitled to receive. (4) Intervention to support self-determination struggles is not the same thing as humanitarian intervention, although the two may overlap in certain cases. Despite such limitations, the statement left an opening for a possible future defence of humanitarian intervention in those cases in which there was also a self-determination issue at stake.

The ‘Definition of Aggression’, approved by the UN General Assembly in December 1974, is similar to the two above-mentioned declarations in that it is fundamentally non-interventionist, and does not address humanitarian intervention directly. Article 5(1) states: ‘No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.’ However, its Article 6 leaves substantial scope for the Security Council to authorize the use of force; and Article 7 explicitly echoes the Declaration on Friendly Relations when it refers to ‘the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that

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right’, and ‘the right of these peoples to struggle to that end and to seek and receive support ...’.\(^\text{17}\)

The generally non-interventionist thrust of such UN documents reached a curious high-water mark in the form of the 1981 UN ‘Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States’. A remarkably state-centred text, it proclaimed \textit{inter alia}: ‘The duty of a State to refrain from the promotion, encouragement or support, direct or indirect, of rebellious or secessionist activities within other States, under any pretext whatsoever, or any action which seeks to disrupt the unity or to undermine or subvert the political order of other States;’ and ‘The duty of a State to refrain from the exploitation and the distortion of human rights issues as a means of interference in the internal affairs of States, of exerting power on other States or creating distrust and disorder within and among States or groups of States’. Many important states, including the USA, voted against this declaration.\(^\text{18}\)

The UN General Assembly adopted further documents on similar lines, including the 1987 ‘Declaration on the Enhancement of the Effectiveness of the Principle of Non-Use of Force in International Relations’. As Christine Gray has argued, the drafting processes involved in this series of declarations over several decades ‘reflected deep divisions between states on the value of the whole enterprise of producing resolutions on the use of force’, but at the same time the declarations constituted important expositions of the principle of non-use of force.\(^\text{19}\) Apart from the partial and ambiguous exception in case of self-determination struggles, these declarations offer no encouragement to advocates of forcible intervention, humanitarian or otherwise.

\subsection*{2.3 Aspects of UN practice}

The response of the UN General Assembly and Security Council to military interventions in the Cold War years, while by no means entirely consistent, was in general to condemn such actions, including those with purportedly humanitarian justifications. However, as discussed later in this article, due to the Soviet veto the UN Security Council did not condemn India’s military action in 1971 against Pakistan over East Bengal.

\begin{footnotes}
\item [17] In the Definition of Aggression, in addition to the articles cited, Art. 2 might theoretically be relevant to humanitarian intervention. It recognizes a general right of the UN Security Council to ‘conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances ...’. However, one reason for this provision is to cover cases in which the acts concerned, or their consequences, are not of sufficient gravity to merit being characterized as aggression. (A possible example might be an accidental or unauthorized crossing of an international border by a small group of soldiers.)
\item [18] ‘Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States’, annexed to GA Res. 36/103 of 9 December 1981, adopted with 120 in favour, 22 against, six abstaining and nine absent. Those voting against were mainly western developed states. \textit{Resolutions and Decisions adopted by the General Assembly during its Thirty-Sixth Session,} UN doc. A/36/51, 1982, pp. 78-80.
\end{footnotes}
In the actions of the UN in the Cold War years, there were two notable exceptions to the thrust of the UN’s general pronouncements and resolutions opposing any kind of intervention or interference in states. The UN Security Council determined that two particular situations that were largely internal (in both of which a critical issue was racial domination by a white minority population), constituted threats to international peace and security. It made such determinations in respect of Rhodesia in 1966 and South Africa in 1977, in both cases taking action (namely sanctions) under Chapter VII of the Charter. In neither case did the Security Council view the situation as one of acute emergency, nor did it authorize direct external military intervention within the states concerned. Thus, the Council did not support humanitarian intervention in these cases. However, it did appear to accept that domination by a minority, and refusal to take into account the wishes of the majority population, were factors which helped to justify taking measures under Chapter VII. Thus the Security Council’s approach came close to some, but not all, of the underlying elements of a doctrine of humanitarian intervention. The General Assembly strongly supported certain limited actions against Rhodesia and South Africa, but resisted any doctrine that might imply any general right to take action against oppressive governments.

In the UN operation in the Congo (1960-64), the UN faced a question that was to recur frequently in the 1990s: what should a UN peacekeeping force do if it witnesses atrocities, if there is no formal mandate for the force to intervene in that particular type of situation, and no consent from the government? This was how some UN officials saw the position in August-September 1960, when forces of the Congolese Army engaged in operations in Kasai Province. Dag Hammarskjöld, Secretary-General of the UN, viewed the situation as ‘a case of incipient genocide’, and authorized the interposing of UN troops, using force if necessary, to stop a massacre by Congolese government forces in Kasai. He sent a cable to his representative in the Congo: ‘Prohibition against intervention in internal conflicts cannot be considered to apply to senseless slaughter of civilians or fighting arising from tribal hostilities.’ In principle, and notwithstanding the fact that the UN forces were already stationed in the Congo, the action being authorized could be said to have amounted to a form of humanitarian intervention. However, this episode has been the subject of little or no attention in writing on humanitarian intervention; and it can be seen in a different light as part of the fateful process through which the UN came into conflict with Patrice Lumumba, Prime Minister of the Congo.

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2.4 Certain governmental and academic views

In the Cold War years, although certain policies and acts of governments contained elements of justification in terms of humanitarian intervention, these were not the outcome of any consistent, let alone internationally accepted, doctrine of humanitarian intervention.\(^{23}\) The UN Charter was widely seen as militating against such intervention by states. A study of intervention conducted by Planning Staff of the UK Foreign and Commonwealth Office in 1984 stated that 'the best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal'. This triple negative, a triumph of British officialdom, reflects the tortured nature of this subject. The document went on to conclude, in respect of humanitarian intervention:

'But the overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention, for three main reasons: first, the UN Charter and the corpus of modern international law do not seem specifically to incorporate such a right; secondly, state practice in the past two centuries, and especially since 1945, provides only a handful of genuine cases on humanitarian intervention, and, on most assessments, none at all; and finally, on prudential grounds, that the scope for abusing such a right argues strongly against its creation. ... In essence, therefore, the case against making humanitarian intervention an exception to the principle of non-intervention is that its doubtful benefits would be heavily outweighed by its costs in terms of respect for international law.'\(^{24}\)

In the Cold War years, the writings of scholars in international law and relations contained a notable diversity of views on humanitarian intervention. Most writers were unambiguously opposed to any recognition of a right of such intervention, emphasizing particularly its incompatibility with Article 2(4) of the UN Charter.\(^{25}\) On the other hand, a minority of writers suggested that humanitarian intervention was compatible with the existence, legal principles, and developing role of the

\(^{23}\) Such policies and acts of governments are briefly surveyed below in section 4.2.


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United Nations. In 1984, Hedley Bull suggested that an era characterized by increased attention to human rights, and by an increased focus on the UN, was bound to see a revival of doctrines of humanitarian intervention. He went on:

'Ultimately, we have a rule of non-intervention because unilateral intervention threatens the harmony and concord of the society of sovereign states. If, however, an intervention itself expresses the collective will of the society of states, it may be carried out without bringing that harmony and concord into jeopardy.'

Can any rough and ready generalization be made regarding the directions taken by formal interpretations of the UN Charter in the Cold War years, the deliberations about the question of intervention, and the writings of scholars? While the non-intervention rule continued to be widely seen as fundamental, there were also some conflicting trends and disjointed moves which pointed, often ambiguously and always controversially, in the direction of accepting the legitimacy of intervention in support of an oppressed and threatened population, especially where it was seen as a victim of colonial rule. These trends related more to intervention to support self-determination struggles than to humanitarian intervention as traditionally conceived.

3. PRESSURES AND EVENTS SINCE 1990

There can be no disputing the sheer force of circumstance that contributed to the development of the practice and doctrine of humanitarian intervention in the 1990s. The problem of whether forcible military intervention in another state to protect the lives of its inhabitants can ever be justified became politically sensitive because of a large number of factors including the following.

* Harrowing situations, extensively reported by the media, and discussed by inter-


 Refugees flows from countries in crisis, coupled with the unwillingness of other countries to accept refugees on a permanent basis, meant that states had a strong interest in putting right the situation in the country of origin.

* While the fear of major international war (which tends to inhibit military action outside the framework of self-defence) was low, the reality of brutal civil wars, in many of which there was severe repression by government forces, was all too obvious.

* The growth of two bodies of law in the post-1945 era (human rights law and international humanitarian law) contributed to an emerging view, at least in many parts of the world, that in some circumstances intervention to stop gross violations might be legitimate.

* The developing roles of international institutions, regional and global, increased the possibility of states acting on a multilateral basis. At the global level, the UN Security Council, no longer hamstrung by East-West disagreement, was able at last to reach decisions, giving legitimacy to interventions that might otherwise have been hotly contested. Meanwhile, certain regional institutions had also developed some capacity for decision-making and legitimation of interventions.

* The rapidly growing community of non-governmental organizations played an important role in crises and interventions. NGOs raised international awareness of tragic situations, demonstrated by their acts and omissions the need to protect vulnerable populations and aid activities, and occasionally called directly for international military intervention.

Since early 1991, the question of whether or not external institutions should, on basically humanitarian grounds, organize or authorize military action within a state, whether with or without its consent, has arisen frequently. Within the UN Security Council, this issue (which goes beyond ‘humanitarian intervention’ narrowly defined) arose most sharply in the following nine cases. In all these cases there were Security Council resolutions (in the years given in brackets in the following list) citing humanitarian considerations as a basis for action. In all nine cases there was multilateral military action, going well beyond traditional peacekeeping, by armed contingents from outside the country concerned. In all these cases such action, whether or not specifically authorized by the UN, had a stated purpose of implementing the relevant UN resolutions.

1. northern Iraq (1991)
2. Bosnia and Herzegovina (1992-95)
4. Rwanda (1994)
5. Haiti (1994)
6. Albania (1997)

The four of these nine cases in italics (n. Iraq, Somalia, Haiti and Kosovo) can be considered as having involved at some stage a ‘humanitarian intervention’ within
the definition offered earlier. In these four cases, military action without the approval of the government of the state, and justified largely on humanitarian grounds, was initiated. However, in each of these four cases the question of consent was more subtle and complex than this proposition might suggest, and elements of consent to the international presence did sooner or later play some part. In all four cases of ‘humanitarian interventions’ (unlike in four of the five consent-based operations), US forces took the lead role in the intervening coalitions.

Of these four humanitarian interventions, only two (Somalia and Haiti) had explicit Security Council authorization. In the other two (northern Iraq and Kosovo), military action was initiated by groups of states with the stated purpose of achieving the UN Security Council’s objectives, but without its explicit authorization; and in these two cases it was only after such initial non-UN military action that a UN-authorized presence was established and deployed, benefiting from the consent (albeit belated) of the host state. The UN-authorized military operations in the other five cases (Bosnia, Rwanda, Albania, East Timor and Sierra Leone) do not technically fall within the category of humanitarian intervention, because such military action was only authorized and initiated after host government consent had been obtained. In the case of Rwanda, on 22 June 1994 the representative of Rwanda (at that time a member of the Security Council) voted in favour of the Security Council resolution authorizing the French-led military action, Opération Turquoise, which commenced on the same day. The case of Sierra Leone, with its particularly strong regional aspects, is discussed further below.

Host-government consent is not always uniform throughout a state, nor is it always entirely voluntary. In the case of Bosnia, NATO’s ‘Operation Deliberate Force’ in 1995, which was the principal outside use of force in that war, had the support of the Bosnian government but obviously not that of the de facto authorities in the Serb-held part of Bosnia. In the case of East Timor, the entry of the Australian-led multinational force in September 1999 was with the consent of the Indonesian government (whose claim to sovereignty over East Timor was of course contested); but this consent was given after, and no doubt because of, the application of intense pressure by the USA, the UN and others. The distinction between coercive intervention and intervention by consent has often been blurred.

In most of these cases, it was not only in a UN context that the issue arose of military intervention without explicit invitation from the host government. Questions relating to humanitarian intervention regularly involved regional bodies


30. In northern Iraq, following the creation of the ‘safe havens’ by US, British and French forces in April 1991, the presence of the lightly-armed UN Guards Contingent in Iraq (UNGCI), which is not a peacekeeping force, was authorized by the UN Secretary-General in May 1991, in conjunction with an agreement with Iraq. In Kosovo, following the NATO bombing campaign of Yugoslavia in March-June 1999, the international security presence – i.e., the NATO-led Kosovo Force (KFOR) – was authorized in SC Res. 1244 of 10 June 1999.

31. SC Res. 929 of 22 June 1994. The French-led operation, which thus started eleven weeks after the mass killings had begun, has been widely criticized.
as well as the UN. This is illustrated by the major involvements in civil wars in West Africa of the Nigerian-led force, ECOMOG.\footnote{32} In Liberia from 1990, and Sierra Leone from 1997, ECOMOG sometimes acted without the authority of, or in opposition to, the incumbent government. For example, the first phase of ECOMOG’s presence in Sierra Leone was concerned with intervening against the military junta of Major Koroma, who had seized power in a \textit{coup d’état} in May 1997. ECOMOG had a measure of support from the UN Security Council, which in October 1997 called on the military junta in Sierra Leone to step down, and took certain limited measures against it under Chapter VII of the UN Charter.\footnote{33} It would be possible to argue that the Nigerian military action in February-March 1998, which ousted the military junta of Major Koroma, had an element of humanitarian intervention, albeit without explicit UN authorization for the use of force. However, there are certain difficulties in characterizing this as a case of humanitarian intervention, including the fact that Nigeria itself was at that time under a military regime which had come to power in a \textit{coup d’état}. Following the deposition of Koroma, ECOMOG’s actions had the consent of the host government, as did the actions of the UN peacekeeping forces which operated in Sierra Leone from July 1998. ECOMOG’s effectiveness in assisting in bringing an end to civil wars in Liberia and Sierra Leone has been extremely limited. Despite this, some have suggested that ECOMOG’s involvements illustrate the legitimacy of efforts of regional organizations to remove regional threats to peace and security, and/or that they had elements of humanitarian intervention.\footnote{34}

Already in the early 1990s it was recognized that there would be limits to the new interventionism, and in particular to the UN’s capacity to manage complex crises in collapsing states.\footnote{35} Nonetheless, the frequency with which humanitarian issues have been an element in justifications for actual interventions since 1990 confirms that there has been a significant change in the conditions in which international political decisions are taken.

To suggest that there has been a significant change in international relations, making the question of intervention more central than before, is not the same as

\footnote{32. ECOMOG (ECOWAS Monitoring Group) is a military force consisting of troops from Nigeria and some other West African states operating under the auspices of ECOWAS (the Economic Community of West African States). Its two main involvements have been in Liberia from August 1990 and Sierra Leone from May 1997. In both countries its role has not been confined to monitoring, but has included phases of direct support for one or another party in the civil wars. Its activities have been multi-faceted and controversial.}

\footnote{33. SC Res. 1132 of 8 October 1997 on Sierra Leone. This took note of previous decisions of the OAU and the ECOWAS; then, under Chapter VII, demanded that the military junta in Sierra Leone should relinquish power; called on it to cease all interference with the delivery of humanitarian assistance; and expressed strong support for ECOWAS actions, authorizing ECOWAS to ensure strict implementation of certain sanctions provisions.}

\footnote{34. See e.g., R. Wedgwood’s contribution to the editorial comments on ‘NATO’s Kosovo Intervention’ in 93 \textit{AJIL} (1999) at p. 832 and n. 22.}

saying that a completely new world has emerged in which the whole UN Charter-based body of law seeking to outlaw inter-state violence is fundamentally out of date, and needs to be replaced by a new interventionist regime. Such an argument, made in an article in *Foreign Affairs* at the time of the war over Kosovo, lacks both legal and descriptive rigour, and is not convincing.36

4. THE CASE FOR A ‘RIGHT OF HUMANITARIAN INTERVENTION’

This section sets out and assesses key considerations suggesting that there is, or ought to be, a right of humanitarian intervention. The subsequent section sets out considerations pointing in the opposite direction.

Since the early 1990s, in association with developing practice in the field, there has been much advocacy of a general right of humanitarian intervention, either as an existing right or as one that is in process of creation.37 The case for asserting a right of ‘humanitarian intervention’ in political morality and in international law involves a wide range of considerations, many based on developments which began long before 1990. Five groupings of considerations are offered here.

4.1 Developments in human rights law and international humanitarian law

In the years since 1945, many legal developments have made the actions of governments subject to international scrutiny and, ultimately, to certain forms of international pressure. In fields ranging from arms control to the environment there are international standards by which the conduct of states can be evaluated. Two main streams of international law, both of which relate to the treatment of individuals by governments, have been of particular significance for the concept of humanitarian intervention:

36. M. J. Glennon, ‘The New Interventionism: The Search for a Just International Law’, 78 *Foreign Affairs* (May/June 1999) pp. 2-7. The article is predicated on the claims that the transcendent problem addressed in the UN Charter was inter-state violence and that the Charter scheme is irrelevant to today’s problem, which is securing justice. Prof. Glennon asserts, grandly and incorrectly, that in Haiti, Somalia and Rwanda, ‘when the international community stepped in to halt the slaughter of civilians, it did so without the blessing of international law’. The author favours a new interventionist regime in support of justice, but says that it ‘might not at the outset be a legal one’.

1. Human rights law, including especially the law relating to torture and unlawful killing; and
2. The law of armed conflict (i.e., international humanitarian law), especially those aspects that address the protection of civilians.

Some international agreements concluded since 1945 contain provisions pointing towards a possible right of humanitarian intervention, at least when under UN auspices. The clearest example (which belongs equally to both the human rights and armed conflict streams of law) is the 1948 Genocide Convention, which specifies that any contracting state ‘may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide...’. 38

In the field of the law of armed conflict, certain provisions of the 1949 Geneva Conventions and 1977 Additional Protocol I can be interpreted as pointing to a basis for humanitarian intervention. Common Article 1 of the four 1949 Geneva Conventions states: ‘The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.’ 39 This is reiterated in Article 1(1) of 1977 Geneva Protocol I, on international armed conflicts; and this latter agreement additionally provides, in Article 89: ‘In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.’ These provisions have been followed in the 1990s by practices of states and the UN in which humanitarian considerations have been cited as a basis for military action. 40

Another possible basis for international military action is the 1994 Convention on the Safety of UN Personnel, which provides that ‘States Parties shall co-operate with the United Nations and other States Parties, as appropriate, in the implementation of this Convention, particularly in any case where the host State is unable itself to take the required measures’. 41 This could be taken as implying an obligation to


39. For an authoritative account of the origins and meanings of common Article 1 see F. Kalshoven, ‘The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit’, 2 YIHL (1999) pp. 3-61. This presents conclusive evidence that the negotiators at Geneva in 1949, in drawing up Art. 1, did not have in mind anything approaching a legal right of States Parties to take action regarding violations in conflicts in which they were not involved. They were in fact addressing a completely different issue. However, the author does accept that a moral if not legal right along the lines indicated has emerged.

40. For a judicious interpretation of these provisions of international humanitarian law, surveying the ways in which they can provide a basis for enforcement action by states and the UN, see L. Boisson de Chazournes and L. Condorelli, ‘Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests’, IRRC No. 837 (2000) pp. 67-87.

41. 1994 Convention on the Safety of United Nations and Associated Personnel, Art. 7(3). Since the Convention’s entry into force on 15 January 1999, several UN Security Council resolutions on operations in which UN forces were vulnerable have emphasized the need to observe the principles of this Convention. See for example, the following resolutions: on Sierra Leone, 1270 of 22 October 1999, paras. 13 et seq., and 1289 of 7 February 2000, preamble and para. 15; and on East Timor, 1264
take action (possibly even military action) in cooperation with the UN against a host state that fails to take effective measures to stop, say, extensive attacks on humanitarian workers who are part of a UN operation in that state.

Not all violations of human rights law, the law of armed conflict, or other parts of public international law, could justify intervention as a response. In this connection, the concept of ‘crimes against humanity’ has particular significance. This is not only because it defines certain very extreme crimes as internationally punishable but also because it has always encompassed, to a greater or lesser degree, the proposition that even a government’s actions against its own citizens may be the subject of international action. Put in its simplest form, the slaughter by a government of its own population cannot be allowed to go unpunished because of an excessive deference to the idea of sovereignty.

The idea of ‘crimes against humanity’, enunciated in the 1945 Nuremberg and 1946 Tokyo Charters, was reflected in the Nuremberg and Tokyo Judgments of 1946 and 1948 respectively, and in the 1948 Genocide Convention. In the 1990s, with renewed focus on the implementation of international humanitarian norms, the concept of ‘crimes against humanity’ was the subject of articles in the 1993 Statute of the International Criminal Tribunal for the former Yugoslavia (Art. 5), the 1994 Statute of the International Criminal Tribunal for Rwanda (Art. 3), and the 1998 Rome Statute of the International Criminal Court, which is not yet in force (Art. 7).

Underlying these developments in international law are two significant changes in how the state is viewed. First, there is a tendency to see the state as subject to certain international institutions, decisions and norms. Second, there is an emerging view that the state should be understood to be the servant of the people, not its master. This latter approach has been much emphasized by Kofi Annan. Some UN General Assembly resolutions have pointed in the same direction. A stronger variant of this view is that state sovereignty is vested in the people, not in the government. Neither of these changes in how the state is viewed constitutes in itself a general justification of humanitarian intervention. An argument for intervention based on the presumed failure of a government to represent the majority of a population would not be relevant in a case, such as Rwanda in 1994, in which a government could at least claim to represent a majority of the population and was

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44. See e.g., GA Res. 53/144 of 9 December 1998, ‘Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms’, which emphasizes individual human rights, but at the same time stresses that ‘the prime responsibility and duty to promote and protect human rights and fundamental freedoms lie with the state’.
engaging in crimes (in this case genocide) against a minority. However, such an argument can help to justify humanitarian intervention in cases, such as Haiti, in which an armed minority has seized power in a state, overthrowing a democratically elected government, and continues to defy international efforts to restore an elected government.\cite{45}

The development of the idea that state sovereignty may occasionally have to yield to urgent humanitarian considerations has a parallel in domestic law. Today, in many countries, we are less inclined than in earlier times to tolerate violence and rape behind the walls of the family home. Subject to certain safeguards, some limited rights of involvement in domestic violence have come to be widely accepted.

Behind the legal detail lies a fundamental problem which affects much international law, particularly human rights law and the law of armed conflict. This is the problem of the relation between law and power. If there is no effective means of implementing international law, it may be discredited. The old dictum that law without power is no law retains its meaning, and may in particular instances reinforce the case for humanitarian intervention to stop flagrant and repeated violations of basic norms. Lawyers sometimes see law as gradually replacing power politics, but in reality law and power have to operate in harness together; and humanitarian intervention may be one way in which they can do so.

4.2 Policies and acts of governments

The actual practice of states since 1945, and the justifications they have given for their military actions, suggests that the concept of humanitarian intervention has considerable appeal and utility. Even governments that have opposed a general doctrine of humanitarian intervention have in particular cases implicitly recognized the strength of the case for it.

The 1971 Indian decision to intervene by force in East Pakistan provides a clear example. When, following extreme cruelties perpetrated by Pakistani forces in the eastern part of Pakistan in 1971, India invaded the territory, it justified its actions in terms which, apart from encompassing an element of self-defence, were not totally different from the justifications for NATO action over Kosovo in 1999. Indian ministers and officials referred repeatedly to the urgency of responding to a situation that had resulted in ten million refugees fleeing from East Pakistan to India. On 4 December 1971, in a discussion in the UN Security Council on the Indian military action which had just commenced, the Indian representative (Mr Sen) said: 'We are glad that we have on this particular occasion nothing but the purest of motives and the purest of intentions: to rescue the people of East Bengal from what they are suffering.' The US representative (Mr George Bush) strongly opposed the Indian action: 'The time is past when any of us could justifiably resort

to war to bring about change in a neighbouring country that might better suit our national interests as we see them. Claims that India changed the record of this Security Council meeting so as to appear to have relied on a self-defence argument, and that no member of the Council supported the legality of humanitarian intervention, appear to be wrong, or at least over-stated. In a further Security Council meeting, held on 13 December, the Soviet representative (Mr Malik) made a strong justification of the Indian action, particularly on the grounds that a situation producing ten million refugees demanded action, and that this was a case in which the principle of self-determination should be applied. At the same meeting the Indian foreign minister (Swaran Singh) placed emphasis on Pakistan’s human rights violations in East Bengal, and he stated specifically that the massive violation of human rights was a direct threat to the security of nations. At these meetings, three resolutions, which India strongly opposed, calling for a withdrawal of forces and a cease-fire were defeated due to the Soviet veto.

The justifications offered for many other forcible interventions in the post-1945 period have included assertions about the need to alleviate the suffering of the inhabitants under their existing government. Such assertions have often only been one small part of a broader justification, concerned, for example, with self-defence, or with international peace and security. In many instances, including Vietnam’s intervention in Cambodia in December 1978, and Tanzania’s intervention in Uganda in 1979, the justifications offered contained numerous distinct elements, and did not rely heavily on humanitarian issues despite the record of criminal violence of the rulers of the invaded state who were, in each case, in the process of being dethroned.

The US-led intervention in Grenada in October 1983 was based on a claim not only to protect the lives of US citizens but also to stop the Grenada regime’s general

46. UN, Security Council Official Records (SCOR), 26th year, 1606th meeting, 4 December 1971, pp. 14-18, statement of Mr Sen (India); and pp. 18-19, statement of Mr Bush (USA).
47. Michael Akehurst later wrote, apropos this meeting, that in the official record of UN Security Council proceedings India deleted its statements suggesting a humanitarian justification for its military action, replacing them with claims that Pakistan had attacked India first. He also stated: ‘Certainly the reactions of other states provided no support for the legality of humanitarian intervention.’ M. Akehurst, ‘Humanitarian Intervention’, in Bull, ed., op. cit. n. 27, at pp. 96-97. These statements appear to be incorrect. Whether or not any amendments were made, the Indian justification as it appears in the printed record is mainly on the grounds of humanitarian considerations, especially Pakistan’s human rights violations. The Soviet Union strongly supported the Indian action, and while its representatives in the Security Council did not use the term ‘humanitarian intervention’ their arguments largely fell within that category. In the Security Council debate on 4 December 1971 the Soviet representative vetoed a ceasefire resolution promoted by the USA.
49. These three draft UN Security Council resolutions on the India-Pakistan war were defeated on 4, 5 and 13 December 1971. In each case the voting was 11 in favour, two against (Poland and the Soviet Union), and two abstaining (France and UK). Source: ‘Table of Vetoed Draft Resolutions in the United Nations Security Council 1946-1998’, Research Analysts Memorandum 2 (London, Foreign and Commonwealth Office September 1999) p. 25.
human rights violations against its own citizens. The Organization of Eastern Caribbean States (OECS), in a plea for outside military action which helped to legitimise the US action, referred to ‘the serious violations of human rights and bloodshed that have occurred and the consequent unprecedented threat to the peace and security of the region’. A draft resolution in the UN Security Council which ‘deeply deplored’ the armed intervention in Grenada was vetoed by the USA. However, the General Assembly, in a condemnatory resolution typical of the period, deplored the subsequent US-led military intervention as ‘a flagrant violation of international law’.

The interventions of the 1990s resulted in a revival of governmental statements justifying humanitarian intervention. In the case of Kosovo, the UK government took a significant though undramatic part in this process. In October 1998, with the crisis moving towards military action, the UK Foreign and Commonwealth Office circulated the following statement to allied governments, apparently on a confidential basis. While it is not such a considered summation of government policy as a further FCO statement issued a month later (see below), it is interesting evidence of official thinking at a time when NATO States’ policies on Kosovo were beginning to harden:

‘Security Council authorization to use force for humanitarian purposes is now widely accepted (Bosnia and Somalia provided firm legal precedents). A UNSCR would give a clear legal base for NATO action, as well as being politically desirable. But force can also be justified on the grounds of overwhelming humanitarian necessity without a UNSCR. The following criteria would need to be applied.

a) that there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;

b) that it is objectively clear that there is no practicable alternative to the use of force if lives are to be saved;

c) that the proposed use of force is necessary and proportionate to the aim (the relief of humanitarian need) and is strictly limited in time and scope to this aim – i.e. it is the minimum necessary to achieve that end. It would also be necessary at the appropriate stage to assess the targets against this criterion.

There is convincing evidence of an impending humanitarian catastrophe (SCR 1199 and the UNSG’s and UNHCR’s reports). We judge on the evidence of FRY handling of Kosovo throughout this year that a humanitarian catastrophe cannot be averted unless Milošević is dissuaded from further repressive acts, and that only the proposed threat of


51. The voting on the UN Security Council draft resolution on Grenada on 27 October 1983 was 11 in favour, one against (USA), and three abstaining (Togo, UK and Zaire). Source: 'Table of Vetoed Draft Resolutions 1946-1998', p. 34. The voting on the General Assembly resolution on the subject, GA Res. 38/7 of 2 November 1983, was 108 in favour, nine against, and 27 abstaining.
force will achieve this objective. The UK's view is therefore that, as matters now stand and if action through the Security Council is not possible, military intervention by NATO is lawful on grounds of overwhelming humanitarian necessity.\footnote{A one-page FCO note of 7 October 1998, 'FRY/Kosovo: The Way Ahead; UK View on Legal Base for Use of Force'. This note states that it was being circulated 'to all our NATO allies'. The author received a copy indirectly in 1999, and published it in an article in 41 Survival (Autumn 1999).}

The most carefully considered and definitive articulation of the UK government position was in the notably cautious wording of a short written answer made by a Foreign Office Minister, Baroness Symons, in the House of Lords in November 1998:

‘There is no general doctrine of humanitarian necessity in international law. Cases have nevertheless arisen (as in northern Iraq in 1991) when, in the light of all the circumstances, a limited use of force was justifiable in support of purposes laid down by the Security Council but without the Council’s express authorization when that was the only means to avert an immediate and overwhelming humanitarian catastrophe. Such cases would in the nature of things be exceptional and would depend on an objective assessment of the factual circumstances at the time and on the terms of relevant decisions of the Security Council bearing on the situation in question.’\footnote{Baroness Symons of Vernham Dean, written answer to Lord Kennet, Hansard, 16 November 1998, col. WA 140. The same basic line of UK government thinking on legal authority for military action over Kosovo can also be found in an FCO memorandum of 22 January 1999 which made brief additional reference to the possibility that circumstances could arise in which a use of force over Kosovo would be justified in terms of individual or collective self-defence. The text of the memorandum, and of the House of Commons Foreign Affairs Committee’s examination on 26 January 1999 of Mr Tony Lloyd MP, Minister of State at the Foreign Office, is in House of Commons Foreign Affairs Committee, Seventh Report – Kosovo: Interim Report (London, Stationery Office, July 1999, HC 188) pp. 1-15.}

The fact that so many NATO governments articulated or accepted public arguments for military action based largely on humanitarian grounds is evidence of some development of opinion in favour of the principle of humanitarian intervention – at least in the particular circumstances of Kosovo.

\subsection*{4.3 Parliamentary consideration}

In debating particular crises, some parliaments appear to have accepted that in extreme circumstances there can be a right of humanitarian intervention, even in...
the absence of a UN Security Council resolution. For example, a thoughtful debate about Kosovo in Canada’s House of Commons on 7 October 1998 indicated a consensus in favour.54

Later the same month, the German Bundestag debated the same issue, with particular reference to the question of German participation in possible air strikes against the Federal Republic of Yugoslavia. The German government spoke of the NATO threat of such air strikes as an instance of ‘humanitarian intervention’. As Bruno Simma has written:

‘The Bundestag finally gave its approval to German participation in NATO action. But it was stressed by all voices in favour of such participation, in particular by the Federal Government, that German agreement with the legal position taken by the Alliance in the specific instance of Kosovo was not to be regarded as a “green light” for similar NATO interventions in general. To quote Foreign Minister Kinkel before the Bundestag: “The decision of NATO [on air strikes against the FRY] must not become a precedent. As far as the Security Council monopoly on force is concerned, we must avoid getting on a slippery slope.”’ 55

4.4 The UN Secretary-General

Kofi Annan, since he became UN Secretary-General on 1 January 1997, has spoken eloquently of the need for intervention in cases of urgent humanitarian necessity. His first major contribution on this subject was in a speech at Ditchley in June 1998.56 At the beginning of the NATO bombing campaign over Kosovo in March 1999, he issued a statement which recognized that there were occasions when force might be necessary, but also referred to the importance of Security Council authorization. In a report he issued on 8 September 1999, he recommended that the Security Council should:

‘In the face of massive and ongoing abuses, consider the imposition of appropriate enforcement action. Before acting in such cases, either with a United Nations, regional or multinational arrangement, and in order to reinforce political support for such efforts, enhance confidence in their legitimacy and deter perceptions of selectivity or bias toward one region or another, the Council should consider the following factors:

(a) The scope of the breaches of human rights and international humanitarian law including the numbers of people affected and the nature of the violations;

(b) The inability of local authorities to uphold legal order, or identification of a pattern of complicity by local authorities;

54. Canada, 36th Parliament, 1st session, House of Commons, 7 October 1998, debating the innocuously worded resolution: ‘That this House take note of the dire humanitarian situation confronting the people of Kosovo and the government’s intention to take measures in co-operation with the international community to resolve the conflict, promote a political settlement for Kosovo and facilitate the provision of humanitarian assistance to refugees.’ Verbatim report of debate can be found at the Canadian Parliament website, www.parl.gc.ca.


(c) The exhaustion of peaceful or consent-based efforts to address the situation;
(d) The ability of the Security Council to monitor actions that are undertaken;
(e) The limited and proportionate use of force, with attention to repercussions upon
civilian populations and the environment.57

He pursued the same theme in his address to the UN General Assembly on 20
September 1999:

'While the genocide in Rwanda will define for our generation the consequences of
inaction in the face of mass murder, the more recent conflict in Kosovo has prompted
important questions about the consequences of action in the absence of complete unity on
the part of the international community.
It has cast in stark relief the dilemma of what has been called humanitarian intervention:
on one side, the question of the legitimacy of an action taken by a regional organization
without a United Nations mandate; on the other, the universally recognized imperative of
effectively halting gross and systematic violations of human rights with grave humani-
tarian consequences.
The inability of the international community in the case of Kosovo to reconcile these two
equally compelling interests – universal legitimacy and effectiveness in defence of
human rights – can only be viewed as a tragedy. ...
This developing norm in favour of intervention to protect civilians from wholesale
slaughter will no doubt continue to pose profound challenges to the international
community.
Any such evolution in our understanding of State sovereignty and individual sovereignty
will, in some quarters, be met with distrust, scepticism, even hostility. But it is an
evolution that we should welcome.'58

4.5 The UN Security Council

The UN Security Council’s involvement in questions relating to humanitarian
intervention has to be seen against the background of its extensive involvement in
issues of humanitarian law and assistance in the post-Cold War period. In
numerous conflicts, whether civil or international or a combination of the two, it
has not merely requested, but actually demanded, that humanitarian norms should
be observed and humanitarian assistance delivered. Whether or not peoples in
emergency situations possess a general ‘right of humanitarian assistance’, the
Security Council acts on the basis that it can, if it so decides, require parties to
cooperate with such assistance.

Since the UN Security Council has explicitly authorized at least two interven-

57. 'Report of the Secretary-General to the Security Council on the Protection of Civilians in
cit. n. 43, at pp. 38-39 and 44.
59. SC Res. 794 of 3 December 1992, on Somalia; and SC Res. 940 of 31 July 1994, on Haiti.
tions which might be labelled 'humanitarian' (Somalia and Haiti), the Council might appear to accept that humanitarian intervention is, at the very least, an occasional necessity. However, in these cases in which it approved interventions on largely humanitarian grounds, it used language emphasizing the uniqueness of the particular situation addressed. The key Security Council resolution on Somalia, passed in 1992, said in the Preamble: 'Recognizing the unique character of the present situation in Somalia and mindful of its deteriorating, complex and extraordinary nature, requiring an immediate and exceptional response'. Two years later, almost identical wording was used in the equivalent resolution on Haiti. It appears that these phrases were inserted at the insistence of members of the Council who were nervous about creating precedents for interventions. Thus the Council's approval of particular instances of humanitarian intervention has stopped short of general doctrinal endorsement.

In 1998-99, the Kosovo crisis forced the Security Council to address the difficult question of the legality of an intervention in a case in which the Security Council had agreed on the seriousness of a problem, and had identified it as a threat to international peace and security, but had not been able to agree on military action. The fact that the Security Council could not agree on military action over Kosovo in 1999 does not mean that military action taken by member states was necessarily illegal. On 26 March 1999, two days after the NATO bombing of Yugoslavia began, the Security Council considered a draft resolution sponsored by Russia (and supported by two non-Council members, India and Belarus) calling for 'an immediate cessation of the use of force against the Federal Republic of Yugoslavia'. Only three states voted in favour (Russia, China and Namibia), and twelve against. In the debate, the speeches in support of the resolution did not address in any detail the question of what to do about Kosovo. The representative of Slovenia, which was among the states opposing the resolution, made the key point that the Security Council does not have a monopoly on decision-making regarding the use of force. It has 'the primary, but not exclusive, responsibility for maintaining international peace and security'. The Security Council vote on 26 March was implicit acceptance that an action initiated outside the Security Council is not necessarily illegal.

If it is accepted that the Security Council itself does have the right to authorise intervention on humanitarian grounds, there is some logic in asserting that regional bodies or possibly individual states should, in extreme circumstances, be able to intervene even when the Security Council cannot agree on a positive course of action. If crimes against humanity justify intervention, can it be right that such intervention is subject to a veto from any one of the five permanent members – especially as some of them have a record of limited respect for human rights and opposition to the idea of humanitarian intervention? The argument for regional international organizations, or even individual states, being able to act is bound to be particularly strong in those cases in which the Security Council has decided that a crisis constitutes a threat to peace and security, and has defined key policy objec-

tives in regard to it, but has proved unable to agree on military action. In such cases, the Security Council’s positions create an expectation of some kind of action; and if member states could never act independently of the Security Council, there is a risk that the Security Council itself would become discredited.  

5. THE CASE AGAINST A ‘RIGHT OF HUMANITARIAN INTERVENTION’

If the considerations suggesting that there is, or ought to be, a right of humanitarian intervention seem to be strong, so, too, do those pointing in the opposite direction. The events of the 1990s, including the Kosovo War of 1999, have not significantly dented the strength of the considerations against humanitarian intervention. Again, these are loosely grouped under five main headings.

5.1 Lack of a treaty basis

No treaty or other international legal document recognizes explicitly a right of humanitarian intervention. While many critics of humanitarian intervention do concede that, under Chapter VII of the UN Charter, the Security Council has a right to take a wide range of military actions in cases where there is a threat to international peace and security, they argue that there is very little in the Charter, or in other treaties, which can be interpreted as giving support to humanitarian interventions not authorized by the UN Security Council.

Treaties in the fields of human rights and international humanitarian law do of course require states to observe well-defined standards, and to prevent and punish certain violations of those standards, but they do not state that forcible military intervention is among the means of implementation. The only possible exception is the 1948 Genocide Convention, but that firmly places the prevention of genocide in the hands of the United Nations. The advocates of a right of humanitarian intervention not authorized by the Security Council must therefore rely largely on moral considerations, arguments relating to customary law, or the opinions of writers, to buttress their claims.

The dubious legality of humanitarian intervention not explicitly authorized by the UN Security Council was particularly stressed by a number of respected international lawyers at the time of the NATO war over Kosovo. For example, even though they had considerable sympathy with the objectives of the NATO

61. The question of authorization, as one criterion for intervention, is explored further below in section 6.4.

62. For a strong denial, in the light of the Kosovo events, that there is a right of humanitarian intervention, see the two undated memoranda submitted by Professor Ian Brownlie QC to the UK House of Commons, Foreign Affairs Committee, published in its Fourth Report – Kosovo, Vol. II, Minutes of Evidence and Appendices (London, Stationery Office, May 2000, HC 28-II), pp. 217-241. As indicated in para. 3 of the first memorandum, Brownlie acted as counsel on behalf of the Federal Republic of Yugoslavia in the proceedings in the International Court of Justice in which the FRY sought provisional measures directing a halt to the NATO operation.
operation, and considered that ‘only a thin red line’ separated it from international legality, both Bruno Simma and Antonio Cassese argued that it was a violation of existing international law, and particularly of Article 2(4) of the UN Charter. A question that arises from such analyses is: What would suffice as legal underpinning for humanitarian intervention? Is the apparent assumption of these authors correct, that definite black letter law is needed, or could there be a gradual process of, for example, reinterpretation of the meaning of Article 2(4)?

5.2 Provisions respecting sovereignty in agreements on humanitarian issues

A number of agreements in the fields of international humanitarian law and humanitarian assistance contain provisions which appear to exclude the idea that such agreements could provide a basis for military intervention. These provisions, seldom mentioned by advocates of humanitarian intervention, are to be found mainly in international humanitarian law treaties and in resolutions of the UN General Assembly on humanitarian assistance.

Since the question of humanitarian intervention arises primarily in connection with situations that are internal to a particular state, the main part of international humanitarian law that is relevant is that which relates to non-international armed conflicts. The main treaty which is in principle applicable in such situations is the 1977 Geneva Protocol II. Its Article 3, entitled ‘Non-intervention’, states (in full):

1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.
2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

Treaties applicable in international armed conflicts contain some comparable, albeit less strong, wording. Although the four 1949 Geneva Conventions, and the 1977 Geneva Protocol I on international armed conflicts, do contain certain provisions which could be interpreted as being compatible with enforcement actions, and even possibly interventions to stop violations of humanitarian norms, there is no explicit approval of such intervention. Moreover, 1977 Geneva Protocol I contains this clause in the Preamble:

Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations, ...

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The 1998 Rome Statute of the International Criminal Court, which is not yet in force, and which will apply to both international and non-international armed conflicts, emphasizes in the Preamble that:

... nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State ...

The 1999 Second Hague Protocol on Cultural Property, also not yet in force, reaffirms state sovereignty and non-intervention in its chapter on non-international armed conflicts, Article 22(3) and (5). It does so in sweeping terms virtually identical to those of the 1977 Geneva Protocol II, Article 3, quoted above.

It is true that, in a case of genocide, an intervention (at least if under UN auspices) would be consistent with the provisions of the 1948 Genocide Convention. However, apart from that case, the net effect of the provisions of international humanitarian law cited here is to call into question the idea that there is a general right of intervention as a response to violations of international humanitarian law.

In parallel with these developments in international humanitarian law, UN General Assembly resolutions since the late 1980s on the subject of aid to victims of emergency situations have at one and the same time asserted the primary importance of such aid, and the continuing validity of the principle of state sovereignty. For example, Resolution 43/131, adopted in 1988 after the earthquake in Armenia, reaffirms in the preamble ‘the sovereignty, territorial integrity and national unity of States’, and goes on to say in its first two operational paragraphs that the General Assembly:

1. Reaffirms the importance of humanitarian assistance for the victims of natural disasters and similar emergency situations;
2. Reaffirms also the sovereignty of affected States and their primary role in the initiation, organization, co-ordination and implementation of humanitarian assistance within their respective territories.\(^{64}\)

Some have considered this and subsequent General Assembly resolutions as evidence of an emerging ‘right to humanitarian assistance’, or even as a basis for a right of humanitarian intervention.\(^{65}\) However, it is very hard to read the provisions of these resolutions as going beyond the position of inviting, appealing to, and urging states to facilitate the work of intergovernmental and non-governamental humanitarian organizations.

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\(^{65}\) See e.g., the report of the XVIIth Round Table of the Institute of Humanitarian Law, San Remo, on ‘The evolution of the right to assistance’, IRRC, No. 291 (1992) pp. 592-602; and C. Guicherd, ‘International Law and the War in Kosovo’, 41 Survival (Summer 1999) p. 22. In both these sources there is also reference to the practice of the UN Security Council, for example in demanding that parties to a particular conflict should cooperate with international bodies in the delivery of humanitarian aid, as evidence of a right to assistance.
5.3 Opposition of states

A critical test that any emerging norm or practice must pass, if it is to be accepted as part of international law, is that it is supported by states. Humanitarian intervention does not pass this test. Several large and powerful states (China, India and Russia) have expressed strong opposition to the principle of humanitarian intervention. Equally important, large numbers of post-colonial states, particularly in Africa and Asia, have opposed it. Many such states have a healthy suspicion of the proposition that the motives of would-be intervenors are, and will remain, purely humanitarian. Also, many such states see themselves as vulnerable to foreign intervention, and are understandably sensitive about threats to their newly-won sovereignty. In some cases, other and less creditable considerations are involved, including the desire of oppressive regimes to stop the emergence of a new norm that might upset their monopoly of power within their states. In the 1999 UN General Assembly debate following Secretary-General Kofi Annan’s address of 20 September, only eight states supported the position he took on the ‘developing norm in favour of intervention to protect civilians from wholesale slaughter’. The great majority of states addressing this matter were opposed.66

In April 2000 the final document of a meeting of foreign ministers of the Movement of Non-Aligned Countries stated:

‘We also want to reiterate our firm condemnation of all unilateral military actions including those made without proper authorisation from the United Nations Security Council or threats of military action against the sovereignty, territorial integrity and independence of the members of the Movement which constitute acts of aggression and blatant violations of the principle of non-intervention and non-interference. ...

We reject the so-called “right” of humanitarian intervention, which has no legal basis in the UN Charter or in the general principles of international law. ...’67

5.4 Doubts about the term ‘humanitarian’

The very term ‘humanitarian intervention’ raises a daunting number of questions, many of which are concerned with disentangling the varied motives that may be involved, or be perceived as involved, in any operation. Does the label ‘humanitarian’ not conceal a range of other motives for, interests in, and outcomes of an action? Even if an intervention has its origins in genuine concern about atrocities, it may be perceived by other states as an act of expansionism and a strategic threat.

66. A. Kane (Director, Americas and Europe Division, UN Department of Political Affairs), address at Marshall Center, Garmisch, 16 May 2000.

67. Movement of the Non-Aligned Countries, XIII Ministerial Conference, Cartagena, Colombia, 8-9 April 2000, Final Document, extracts from paras. 11 and 263. There are 115 countries in the Movement. Text and information from the Non-Aligned Movement site at www.nam.gov.za. It is coincidental that the wording and quotation marks in para. 263 and in the title of the present article are identical: the title was decided before the author came across the text of the Cartagena statement.
The views of Russia in respect of NATO’s 1999 war over Kosovo reflected such considerations, which were reinforced by Russia’s sense of slight caused by the recent accession to NATO of three former allies, Poland, the Czech Republic and Hungary.

In some of its versions, the idea of humanitarian intervention as it has developed since 1990 is distressingly close to doctrines that inspired European colonialism over a century earlier. The unhappy history of the Belgian Congo has its origins in King Leopold’s proclamation of humanitarian aims at the Geographical Conference which he convened in Brussels in September 1876; and that in that connection Ferdinand de Lesseps declared the task of opening up Central Africa to be ‘the greatest humanitarian work of this time’. The subsequent history of the Belgian role in Central Africa is a sobering reminder of the terrible consequences that can flow from purportedly humanitarian beginnings.

5.5 The poor record of humanitarian interventions

The results of interventions based on humanitarian grounds has a bearing on the question of whether there ought to be a right of humanitarian intervention. Some of the interventions of the 1990s did achieve important results. Large numbers of refugees were enabled to return to their homes, including in northern Iraq, Haiti, Kosovo and East Timor. Generally, however, such interventions do not have an impressive record of achieving their objectives or achieving a stable political order. For example, neither in Somalia following the US-led intervention in 1992, nor in Haiti following the US-led intervention in 1994, has there been a fundamental departure from long-established patterns of fractured and violent politics. In northern Iraq and Kosovo, interventions on humanitarian grounds did not, and perhaps could not, resolve issues of ethnic rivalry and disputes over political status.

6. CRITERIA FOR INTERVENTION

The arguments outlined above on both sides of the issue do converge at certain points. Many who have argued for a right of humanitarian intervention have indicated that it is at best law in process of formation, and still needs development and clarification, especially as regards conditions to be satisfied if intervention is to be justified. Similarly, some (though by no means all) of those who have argued that such a general right does not at present exist have sought to suggest ways in which it might be developed, and, similarly, have put forward conditions to be met, even in the absence of Security Council authorization.69

Indeed, almost all attempts to develop a consistent doctrine of humanitarian

69. See esp. Cassese, loc. cit. n. 63, at p. 27.
intervention have depended heavily on the idea that a set of conditions or criteria should be formalized that would assist in determining whether, in a particular case, a humanitarian intervention would be justified. Extensive agreement on criteria would be evidence of an emerging doctrine, might make the idea of humanitarian intervention more acceptable to critics, and could also be a safeguard against abuse. Significant expositions of criteria have included those by UK Prime Minister Tony Blair in his speech in Chicago on 22 April 1999; UN Secretary-General Kofi Annan in his report of 8 September 1999 quoted above; a number of speakers in the UN General Assembly in 1999; Canadian Foreign Minister Lloyd Axworthy in a lecture in New York on 10 February 2000; and UK Foreign Secretary Robin Cook in a speech in London on 19 July 2000. There have also been some useful expositions of criteria from writers and research institutes.

Even if there is doubt about the possibility of obtaining general agreement on a right of humanitarian intervention, it is useful to consider criteria for intervention. Granted that such interventions may occasionally happen, and are likely to involve a conflict with the law restricting the resort to force, it is especially important to clarify the legal and moral basis of such intervention.

The idea of general criteria by which to evaluate decisions on the use of force has a long history, including in the ‘Just War’ tradition. It is certainly useful to bear such criteria in mind and adapt them to the question of humanitarian intervention. Most attempts to develop criteria for humanitarian intervention address the following issues:

1. Scope of atrocities.
2. Responsibility for atrocities.
3. Exhaustion of peaceful and consent-based remedies.
5. The interests and concerns of intervening powers.
6. Purposes and results of intervention.
7. Observance of humanitarian norms by intervening forces.

A survey of these issues, against the background of actual cases of intervention, suggests that they constitute critical factors all of which have to be considered in any decision to use force for humanitarian purposes. However, they are no more

70. In outlining ‘five major considerations’ which could assist in deciding ‘when and whether to intervene’, Blair stated: ‘I am not suggesting that these are absolute tests. But they are the kind of issues we need to think about in deciding in the future when and whether we will intervene.’ Tony Blair, ‘Doctrine of the International Community’, speech in Chicago, 22 April 1999, text on the Downing Street website, www.number-10.gov.uk.

71. See for example the speech of the Foreign Minister of Singapore, Mr Shunmugam Jayakumar, at the UN General Assembly on 24 September 1999, stating that ‘rules and objective criteria for such interventions are urgently needed’.

72. Canadian Foreign Minister, Lloyd Axworthy, Hauser Lecture at New York University School of Law, 10 February 2000. Text on file with author. Reference to the lecture, and information on how to obtain a text, is on the New York University website at www.law.nyu.edu.

than criteria for consideration. They do not constitute a simple checklist which, if it were to accumulate enough ticks, would be seen as legitimizing intervention. At best they suggest some necessary but not sufficient conditions for deciding on intervention. As the following discussion indicates, each issue involves problems and is likely to be perceived differently in different states. Such criteria are inherently difficult to develop, and can at best be a set of rough guidelines rather than defined legal preconditions for intervention.

6.1 Scope of atrocities

Most attempts to devise criteria put much weight on the proposition that only the most serious and massive violations of human rights and international humanitarian law can justify intervention. In many such propositions it is suggested that there must be crimes against humanity in which hundreds or thousands of innocent people are killed. However, three principal problems arise.

(1) This criterion, if based on the extent of crimes actually committed or the numbers of casualties, fails to take into account the fact that humanitarian interventions almost always have a preventive function. They are justified largely in terms of saving lives that might otherwise be lost. The heavy emphasis on preventive diplomacy and action in much contemporary diplomatic discourse makes it likely that the preventive function of humanitarian intervention will continue to be important. Hence the rationale for intervention must depend crucially, not on actual crimes or hard numbers, but on speculative judgements about the likely future course of events in a given country.

(2) If this criterion is based on numbers of casualties within the target state, for example as a proportion of the general population, it may be too mechanical. In particular such a criterion may appear to downgrade the importance of relevant considerations such as: the previous record of a ruler in other conflicts; the particular circumstances that led to casualties; and the fact that a humanitarian catastrophe may be serious even if there are few casualties. For example, in Kosovo in the first months of 1999, before the NATO bombing commenced, there were relatively few deaths, but approximately 500,000 people (out of the total population of two million) had fled their homes, whether as internally displaced or as refugees in foreign countries.

(3) A formal criterion relating to the scope of violations is of limited utility because states simply do not in fact respond at all consistently to atrocities. Such a criterion might merely illuminate the uncomfortable fact that peoples and governments are selective about which atrocities they notice, care about, and take forceful action to stop.

6.2 Responsibility for atrocities

Before intervention is initiated, there has to be a serious effort at identification of which individuals and organizations are responsible for the atrocities. Whether it is the government of the territory concerned, or some non-state groups within the state, it must be shown that those responsible have failed to cooperate with initia-
atives designed to stop the crimes. If the atrocities are not committed by the central authorities, it must be shown that the state authorities have proved unwilling or unable to end the crimes.

This criterion, straightforward in theory, can be controversial in some individual cases. In certain conflicts in the 1990s, parties appeared to cooperate with international initiatives to stop killings but then reneged on their commitments. In these and other circumstances there may be sharply differing interpretations of the causes of violence and the best means of ending it.

6.3 Exhaustion of peaceful and consent-based remedies

This criterion, which is fundamental, is based on the idea that the use of force must be a measure of last resort when nothing else will suffice. It suggests that all possible attempts at peaceful or at least consent-based resolution of a crisis should be made before there is a forceful intervention. Such attempts, which need to be consistent with the urgency of the situation, can encompass negotiating a change of policy, trying to secure host state consent for the presence of foreign monitors or troops, organizing arms embargoes and economic sanctions, and even threatening to use force.

Again, a criterion which is straightforward in theory can be difficult in practice. First, in the face of urgent and overwhelming catastrophe, is it really necessary to climb painfully up the ladder of alternatives? Second, if such an ascent is attempted, there may be very different judgements as to whether a particular diplomatic effort at peaceful resolution was in fact sincere and even-handed; and, even if it is agreed that it was, there may be disagreements about the point at which peaceful resolution can be deemed to have failed. Similarly, if there has been an attempt to bring about a change of policy through economic sanctions or similar measures, there are bound to be controversies about determining the moment at which such measures can be deemed to have failed, or to have proved too slow in bringing about urgently needed change.

The criterion that before any humanitarian intervention a serious attempt must be made to secure the presence of foreign forces by consent is also apparently straightforward. Consent is important for practical reasons; and, especially in the case of interventions not explicitly approved by the UN Security Council, it is also important to perceptions of the legitimacy of the operation. However, the practice of the 1990s suggests that the question of whether there is or is not consent on the part of the government of the target state is much more subtle and complex in reality than it has been in legal and moral theory. In many cases, as in northern Iraq, Haiti and Kosovo, some degree of host state consent was given, but only after the clear threat, or even sometimes the actuality, of a use of force without consent. In other cases, as happened in respect of Indonesia in September 1999, the exercise of a wide range of economic and other pressures against a sovereign state was a necessary prelude to an intervention by consent. In yet other cases, as in Bosnia from 1992 onwards, a UN role was established by consent of warring parties, but the relevant Security Council resolutions contained more than a hint that the UN presence might continue even if one or another party withdrew consent. In short,
Host state consent is a murky issue, involving many gradations and different phases. A paradoxical conclusion can be drawn from some of the instances cited, that a willingness to intervene without consent can be a necessary prelude to the securing of consent.

6.4 Authorization and legitimation of intervention

All proposals for developing a coherent notion of humanitarian intervention have devoted much attention to the authorization of such intervention. The question of which bodies (the state, or international organizations whether regional or global) might have authority to initiate humanitarian intervention, has long been discussed: some writers in the Nineteenth and early Twentieth Centuries stressed the requirement that such intervention be authorized by ‘the whole body of civilized states’ or at least should have broad support among them. 74

At least in principle, the possibility that the society of states, acting through regional or global bodies, can authorize particular acts of intervention must weaken one traditional objection to humanitarian intervention. A main foundation of the non-intervention rule has been a concern about states acting unilaterally, pursuing their own interests, dominating other societies, and getting into clashes and wars with each other. If an intervention is authorized by an international body, and has specific stated purposes, this concern begins to dissolve.

6.4.1 Authorization by the UN Security Council

In the various attempts to devise criteria for intervention, it appears to be universally agreed that UN Security Council approval is highly desirable; and it is widely accepted that an attempt to obtain Council support should always be made. When the Security Council has explicitly authorized interventions on largely humanitarian grounds – as it did in Somalia in 1992 and Haiti in 1994 – the legality of the decision authorizing intervention has not been widely challenged, despite the absence of host state consent.

However, as has been seen over both northern Iraq in 1991 and Kosovo in 1999, the question of what constitutes Security Council approval does not always have a simple answer. The Security Council may be willing to proclaim the existence of an extreme humanitarian emergency, and even to convey a threat of force against the offending state, but still stop short of approving the actual use of force. When force is used, the Security Council may refuse to condemn it, and it may even, in later resolutions, give some retrospective legitimacy to an operation.

Even an ambiguous stance by the UN Security Council may favour a particular intervention. In 1998-99 the Council, even though it did not explicitly will the means, had clearly identified certain objectives to be pursued in relation to Kosovo, and that fact was frequently cited by NATO governments as evidence of the legitimacy of their cause. However, in that and other cases two questions remain.

74. Hall, op. cit. n. 3, at p. 344.
Desirable as Security Council approval is, is it essential? And if UN Security Council approval is either absent or ambiguous, can approval by other bodies be a substitute?

One theoretical possibility is that, in cases where the UN Security Council is unable to act, the matter should be addressed by the UN General Assembly under its 'Uniting for Peace' procedure. This requires a two-thirds majority of the General Assembly. In particular long-running crises there might appear to be a certain logic in pursuing this procedure. However, the permanent members of the Security Council show no sign of wishing to see their powers in matters of international peace and security transferred to the General Assembly, and are likely to oppose efforts in that direction. There are in any case two serious difficulties with this procedure. (1) Getting a two-thirds majority is likely to be slow and cumbersome. A time-consuming process of decision-making is a luxury in a situation of extreme urgency in which large numbers of people are at risk of being killed. (2) The General Assembly only has power to make recommendations on such matters, not decisions with binding force.

Although the desirability of UN Security Council authorization for any humanitarian intervention is widely accepted, even by many who would otherwise challenge the existence of a right of humanitarian intervention, there are difficulties about viewing such authorization as absolutely essential. Such a conclusion would mean accepting that Russia and China have an absolute veto on interventions, with the effect that any government able to count on their support at the UN could engage in mass killings with a degree of impunity. It would also mean that the views of states in the region concerned count for little or nothing. It is not surprising that in practice regional bodies have had a significant role in issues relating to humanitarian intervention.

6.4.2 Authorization by regional organizations

A route which has in fact been followed in many crises has been to seek authorization from a regional international organization or alliance, either in addition to or as a substitute for the Security Council. This approach has been articulated by the then-UK Foreign Secretary Robin Cook in the last of six principles which he put forward as part of a framework to guide intervention:

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75. On 3 November 1950, the Western powers, needing continued support for their military action in Korea, secured the passage of GA Res. 377 (V), known as the ‘Uniting for Peace’ resolution, which stated that ‘if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary.’

'Sixth, any use of force should be collective. No individual country can reserve to itself the right to act on behalf of the international community. Our intervention in Kosovo was a collective decision, backed by the 19 members of NATO and unanimously by the 42 European nations which attended the Washington NATO Summit in April 1999. Our own preference would be that, wherever possible, the authority of the Security Council should be secured.'

Regional authorization is sometimes seen as a poor substitute for that of the Security Council. Among the disadvantages of regional bodies is the awkward fact that even within one region there are often several such bodies, some of them dominated by a major regional power, so it is far from obvious which particular one is appropriate to handle a given problem. Furthermore, the provisions of Chapter VIII of the UN Charter provide for Security Council control over the enforcement actions of regional arrangements or agencies. Concern about the rigidity of these provisions has led some regional groupings, most notably NATO, to avoid defining themselves as regional arrangements or agencies within the meaning of Chapter VIII, and to emphasize instead their function of collective self-defence as recognized by Article 51 (which is in Chapter VII).

Regional organizations and alliances do appear to have some independent capacity to legitimize certain military interventions, including on humanitarian grounds. In general, if regional bodies of various kinds can provide legitimation for particular interventions, it is not because of the Charter provisions about regional arrangements, but because strong regional support for an intervention is evidence, though hardly conclusive proof, that it represents a legitimate cause. Moreover, in some cases an operation which was originally authorized at regional level may get at least a measure of subsequent Security Council legitimation. Possible cases of this include the Nigerian-led actions in Liberia from 1990 and in Sierra Leone in 1997-99, and the NATO action over Kosovo in March-June 1999.

A separate but related question is whether regional bodies can claim that the

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77. Cook, supra n. 73.
78. See above, section 2.1.
79. However, the term 'regional security organizations or arrangements' has been applied to NATO in certain UN Security Council resolutions: see e.g., para. 9 of SC Res. 836 of 4 June 1993, addressing the protection of the six 'safe areas' in Bosnia-Herzegovina. Moreover, NATO was one of a large number of international bodies which participated in a meeting on cooperation between the UN and regional organizations on the maintenance of international peace and security, UN Headquarters, New York, 1 August 1994.
80. See e.g., on Sierra Leone, SC Res. 1132 of 8 October 1997, on Sierra Leone. This took note of previous decisions of the Organization of African Unity (OAU) and the Economic Community of West African States (ECOWAS) and expressed strong support for ECOWAS actions, authorizing ECOWAS to ensure strict provisions of certain sanctions. Two years later, SC Res. 1270 of 22 October 1999 reiterated the Security Council's 'appreciation of the indispensable role which ECOMOG forces continue to play in the maintenance of security and stability and in the protection of the people of Sierra Leone ...'.
81. Some have seen SC Res. 1244 of 10 June 1999 as conferring a degree of legitimacy on the NATO military action over Kosovo. This is debatable. It did, however, unambiguously authorize the international security presence in Kosovo that was largely the result of the military campaign.
authorization of military intervention in a state without its consent is within their powers under their own constitutive instruments. This question arose in connection with NATO’s Operation Allied Force in March-June 1999. The justifications for the action over Kosovo made by NATO member states and spokespersons did not rely exclusively on humanitarian intervention, and included a number of other elements. However, to the extent that they did rely on considerations of a ‘humanitarian intervention’ nature, they raised the question of whether such action violated the terms of the 1949 North Atlantic Treaty, which is based on the idea of collective self-defence against armed attack. There is no doubt that the action went beyond what had been envisaged in that treaty. However, there is a long history of international bodies, including the UN and NATO itself, taking action which goes beyond their original constitutive documents. In NATO procedural terms, since the Kosovo operation in 1999 had the formal support of all NATO member governments, it could not easily be faulted on constitutional grounds. The fundamental question was its legitimacy under international law generally rather than under the NATO treaty in particular.

6.4.3 Authorization by a state acting unilaterally

In the post-Cold War period, no state has explicitly defended a right of states to engage in humanitarian intervention unilaterally. However, some states may harbour a wish, not always publicly articulated, to reserve some residual right to act unilaterally in certain extreme circumstances. India’s action over East Bengal in 1971 was unilateral, but special considerations were involved: it followed Pakistani air attacks on India on 3 December 1971 and it was in support of local Mukti Bahini forces in East Pakistan. India only acted after securing strong support from the Soviet Union, which (apart from providing military assistance) was able to veto draft Security Council resolutions that would have undermined India’s military campaign; and the care with which India presented its case in the United Nations after the commencement of the military action demonstrated a strong awareness of the need for international legitimacy.

6.4.4 Other sources of legitimacy

Legitimacy does not just come from the number of states approving an action but from other considerations as well. In particular, intervention may be implicitly or

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explicitly legitimized by political movements within a country that represent an oppressed population, or by a legitimate government in exile that has been ousted in an invasion or coup d'état. In addition, the fact that states supporting an action are democracies may be considered persuasive.

Some interventions may be viewed as relatively uncontentious even though lacking formal approval from any international body. This was the case with the US-led intervention in northern Iraq which began on 17 April 1991. In some respects (heavy refugee flows, and Security Council resolutions willing the end but not the means) the situation was similar to that in Kosovo eight years later. However, the context in which these events unfolded was such that the operation on the ground was relatively uncontentious. The intervention was never likely to result in a military riposte from Iraq – which had recently suffered huge reverses in a war – and it had a direct, immediate and visible effect in enabling the refugees stranded on the border between Iraq and Turkey to return home. Judgements about the legitimacy of an action depend not only on which international bodies give it formal approval, but also, quite properly, on perceptions of the facts on the ground.

Equally, some interventions may have a strong legal basis in the form of explicit UN Security Council approval, and yet quickly lose their legitimacy owing to a failure to achieve their humanitarian objectives or to adhere to humanitarian norms. The unravelling of the UN Operation in Somalia II (UNOSOM II) in 1994-95, following its losses in violent incidents and its involvement in killings of Somalis, is the clearest example.

From the cases considered here it is extremely difficult to devise a general rule about the proper authorization of humanitarian intervention. It is beyond dispute that explicit approval from the UN Security Council is of inestimable value, and that similar approval from a major regional body is also important. However, it is not possible to conclude that in absolutely every case such formal approval is essential to international acceptance of a particular operation.

6.5 The interests and concerns of intervening powers

When there is a humanitarian crisis, outside powers may be reluctant to intervene if they have no obvious and pressing interest in the country concerned, as was the case in Rwanda in April-May 1994. The reluctance will be especially marked if – as in Tibet from 1950 onwards, or in Chechnya from 1994 onwards – the source of concern is the action of a powerful state that would strongly oppose any external intervention in what it claims is its territory.

Against this background, it is extremely difficult to envisage any international order in which outside forces would be willing to intervene in humanitarian crises primarily on the basis of the urgent needs of threatened peoples. Other considerations of the kinds indicated necessarily intrude on decision-making.

In the literature on humanitarian intervention it has often been stressed that any intervention must be disinterested: the powers involved must not have economic or power-political motives for their action, and must not seek territorial or other aggrandizement. However, ‘interests’ can include a wide range of factors; and inevitably, in particular cases, certain interests are involved. In the case of Kosovo,
for example, the Member States of NATO had an interest in ending the flight of refugees from Kosovo, in addressing causes of instability in the Balkans, and in restoring the military credibility of the alliance after Milošević had ignored its threats. In connection with Kosovo, some advocacy of intervention openly acknowledged that interests could be a legitimate consideration in deciding whether to intervene. In his Chicago speech on 22 April 1999, Tony Blair included interest as the last item in his list of ‘five major considerations’ on when and whether to intervene: ‘And finally, do we have national interests involved? The mass expulsion of ethnic Albanians from Kosovo demanded the notice of the rest of the world. But it does make a difference that this is taking place in such a combus-
tible part of Europe.’

The fact that certain interests are involved in cases of humanitarian intervention reinforces the doubts about whether humanitarian intervention is an entirely separate category. It also suggests that the relevant criterion should not be whether the intervening powers are entirely disinterested but whether the interests of the intervening powers are viewed by other states as reasonable, and are compatible with the rights and interests of those being protected.

6.6 Purposes and results of intervention

A curious problem in much past writing about humanitarian intervention has been the lack of any systematic attention to what the intervening armed forces are actually supposed to do, and also what the eventual results of such interventions are supposed to be. The implicit assumption has often been that the mere presence of foreign military forces, and/or their initial action in stopping ongoing atrocities, will create the conditions for lasting improvement. Often, however, the circum-
stances within a target society that give rise to humanitarian intervention are deeply ingrained, and are not fundamentally changed by a temporary injection of foreign military forces.

An obvious and crucial criterion for any humanitarian intervention is that there should be a serious prospect of achieving results. This has some difficult aspects, including (1) addressing the root causes of the crisis which has created the need for intervention; (2) instituting changes in the political order in the territory concerned; and (3) being prepared for a long-term involvement. All three of these aspects militate against any idea that humanitarian intervention can be essentially non-
political, and involves no threat to the status and sovereign rights of the country in which the intervention takes place. An emphasis on humanitarianism sometimes conceals an underlying failure to think about, or secure agreement on, what actual outcome is sought in an area undergoing conflict. The difficulty of working out political objectives has been evident, for example, in northern Iraq, Somalia, Haiti and Kosovo.

The relationship between humanitarian intervention and intervention to support self-determination has proved to be particularly troublesome. Humanitarian inter-
vention has often been advocated as a simple humanitarian measure, not designed to bring about major political change. However, several cases of intervention based on humanitarian grounds have been in support of one particular section of the popu-
Humanitarian intervention

oration of the target country, inhabiting a particular region within it; and intervention has had the effect, intentional or otherwise, of strengthening demands for the independence of that region. In 1971, India was open about supporting secession in what is now Bangladesh. Western powers have formally declared themselves against secession by northern Iraq or Kosovo, yet their actions have contributed to demands for independence in the territories concerned.

6.7 Observance of humanitarian norms by intervening forces

There is general agreement that an intervention must be humanitarian in mode of implementation. In particular, any military action must conform with basic norms, including those of the law of armed conflict. However, what is generally agreed in principle is by no means free of difficulty in practice. Two types of problem in this regard were evident in the 1990s.

First, an intervention leading to control of territory can result in a situation in which outside forces, exercising considerable power in an environment which they may regard as threatening and hostile, may be at risk of losing their discipline and self-control. Outside forces on a humanitarian mission, especially if not specifically trained for such operations, may be prone to impatience, or inclined to opt for military solutions. Problems can arise when, as is often the case, inhabitants fail to show gratitude and respect towards the intervenors. They can also arise if there are armed groups in the territory and continuing use of force. The many crimes committed by outside forces during UN-authorized operations in Somalia in 1992-93, leading to courts-martial in several countries and the disbandment of a Canadian regiment, are cases in point.

A second type of problem arises from the evident reluctance of states and armed forces to take major risks for humanitarian purposes. Even if states do decide to take military action, they may well take forms of action that are least risky for their own armed forces. Thus, they may send troops in only after the worst dangers are past, or to areas that are relatively secure, or they may use remote-control forms of force, such as the bombing from a safe altitude used in the war over Kosovo. There is thus a curious and worrying logic in ‘humanitarian war’ taking the form of bombing. One risk here is that bombing from high altitude may involve more risk of error in target selection than bombing from nearer the ground: however, this is not necessarily the case, as decisions by airmen flying at lower level under hostile fire might be less considered and less accurate. A second and more serious risk is that, in the short term, bombing may actually increase the dangers to which the inhabitants supposedly being protected are exposed. Both these risks were evident in the 1999 Kosovo War. These risks are potentially serious irrespective of whether the bombing concerned involves violations of the laws of war.84

The logic of asserting that any humanitarian intervention must observe the relevant rules of the laws of armed conflict is to assert, as well, that any violations

84. These issues are explored in A. Roberts, ‘NATO’s “Humanitarian War” over Kosovo’, 41 Survival (Autumn 1999) pp. 102-123.
must be punishable. Any prosecution, trial and punishment would normally be by
the national courts (including military courts) of the intervening states. However,
the question of supranational jurisdiction has arisen in connection with the Interna-
tional Criminal Tribunal for the former Yugoslavia (ICTY), and the planned Inter-
national Criminal Court (ICC). In respect of both, there has been particularly strong
opposition in the USA to any suggestion that US forces acting abroad should be
subject to investigation by an independent prosecutor. Since the USA has taken the
lead role in several military operations with humanitarian objectives, its objections
to international tribunals are worrying and confirm that the concept of humanitarian
intervention is far more complex in reality than it is in theory.

7. GENERAL ISSUES AND CONCLUSIONS

In an extraordinary paradox, the result of a vast amount of legal development in the
post-1945 period is an irreconcilable clash of two impressive bodies of interna-
tional law. On the one hand there is a body of law restricting the right of states to
use force, and on the other hand a body of human rights and humanitarian law. Both
bodies of law, often claimed to have an elevated status, as *jus cogens*, comprise
norms whose violation constitutes an international crime. Following the develop-
ment of these bodies of law, it is inherently no less difficult than in earlier times to
resolve the clash which occasionally arises between the principles of non-interven-
tion and humanitarian intervention. In particular, as several investigations have
shown, it is difficult to arrive at a clear answer regarding the legality of interven-
tions on humanitarian grounds, such as that in Kosovo in March-June 1999, not
based on UN Security Council authorization. The hard cases giving rise to the demand for interventions on humanitarian
grounds show no sign of disappearing. The following exploration of general issues
and conclusions is an attempt to see how debates on the subject might be devel-
oping, or be helped to develop, in ways that move beyond the obdurate core
question of whether or not there is a right of humanitarian intervention.

85. See for example the discussion in H.-P. Neuhold, ‘The Foreign-Policy “Cost-Benefit
Analysis” Revisited’, 42 GYIL (1999) pp. 108-109. The framing of the issues in terms of *jus cogens*
does not make clashes of law over the question of intervention any easier to resolve. See his discussion
on pp. 118-122 of ‘situations in which actions to stop and prevent further violations of key obligations
under international law are urgently needed’. He concludes (p. 122) that NATO’s operations over
Kosovo in March-June 1999 were ‘contrary to international law as it stands today’. He goes on to
express the opinion that ‘NATO’s air raids against the FRY were morally acceptable and politically
necessary. This view is easier to live with if one does not consider compliance with the law – not only
international law for that matter – as the supreme value. Law and justice do not always coincide.’

86. See for example, the hesitant conclusions on the international legal basis of non-Security
Council based military action in two post-Kosovo War reports: the October 1999 Danish report on
Humanitarian Intervention: Legal and Political Aspects, pp. 121-130; and the UK House of
7.1 **Is there a category?**

The experiences of the 1990s confirm earlier doubts about the extent to which ‘humanitarian intervention’ is a separate legal or conceptual category. Neither the UN Security Council, nor states acting independently, have ever cited humanitarian considerations alone as a basis for intervention: they have always, and justifiably, referred to other considerations as well. These have included considerations of international peace and security; this is not only for the obvious procedural reason that reference to international peace and security is a *sine qua non* for any action by the Security Council but also because different issues do overlap in practice.

In debates at the UN and elsewhere, humanitarian intervention has been widely viewed as a separate issue from intervention in support of self-determination struggles. Proponents of the first have often been sceptics about the latter, and *vice versa*. Viewing these categories as distinct and unrelated, and not discussing them together, is understandable. While humanitarian issues are widely (though not universally) viewed as ‘non-political’, and not directed at achieving a specific permanent change in the status of a territory, self-determination is clearly a political goal. Yet, as indicated above, humanitarian and self-determination issues do in actual fact overlap. It could be useful, not least in reducing the emotional temperature of the issues in international diplomacy, to recognize that humanitarian intervention is not a tidy category on its own but part of a larger debate about very exceptional circumstances in which certain uses of force may be justified or at least tolerated.

The possibility that ‘humanitarian intervention’ is not an entirely separate and watertight category does not invalidate it as a concept. It can still be useful as an ‘ideal type’, and it does reflect real situations, activities, and legal provisions. However, the fact that other motives and considerations are involved in most if not all actual cases of intervention strengthens scepticism about the utility of trying to reach a conclusion of a general character about whether humanitarian intervention is or can become a right in international law.

7.2 **Might a doctrine be advanced on a regional basis?**

Since the war over Kosovo, the many proposals from Kofi Annan and others to develop a coherent legal concept of humanitarian intervention, whether exclusively under UN authorization or more generally, have not resulted in any general agreement. One fundamental difficulty in getting intergovernmental agreement on any doctrine of humanitarian intervention remains the awkward fact that a large number of governments around the world, seeing themselves as potential targets of intervention, explicitly oppose any such doctrine, and therefore oppose all efforts to devise criteria for intervention.

Although there are exceptions, Europeans and North Americans have probably been the most inclined to support the principle of humanitarian intervention. This raises the question of whether the principle could be advanced on a regional rather than a global basis. While a regional approach would in itself lack universality, it
could be one way of taking the issue forward in the hope of wider agreement later. There was a hint of such an approach in an article, published in late 1999, by Ove Bring of the Swedish Defence College and Stockholm University:

'Most international lawyers would agree that the current law of the UN Charter does not accommodate the bombing of Yugoslavia, since the action was neither based on a Security Council decision under Chapter VII of the UN Charter, nor pursued in collective self-defence under Article 51 of the Charter – the only two justifications for use of force that are currently available under international law.

... The formulation of a doctrine on humanitarian intervention would be the desirable legal outcome of the Kosovo crisis and would represent a huge step forward in the international order. NATO countries should take the lead in this worthy endeavour by setting out the issues involved and bringing them to the appropriate international fora.'

Within NATO and some of its member states there were a number of efforts after the Kosovo War to develop an agreed doctrine of ‘humanitarian intervention’. For example, in November 1999, the NATO Parliamentary Assembly agreed a long resolution on the subject which, *inter alia*, urged member governments and parliaments of the North Atlantic Alliance:

- to work together and with Partner countries to develop a clear set of international rules to allow for humanitarian intervention in case of massive human rights violations or an impending humanitarian catastrophe and to commend them for approval by the United Nations;
- to strive, in particular, to legitimize a new interpretation of article 2 para. 4 of the UN Charter according to which humanitarian intervention no longer be considered ‘inconsistent with the purposes of the United Nations’, but rather as a contribution to the realization of these purposes.

This and similar efforts by a few national governments, including that of the UK, have failed to make significant progress, and are now largely in abeyance. Among the many obstacles to getting any agreed doctrine, regional or global, may be the reluctance of potential intervenors, including the USA, to bind themselves in advance to any obligation to intervene in particular defined circumstances. It is far from clear whether any such obligation follows in logic or law from criteria delimiting conditions in which an intervention might be justifiable. However, it is understandable that such an obligation is perceived as a danger. Powerful states often decide to take no action (or at least no serious action) in relation to major humani-

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87. O. Bring, ‘Should NATO Take the Lead in Formulating a Doctrine on Humanitarian Intervention?’, *NATO Review* (Autumn 1999) pp. 25 and 27. Prof. Bring’s scepticism as to whether there was any UN Charter basis for the NATO action over Kosovo were, perhaps, overstated. In some NATO countries, there was extensive reference to UN Security Council resolutions and UN principles on human rights as being relevant to the decision to use force even if the Security Council had not specifically authorized it.
tarian crises. They are unlikely to want to limit their freedom of (in)action by subscribing to a doctrine or set of criteria that might imply a duty to intervene militarily even in a situation in which they are not keen to do so.

7.3 Can UN decision-making process be improved?

The process by which decisions are made to intervene, or not to intervene, has been undergoing significant scrutiny and change. In an age of instant communications, such decisions are taken against a background of widespread but often superficial awareness of the human dimension of some (though by no means all) humanitarian crises. Improvements in decision-making procedures, especially any which improve first-hand knowledge of the situation in the territory concerned, are needed in their own right. They can also help to overcome perceptions of humanitarian intervention as exclusively reflecting the interests and preoccupations of western states.

In the case of the UN Security Council, apart from the general attempts to improve coordination within and beyond the UN system, there have been three specific changes of practice and behaviour in decision-making in recent years:

1) **Permitting certain non-state bodies to give testimony to the Council.** Regarding Kosovo, UNHCR gave such testimony on 10 September 1998, with significant effect.

2) **Sending delegations from the Security Council to investigate particular situations on the ground.** This was done in September 1999 in respect of East Timor, before the Australian-led force was authorized. In October 2000, 11 members of the UN Security Council visited Sierra Leone and other states in the region to examine the UN role.

3) **Conducting serious retrospective examinations of humanitarian crises involving the Council.** Two important examples are the detailed account of the establishment, maintenance and fall of the ‘safe area’ of Srebrenica in Bosnia in 1993-95, and related events; and the survey of genocide in Rwanda in 1994 and the failure both of the UN and its member states to act.

Among the hard problems that remain is speeding up the Security Council’s decision-making process. By definition, cases of extreme humanitarian emergency are urgent, and the spectacle of UN inaction in crises is damaging. Yet the UN, including the Security Council, has often been seen by states as an institution on which insoluble problems can be dumped, sometimes with the unstated but detectable purpose of avoiding decisive action. The three changes of the last few years

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7.4 Use of force distinct from peacekeeping and enforcement

In many crises in the 1990s, the absence of preparedness to use force in a manner appropriate to extreme humanitarian crises was at least as serious an obstacle to intervention as was the lack of an agreed legal doctrine of humanitarian intervention. A key issue is for the UN and its member states to develop a conception of the use of armed forces which is distinct from the familiar forms of (1) peacekeeping and (2) enforcement. Such a conception has been needed not just in cases where a humanitarian intervention into a country is being contemplated but also in cases where UN peacekeeping forces are already in place and, in a deteriorating situation, witness atrocities or ceasefire violations. In such cases, the notions of neutrality, impartiality and the non-use of force (all of which have been associated with peacekeeping) are not necessarily appropriate.

The protection of threatened civilians may require armed forces that are configured, trained and equipped for action in a hostile environment, and have an effective system of command and control, whether UN-based or delegated to a state or international body. Such protection of civilians may also require the withdrawal of UN peacekeeping forces and related personnel from places where they are vulnerable to reprisals and hostage-taking. In some cases a peacekeeping force might need to be so armed from the start that it can adopt a forceful protective or combat role. In other cases, it might metamorphose into a body with such capacity: the transformation of UNPROFOR in Bosnia in May-August 1995, and then the further post-Dayton transformation into IFOR and SFOR, being such cases.

The UN has begun to address the use of force in UN operations. The Report of the Panel on UN Peace Operations chaired by Lakhdar Brahimi, issued in August 2000, took some limited steps in this direction. It stated, for example:

'... United Nations peacekeepers – troops or police – who witness violence against civilians should be presumed to be authorized to stop it, within their means, in support of basic United Nations principles. However, operations given a broad and explicit mandate for civilian protection must be given the specific resources needed to carry out that mandate.'

The Brahimi report failed to address squarely the systems of military support, control and deployment that would be necessary for such missions to be conducted effectively. However, the report was a step in the direction of getting more serious

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Humanitarian intervention

about the use of force. It was viewed favourably at the Millennium Assembly of the United Nations, held from 6-8 September 2000. It is widely, if not universally, viewed as a basis for development of UN operations so as to provide some military capacity for protecting civilians, as well as for such other functions as ensuring observance of ceasefires. Such progress as the panel made in these directions was achieved without the report ever addressing the question of humanitarian intervention as such. A glance at the panel’s composition, which reflected real divisions on this issue in the world generally, indicates that there would have been no prospect of agreement on the principle of humanitarian intervention, which was therefore best avoided.92

7.5 Practical issues in interventions

Instead of concentrating on the term ‘humanitarian’, or on the question of whether or not there is a general right of humanitarian intervention, it would be useful to focus attention on little-discussed practical issues: what the intervening troops are supposed to do after they arrive; what rules of restraint may apply to their conduct; whether they and the countries sending them can be expected to have sufficient interest to stay for the long haul in cases where that may be needed, for example, in territories where there are long-standing ethnic rivalries; and what lessons are to be learned from the international community’s efforts at international administration, whether in the form of trusteeship or in the more variable forms of international administrative assistance in the post-Cold War era.

7.6 Relation to non-intervention

Ideas about humanitarian intervention might be intellectually better grounded, and accepted by more states, if they were set more explicitly against the background of the still valid norm of non-intervention. The way in which humanitarian intervention is frequently presented as an alternative to non-intervention, and as taking the world beyond existing conceptions of sovereignty, naturally arouses antagonism. There is a case for reaffirming strongly the principle of non-intervention, and recognizing that any forceful intervention on humanitarian grounds is a very occasional exception to that still valid principle. Indeed, an occasional and tolerated practice of humanitarian intervention may help to rescue the principle of non-intervention from its obvious weakness: if the principle is viewed as inviolable in absolutely every circumstance, irrespective of all evidence of human misery, it risks being discredited.

92. Lakhdar Brahimi has confirmed that the panel could not have reached agreement on the principle of humanitarian intervention. Address at a seminar on ‘The UN, Europe and Crisis Management’, held at Institute for Security Studies of the WEU, Paris, 19 October 2000.
7.7 Is the language of ‘rights’ the right language?

Discussion of a right of humanitarian intervention poses at least four major problems which suggest that some other approach may be needed.

(1) The language of rights is a strong language. For example, human rights are so described partly to make it clear that they trump lesser considerations and rules. To the extent that they do so, the case for a principle of humanitarian intervention is strengthened. Yet it is amply clear that in every case any particular proposal for a humanitarian intervention hardly constitutes a right which trumps other rights: it has to be balanced against a wide range of considerations, including the principle of non-intervention.

(2) Rights, if they are to have any meaning, have to be rights of particular individuals or organizations. Which ones are to have such rights? To recognise that, say, individual states have a right of humanitarian intervention is obviously problematic. There are also hazards in viewing regional international organizations as having such a right, especially in view of the fact that some of them are perceived as instruments of dominance of the major power in the area.

(3) If rights are to be effective, there has to be a significant measure of agreement about their content and importance. Although there may be a degree of consent to particular cases of intervention, there is absolutely no general agreement among states about the existence, or even the desirability, of a general right of humanitarian intervention.

(4) If a right of humanitarian intervention were to be enshrined in law, it could be open to abuse. The motives of states are often mixed, and there have been many instances in which humanitarian motives have been claimed for actions that had other purposes as well.

Some have suggested that humanitarian intervention should be viewed, morally and legally, as first and foremost a duty, and a natural corollary of the existing duty of states to uphold human rights and humanitarian law. This could be seen as analogous to, or a further development of, the statement in the 1970 UN Declaration on Friendly Relations, cited earlier, which referred to ‘the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples’. However, advocacy of a general duty to intervene presupposes the right to do so, so the legality of humanitarian intervention still has to be addressed first. Moreover, redefining humanitarian intervention as a general duty of states, as distinct from a right, might imply an obligation on all states to support an intervention: states are even less likely to accept this than the idea of a right of intervention. The fundamental problem is that, in view of the delicate political, military and moral judgements that have to be made in each case, it is essentially absurd to speak of a duty of intervention as such: what there may be is a duty to consider appropriate action in the circumstances that are faced.

It may be more useful to think of humanitarian intervention, not as a general right or duty, but as an occasional and exceptional necessity which is the outcome of a situation in which legal requirements clash. One could sum up a complex situation in international law by saying that humanitarian intervention is not abso-
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...excluded. In principle, it is wrong to expect international law to provide anything even approaching generic approval in advance to a type of action resulting from situations each of which is unique, and in which powerful legal and moral considerations have to be balanced against each other.

7.8 The merits of ambiguity

Generals are sometimes accused of planning for, or even fighting, the last war. Pacifists often oppose the last war. Lawyers and others may be at risk of drawing too many grand principles from the last war, which for many of them is the war over Kosovo.

It may be for the best that the question of a right of humanitarian intervention, despite its undoubted importance and the many developments which have affected the balance on it in the years since 1945, remains shrouded in legal ambiguity. While there is no chance of a so-called right of humanitarian intervention actually being agreed by a significant number of states, it is also likely that a diplomatic attempt to secure an explicit and absolute rejection of humanitarian intervention in all circumstances would fail to gain sufficient support to be accepted as a norm of international law. To point to the difficulty of getting a general answer on the question of humanitarian intervention, and to urge that the specifics of each episode be addressed case by case, is not to imply that answers will always be forthcoming on that more modest basis. Some interventions may get a significant degree of overt or tacit support from states and international organizations. However, answers to the question of whether in a particular instance humanitarian intervention is viewed as legal or illegal are likely to depend not just on the circumstances of the case, interpreted with the such help as an emerging body of criteria can provide, but also on the perspectives and interests of the states and individuals addressing the matter: in other words, they are not likely to be uniform. States engaging in interventions on humanitarian grounds, especially in the absence of Security Council authorization, act in a situation of legal and political precariousness, and it may be right that they should have that burden on their shoulders.

Interventions based at least partly on humanitarian grounds are the outcome of enduring realities of the contemporary international political and legal system. There will certainly be new cases, if only as occasional and exceptional necessities. The questions that they raise need to be addressed less in terms of a purported general legal doctrine for or against humanitarian intervention and more in terms of the particular nexus of legal, moral and practical issues raised by each case.