

# LEGITIMATING HUMANITARIAN INTERVENTION: PRINCIPLES AND PROCEDURES

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## I INTRODUCTION

The current debate over the legitimacy and legality of humanitarian intervention is bogged down in doctrinal trench warfare over the meaning of sovereignty. NATO’s use of force against the Federal Republic of Yugoslavia (‘FRY’) in March 1999 was opposed by Russia, India and China on the grounds that NATO breached core *United Nations Charter* (‘the *Charter*’) principles of sovereignty, non-intervention and the non-use of force.<sup>1</sup> Although many members of the Non-Aligned Movement<sup>2</sup> were not prepared to condemn NATO’s action because they grudgingly acknowledged that it was saving Kosovar Albanians in peril, this grouping was emphatic in its *Declaration on the Millennium Summit* in Cartagena that it did not accept the principle of unilateral

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<sup>1</sup> For the positions adopted by Russia, India and China in the Security Council debates, see UN Doc S/PV.3988 (1999) 2; UN Doc S/PV.3989 (1999) 6.

<sup>2</sup> For a list of the 118 member states of the Non-Aligned Movement, see <<http://www.nam.gov.za/background/members.htm>> at 26 September 2001.

humanitarian intervention.<sup>3</sup> The counter-claim made by UN Secretary-General Kofi Annan and Western states, especially the UK and Canada, is that sovereignty cannot be a licence for states to massacre their citizens with impunity. The future of the doctrine of humanitarian intervention at the UN is bound up with how this conflict of principles is resolved.

In a speech to the General Assembly ('GA') in September 1999, Annan threw down the gauntlet on the question of humanitarian intervention. Pointing explicitly to the case of Rwanda, he asked the GA whether in cases of genocide non-intervention was preferable to the use of force without Security Council ('SC') authority.<sup>4</sup> At the same time, Annan cautioned those who might wish to trumpet a right of humanitarian intervention after Kosovo to remember that unilateral intervention to defend human rights could set 'dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents, and in what circumstances?'<sup>5</sup> Subsequent to the Secretary-General's speech, a number of governments from developed and developing states have called for a debate at the UN on the principles that should govern the use of force in defence of the humanitarian values enshrined in the *Charter* and customary international law.

This commentary examines the conceptual issues raised by the current debate and considers the prospects for arriving at a new consensus at the UN. Firstly, I will reflect on what the doctrine of humanitarian intervention means for the principle of non-intervention in international society. Having argued for a conception of 'sovereignty as responsibility', Part III identifies six substantive principles that should be applied in any assessment of the legitimacy of using force to promote humanitarian ends.

Reaching agreement on the appropriate substantive principles is only half the battle, since there remains the procedural question of how to resolve disagreement when the application of agreed principles is contested. This problem is resolved through the judicial system in domestic law, but how is it to be resolved internationally? This issue is fundamental to the question of arriving at a new consensus on humanitarian intervention, but is often neglected in discussions of this sort. Part IV queries the extent of any progress made towards reaching a consensus on criteria of legitimate humanitarian intervention at the UN. The commentary concludes with some recommendations for how the debate might be advanced in the future.

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<sup>3</sup> See Andres Pastrana, President of the Republic of Columbia (Address to the opening ceremony of the Movement of Non-Aligned Countries' 13<sup>th</sup> Ministerial Conference, Cartagena de Indias, 8 April 2000) <<http://www.nam.gov.za/xiiiiminconf/speech.htm>> at 11 October 2001.

<sup>4</sup> Kofi Annan, 'Two Concepts of Sovereignty', Address to the 54<sup>th</sup> Session of the General Assembly, reprinted in *The Question of Intervention: Statements of the Secretary-General* (1999) 39.

<sup>5</sup> *Ibid.*

## II CHANGING CONCEPTIONS OF THE NON-INTERVENTION PRINCIPLE AND THE DOCTRINE OF 'SOVEREIGNTY AS RESPONSIBILITY'

The idea that there is a relationship between a state's internal and external legitimacy has been at the heart of the global human rights regime since 1945. What is new is the claim that in the most appalling cases of brutality and slaughter, the use of force can be justified to end such atrocities. If this normative position is accepted, then it would have profound implications because the legal principles of non-intervention and non-use of force would no longer be sacrosanct. Instead, a state's legal and moral right to claim protection of the norm of non-intervention would depend upon its observance of certain minimum standards of common humanity. The Special Representative of the UN Secretary-General for Internally Displaced Persons, Francis Deng, has called this approach 'sovereignty as responsibility'.<sup>6</sup> The Secretary-General is a great enthusiast of this doctrine. Speaking in 1998 before NATO's intervention in Kosovo, Annan emphasised that the *Charter* belongs to the peoples of the world and not the states representing them at the UN:

The Charter protects the sovereignty of peoples. It was never meant as a license for governments to trample on human rights and human dignity. Sovereignty implies responsibility, not just power.<sup>7</sup>

This is not a rejection of the core principles of sovereignty and non-intervention; rather, states that claim these rights must recognise a responsibility to protect citizens inside their jurisdictions.

Although the SC's actions during the last decade reflected a growing acceptance of the doctrine of 'sovereignty as responsibility', this argument remains an uncomfortable one for states jealous of their sovereign rights. It is Western states, under pressure from domestic publics and human rights constituencies, which have used their dominant position on the SC to expand its normative agenda in the last 10 years.<sup>8</sup> Nevertheless the significance of this normative change should not be exaggerated. To date the SC has not expressly authorised a state, or group of states, to use force to end a human rights emergency where this lacked either the consent of the target state, or where the state had not already collapsed (as in Somalia, Liberia and Sierra Leone). Whilst it is extremely unlikely that Russia and China would veto SC action in a clear-cut case of genocide or wholesale slaughter, unless they had vital interests at stake, their strong bias against intervention makes them very cautious about endorsing the use of force. Russia and China can be expected to be most supportive when a target state, under intense diplomatic pressure from the

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<sup>6</sup> Francis Deng, *Protecting the Dispossessed: A Challenge for the International Community* (1993); Francis Deng et al, *Sovereignty as Responsibility: Conflict Management in Africa* (1995); Francis Deng, 'Frontiers of Sovereignty' (1995) 8(2) *Leiden Journal of International Law* 249.

<sup>7</sup> Kofi Annan, 'Reflections on Intervention' in *The Question of Intervention: Statements of the Secretary-General* (1999) 6.

<sup>8</sup> For a detailed discussion of this development, see Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (2000).

international community, has reluctantly ‘consented’ to outside military intervention to end a humanitarian crisis. This is what happened in the case of East Timor. The international community was successful in cajoling and coercing the Habibie Government into accepting that only outside military assistance could end the humanitarian crisis facing the Timorese.<sup>9</sup> In the case of Kosovo, there was no such consent from the Milošević Government. The disagreement among the permanent members of the SC arose over whether the humanitarian crisis in Kosovo justified the use of force.

The divisions over Kosovo alert us to a crucial point. Even if there is an emerging consensus in the SC that states guilty of systematic violations of human rights should forfeit their right to protection of the norm of non-intervention, how should the SC proceed if members — especially permanent members — are divided over whether a particular situation warrants intervention? And if the SC is paralysed because of the power of the veto, how should other governments, non-governmental organisations (‘NGOs’) and wider public opinion judge a state, or group of states, that justifies the use of force on humanitarian grounds? This was the difficulty posed by NATO’s intervention in Kosovo. This is why humanity needs a moral, legal and political framework for judging the legitimacy of particular interventions that purport to be humanitarian.

Before proceeding to discuss the criteria that should be applied to such cases, it is necessary to deal with the fundamental objection that the use of force can never be compatible with the promotion of humanitarian ends. Michael Ignatieff expresses this dilemma when he asks:

What about the right to life – at the core of human rights doctrines? How can you have a human rights doctrine that puts the right to life at the centre of that doctrine but simultaneously legitimises violence to right human rights abuses either internally or externally?<sup>10</sup>

The pacifist answer to Ignatieff’s question is that this would be a contradiction in terms. Humanitarian organisations such as the International Committee of the Red Cross and Médecins sans Frontières similarly object to any pairing of the concepts of ‘humanitarian’ and ‘intervention’ because this implies that military action can be compatible with the humanitarian impulse.<sup>11</sup> The alternative to the use of force is not inaction but non-violent strategies of humanitarian intervention. Too little attention has been paid to the worth of this response to human rights emergencies,<sup>12</sup> but it seems reasonable to conclude that such measures are likely to prove most effective if implemented in the early

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<sup>9</sup> For further discussion, see Nicholas Wheeler and Tim Dunne, ‘East Timor and the New Humanitarian Interventionism’ *International Affairs* (forthcoming 2001).

<sup>10</sup> Michael Ignatieff, ‘Human Rights, Sovereignty, and Intervention’ (Amnesty International Lecture, Oxford, 2 February 2001) 3.

<sup>11</sup> Gareth Evans and Mohamed Sahnoun, ‘Intervention and State Sovereignty: Breaking New Ground’ (2001) 7(2) *Global Governance* 119.

<sup>12</sup> Notable exceptions include Liam Mahony and Luis Eguren, *Unarmed Bodyguards: International Accompaniment for the Protection of Human Rights* (1997); Peter Ackerman and Jack Duvall, *A Force More Powerful: A Century of Nonviolent Conflict* (2000); Howard Clark, *Civil Resistance in Kosovo* (2000).

stages of a conflict. The difficulty with non-violent approaches is that it is hard to see how they could have ended the mass killings in Cambodia in the period 1975–78, or the genocide perpetrated against the Tutsis in Rwanda in April 1994 that claimed over half a million lives. In both Rwanda and Cambodia the machinery of state power was mobilised for mass murder and the only means of immediately ending the slaughter was armed intervention. Such cases make it necessary to consider when it is legitimate to use force in defence of human rights.

### III JUST WAR PRINCIPLES FOR HUMANITARIAN INTERVENTION

The Western Just War tradition developed out of a rejection of the pacifist views that had dominated the early Christian church.<sup>13</sup> It was an attempt by theologians to come to terms with the reality that, given the existential condition of sin, violence would always be an endemic feature of human society. Violence was acknowledged to be evil, but so was inaction in the face of great injustice. Consequently, the tradition is built on the assumption that as a last resort, the use of force might be the only means to avert an even greater evil. It is misleading to think of Just War theory as a check-list for political and military leaders contemplating the use of force. A more apposite understanding of the approach is supplied by the American Bishops' injunction that the tradition does not provide 'a set of mechanical criteria that automatically yields a simple answer, but a way of moral reasoning to discern the ethical limits of action'.<sup>14</sup> With these caveats in mind, and drawing on some of the tenets of the tradition, I want to identify six substantive principles that should be applied when judging the humanitarian credentials of particular cases of intervention.<sup>15</sup>

#### A *Just Cause*

The first principle is just cause. The Western Just War tradition has always recognised protection of the victims of cruelty and violence as a legitimate basis for the use of force.<sup>16</sup> I prefer to use the language of 'supreme humanitarian emergency' to capture the extraordinary character of the cases under consideration. One of the most persistent arguments against creating a doctrine of humanitarian intervention in international law is that it will be abused, and

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<sup>13</sup> For general treatments of the Western Just War tradition, see Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (1977); Paul Ramsey, *The Just War: Force and Political Responsibility* (1968); Robert Tucker, *The Just War: A Study in Contemporary American Doctrine* (1960). For a discussion of the specific applications of Western Just War theory to humanitarian intervention, see Robert Phillips and Duane Cady, *Humanitarian Intervention: Just War vs Pacifism* (1995); Mona Fixdal and Dan Smith, 'Humanitarian Intervention and Just War' (1998) 42(2) *Mershon International Studies Review* 283; Ignatieff, above n 10, 6–7.

<sup>14</sup> Cited in Hugh Beach, 'Secessions, Interventions and Just War Theory' [1999] *Pugwash Occasional Papers* 35–6.

<sup>15</sup> The six principles discussed here build on the original framework that I developed in Wheeler, *Saving Strangers*, above n 8.

<sup>16</sup> Fixdal and Smith, above n 13, 296–7.

that such abuse will undermine the already fragile restraints on the use of force.<sup>17</sup> The best response to this concern is to identify the threshold for intervention so narrowly that it becomes very difficult for states to exploit this standard to justify the use of force for ulterior purposes. What I have in mind by just cause is contained in the statement of India's Permanent Representative to the UN, Ambassador Sen, defending his government's intervention to end the humanitarian crisis in East Pakistan in December 1971. India did not act primarily for humanitarian reasons; instead, it relied on a claim of self-defence to justify the use of force. Nevertheless, Ambassador Sen did refer to the level of suffering inflicted by the Pakistani Government on the Bengali people, which he described as a 'shock to the conscience of mankind'.<sup>18</sup> Interestingly, the SC did not question this interpretation of the magnitude of the humanitarian crisis in East Pakistan. What was challenged in the SC, and in the GA, was the notion that the atrocities committed by Pakistan could possibly justify India's use of force.

Many have questioned whether the FRY's repression of the Kosovars constituted a supreme humanitarian emergency. This raises the problem of determining how early a rescue mission should take place. If the threshold for intervention is defined as genocide or mass murder, does this mean that the bodies have to pile up to this level before intervention can occur? Those sympathetic to the position adopted by Russia in the SC argue that Russia's intention to veto any draft resolution authorising force against the FRY reflected the belief it held, in late 1998 and early 1999, that the crisis did not warrant an armed response. As a permanent member of the SC, entrusted under article 24 of the *Charter* with a 'responsibility to maintain international peace and security', Russia was not persuaded that Kosovo met the threshold.<sup>19</sup> It is suggested that Russia's position might have changed had the emergency worsened along the apocalyptic lines predicted by NATO governments. The difficulty with this argument is that it is uncertain how many Kosovars would have had to die or be expelled before Russia and China sanctioned the use of force. The best justification for NATO's action is that it was an anticipatory humanitarian intervention, undertaken in response to intelligence that the Milošević regime was planning to expel Albanians forcibly from Kosovo. The problem with using force in response to warning indicators of an impending disaster is that it can never be known whether intervention was justified; we can never know what would have happened had the intervention not taken place. Robert Legvold

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<sup>17</sup> The classic statement of this argument is to be found in Thomas Franck and Nigel Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force' (1973) 67 *American Journal of International Law* 275.

<sup>18</sup> 26 UN SCOR (1606<sup>th</sup> meeting, 4 December 1971) 14. For a full discussion of the case, see Wheeler, above n 8, 55–78.

<sup>19</sup> Simon Chesterman argues against the widely accepted view that the Russian threat to veto was an act 'of mere contrariness' considering that '[i]t was never seriously contemplated that there might be genuine objections to the policies of NATO member states in their dealings with the FRY': Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention in International Law* (2001) 221.

captures the dilemma of legitimating anticipatory humanitarian intervention in international society:

To wait until massive numbers of lives have been lost before acting will ... compound the tragedy ... Yet, to reach agreement on forceful action in response to warning signs before tragedy strikes promises to be difficult in the extreme, if the evidence is ambiguous, as it is likely to be, and, if a sizeable number of states, including major powers like Russia, China and India, start from a strong bias against intervention.<sup>20</sup>

There is no obvious answer to this moral and political conundrum.

### B *Last Resort*

Closely allied to the principle of just cause is that of last resort. Russia's belief that Kosovo did not satisfy the requirement of just cause was buttressed by its belief that more could have been done after the negotiations at Rambouillet to prevent the use of force.<sup>21</sup> The fact that NATO contested this judgment highlights the crucial point that agreement on the criteria to govern the use of force in humanitarian crises provides no guarantee of consensus in particular cases. The general problem that confronts us is how to reconcile the moral imperative for precipitous action to end human rights abuses with the Just War requirement that all peaceful means be exhausted. While policy-makers try to halt killings through non-violent means, massacres might be continuing on the ground. It is too demanding to require politicians to exhaust all peaceful remedies; rather, they must be confident that all avenues have been explored which are likely to prove successful in stopping the violence. If there is doubt on this score, then state leaders are morally obliged to continue to pursue humanitarian ends through non-violent means since, while the use of force can achieve good, it inevitably causes harm as well.

### C *Good over Harm*

The third principle is that decision-makers must be reasonably satisfied that the use of force will produce a surplus of good over harm. The stipulation that the means employed must not exceed the harm that it is designed to prevent or stop recalls the fundamental question whether violent means can ever serve humanitarian ends. The Independent International Commission for Kosovo concluded that '[t]he method of intervention must be reasonably calculated to end the humanitarian catastrophe as rapidly as possible'.<sup>22</sup> It is crucial that force be employed in such a way that the process of escalation is controlled.<sup>23</sup> This is why humanitarian intervention has to be selective since it would be reckless to use force against major military powers. However, selective action based on

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<sup>20</sup> Robert Legvold, 'Foreword' [2000] *Pugwash Occasional Papers* 10.

<sup>21</sup> For a selection of conflicting perspectives on this question, see Ken Booth (ed), *The Kosovo Tragedy: The Human Rights Dimensions* (2001).

<sup>22</sup> Independent International Commission on Kosovo, *Kosovo Report* (2000) 194.

<sup>23</sup> Ignatieff, above n 10, 12–13.

considerations of prudence should be clearly distinguished from cases of inaction, either because states have no significant interests at stake (eg, Rwanda), or because states have an interest in supporting the government or faction perpetrating the human rights abuses (eg, Cambodia under Pol Pot).

#### D Proportionality

The fourth criterion is that intervening states must respect the protection of civilians under international humanitarian law. The proportionality requirement is a utilitarian or consequentialist one: it must be believed that more lives will be saved by intervention than would be lost through a policy of non-intervention. This principle is subject to one absolute and overriding constraint. The concept of human rights is predicated on all lives being treated as morally equal, and it is not acceptable for the intervening side to employ military means that reduce its risks to a bare minimum if this leads to excessive harm being inflicted on civilians in the target state.<sup>24</sup> Unfortunately, this moral principle offers no guidance on permissible targeting activity in cases like Kosovo. Those who argue that NATO's conduct was illegal point to its targeting of dual-purpose facilities, such as the attack on 23 April against the radio and television station that killed 16 civilians, and the escalation of the campaign during May against electricity plants and factories in the FRY.<sup>25</sup> This led Adam Roberts to suggest that

the disturbing lesson of the air campaign may be that its most effective aspect involved hurting Serbia proper (including its population and government) rather than directly attacking Serb forces in Kosovo and protecting the Kosovars.<sup>26</sup>

NATO claimed that its targeting of the FRY was legal and in conformity with the *Additional Protocol I* to the 1949 *Geneva Conventions*.<sup>27</sup> The problem is that the language of this document is sufficiently ambiguous that it could be

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<sup>24</sup> I owe this formulation to Tom Farer.

<sup>25</sup> The most critical legal commentaries were those made by the human rights NGOs Amnesty International and Human Rights Watch: Amnesty International, '*Collateral Damage*' or *Unlawful Killing? Violations of the Laws of War by NATO During Operation Allied Force* (2000) <<http://www.amnesty.org/ailib/aipub/2000/SUM/47001800.htm>> at 12 September 2001; Human Rights Watch, *Civilian Deaths in the NATO Air Campaign* (2000) <<http://www.hrw.org/reports/2000/nato>> at 11 January 2000.

<sup>26</sup> Adam Roberts, 'NATO's Humanitarian War over Kosovo' (1999) 41(3) *Survival* 117, 118.

<sup>27</sup> *Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).



interpreted as supporting the claims of either NATO or its critics.<sup>28</sup> Indeed, what is significant about the legal controversies over NATO's targeting of the FRY, is that the contending parties rely on the same legitimating framework but reach radically different conclusions on the legality of the bombing.

### E *Right Intention*

The fifth principle — right intention — relates to how important the humanitarian impulse should be in deciding whether an intervention is just. In their comprehensive assessment of the Western Just War tradition, Mona Fixdal and Dan Smith argue that most writers consider that 'the motive for a decision to act on a just cause should be the creation of a just peace. Such a position excludes, among other things, self-interested motives like profit, power and glory'.<sup>29</sup> The problem with stipulating that states should only act for altruistic or humanitarian purposes is that there are few, if any, cases where this is the only motivation for an intervention.<sup>30</sup> This leads Michael Walzer to argue that '[s]tates don't send their soldiers into other states ... only in order to save lives. The lives of foreigners don't weigh that heavily in the scales of domestic decision-making'.<sup>31</sup> The recognition that mixed motives are inevitable invites the question how significant the humanitarian component should be and what motivations would fail to satisfy the criterion of right intention?<sup>32</sup> Territorial conquest and annexation would surely breach this requirement, but what about a reasonable plea of self-defence? Adam Roberts has suggested that the relevant criterion is not the disinterestedness of states, but whether 'the interests of the

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<sup>28</sup> The Committee established by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia that reviewed the NATO bombing campaign against the Federal Republic of Yugoslavia concluded:

On the basis of information reviewed ... the committee is of the opinion that neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents are justified. In all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences.

International Criminal Tribunal for the Former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia* (1994) [90].

<sup>29</sup> Fixdal and Smith, above n 13, 299.

<sup>30</sup> The Australian intervention in East Timor in September 1999 might be pointed to as a case where force was used for primarily humanitarian purposes. Nevertheless this judgment has to be qualified by the fact that the Howard Government was under considerable domestic pressure to act. That said, the case is important because in leading the UN authorised multinational force, Australia placed at risk its long-standing interest in promoting good relations with Indonesia. See Wheeler and Dunne, above n 9.

<sup>31</sup> Walzer, above n 13, 101–2.

<sup>32</sup> As Fixdal and Smith point out, right intention tells us what is prohibited in terms of motivation, but it does not address the question of 'what constitutes an acceptable motive': Fixdal and Smith, above n 13, 301. Hugh Beach considers that '[i]t is a difficult question to what extent self-interest is a necessary ingredient in Right Intention': Beach, above n 14, 25.

intervening powers are viewed by other states as reasonable, and are compatible with the rights and interests of those being protected'.<sup>33</sup>

There are two difficulties with this formulation. Firstly, what counts as reasonable will always be contested by states with differing interests and values. NATO argued that the crisis in Kosovo in 1998–99 posed a threat to wider regional security that justified the use of force, but two other members of the SC, China and Russia, did not accept this argument.<sup>34</sup> Secondly, what about a case like Vietnam's intervention in Cambodia in December 1978 that ended the tyranny of the Khmer Rouge? The available evidence suggests that the ethical reasoning underpinning the Just War tradition played no part in the decision of the Vietnamese Politburo to invade Cambodia.<sup>35</sup> The intervention was not motivated by humanitarian concerns and this justification was explicitly rejected by the Vietnamese Foreign Minister as a legitimate basis for the use of force.<sup>36</sup> Nor were the means calibrated to end the humanitarian catastrophe as rapidly as possible, subject to the deontological requirement of respecting the rights of civilians. On the other hand, there is little doubt that the brutality and slaughter perpetrated by the Khmer Rouge constituted a just cause for intervention, and that the outcome of the Vietnamese intervention was 'compatible with the rights and interests' of the victims of Pol Pot's tyranny.

Vietnam's action should not be praised as a model of legitimate humanitarian intervention, but neither should it have been condemned by the international community as a breach of the principles of non-intervention and the non-use of force. Moreover, there was no justification for the decision by Western states to impose sanctions against Vietnam and the new government in Phnom Penh, and provide financial aid and military support to the guerrilla army (dominated by Khmer Rouge forces) seeking to overthrow it. Vietnam was treated so harshly because it was perceived by the West and members of the Association of South-East Asian Nations ('ASEAN') as a proxy for the advancement of Soviet power in the region. The US was particularly hostile given the bitter memories of its defeat against Vietnam in the war that had ended four years earlier. The position taken by the West and ASEAN was echoed in statements of the Non-Aligned Movement in the SC and GA. The international reaction reflected the moral bankruptcy that flows from a dogmatic application of the non-intervention principle in international society. Vietnam's breach of the rules should have been excused because 'the net result of [the intervention] was to interrupt the killing

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<sup>33</sup> Adam Roberts, 'Intervention: Suggestions for Moving the Debate Forward' (Paper presented at the Round-Table Consultation of the International Commission on Intervention and State Sovereignty, London, 3 February 2001) 10.

<sup>34</sup> A record of Russia's objection is contained in *Meeting Record*, UN Doc S/PV.3988 (1999) 2. For a record of the objection made by China, see *Meeting Record*, UN Doc S/PV.3989 (1999) 6.

<sup>35</sup> For a detailed discussion of the case, see Gary Klintworth, *Vietnam's Intervention in Cambodia in International Law* (1984); Michael Leifer, 'Vietnam's Intervention in Kampuchea: The Rights of State v the Rights of People' in Ian Forbes and Mark Hoffman (eds), *Political Theory, International Relations and the Ethics of Intervention* (1993); Wheeler, above n 8, 78–111.

<sup>36</sup> See Klintworth, above n 35, 11.

that was underway inside Cambodia'.<sup>37</sup> This highlights the importance of not treating the Western Just War tradition as a checklist of criteria to be ticked off. Each case must be judged on its legal, moral and political merits.

#### F *Reasonable Prospect*

The final criterion is reasonable prospect. An intervention must have a reasonable chance of ending the human rights abuses. This raises the question of what counts as a successful humanitarian intervention. Fernando Teson defines this as one that rescues 'the victims of oppression, and [where] human rights have subsequently been restored'.<sup>38</sup> It might be argued that this is too demanding a test and what matters is simply ending the atrocities. What happens after this is not the concern of the interveners. This approach avoids the risk of intervention leading to a prolonged stay during which the intervening powers play a quasi-Imperial role. Set against this, it is problematic if the intervening forces withdraw after stopping the killing and without the guarantee that human rights abuses will not resume on an equally deadly scale. Once a state intervenes in another state's internal affairs, its responsibility should extend to policing the conflict and rebuilding legitimate state institutions in order to prevent a repeat of the violations. As the international community has discovered in Somalia, Bosnia, Kosovo and East Timor, this requires a sustained commitment of political will and resources.<sup>39</sup> It remains to be seen whether the Western public is prepared to pay the price and bear the burden of rebuilding these failed polities. The jury remains out on whether the interventions have 'created [the] institutional conditions for the avoidance of human rights abuses in the long term'.<sup>40</sup>

#### IV WHEN ARE THE CRITERIA SATISFIED?

Even if it is possible to arrive at a new consensus on the substantive principles that justify humanitarian intervention, the question remains how to decide when these principles have been met in specific cases. Central to Western Just War theory is the question of right authority: who has the right to wage war and how can this right be justified?<sup>41</sup> One of the most important normative developments in the 20<sup>th</sup> century has been the gradual erosion of the bases upon which it is legitimate to resort to force. Starting with the League of Nations in 1919 and then the signing of the *Charter*, states agreed to restrict the use of force to purposes of self-defence. Provision was made in the League Council, and especially in the SC, for collective action against states committing aggression. The SC is a quasi-Leviathan in the international community, empowered with a

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<sup>37</sup> Ibid 76.

<sup>38</sup> Fernando Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (1988) 106.

<sup>39</sup> See, eg, Alexander Downer (Speech delivered at the opening of the Donors' Meeting on East Timor, Canberra, 14 June 2001) <[http://www.dfat.gov.au/media/speeches/foreign/2001/014606\\_fa\\_donors.html](http://www.dfat.gov.au/media/speeches/foreign/2001/014606_fa_donors.html)> at 12 September 2001.

<sup>40</sup> Ignatieff, above n 10, 16.

<sup>41</sup> Fixdal and Smith, above n 13, 291–2.

mandate to authorise the use of force to maintain ‘international peace and security’. Given that the *Charter* bestows the primary responsibility for maintaining international order on the SC, it is argued that the authority to use force in defence of humanitarian purposes must always rest with the SC, and it alone.

The legitimacy of a legal order rests on the substantive values it upholds. If the provisions of the *Charter* cannot protect civilians from genocide and mass murder, it risks being ridiculed. It was this concern — that there might be vetoes on the table in future cases like Rwanda — that led Annan to issue the following moral and legal challenge to the GA in September 1999:

If, in those dark days and hours leading up to the genocide [in Rwanda], a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorisation, should such a coalition have stood aside and allowed the horror to unfold? <sup>42</sup>

One interpretation of this passage is that it was a clever debating move designed to legitimate NATO’s action in Kosovo. Certainly Annan is on record as acknowledging that concerns about sovereignty were not a barrier to effective SC action in the case of Rwanda.<sup>43</sup> Nevertheless the possibility that the SC may be unwilling or unable to act in a supreme humanitarian emergency because of the use of the power of veto cannot be ruled out. Consequently, it is necessary to consider whether it is possible to arrive at a consensus on what should happen in such cases.

An alternative procedural mechanism that has been suggested involves recourse to the GA under the 1950 ‘Uniting for Peace’ resolution.<sup>44</sup> NATO could have strengthened its claim to be acting on behalf of the international community in its use of force against the FRY by putting the decision before the GA. Adopted at the height of the Cold War, ‘Uniting for Peace’ was a way of bypassing the Soviet veto in the SC.<sup>45</sup> NATO could have tabled a draft resolution in the SC authorising it to use force against the FRY. Even if Russia had cast its veto, NATO could have tabled a procedural resolution requesting that the matter be transferred to the GA. This led Nigel White to argue that had NATO

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<sup>42</sup> Kofi Annan, ‘Two Concepts of Sovereignty’, above n 4.

<sup>43</sup> Kofi Annan, *Preventing War and Disaster: A Growing Global Challenge: 1999 Annual Report on the Work of the Organization* (1999) 12.

<sup>44</sup> This provides that ‘if the Security Council, because of lack of unanimity of the permanent members fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security’: GA Res 377 (v), UN GAOR (30<sup>th</sup> plen mtg), A/Res/377(v)A (1950).

<sup>45</sup> Nigel White, ‘The Legality of Bombing in the Name of Humanity’ (Paper presented at the British International Studies Association Annual Conference, University of Manchester, 20–2 December 1999) 10–11.

won both a procedural vote in the Security Council [the right of veto does not apply in such cases] and a substantive vote in the GA [requiring a two-thirds majority of the Assembly], NATO then would have had a sound legal basis upon which to launch its air strikes.<sup>46</sup>

The strongest argument for promoting the role of the GA is that it establishes a high threshold of international legitimacy. States would have to persuade the overwhelming majority of their peers that they had a reasonable case for using force, and this should ensure that the doctrine of humanitarian intervention would not be abused for selfish reasons. This position finds support in the proposals for reform advanced by the Independent International Commission on Kosovo.<sup>47</sup> The commissioners considered that ‘the veto right [should be] superseded by a [two thirds] or better majority determination ... that a humanitarian catastrophe is present or imminent’.<sup>48</sup>

Leaving aside the enormous political obstacles to implementing this recommendation, which I discuss in the next section, there are two normative reasons for being cautious about embracing this policy prescription. Firstly, even if it is possible to arrive at a consensus in the GA on the substantive criteria that should determine future UN decisions on humanitarian intervention, this will not resolve ambiguities as to whether a particular case satisfies the criteria. The difficulty is that requiring GA approval for a humanitarian intervention poses the same dilemma, by analogy, that Annan raised in relation to SC authorisation. That is, should a group of states stand aside if they cannot secure the necessary votes in the GA in cases where massive and systematic abuses of human rights are taking place? Secondly, many governments in the GA are privately opposed to humanitarian intervention because they worry that their violations of human rights could make them future targets of intervention. Consequently, they are likely to oppose interventions that could set precedents for future applications of the doctrine. Why should such states be given a veto over the actions of other state(s) prepared to end the slaughter of civilians? This argument seems especially pertinent in the case of NATO: should a minority of liberal-democratic states submit to the tyranny of the majority of governments in the GA that lack strong democratic credentials? This is not to say that liberal-democratic states should not be held accountable for their actions, but domestic public opinion in the intervening states and bodies that can claim some democratic legitimacy should exercise this function.

Given the difficulties of relying on the SC and GA to authorise future humanitarian interventions, it might be argued that states should launch their interventions, and then seek to legitimate their actions retrospectively at the UN. This is what happened in the case of NATO’s use of force against the FRY. NATO governments defended their case in the SC, and the conflicting claims were tested when Russia, supported by Belarus and India, tabled a draft

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<sup>46</sup> Ibid 14.

<sup>47</sup> *Kosovo Report*, above n 22, 185–98.

<sup>48</sup> Ibid 194.

resolution condemning the action and demanding a halt to the bombing.<sup>49</sup> The resolution was comprehensively defeated by twelve votes to three. Slovenia, Brazil, Argentina, Gabon, Malaysia, Gambia and Bahrain joined the five NATO members on the Council to vote down the resolution condemning NATO for breaching article 2(4) of the *Charter*. It is important not to exaggerate the significance of this vote since none of these states explained their vote in terms of support for the doctrine of humanitarian intervention. To understand the SC's rejection of the Russian draft, it is necessary to realise that the four Muslim states on the SC were prepared to excuse NATO's breach of *Charter* principles because they were desperate for action to protect the Muslim victims of ethnic cleansing in Kosovo. It is clear from the international response to NATO's use of force that ringing statements of principle, such as the Non-Aligned Movement's rejection of the 'so-called right of humanitarian intervention',<sup>50</sup> are not necessarily a reliable guide to how members will react in specific cases where they have to balance conflicting legal and moral concerns. Although it would be naive to ignore power considerations in deciding which interventions are approved or excused, it is evident that the exercise of power would be constrained if it were possible to reach agreement on the substantive principles that should be applied in such cases. As with the proposal to rely on the GA, this would not eliminate the problem of how to decide between conflicting interpretations of the principles in hard cases. However, arguments that could not be reasonably defended in terms of the agreed criteria would lack credibility.

Such a framework could develop in two ways. Firstly, a set of norms would evolve as international society builds up a series of precedents supporting the practice of interventions taken outside of express SC authorisation. A process similar to the development of the common law in domestic society might then develop, whereby these precedents crystallised over time into a new law that would regulate these exceptional cases. Alternatively, formal agreement might be reached at the UN on the substantive criteria that should be satisfied for an intervention to count as humanitarian. Even if these criteria specified SC or GA approval as prerequisites for action, states that used force without such authorisation could defend their actions by reference to these criteria. Exploring the possibility of reaching such a consensus is the task of the final part of the commentary.

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<sup>49</sup> The positions taken by the members of the SC are in the provisional minutes S/PV.3989, 26 March 1999.

<sup>50</sup> Foreign Ministers of the Movement of Non-Aligned Countries (Statement delivered at the Movement of Non-Aligned Countries' 13th Ministerial Conference, Cartagena de Indias, 8 April 2000). The passage on humanitarian intervention read:

We also want to reiterate our firm condemnation of all unilateral military actions without proper authorisation from the United Nations Security Council ... We reject the so-called "right" of humanitarian intervention, which has no legal basis in the UN Charter or in the general principles of international law.

## V THE DEBATE OVER CRITERIA AT THE UN

The UK took the lead after Kosovo by arguing that the SC should formulate criteria, or what it called 'guidelines', for deciding when intervention is permissible. This initiative, promoted by the then Foreign Secretary, Robin Cook, was pursued with the other permanent members of the SC in New York, and through the UK's bilateral relations.<sup>51</sup> It has run into difficulties for two reasons.

Firstly, the US was extremely reluctant to establish a process that might constrain its freedom of action in future cases. As far as Washington is concerned, it wants to avoid being in a position where it can be put under pressure to act because it has signed up to a set of criteria. US opposition to reaching agreement in the SC on criteria is shared by China. However, whereas the former wants to maintain its freedom of action, the latter is worried that any discussion of criteria will become a stalking horse for legitimating the doctrine of unilateral humanitarian intervention. The UK draft paper was circulated among the permanent members of the SC in late 1999.<sup>52</sup> It identifies the following parameters for legitimate interventions: the existence of an extreme humanitarian emergency; the exhaustion of all peaceful remedies; an 'objective determination' that force is the only means to avoid a humanitarian catastrophe; and conduct of a military operation so that it meets the requirement of proportionality and is in conformity with international humanitarian law. What is not discussed in the UK document is how important humanitarian motives should be in decisions to intervene; yet without agreement on this question, states that want to oppose an intervention can always argue that an intervention is not disinterested.

The second problem with the British approach is that it does not discuss what to do if there is agreement on the substantive criteria, but disagreement over whether the criteria have been met in specific cases. The existence of an agreed framework based on the UK paper would not have resolved the controversies that raged in the SC over the merits of intervention in Kosovo. This is revealed in Russia's attitude to the UK paper. It would sign up to such a paper provided that it contained the additional criterion, unacceptable from the British point of view, that intervention to prevent or end humanitarian emergencies must always have the express authorisation of the SC. The whole rationale behind the UK initiative is to leave open the possibility that Western states might need to act outside of express SC authorisation in future cases. The goal of British diplomats was to secure agreement in the SC on the criteria that should govern the use of force in such cases, while leaving unresolved the question whether this required

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<sup>51</sup> In response to suggestions from other governments, and the development of thinking within the Foreign and Commonwealth Office, the British document has gone through several drafts. However, it is still not publicly available. A good guide to what is in the document is found in Robin Cook, 'Guiding Humanitarian Intervention' (Paper presented at the American Bar Association, London, 17 July 2001) <<http://www.fco.gov.uk/news/speechtext.asp?3989>> at 19 July 2000 (copy on file with author).

<sup>52</sup> *Ibid.*

express SC authorisation. In the event that Western states intervened again without a UN mandate, the idea was that the intervening states could appeal to the previously agreed SC guidelines as a legitimating ground for action — the assumption being that the UK would not support an intervention that did not meet these criteria. However, any attempt to retain a residual right of unilateral action in such cases was never going to secure the acceptance of Russia.

Another proposal on the table in New York is for the GA to discuss the question of humanitarian intervention with a view to agreeing on a framework document. Certainly, any agreement on triggering the ‘Uniting for Peace’ mechanism in future cases presupposes some agreement within the GA on the principles to be applied. This position is strongly advocated by some members of the Non-Aligned Movement, notably Egypt, which supports the use of the GA in cases where the SC is prevented from discharging its responsibilities. At the same time, Egyptian representatives have argued that a legitimate intervention must satisfy the requirement of ‘non-selectivity’. According to Ambassador Soliman Awaad, Egyptian Assistant Foreign Minister for Multilateral Affairs, this criterion of legitimacy is fulfilled when ‘norms and criteria of humanitarian intervention ... [are] indiscriminately applied to all cases without double standards or politicization’.<sup>53</sup> However, this establishes too demanding a condition of legitimacy that few, if any, interventions could meet.

While it is understandable that developing states are worried about powerful states cloaking ulterior motives behind the thin veneer of humanitarian claims, what is needed is a debate on the kinds of interests that may be legitimately advanced by states when intervening to protect civilians in peril. In this context, it is important that the international community address the question of how to respond where a state acts without humanitarian motivation or justification, but where the action ends a humanitarian catastrophe. If governments are seen to eschew these hard questions, and posit unrealistic standards and expectations for humanitarian intervention, this will give rise to concerns that their interest in such a dialogue is not a sincere one. The worry is that states opposed to the doctrine of humanitarian intervention wish to see a debate on criteria because they want to use the long and often torturous negotiating process in the GA to bury the idea. Once a draft document is introduced into the UN process, endless argument over the details of the text and the necessity of reaching consensus on the lowest common denominator often result in final documents that have little real import.

From the vantage point of Western governments, the enthusiasm of some members of the Non-Aligned Movement for employing the ‘Uniting for Peace’ mechanism is a move designed to change the balance of power vis-à-vis the SC. One of the reasons why NATO was extremely reluctant to engage the GA over Kosovo was the concern that this would erode the power of the veto. The UK and US felt it necessary to bypass the veto in this particular case, but did not

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<sup>53</sup> Soliman Awaad, ‘Sovereignty and Intervention: The Legal Aspects’ (Paper presented at the Conference on State Sovereignty in the 21<sup>st</sup> Century: ‘Concept, Relevance and Limits’, New Delhi, 23–4 July 2001) 4.



want to issue a direct challenge to the legitimacy of the veto. Moreover, this position is supported by Russia and China who are eager to maintain the primacy of the SC, since it is the one body in which they continue to have major influence in the global arena. A further reason why proposals to develop the GA's role under 'Uniting for Peace' will not receive support from Western states is that this might embolden the Arab states at the UN to try to circumvent the US veto by adopting a resolution in the GA that recommends coercive measures against Israel.

## VI CONCLUSION

This commentary has examined the substantive and procedural principles at stake in the current debate over humanitarian intervention. The debate over the merits of criteria is long-standing, but to date these arguments have been confined to academic controversies. What is new about the contemporary debate is that these issues are being debated in the corridors of the UN and in national capitals. The best argument for devising criteria is that they will constrain states from intervening without a plausible and convincing defence for their actions, and hence should reduce the risks of abuse. It is also contended that criteria would enable actions that states might otherwise refrain from undertaking because they would know that such actions would be welcomed. Against this, opponents of criteria argue that it would have neither this constraining nor enabling function. States would not be inhibited from intervening if they judge vital interests to be at stake because of the lack of plausible legitimating arguments. Similarly, states would not decide to incur the costs and risks of armed intervention just because a particular case could be argued to satisfy the criteria.

In the absence of an agreement on criteria, such arguments remain theoretical possibilities. Whatever the merits of the case for devising a framework, it seems that there is little prospect of an immediate breakthrough in this area. On the one hand, the five permanent members of the SC are united in opposing any attempt by members of the Non-Aligned Movement to develop the role of the GA. At the same time, the five permanent members cannot reach a consensus on the guidelines that the SC should apply in such cases. Despite these difficulties, it is important that the SC debate these issues publicly, since there can be no more urgent a moral issue than protecting civilians from appalling cruelty and slaughter.

It has been a constant theme of this commentary that agreement on the substantive principles, which justify humanitarian intervention, is no guarantee of agreement in specific cases. But in the absence of such a legitimating framework, there will be no common reference points with respect to which actors can raise and criticise each other's claims. Perhaps the strongest argument for trying to reach agreement on criteria within the SC is that it might make it more difficult for the SC to turn a blind eye to genocide, as it did in the case of Rwanda. If this can be achieved, then the effort to develop such criteria is more than worthwhile.

In the absence of the SC taking the lead in this area, it falls to those liberal-democratic states that are committed to the defence of human rights at home and abroad to forge ahead and reach consensus on the criteria that should be applied in such cases. The effect of this could be to generate international momentum behind a normative framework that might eventually gain widespread acceptance at the UN. And should Western states intervene in the future to protect civilians without express SC authorisation, they could invoke the criteria in defending their actions before the court of domestic and world public opinion.