

**The So-Called Right of Humanitarian Intervention**

**by Adam Roberts**

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**Professor Adam Roberts is a Fellow of Balliol College and Montague Burton Professor of International Relations in the University of Oxford. This text represents a revised and expanded version of a lecture he delivered at Trinity College on 23 November 1999.\* An expanded version of this paper is being published in *Yearbook of International Humanitarian Law*, The Hague, vol.3, summer 2001.**

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*Introduction by the Warden of Trinity College, Professor Donald Markwell.*

Distinguished guests, ladies and gentlemen -

It is a very great pleasure for me as Warden of Trinity College in the University of Melbourne to welcome you to this lecture by Professor Adam Roberts on 'The So-Called Right of Humanitarian Intervention'.

The decade now drawing to a close, in the aftermath of the cold war and with new possibilities perceived for the United Nations, has seen the role of humanitarian action achieve a new centrality in international thought and action. The traditional doctrine that non-intervention in the affairs of other states is an essential building block of order among states has been challenged in theory and practice with some vigour. This has been the decade of Iraq, and the Kurds; the aftermath of Yugoslavia in its various phases; Somalia; Rwanda; Haiti; and this has been the year of Kosovo and East Timor.

Professor Adam Roberts is one of the world's leading scholars in this field, and we are deeply fortunate to have him speak to us tonight on this highly topical subject.

Adam Roberts is a Londoner who has made Oxford his home. He was born into a most remarkable family on 29 August 1940, as Hitler's airforce was already pounding major British cities. Both his parents were authors and anthologists. His father, a schoolmaster and poet, Michael Roberts, who died in 1948 edited *The Faber Book of Modern Verse*, first published in 1936, at the suggestion of T.S. Eliot; and his mother, who died just over two months ago, was Janet Adam Smith, whose extraordinary accomplishments include serving as literary editor of *New Statesman* in the 1950s and writing a brilliant biography of John Buchan. Adam inherited from both parents a love of mountaineering and rock climbing. His family connections include the economist Adam Smith; RAB Butler, twice almost Prime Minister of the United Kingdom; and, just to establish his Australian credentials, the Alice of Alice Springs, Lady Alice Todd.

Adam went up from Westminster School to read History at Magdalen College, Oxford, where one of his tutors was A.J.P. Taylor. He became greatly absorbed in the issues of war and peace in the 1960s, and served as Assistant Editor of the radical pacifist *Peace News* from 1962 to 1965. The history of *Peace News* records - and I quote - that 'from the early 1960s Adam Roberts had begun to write about the struggle in Vietnam, well before it became an international issue that mobilised concerned people around the world'. In 1965, Adam went to the London School of Economics on a studentship named for the British MP, peace-monger and philanthropist Noel Buxton. In 1968, he became a lecturer in International Relations at LSE, and stayed in that position until 1981. His academic interests in the 1960s and 1970s, reflected in his major writings and reflecting his undocinaire openness to alternative approaches, included 'civilian defence' - a policy of resisting aggression by non-violent methods; the Prague Spring of 1968, and its repression by Soviet forces; and 'territorial defence', the preparation of a whole nation to conduct defence in depth throughout its national territory, interest in which was encouraged by guerrilla warfare against the French and then the Americans in Vietnam.

In April 1981, Adam returned to Oxford as Alastair Buchan Reader in International Relations

and a Fellow of St Antony's College to work as close colleague of Hedley Bull, the Australian who held the Montague Burton chair of International Relations. It was at this time that I came to know him, when I went to Oxford in October 1981 as a post-graduate student and undertook, with his warm encouragement at the outset and along the way, the M.Phil. degree in International Relations which he and Hedley were, with other colleagues, responsible for teaching.

As a teacher, Adam superbly combined an expectation of high standards of scholarly precision and careful judgement, in which of course he taught by example, with warm encouragement reflecting his great generosity of spirit and keen eye for the strengths of other people. I think that, like so many of us, Adam himself was greatly influenced by Hedley Bull's conceptualisation of the foundations of order in the so-called 'anarchical society' of states, and by his interest in the history of thought about such issues, including reviving neglected thinkers about international relations.

After Hedley Bull's untimely death in 1985, Adam with characteristic modesty and public spirit encouraged a number of other internationally acclaimed scholars to apply for the Montague Burton chair, but he ultimately succumbed to the insistent encouragement of his colleagues - of whom I was by that time one - that he should allow his own name to be considered; and in 1986, he became Montague Burton Professor of International Relations in the University of Oxford, and a Fellow of Balliol College, the positions he now holds. Over the subsequent decade, during which I was a Fellow of Merton College, teaching International Relations alongside other aspects of Politics, Adam and I were close colleagues; and he remained a warm encourager and a very good friend. The 1980s and 1990s have been decades of very major growth and consolidation of International Relations as a discipline - a very popular subject - in Oxford; and Adam has provided leadership in this of a very high order.

Throughout his career, Adam has taken a keen interest in issues of war and of law in international society. This has been reflected in his major publications - as already mentioned, on non-violent civilian defence, and on territorial defence in depth, an idea he studied in the 1970s with particular reference to Sweden and Yugoslavia; the laws of war - when and how force may be used; the role of the United Nations in a divided world; the tradition of thought about international society derived from Hugo Grotius; and, most recently, humanitarian action in war. Adam's erudition and scholarship have been recognised, for example, in his election in 1990 as a Fellow of the British Academy.

Adam Roberts brings to everything he does those qualities I have alluded to - high scholarship and precision, careful judgement, conscientiousness, a warm interest in and respect for people of all stations in life and from all backgrounds, great generosity of spirit and good humour, irreverence, modesty, and utter lack of pomposity. I am delighted that this, his first visit to Australia, includes time with us here at Trinity, and it is a great pleasure to call on him to speak on 'The So-Called Right of Humanitarian Intervention'.

## ***The So-Called Right of Humanitarian Intervention***

The post-Cold War international debate, which is my central concern here, has revolved around a question that has been discussed for centuries by international lawyers: does international law provide an actual or possible basis for a right of humanitarian intervention? My central contention is that international law cannot at present provide a definite general answer to this question. It provides guidelines, competing principles, and structures for legitimate decision-making, but not a clear general answer to a seemingly clear question.

A difficult part of the question is whether there is a right of humanitarian intervention in those cases in which the UN Security Council, despite recognizing the gravity and urgency of a threat, is unable to reach agreement on specific action. Do states or regional bodies have any right to act in such circumstances? This question threatens to become deeply divisive in international relations. Particularly in the absence of Security Council authorization, there may be cases of intervention which are in a legal 'grey area': neither legal nor illegal, but rather the outcome of a difficult process of balancing competing principles.

The fact that much international debate has had as a focus the question of whether or not there is a 'right' of humanitarian intervention may have distracted attention from other equally urgent issues arising from recent and contemporary practice, including particularly the questions of what exactly outside military forces and administrative mechanisms should aim to achieve.

This short survey has four parts, each of which has two disciplinary threads: International Relations (in particular, an emphasis on trying to understand actual practice and its underlying causes) and International Law. In the second and third parts I try to present a strong case for such a right, and a strong case against. The final section offers some suggestions regarding future development.

1. Introduction to the debate.
2. The case for a 'right of humanitarian intervention'.
3. The case against a 'right of humanitarian intervention'.
4. Conclusions.

### **1. INTRODUCTION TO THE DEBATE**

#### *a. Definition and background*

'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.<sup>1</sup> Some definitions of recent decades have encompassed two further elements:

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<sup>1</sup> This definition is consistent with the implicit or explicit definitions in numerous works including W.E. Hall, *A Treatise on International Law*, 8th edn., ed. A. Pearce Higgins (Oxford: Clarendon Press, 1924), pp. 342-4; Ulrich Beyerlin, 'Humanitarian Intervention', in Rudolf Bernhardt (ed.), *Encyclopaedia of Public International Law*, vol. 3 (Amsterdam: North-Holland Publishing, 1982), p. 211; and Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (The Hague: Kluwer Law International, [1999]), p. 18.

such intervention may be with or without the authorization of the UN Security Council, and has the purpose of preventing or putting a halt to gross and massive violations of human rights or international humanitarian law.<sup>2</sup> These elements are consistent with, and can now be taken as part of, the classical definition.

Confusingly, in the 1990s the term has sometimes been used, especially in 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.<sup>3</sup> The following discussion sticks to the first, classical, meaning of the term.

Legal writers addressing the topic have generally recognized it as difficult and contentious.<sup>4</sup> In particular, 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 stressed the requirement that such intervention be authorized by 'the whole body of civilized states' or at least should have broad support among them.<sup>5</sup>

During the years between 1945 and the end of the Cold War, UN attempts to codify issues relating to the lawfulness of the use of force did not address the matter of humanitarian intervention.<sup>6</sup> However, there was much relevant state practice. Many writers recognized the varied ways in which the legitimacy of humanitarian intervention was affected by the existence,

legal principles, and developing role of the United Nations;<sup>7</sup> while other writers were unambiguously opposed to any recognition of a right of such intervention.<sup>8</sup> Already 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

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<sup>2</sup> For example, both these elements are in the definition of humanitarian intervention in a report commissioned by the Danish Government in January 1999 and completed in October, *Humanitarian Intervention: Legal and Political Aspects* (Copenhagen: Danish Institute of International Affairs, 1999), p. 11.

<sup>3</sup> 'Humanitarian intervention' is viewed in both these senses in John 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.

<sup>4</sup> See e.g. Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edn. (Irvington-on-Hudson, New York: Transnational Publishers, 1997). This is the revised edition of the book, which was first published in 1988.

<sup>5</sup> Hall, *A Treatise on International Law*, 8th edn., p. 344.

<sup>6</sup> The 'Definition of Aggression', approved in UN General Assembly Resolution 3314 of 14 December 1974, does not address the matter. However, its Article 2 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 ...'

<sup>7</sup> See e.g. Richard B. Lillich (ed.), *Humanitarian Intervention and the United Nations* (Charlottesville: University Press of Virginia, 1973); Wil D. Verwey, 'Humanitarian Intervention', in Antonio Cassese (ed.), *The Current Legal Regulation of the Use of Force* (Dordrecht: Martinus Nijhoff, 1986), pp. 57-78; and Jean-Christophe Rufin, *Le piège humanitaire* (Paris: Jean-Claude Lattès, [1986]).

<sup>8</sup> For a succinct and sceptical survey of the history of 'humanitarian intervention' in international legal debate over the centuries, see Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), pp. 338-42. A fundamentalist denial of any right of humanitarian intervention can also be found in Bert V.A. Röling, 'The Ban on the Use of Force and the U.N. Charter', in Cassese, *The Current Legal Regulation of the Use of Force*, pp. 3-8.

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.<sup>9</sup>

*b. Continued relevance of the norm 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 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.

*c. Pressures for 'humanitarian intervention' in the 1990s*

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.<sup>10</sup> 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 combination of factors:

- \* Harrowing situations, extensively reported on TV, and discussed extensively by international bodies, led to calls for action.
- \* Refugee 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

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<sup>9</sup> 'Conclusion' in Hedley Bull (ed.), *Intervention in World Politics* (Oxford: Oxford University Press, 1984), p. 195. See also his remarks on p. 193 on the impact of 'the growing legal and moral recognition of human rights on a world-wide scale' on the question of humanitarian intervention.

<sup>10</sup> Writing on the issue reflecting the experience of the 1990s includes Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia: Univ. of Philadelphia Press, 1996); and Nicholas Wheeler's forthcoming book, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, forthcoming c. September 2000).

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), and the preoccupation of the public in many Western countries with humanitarian issues, led to a stronger sense that in certain circumstances intervention might be legitimate.
- \* The growth of international institutions, including in the field of international security, 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 authoritative decisions, giving a degree of 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.

*d. Eight cases in the 1990s of military action on humanitarian grounds*

In the 1990s, 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 in respect of the following eight cases, in all of which humanitarian considerations were cited in Security Council resolutions, and in all of which there were actual military interventions:

- \* *Northern Iraq (1991)*
- \* *Bosnia and Herzegovina (1992-5)*
- \* *Somalia (1992)*
- \* *Rwanda (1994)*
- \* *Haiti (1994)*
- \* *Albania (1997)*
- \* *Kosovo (1998-9)*
- \* *East Timor (1999)*

Four of these eight cases (those in italics above) can be considered 'humanitarian interventions' within the definition offered earlier. In these four cases military action without the approval of the government of the state, and justified largely on the grounds of 'humanitarian intervention', was initiated. However, in all 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 (in contrast to three of the four 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 a US-led group of states with the stated purpose of achieving the UN Security Council's objectives, but without its explicit authorization; and in each of these two cases it was only after such initial non-UN military action that a UN-authorized force was established and deployed, benefiting from the consent (albeit belated) of the host state.

The other four cases (Bosnia, Rwanda, Albania, and East Timor) do not technically fall within the category of humanitarian intervention, because military action was only authorized and initiated after host government consent had been obtained. In the cases of Bosnia and East Timor some qualification is required regarding the matter of host state consent. In the case of Bosnia, where the principal military action taken was NATO's 'Operation Deliberate Force' in 1995, this 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 consent of the Indonesian Government, whose claim to sovereignty over East Timor was in any case strongly contested, was given after, and no doubt because of, the application of intense pressure by the USA, the UN and others.

In the 1990s it was not only in a UN context that the issue arose of intervention without explicit invitation from the host government. The same issue arose in both the major involvements of ECOMOG in civil wars in West Africa. Both in Liberia from August 1990 and Sierra Leone from May 1997 it acted on occasion without authority of, or in opposition to, the incumbent government. ECOMOG's effectiveness in assisting an end to civil wars in these countries has been limited.<sup>11</sup> Some have suggested that these 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.<sup>12</sup>

The frequency with which humanitarian issues have been an element in justifications for actual interventions in the 1990s confirms that there have to be some common causes in the structure of contemporary international politics; and suggests that the case for the existence of a right of humanitarian intervention may be based on serious considerations.

## **2. THE CASE FOR A 'RIGHT OF HUMANITARIAN INTERVENTION'**

The case for asserting that there is a right of 'humanitarian intervention', and that this is a right in contemporary international law, involves a number of distinct elements, which are loosely grouped under five headings below.

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<sup>11</sup> 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, and has included elements of peace enforcement. Its activities have been multi-faceted and controversial.

<sup>12</sup> See e.g. Ruth Wedgwood's contribution to the editorial comments on 'NATO's Kosovo Intervention' in *American Journal of International Law*, vol. 93, October 1999, at p. 832 and n. 22.

*a. Developments in international law since 1945*

In the years since 1945, many legal developments have indicated that the actions of individual governments are subject to international scrutiny and, ultimately, to certain forms of implementation. The two main streams of law that have been of particular significance in this regard are:

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

The UN Charter, while it does not provide any specific authorization of humanitarian intervention, and essentially limits the right of states to use force to cases of self-defence, does contain provisions that are open to interpretation as potentially compatible with humanitarian intervention. There are references to fundamental human rights in the Preamble and in Article 1(2) and (3). Article 2(7) states that nothing in the Charter 'shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state', but then concludes that 'this principle shall not prejudice the application of enforcement measures under Chapter VII'. There is substantial evidence that gross violations of human rights and international humanitarian law are now considered matters of international concern, not just domestic jurisdiction.<sup>13</sup> 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'; and Chapter VII gives the Security Council considerable authority regarding the use of force in cases where it considers there is a 'threat to the peace, breach of the peace or act of aggression'. Chapter IX, on international economic and social cooperation, contains a pledge by members to 'take joint and separate action' to achieve, *inter alia*, universal observance of human rights, but it has never been suggested that this legitimizes military action. All these 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.

Although it is a key foundational document of the post-1945 international 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.

Some international agreements concluded since 1945 contain provisions pointing towards a possible right of humanitarian intervention. The clearest example (which belongs equally to both the human rights and armed conflict streams of law identified above) is the 1948 Genocide Convention, Article VIII of which specifies that any contracting state 'may call upon the competent organs of the United Nations to take such action under the Charter of

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<sup>13</sup> See e.g. Laurence Boisson de Chazournes and Luigi Condorelli, 'Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests', *International Review of the Red Cross*, Geneva, No. 837, March 2000, pp. 67-87.

the United Nations as they consider appropriate for the prevention and suppression of acts of genocide...'.<sup>14</sup> Another possible example is the 1994 Convention on the Safety of UN Personnel, Article 7 of which contains a provision that states will co-operate in its implementation, 'particularly in any case where the host State is unable itself to take the required measures'.

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. For this reason, the concept of 'crimes against humanity' has always had a particular significance for the idea of humanitarian intervention. 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.

This idea of 'crimes against humanity', enunciated in the 1945 Nuremberg and 1946 Tokyo charters, was reflected in the Nuremberg and Tokyo judgements 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 (Article 5), the 1994 Statute of the International Criminal Tribunal for Rwanda (Article 3), and the 1998 Rome Statute, which is not yet in force (Article 7).

Underlying these developments in international law is an emerging view, much emphasized by Kofi Annan, that the state should be understood to be the servant of the people, not its master.<sup>15</sup> Some UN General Assembly resolutions have pointed in the same direction.<sup>16</sup> A stronger variant of this view is that state sovereignty is vested in the people, not in the government. This latter approach could help to justify humanitarian intervention in cases, such as Haiti, in which an armed minority has seized power in a state and has overthrown a democratically elected government: however it would be of less relevance 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 engaging in crimes (in this case genocide) against a minority.

As regards the actual practice of the UN Security Council and General Assembly, there have been many developments which suggest that international institutions, decisions and norms

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<sup>14</sup> For a critical view of the provisions and working of the 1948 Genocide Convention see Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (New Haven: Yale University Press, 1982), esp. pp. 36-9 and 174-85.

<sup>15</sup> See e.g. Kofi Annan's speech to the UN General Assembly on 20 September 1999, 'Two Concepts of Sovereignty', UN Press Release SG/SM/7136 GA/9596 of 20 September 1999; text reprinted in Annan, *The Question of Intervention: Statements by the Secretary-General*, UN Department of Public Information, New York, December 1999, pp. 38-9.

<sup>16</sup> See e.g. UN General Assembly resolution 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, and at the same time stresses that 'the prime responsibility and duty to promote and protect human rights and fundamental freedoms lie with the state'.

have a degree of authority over sovereign states.<sup>17</sup> While not all these developments relate specifically to humanitarian intervention, they do confirm the significant shift in the view of states regarding sovereignty.

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.

*b. Policies and Acts of Governments*

Even governments that have opposed a general doctrine of humanitarian intervention have in particular cases implicitly recognized the strength of the case for it. When, following extreme cruelties perpetrated by Pakistani forces in the eastern half of Pakistan in 1971, India invaded the territory, it justified its actions in terms not totally different from, say, the justifications for NATO action over Kosovo in 1999. Indian ministers and officials referred repeatedly to 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 ongoing Indian military action, 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.'<sup>18</sup> Claims that India changed the record of Security Council proceedings so as to appear to have relied on a self-defence argument, and that no country supported the legality of humanitarian intervention, appear to be wrong, or at least over-stated.<sup>19</sup> In a further Security Council meeting on 13 December 1971, 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

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<sup>17</sup> One example is the establishment of the criminal tribunals for former Yugoslavia and Rwanda by the authority of the UN Security Council. Their respective charters place duties on states to co-operate with the tribunals.

<sup>18</sup> 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).

<sup>19</sup> 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.' Akehurst, 'Humanitarian Intervention', in Bull (ed.), *Intervention in World Politics*, pp. 96-7. 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 cease-fire resolution promoted by the USA.

violation of human rights was a direct threat to the security of nations.<sup>20</sup>

The justifications offered for many other forcible interventions in the post-1945 period have included assertions about the need to alleviate the sufferings 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 process of being dethroned.

The interventions of the 1990s resulted in a revival of official statements justifying humanitarian intervention. In October 1998, with the crisis in Kosovo moving towards military action, the UK Foreign and Commonwealth Office circulated the following statement to allied governments:

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 Milosevic is dissuaded from further repressive acts, and that only the proposed threat of 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.<sup>21</sup>

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<sup>20</sup> UN, SCOR, 26th year, 1613th meeting, 13 December 1971, pp. 15-17 and 19-23. For a sophisticated discussion of the question of humanitarian intervention in light of the 1971 events in the Indian subcontinent, see Thomas M. Franck and Nigel S. Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force', *American Journal of International Law*, vol. 67, April 1973, pp. 275-305.

<sup>21</sup> 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'. See also Baroness

As indicated later, there are many possible grounds of criticism of this view. Its opening claim, implying that Bosnia and Somalia provide firm legal precedents for humanitarian intervention authorized by the Security Council, underplays the fact that in Bosnia there was government consent for military action under UN auspices, while in Somalia there was no government to give or refuse consent: so neither is an ideal-type of humanitarian intervention. The central argument, that intervention could be legitimate even in the absence of Security Council authorization, has been contested. Yet the fact that so many NATO governments accepted an argument broadly along these lines is evidence of a significant development in favour of humanitarian intervention -- at least in the particular circumstances of Kosovo.

*c. Parliamentary consideration*

In debating particular crises, some parliaments appear to have accepted that in extreme circumstances there is 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.<sup>22</sup>

*d. The UN Secretary-General*

Kofi Annan, since he became UN Secretary-General on 1 January 1997, has spoken eloquently of the need of intervention in cases of urgent humanitarian necessity. His first major contribution on this subject was in a speech at Ditchley in June 1998.<sup>23</sup> 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:

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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 to House of Commons Select Committee on Foreign Affairs, 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. See also the Committee's examination of Mr Tony Lloyd on 26 January 1999.

<sup>22</sup> 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 <http://www.parl.gc.ca/>

<sup>23</sup> Kofi A. Annan, Ditchley Foundation Lecture, 'Intervention', Ditchley Park, England, 26 June 1998. This and four key statements made in 1999 are usefully collected in Annan, *The Question of Intervention*.

- (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;
- (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.<sup>24</sup>

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 humanitarian 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.<sup>25</sup>

*e. Right of intervention independent of the UN Security Council*

In 1998-9 the Kosovo crisis concentrated attention on the question of whether there is a right of intervention even when the Security Council cannot agree. There is a powerful logic in asserting such a right. If crimes against humanity justify intervention, can it be right that such intervention is subject to a veto from any one of five states, some of which have a record of scepticism or even opposition to humanitarian intervention?

The fact that the Security Council could not agree on military action over Kosovo in 1999 does not mean that the action was necessarily illegal. On 26 March 1999, two days after the

<sup>24</sup> 'Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict', UN doc. S/1999/957, 8 September 1999, pp. 26-7.

<sup>25</sup> UN Press Release SG/SM/7136 GA/9596 of 20 September 1999; text reprinted in Annan, *The Question of Intervention*, pp. 38-9 and 44.

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'.<sup>26</sup>

Since the war over Kosovo, there has been substantial support for attempts to develop a coherent legal concept of humanitarian intervention. Representatives of a wide range of countries have supported such efforts.<sup>27</sup> Europeans and North Americans have probably been the most inclined to support humanitarian intervention. The legitimization of uses of force not specifically authorized by a UN Security Council decision has been addressed in the following terms by Prof. 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.<sup>28</sup>

In these statements Professor Bring is remarkably cautious about possible justifications under existing international law for humanitarian intervention not based on a Security Council decision. Granted that the UN Charter does not directly address the issue of humanitarian intervention, it does leave some possible scope for the concept. As to Professor Bring's central proposition, that there is a need to formulate a doctrine of humanitarian intervention, it is necessary to consider the case against humanitarian intervention before seeing whether progress in this direction is possible or desirable.

### **3. THE CASE AGAINST A 'RIGHT OF HUMANITARIAN INTERVENTION'**

If the considerations suggesting that there may be a right of humanitarian intervention in

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<sup>26</sup> Account of the Security Council debate, UN Press Release SC/6659, 26 March 1999.

<sup>27</sup> See for example the speech of the Foreign Minister of Singapore, Mr S. Jayakumar, at the UN General Assembly on 24 September 1999.

<sup>28</sup> Ove Bring, 'Should NATO Take the Lead in Formulating a Doctrine on Humanitarian Intervention?', NATO Review, Brussels, Autumn 1999, pp. 25 and 27.



contemporary international law seem to be strong, so, too, do the considerations which point in the opposite direction. Again, these are loosely grouped under five main headings.

*a. Lack of a treaty basis*

Advocates of humanitarian intervention are unable to point to any treaty or other legal document that clearly recognizes a right of humanitarian intervention. The nearest to a legal basis for such action is the UN Charter: Chapter VII recognizes the Security Council's right to take a wide range of military actions in cases where there is a threat to international peace and security. However, as noted above, there is virtually nothing in the Charter that gives support to humanitarian interventions not authorized by the UN Security Council.

Moreover, no other binding legal text explicitly supports such interventions by states. Treaties in the fields of human rights and international humanitarian law do require states to observe well-defined standards, and to prevent and punish certain violations of those standards, but they do not suggest 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 under the Security Council must therefore rely on moral considerations, arguments relating to customary law, or the opinions of writers, to buttress their claims.

*b. International humanitarian law and non-intervention*

A number of treaties in the field of the laws of war (i.e. international humanitarian law) appear to exclude the idea that a state's violations of their terms could provide a basis for military intervention. Understandably, these provisions are seldom mentioned by advocates of humanitarian intervention.

The 1977 Geneva Protocol I, on international armed conflicts, does contain certain provisions that might seem to point towards enforcement actions. Article 1 (echoing the same article in the four 1949 Geneva Conventions) specifies that the states parties to it undertake to 'respect and ensure respect for this Protocol in all circumstances'; and Article 89 builds on this by requiring states to respond to serious violations by acting 'jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.' However, these provisions would be a weak basis for an enforcement action arising from a non-international conflict, not least because Protocol I is not formally applicable to such cases. Moreover, 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...*

The 1977 Geneva Protocol II, on non-international armed conflicts, is directly applicable in many of the essentially internal situations that have given rise in the 1990s to military action on humanitarian grounds. However, 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.

The 1998 Rome Statute of the International Criminal Court (not yet in force) contains a similar provision in the Preamble, emphasizing:

... 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 ...

Finally, the 1999 Second Hague Protocol on Cultural Property, in its chapter on non-international armed conflicts, reaffirms state sovereignty and non-intervention in Article 22(3) and (5), in terms virtually identical to those of the 1977 Geneva Protocol II, Article 3, quoted above.

#### *c. 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. Equally important, large numbers of post-colonial states, particularly in Africa and Asia, have opposed it. Many such states see themselves as vulnerable to foreign intervention, and are understandably sensitive about defending their newly-won sovereignty. In some cases other and less creditable considerations are involved, including the protection of oppressive regimes from 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.

Sometimes states, even if opposed to humanitarian intervention in principle, have given some degree of approval to a particular instance of it. In the case of such interventions authorized by the UN Security Council, some states on the Council have insisted on the inclusion of language specifying that the situation in the target country is wholly exceptional, and the intervention is not to be viewed as a precedent. By such devices they are anxious to preserve the principle that there is no general norm of humanitarian intervention even when it is under Security Council auspices.

#### *d. The poor record of humanitarian interventions*

Some of the interventions of the 1990s did achieve important results, including the return of large numbers of refugees to their homes. Generally, however, interventions based on humanitarian grounds 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.

A curious problem in much past writing about humanitarian intervention has been the lack of any systematic attention to the results of such intervention, or to what the intervening armed forces are actually supposed to do. 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 circumstances 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.

*e. Difficulties of converting an occasional practice into a coherent doctrine*

Almost all attempts to develop a consistent doctrine of humanitarian intervention have depended heavily on establishing criteria that would assist in determining whether a humanitarian intervention was justified. Significant expositions of such criteria in the 1990s include those advanced by Kofi Annan in his report of 8 September 1999 quoted above.

The question of criteria is inherently problematical. If the criteria are based on numbers of casualties within the target state, they may be too mechanical, and in particular may miss important considerations such as the circumstances that led to such casualties, or the realistic possibilities of an intervention being launched and achieving results. A further difficulty of criteria based on numbers of casualties is that humanitarian interventions may have a preventive function, and hence depend crucially on inevitably speculative judgements about the likely future course of events in a given country.

A fundamental difficulty in getting intergovernmental agreement on any doctrine of intervention, and on the criteria that are a necessary part of such a doctrine, is that a large number of governments around the world, seeing themselves as potential targets of intervention, explicitly oppose any such doctrine. An even more serious difficulty is that potential interveners are reluctant to bind themselves in advance to any obligation to intervene. Powerful states often decide to deal with (or evade) major humanitarian issues by means other than military intervention, and are unlikely to want to limit their freedom of action in this regard.

#### **4. CONCLUSIONS**

The result of a vast amount of legal development in the post-1945 period is an extraordinary paradox. The development on the one hand of a body of law restricting the right of states to use force, and on the other hand of human rights and humanitarian law, has contributed to the situation in which the principles of non-interventionism and humanitarian intervention clash with one another. This clash is difficult to resolve both in principle and in practice.

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'.<sup>29</sup> This triple negative, a triumph of British officialdom, reflects the tortured nature of this question. Almost two decades later, on the basis of the much experience in the intervening years, it is still difficult to arrive at a clear answer regarding the legality of interventions not based on UN Security Council authorization, as several investigations have shown.<sup>30</sup> Is it possible here to reach more definite and useful conclusions?

*a. Is there a right?*

Discussion of a *right* of humanitarian intervention poses major problems which suggest that some other approach may be needed. Three are particularly difficult.

- (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. Yet in every case any particular proposal for a humanitarian intervention has to be balanced against a wide range of other considerations.
- (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 problematical. 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 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.

It may be more useful to think of humanitarian intervention, not as a right, but as an occasional and exceptional necessity. It could even be conceived of as a duty, or at least as deriving from the duty to uphold human rights and humanitarian law. However, redefining it as a duty rather than a right does not greatly affect the question of its legality. Answers to the question of whether in a particular instance humanitarian intervention is viewed as legal or illegal are likely to depend on the circumstances of the case and on the perspectives of the states and individuals addressing the matter: in other words, they are not likely to be uniform. In principle, it is wrong to expect international law to provide one-word answers in

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<sup>29</sup> The same paragraph's discussion of humanitarian intervention ends: '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.' – 'Is Intervention Ever Justified?', July 1984, issued as Foreign Policy Document No. 148, 1986, paragraph II.22. The whole of Part II of the document is reprinted in *British Year Book of International Law* 1986 (Oxford: Clarendon Press, 1987), pp. 614-20.

<sup>30</sup> See, for example, the hesitant conclusions on the international legal basis of non-Security Council based military action in two thoughtful post-Kosovo War reports: the October 1999 Danish report on Humanitarian Intervention: Legal and Political Aspects, pp. 121-30; and the UK House of Commons, Foreign Affairs Committee, Fourth Report: Kosovo, vol. I, Report and Proceedings of the Committee (London: Stationery Office, May 2000, HC 28-I), paragraph 132.

advance to cases in which powerful legal and moral considerations have to be balanced against each other.

*b. Authorization*

Any possibilities of developing a coherent notion of humanitarian intervention involve, crucially, questions about the authorization of such intervention. At least in principle, the possibility that the society of states, acting through regional or global bodies, might authorize particular acts of intervention might 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. However, the question of which bodies, apart from the UN Security Council, might have a right to authorise intervention has not been extensively addressed.

One obvious 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. The principal difficulties with this proposal is that it requires a two-thirds majority of UN member states, and that it is likely to involve a slow and cumbersome process of decision-making, which is a luxury when large numbers of people are being killed. Yet in particular crises there may be a certain logic in pursuing the 'Uniting for Peace' course.

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 explicitly legitimized by movements within a country representative of an oppressed population; or by a legitimate government in exile that has been ousted in an invasion or *coup d'état*.

*c. Decision-making process*

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 territory concerned, might have as one benefit that they could help overcome perceptions of humanitarian intervention as exclusively reflecting the interests and preoccupations of Western states.

In the case of the UN Security Council, there have been three changes in the last few years affecting decision-making procedures: (1) Permitting certain non-state bodies to give testimony to the Council, as UNHCR did on 10 September 1998 on Kosovo, with significant effect. (2) Sending a delegation from the Security Council to investigate a particular situation on the ground, as was done in September 1999 in respect of East Timor, again with much effect. (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' on Srebrenica in Bosnia in 1993-5, and

related events;<sup>31</sup> and the survey of genocide in Rwanda in 1994 and the failure both of the UN and its member states to act.<sup>32</sup>

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 discussed above may on occasion help with speeding up the decision-making process, but even this cannot be guaranteed. More pressure will be needed, and changes in attitudes of major states, if there is to be a move to prompt decision-making.

*d. The question of host state consent*

In cases where the UN Security Council agrees on an intervention, it may be argued that in international legal terms host state consent is not important. Such consent will make a major difference to practical aspects of the intervention, but not to its fundamental legality. Neither in the case of Somalia in 1992 nor that of Haiti in 1994 was the legality of the UN Security Council decision authorizing intervention seriously challenged, despite the absence of host state consent.

However, in all interventions, consent remains important for practical reasons; and in the case of interventions not explicitly approved by the UN Security Council it remains important to perceptions of the legitimacy of the operation.

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 and Kosovo, some degree of host state consent was given, but only after the 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 pressure against a sovereign state to secure its consent was a necessary prelude to an effective intervention. 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.

Critics of humanitarian intervention see host state consent, given in advance, as vital for the legality of a foreign military operation in a country. Yet such consent is itself a murky issue, involving many gradations and different phases; and to make intervention wholly dependent on such consent poses obvious moral and practical problems.

*e. Use of force distinct from peacekeeping and enforcement*

<sup>31</sup> Report of the Secretary-General pursuant to General Assembly resolution 53/35: The Fall of Srebrenica, UN doc. A/54/549, New York, 15 November 1999.

<sup>32</sup> Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, attached to UN doc. S/1999/1257, New York, 16 December 1999.

In many crises in the 1990s, the absence of preparedness to use force in a manner appropriate for 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, if intervention is even to be an option in many cases, 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 particularly needed in cases where UN peacekeeping forces, in a deteriorating situation, witness atrocities or cease-fire 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 military action, 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 be metamorphosed 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 needs to address these issues directly if it is to avoid being caught once again in the situation of having forces in place which witness atrocity but are powerless to prevent it.

*f. Addressing deficiencies in the idea of humanitarian intervention*

The very term 'humanitarian intervention' raises a daunting number of questions. Is an intervention humanitarian in motive, or in mode of implementation? Does the label 'humanitarian' not conceal a range of other interests in and motives for an action? In some of its versions, is not the idea of humanitarian intervention distressingly close to doctrines that inspired European colonialism? Does the emphasis on humanitarianism sometimes conceal an underlying failure to think clearly about what actual outcome is sought in an area undergoing conflict? Whereas it has often been advocated as a simple humanitarian measure, not designed to bring about major political change, may such intervention sometimes need to embrace the cause of self-determination and secession, as India did (for its own good reasons) in 1971 in what is now Bangladesh?

The experiences of the 1990s confirm earlier doubts as to whether 'humanitarian intervention' is really a separate legal or conceptual category at all. Neither the UN Security Council, nor states acting independently, has ever cited humanitarian considerations alone as a basis for intervention: they have always, at the very least, referred also to considerations of international peace and security. However, the conclusions that humanitarian considerations only form one part of the basis for an intervention, and that 'humanitarian intervention' may be a label without a box, does not actually change very much in practice.

Events since the 1999 Kosovo War confirms that there is no prospect of getting general agreement in the international community on any doctrine of humanitarian intervention that are presently being advanced. The fate of Kofi Annan's call in September 1999 for a right of humanitarian intervention confirms this. Similarly, within NATO and some of its leading member states efforts since the 1999 Kosovo War to develop an agreed doctrine of

'humanitarian intervention' have failed to make any significant progress, and are now largely in abeyance.

However, the hard cases giving rise to the demand for humanitarian intervention show no sign of disappearing. The debate might now be taken forward by addressing the matter in three different ways.

**First**, 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. The alternative, of strictly observing non-intervention in all circumstances in defiance of all evidence of human misery, could itself discredit the non-intervention rule by exposing it as inflexible and uncomprehending of human misery. Ideas of humanitarian intervention might be intellectually better grounded, and accepted by more states, if they were set more explicitly against the background of the norm of non-intervention.

**Second**, there is a need to concentrate on the broader overall issue of action in response to serious human rights violations. Forcible military intervention is only one form of response, and in many situations not the most effective one.

**Third**, instead of concentrating on the term 'humanitarian', or on the essentially unanswerable 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 geometry of international administrative assistance in the post-Cold War era. This is not to suggest that issues of law and justice should be ignored: they have to be addressed directly in each crisis, but probably without benefit of a general seal of international legal approval granted in advance.

In short, it may be for the best that the general principle of humanitarian intervention, despite its undoubted importance, remains shrouded in legal ambiguity. There is no chance of a so-called right of humanitarian intervention actually being agreed by a significant number of states; and, if it were agreed, even with the most carefully considered criteria, it would risk being open to abuse. The reality is that international law has created competing considerations which have to be balanced in each case and cannot be adjudicated in advance. Some practice in this field will certainly continue, if only as an occasional and exceptional necessity, and in many cases it will get a significant degree of overt or tacit support from states and international organizations. The question of humanitarian intervention needs to be addressed less in terms of general legal doctrine or moral imperative, and more in terms of the particular legal, moral and practical issues raised by each case.