Intervening in Mass Atrocities

The Way Forward

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Abstract

This thesis aims to critically assess the three main approaches for the legal and political future of humanitarian intervention. It does so through the use of a normative and, to a lesser extent, a dogmatic methodology. The thesis thoroughly examines whether the relevant provisions of the UN Charter provide a satisfactory legal framework. Acknowledging the deficiencies of existing international law, the thesis brings under scrutiny the position that the law should be disregarded. Finding such a world order to be unacceptable, the thesis further sets off to explore potential legal and political reforms. The conclusion of the analysis is that a reform must consist of two elements in order to be both effective and legitimate. First, the codification of criteria under which humanitarian intervention is recognised as a legal right. Second, an institutional reform that mitigates the opportunities for states to pursue their political self-interests.
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<th>Abbreviation</th>
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<tbody>
<tr>
<td>AJIL</td>
<td>American Journal of International Law</td>
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<tr>
<td>Case W Res J Int'l L</td>
<td>Case Western Reserve Journal of International Law</td>
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<td>Crim L R</td>
<td>Criminal Law Review</td>
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<td>CWC</td>
<td>Chemical Weapons Convention, formally Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction</td>
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<td>EJIL</td>
<td>European Journal of International Law</td>
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<td>EU</td>
<td>European Union</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICISS</td>
<td>International Commission on Intervention and State Sovereignty</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>Int C L R</td>
<td>International Criminal Law Review</td>
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<td>JICJ</td>
<td>Journal of International Criminal Justice</td>
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<tr>
<td>JT</td>
<td>Juridisk Tidskrift (translation: Law Journal)</td>
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<tr>
<td>LCP</td>
<td>Law and Contemporary Problems</td>
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<tr>
<td>MLR</td>
<td>Modern Law Review</td>
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<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<td>ONUC</td>
<td>Opération des Nations Unies au Congo (translation: The United Nations Operation in the Congo)</td>
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OPCW  Organisation for the Prohibition of Chemical Weapons

OTP  Office of the Prosecutor

P3  Permanent three western members of the United Nations Security Council (France, the United Kingdom and the United States)

P5  Permanent five members of the United Nations Security Council (China, France, Russia, the United Kingdom and the United States)

R2P  Responsibility to Protect

SvJT  Svensk Juristtidning (translation: Swedish Law Review)

U Chi L Rev  University of Chicago Law Review

UN  United Nations

UNAMIR  United Nations Assistance Mission for Rwanda

UNCIO  United Nations Conference on International Organization
1 Introduction

1.1 Background

Armenia, Treblinka, Choeung Ek, Nyarubuye, Srebrenica, Darfur. The past 100 years of the genocide timeline show no signs of abatement.

It is not unusual that such massive and systematic human rights violations are conducted by states against their own population. State sovereignty has traditionally been considered a bar to one state’s intervention in the internal affairs of another. Since the end of World War II, the principle of sovereignty has gradually been diminishing in relation to the ever-increasing strength of the human rights movement. In this more interventionist era, states can no longer commit mass killings of their own citizens while hiding under the shield of sovereignty. Held up against the all-piercing sword of humanitarian knights, the shield of sovereignty does not seem so impenetrable anymore.

The question is no longer if but rather how the international community should respond when a state systematically violates its citizens’ right to life, liberty and security. Giving priority to human rights and humanitarian intervention over state sovereignty becomes problematic in view of the UN Charter provisions governing the use of force. Although somewhat ambiguously, the Charter instructs states to always obtain the authorisation of the Security Council before embarking on a military intervention to save civilians from their killing regime.

Too often, threats to exercise the veto power have generated a consensus-driven deadlock in the Security Council. This familiar practice has on occasion caused a “coalition of the willing” to resort to unauthorised uses of force. The international community’s retrospective approval of NATO’s intervention in Kosovo has raised concerns that an unwritten right to bypass the UN in exceptional circumstances may be abused.

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Kofi Annan, former Secretary-General of the UN, voiced these concerns in his opening address to the General Assembly in 1999:\(^2\)

To those for whom the Kosovo action heralded a new era when States and groups of States can take military action outside the established mechanisms for enforcing international law, one might ask: Is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents, and in what circumstances?

Although it may be wise to treat unilateral interventions with a dose of healthy scepticism, the alternative – inaction – is arguably even less desirable. Annan indeed identified the flip side of the coin in an equally thought-provoking statement about the world’s inaction during the Rwandan genocide:\(^3\)

To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask – not in the context of Kosovo, but in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?

Today, 20 years after the genocide in Rwanda and 15 years after the intervention in Kosovo, this dilemma is as relevant as ever. The international community objected strongly to the invasion of Iraq and has reacted with horror to the unhindered atrocities in Darfur and Syria. There are still profound disagreements on how the community of states should respond to humanity’s inhumanity.

### 1.2 Purpose and Delimitation

There are three main approaches to resolving the debate on humanitarian intervention. They are the argument of maintaining the status quo established in 1945, the argument that a legal and political reform is needed, as well as the most radical and controversial

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\(^3\) Kofi Annan “Two Concepts of Sovereignty” (Address to the 54th session of the United Nations General Assembly, New York, 20 September 1999).
argument that the current norms and customs under international law are no longer appropriate and should be ignored.

The purpose of this thesis is to examine these three approaches in light of the Kosovo/Rwanda dilemma. Specifically, the thesis aims to:

(1) assess the current normative framework, including international criminal law;

(2) scrutinise the practice of ignoring the UN; and

(3) analyse different reform proposals from an effectiveness and feasibility perspective.

Owing to the vast area of examination, the thesis is delimited to highlighting a few chosen aspects of each approach. Furthermore, the thesis is confined to reflecting on the future of humanitarian intervention. It therefore serves no purpose to engage in debating the pros and cons of the act of humanitarian intervention and the principle of state sovereignty as such.

Humanitarian intervention is a multi-faceted subject matter, raising a wide array of legal, moral and political questions. A fundamental presupposition of the thesis is that humanitarian intervention is a morally justifiable act – provided that it in fact is humanitarian. Under this premise, it is only natural that moral arguments will receive less attention than legal and political ones.

1.3 Method and Material

Throughout the thesis, a combination of legal methods is used. Insofar the analysis entails an attempt to determine existing law, the traditional legal dogmatic method is employed. For these parts, the approach to the legal material reflects the hierarchy of sources of international law as listed in article 38(1) of the Statute of the International Court of Justice (ICJ).4

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4 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 933.
However, the greater part of the thesis is conducted through the complete opposite of a dogmatic method. By weighing relevant sources rather than considering them as hierarchical, and by pointing to various conceivable solutions rather than determining the meaning of the law, the normative and analytical legal method is applied. This approach emphasises a rather free, open-ended, argumentation. Accordingly, while paying due regard to other sources of international law, the discussions are primarily based on literature.

1.4 Outline

The following chapter lays the legal foundation for the subsequent discussion. It does so by providing a working definition of humanitarian intervention and by assessing the legality of humanitarian intervention under the status quo of international law. Chapter three examines the diverging positions of those who accept that the UN Charter prohibits humanitarian intervention. The purpose is two-fold. First, to scrutinise the current legal framework of the UN Charter. Second, to confront the state practice that embodies the argument of ignoring international law. In chapter four the assessment of the status quo continues by turning to a potentially underestimated actor in the context of humanitarian intervention, namely the International Criminal Court. The intention of this chapter is to assess the merits of a “judicial intervention”. Chapter five then explores four different reform proposals that can alter both the legal and political landscape. Each reform proposal is put to the tests of effectiveness and feasibility. The final chapter sums up the discussions with some concluding remarks.
2 Definitions and Debates

2.1 Conceptual Framework

Notwithstanding the fact that the term has already been used, any analysis on the topic of humanitarian intervention must begin with defining the two words and their sum. Considering the tendency within security policy rhetoric to use humanitarian arguments to justify any use of force, it is key to distinguish humanitarian intervention from illegitimate military action. If a state deploys armed troops across a border, the international community will judge this act depending on how it is interpreted.\(^5\) In trying to pinpoint the meaning of humanitarian intervention, it must be conceded that there is no accepted definition of the concept. Its two constituents carry inherently normative assumptions with them, thus joining them together is bound to cause uncertainty and debate.\(^6\) Because of the controversy over the definition, the International Commission on Intervention and State Sovereignty (ICISS) decided to abandon the term in its report *The Responsibility to Protect* (R2P).\(^7\) However, opting for the unwieldy phrase “military intervention for human protection purposes” was hardly helpful. Rather than rejecting the term out of hand, it is more appropriate to distinguish responsibility to protect from humanitarian intervention.\(^8\) Accordingly, responsibility to protect will be treated as an individual and separate concept during the course of this thesis.

The concept of humanitarian intervention comprises three defining conditions. To begin with, the notion of *intervention* must be narrowed down from broadly referring to one state’s involvement in another one’s domestic affairs. In this context, intervention is a violation of state sovereignty through the means of military force.\(^9\) In defining it this way, non-forcible acts of intervention such as the use of economic and diplomatic

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\(^7\) International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (International Development Research Centre, Ottawa, 2001) at 9.


sanctions are excluded. The definition is also, deliberately, crafted in an ethical way by adding sovereignty to the equation. Furthermore, a violation of state sovereignty implies lack of consent on behalf of the target state. This requirement should, however, not be construed too strictly as there might not even exist any government to give its consent.\(^\text{10}\)

Lastly, an intervention must be a cross-border operation, i.e. it may only be performed by an external agent. Humanitarian intervention is usually carried out by a coalition of states.\(^\text{11}\) Nonetheless, the door will be left open for now as regards who may do the intervening.

Second, the settings of such interventions are ongoing or apprehended violations of fundamental human rights. That is where the line will be drawn in this thesis for a state to be subject to humanitarian intervention whatsoever. A subsequent, for now unrelated, question is if the intervention is justifiable. This is likely to require atrocities to be ongoing and of large scale.

Third, in order to stage a humanitarian intervention the intervention must be \textit{humanitarian}. As emphasised by Louis Henkin and others, the term intervention has a negative connotation.\(^\text{12}\) Joined together with humanitarian, however, it is prefaced by a word that is approving by nature. Aside from making the concept a bit paradoxical, it also accounts for the issue of ascertaining whether the intervener has humanitarian intentions.\(^\text{13}\) Nicholas Wheeler argues that defining humanitarian intervention on the basis of the intervener’s motives excludes cases where the intervener acts for non-humanitarian reasons yet produces a positive humanitarian outcome.\(^\text{14}\) A broad subjective element, as advocated by Wheeler, produces a dangerous definition that is exposed to abuse. The concept of humanitarian intervention is too fragile to encompass acts that in the aftermath of an armed intervention are lucky enough to have had some positive humanitarian effects. Accordingly, the presence of a humanitarian motive must


\(^\text{11}\) The Security Council may authorise intervention under Chapter VII of the UN Charter, which would effectively make it a peace enforcement mission. Nonetheless, it would still be states that execute the intervention.


be a defining condition. This is not to say that it needs to be the sole motive. It would be deceptive, however, to describe an intervention as humanitarian if humanitarian contemplations were not the predominant factor in the decision to intervene.\(^{15}\)

Hence, the working definition of humanitarian intervention may be summarised as follows:

Violation of state sovereignty through the means of military force with the predominant purpose of averting or halting ongoing or apprehended violations of fundamental human rights.

As alluded to earlier, these defining criteria are surrounded by diverging opinions. The political positions are rather predictable, with liberal idealists advocating intervention and conservative realists opposing the same.\(^{16}\) The academic debate does to a large extent focus on the legality and legitimacy of humanitarian intervention. International lawyers have looked at humanitarian intervention with disapproving eyes owing to its alleged violation of one of the most fundamental provisions of the UN Charter – the prohibition on the use of force in article 2(4). In considering this an absolute bar to humanitarian intervention, many legal scholars have been faced with the predicament of condemning human rights abuses while objecting to the use of military force as a means of stopping such abuses. The law-centred position of legal scholars has instigated a heated debate with non-governmental organisations and international organisations, which tend to base their views on a moral mind-set rather than a legal one. The Responsibility to Protect, a prominent example of a report with such an approach, marks an attempt to shift the perspective of the debate from that of “the right to intervene” to one of “the responsibility to protect”.

The lack of consensus on these issues does not mean that there is no need to further fuel the debate. There is, however, little to gain from joining the pundits in their relentless hammering on the same nail. The debate contribution of this thesis is an ambitious one – it endeavours to reconcile the legal, moral and political debates.


2.2 Legal Framework

Before embarking on a normative assessment of the international framework on humanitarian intervention, the basic legal picture must be grasped.

In 1945, a prohibition against the use of force was laid down for the very first time. The time of the rule’s birth hardly comes as a surprise. The drafters of the UN Charter set out a general ban on the use of force in article 2(4):

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.

Use of force and aggression is not one and the same concept – the Charter rather recognises aggression as an aggravated form of use of force. However, one interesting observation can be made in the context of humanitarian intervention. When the States Parties to the International Criminal Court (ICC) were negotiating the definition of the crime of aggression during the Review Conference in Kampala 2010, they agreed upon the three components of character, gravity and scale. This threshold requirement left the door open to carry out humanitarian intervention without it giving rise to individual criminal responsibility.

The UN Charter provides two significant exceptions to the prohibition on the use of force: enforcement measures authorised by the Security Council under Chapter VII and self-defence under article 51. In the present context, the latter can be disregarded since humanitarian intervention will hardly ever be legal on the basis of self-defence. The principal exception that remains is therefore Security Council enforcement action. The practice of the Security Council on articles 39 and 42 has stirred up a controversy.

17 A distinction appears to be made in article 39, which leaves determination of the act of aggression in the hands of the Security Council. This view is also confirmed by the General Assembly in GA Res 3314 (1974).
18 See The crime of aggression Review Conference of the Rome Statute, Resolution RC/Res.6, 11 June 2010, Annex III, at [6]–[7].
19 As ruled by the ICJ, self-defence may only be invoked as a response to an armed attack. See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14 at [195].
Nevertheless, the legal debate does not stop there. The need for the rule to be accompanied by a number of exceptions has proved to be its Achilles’ heel.21 States that have sought to side-step the prohibition have often done so by construing the main rule as narrowly as possible, or by construing the exceptions as broadly as possible.

One defence of the legality of humanitarian intervention is based on a literal reading of the phrase “territorial integrity or political independence”. Following the United States’ invasion of Panama in 1989, Anthony D’Amato argued that article 2(4) was not violated because the intervention did not reduce the size of Panama’s territory, nor did it result in colonisation, annexation or incorporation of Panama.22 Similarly, Fernando Tesón suggests that territorial conquest or political subjugation can never be a possible outcome of a genuine humanitarian intervention.23 This interpretation of “territorial integrity” is difficult to reconcile with article 2(4) as such a loophole would seriously undermine the prohibition on the use of force.24 By adding “territorial integrity or political independence”, the drafters of the Charter clearly aimed at reinforcing the prohibition on the use of force rather than limiting it.25

Another argument for legality focuses on the last limb of article 2(4), which says that force must not be used “in any other manner inconsistent with the Purposes of the United Nations”. Protection of human rights is a core purpose of the UN and hence, some commentators argue, use of force for such purpose cannot violate article 2(4).26 The argument purports that use of force against the territorial integrity of another state is lawful as long as it is consistent with the purposes of the UN. This would, in effect, mean that there is a “human rights exception” built into the rule that bans the use of force. The chain of reasoning in this “force for good” theory does simply not hold water. First and foremost it is a difficult argument to make in terms of basic sentence structure and use of conjunctions. It is a logical fallacy to contend that a prohibition on

22 Anthony D’Amato “The Invasion of Panama Was a Lawful Response to Tyranny” (1990) 84 AJIL 516 at 520.
use of force in all manners inconsistent with UN’s purposes permits the inference that force may be used in order to achieve any of those purposes.\textsuperscript{27} Getting past the grammatical and common-sensical obstacle there are the \textit{travaux préparatoires} revealing the intention of an absolute all-inclusive language in article 2(4).\textsuperscript{28} Any reading of ICJ jurisprudence that suggests the endorsement of a human rights exception is a desperate exercise. In the Nicaragua Judgment, the Court stated that “the use of force could not be the appropriate method to monitor or ensure […] respect [for human rights]”.\textsuperscript{29} Tesón’s reading of the judgment, namely that it condemned the United States’ military actions solely on grounds of disproportionality,\textsuperscript{30} is clearly too narrow.\textsuperscript{31} For all the above reasons, the existence of a human rights exception to the ban on force is not a tenable interpretation of article 2(4).

Using force to restore democracy, to rescue own nationals abroad or to stop humanitarian catastrophes are all popular positions, but are not acknowledged by any black letter rule as constituting lawful use of force. Regardless of their noble motives, such positions remain illegal in the absence of any supporting peremptory customs.\textsuperscript{32}

The question then arises whether the interpretation of the UN Charter is dynamic rather than fixed, thus able to change over time on the basis of customary international law. The ICJ has answered this in the affirmative.\textsuperscript{33} The notion that unilateral humanitarian intervention is permitted under customary international law is most often asserted by proponents of the naturalist view. Building on Ronald Dworkin’s natural law theory, Tesón argues in favour of the customary rule by adopting a human rights-based approach for interpreting the alleged precedents.\textsuperscript{34} This natural law position will not be

\begin{itemize}
  \item \textsuperscript{27} Gerald Fitzmaurice, as cited in Ademola Abass \textit{Complete International Law: Text, Cases, and Materials} (Oxford University Press, Oxford, 2012) at 362.
  \item \textsuperscript{28} See e.g. UNCIO, Vol VI (1945) at 335. For further references, see Ian Brownlie \textit{International Law and the Use of Force by States} (Oxford University Press, Oxford, 1963) at 268, n 6.
  \item \textsuperscript{29} \textit{Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)} [1986] ICJ Rep 14 at [268].
  \item \textsuperscript{30} Fernando R Tesón \textit{Humanitarian Intervention: An Inquiry into Law and Morality} (2nd edn, Transnational Publishers, Irvington-on-Hudson, 1997) at 270 and 308–312.
  \item \textsuperscript{34} Fernando R Tesón \textit{Humanitarian Intervention: An Inquiry into Law and Morality} (2nd edn, Transnational Publishers, Irvington-on-Hudson, 1997).
\end{itemize}
rejected out of hand, but whichever way one looks at state practice on humanitarian intervention since 1945 it fails to meet the threshold of *opinio juris*. In the post-UN Charter era, there has not been one single unambiguous case of an intervening state acting under the belief that there is in fact a legal right of unauthorised humanitarian intervention. In cases where it might have been appropriate to do so, intervening states did not invoke humanitarian intervention as a legal justification for their uses of force. Admittedly, there are a handful of cases that have not been so clear-cut, but they are insufficient to form a repetitive practice, thus establishing a customary rule.

The subjective element of international customary law can arguably also be evidenced by an *opinio necessitatis*. Although very real and widespread in the case of Kosovo, the necessity argument has not yet gained adequate support and generality to establish a custom. Hence, a customary right of unauthorised humanitarian intervention may – at best – be emerging. For now, the legal positivists are indeed correct that legal interveners are those who have express Security Council authorisation and illegal interveners are those without it.

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35 According to the ICJ, the *opinio juris* requirement means that state practice is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. See *North Sea Continental Shelf (Germany v Denmark and The Netherlands) (Judgment)* [1969] ICJ Rep 3 at [77].
38 Post-Cold War examples are the interventions in Iraq (1992), Sierra Leone (1997) and Kosovo (1999).
39 Circumventing the element of *usus* or *diuturnitas* by arguing for “instant” customary international law does not seem to be a possibility in the case of humanitarian intervention, owing to the fact that there are real and concrete rights at stake. See Antonio Cassese “A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis” (1999) 10 EJIL 791 at 796–797.
3 Accepting Illegality: The Sigh and the Shrug

Approaches

3.1 Is the Legal Framework to Blame?

The foregoing discussion of distinguishing apples from bananas begs the question whether some of the debaters slipped on a couple of banana peels when deciding where to direct their energy. Define the concept in any preferred way, dub it moral or immoral, legal or illegal – but those are not the real issues at hand. The matter of fact is that there is actual state practice happening and the world jury has to deal with it in a pragmatic manner whether it likes it or not. Humanitarian intervention is not something that can be brushed off as being “just politics”. Law and politics are inevitably intertwined, especially so when it comes to international law. When facing a problem in the practical application of the law, it is essential not to stare oneself blind at the black letter rules. Nevertheless, the logic of “if it ain’t broke, don’t fix it” should have some attraction to a pragmatic mind. Something is arguably wrong with humanitarian intervention – but is it the law?

The need for legal reform is often presented as pressing, but amending the law is not necessarily the best solution. If the problem concerning humanitarian intervention were the legal restrictions, a relevant legal reform would seemingly be an appropriate measure. An examination of what has prevented interventions during past humanitarian crises does, however, suggest that the obstacles are primarily political rather than legal. As held by Aidan Hehir, it is power and self-interest that have influenced the decisions not to intervene – not the fact that it is illegal.\footnote{Aidan Hehir Humanitarian Intervention: An Introduction (Palgrave Macmillan, Basingstoke, 2010) at 102.} If the realist theory that states intervene solely by self-interest is true, a legal reform would not address the problem that Simon Chesterman refers to as \textit{inhumanitarian non-intervention}, i.e. failure to act during humanitarian crises.\footnote{On the term, see Simon Chesterman “Hard Cases Make Bad Law: Law, Ethics, and Politics in Humanitarian Intervention” in Anthony F Lang, Jr (ed) Just Intervention (Georgetown University Press, Washington, DC, 2003) 46 at 54.} The idea that international law has put obstacles in the way of
states that have been willing to save innocent people from suffering is, according to Chesterman, a misinterpretation of history.  

The foregoing suggests that the legal barrier is not what has prevented interventions in humanitarian disasters in the past, but political unwillingness. At the same time it is hard to deny that the current legal framework is defective if atrocities as those in Rwanda, Darfur and Syria remain unhindered.

Advocates of a legal reform are, as opposed to those who want to maintain the status quo established in 1945, uncomfortable with a system that prohibits actions that are perceived as morally permissible. One purpose of having legal rules at all must surely be to formalise the moral rules of society. If the legal and moral norms of society are at odds, every endeavour should be made to reconcile the differences. As Jean Cohen argues, only international law has the ability to mediate between the moral and political domains by providing legality and legitimacy as well as setting up clear boundaries.

International law does already contain a number of documents specifying the fundamental human rights all individuals are entitled to. However, legislation and treaties safeguarding human rights are themselves powerless if they lack mechanisms to enforce these rights.

The UN Charter reveals some aspirations relating to human rights – articles 1(3) and 55(c) provide that the UN shall promote respect for human rights and fundamental freedoms for all. According to article 56, all Member States pledge themselves to take joint and separate action in cooperation with the UN for the achievement of the purposes set forth in article 55. The UN Charter does, however, not specify what obligations states have towards their own citizens. Perhaps even more importantly, the Charter does not specify the obligations of other states when an individual state knowingly violates the human rights of its own citizens. This legal vacuum has, together with the lack of political will, created the situation that the international community faces today.


The provisions of Chapter VII of the UN Charter may be identified as potential means of forcing states to comply with human rights. Even though a broad interpretation of what constitutes a threat to international peace has proved possible on several occasions, these cases do not seem to show any consistent pattern but rather appears to be situations where humanitarian urgency happened to coincide with political expediency. As indicated by Antonio Cassese, this inconsistency and selectivity is probably a result of self-interest considerations by the five permanent members of the Security Council (P5). Although it might be possible to link a humanitarian intervention regime to this existing practice on articles 39 and 42, such a system would be a weak one for two primary reasons. First, there is a transparency issue arising from the fact that the Security Council tends to be rather vague about the nature of the link between internal conflicts and international peace threats. Second, a broad interpretation of Chapter VII is not always a viable option during domestic crises – there are constitutional limits to the Security Council’s competence to invoke Chapter VII in an internal conflict. The UN Charter thus creates an inherently selective humanitarian intervention regime.

The main defect of the status quo is that the present international legal framework does not provide any means of stopping immense human suffering in a swift and consistent manner. All international documents that protect human rights must rely on the UN Charter’s provisions to put an end to ongoing violations. These provisions, which fall under Chapter VII, are ill-adapted to be applied to internal conflicts. It is considered that Chapter VII, despite its shortcomings, can be applied to internal humanitarian crises. Even so, a fundamental barrier to taking action remains, namely the political interests of the P5. No action may be taken under Chapter VII without the approval of the P5 and there are no provisions requiring them to act in a given situation. The argument that new laws are not needed because of the Security Council’s capability to utilise Chapter VII is therefore partly flawed.

46 See e.g. SC Res 161 (the Congo, 1961); SC Res 794 (Somalia, 1992); SC Res 836 (Bosnia and Herzegovina, 1993); SC Res 929 (Rwanda, 1994); and SC Res 1306 (Sierra Leone, 2000).
47 See Simon Chesterman Just War or Just Peace?: Humanitarian intervention and international law (Oxford University Press, New York, 2001) at 128 et seq; and Dansk Udenrigspolitisk Institut Humanitær intervention: Retlige og politiske aspekter (Dansk Udenrigspolitisk Institut, Copenhagen, 1999) at 75–76.
It is worth emphasising that the Security Council is not a humanitarian organ, but a political one. The negotiation room consists of diplomats who will remain loyal to the instructions from their respective capitals. Although the UN Charter was a revolutionary creation in 1945, it is important not to become apologists for the status quo. As shown above, the ability to take legal action against human rights breaches depends on stretched interpretations of Chapter VII and the whims of the P5. This has caused a new perspective to emerge. Frustrated over the restrictions and inconsistencies of international law and finally despaired over the Security Council’s arbitrariness, many have gazed towards the international community and the ostensible sense of righteousness among western states.

3.2 Leaving the Law Behind

Practice shows that states, despite their pretences, are prone to conduct armed interventions with complete awareness of their illegality. This is the crux of the debate – the illegality of humanitarian intervention is not the end of the matter. Many of its most noisy advocates accept that there is a legal barrier – they simply contend that the letter of the law does not bar legitimate action. Political leaders of intervening states often adduce thorough political justifications for their uses of force, but they tend to be quieter about defending their actions on legal grounds. Following the United States’ invasion of Panama in 1989, President Bush plainly stated that the United States had “used its resources in a manner consistent with political, diplomatic and moral principles”.\(^50\)

International politics has over the last decades demonstrated an increased propensity among actors in the international arena to exempt themselves from what international law prescribes on the use of force.\(^51\) This is evident by various states’ disregard for the UN Charter’s requirement that enforcement action be authorised by the Security Council – an institutional procedure to which all UN Member States are obliged to adhere.

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In the years following the failure to prevent and to stop the Rwandan genocide in 1994, the UN endured severe criticism of its structure, bureaucracy and loyalty to the seemingly outdated principles of international law. When the Kosovo crisis culminated in the spring of 1999, NATO launched a two month bombing campaign, *Operation Allied Force*, without authorisation of the Security Council. Many states welcomed NATO’s initiative and advocates of interventionism tried to shift focus from the Security Council to specific states that were identified as *norm entrepreneurs*.

Arguably, the American and British co-led invasion of Iraq in 2003 also took place without UN authorisation. Although self-defence was their main justification, the humanitarian angle was used as well. The UN’s efforts to act as a debate forum between the states concerned failed as the Security Council was ultimately ignored. American and British attempts to obtain UN authorisation suggest that they merely considered such mandate a welcome, but ultimately unnecessary, approval. The invasion of Iraq displayed a lack of confidence in international law by suggesting that the UN is not the only source of legitimacy for armed interventions. This view of the intervening states was confirmed when the president of the United States declared that “[they] don’t really need the United Nations’ approval to act”.

A similar farce was played out with regard to the situation in Syria. After a prolonged period of discussions that was leading nowhere, the window of opportunity was blown wide open by the chemical weapons attack in Ghouta – a suburban area near Damascus – in August 2013. As the attempt to act through the Security Council was blocked by China and Russia, the “P3” explored the possibility of a state-led intervention.

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53 Although SC Res 678 (1990) was relied on to some extent, it was adopted 13 years earlier and did not even contain any authorisation to resort to military force.
54 As a matter of fact, the name of the operation was *Operation Iraqi Freedom*. The humanitarian position was not pushed too hard though, since the United States had been in bed with Saddam Hussein for so long before the invasion.
However, owing to Syria’s accession to the *Chemical Weapons Convention*\(^{57}\) (CWC) and Russia’s diplomatic involvement, the military option grew politically unfeasible.

If the illegality of unauthorised humanitarian intervention is accepted,\(^{58}\) then resort to such practice implicitly questions the legitimacy of the law governing the use of force. Public opinion to ignore the UN in the face of gross human suffering has grown stronger in recent years. The conclusion of the Independent International Commission on Kosovo (Kosovo Commission), that *Operation Allied Force* was “illegal but legitimate”,\(^{59}\) definitely bolstered the morale of those who were eager to find alternative sources of legitimacy to the UN.

An unwritten right of humanitarian intervention, where self-appointed guardians of international peace and security dismiss both international law and the UN, has some serious implications. First, the conflicts in Darfur and Syria have thrown into sharp relief that there is still a high prevalence of *inhumanitarian non-intervention* despite the Kosovo precedent. Second, the United States’ entry into Iraq highlighted the scope for abusing the new principle through moral rhetoric.\(^{60}\) This second issue of interventions being undertaken on non-humanitarian grounds is hereinafter referred to as *non-humanitarian intervention*. The practice since Kosovo indeed illustrates that selective interventionism is alive but not well.

Accepting the intervention in Kosovo as a precedent could open a Pandora’s Box of new issues. In fact, NATO’s intervention provides an example of the traditionally strongest arguments against humanitarian intervention – that states do not intervene primarily on humanitarian grounds, that there is a risk of abuse and that the application will always be selective.\(^{61}\) Had the international community not accepted the “peace


\(^{58}\) See discussion above in section 2.2.


bombs” over Kosovo in 1999, the interventions in Afghanistan in 2001 and in Iraq in 2003 would probably not have been as easy to undertake from a political perspective.\textsuperscript{62}

A development that leads to various players assuming the right to override international law and act on their own terms is undesirable for many reasons. Such behaviour is analogous to civil disobedience and undermines the UN’s authority as well as erodes the prohibition against the use of force. Moreover, the politicisation – and thus the selectivity – in the application of the use of force doctrine is increased. This, in turn, reduces the stability and certainty in international politics. It would, as Rolf Lindholm aptly puts it, mean reverting to the law of the jungle.\textsuperscript{63} Humanitarian intervention must therefore be carried out only upon authorisation by the UN, or possibly another institution that has been endorsed by international law.


4 ICC Referrals: Modern Means of Intervention or Just Another Brick in the Wall?

4.1 The Basis of “Judicial Intervention”

The comprehensive regime of international reactions against serious human rights violations can be said to consist of two tenets – one based on the principle of state responsibility and another based on the principle of individual criminal responsibility. Rather than pointing to the failures of more anonymous state actors, international criminal tribunals try individual perpetrators. Up until recently, international criminal tribunals had existed only on ad hoc basis and had more or less been of “hybrid”, or “internationalised”, character. The world’s first permanent international criminal court came into being in 2002. Unlike its ad hoc predecessors, the ICC machinery is already in place when a violent conflict erupts.

There is an interesting link between the ICC and humanitarian intervention. The Security Council responded to the situation in Libya in two ways – first by referring the situation to the Prosecutor of the ICC, and later by authorising the use of force. This course of action may be considered to be a new type of humanitarian intervention. The Council’s first response to the situation in Libya can be described as an authorisation for judicial intervention. The ICC did indeed “intervene” swiftly, as three arrest warrants were issued only four months later for alleged crimes against humanity.

In the scholarly debate, Payam Akhavan stands out as one of the most persistent proponents of international criminal justice. He argues that the ICC has the world-wide potential to prevent outbreak or resumption of violence, given that the goal of deterrence is reinforced by state cooperation in executing arrest warrants against

67 The three men that were targeted all played key roles in the Libyan regime: Muammar Gaddafi (de facto Head of State), his son Saif Al-Islam Gaddafi (de facto Prime Minister) and Abdullah Al-Senussi (head of the Military Intelligence).
suspects. 68 By no means claiming to be a complete assessment of the ICC’s merits in the context of intervention, Akhavan’s assertion will be critically evaluated in the following sections. In particular, the prospects of arrests and deterrence becoming a reality are put to the test. An overarching question is whether the ICC can live up to its promise of being an independent institution that withstands external political pressure.

4.2 Between Justice and Politics

The role of the Security Council was a key issue at the Rome Conference. 69 This was hardly surprising since the aim of the Conference was to establish an institution separate from the UN, yet exercising power in an area overlapping the Security Council’s domain. 70 In a way, drafting the Rome Statute 71 was an effort by many states to indirectly amend the UN Charter. 72 This unprecedented attempt to challenge the Security Council’s monopoly on matters of war and peace accounts for the antagonism of the United States and other major powers. 73 The members of the Non-Aligned Movement put particular emphasis on the ICC being free from political influence. 74 The diplomatic achievements at the Conference resulted inter alia in a provision granting the Office of the Prosecutor (OTP) independence vis-à-vis all external sources in exercising its discretionary powers. 75

The Office of the Prosecutor shall act independently as a separate organ of the Court. […]
A member of the Office shall not seek or act on instructions from any external source.

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70 For example, the P5 did not like the idea of an international criminal court having a say in matters of going to war, which is exactly what the crime of aggression is about.
75 Article 42(1) of the Rome Statute.
As we are all acutely aware of, statutory independence is not a guarantee for de facto independence. The Organisation for the Prohibition of Chemical Weapons (OPCW) was also supposed to be independent from the UN, but then the unprecedented case of Syria’s accession to the CWC made the organisation succumb to pressure from Russia and the United States, ultimately endorsing several CWC violations to be carried out under UN flag. To what extent has the ICC achieved the aim of being a genuinely international court; free from accusations of selectivity and victors’ justice?

Luis Moreno-Ocampo, the former Prosecutor of the ICC, has stated that the Court is leading the world into a new era where political actors have to adjust to the law, instead of the other way around. However, as the forthcoming will show, the ICC’s political legitimacy is not as impeccable as Moreno-Ocampo leads us to believe.

While the ICC might be a threat to the Security Council, the Security Council might also be a threat to the Court. This is particularly true when it comes to the issue of jurisdiction triggering. The Security Council has a privileged position when it comes to referrals and an even more privileged position in its deferral powers. In both of its two ICC referrals to date, the Security Council decided that non-State Party nationals – except for the target states’ – may only be prosecuted by national courts. Bearing the United States’ opposition to the ICC in mind, it is not difficult to see why that language was included. Paragraph 6 in the Darfur and Libya referrals reveals a severe case of selectivity, very much like the peacekeeping resolutions. This selectivity is a setback to the legitimacy of the ICC, as the intended functioning of the Rome Statute is tarnished by the realpolitik of the P5 and their allies. Although the resolutions triggered jurisdiction for the ICC to try those responsible for the atrocities in Darfur and Libya, they can hardly be regarded as success stories. The political manipulation of this

77 See Destruction of Syrian Chemical Weapons OPCW Executive Council, Decision EC-M-33/DEC.1, 27 September 2013; and SC Res 2118 (2013). In particular, I am referring to para 10 of the Security Council Resolution which endorses destruction of chemical weapons outside Syrian territory (aptly named “elimination” in para 1(c) of the Executive Council Decision). The states taking part in the destruction will, in effect, acquire chemical weapons – contrary to the most central provision in CWC. Under the very first article of the Convention, States Parties undertake never under any circumstances to acquire nor to transfer, directly or indirectly, chemical weapons to anyone.
79 See articles 12, 13 and 16 of the Rome Statute.
judicial mechanism produces a peculiar version of victors’ justice, echoing from World War II.\textsuperscript{82}

Turning to the ICC’s point of view, it is interesting to examine how the OTP has treated Security Council referrals compared to State Party referrals and \textit{proprio motu} investigations. The Rome Statute does not offer any preferential treatment to Security Council referrals. Determining whether to prosecute, whom to indict and which charges to bring is within the Prosecutor’s unfettered discretion. The Security Council may, of course, only refer a \textit{situation} to the ICC, not a \textit{case}. To say that the Security Council referred the case against Gaddafi would be to politicise too much. Nevertheless, it is worth reflecting upon the amount of political pressure that a Security Council referral exerts on the Prosecutor. If Akhavan is right on his point that a swift judicial intervention in an ongoing conflict can cause the violence to subside, this power of the Court is a double-edged sword. The Libya timeline reveals an unseemly haste,\textsuperscript{83} which was most likely generated by political pressure. An investigation rushed through can be seen as a way of surrendering to the Security Council’s will.

\subsection*{4.3 Arrested Suspects or Arrested Development?}

If one accepts, for argument’s sake, that every cooperation request by the Court for arrest and surrender is executed expeditiously and forcefully, the ICC can help stopping ongoing atrocities. The ICC is only in the business of chasing the most responsible perpetrators and hence, this intellectual experiment suggests, the violence will subside if the leaders are sent to The Hague.

The ICC is founded on a two pillar structure. Whereas the judicial pillar consists of the Court itself, the States Parties are in charge of the operational pillar – \textit{inter alia} enforcing the Court’s decisions. Getting states to enforce arrest warrants has proven to be easier said than done. To date, the Court has issued 22 arrest warrants for core crimes under the Statute. Only six of them have resulted in surrenders and 13 are still

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{82} Ezequiel Jimenez “Seeking Global Reform: The United Nations Security Council, the International Criminal Court, and Emerging Nations” (2012) 30 Macalester International 84 at 91.
\item \textsuperscript{83} The situation was referred on 26 February. Four days later the Prosecutor decided there was enough evidence to launch a full scale investigation. Three arrest warrants were subsequently issued on 27 June. By contrast, the situation in Colombia has been under preliminary examination since June 2004.
\end{itemize}
\end{footnotesize}
outstanding. The ICC’s two most high-profile suspects, Omar Al Bashir and Joseph Kony, have been evading arrest for years.

Enforcement of arrest warrants can be said to consist of three elements – location of the indictee, capacity of the state and legal status of the indictee. The first element is not only about identifying the wanted person’s physical location. Not all states are obliged to surrender suspects hiding on their territory. Such obligation derives either from the Rome Statute or from a Security Council resolution, rendering non-States Parties unbound in the absence of a Security Council referral.

Once the indictee’s whereabouts are known, the question arises whether the prospect of arrest rests on the state’s willingness or on its ability. Owing to the anti-ICC fever within the African Union, Al Bashir has been able to travel in the open to African States Parties without getting arrested. Non-cooperation as a matter of unwillingness is a problem in itself, as it shows that the Court does not enjoy the international community’s full support. However, certain actions may be taken against uncooperative states pursuant to the UN-ICC Relationship Agreement and the Rome Statute. If the ICC is to be utilised as a peace-making instrument in an unwilling state, the Prosecutor must employ these tools expeditiously. In this respect, the ICC Prosecutor Fatou Bensouda has hopefully learned from her predecessor’s mishandling of Sudan’s non-cooperation. While sporadic occurrences of unwillingness may be duly dealt with under the relevant procedures, the incapacity of a willing state can be more difficult to overcome. Such capacity issues usually relate to the state’s lack of control over the region in which the suspect is hiding, or its lack of technical abilities to ensure arrest. The former, which may be said to be the case in Uganda and was also the case in Libya.

84 Ntaganda (DRC) surrendered himself voluntarily to the Court and the arrest warrants against Lukwija (Uganda) and Gaddafi (Libya) were withdrawn following the deaths of the indictees.
86 For example Kenya on 7 August 2010; Chad on 21–23 August 2010; Djibouti on 8 May 2011; and Malawi on 14 October 2011.
88 Articles 87(7) and 112(2)(f) of the Rome Statute have paved the way for a procedure set up by the ASP in its “Omnibus Resolution”, see Strengthening the International Criminal Court and the Assembly of States Parties Tenth Session of the Assembly of States Parties to the Rome Statute, Resolution ICC-ASP/10/Res.5, 21 December 2011, annex. In the case of a Security Council referral, article 17(2) of the UN-ICC Relationship Agreement opens the door to UN sanctions and other measures, compare SC Res 1207 (1998).
89 For an in-depth criticism of the prosecution’s handling of the Darfur referral, see Antonio Cassese “Is the ICC Still Having Teething Problems?” (2006) 4 JICJ 434 at 438 et seq.
concerning Gaddafi, is especially troubling for the ICC’s prospects of stopping ongoing violence.

In other cases, the ICC’s ability to stop ongoing atrocities is a legal question of immunity from the Court’s jurisdictional reach. As history has shown, the big fish responsible for international crimes are often state officials. The immunities that incumbent heads of state enjoy under customary international law can therefore impede the effectiveness of the Court. Article 27(2) of the Rome Statute explicitly removes all immunities that may bar the ICC from exercising its jurisdiction. However, this provision is undermined by the fact that the ICC has no independent powers of arrest. As the Court lacks jurisdiction in this crucial matter, heads of state still have their immunity from arrest intact. This is duly recognised under article 98(1). All States Parties are obliged to cooperate with the Court and thus to surrender their own state officials upon request, but the Rome Statute cannot impose such obligation on non-States Parties such as Sudan.

The three elements of an arrest – the suspect’s location, the state’s arrest capacities and the suspect’s legal status – are enough challenging as they are. In an ongoing conflict it must be conceded that the second element appears to be insurmountable. This is not to say that the issuance of arrest warrants is without merits. Even if they remain unenforced, arrest warrants might have considerable impact by drawing attention to the ongoing conflict. Although the International Criminal Tribunal for the former Yugoslavia’s (ICTY) arrest warrants against Karadžić and Mladić remained unexecuted for the rest of the Balkan war, they successfully turned the accused into pariahs in the international community. However, as far as “judicial intervention” goes, it is clear that an arrest warrant is a weak intervening force.

91 But see Prosecutor v Al Bashir (Failure by Malawi to Comply with Cooperation Requests) ICC Pre-Trial Chamber I, ICC-02/05-01/09, 12 December 2011, in which the Pre-Trial Chamber unconvincingly argues that customary international law has created an exception to immunity when international criminal tribunals seek the arrest of an incumbent head of state.
4.4 The Deterrence Rationale

The Security Council’s landmark decision to create the ICTY was an act under Chapter VII of the UN Charter,\(^\text{94}\) which means that the tribunal was considered an appropriate measure to maintain or restore international peace and security. In retrospect, of all the tribunal’s tasks this is probably the one where it has failed the most.\(^\text{95}\) Delivering justice post-mortem while more people keep getting massacred has been criticised for being too little, too late. Establishing the ICTY, the cynics said, was a convenient substitute for forceful military intervention.\(^\text{96}\) Even though this argument may have some traction – as discussed above, trials are unlikely to stop ongoing violence – the creation of the ICTY gave rise to another question: Could punishment of perpetrators lead to the prevention of future atrocious acts? If so, international criminal tribunals can serve as an indirect intervening force – intervention through prevention. To have any resemblance to an intervention, the point of focus should be whether a judgment can be a deterrent in the present conflict.

Advocates of international criminal justice often refer to it as “the fight against impunity”. The argument of ending impunity is linked to that of deterrence. To the extent that prosecutions could be a deterrent, their absence has assisted in creating a culture of impunity.\(^\text{97}\) The proponents of the deterrence argument are fighting a tough battle as they are faced with inherent difficulties to support their contention with empirical evidence. Despite its unsubstantiated nature, the deterrence argument is made over and over in the literature.\(^\text{98}\) In Cherif Bassiouni’s view, other rationales of

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international criminal law are measured on the basis of their contribution to deterrence.\(^9^9\)

The relevance of prosecution and other accountability measures to the pursuit of peace is that through their effective application they serve as deterrence, and thus prevent future victimization.

Indeed, Bassiouni considers deterrence to be the glue that keeps the whole project of international criminal justice together. But, interestingly enough, deterrence is not just the subject of showy academic somersaults. The tribunals themselves also seem to have confidence in their judgments deterring future crimes. As asserted by the International Criminal Tribunal for Rwanda (ICTR):\(^1^0^0\)

\[
\text{[Punishment]} \text{ dissuade[s] for ever […] others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights.}
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This is a bold statement by the ICTR. The ICC Prosecutor has also made similar claims as regards the cases tried by the ICC.\(^1^0^1\) Notwithstanding its positive effects, the question whether international criminal justice has the capacity to effectively deter future atrocities remains hotly debated.\(^1^0^2\) Advocates of the deterrence theory must contend with the reality that atrocious acts have kept occurring after the establishment of international criminal tribunals. The ICTY was created in 1993, yet some of the most horrific atrocities in the former Yugoslavia – including the Srebrenica massacre in 1995 and the ethnic cleansing in Kosovo in 1999 – occurred years after the tribunal was founded. However, inferring that the ICTY has had no deterrent effect is a bit too simplistic. Had it not been created, who is to say that even more horrific acts of violence would not have been committed? Also, its work may have long-term effects that go beyond the Balkan wars. That said, if an act of genocide takes place under the

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\(^1^0^0\) Prosecutor v Rutaganda (Judgment) ICTR Trial Chamber I, ICTR-96-3-T, 6 December 1999 at [456].

\(^1^0^1\) Fatou Bensouda “Twenty Years of International Criminal Law: From the ICTY to the ICC and Beyond” (Panel discussion moderated by The Hague Institute for Global Justice, The Hague, 2 October 2013). She argued, \textit{inter alia}, that the conviction of Lubanga has contributed to demobilising child soldier armies over the world.

jurisdiction of a tribunal set up specifically to try the worst criminal acts, the tribunal cannot be said to effectively deter atrocities.

The limited number of cases that are brought before the Court, and the low risk of getting caught, are two factors that are particularly damaging to the deterrent value of the ICC. At the level of foot soldiers, who will never face justice in The Hague, only local trials can have a positive deterrent effect. Idealists will of course stress that domestic courts pick up the leftovers and close the impunity gap that the ICC leaves behind, but the current functioning of the complementarity principle proves them wrong.

Another objection raised against the deterrence theory is that – irrespective of its merits in domestic criminal justice systems – it is not transferable to the context of international criminals. Behind the deterrence theory lies an assumption that some degree of rationality is attributed to offenders, which seems ill-fitted to extraordinary international criminals. Do genocidal madmen – psychologically committed to mass murder and ethnic cleansing – mull over cost-benefit analyses before going to work? That scenario is dubious at best. In any society on the brink of genocide, the predominant perception of legitimacy will overshadow all rational considerations.

What is tricky about deterrence is that it only works for people who have a lot to lose, but not for the ones who do not buy into the system. Men prepared to commit gross violations of human rights are for this reason extremely hard to dissuade.

4.5 Future Role of Judicial Intervention

The international community had, and still has, high hopes for the ICC to dispense swift and unbiased justice. The Security Council’s actions as a self-assigned administrator of

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103 The Srebrenica massacre was declared genocide in *Prosecutor v Krstić (Judgment)* ICTY Appeals Chamber, IT-98-33-A, 19 April 2004. For a brief point regarding this ruling, see n 133 below.


justice have revealed the dilemma of legal action in an essentially political context. When the UN puts pressure on “independent” institutions, such as the ICC, it is bound to produce a baby who is bigger than its parents. Also, the veto power makes any judicial arrangement under the Council’s direct or indirect control completely dysfunctional.

A salient trait of the ICC is its reliance on states to arrest indictees. The former president of the ICC pointed out the seeming paradox that the Court is independent and interdependent at the same time. The Court’s ability to stop ongoing atrocities has proven challenging to say the least. States themselves have the power to make the Court effective or to render it useless. As aptly illustrated by Cassese, the ICC is like a giant without arms and legs, who thus needs artificial limbs – i.e. state authorities – to walk and work.

The notion of deterrence is a thorny criminological question that does not yield an easy answer. Interestingly enough, the language of deterrence – the “never again” stance – is often used in the literature. Deterrence is an empirical phenomenon rather than a normative principle, yet it is inherently difficult to support with empirical evidence. That makes the case of deterrence a hard one to make. Even more so since both the nature of international crimes and the nature of international criminals are heavily contrasted to those in common domestic cases. Neither the ICC’s plan of attack nor its weapon of choice is powerful enough to effectively deter future atrocities.

Against the backdrop of a grim reality that large-scale atrocious crimes are committed continuously, there is no scope for judicial romanticism. It is true that the ICC is still walking in its children’s shoes and will undoubtedly become more efficient and effective with time, even under the status quo. However, the discussion of the ICC’s ability to function as a direct or indirect intervening force has one principal flaw. The ICC is not an isolated piece of a human rights jigsaw puzzle. In assessing the capacities of the status quo, it is essential to recognise the ICC not as an end in itself, but rather as an element of a much wider project. Justice has the privilege to be blind, but that is a luxury the state community cannot afford. Whereas the ICC plays a vital role in the anti-genocide regime, its existence must not be turned into an excuse for not taking

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other – more effective – measures that are required to prevent and respond to mass atrocities.\textsuperscript{109} In the words of Miriam Aukerman: “\textit{[T]he international community has bigger sticks to shake than the threat of trial}”.\textsuperscript{110}


5 Need for a Reform – But How?

5.1 A Pre-Packaged Solution? R2P in a Blunt Nutshell

The Responsibility to Protect has emerged as a new perspective on the humanitarian intervention debate. The basic premise of the report is that all states have a responsibility to protect their own citizens. If a state fails to do so, the responsibility is transferred upon the international community.111

The reform ideas put forward in the report are, however, much like old wine in new bottles. For starters, ICISS’s assertion that states have a responsibility to protect their citizens from harm is hardly a revolutionary stance. This legal obligation is laid down in every human rights document – and there are a few of them out there.112 Neither is it ground-breaking to proclaim that state sovereignty is not an absolute bar to intervention. As outlined above, enforcement action under Chapter VII of the UN Charter is a recognised exception to articles 2(4) and 2(7).113 This is also reflected by the requirement in The Responsibility to Protect that any intervention be authorised by the Security Council.

ICISS did present some radical propositions, such as the duty of outsiders to intervene if certain preconditions have been met. However, none of the controversial parts of the report made it into the World Summit Outcome Document in 2005.114 It was therefore a gross exaggeration to hail the UN endorsement as “an international Magna Carta”.115

The shift from the right to intervene to the rights of the victims and the duty to protect remains ICISS’s most significant contribution. The reform proposals themselves are not

111 International Commission on Intervention and State Sovereignty The Responsibility to Protect (International Development Research Centre, Ottawa, 2001) at 17.
112 See e.g. article 2 in conjunction with articles 6 (right to life) and 9 (right to liberty and security of person) of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; and article 1 in conjunction with articles 2 (right to life) and 5 (right to liberty and security of person) of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222.
113 See section 2.1.
ground-breaking, but thanks to the report they are now in the policy mainstream and subject to debate.\textsuperscript{116} Both the opinions of those who strive for a strong Responsibility to Protect framework, and the concerns of those who fear that it will be abused, deserve to be taken seriously.\textsuperscript{117}

5.2 Codify Criteria for Humanitarian Intervention

5.2.1 Object and Scope

There have been many efforts over the years to formalise, or codify, certain criteria that are intended to guide a given intervener. The most prominent example is the initiative by the International Law Association in 1970 to draft a protocol of procedure for humanitarian intervention that included criteria for legitimate intervention. The efforts ultimately failed as it proved unfeasible to reach consensus.\textsuperscript{118} After NATO’s intervention in Kosovo there was an increased need for clearer guidance on when it is – or should be – permissible to intervene for the protection of people exposed to great suffering. It was mentioned before that the Kosovo Commission described the intervention as “illegal but legitimate”.\textsuperscript{119} In another part of its report, which received less publicity, the Commission made the case for creating a right of unauthorised humanitarian intervention and specified criteria for the legal assessment to form part of the framework.\textsuperscript{120}

Owing to the impact of the Responsibility to Protect doctrine, proposals to codify criteria for humanitarian intervention have been back in the limelight during the last

\textsuperscript{116} Thomas G Weiss “Cosmopolitan force and the responsibility to protect” (2005) 19 International Relations 233 at 234.  
decade. Drawing on *jus ad bellum* principles of traditional Just War theory, ICISS set out the following six criteria: right authority, just cause, right intention, last resort, proportional means and reasonable prospects.121

The question of authority – i.e. who may authorise humanitarian intervention – is a crucial one and will be subject to further discussions.122 The importance of the intervener’s intention was emphasised above when drafting a working definition of humanitarian intervention.123 In many cases, concerns other than humanitarian have been paramount. Indeed, in a speech delivered at the height of NATO’s bombing campaign in Kosovo, the British Prime Minister Tony Blair presented a list of criteria of his own, one of which was whether “we have national interests involved”.124 Even the best-practice cases of humanitarian intervention probably fail on the *right intention* criterion.125

The just cause threshold is otherwise the most controversial criterion. The human rights-based approach, which was advocated by Cassese,126 should be rejected because of vagueness.127 It ought to be easier to agree that certain actions are not acceptable, “human wrongs”, and thus constitute a basis for humanitarian intervention.128 ICISS decided on two broad defining conditions that human protection claims must meet in order to justify intervention – actual or apprehended *large scale loss of life or large scale ethnic cleansing*.129 The General Assembly did not formally adopt any criteria at the World Summit in 2005, but in the Outcome Document the Assembly opted for the

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121 International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (International Development Research Centre, Ottawa, 2001) at 32 et seq.
122 See sections 5.3–5.4 and 5.5.3 below.
123 See section 2.1.
124 Blair T “Doctrine of the International Community” (Speech to the Economic Club, Chicago, 22 April 1999) [emphasis added].
126 See Antonio Cassese “Ex inuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?” (1999) 10 EJIL 23 at 27.
127 See Aidan Hehir *Humanitarian Intervention after Kosovo: Iraq, Darfur and the Record of Global Civil Society* (Palgrave Macmillan, Basingstoke, 2008) at 133.
more ambiguous term genocide. Genocide is a legal term, authoritatively defined in the Genocide Convention. The enumerated acts of genocide overlap with those constituting crimes against humanity, but the mens rea elements are completely different. The underlying motive, e.g. a political motive, is irrelevant to genocide claims. It is a notoriously difficult task to determine whether or not certain acts manifest an “intent to destroy”, which has been shown by case law from the international criminal tribunals. For example, in the case of Srebrenica the ICTY inferred intent to wipe out a whole group, even though only men of military age were targeted. In contrast, the selective nature of the Darfur killings left the ICC’s Pre-Trial Chamber satisfied that there had been no act of genocide. Considering the difficulties in making a judicial determination, it is all the more demanding to do that exercise while the acts are ongoing. It is hard to predict whether a given situation will in fact deteriorate into genocide, especially because of the special intent requirement. The task thus gets even more complicated in the present context when timely action is called for. The “G-word” is a delicate one that is not tossed around lightly and should not be the basis of any threshold criterion. A discussion whether genocide is taking place would risk superseding the discussion on swift and forceful action, which is exactly what happened with Rwanda and Darfur.

The threshold recommended by ICISS is seemingly more appropriate than genocide. However, if intervention is permitted in anticipation of mass murder of ethnic cleansing, the safeguard against abuse is effectively ruined. In addition, interventions on

130 GA Res 60/1 (2005) at [138]–[139]. The General Assembly also included war crimes, ethnic cleansing and crimes against humanity.
132 Prosecutor v Krstić (Judgment) ICTY Appeals Chamber, IT-98-33-A, 19 April 2004 at [26]–[35].
133 See Prosecutor v Al Bashir (Decision on the Prosecution’s Application for a Warrant of Arrest) ICC Pre-Trial Chamber I, ICC-02/05-01/09, 4 March 2009 at [196] and [201]. Whether this disparity indicates that Darfur was in fact genocide, or that Srebrenica was not, will be left unsaid. In any case, it is worth noting that ICC’s Pre-Trial Chamber subsequently issued a second arrest warrant that included the crime of genocide, after being taught a lesson on article 58 by the Appeals Chamber. See Prosecutor v Al Bashir (Second Warrant of Arrest) ICC Pre-Trial Chamber I, ICC-02/05-01/09, 12 July 2010 and Prosecutor v Al Bashir (Judgment on the appeal of the Prosecutor against the Warrant of Arrest Decision) ICC Appeals Chamber, ICC-02/05-01/09, 3 February 2010.
preventive grounds are more difficult to reconcile with calls for legitimacy. Accordingly, the threshold should be somewhere in-between ICISS’s and the General Assembly’s texts – maintaining a relatively low bar, but without any reference to anticipated acts.

There are several options as regards the method of codification. The two main alternatives are either to add the criteria to the existing body of law, or to create an independent legal right of humanitarian intervention. Most proposals essentially adopt the first approach, as they suggest that Security Council authorisation will be necessary to meet the criteria.

Both ICISS and the subsequently established UN High-level Panel on Threats, Challenges and Change (High-level Panel) argued that the Security Council and the General Assembly should embody the criteria in declaratory resolutions. Although such resolutions are not of legally binding nature, the criteria might become part of customary international law if the guidelines are followed strictly. That said, reforming existing international law through the creation of new customary norms is highly unpredictable and can deliver a completely different set of criteria. It would arguably be a better approach to amend the UN Charter straight away instead of agreeing on political principles. However, it is always easier to reach a non-binding political consensus than to amend international legislation. Such a political decision

139 International Commission on Intervention and State Sovereignty The Responsibility to Protect (International Development Research Centre, Ottawa, 2001) at 74; and High-level Panel on Threats, Challenges and Change A more secure world: Our shared responsibility (United Nations, 2004) at 57–58.
140 For the contrasting argument that state practice is manifest when states vote for a resolution, see Obed Y Asamoah The Legal Significance of the Declarations of the General Assembly of the United Nations (Martinus Nijhoff, The Hague, 1966) at 46 et seq. It is a separate and insufficient assertion, though, that resolutions can provide evidence of the emergence of an opinio juris, see Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226 at [70].
would not rule out the possibility of amending the law at a later stage and may in fact be a crucial step toward the feasibility of such a reform.  

5.2.2 The Pitfalls of Criteria: Too Much or Too Little Intervention?

Notwithstanding the issues relating to the method and place of codification, the idea of having criteria also causes a headache as a matter of principle. During the course of this thesis, the two main problems surrounding humanitarian intervention have consistently been identified as non-humanitarian intervention and inhumanitarian non-intervention. In assessing various reform proposals, their probable impact on these two problems must continuously be used as a benchmark. It is therefore appropriate to consider this: What is the problem to which criteria are supposed to be the solution?

Whether criteria are codified by supplementing the existing body of international law or by constituting a separate legal right, their aim is to enhance the legitimacy of interveners. The first approach would aim to enhance the legitimacy of interveners that have received Security Council authorisation and the second approach would bolster the legitimacy of unauthorised interveners. However, the problem that needs to be solved is not the legitimacy of humanitarian interventions. Rather, the problem is the presence of abusive interventions and the absence of humanitarian interventions. Efforts to codify legal criteria have often been opposed on the ground that they would be counter-productive for this cause.

The first objection is that a written right of humanitarian intervention could increase the risk of abuse, i.e. that it would be easier to carry out what has been labelled non-humanitarian intervention. Jane Stromseth argues that “creating a clear legal right of humanitarian intervention would encourage more frequent resort to the practice in less compelling circumstances than at present by creating an additional doctrinal basis for

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justifying the use of force”. 146 This is a classic Trojan Horse objection. The basis for this argument is that the legal uncertainty that surrounds humanitarian intervention today puts an extraordinarily high burden of justification on the more Machiavellian-minded interveners.147 Be that as it may, but it is not clear why legal uncertainty would have a more dissuading power than legal criteria. In other parts of the legal system, it is rarely argued that legal clarity is more liable to abuse than subjective interpretation. Compared to the case for ignoring the law completely, 148 a codification procedure certainly leaves less scope for abuse. It is true that self-defence has historically been invoked under dubious circumstances,149 but this is not necessarily evidence that leaving self-defence out of the Charter would have led to fewer interventions in bad faith.

Having criteria in place would naturally not be an automatic free-pass for any states that claim to be meeting all the criteria. Those states that wish to launch a legal humanitarian intervention would need to adduce evidence that all criteria have been met in order to convince the international community. The few states that are prepared to ignore both law and public opinion, and intervene anyway, can do so also under the present system.150 All things considered, the possibilities of abusing a system of criteria should not be greater than today.

A second, arguably more powerful, objection is that a reform that codifies criteria does not address the issue of inhumanitarian non-intervention. States’ tendency to refrain from intervening when they have no security interests at stake is an essential issue. Criteria do not offer much in terms of a solution to this problem. On the contrary, a system of intervention criteria would be designed to discourage engagement. 151 States may argue that the criteria are not met as an excuse to avoid fulfilling their moral duty

148 Outlined above in section 3.2.
151 Chris Brown “What, exactly, is the problem to which the ‘five-part test’ is the solution?” (2005) 19 International Relations 225 at 227.
to launch an intervention. This second objection suggests that criteria only target the quality of interventions when in fact it is the quantity that needs improvement. Actually, both are required – humanitarian intervention needs to be better and occur more often.

For a legal reform to target *inhumanitarian non-intervention*, it must signify not only a right but also a duty to intervene when the criteria have been met. The *reasonable prospects* criterion ensures that such an obligation does not fall upon small states that lack the military capacity to carry out a successful intervention.

Regardless of whether a legal reform signifies a right to undertake humanitarian intervention or a duty to do so, implementation of criteria is not the miracle cure-all that it has sometimes been made out to be. Most importantly, a reform entailing criteria cannot stand on its own. It must therefore not be regarded as a “first step” in a long-term effort. While international law is recognised to be the dominant form of obligations between states, the history of failure to prevent genocide and other horrendous acts suggests a minor added value by an additional norm as such.

In the absence of a supplementary political reform, it is only natural that it will be the Security Council that decides whether the criteria have been met. The idea that the P5 will hold on to a voluntary code of conduct – which ultimately depends on their subjective interpretations of their own national interests – appears hopelessly idealistic in light of existing state practice.

If implemented prematurely as an isolated reform, the worst-case scenario would be that a list of criteria actually decreases the number of legitimate interventions. It is therefore necessary that any such amendment be accompanied by political or institutional reforms. Collectively, legal and political reforms can build a framework for humanitarian intervention as a practical political option.

152 International Commission on Intervention and State Sovereignty *The Responsibility to Protect: Research, Bibliography, Background* (International Development Research Centre, Ottawa, 2001) at 172.
5.3 Democratise the Security Council

5.3.1 A System Resistant to Change

In approaching the issue of UN reform, it is natural to turn to the Security Council. The Security Council is primarily responsible for the UN’s inactivity during the humanitarian disasters in Kampuchea, Rwanda and Darfur. Blocked efforts to take action against the deteriorating humanitarian situation in Syria have spawned renewed demands for UN reform.

The dysfunction of the Security Council is noticeable not only in the face of humanitarian emergencies, but generally when the Security Council is to adopt resolutions. Israel, for example, has practically been immune to UN criticism owing to its alliance with the United States. There are two main issues with the Security Council: representativeness and arbitrariness.

Since the creation of this Byzantine system in 1945, the world has gone through radical changes. The structure of the UN organs has, however, essentially remained the same. An overhaul of the whole UN system might be needed to make it more proactive during humanitarian crises. The problem is that the UN system is so massive and so rigid that any major political or institutional reform seems Herculean-like. The size, composition, voting rules and veto power of the Security Council are regulated by articles 23 and 27 of the UN Charter. The fact that article 108 grants the P5 veto on Charter amendments makes it extremely difficult to push any substantial reform through. For this reason, little has been done to introduce anything more than cosmetic changes to the UN.

155 Interestingly enough, the UN’s positive contributions in the areas of decolonisation, human rights, environmental protection and international law may in fact be one of the main reasons why the international community is so different today. See Antonio Cassese *International Law* (2nd edn, Oxford University Press, Oxford, 2005) at 338.


5.3.2 Enlargement of the Council

That said, the High-level Panel appointed by the Secretary-General submitted its report in 2004, entailing a wide-sweeping reform proposal. The High-level Panel explained that “the task is not to find alternatives to the Security Council as a source of authority but to make the Council work better than it has”.158

Legitimacy concerns might be mitigated if the Security Council was more representative. The composition of the Council reflects the post-World War II power balance. If the UN were created today, it might not be the same states constituting the “Big Five” as in 1945.159 Neither is it likely that the concept of veto would have been adopted. Nevertheless, it is still doubtful whether it is feasible to close this power gap now or if it is too late.

A reform of Security Council membership can come in many different shapes. The main alternatives are either to provide for new permanent seats, new non-permanent seats or – as advised by the High-level Panel’s model B – a new category of renewable semi-permanent seats.160 A change in size and composition of the Security Council is likely to have broad support among UN member states.161 However, the P5 hold veto on such reform and they have little to gain from endorsing it. Adding more non-permanent seats leads to an increased number of affirmative votes being required for Security Council decisions. Additional permanent seats weaken the privileged position of the veto-wielding powers. Although it is difficult to see how the P5 would support any reform proposal that is inferior to the status quo, they did in fact agree to the enlargement to 15 members that came into force in 1965.162

It remains to be seen whether a reform targeting the membership of the Security Council is possible to achieve and, if so, whether such changes make the Council more effective and efficient in addressing mass atrocities. Even though an enlargement would make the

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Security Council more representative and thereby also spread responsibility among more states, it is unlikely to streamline decision-making within the Council. On the contrary, the decision-making process might become even more cumbersome. As Thomas Weiss argues, an expanded Security Council would be “too large to conduct serious negotiations, and still too small to represent the UN membership as a whole.” Indeed, considering the difficulties for the 15-seat Security Council to achieve consensus, it seems pointless to introduce more Council members fighting for their own political interests.

Furthermore, the power of veto remains unscathed in the High-level Panel’s proposal. Thus, none of the proposed membership reforms can do much to prevent inhumanitarian non-intervention. Such reforms amount to no more than putting lipstick on a pig – they come out looking rather good, but it is still the same pig underneath. A more radical reform will be required to break the influence of realpolitik in the way UN responds to mass atrocities.

5.3.3 Abolishment or Restriction of the Veto

The time may be ripe to reconsider whether it is still appropriate that one single country can overpower the rest of the world. The veto wielded by the P5 excludes the possibility of authorised interventions being launched against the P5 or their allies.

As outdated and undemocratic as it may seem, the veto right bestowed upon the P5 was an essential part of the 1945 deal. If elimination of the veto would be proved feasible, there is a risk that the UN would go down with it. It is difficult to imagine that the UN would survive without the right of veto – the five states that hold veto power are unlikely to agree on a reform that limits their power in such a far-reaching way. Even those veto-holding states that claim to be interested in finding alternative ways out of Security Council deadlock over the use of force – France, the United Kingdom and the

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United States – oppose reform proposals for weakening or eliminating the veto.\textsuperscript{165} If the P5 were to abandon the UN, the world would lose its only universal international organisation.

Despite this ostensible unfeasibility, the P5 may feel that it is in their best interest to go along with a reform that limits the power of veto for the sake of boosting the legitimacy and credibility of Security Council decisions. There is an ongoing trend of disobeying the Security Council – not only when it comes to undertaking unauthorised interventions, but also in a number of other areas. States have failed to cooperate with the Security Council in fields as diverse as disarmament and non-proliferation, international criminal justice and human rights investigations.\textsuperscript{166} If the P5 do not wish to walk any further down the path to anarchy, they would be wise to take any steps necessary to bolster the Council’s legitimacy.

5.4 Empower the General Assembly

5.4.1 Legal Aspects

Accepting the predicament with reforming the Security Council, this calls for expanding the search beyond the Security Council. However, any idea of an alternative decision-maker is bound to be challenged on constitutional grounds.

The General Assembly may be identified as an appropriate actor to take charge in the face of a deadlocked Security Council. As far as the legitimacy of an intervention is concerned, it must undoubtedly be said to grow with the number of states that stand behind the operation. Questions have been raised about the Security Council’s ability to represent the voice of the whole international community. The General Assembly, on the other hand, is the closest we get to a forum so universal that it can practically be said to be the international community.


The legal side of the issue has been fiercely debated. Disputes about the General Assembly’s competence to recommend military force tend to be overshadowed by a related and delicate issue, namely the legality of the Uniting for Peace Resolution adopted by the General Assembly in 1950.\textsuperscript{167} Even though the immediate reason for adopting the Resolution was the Soviet Union’s resistance against authorising force in Korea, the reasons for Uniting for Peace went beyond Korea.\textsuperscript{168} The Soviet Union had made frequent use of its veto right during 1946–1950 and many western states regarded this as an abuse of power. The western influenced majority in the General Assembly wanted an alternative form of collective security – one based not on P5 unanimity, but on the will of the majority in the Assembly. The key passage of the Resolution reads:\textsuperscript{169}

\begin{quote}
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.
\end{quote}

Uniting for Peace was, and still is, a potentially dangerous mechanism for the P5. The scenario of military force being recommended against one of the Big Five is highly unlikely to materialise. However, Uniting for Peace is bound to put vital P5 interests in jeopardy – otherwise the Security Council would not have been paralysed by veto in the first place.

Its dangerous character may have been the reason why the Resolution restricts the General Assembly’s power to recommend military action to the most flagrant violations of international peace, namely breaches of the peace and acts of aggression. While it is evidenced that internal humanitarian crises can be linked with threats to the peace,\textsuperscript{170} it seems far-fetched to assert that they can amount to breaches of the peace or acts of aggression.\textsuperscript{171} The Uniting for Peace Resolution – in its current form – thus falls short of providing an effective alternative to the Security Council in the face of humanitarian

\textsuperscript{167} GA Res 377 (1950).
\textsuperscript{169} GA Res 377 A (1950) at [1].
\textsuperscript{170} See section 3.1 above.
crises. Ironically enough, the Resolution can arguably be invoked to recommend military force against states that undertake unauthorised humanitarian intervention, as this conduct is likely to constitute an act of aggression under current international law. 172

The Uniting for Peace Resolution’s consistency with the UN Charter has also been under debate. If one accepts the interpretation of article 2(4) of the UN Charter as laid out above, 173 allowing the General Assembly to recommend military action arguably creates a new exception to the prohibition on the use of force – one not explicitly recognised under the Charter. Only two exceptions are, prima facie, recognised: self-defence and force authorised by the Security Council.

Without reinterpreting these previous findings too much, article 24(1) of the UN Charter, in conjunction with Chapter VII, grants the Security Council the power to authorise interventions on behalf of the UN. Under the same article, the Council is empowered with the primary responsibility to maintain international peace and security. Subsidiary competence in this area lies with the General Assembly and, to a lesser extent, with the ICJ. 174 The choice of UN organ thus seems to be no more than an internal issue. 175 Not only does the Assembly have subsidiary competence when it comes to collective security enforcement action – it may also be said to bear responsibility over the protection of human rights. Human rights principles are enshrined in the Charter, but no specific organ is entrusted with their protection. It would be natural for the General Assembly, embodying the UN, to assume responsibility to defend those principles. 176

If the Security Council does not live up to its responsibility to ensure “prompt and effective action” in the face of a humanitarian disaster, the General Assembly should

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172 The claim that most cases of humanitarian intervention amount to acts of aggression is based on the General Assembly’s definition of aggression, which states that use of force by means of any of the enumerated acts may never be justified by any motive whatsoever, see GA Res 3314 (1974), annex, articles 3 and 5(1). On the early discussions in the Assembly, see Ian Brownlie International Law and the Use of Force by States (Oxford University Press, Oxford, 1963) at 341–342.
173 See section 2.2.
arguably seize its inherent subsidiary responsibilities. The UN Charter should be flexible enough to incorporate this interpretation, thus render the Uniting for Peace procedure constitutional.

It is a common misconception that the Uniting for Peace Resolution may be invoked in internal crises, such as the one in Syria. As previously mentioned, the Resolution explicitly requires either a breach of the peace or an act of aggression. Notwithstanding this fact, it has been argued here that the procedure described in the Resolution (hereinafter the Uniting for Peace procedure) may lawfully be used by the General Assembly to recommend military intervention in internal humanitarian crises. The UN Charter may be interpreted as conferring subsidiary responsibilities to maintain international peace on the Assembly, which are not limited only to breaches to the peace and acts of aggression.

If this reading of the Charter goes too far in terms of traditional treaty interpretation – and it may possibly do so – one instrument remains that could turn the Uniting for Peace procedure into a lawful and powerful mechanism, namely customary international law. Treaties may be subject to modification by subsequent state practice if this practice gains broad support by the ratifying parties. This is certainly true in terms of treaty interpretation, but the theory might extend even further. In its Namibia Opinion, the ICJ held that a Security Council resolution may be adopted on the basis of the P5’s non-objection, contrasted with their “concurring votes” as required by article 27(3) of the UN Charter. The Court pointed out that this construction had been put into practice by the Security Council and was generally accepted. An example is the authorisation of military force in the Korean War, despite the Soviet Union’s boycott of Security Council sessions at the time. Even though advisory opinions have no binding authority, the Charter has been construed in that way ever since.

This flexibility of the UN Charter must surely be a two-way street. In other words, Charter amendment by means of international customary law must not only be a device that is used to enhance the Security Council’s powers, but also one that can confine

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them. State practice as the legal basis for humanitarian intervention has already been touched upon above. 180 Apart from answering the “if” question of humanitarian intervention, state practice can also make a substantial difference for the “how” problem. Contending that the procedure has not been sufficiently utilised to form either state practice or general acceptance, it might be time to raise Uniting for Peace from the dead.

5.4.2 Effectiveness and Feasibility

Whether it manifests as an argument of legality or one of feasibility, state practice is crucial for Uniting for Peace. The procedure has existed as a viable option for more than 60 years. Needless to say; in order for Uniting for Peace to become an effective tool, it needs to be used to a greater extent in the future.

Two examples of Security Council stalemate leading to the General Assembly mandating UN forces are the Suez crisis in 1956 and the Congo crisis in 1960. 181 However, none of the resolutions contained an authorisation to use force against another state. 182 Recent opportunities to put Uniting for Peace into practice have also passed by without notice. At the time of the intervention in Kosovo, the Security Council was considered by NATO to be the only path that led to UN authorisation. 183 Since the deadlock in the Security Council following the chemical weapons attack in Syria, discussions on the possibility of using the Uniting for Peace procedure have been very limited.

ICISS attempted – and failed – to revive Uniting for Peace by including it in The Responsibility to Protect. 184 The final report that the General Assembly adopted at the World Summit in 2005, and a few years later reiterated in a new resolution, was a watered down version of ICISS’s original proposal and did not even contain any

180 See section 2.2.
182 As regards ONUC, see judicial determination by the ICJ in Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter) (Advisory Opinion) [1962] ICJ Rep 151 at 177.
184 International Commission on Intervention and State Sovereignty The Responsibility to Protect (International Development Research Centre, Ottawa, 2001) at 53.
reference to the report. In blunt words, the Assembly voted down the very same text that it had passed 55 years earlier.

There obviously exists a fear within the international community that a more robustly engaged General Assembly could set a dangerous precedent and that there is a risk of UN-sanctioned military action in politically delicate situations. This argument ignores the fact that the machinery is already in place; it has just been forgotten. It also ignores the fact that use of force without any UN authorisation is an even more dangerous precedent.

The reason why the viability of the Uniting for Peace procedure has fallen into oblivion is that it has been perceived to give the General Assembly too much power. The main disagreement does not stem from the fact that the Resolution grants the Assembly a subsidiary responsibility, which is activated when the Council fails to fulfil its primary responsibility. The disputed issue is rather in which forum the legitimacy of the use of veto is to be determined. Clearly, the Uniting for Peace procedure is not intended as an opportunity for the losing side of a Security Council vote to have a second bite of the cherry. It is meant to unblock the Security Council in cases where the veto power has been exercised in an illegitimate manner that is not justifiable under the UN Charter. If the Assembly is granted the power to assess a veto’s legitimacy, the Security Council’s role is obscured. The hierarchy in maintenance of international peace and security would be rearranged to give the Assembly not secondary – but final – responsibility for such matters.

In order to solve this dilemma, the General Assembly must not be assigned a role that hijacks the Security Council’s primary responsibility in the area of maintaining international peace and security. Andrew Carswell makes a compelling argument in favour of allowing the matter to be referred to the General Assembly via a procedural vote not subject to veto rights. The decision by the Council to request an emergency special session of the Assembly would then, pursuant to article 27(2) of the UN Charter, require affirmative votes by nine of the Council’s 15 members. This signifies a more

restrictive approach than in the Uniting for Peace Resolution, which as an alternative suggests that an Assembly majority can make a *self-referral* without the involvement of the Security Council.\(^{188}\)

Accordingly, a challenge to the legitimacy of a veto should be put to a two-level test: a qualified majority of the Security Council has the capability of signalling an abuse of the right of veto to the General Assembly which can, by two-thirds majority, recommend appropriate measures, including use of force. If such a system were to be accepted and used, it would be able to mitigate the worst consequences of bad faith veto use in situations that cry out for a response from the international community.

It might just be that the Uniting for Peace procedure is the best basis for humanitarian intervention to be compatible with the principle of sovereignty under the present UN Charter.\(^{189}\) As outlined above, the Uniting for Peace Resolution is largely consistent with the UN Charter, the primary and subsidiary responsibilities of the Security Council and the General Assembly should be clearly separated. Moreover, for it to be an effective procedure in response to domestic humanitarian crises, the triggering mechanism should not be limited to breaches of the peace and acts of aggression.

In assessing the feasibility of renewing the Uniting for Peace Resolution, it should be recalled that it was in fact one of the P5 that introduced the proposal to the Assembly in 1950. The United States, as well as the British and French governments that supported the proposal, were certainly conscious of the Resolution’s encroachment on the prominent position that their respective states enjoyed in the UN hierarchy. Though prompted by the Korea situation, the P3 were prepared to make that sacrifice for the sake of a more efficient and effective collective security mechanism. However, the Uniting for Peace scheme does not necessarily demand any sacrifice to be made.\(^{190}\) All that is expected by the veto-holders is that they invoke their right in accordance with the purposes and principles of the UN Charter.\(^{191}\)

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\(^{188}\) See GA Res 377 A (1950) at [1].


\(^{191}\) Compare article 24(2) of the UN Charter.
If it is found feasible in the future to renew and expand the Uniting for Peace Resolution, it may be asked whether the political courage will ever be strong enough for the procedure to be effective and efficient. The purpose of the Uniting for Peace Resolution was to overcome abuses of the veto right. Nonetheless, even if it is put into practice, it is doubtful that it can ever be a universal answer to the conundrum that is humanitarian intervention. The doubts mainly rest with its practical capabilities to counterweight the P5’s muscles. The decision-making power within the UN was never meant to be equally distributed among the organisation’s Member States. The unequal separation of powers between the Security Council and the General Assembly is due to a compromise that was politically necessary in 1945. Without a prevailing role for the Allied Powers, the UN would never have seen the light of day.192

In view of this compromise, which is the foundation of the whole UN Charter, it is naïve to think that Uniting for Peace can upset the power balance in international relations. In fact, the military superpowers’ influence extends far beyond the right of veto. They will always be able to rely on support from their regional groups and smaller states that are in a state of dependence. The Assembly will never recommend force against any of the P5. Furthermore, few western or eastern states in the General Assembly are likely to be voting in favour of an intervention that the United States or Russia and China have vetoed in the Security Council. The fear that a majority rule will lead to the UN’s destruction from within was one of the reasons for creating the veto in the first place – it was considered more desirable not to have a decision at all than a profound disagreement between the major powers.193

5.5 Arm the UN

5.5.1 A 70 Year Old Idea Revisited

The existing system suffers from two fundamental flaws, which have been touched upon above. The first is the lack of clear guidance on the circumstances under which states may undertake interventions and an objective mechanism to determine when

these requirements have been met. The second is that there are no means by which interventions can be launched automatically when the humanitarian crisis has reached a certain level. In other words, the first flaw embodies the issue of *non-humanitarian intervention* and the second one relates to *inhumanitarian non-intervention*. For a legal reform to be fully legitimate and effective, it must contain two elements that address both of these deficiencies.\(^{194}\)

An appropriate two-step approach basically has to involve an objective international body having the power to deploy troops abroad. The first step would mean that this international body is given the exclusive right to authorise interventions. It would be tasked with determining when a situation requires external intervention, based on precise criteria under international law. The choice of international organ would have to strive to satisfy the objectivity issue.

Such an arrangement would provide much-needed legitimacy to interventions, but would not solve the second issue of the existing system – states could easily ignore the unit’s demands for intervention. The second aspect of the reform would therefore require the development of an international military force, which can be deployed when the authorisation for intervention has been given but states’ will to intervene is missing.\(^{195}\)

This is not a newly invented idea. A UN “army” is exactly what was proposed at the Dumbarton Oaks Conference in 1944.\(^{196}\) Article 43 of the UN Charter reveals that this army was supposed to be placed at the Security Council’s disposal through the means of special agreements. Because of the Cold War, this centralised use of force regime never became a reality and the efforts to develop a UN force fell through.\(^{197}\) Is it perhaps time to revive the idea?

\(^{194}\) Aidan Hehir *Humanitarian Intervention after Kosovo: Iraq, Darfur and the Record of Global Civil Society* (Palgrave Macmillan, Basingstoke, 2008) at 130.

\(^{195}\) Aidan Hehir *Humanitarian Intervention after Kosovo: Iraq, Darfur and the Record of Global Civil Society* (Palgrave Macmillan, Basingstoke, 2008) at 130.


5.5.2 Effectiveness of a UN Force

To date, the Security Council has never “decided” to use force, but merely recommended or authorised the same. This signifies a mandate for military action by volunteering states. It is difficult to make any de lege lata objections to the volunteer collective security scheme under Chapter VII, since that is exactly how Chapter VIII is intended to function according to article 53. However, if the collective security ideal can be described as meeting every incident of illegal use of force with counter-force, the present system is substandard as there might be no states volunteering and those who do may withdraw without any legal repercussions.198

The establishment of a UN force would hopefully reduce the need to depend on individual states to provide military support. A quick and effective UN force would stand in stark contrast to the prevailing conduct of states, which are often tentative about contributing troops to an intervention force.199

Despite these prima facie merits of a UN force, there are doubts concerning its practical effectiveness. A potential drawback of such a force is that it must be large enough to be able to intervene successfully in a serious humanitarian crisis, which requires funding. For example, a force of 20,000 men was needed in Haiti 1994 and the peacekeeping troops in Kosovo consisted of 50,000 men. Hence, James Pattison estimates, the size of the force would have to be in the area of 175,000 men taking the need for rotation into account.200

It is worth noting, however, that the size of the force goes hand in hand with the ambition of the reform. The purpose of a smaller force, i.e. a rapid reaction force, would be to provide quick response to a humanitarian crisis before it escalates. Realistically, a rapid reaction force would never have the military capability to execute an intervention of the same magnitude as NATO’s in Kosovo. It is crucial, though, that the force is big enough to achieve a higher purpose than merely functioning as an early warning system.

The UN peace-keeping troops in Rwanda, UNAMIR, had plenty of early warnings but had no mandate to effectively protect the Tutsi victims as the civil war turned to genocide in 1994. Despite their small size, the 2,500 UNAMIR troops could have saved hundreds of thousands of lives had they only received an extended mandate and remained in Rwanda at the outbreak of the genocide. Whether the UN force can become so large and effective so as to eradicate the need for national troops altogether is a matter of feasibility.

In addition to being of adequate size, the force needs to be deployed quickly when a humanitarian crisis has reached a certain level. Provided that the force does get created, its rapidity will most likely not be an intractable issue. The Standby High-Readiness Brigade, which was operational between 2000 and 2009, had 5,000 peace-keeping troops on standby to be deployed within 30 days. The EU Battlegroups, each consisting of 1,500 troops, are to be deployed within ten days.

Another issue is that a UN force would hardly be effective against powerful states. A UN force would never be sent into China, Russia or the United States. The events at Tiananmen Square, in Chechnya and at Guantánamo Bay demonstrate the major powers’ propensity to systematically violate human rights. Were these states ever to go on a mass killing rampage, the capacity of a UN force to command them to cease such activities would be extremely limited. The most troubling aspect of this objection is that it is not only directed against the size of the force but also against its political reach.

It is important to note, however, that this limitation does not signify any deterioration compared to the existing system or any other proposal put forward in this thesis. As Chris Brown pragmatically emphasises, it is a matter of priority – resources are focused on situations where an intervention is considered to be a practical option and has the potential of actually improving the situation in the target state. Such priority deliberations are inherent in the reasonable prospects criterion.

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202 Aidan Hehir Humanitarian Intervention after Kosovo: Iraq, Darfur and the Record of Global Civil Society (Palgrave Macmillan, Basingstoke, 2008) at 140–141.
5.5.3 **Whose Finger Should Be on the Trigger?**

There have been talks within the UN about creating, funding and operationalising a quick reaction force similar to the one envisaged here. Less attention has been paid to the question which body should be in charge of such a force.\(^{204}\)

From the previous discussion, one thing is certain – it must not be left in the hands of the P5 with one finger on the trigger and another on the veto button. If the politicised nature of the UN could be mitigated through the recommended reforms of the Security Council or the General Assembly, a satisfactory level of representativeness and democracy might be achieved.

Some commentators have insisted on the need for an independent body to have oversight responsibilities.\(^{205}\) Implementing the proposal for a rapid reaction force outside the UN framework would not be an easy task. However, there are modern examples of the greater part of states in the world leaving the UN behind, such as the Mine Ban Treaty and the Convention on Cluster Munitions.\(^{206}\) They have been regarded as success stories. Nonetheless, circumventing the UN can of course not be done without implications. As stipulated by article 103 of the UN Charter, the Charter prevails over any other inconsistent treaty obligations. If a group of states attempt to side-step the Security Council by signing a treaty of their own, they risk being in breach of the UN Charter. Furthermore, there is nothing that suggests that a multilateral arrangement outside the UN would be a source of legitimacy superior to the Security Council, thus more desirable.

An interesting middle ground could be to let a group operate independently yet under UN umbrella. For the sake of illustration, let us call it the “Humanitarian Council”. It could be comprised by a large number of states that are to decide on intervention for humanitarian purposes. Such decision could require super-majority without any right of

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veto. If it would be possible to agree on these terms in the future, an influential role of the Security Council is unfortunately likely to be at the heart of the consensus.

No matter which of these three oversight mechanisms is pursued, the classical problems of abuse and selectivity would be reduced as the subjective element is removed or, at least, mitigated. It may be contended that removing the authoritative power over humanitarian intervention from the Security Council would be unfeasible and not sufficiently accommodating to the P5’s realpolitik concerns. The logical fallacy of this argument is worth emphasising – if decisions to undertake interventions have to undergo realpolitik considerations, they are not humanitarian in character and do not meet the right intention criterion. 207

The scale of any of the reform proposals is naturally huge and the ideas are unlikely to become a reality in the foreseeable future. However, a reform is not entirely impossible in view of the speed with which international law has evolved since World War II, especially the human rights regime. It should also be noted that the considerations of the body authorising humanitarian intervention, and the development of a new actor executing the same, is a long-term normative goal to work towards. It is therefore irrelevant that the project is not feasible in the immediate future. Political feasibility cannot, as David Held aptly emphasises, be used as an argument against a political ambition. 208 In particular, doubts over feasibility cannot be used as an excuse to give up the efforts of developing a UN force. 209 Even though the major powers do not stand behind the concept at this point, its time will come.

6 Concluding Remarks

A bit simplified, the debate on humanitarian intervention can be said to split the international community into two camps – those who never want to see a Rwanda again and those who never want to experience a Kosovo again. In neither case was the Security Council able to adopt a sufficiently strong resolution that authorised the use of force to end the atrocities. Whereas the French action in Rwanda has generally been lambasted for being “too little, too late”, NATO’s intervention in Kosovo was by some considered “too much, too soon”. In his speech before the General Assembly in 1999, Annan aptly uncovered the tensions between the two sides of the debate.²¹⁰ Throughout this thesis, the terms *inhumanitarian non-intervention* and *non-humanitarian intervention* have been used to label the problems that these two situations have spawned.

Between and within the two camps there are diverging opinions on how the international community should react when states commit massive and systematic violations of their citizens’ human rights. In this globalised world, internal humanitarian crises are already of international concern. It is meaningless, though, to praise human security or cosmopolitan humanitarianism without offering ideas on how such utopian ideals can be achieved.

Three different attitudes towards the current legal framework have been examined in this thesis. First, the view that international law is not to blame for the humanitarian intervention regime going off course, but rather the international community’s difficulties to apply existing law to a new era of humanitarianism. Second, the opinion that the current legal framework is unsatisfactory and therefore needs to be bypassed. Third, the position that acknowledges the poor nature of existing law, but seeks to improve it rather than to ignore it.

The restrictions that the UN Charter imposes on the use of force have one often overlooked benefit. The uncertainty surrounding the legality of humanitarian intervention serves as a counterweight to *non-humanitarian intervention*. That said, the practice of unauthorised interventions disregards the legal restrictions and, in turn, the normative impulse of treating these cases as precedents opens the door for abuse.

²¹⁰ See n 2–3 above.
Hence, the existing body of international law indirectly leaves ample room for non-humanitarian intervention.

An even less attractive aspect of the status quo is that it produces a remarkably tolerating attitude towards inhumanitarian non-intervention. Not only does the legal uncertainty give states an excuse not to intervene to save suffering strangers, but the Security Council – set up to be the linchpin of international order and stability – has proved incapable of placing humanitarian necessity above political self-interest. In the golden age of humanitarianism, this is a startling feature of the existing legal framework. Although the Security Council has been identified as a stumbling block for action – and rightly so, in many cases – descending into anarchy appears to be an ill-conceived plan. Such a plot provides too many opportunities to cut corners to even pass the “smell test”. Any benefit of the doubt initially given to the Kosovo internerers is clearly due to be withdrawn after the international community’s failure to act in Darfur and Syria.

International criminal justice has a long way to go before “judicial intervention” becomes a reality. The ICC’s capacities to forcefully intervene in an ongoing conflict will remain minimal as long as the Court lacks an enforcement mechanism. The idea that conviction can act as a significant deterrent fails at the conceptual level. Nonetheless, international criminal prosecution goes hand in hand with humanitarian intervention and the ICC can hopefully establish itself as a key player that facilitates the political will to intervene with military force.

These findings concerning existing law and practice suggest that it may be worth exploring the possibilities of a legal and political reform. When approaching the idea of a reform it is important to bear in mind its potential of contributing to, rather than reducing, instability and violence.

For a reform to reduce the scope for non-humanitarian intervention, it needs to quell the urge to disobey the law. In order to do that, humanitarian intervention must be recognised as a legal right. Contrary to popular claim, codification of legal criteria will not open the floodgates to non-humanitarian intervention.
A serious implication of defining criteria, though, is their adverse effect on *inhumanitarian non-intervention*. The reform must therefore entail a second step that aims to generate an increased number of legitimate interventions.

The most effective alternative is the development of a cosmopolitan intervention force that can be deployed by an impartial body. While being the most effective option, it is also the least feasible one. Nevertheless, such a reform may be easier to realise in the future. Claiming otherwise would demonstrate a poor understanding of the dynamics of international relations. Presumably, a fairly large window of opportunity – i.e. a rather severe humanitarian disaster – must open up for this alternative to receive world-wide support.

The second most effective alternative is to eliminate the veto power of the P5. At the political level, such a reform seems unlikely to become a reality in the foreseeable future. However, it should be in the major powers’ interest to re-establish support for the Security Council. Efforts to improve the Security Council instead of ignoring it should be welcomed, not shunned.

The third most effective alternative has been right in front of the UN Member States all along – strengthening the General Assembly through the implementation of the Uniting for Peace procedure. Reviving this mechanism will arguably not require any amendments of the UN Charter at all. However, for both constitutional and political reasons, the Uniting for Peace Resolution should be renewed with minor changes in language.

Accordingly, the reform recommended in this thesis consists of one element that addresses the issue of *non-humanitarian intervention* and three alternatives for a second element that primarily aims at preventing *inhumanitarian non-intervention*. Both of these two key problems must be addressed in order for a reform to achieve full legitimacy and also to mediate between the two camps of the debate. It is hard to ignore the feasibility issues relating to the proposals, but these reforms are certainly more realistic than any scenario based on the idea of the P5 – despite their history – developing a moral conscience that will prevail over political interests.
Not only does this thesis indicate that the map of international law really includes the land of Utopia, but it also marks out the path to get there for those who are prepared to pay the price. St. Augustine once wrote:\textsuperscript{211}

Hope has two beautiful daughters; their names are Anger and Courage. Anger at the way things are, and Courage to see that they do not remain as they are.

The global community has been feeling angry for quite a while now. The time has come to start showing some courage as well.

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