The Law Society
of England and Wales

The Graham Turnbull Essay Competition 2014

Applying human rights and humanitarian law, in what circumstances should forcible measures be permitted against a state that is subjecting its people to human rights abuses?

Human Rights Committee
of The Law Society of England and Wales

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Contents

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The Human Rights Committee of the Law Society has traditionally run an annual human rights essay competition for law students across England and Wales. The competition is named after Graham Turnbull, an English solicitor, who did much to promote respect for human rights. Graham was killed in February 1997, aged 37, while working as a human rights monitor on the United Nations Human Rights Mission in Rwanda. The Human Rights Committee founded the competition in 1998 to honour Graham's commitment to human rights. It aims to encourage awareness and knowledge of international human rights issues and remedies among young lawyers. The topic for the competition in 2013/2014 was:

> ***'Applying human rights and humanitarian law, in what circumstances should forcible measures be permitted against a state that is subjecting its people to human rights abuses?'***

The essay competition was open to all students from around the world who were less than three years' qualified at the closing date. Six essays were shortlisted from the entries by a panel from the Human Rights Committee. The winner and runner-up were chosen from the shortlist by this year's judge, Lord Dyson, Master of the Rolls.

This short booklet reproduces the winning essay, the runners-up essay and summaries of the remaining four shortlisted essays. The summaries were written by the shortlisted authors and are published in alphabetical order.

The author of the winning essay was Rebecca Hadgett who will be awarded a prize of £500, funded from the Graham Turnbull Memorial Fund.

The runner-up was Natasha Holcroft-Emmess who will be awarded book tokens to the value of £250 kindly donated by LexisNexis Butterworths.

The Graham Turnbull Essay Competition 2014

Applying human rights and humanitarian law, in what circumstances should forcible measures be permitted against a state that is subjecting its people to human rights abuses?

By

Rebecca Hadgett

Winning Essay: Rebecca Hadgett

At present, forcible measures on the basis of grave human rights abuses are legally permissible with United Nations (UN) Security Council authorization under Chapter VII of the UN Charter.[1] The natural understanding of the Charter is that recourse to forcible measures outside the Chapter VII scheme is a violation of the blanket prohibition on use of force contained in Article 2(4) [2] and the commitment to respect sovereignty in Article 2(7).[3] However, there are arguably sound moral grounds for intervention in crises absent such authority, causing some states to both conduct unauthorized forcible measures on humanitarian grounds[4] and continually made statements as to their belief that some sort of exception sanctioning such action subsists in international law,[5] raising the question of an evolving *opinio juris*.

Whilst a question mark continues to hang over the legality of any such intervention, the recourse to forcible measures may occur in unsuitable circumstances, namely those motivated by foreign policy decisions unconcerned with abuses of human rights. Clarification is necessary.

In this essay, I elucidate the factors that should be contained within a definition of appropriate international humanitarian intervention. I propose that consideration of the 'intention' of the forcible measures is not to be incorporated as a condition of action but, instead, is suitable as a guiding principle. The 'intention to halt or alleviate human suffering caused by grave human rights abuses' becomes a framing principle of the entire discussion, ensuring that the factors included in a definition of forcible measures in this context respond to the risk of unjustified unilateral action.

The Importance of Intention

Drawing upon the 'just cause' principle in *jus ad bellum*, previous attempts to delineate acceptable circumstances for humanitarian action have included a condition pertaining to the intention behind forcible measures. When academics outlined their proposal for the Responsibility to Protect (R2P), one key condition was that the action was conducted with the "Right Intention", which meant that the "primary purpose of the intervention, whatever

[1] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16 (UN Charter) ch 7.
[2] Ibid, art 2(4).
[3] Ibid, art 2(7).
[4] See eg, North Atlantic Treaty Organization (NATO) campaign in Kosovo in 1999.
[5] Eg, Belgium relied on a doctrine of humanitarian intervention in *Legality of Use of Force Case (Provisional Measures)* [1999] ICJ Rep, pleadings of Belgium, 10 May 1999, CR99/15 in Simon Chesterman, *Just War or Just Peace?* (OUP 2001) 213.

other motives intervening states may have, must be to halt or avert human suffering".[6] Similarly, Human Rights Watch stated that the "dominant reason" for action should always be "humanitarian purpose".[7]

Though reassurance may be gained by including such a condition, in this form it is likely to raise more questions than it answers. It is an imprecise notion, with little indication of how it could be evidenced in practice. Further, as Human Rights Watch highlights, "purity of motive" can hardly be expected,[8] given that any resort to forcible measures will inevitably incorporate consideration of many varying tactical factors. Simply citing humanitarian motive or proper intention as a condition for action fails to achieve clarity. Further, to list intention of one of several requirements underplays the fact that identifying illegitimate action is a central concern and, ultimately, the *raison d'être* of any attempt to define the principle of forcible measures on humanitarian grounds.

Instead, acknowledging that action should only be permitted for the purposes of preventing further abuse of human rights should *inform* decisions about other criteria. The 'intention to halt or alleviate human suffering caused by grave human rights abuses' would serve as the guiding principle, promoting positive action aimed at preventing abuse of human rights whilst restricting any permissible action to the furtherance of this cause.

I. A Threshold Criterion

The most obvious method of securing proper intention is to prescribe the situations in which forcible measures may be appropriate. By raising a threshold requirement, the pool of situations requiring potential action is narrowed considerably, ensuring states only intervene when there are grave breaches of human rights.

In this regard, during a speech given to the House of Commons, Leader of the Opposition Ed Miliband spoke of two elements to a threshold requirement: the need for clear, condemnatory evidence and the requirement that the crimes perpetrated are of an extreme nature.[9] Citing the Attorney General's advice on the legality of intervention in Syria, he spoke of the need for "convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress".[10]

[6] International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (International Development Research Centre, 2001) xii, <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.
[7] Human Rights Watch (HRW), 'War in Iraq: Not a Humanitarian Intervention' (*Human Rights Watch*, 26 January 2004) <http://www.hrw.org/news/2004/01/25/war-iraq-not-humanitarian-intervention>.
[8] Ibid.
[9] HC Deb 29 August 2013, vol 566, cols 1440–1448.
[10] Ibid, col 1443.

On the need for evidence, Miliband discussed the importance of thorough research to ensure that there is "compelling" evidence of state responsibility before action is considered.[11] It seems appropriate that detailed fact-finding should be a part of this process and is a necessary precursor to any action, forcible or otherwise. To prevent manipulation of the evidence by interested parties, it is also important that the gathering of evidence and the determination of whether the threshold requirement is surpassed are conducted by an impartial multinational body.

On the substantive requirement of the nature of the crisis, a threshold requirement was considered in the formulation of R2P, where intervention would require "a large scale loss of life" at the responsibility of the state or "large scale 'ethnic cleansing'".[12] A focus on severe international crimes, as defined in customary international law, the Geneva Conventions[13] or statutes of international tribunals,[14] would provide both consistency with the post-conflict regime of accountability through international criminal charges and would provide a focus on alleged abuses that comprise relatively well defined and widely condemned criminal actions.

Both the "compelling" evidence requirement and the narrowing of the remit to particular international crimes provide tests amenable to adjudication by a court or independent tribunal, a role potentially appropriate for the ICJ, ICC or a relevant UN organ. This would ensure the decision is a step removed from key political players who may have vested interests in pursuing, or prohibiting, action.

II. A Necessity Requirement

Given that the appropriate motivation for action is solely to limit grave human rights breaches, it is apt that the response should be tailored to focus solely upon the humanitarian crisis and the abuses giving rise to it. Such an obligation would have three elements.

First, all other non-forcible routes should have been exhausted. The doctrine of R2P espouses a rule that "every non-military option for the prevention or peaceful resolution of the crisis has been explored", ensuring that diplomatic alternatives are pursued vigorously.[15] If the aim of humanitarian protection can be achieved in a less invasive way, then the non-forcible alternative should be pursued.

[11] Ibid.
[12] ICISS (n 6).
[13] Eg, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention) art 147, creating penal sanctions for particular 'grave breaches'.
[14] Eg, UNSC Res 827 (25 May 1993) UN Doc S/RES/827 arts 2–5.
[15] ICISS (n 6).

Secondly, forcible methods should only be considered where they are significantly likely to have an impact.[16] If forcible measures are unable to address the humanitarian crisis, they should not be pursued, even if the circumstances giving rise to the need are dire and there are no viable non-forcible measures. In practice, the threshold condition requiring "compelling" evidence of state responsibility will involve an impartial and timely investigation into events, usually conducted by a UN body, as with Syria,[17] but potentially also as an outcome of preliminary ICC investigations, perhaps in circumstances similar to the prompt examination into recent events in the Central African Republic.[18] Either those conducting the investigation, or a UN body assessing the evidence, should form a series of assessments as to the viability and potential impact of both non-forcible and forcible measures.

Finally, any forcible measures taken should be proportionate, which would include, at the least, a geographic and time limitation.[19] In order to ensure such measures do not become a method of circumscribing international law and are instead pursued as part of the wider international legal system, there should be a duty to uphold other international objectives, including maintaining state sovereignty, to the greatest extent possible. A disproportionate use of force would both betray a non-humanitarian purpose and constitute an unjustified use of force contrary to the UN Charter.[20]

III. A Need for Proper Authorisation and Procedural Safeguards

One of the most controversial aspects that must be addressed is the procedure required to gain authorisation to conduct forcible measures. Requiring unanimous Security Council agreement before action would ensure there is little distinction between a doctrine of humanitarian intervention and current practice under Chapter VII. Though the Security Council have been willing to see humanitarian crises as threats to peace and security in the past,[21] and elucidating a doctrine of intervention may reinforce the obligations of the international community to support such action, the Security Council has largely been unwilling to commit to forcible measures that may be legitimate on the grounds outlined above.[22] It is for this very reason that states have contemplated unilateral forcible measures

[16] A provision of "reasonable prospects" is included in R2P, ibid.
[17] United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, 'Report on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013' (2013) <http://www.un.org/disarmament/content/slideshow/Secretary_General_Report_of_CW_Investigation.pdf>.
[18] 'ICC to Open War Crimes Probe in CAR' (*Al Jazeera*, 8 February 2014) <http://www.aljazeera.com/news/africa/2014/02/icc-open-war-crimes-probe-car-2014285164926916.html>.
[19] HC Deb (n 9) col 1440.
[20] UN Charter (n 1) art 2(4).
[21] Eg, UNSC Res 955 (8 November 1994) UN Doc S/RES/955 established ICTR in response to threat to peace arising from Rwandan conflict.
[22] Both Russia and China vetoed a draft Resolution threatening UN action against Syria under Chapter VII; see Adam Gabbat, 'Russia and China Veto of Syria Sanctions Condemned as 'Indefensible'', *The Guardian* (New York, 19 July 2012)

to date. The continued failure to provide an alternative to Security Council sanctioned action has resulted in frustration, inadequate response to crises and an increased risk of unilateral action.

A definition for forcible measures taken in pursuance of human rights objectives should recognise that legitimacy and authorisation could come from a range of sources. A thorough proposal was drafted as part of the R2P doctrine, where three authorising bodies were suggested: the Security Council, the General Assembly and Regional Organisations, with the Security Council having the first opportunity to respond.[23] Other organisations have emphasised the importance of approval from a number of states.[24] Ensuring action was authorised by a widely-supported multinational body would adequately facilitate action, in a greater range of scenarios than is currently viable, whilst ensuring unilateral action is not feasible.

IV. Respect for International Human Rights Law

For the same reason that Chapter VII confers broad powers on the UN to respond in whatever way is required, it is important that impact of intervention is not unduly inhibited. Despite this, given any measures are to be pursued with the aim of securing human rights protection, it seems important to articulate that the military forces conducting any intervention must themselves respect international human rights law.[25]

Conclusion

In light of fears that a principle of forcible measures could be used for illegitimate political means, I suggested that consideration of the 'intention to halt or alleviate human suffering caused by grave human rights abuses' should be at the forefront of any definition and must frame substantive requirements. The test itself could then incorporate safeguards through a threshold requirement, a necessity requirement, proper procedure for authorisation and a requirement that military forces act in line with international human rights law.

<http://www.theguardian.com/world/2012/jul/19/russia-china-syria-sanction-veto>. A copy of the draft resolution is available at <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2012/538>.

[23] ICISS (n 6) xii, 53–54.

[24] HRW (n 7).

[25] Ibid.

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Applying human rights and humanitarian law, in what circumstances should forcible measures be permitted against a state that is subjecting its people to human rights abuses?

By

Natasha Holcroft-Emmess

Runner-Up Essay: Natasha Holcroft-Emmess

Introduction

The necessity for international law to provide a mechanism to respond to atrocities committed by States against their own people has become uncomfortably apparent. The need is brought about by a legacy of lethargic international response to incomprehensible brutalities. History saw the horrors of the Holocaust, the 'killing fields' of Cambodia and genocide in Rwanda, but the problem persists in modern day, most recently with the slaughter of civilians in Syria. The human losses resulting from political inaction highlight the importance of developing a workable framework in international law to govern forcible responses to 21st Century atrocities.

There is a balance to be struck. On the one hand, international law must have a way of countering grave human rights abuses, but on the other, States must not use the justification of humanitarianism as *carte blanche* for devastating transnational force. Firstly, it is argued, in *no* circumstances should individual or coalitions of States be permitted to rely on humanitarian aims as exceptional justification for forcible measures in another State without the authorisation of the United Nations ('UN') Security Council. The purported doctrine of 'humanitarian intervention', which has served as a questionable justification for such unilateral uses of force, lacks sufficient foundation in international law. Moreover, the risks inherent in this doctrine are too great to permit of a workable concept.

Secondly, forcible measures may be permitted in response to gross human rights violations when such measures have been deemed necessary by the UN Security Council, in accordance with the collective security framework in the UN Charter. Every case must be analysed individually, but certain international law principles can indicate when force may be permitted against a State subjecting its people to such abuse. These principles are outlined below. It will be shown that there is ample political will and impetus in the UN to make the collective security system prospectively practicable. This can and ought to achieve expression through the developing international law concept of the collective 'responsibility to protect'. In these circumstances alone should forcible measures be permitted against States subjecting their own people to grave human rights violations.

No right to forcible humanitarian intervention

Firstly, it is argued that there is not, nor ought there to be, in international law any right of States to use force against another State when the latter subjects its own people to human rights abuses. The starting point must be Article 2(4) of the UN Charter, which states:

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

This provision encompasses a prohibition on the use of force. The only exceptions provided for in the Charter are lawful self-defence (under Article 51) and the collective security system (via Chapter VII).

Some states (the UK in particular), however, have asserted a right to use force for ostensibly humanitarian purposes under the purported doctrine of 'humanitarian intervention'. This doctrine was employed, for example, by the UK ahead of NATO's intervention in Iraq during the First Gulf War in 1990-91 and to justify the NATO bombing of Kosovo in 1999. Contemporary UK foreign policy asserted that in exceptionally grave circumstances of humanitarian crisis, States could intervene forcibly. Human rights violations were also mooted, *inter alia*, as justification for the use of force in Iraq and Afghanistan in the early 2000s.

However, the mere assertion of a right to intervene on humanitarian grounds is not enough. It is argued that there is insufficient practice to support the recognition of such a doctrine, nor *should* such a right exist in international law. There are practical and principled problems in permitting States this justification for extraterritorial force.

In practice, the international community appears to have rejected a right to forcible humanitarian intervention. Only a very small number of States assert such a right and the vast majority of State practice is contraindicative. The UN General Assembly clarified in Resolutions 2625 and 3314 that no political motive may justify use of force.[26] Furthermore, the International Court of Justice has apparently rejected human rights protection as a justification for force; in the *Nicaragua* case, in which the legality of the United States intervention in the Nicaraguan conflict was decided, it was held:

[26] UNGA Res 2625 (XXV) (24 October 1970); UNGA Res 3314 (XXIX) (14 December 1974)

"...[T]he protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports [or] the destruction of oil installations … The Court concludes that the argument derived from the preservation of human rights … cannot afford a legal justification ..." [27]

It is argued, therefore, that there is insufficient practice to support any right to humanitarian intervention in international law.

Should States have a unilateral right to intervene forcibly in humanitarian crises? Greenwood and Lowe have argued that recognition of a limited, exceptional right is desirable where human rights abuses are committed.[28] The alternative, they contend, is to permit the international community to stand idly by. However, three arguments point persuasively the other way.

The first is practical; with any such right, there is a grave risk of abuse. States might genuinely sympathise with the plight of oppressed peoples, but risk going too far, venturing beyond humanitarian aid. At worst, States may use the human rights justification as a front for a concealed ulterior motive. Secondly, there is a paradox in attempting to remedy human rights abuses using force, since force is more likely to engender additional violations. It would, moreover, be extraordinary if an asserted practice of a handful of States could overrule a treaty norm as important as the prohibition on the use of force, arguably a peremptory norm of *jus cogens*, which no State may abrogate. Thirdly, even if international law does not recognise a right of humanitarian intervention, this does not mean that atrocities may be committed unchallenged. The Charter system makes it the responsibility of the Security Council to respond to such brutality. It is therefore argued that there ought not to be any circumstances in which States may unilaterally determine that human rights abuses warrant a forceful response.

Collective Security and The Responsibility to Protect

The UN Charter incorporates a mechanism by which the international community may respond to gross human rights abuses committed by States against their own people. Article 42 makes it the 'primary responsibility' of the Security Council to ensure international peace and security. Chapter VII gives that body the power to authorise the use of force to achieve those aims. Thus the UN Charter conceives of a system in which the use of force is

[27] *Nicaragua v United States Of America* (Merits) [1986] ICJ 14 at [268]
[28] Greenwood; Lowe *Memoranda on the Legality of NATO Action in Kosovo* (2000) 49 ICLQ 876

prohibited except under the conditions set out in the Charter. This prescribes when international law permits a forcible response to gross human rights violations.

Unfortunately, the collective security system in the Charter has received little support in practice, with States preferring to launch their own forcible incursions without Security Council authorisation or oversight. Even where the Security Council has authorised action, there has been insufficient backing by States or lack of a clear mandate, hence, for example, the replacement of peacekeeping missions UNOSOM I and II by the US-led UNITAF in Somalia, and the inefficiency of the UNAMIR and UNProFor in Rwanda and Bosnia respectively. The lacklustre international response to these tragedies makes it vitally important for the international community to develop a workable framework for future forcible interventions.

This background was the catalyst for developing a collective international *duty* to respond to atrocities, within the Charter framework. Thus was conceived the concept of the 'responsibility to protect' ('R2P'). The 2005 World Summit Outcome accepted the R2P as a tool of international law to govern the circumstances in which the international community shall respond to humanitarian crises. The UN Secretary General was mandated to substantiate the doctrine. Kofi Annan emphasised the importance of a collective international endeavour, stating: "the task is not to find alternatives to the Security Council as a source of authority, but to make it work better."[29]

In 2009, Secretary General Ban Ki-moon issued a report indicating how the R2P is to operate in practice.[30] The concept is three-tiered: first, the territorial State has primary responsibility to protect its people from human rights abuses. Secondly, if, however, the territorial State fails, responsibility shifts to the international community to try diplomatic methods to restore human rights protection. Thirdly, if these efforts appear unlikely to succeed, the international community is prepared to take collective action in a timely and decisive manner, if necessary using extraterritorial force, to respond to gross human rights violations. The Security Council should consider carefully whether forcible intervention should be undertaken on the facts of each case, but international law incorporates principles which can assist. These principles run through the report on the implementation of the R2P and can be summarised as follows:

[29] UNGA 'In Larger Freedom: Towards Development, Security And Human Rights For All' (2005) UN Doc A/59/2005 at [126]
[30] UNGA 'Implementing the Responsibility to Protect' (2009) UN Doc A/63/677

i) The R2P is limited to circumstances of **mass atrocity**: genocide, war crimes, ethnic cleansing and crimes against humanity;
ii) The territorial State is **unable or unwilling** to realise its responsibility to protect its people;
iii) **Diplomatic, humanitarian** and other methods appear unlikely to succeed;
iv) The **Security Council** ordains **collective** action, **in line with the UN Charter** (with regional organisations as appropriate);
    a. Collective action will be **proportionate** in time and scope, with a reasonable chance of success;
    b. Enforcement action is **necessary as a matter of last resort**.

In these circumstances alone should forcible measures be permitted against territorial States subjecting their own populations to human rights abuses. This approach also affords transparency; collective decision-making on the basis of considered principles enhances the Rule of Law, whereas reliance on 'exceptional' justifications is opaque.

Some difficulties remain. The problem of raising sufficient forces to carry out a Security Council mandate endures. This could be resolved with improved discussion of the Charter obligation to supply troops (Article 43), and this should be investigated further. There is, moreover, some doctrinal 'overreach': the use of the R2P by NATO to justify action in Libya in 2011, resulting in regime change, sparked controversy about the acceptable bounds of the doctrine. Similarly, there is some doctrinal 'under-reach', such as the tragic failure to prevent the slaughter of Syrian civilians in 2013. However, hope is not lost for the R2P concept. In order to address the former issue, key limits of necessity and proportionality run through the doctrine. To remedy the latter problem, there is sufficient impetus in the UN to make the R2P doctrine practicable. In a 2012 report, the Secretary General states that the R2P is based on fundamental principles of international humanitarian and human rights law.[31] It is argued here that further development of this concept would beneficially enhance the human rights machinery of the UN.

Conclusion

International law must have a mechanism for deciding when forcible measures are permissible against a State subjecting its own people to serious human rights abuses. The purported doctrine of humanitarian intervention poses great risks of abuse and is too nebulous to make for a workable concept. The only circumstances in which force may be

[31] UNGA 'Responsibility To Protect: Timely And Decisive Response' (2012) UN Doc A/66/874

used against a State causing or acquiescing in humanitarian crises are when the UN Security Council determine intervention necessary in line with considered principles of international law. In this way, atrocities will not only be seen as domestic crises, but as transnational issues to which the international community, operating through the auspices of the UN, has an obligation to respond.

Essay summaries of the shortlisted candidates

Summary of essay by Nehal Depani

In considering this question, it appeared from the outset that there were two ways in which the legality or otherwise of forcible intervention on human rights grounds could be discussed. The first would be to consider examples of where such arguments had been used in the past, alongside the numerous guidance papers on the "Responsibility to Protect", and consider the factors which were more or less likely to make an action permissible. However, apart from the difficulties in trying to draw common themes from a handful of different cases set in different contexts, this approach did not seem to be able to offer an explanation of *why* some interventions were legal or permissible and others were not.

The approach that I therefore decided to follow was to start from basic principles to understand when force was acceptable and why. The most important of these principles, which describe the place of nation states in the modern world order, are the concepts of sovereign equality, non-intervention and the general prohibition on force. Human rights intervention does not sit easily with these concepts. There is no express "humanitarian" exception to the general prohibition. More than this, on a strict construction of the UN Charter, it is not even clear that the Security Council's power to authorise force to maintain or restore international peace or security would cover a purely humanitarian intervention. The grounds for authorisation relate to inter-state relations, whereas human rights are primarily owed by a state to its citizens.

However, few people would now seriously argue that the Security Council could not legally authorise an armed intervention on the basis of human rights. This is due to an acceptance that only an international consensus that forcible measures are needed in response to human rights abuses will render such measures legal. This premise is the basis of my two main conclusions. First, a degree of pragmatism has emerged over what kind of consensus is required. While Security Council authorisation might be the only strictly *legal* route, other types of consensus (demonstrated for instance by retrospective commendation by the Security Council or through the actions of a regional body) might render measures *permissible*. Secondly, and most fundamentally, this acceptance is the result of the normalisation of human rights norms to the extent that they can be upheld against states with the general acceptance of the international community. This normalisation cannot be

taken for granted and must be further progressed to ensure that states who perpetrate human rights abuses against their own people are not tolerated, and to prevent the world order being undermined by unilateral actions outside of the UN system.

Summary of essay by Krishan Nadesan

This essay focuses on the effects of the United Nations legal regime on the right to intervene for humanitarian purposes. Before the UN, States had the right, under customary international law, to intervene to other States' affairs for humanitarian purposes, but the UN Charter did away with this right. The Charter restricted both the grounds for humanitarian intervention and the parties competent to intervene. With regards grounds, the Charter forbade interference 'in matters essentially within the domestic jurisdiction of any State', with regards competent parties; it vested the right to use force, except in self-defence, in the Security Council alone. So, *prima facie*, the UN legal regime bans humanitarian intervention. If we wish to get around this, we must either argue that that regime has been superseded or that, properly interpreted, it does allow for some circumstances in which intervention is legal.

The UN legal regime rests on the Charter, which is a treaty. Under international law, treaties can only be superseded by subsequent treaties or by subsequent developments in customary international law. So if the supersession strategy for establishing a right to humanitarian intervention is to be successful, we must show that either subsequent treaty or custom has abolished or modified the Charter's use of force regime. With regards treaties, this is highly implausible. While it is true that some international agreements, such as the Constitutive Act of the African Union and the Genocide Convention, contain phrases that seem to imply a right to use force to prevent or punish war crimes, genocide etc., Article 103 of the Charter clearly states that the latter takes precedence over any other treaty. Given this, the former agreements must be treated either as void, to the extent of their conflict with the Charter, or else as enforceable through UN authorised mechanisms.

Customary international law is equally unsuccessful in showing that the Charter's use of force regime has been superseded. For developments in customary international law must be based on the general practice of States who believe their actions are legally justified, presumably subsequent to the treaty these developments are supposed to be modifying. But it is clearly untrue that such a general practice has arisen since the Charter's adoption. In the first place, blatant breaches in general of the Charter's use of force regime, such as the Iraqi invasion of Kuwait, are not the acts of States who believe their actions are legally justified, so the use of force regime in general remains. In the second place, breaches of the Charter for humanitarian purposes are not the general practice of States, while the Western powers might believe they are legally justified and act accordingly, Russia, China and others do not.

Since the UN use of force regime has not been superseded, any right to humanitarian intervention must therefore be based upon the Charter. And the Charter clearly does give the Security Council the right to intervene for humanitarian purposes, for the latter is given power to ‘maintain and restore international peace and security’, which the practice of the Council has interpreted as including punishing breaches of international law. Given that extreme human rights abuses are breaches of international law, the Council has authority to intervene in such cases. States, however, have much more limited rights; for only when a State can be said to no longer have a legitimate government can we say that intervention does not violate its independence or territorial integrity. But, under the Genocide Convention, rulers forfeit their sovereignty if they commit genocide, so genocide may be the only case where States have a UN sanctioned right to intervene without Security Council authority.

Summary of essay by John Olsson

International law is built on the necessary fiction that all states are equal. States do not tell each other what to do and must conduct their relations without the threat or use of force. When that system breaks down the global order is at risk. But a system which would allow a state to violate the human rights of its people unchecked is of little value. When millions are dying, as in Rwanda, waving the UN Charter in their faces is futile. The question boils down to this: how can we balance the supreme violation of domestic law against the cardinal sin of international law? Put another way, to restore the rule of municipal law we must first destroy the foundation of international law. Where does this leave the *jus cogens* doctrine?

Several international bodies have shirked these questions: the *Vienna Convention* could not state which rules were peremptory, and the International Law Commission deleted a clause from the final version of the *Draft Articles* which stated that "serious breaches of international duties on safeguarding human rights*"* were violations of *jus cogens*. Only the *Convention for the Prevention and Punishment of the Crime of Genocide* came clean.

Somewhere along the line, international jurists lost the thread of what was important: *jus cogens* is such a beautiful theory that no self-respecting academic lawyer would want to try to fit the messy business of human rights within its compass. Apparently, a state must be allowed to 'conduct its affairs' without the threat or the use of force (as was held in *Nicaragua v United States*). But no state, no jurist, can reasonably claim that grossly abusing the human rights of its population meets the definition of *"*conducting its affairs". Grossly abusing human rights must therefore mean that a state has, for a time at least, forfeited its own territorial integrity or at the very least its political independence.

At a practical level, any intervention needs strict pre-conditions: reports on alleged abuses have to be reliable, claims of state involvement need to be credibly evidenced, and realistic attempts must be made by the international community to get the state in question to desist from its conduct. Recent history teaches us that much.

Thus, when we do intervene it has to be fully justified, and – crucially – we must not make matters worse for the people whom we are supposedly helping. Those undertaking intervention must be accountable to the international community. People who have been abused by their own governments should not suffer further victimisation at the hands of

those sent to alleviate their distress. Law, whether international or municipal, has no value if it fails the simple utilitarian goal of protecting life.

Summary of essay by Francisco José Quintana

Recent Libyan and Syrian Civil Wars have re-opened the old debate over the ability of international law to put an end to massive human rights violations by states against their own citizens. Suffering, injustice, the violations of legal norms and the ghosts of former tragedies were put forward as moral and political arguments in favour of the use of force against both Libya and Syria. Yet the use of force for humanitarian purposes remains a very controversial area of international law. The Article examines the circumstances under which, if any, international law permits forcible measures against a state that is subjecting its people to human rights abuses.

The Article concludes that, under international law, only Security Council authorisation permits to apply forcible measures against a state that is subjecting its people to human rights abuses. After examining relevant state practice (mainly the Air Exclusion Zone in Iraq in 1991 and the NATO bombing of Yugoslavia in 1999), it states that, even if it was possible for this practice to derogate in some sense the absolute prohibition of the use of force present in the UN Charter, it hasn't yet done so. The rise of the "Responsibility to Protect" concept does not change this fact: the World Summit Outcome Document where it was adopted clearly states that collective action fulfilling the responsibility to protect still requires Security Council authorisation. State practice confirms this requirement: the 2011 military intervention in Libya followed authorisation by the Council. Short of both Council authorisation and international support, the possibility of a military intervention in Syria, which was considered imminent by the global press, was finally dismissed.

The Article's conclusion does not mean that, given the blockage in the Council, International Law forces States to quietly tolerate massive human rights violations. There is a wide range of options other than resorting to the use of force to bring relief: diplomacy, lawful countermeasures, international criminal law, etc. Even if there were scenarios where resort to the use of force was necessary, rather than make us reflect on whether humanitarian intervention should be lawful, the Article suggests these scenarios should make us reflect on the possibility of reforming the Security Council.

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