

HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT: WHERE IT STANDS IN 2020

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“The UK is permitted under international law, on an exceptional basis, to take measures in order to alleviate overwhelming humanitarian suffering. The legal basis for the use of force is humanitarian intervention...”

- The UK’s legal position regarding attacks on chemical weapons facilities in Syria¹

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1. PRIME MINISTER’S OFFICE, *Syria Action – UK Government Legal Position*, GOV.UK (Apr. 14, 2018), <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position> [hereinafter *Syrian Action*].

1. INTRODUCTION

On April 14, 2018, the United Kingdom, along with its United States and French allies, carried out aerial attacks against three of Syria's chemical weapons sites, including a scientific research center and two chemical weapons facilities.² That attack was prompted by an earlier use of chemical weapons by the Syrian regime on April 7, in Douma, the last rebel-held town in the Eastern Ghouta region.³ The Syrian action had caused an estimated forty to seventy fatalities, including a large number of children, while hundreds of persons were injured.⁴ Each of the attacking States gave a slightly different rationale for seeking to respond to the Syrian use of chemical weapons. The United Kingdom stated it was relying on "humanitarian intervention" as the legal basis for its strikes. Its co-belligerents were less forthcoming regarding a rationale under international law. The United States, relying largely on domestic legal authorities,⁵ indicated it acted "to promote the stability of the region, to deter the use and proliferation of chemical weapons, and to avert a worsening of the region's current humanitarian catastrophe."⁶ The French rationale, which reads primarily as a policy document, focused on the requirement to dissuade the Syrian regime from using chemical weapons. The Syrian regime's use of chemical weapons meant "the very foundations of reason and civilisation are under threat."⁷

2. Helene Cooper, Thomas Gibbons-Neff & Ben Hubbard, *U.S., Britain and France Strike Syria Over Suspected Chemical Weapons Attack*, N.Y. TIMES (Apr. 13, 2018), <https://www.nytimes.com/2018/04/13/world/middleeast/trump-strikes-syria-attack.html>.

3. *Syria War: What We Know About Douma 'Chemical Attack'*, BBC NEWS (Jul. 10, 2018), <https://www.bbc.com/news/world-middle-east-43697084>.

4. Organisation for the Prohibition of Chemical Weapons [OPCW], *Note by the Technical Secretariat: Report of the Fact-Finding Mission Regarding the Incident of Alleged Use of Toxic Chemicals as a Weapon in Douma, Syrian Arab Republic, on 7 April 2018*, at ¶ 3.1, OPCW Doc. S/1731/2019 (Mar. 11, 2019).

5. See, e.g., Memorandum from Steven. A. Engel, Assistant Attorney General, U.S. Dep't of Justice, to Counsel to the President (May 31, 2018), <https://www.justice.gov/olc/opinion/file/1067551/download>.

6. Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate. (Apr. 15, 2018), <https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate-3/>.

7. See Press Release, Edouard Philippe, Prime Minister, Statement to the National Assembly on French Armies' Intervention in Response to the Use of Chemical Weapons in Syria, (Apr. 16, 2018), https://www.gouvernement.fr/sites/default/files/locale/piece-jointe/2018/04/declaration_de_m_edouard_philippe_premier_ministre_sur_lintervention_des_armees_francaises_en_reponse_a_lemploi_darmes_chimiques_en_syrie_-_16.04.2018_en.pdf [hereinafter France's Statement].

While the protection of humanity writ large was clearly part of the American and French rationales for acting, the United Kingdom was particularly direct in stating it was relying on the international principle of humanitarian intervention as the legal basis for bombing Syrian targets. Claiming such an authority to intervene appears, at first glance, to be at odds with the considerable effort expended by the international community over the past twenty years to restrict States taking military action in another State on humanitarian grounds without authorization by the United Nations Security Council. In this respect, a United Kingdom academic, Dapo Akande, provided an opinion regarding the 2018 strike stating that the legal position advocated by “the government is not an accurate reflection of international law as it currently stands. International law does not permit individual States to use force on the territory of other States in order to pursue humanitarian ends determined by those States.”⁸ This approach is consistent with interpretations of the U.N. Charter’s *travaux préparatoires* that “unambiguously confirm that, apart from a use of force in self-defense, the prohibition contained in Article 2(4) was intended to be all-inclusive with respect to unilateral uses of force.”⁹

Professor Akande’s negative view was reinforced by reference in his opinion to the government having relied on the “so-called doctrine of ‘humanitarian intervention.’”¹⁰ Further, it indicated that the United Kingdom “is one of only a handful of States that accepts that international law provides a right of humanitarian intervention.”¹¹ Regarding humanitarian intervention, it was suggested:

The most significant problem with the government’s legal position is that it would require a radical restructuring of the most fundamental rules of the international legal order. The argument that there is a right of humanitarian intervention under customary international law implies that a rule of customary international law can prevail over or modify the prohibition of the use of force in the UN Charter.¹²

8. Opinion of Dapo Akande, *The Legality of the UK’s Air Strikes on the Assad Government in Syria*, ¶ 4 (Apr. 16, 2018), https://d3n8a8pro7vhnmx.cloudfront.net/campaigncountdown/pages/2243/attachments/original/1523875290/Akande_Opinion_UK_Government%27s_Legal_Position_on_Syria_Strike_April_2018.pdf?1523875290.

9. Int’l Law Ass’n Conference on Use of Force, *Final Report on Aggression and the Use of Force*, 21, (2018), <http://repository.essex.ac.uk/24215/1/ILA%20Use%20of%20Force%202018.pdf> [hereinafter *Final Report*].

10. Akande, *supra* note 8, at ¶ 5.

11. *Id.* at ¶ 8.

12. *Id.*

Yet, these arguments did not convince a United Kingdom Parliamentary Committee, which after reviewing differing approaches towards the issue stated, “[w]hilst noting the divisions in legal opinion around the concept of humanitarian intervention, we agree that it seems unlikely the creators of the UN Charter would have expected that the prohibition on the use of force would be applied in a way that prevented States from protecting civilian populations and stopping mass atrocities.”¹³ This highlights a common aspect of humanitarian intervention. There is a key tension between strict legal opinions seeking to restrain force squarely within the wording of the U.N. Charter, and what is viewed as an imperative moral and political responsibility to act. Notably, attempts at the United Nations Security Council to have the strikes against the Syrian chemical weapons facilities condemned were unsuccessful.¹⁴ While not a direct endorsement of the allied action, it will be seen that the rejection by the Security Council of an attempted condemnation on humanitarian intervention has been used elsewhere to suggest a level of political endorsement of that action.

At the heart of the issue is the question of whether the authority to use force is solely bound by the wording of the U.N. Charter, or whether independent State action can be taken to “alleviate overwhelming humanitarian suffering.”¹⁵ This issue frequently arises when the “positivist” mechanism established in the U.N. Charter after World War II for maintaining international order does not, for whatever reason, offer a solution to such humanitarian crises. In this regard, the United Kingdom and France made specific reference to the stymying of efforts to gain Security Council approval for the action to be taken to address Syria’s use of chemical weapons.¹⁶ Considering when to embark on humanitarian intervention raises numerous issues, such as the scope of the intervention related to the nature of territorial State sovereignty, the application of moral principles, a growing international emphasis on human rights, questions about the legitimacy versus the legality of State action, and the interaction between law and political reality.

This is not the only context within which questions have been asked regarding the exclusivity of U.N. Charter-based international security framework. That framework was specifically established to restrict the

13. FOREIGN AFFAIRS COMMITTEE, GLOBAL BRITAIN: THE RESPONSIBILITY TO PROTECT AND HUMAN INTERVENTION, 2017-19, HC 1005, ¶ 18 (UK) [hereinafter GLOBAL BRITAIN].

14. *Id.* at ¶ 17 (following the airstrikes Russia sought condemnation of the attacks in the UN Security Council and proposed a draft resolution that “would have demanded the United States and its allies immediately cease such actions and refrain from any further use of force in violation of international law.”).

15. *Syrian Action*, *supra* note 1, at ¶ 3.

16. *Id.* at ¶ 4(ii); *see also* France’s Statement, *supra* note 7.

recourse to war, and significant portions of the international legal community have interpreted its provisions very strictly with a goal of limiting any use of force, except in the most exceptional and grave instances where action in self-defense is warranted. Yet, disagreements amongst international scholars remain. As will be discussed, humanitarian intervention provides another example of an area of international law governing the security environment that is not settled. Ultimately, the need to act on political and moral grounds must be weighed against restrictive text-based interpretations of the legal framework established in the “black letter” law.

The concept of humanitarian intervention will be addressed by outlining how it has developed, and the controversy its invocation creates. By necessity, this means looking not only at humanitarian intervention, but also the principles that have been established in a modern context to frame its application to humanitarian crises, which has become known as *The Responsibility to Protect*, or R2P. First, the historical basis of humanitarian intervention and the impact of the development of the 1945 U.N. Charter will be explored. This includes assessing changing notions of “sovereignty,” and the growing interest in the 20th Century in international “justice.” Secondly, the post-Charter introduction of humanitarian intervention will be explored, including the introduction of an element and significance of acquiescence by the international community towards action being taken without prior Security Council authorization. Next, the analysis will turn to the impact of the changing post-Cold War security situation and the subsequent response by the international community that ultimately established the doctrine of *The Responsibility to Protect*.¹⁷

The fourth part will look at humanitarian intervention in the 21st Century highlighting a continuing level of resistance from a number of States to the concept, and a reluctance by the United Nations to authorize military intervention on that basis. At the same time, as can be seen in the 2018 United Kingdom/Syria chemical weapons example, there remains the likelihood that some States will claim such intervention to be applicable when they conclude there is a compelling need to use force to prevent or mitigate a humanitarian crisis. The analysis then turns to an assessment of the concept of humanitarian intervention in terms of the disagreement that exists as to whether such action is legally justified only when authorized in accordance with the U.N. Charter or can be also justified on a customary law basis. Other areas of international law, where similar differing views exist,

17. See generally INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, INT’L DEV. RESEARCH CTR., *THE RESPONSIBILITY TO PROTECT* (2001), <https://idl-bnc-drc.dspacedirect.org/bitstream/handle/10625/18432/IDL-18432.pdf?sequence=6&isAllowed=y> [hereinafter *THE RESPONSIBILITY TO PROTECT*].

will be discussed in order to illustrate that this is not the exclusive source of use of force debate and to better situate the ongoing controversy. The sixth and final part provides a conclusion indicating where the law presently stands, setting out a way ahead at the dawn of the third decade of this Century.

A. *Humanitarian Intervention and the United Nations Charter*

The issue of whether other governments can intervene when another State abuses its own people is not a new one under international law. As James Turner Johnson suggests, a key aspect of the authority to intervene is centered on the notion of “sovereignty,” which “is identified with the European international order that came out of the 1648 Peace of Westphalia...and is currently legally defined by the United Nations Charter.”¹⁸ A pre-modern view of sovereignty had been based on an interpretation of Just War theory that focused on a ruler’s authority to rectify injustice and punish wrongdoing, effectively a “personal moral responsibility to seek the common good.”¹⁹ This idea of sovereignty was to change because of a re-conceptualization of a State’s authority to use force in self-defense where “the fundamental measure of injustice was any attack across the territorial boundaries of a political community.”²⁰ As a result, “the idea of sovereignty became defined with a responsibility to protect those borders.”²¹

In any event, by the 19th Century, Just War principles had waned in significance, being replaced by a “balance of power” doctrine between States that reflected an unrestricted right of war.²² Given that Just War theory had lost relevance regarding its influence on State action, it would be difficult to argue that a contemporary right to intervene can be based on international standards developed during that period. However, the U.N. Charter use of force legal framework introduced after World War II represented a reintroduction of Just War principles (*jus ad bellum*) regarding State recourse to war. In doing so, it was the later definition of sovereignty based on

18. James Turner Johnson, *Humanitarian Intervention, the Responsibility to Protect, and Sovereignty: Historical and Moral Reflections*, 23 MICH. ST. INT’L. L. REV. 609, 619 (2015) (citation omitted).

19. *Id.* at 623.

20. *Id.* at 625.

21. *Id.*

22. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 14-19 (1963); see also Robert J. Delahunty & John Yoo, *From Just War to False Peace*, 13 CHI. J. INT’L L. 1 (2012).

“territorial inviolability” that underpinned that framework, rather than “in terms of the responsibility of government to serve the good of its people.”²³

Therefore, the starting point for analyzing the modern concept of humanitarian intervention is the adoption of the U.N. Charter, and in particular, the emphasis placed on the responsibility of the State to protect the population on its own territory. Correspondingly, intervention by other States was presumptively prohibited.²⁴ As Article 2(4) of the U.N. Charter indicates, “[a]ll 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.”²⁵ This idea is reinforced in Article 2(7), which expressly provides that nothing in the U.N. Charter authorizes “the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State,” except through the application of enforcement measures authorized under Chapter VII.²⁶

While the U.N. Charter clearly privileges the sanctity of State boundaries and jurisdiction, it also laid the seeds for consideration of the protection of human rights. In the preamble, it is noted that a key purpose of the United Nations is “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.”²⁷ Universal respect for human rights was further addressed in Articles 55 and 56 of the Charter. Importantly, these rights were identified as being linked to international security in terms of “the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations.”²⁸ It has been noted that human rights, as enshrined in the Charter, is a principle that is equal to the non-use of force.²⁹ This post-war focus on international human rights law, which previously had been largely viewed through a domestic law lens, was indicative of the tension that was to develop between States protective of their sovereign territorial rights,

23. Johnson, *supra* note 18, at 632.

24. Corfu Channel Case, (U.K. v. Albania), Judgement, 1949 I.C.J. Rep. 4 (Apr. 9) (“The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law.”).

25. U.N. Charter art. 2, ¶ 4.

26. *Id.* at art. 2, ¶ 7.

27. *Id.* at art. 1, ¶ 3.

28. *Id.* at art. 55, 56.

29. Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, 10 FINNISH Y.B. INT’L. L. 141, 161-62 (1999).

and those seeking to ensure there was no immunity for the humanitarian abuses.

In a similar vein, the immediate aftermath of World War II saw the international prosecution of war criminals, the creation of the prohibition on genocide, and the development of international human rights law treaties. For example, the international reach of post-World War II international law can be seen in the 1949 Geneva Conventions, where States were, in respect of war crimes resulting from what treaties designated as grave breaches, required to search for and bring alleged war criminals before their own courts, or hand them over to another State for prosecution.³⁰ Similarly, the 1948 Genocide Convention called upon States to prevent and punish acts of genocide,³¹ pledge themselves to grant extradition,³² and permitted them to “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 or any of the other acts enumerated” therein.³³

The U.N. Charter places the authority to intervene in the affairs of a Member State squarely in the hands of the Security Council with its power to act pursuant to Chapter VII regarding any threat to the peace, breach of the peace, or act of aggression. Regional or sub-regional organizations carrying out enforcement action under Chapter VIII of the U.N. Charter also require the authorization of the Security Council.³⁴ The interpretation that there is a restriction on States acting unilaterally is supported by the *Military and Paramilitary Activities in and Against Nicaragua Merits* case, where the International Court of Justice ruled, “the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States,” and was inconsistent with the claim of acting in self-defense.³⁵

30. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 129, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

31. Convention on the Prevention and Punishment of the Crime of Genocide art. I., Jan. 12, 1951, 1021 U.N.T.S. 278.

32. *Id.* at art. VII.

33. *Id.* at art. VIII.

34. U.N. Charter art. 53, ¶ 1.

35. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 268.

However, reliance need not necessarily be placed solely on the United Nations Security Council as the option might also be available to have the matter considered by the General Assembly in Emergency Special Session under the 1950 Uniting for Peace resolution.³⁶ That said, this approach, while frequently suggested as a possibility,³⁷ suffers some weaknesses and is not universally embraced.³⁸ In terms of a positivist textual interpretation of the U.N. Charter, the Security Council is often viewed as the sole proper authority empowered to authorize intervention.³⁹ The International Court of Justice is another organ of the United Nations that might be called upon to take action in respect of genocide,⁴⁰ although it is difficult to see how it could act in a timely fashion to avert the humanitarian crisis.

B. *Post-Charter Interventions to 2000*

Although there clearly has been a concentration of power in the hands of United Nations organs, this has not ended international debate over humanitarian intervention in the post-Charter period. The post-World War II period has witnessed a number of interventions by States that were justified, at least in part, by claiming they were for humanitarian purposes. Those interventions include India-Bangladesh (1971), Tanzania-Uganda (1978), Vietnam-Kampuchea (1978-1979), France-Central African Empire (1979), France, U.K., and the U.S.-Iraq (1991-to protect the Kurds), ECOMOG-Liberia, Sierra Leone (1989-1999), and NATO-Kosovo (1999).⁴¹ These actions were controversial, occurring within the overall context of State skepticism regarding the willingness of the United Nations Security Council to act; a concern, particularly by weaker and non-Western States, that such intervention represented entry onto a slippery slope eroding

36. U.N. Charter art. 10, ¶ 1; U.N. Charter art. 11, ¶¶ 1-3; G.A. Res. 377 (V), § A (Nov. 3, 1950).

37. See, e.g., Akande, *supra* note 8, at 5; see also Michael Ramsden, “Uniting for Peace” and Humanitarian Intervention: The Authorising Function of the U.N. General Assembly, 25 WASH. INT’L L. J. 267, 305 (2016) (arguing the Uniting for Peace resolution “mechanism, when properly used and supported by a consensus of U.N. members, holds the promise of promoting both legality and legitimacy in the attainment of collective security objectives that would otherwise be unreachable due to Council deadlock.”).

38. Ramsden, *supra* note 37, at 270-72 (discussing weaknesses of the “Uniting for Peace” approach).

39. GLOBAL BRITAIN, *supra* note 13, at 12 (“[T]here are risks to undermining the authority of the UNSC through invoking the ‘Uniting for Peace’ resolution.”).

40. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 77 (5th ed. 2017).

41. THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 139-70 (2002).

sovereign rights; and the fact that such interventions could occur for broader geo-political reasons than just humanitarian ones.⁴²

It is noteworthy that not all of these interventions attracted international criticism, and some received United Nations Security Council recognition after the fact. In this respect, the Economic Community of West Africa (“ECOWAS”) interventions under the auspices of its multi-lateral armed force, and the Economic Community of West African States Monitoring Group (“ECOMOG”) in Liberia and Sierra Leone, were eventually ratified and adopted by the Security Council through their being commended in subsequent resolutions, and by making the United Nations a partner in follow on operations.⁴³ The 1999 NATO intervention in Kosovo was more controversial. Humanitarian “necessity,” “catastrophe,” or “considerations” was invoked by a number of States to justify the bombing.⁴⁴ In that case, a limited indication of support might be indirectly based on the fact that a Resolution condemning that action was rejected in a 12-3 vote by the United Nations Security Council.⁴⁵ As has been noted, there was a very similar reaction to the 2018 Russian efforts to condemn the American, British and French attack on Syrian chemical weapons facilities.

In addition, in the Kosovo example, once the conflict was over, the Council passed a resolution calling on the Federal Republic of Yugoslavia to “put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces,” as well as deploy military and civilian personnel to maintain security and establish a transitional administration.⁴⁶ However, there was no United Nations “commendation” for the NATO action, and considerable State condemnation of the bombing. It quickly became evident that there would be opposition by China, Russia and members of the Non-Aligned Movement to intervention occurring in the internal affairs of States without the authority of the Security Council.⁴⁷

42. Ramsden, *supra* note 37, at 276 (describing that India, Vietnam and Tanzania interventions “each brought an end to serious human rights abuses, but the basis for the interventions was hotly contested and the intervening States prevaricated about their legal justifications.”).

43. *Id.* at 162.; see S.C. Res. 788, ¶ 1 (Nov. 19, 1992); S.C. Res. 856, ¶ 2 (Aug. 10, 1993); S.C. Res. 866, ¶ 2 (Sept. 22, 1993); S.C. Res. 1289, ¶¶ 8-9 (Feb. 7, 2000); S.C. Res. 1299, ¶ 1 (May 19, 2000).

44. Greenwood, *supra* note 29, at 157-58 (e.g., United Kingdom, The Netherlands, Canada).

45. U.N. President of the S.C., Letter dated March 24, 1999 from the Permanent Representative of the Russian Federation addressed to the President of the Security Council, U.N. Doc. S/1999/320 (Mar. 26, 1999).

46. S.C. Res. 1244, ¶¶ 3, 9 (June 10, 1999).

47. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 47-51 (3rd ed. 2008).

It is difficult to argue that silence or perceived acquiescence by States, or after-the-fact Security Council commendations for State action, establishes a broad unilateral right of humanitarian intervention. At most, what might be said is that, notwithstanding the clear “positivist” rules in the U.N. Charter restricting intervention to that authorized by the Security Council, there remains a certain level of acceptance that such action might be taken by States on an exceptional basis. This leaves the world community to judge after the fact as to what moral and political grounds the State should be condemned or supported. It has perhaps been put best as “it is important not to confuse what the law *in some limited circumstances may condone* or excuse with what is *required* by the law in every circumstance.”⁴⁸ There have developed suggestions of a unlawful, but legitimate distinction in addressing action by a State without Security Council approval. As was stated by the Independent Commission on Kosovo regarding action NATO action taken to liberate Kosovo:

The Commission’s answer has been that the intervention was legitimate, but not legal, given existing international law. It was legitimate because it was unavoidable: diplomatic options had been exhausted, and two sides were bent on a conflict which threatened to wreak humanitarian catastrophe and generate instability through the Balkan peninsula. The intervention needs to be seen within a clear understanding of what is likely to have happened had intervention not taken place: Kosovo would now still be under Serbian rule, and in the middle of a bloody civil war. Many people would still be dying and flows of refugees would be destabilizing neighboring countries.⁴⁹

Such a conclusion appears fundamentally problematic. It has been noted that “a dichotomy between what is ‘lawful’ and what is ‘legitimate’ is undesirable in any society and particularly undesirable in international law.”⁵⁰ This is an issue that fundamentally highlights the clash between “power-based views of law (domestic or international)” and “norms autonomously validated by God, nature, or a common sense of right or justice.”⁵¹ It represents a tension between “strict” interpretations of the law and the morally right thing to do. However, this also makes such intervention a risky proposition for any State, or coalition of States, as there is no guarantee of subsequent acceptance of that action.

48. FRANCK, *supra* note 41, at 173 (emphasis added).

49. *Kosovo Report*, Independent Commission on Kosovo (2000), <https://reliefweb.int/sites/reliefweb.int/files/resources/F62789D9FCC56FB3C1256C1700303E3B-thekosovoreport.htm>.

50. Greenwood, *supra* note 29, at 145.

51. FRANCK, *supra* note 41, at 176.

C. *The 21st Century, Humanitarian Intervention, and The Responsibility to Protect*

The 1990s witnessed a number of humanitarian catastrophes resulting, in large part, from the re-alignment of Cold War powers and interests, an attendant implosion of States, and a degradation of the ability of a number of countries to effectively govern their territory. The concept of “failed” or “failing” States began to dominate the international dialogue. Not only were there conflicts in the countries such as the former Yugoslavia, Somalia, and East Timor, but in 1994, there was a horrific genocide in Rwanda. These conflicts threatened international peace and security, and their humanitarian impact was significant. Ending that decade was the 1999 NATO bombing in Kosovo, which provided further impetus to deal with the concept of humanitarian intervention. However, it was to be an area fraught with controversy as those favouring intervention were confronted with forceful resistance by States arguing for the protection of territorial integrity and political independence.

The 1990s was a period that witnessed a renewed emphasis on international human rights and, in particular, a focus on holding perpetrators of war crimes, genocide, and crimes against humanity to account. At times, international criminal law, through the judgements of various criminal tribunals, even appeared to provide the main impetus to reinvigorate and update humanitarian law. Human rights law advocates largely sought an independent path, often acting in competition with humanitarian law advocates in the struggle to determine which regulatory framework would govern State action (e.g., the *lex specialis* debate).⁵² The result was that the international dialogue was increasingly about the application of international human rights law, the rights of individuals subjected to violence within territorial boundaries, and an ending of immunity for abusive world leaders. The creation of international criminal tribunals and claims of universal jurisdiction also produced some very uncomfortable moments as they exposed the tensions between different values such as State immunity and individual criminal responsibility, and State sovereignty and internationalism.⁵³

52. See, e.g., William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT'L L. 741, 747-48 (2005) (suggesting that human rights law should govern the use of force during internal conflict).

53. Greenwood, *supra* note 29, at 142.

The “sanctity” of international borders was increasingly questioned, both in theory and in practice. In this respect, with many conflicts spilling over to adjacent States, the focus increasingly turned to the parties to a conflict, and not to the conflict’s geographic location.⁵⁴ Overall, the international law governing “internal” armed conflict was seen to include human rights, international criminal law, and humanitarian law.⁵⁵ The international legal community has struggled with how to deal with this shift towards seeking greater protection for foreign populations while balancing the desire to maintain the sanctity of State borders.

Kofi Annan, the United Nations Secretary-General, acknowledged in his 1999 report on the work of the organization that “[w]ith relatively few inter-State wars, traditional rationales for intervention have become decreasingly relevant, while humanitarian and human rights principles have increasingly been invoked to justify the use of force in internal wars, not always with the authorization of the Security Council.”⁵⁶ At the same time, he reinforced the traditional view “that enforcement actions without Security Council authorization threaten the very core of the international security system founded on the Charter of the United Nations. Only the Charter provides a universally accepted legal basis for the use of force.”⁵⁷ The desire to prevent the types of humanitarian and human rights tragedies that arose in the 1990s resulted in the international community turning its attention increasingly towards studying the authority to intervene on humanitarian grounds.⁵⁸ However, only a minority of States were advocates for the right of humanitarian intervention without a Security Council authorization.⁵⁹ This could be seen in the 2000 declaration made by States of the Non-Aligned Movement, where all unilateral military action was condemned, “including those made without proper authorization from the United Nations Security Council.”⁶⁰

54. SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 9-20 (2012).

55. Sandesh Sivakumaran, *Re-envisaging the International Law of Internal Armed Conflict*, 22 *EUR. J. INT’L L.* 219, 232 (2011).

56. U.N. Secretary-General, *Rep. on the Work of the Organization of Its Fifty-Fourth Session*, ¶ 62, U.N. Doc. A/67/1-S/1 (1999).

57. *Id.* at ¶ 66.

58. See SUSAN BREAU, *THE RESPONSIBILITY TO PROTECT IN INTERNATIONAL LAW: AN EMERGING PARADIGM SHIFT* 17-26 (2016) (presenting an excellent overview of the development of the concept of the responsibility to protect and its relationship to the “right” of humanitarian intervention).

59. OLIVIER CORTEN, *THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW* 515 (2012).

60. *Id.* at 516 (quoting from the *Final Document*, Ministerial Conference, Cartagena (Columbia) ¶ 11 (Apr. 8, 2000)).

The effort to address the challenge of humanitarian intervention at the turn of the 21st Century was reflected in two 2001 reports. The first report, *Humanitarian Intervention*, commissioned by the Dutch government, found “not only that there is currently no sufficient legal basis for humanitarian intervention without a Security Council mandate, but also that there is no clear evidence of such a legal basis emerging.”⁶¹ However, the report also acknowledged the counterweight of a concern over an abuse of human rights, and attached “great importance to the increasing significance of the international duty to protect and promote fundamental human rights,” and in the Advisory Committee on Issues of Public International Law and the Advisory Council on International Affairs’s view, “this duty forms the basis for further development of a customary law justification for humanitarian intervention without a Security Council mandate.”⁶² Reference was made to *The Case Concerning the Barcelona Traction, Light and Power Company Limited*, which indicated that there are certain rights of interest to the international community as a whole “that are the concern of all States,” and that “all States can be held to have a legal interest in their protection.”⁶³

The second report, *The Responsibility to Protect*, commissioned by the Government of Canada, further developed the notion of intervention to protect populations for humanitarian purposes.⁶⁴ This 2001 International Commission on Intervention and State Sovereignty report’s central theme was “the idea that sovereign States have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.”⁶⁵ The three main elements of *The Responsibility to Protect* were: (1) the responsibility to prevent; (2) the responsibility to react, (3) and the responsibility to re-build.⁶⁶ Regarding principles of military intervention, reliance was placed on the Just War (*jus ad bellum*) principles of just cause, right authority, right intention, last resort, proportional means, and reasonable prospects of success.⁶⁷ Of particular note was the conclusion that:

61. *Humanitarian Intervention*, International Affairs and Advisory Committee on Issues of Public International Law 23 (2001).

62. *Id.*

63. *Barcelona Traction, Light and Power Co. (Belgium v. Spain)*, Judgement, 1970 I.C.J. 3, at ¶ 33 (second phase) (Feb. 5).

64. THE RESPONSIBILITY TO PROTECT, *supra* note 17.

65. *Id.* at VIII.

66. *Id.* at XI.

67. *Id.* at XII; see JAMES TURNER JOHNSON, MORALITY AND CONTEMPORARY WARFARE 28 (1999) (noting that the Just War principles regarding the resort to the use of force by States (*jus ad*

There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.⁶⁸

The Responsibility to Protect report also identified that where the Security Council failed to deal with a request to intervene in a reasonable time, alternative options included consideration by the General Assembly in Emergency Session, and action by regional and sub-regional organizations acting under Chapter VIII of the U.N. Charter. This latter action could be undertaken “subject to their seeking *subsequent* authorization from the Security Council.”⁶⁹ In making this recommendation, the report specifically notes “that in some cases that authorization has been after the event, as with the approval of the interventions by ECOWAS’s Monitoring Group (ECOMOG) in Liberia in 1992 and Sierra Leone in 1997.”⁷⁰

The reference to the General Assembly acting to intervene reflects an overall frustration with the deadlock that gripped the Security Council for much of the Cold War, and can still be a factor impacting on the international response to security crises. In this regard, the *Responsibility to Protect* report found that “[i]t is evident that, even in the absence of Security Council endorsement and with the General Assembly’s power only recommendatory, an intervention which took place with the backing of a two-thirds vote in the General Assembly would clearly have powerful moral and political support.”⁷¹ Subsequently, a 2011 letter to the Secretary General from the Brazilian representative to the United Nations stated, “[t]he use of force, including in the exercise of the responsibility to protect, must always be authorized by the Security Council, in accordance with Chapter VII of the Charter, or, in exceptional circumstances, by the General Assembly, in line with its resolution 377 (V) [“Uniting for Peace” resolution].”⁷²

Whatever the political impact of such General Assembly action, it cannot be said that body has the power to authorize the use of force as part

bellum) are identified as just cause, right authority, right intention, proportionality of ends, and last resort).

68. THE RESPONSIBILITY TO PROTECT, *supra* note 17, at XII (3) A.

69. *Id.* at XIII (emphasis added).

70. *Id.* at ¶ 6.5; *see also id.* at ¶ 6.35.

71. *Id.* at ¶ 6.7.

72. G.A. Res. 56/211, *Integrated and Coordinated Implementation of and Follow-up to the Outcomes of the Major United Nations Conferences and Summits in the Economic, Social and Related Fields Follow-up to the Outcome of the Millennium Summit*, at 3 (Nov. 11, 2011).

of an enforcement action in the same manner as the Security Council.⁷³ That said, were an intervention ever to be based upon a General Assembly recommendation, it would be difficult to argue it had no political/diplomatic “legitimacy.”⁷⁴ However, as can be seen from the United Kingdom Parliamentary Committee rejection of that approach following the 2018 chemical weapons facilities strike in Syria, reliance on a General Assembly resolution has not necessarily gained wide support.⁷⁵ However, this approach does have the advantage of keeping the debate about the morality of intervention within the confines of the “black letter” law of the U.N. Charter, rather than assess the independent actions of one or a small number of States.

Once again, the analysis of humanitarian intervention pits a positivist view that action can only be taken under the Charter against the morale or legitimacy pressure that something must be done. In extreme situations where the responsibility to protect is so objectively clear, the result is that the general rule, the sovereignty of the problem State must be respected, is rebutted. The issue is by what authority, and with what degree of political consensus. It has been suggested that while the *Responsibility to Protect* report attempted “to establish a case for the responsibility to protect and humanitarian intervention to support it, important segments of the international community are not convinced.”⁷⁶

In 2004, the United Nations Secretary General released a report title, *A More Secure World: Our Shared Responsibility*, which once addressed the responsibility to protect issue.⁷⁷ The report recognized:

[T]here is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international community — with it spanning a continuum involving prevention, response to violence, if necessary, and rebuilding shattered societies.⁷⁸

73. Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. 151, 165 (Mar. 30).

74. THE RESPONSIBILITY TO PROTECT, *supra* note 17, at ¶ 6.9 (“Collective intervention blessed by the UN is regarded as legitimate because it is duly authorized by a representative international body; unilateral intervention is seen as illegitimate because self-interested.”)

75. GLOBAL BRITAIN, *supra* note 13, at ¶¶ 29-30.

76. Johnson, *supra* note 18, at 630.

77. U.N. Security-General, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (Dec. 2, 2004).

78. *Id.* at ¶ 201.

The focus was on the authority of the Security Council to intervene as it endorsed:

[T]he emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.⁷⁹

That report also outlined “five basic criteria of legitimacy” for the Security Council to apply when considering whether to authorize military intervention, including (1) the seriousness of the threat; (2) proper purpose; (3) last resort; (4) proportional means, and (5) the balance of consequences.⁸⁰ Further, those “guidelines for authorizing the use of force should be embodied in declaratory resolutions of the Security Council and General Assembly.”⁸¹ These criteria mirror those found in *The Responsibility to Protect*, and also confirm that traditional State self-defense principles (*jus ad bellum*) should be applied in assessing whether intervention should occur.

In a 2005 report, *In Larger Freedom, Towards Development, Security and Human Rights for All*, the Secretary-General confirmed that:

If national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required.⁸²

Further, reference was made once again to principles regarding the use of force that were firmly grounded in Just War theory.⁸³

79. *Id.* at ¶ 203.

80. *Id.* at ¶ 207.

81. *Id.* at ¶ 208.

82. U.N. Secretary-General, *In Larger Freedom, Towards Development, Security and Human Rights for All*, ¶ 135, U.N. Doc. A/59/2005 (Mar. 21, 2005).

83. *Id.* at ¶ 126 (“When considering whether to authorize or endorse the use of military force, the Council should come to a common view on how to weigh the seriousness of the threat; the proper purpose of the proposed military action; whether means short of the use of force might plausibly succeed in stopping the threat; whether the military option is proportional to the threat at hand; and whether there is a reasonable chance of success.”).

The Responsibility to Protect doctrine was the subject of further comment in the 2005 *World Summit Outcome* document adopted by the High Level Plenary Summit of the General Assembly.⁸⁴ The responsibility of States to protect their populations was stressed,⁸⁵ however, it was also noted that:

[W]e are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁸⁶

It has been suggested that this World Summit Outcome document represents a critical turning point regarding the humanitarian intervention as “[n]owhere is there a discussion of a right to intervene but, rather, the resolution is confirmation of an international responsibility to react to genocide, crimes against humanity, ethnic cleansing and war crimes.”⁸⁷ The growing interest in a “responsibility to protect” was also reflected in the 2007 Secretary-General appointment of a Special Advisor on the Responsibility to Protect. This appointment was directly linked to “the agreement contained in paragraphs 138 and 139 of the 2005 World Summit Outcome Document.”⁸⁸

What is evident from the history of the acceptance of a responsibility to protect approach is that by the turn of the 21st Century, the dialogue concerning intervention for humanitarian grounds, while based on intervention under the U.N. Charter, would be assessed against principles that have their genesis in Just War theory, underpinning the legitimate recourse to force by States. From a United Nations perspective, the focus remained on seeking authority from the Security Council. However, any suggestion that all Member States concurred in that being the exclusive mechanism for authorizing such intervention is not supported by State practice.

84. G.A. Res. 60/1, 2005 World Summit Outcome (Sept. 16, 2005).

85. *Id.* at ¶ 138.

86. *Id.* at ¶ 139.

87. BREAU, *supra* note 58, at 25.

88. Letter dated 31 August 2007 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2007/721 (Dec. 7, 2007).

D. *The Responsibility to Protect to Present Day*

The *Responsibility to Protect* report has attracted interest, study and comment, but it cannot be said to have been embraced in terms of the Security Council taking military action to protect persons being subjected to serious humanitarian abuses. It has been noted that the concept began to be operationalized by the United Nations, which includes the Secretary-General's release of the 2009 report, *Implementing the Responsibility to Protect*.⁸⁹ However, particular attention was placed on the first pillar: prevention. It did not fundamentally increase the Security Council's willingness to authorize military action to protect persons victimized by serious humanitarian abuses. The Human Rights Council and the office of the High Commissioner of Human Rights were slow to react, although it has been noted that "[t]he architecture of the United Nations bureaucracy has undergone substantial change with the introduction of the Special Advisors on Genocide and the Responsibility to Protect, who ensure annual reporting on the implementation of the concept."⁹⁰

An example where the world might have invoked humanitarian intervention in responding to a genuine humanitarian catastrophe was in the early 2000s in Sudan. However, States were reluctant to intervene without territorial State consent in a conflict starting in 2003 which had created large scale human suffering. A July 2004 Security Council Resolution expressed grave concern, but also noted "that the Government of Sudan bears the primary responsibility to respect human rights while maintaining law and order and protecting its population within its territory."⁹¹ This was followed by a Resolution calling for support for "the efforts of the African Union aimed at a peaceful conclusion of the crisis and *the protection of the welfare of the people of Darfur*."⁹² There was also a 2005 reference by the Security Council to the International Criminal Court encouraging the Court to "to support international cooperation with domestic efforts to promote the rule of law, *protect human rights* and combat impunity in Darfur."⁹³ Notwithstanding reference to "the provisions of paragraphs 138 and 139 of the 2005 United Nations World Summit Outcome Document," in the

89. U.N. Secretary-General, *Implementing the Responsibility to Protect*, U.N. Doc A/63/677 (Jan. 12, 2009).

90. BREAU, *supra* note 58, at 29.

91. S.C. Res. 1556, Preamble (Jul. 30, 2004).

92. S.C. Res. 1564, ¶ 3 (Sept. 3, 2004) (emphasis added).

93. S.C. Res. 1593, ¶ 4 (Mar. 31, 2005) (emphasis added).

preamble of a 2006 Security Council Resolution, there was to be no true military intervention.⁹⁴ The deployment of an African Union military force (“AMIS”) in 2004, and subsequently, a hybrid AU/UN force mission, effectively relied on Sudanese consent.⁹⁵

One analysis of *The Responsibility to Protect* doctrine identifies the option of “robust peacekeeping” as being indicative of the post-report evolving practice of the United Nations towards protecting civilian populations in the Sudan, the Democratic Republic of Congo, Burundi, and the Ivory Coast.⁹⁶ It is certainly evident that the concept of “robust peacekeeping” was also a product of the complex and difficult United Nations operations that arose during the 1990s. It describes the situation wherein the Security Council has not authorized peace enforcement under Chapter VII, but has “given United Nations peacekeeping operations ‘robust’ mandates authorizing them to ‘use all necessary means’ to deter forceful attempts to disrupt the political process, protect civilians under imminent threat of physical attack, and/or assist the national authorities in maintaining law and order.”⁹⁷

Robust peacekeeping is distinguished from Chapter VII peace enforcement in that the former still requires the consent of the “main parties,” including the territorial State.⁹⁸ This modernized form of peacekeeping is a doctrine that clearly has an internal conflict and protection-of-civilian focus. That focus is represented in the *United Nations Peacekeeping Operations: Principles and Guidelines* observation that “[t]he environments into which United Nations peacekeeping operations are deployed are often characterized by the presence of militias, criminal gangs, and other spoilers who may actively seek to undermine the peace process or pose a threat to the civilian population.”⁹⁹ In some respects, similar to the acknowledgement in the *Responsibility to Protect* report of a General Assembly Uniting for Peace, and subsequent Security Council authorization of Chapter VII regional action, there was pressure within the international community to find non-traditional means of protecting civilians severely threatened by internal strife.

Notwithstanding these indirect efforts to protect threatened populations, the idea of military intervention, even under Security Council authorization, remained controversial. This was particularly evident in the 2011 United

94. S.C. Res. 1706, Preamble (Aug. 31, 2006).

95. GRAY, *supra* note 47, at 380-82.

96. BREAU, *supra* note 58, at 217-18.

97. UNITED NATIONS PEACEKEEPING OPERATIONS: PRINCIPLES AND GUIDELINES, DEP'T OF PEACEKEEPING OPERATIONS 34 (2008).

98. *Id.* (emphasis added).

99. *Id.* (emphasis added).

Nations' intervention in Libya. That year, the "Arab Spring" led to protests and a government crackdown that rapidly caught the attention of the international community. Discussion of responsibility to protect doctrine quickly gained traction as the Libyan government was identified as having committed crimes against its population. The Security Council asserted Libya's responsibility to protect its population in a February 2011 resolution mandating action, including a referral to the International Criminal Court, and an arms embargo, travel ban, and assets-freeze against high-level Libyan officials.¹⁰⁰ Its failure resulted in Resolution 1973, which authorized enforcement action, including the creation of a no-fly zone, enforcement of the arms embargo, and "all necessary measures...to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory."¹⁰¹

With the reference in Resolution 1973 to excluding a foreign occupation force, the Libya intervention appeared to be uniquely crafted to limit "intervention" to an aerial response. Some countries that might have normally been considered against such an intervention abstained from the vote.¹⁰² However, the operation ultimately was to be viewed by many States and commentators as having strayed into "regime change," with the NATO-led aerial bombing campaign assisting rebel forces to topple the Ghaddafi regime.¹⁰³ This very likely led the abstaining States to question the wisdom of tolerating the authorization. It has also been criticized by human rights groups for having caused civilian casualties.¹⁰⁴

Therefore, it is no surprise that the Libya operation sparked considerable debate concerning the future of *The Responsibility to Protect* doctrine. This was to have direct impact on decisions about intervening in Syria later that decade. It is evident that concern about how the Security Council mandate for Libya was executed directly impacted on whether intervention would be considered in the subsequent Syrian conflict.¹⁰⁵ At the same time, it has also been noted that intervention in Syria, or later in Iraq, would have had trouble meeting the precautionary principle of "a reasonable chance of success."¹⁰⁶

100. S.C. Res. 1970 (Feb. 26, 2011).

101. *Id.* at ¶ 4, at 3 (citation omitted).

102. BREAU, *supra* note 58, at 230.

103. See DINSTEIN, *supra* note 40, at 359; *The Crisis in Libya*, INT'L COALITION FOR THE RESP. TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya#Lessons> (last visited 19 May 2019).

104. *The Crisis in Libya*, *supra* note 103.

105. Sarah Brockmeier, Oliver Stuenkel & Marcos Tourinho, *The Impact of the Libya Intervention Debates on Norms of Protection*, 30 GLOBAL SOCIETY 113, 125-26 (2015).

106. BREAU, *supra* note 58, at 254.

This latter point highlights the development a more recent nuanced discussion of *The Responsibility to Protect* doctrine, with analysis focusing on how military force is used and controlled.¹⁰⁷

In this respect, the 2011 Brazilian letter to the Secretary-General following the Libyan operation focused on military force as: (1) being limited by its legal, operational, and temporal elements; (2) abiding by the letter and spirit of the United Nations authorized mandate; (3) producing as little violence, instability and harm as possible, and (4) using force must be limited, proportionate, and limited to the established objectives.¹⁰⁸ These factors reflect the traditional *jus ad bellum* principles set out in *The Responsibility to Protect*, including right intention, last resort, proportionate means, and reasonable prospects.¹⁰⁹ Notably, the *Responsibility to Protect* report also included an operational principle that should have had particular relevance when assessing the Libyan operation: “[a]cceptance of limitations, incrementalism and gradualism in the application of force, the objective being protection of a population, not defeat of a state.”¹¹⁰

The controversy and debate regarding the Libyan operation did not end the responsibility to protect debate, nor its potential applicability to the contemporary global security situation. Notably, the United Nations Security Council has continued to include protection of the civilian population as part of its mandates for United Nations controlled operations (e.g., the Sudan,¹¹¹ and Mali¹¹²).¹¹³ Further, the responsibility to protect was the subject of a 2018 Secretary-General report seeking to improve the reaction of the international community towards “the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity and the protection of vulnerable populations.”¹¹⁴ The problem was not seen to be one of a weak or misplaced principle, but rather “because the international community has been insufficiently resolute in its implementation and has allowed disagreements

107. Brockmeier, Stuenkel & Tourinho, *supra* note 105, at 129-30.

108. U.N. Security-General, *Follow-up to the Outcome of the Millennium Summit*, at ¶ 11(d)(e) & (f) U.N. Doc. A/66/551-S/2011/701 (Nov. 11, 2011).

109. THE RESPONSIBILITY TO PROTECT, *supra* note 17, at XII, ¶ (3).

110. *Id.* at XIII, ¶ (4).

111. S.C. Res. 1990, ¶ 3(d) (Jun. 27, 2011) (calling upon United Nations Interim Security Force for Abyei acting under Chapter VII to “without prejudice to the responsibilities of the relevant authorities, to protect civilians in the Abyei Area under imminent threat of physical violence”).

112. S.C. Res. 2085, ¶ 9(d) (Dec. 20, 2012) (acting under Chapter VII to create the African-led International Support Mission in Mali (AFISMA) tasked with supporting “the Malian authorities in their primary responsibility to protect the population”).

113. Brockmeier, Stuenkel & Tourinho, *supra* note 105, at 129-30.

114. U.N. Secretary-General, *Responsibility to Protect: From Early Warning to Early Action*, U.N. Doc. A/72/884 (Jun. 1, 2018).

about the past to foil unity of purpose in the present.”¹¹⁵ This resonates with a sentiment expressed by Thomas Franck that “the problem for the system is not so much how to accommodate such interventions in its framework of legality but how to find States willing to undertake the necessary rescue.”¹¹⁶

E. *Testing the Limits of “Established” Law*

As the 21st Century enters its third decade, intervention to prevent humanitarian atrocities is now firmly grounded in the idea of a “responsibility to protect” vulnerable civilian populations. However, questions remain regarding if, when, or how such interventions might actually be authorized. Does such authorization have to be provided solely by the United Nations Security Council? Absent such authorization, can such a military intervention ever be considered legally justified by the international community? In this respect, territorial integrity and political independence remain key factors influencing international reluctance to accept that humanitarian intervention should be considered. However, these are factors to be considered. They should not necessarily be seen as bars to such intervention taking place. It is clear that the Security Council is the preferred lawful or “right” entity to authorize such action, either through Chapter VII, or Chapter VIII of the U.N. Charter, but is it the only one?

There has been an acceptance, although somewhat grudgingly, that the General Assembly might also become involved on an exceptional basis recommending such action. That said, there is no mention of that option in a 2018 International Law Association study titled, *Final Report on Aggression and the Use of Force*.¹¹⁷ Notwithstanding that oversight, support for General Assembly action undoubtedly has been gained precisely because it can be anchored within the provisions of the U.N. Charter. Still, given a desire to act in the face of a humanitarian crisis, as well as the possibility that such action may fail to gain sufficient support in the Security Council, or is vetoed by one of its permanent members, or simply not be dealt with by the General Assembly, it remains possible that a State, coalition, or even a regional grouping of States, will want to act without the prior authority of the Security Council. This is exactly the situation presented by the United Kingdom in its reliance on humanitarian intervention as the basis for striking Syrian chemical facilities in 2018.

Ultimately, the question is one of whether the written words of the U.N. Charter exhausts the permissible action by a State or States confronted with

115. *Id.*

116. FRANCK, *supra* note 41, at 191.

117. *See Final Report, supra* note 9.

a population being exposed to criminal acts of clearly inexcusable proportions. Despite views that have been expressed to the contrary, one possible avenue is customary international humanitarian law. Indeed, the issue of a customary law basis for intervention was also raised in the 2018 International Law Association's study, *Final Report on Aggression and the Use of Force*.¹¹⁸ As was noted in that study, such a position automatically runs up against the requirement to provide evidence of State practice, and that such practice has been widely accepted by other States (e.g., *opinio juris*).¹¹⁹ By broadly considering the concept of humanitarian intervention, it is challenging to suggest such a customary rule has fully crystallized or attracted wide support given the limited number of times it has been invoked and the resistance it has encountered from some parts of the globe.¹²⁰

However, that is not the end of the discussion. Customary law is established by "a pattern of claim, absence of protest by States particularly interested in the matter at hand and acquiescence by other States."¹²¹ Further, "[t]ogether with related notions such as recognition, admissions and estoppel, such conduct or abstinence from conduct forms part of a complex framework within which legal principles are created and deemed applicable to States."¹²² In this regard, the scope and nature of humanitarian intervention as a customary rule appears to be in the formation stage. Indeed, the International Law Association study expends nearly four pages assessing its potential status. The study comes to the conclusion that humanitarian intervention is supported by a minority of writers, and also notes that others emphasize "that a use of force to avert a humanitarian catastrophe will, if stringent conditions are met, fall into a legal grey area."¹²³ Further, the *Final Report on Aggression and the Use of Force* states "that it is difficult to conclude that a right of humanitarian intervention is unquestionably unlawful."¹²⁴

The viability of humanitarian intervention as a customary rule may be considerably aided when the focus is narrowed to specific instances where States are confronted with horrific acts amounting to war crimes, genocide, and crimes against humanity in circumstances where the Security Council for whatever reasons is deadlocked, and there are no other ulterior motives on the part of the intervening State or States. In assessing this issue, it is difficult

118. *Id.* at 21.

119. *Id.*

120. However, in 1991, it was suggested that in respect of the Kosovo operation that "modern customary international law recognizes a right of military intervention on humanitarian grounds by States, or an organization like NATO." Greenwood, *supra* note 29, at 171.

121. MALCOLM N. SHAW, *INTERNATIONAL LAW* 89 (6th ed. 2008).

122. *Id.* at 89.

123. *Final Report*, *supra* note 9, at 24.

124. *Id.*

to ignore that State practice does exist, as seen both during the Cold War and after (e.g., action taken by India, Tanzania, Vietnam, France, the United Kingdom, ECOMOG, and NATO). This action was clearly not limited to Western powers, nor were these claimed humanitarian interventions carried out exclusively by developed States. Interventions occurred in circumstances where the United Nations Security Council was seen in some instances to subsequently condone the action, and in others, to at least not condemn it. This reality is significant and cannot be ignored.¹²⁵

The debate concerning humanitarian intervention highlights yet another area where long held interpretations may be giving way to the realities of the changing security environment. This is not the only area of international law where this is occurring. The certainty with which international law is sometimes viewed to be “settled” is being challenged on a number of fronts. It has rightly been noted that “[l]egal rules are not static, but are capable of evolving over time.”¹²⁶ For example, prior to 9/11, it was not uncommon to hear international lawyers claim that the right to self-defense, set out in the U.N. Charter, had no application to non-State actors acting alone since their actions had to be attributable to a State in order for an armed attack to occur, such that Article 51 was applicable. In 2020, it is safe to say that this “is no longer the majority view.”¹²⁷

Similarly, the authority to intervene in another State to defend your own nationals has been area of longstanding controversy. However, there has been increasing acceptance in this area, particularly given the contemporary threats posed to persons located in failed or failing States, that intervention in another State to protect one’s own nationals can be justified under international law. That said, due to the lack of consensus, such intervention has been argued to be justified under a variety of different rationales (e.g., law enforcement, forceful countermeasures, self-defense in response to an armed attack, non-combatant evacuation measures, proportionate defensive measures, or simply the defense of nationals).¹²⁸ The wide variety of suggested legal bases is not necessarily an indication of their weakness, but rather that an overly strict interpretation of the law will cause alternative rationales to be considered.

125. GLOBAL BRITAIN, *supra* note 13, at ¶¶ 16-17; *see also* Greenwood, *supra* note 29, at 163.

126. TOM RUYTS, ARMED ATTACK AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 6 (2010).

127. David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24 EUR. J. INT’L L. 235, 273 (2013).

128. Kenneth Watkin, FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT 394 (2016); *see also Final Report*, *supra* note 9, at 17-18.

The law does not stand still, and with respect to humanitarian intervention, State practice has likely not come to an end. There may crystallize a broader acceptance of a customary law norm recognizing that in exceptional circumstances, relief needs to be provided militarily to a threatened population even if only by a State acting alone, or in conjunction with a small number of allies. For that to happen, a State or States claiming a customary law authority to intervene will have a more sympathetic argument if they closely adhere to Just War principles (i.e., just cause, right intention, last resort, proportional means, and reasonable prospects of success) to guide their conduct.

In this respect, it is noted that the United Kingdom was careful to indicate its adherence to such principles in its published legal position. It stated that:

In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention to strike carefully considered, specifically identified targets in order effectively to alleviate humanitarian distress by degrading the Syrian regime's chemical weapons capability and deterring further chemical weapons attacks was necessary and proportionate and therefore legally justifiable. Such an intervention was directed exclusively to averting a humanitarian catastrophe caused by the Syrian regime's use of chemical weapons, and the action was the minimum judged necessary for that purpose.¹²⁹

Given such a measured approach, and what was at stake, it is difficult to imagine such action would attract liability under the crime of aggression.¹³⁰ In this respect, it should be noted that the *Final Report on Aggression and the Use of Force* indicated that an inability to state such an intervention is unquestionably unlawful may well be of relevance when considering whether an act of aggression occurred.

2. CONCLUSION

Nearly twenty years after the publication of the *Responsibility to Protect* report, it is likely that the international community will continue to place particular importance on the territorial sovereignty with an initial approach towards humanitarian crises being that the protection of the human rights of persons found in the territory of a State remains the responsibility of that State. However, the requirement that United Nations Members must refrain from the threat or use of force against the territorial integrity or political

129. *Syria Action*, *supra* note 1, at ¶ 4(iii).

130. Rome Statute of the International Criminal Court, art. 8 bis., June 11, 2010, 49 I.L.M. 1325, 1334-35.

independence of any State will not preclude intervention occurring on humanitarian grounds, such as in situations of genocide or other large-scale killings, war crimes, ethnic cleansing, and crimes against humanity. Such intervention can be comfortably authorized by the Security Council acting pursuant to Chapter VII, or as a regional action under Chapter VIII of the Charter.

While there is not universal agreement, there is a role for the United Nations General Assembly in authorizing humanitarian intervention. That option should not be discounted. In that regard, the General Assembly has, at least in theory, the option to exceptionally recommend intervention by acting under the 1950 *Uniting for Peace* Resolution. This would provide a form of legitimacy. That said, the General Assembly has never acted in this manner, and it is not clear under what circumstances it would be prepared to do so.

This leaves open the question of individual States, a coalition of States, or a regional organization, acting on its own without prior Security Council authorization. Given recent history, such action may be more likely to occur than having authorization provided by the Security Council to carry out a humanitarian intervention. Any such action will undoubtedly be better received if a State is not acting alone, and instead acting as part of a coalition or regional effort. This does not mean the Security Council may not eventually be involved, as it is very possible that attempts may be made by the territorial State or an ally to condemn the humanitarian action. That body may also be asked to address the crisis or other issues in the territorial State related to that intervention. This can possibly set the scene for a form of direct or indirect “commendation” by the Security Council, or at least provide a record that no “condemnation” was made of the intervention. This in turn could further aid in crystalizing the argument for a customary law basis for humanitarian intervention.

Given the risk attendant with a State relying on a claim based on customary international law to be able to carry out a humanitarian intervention, any decision to do so should be strictly governed by the principles identified in the *Responsibility to Protect* doctrine. These include a just cause, a right intention, acting as a last resort, using only proportional means, and having a reasonable prospects of success.¹³¹ Further, there should be clear operational objectives, an unambiguous mandate, adequate resources provided to complete the mission, an acceptance that the objective is the protection of the population and not the defeat of the State, appropriate rules

131. THE RESPONSIBILITY TO PROTECT, *supra* note 17, at XII, ¶ (2).

of engagement, and maximum coordination with humanitarian organizations.¹³²

132. *Id.* at XIII, ¶ (4).