

# Critical Report n° 12

Issue: International Right

Part of a series of the Human Rights Programme



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December 2013

URL: [http://www.cetim.ch/en/publications\\_cahiers.php](http://www.cetim.ch/en/publications_cahiers.php)

## RESPONSIBILITY TO PROTECT: PROGRESS OR REGRESSION OF PUBLIC INTERNATIONAL LAW?

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### INTRODUCTION

As defined in numerous writings, the “responsibility to protect” (R2P) is a “more complete” formulation of the theory of “humanitarian interference”\*, or the “right to interfere”, considered by some to represent one of the most recent evolutions in international public law since 2000. By virtue of this theory, a state's sovereignty is subordinate to the respect of the fundamental rights of its population. Some have considered such an idea innovative, some even proclaiming that it heralds the advent of a new international humanitarian order.

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\* In the second half of the nineteenth century, French-language writers used the term *intervention d'humanité* to speak of an intervention of “civilized nations” in “barbaric” countries, particularly the Ottoman Empire. English-language writers initially referred to such action as *intervention based on humanity*, but this rapidly evolved into the simpler term *humanitarian intervention*. When this English term was carried over into the latter half of the twentieth century, English-language writers made no distinction between what it ordinarily refers to now (intervention to bring life-sustaining aid) and what it had earlier referred to (armed intervention on the pretext of protecting the Christian populations suffering under “barbaric” Ottoman rule). French-language writers – including the author – now use *intervention humanitaire* in the same sense in which it is used in English, but the original *intervention d'humanité* remains for the past actions of “civilized nations” against those considered “barbaric”. The idea behind the original term, however, is more relevant today than ever, namely “the right to protect” by using armed force and absent any consent on the part of the state concerned. This new incarnation of what amounts in practice to *intervention d'humanité* is what the French now call *ingérence humanitaire*, well rendered in English as simply *humanitarian meddling*. Throughout this essay, however, the term used to translate the author's *ingérence humanitaire* is that used consistently by the International Committee of the Red Cross, *humanitarian interference*. – Translator's note.

However, a look back in history, without going all the way back to Byzantium<sup>1</sup> but merely to the nineteenth century, refutes this position. “Intervention based on humanity” a principle widely known in theory and somewhat in practice in the latter half of the nineteenth century, constitutes a premise of this right to interfere and this “responsibility to protect”. However, does not the return to favor of this theory signal rather a regression of public international law? It is imperative to examine this theory and the reasons for which it was abandoned at the time of the drafting of the *Charter of the United Nations*.

## I. HISTORICAL OVERVIEW

### A. The Nineteenth Century Theory of “Intervention Based on Humanity”

“Intervention based on humanity” is defined as “*pressure from one or several foreign governments exercised on another government to force it to change its arbitrary practices regarding its own subjects*”.<sup>2</sup> However, given that this definition can cover simple diplomatic pressure affecting neither territorial integrity nor state sovereignty, it is too broad for the scope of this report. We shall thus restrict this definition to recourse to armed coercion by one or several states against another state, for the theorists of the past cited only this means of pressure as “intervention based on humanity”.<sup>3</sup> It is certainly easy to see the link between this sort of intervention and “the right to humanitarian interference” as well as the “responsibility to protect”. Yet, as a concept is closely linked to the historical context giving rise to it, it is indispensable to explore at least briefly that context.

#### 1. *The Context for the Practical Application of the Theory*

In the nineteenth century (even before the founding of the League of Nations), recourse to force was not an uncommon practice, generally accepted – thus, far from prohibited – in international law, and the notion of the state applied only to “civilized nations”, in other words to the countries of Europe and their allies, especially the United States. At the beginning of the century, this European society devised a new practice in international relations intended to keep the peace. Peace was underpinned by a balance of powers built on a European interstate understanding called the Concert of Europe. Thus, in the event of conflict, the European states acted in concert. This period also gave rise to an alliance of states against the neighboring Ottoman Empire, against which many “interventions based on humanity” were carried out.<sup>4</sup>

In short, the principle of “intervention based on humanity” was considered as such only when proclaimed by one or more European states according to a European conception of human rights and against a state or states considered “uncivilized”.

#### 2. *Justifications and Bases in Legal Doctrine*

The theoretical construction of “intervention based on humanity” draws on the theory of the *just war* developed over the centuries by Cicero (106-43 B. C.), Saint Augustine (354-430 A.D.) and

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1 In this regard, see Baron Michel De Taube, *L'apport de Byzance au développement du droit international occidental*, (1939) (I), *Recueil des Cours de l'Académie de Droit international*, p.305.

2 Georges Scelle, *Précis de Droit des Gens*, Second Part, (Paris : Librairie du Recueil Sirey, 1934), p. 50.

3 Elisa Perez-Vera, “La protection d'humanité en droit international”, *Revue belge de droit international*, 1969, Volume 2, pp. 401-402.

4 In reality, this theory was later to be implemented exclusively against the Ottoman Empire. See David Rodogno “Réflexions liminaires à propos des interventions humanitaires des Puissances européennes au XIXe siècle”, *Relations internationales* 3/2007 (N° 131), pp. 9-25, [www.cairn.info/revue-relations-internationales-2007-3-page-9.htm](http://www.cairn.info/revue-relations-internationales-2007-3-page-9.htm)

Francisco de Vitoria (1483-1546). It considers that a war is legitimate if it defends a noble cause, in other words, if the motive for its outbreak is morally acceptable. In the Middle Ages, the spread of Christianity was considered a just motive for declaring war (thus legitimating the Crusades). However, an armed intervention intended to protect populations oppressed by another state was also often considered legitimate. Thus, Hugo Grotius (1583-1645) reckoned in this famous work *On the Law of War and Peace* (1625) that such an intervention was legitimate “when oppression is manifest: if some Busiris, Phalaris, Diomedes of Thrace, inflicts upon his subjects cruel acts which no just man can countenance”. Similarly, in the middle of the eighteenth century, Emer De Vattel (privy counselor to Augustus III, Elector of Saxony) reckoned that “... any foreign power has the right to support an oppressed people who ask for its assistance”.<sup>5</sup>

Little by little, the idea developed that there was an “*imperative rule of law, general and compelling applicable to all states as well as to all individuals, superior to national legislation as well as to international conventions and which constitutes the common law of humanity*”.<sup>6</sup> This was not unlike the Enlightenment concept of natural law and our contemporary concept of *jus cogens*.<sup>7</sup>

Thus, the doctrinal justification of “intervention based on humanity” is built on the principle that “*the government failing in its function by ignoring the human interests of its people commits what one might call an abuse of sovereignty: its decisions can no longer be sovereignly imposed on another party, for... arbitrary acts are not acts of sovereignty*”.<sup>8</sup> In other words, a state that commits serious violations of rights against its populations loses its sovereign immunity, and for this reason it is totally legitimate and licit for another state to intervene to end these violations.

### **3. Conditions for Implementation**

Nonetheless, the theoreticians of the beginning of the twentieth century sought a formal legal framework to legitimize this intervention. The first element of this was the content of this superior norm, imperative and incumbent upon states. According to A. Rougier, it is a “human right” arising from the universality of human rights.<sup>9</sup> Further, according to this author, only the violation of three human rights can justify a humanitarian intervention: the right to life,<sup>10</sup> the right to freedom, understood mainly as the prohibition of slavery and servitude,<sup>11</sup> and the right to the guarantee of the these two, or the right to legality.<sup>12</sup>

The second element was that the nature of this violation, which had to be taken into consideration. The violation of human rights must be imputable to the public powers. In practice, it would seem that only the violation of the right to life entails a humanitarian intervention, and this violation must be horrible, offending the conscience. It must “*consist of especially revolting crimes, extreme cruelty, which government complicity leaves unpunished, or else massacres of a nature such as to offend the conscience of humanity. It will in general be an excess of injustice and of cruelty that profoundly offends our mores and our civilization.*”<sup>13</sup>

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5 E. De Vattel, in Juanita Westmoreland-Traoré, « Droit humanitaire et droit d'intervention », *Revue de droit de l'Université de Sherbrooke*, 2003-2004, volume 34, p. 161.

6 Antoine Rougier, “La théorie de l'intervention d'humanité”, 1910, XVII, *Revue général de droit international public*, pp. 478-479: <http://www.solidarite-internationale.com/rougier.pdf>

7 Imperative norms of international law. (See the *Vienna Convention on the Law of Treaties*, 23 May 1969).

8 A. Rougier, op. cit., pp. 495-496.

9 Ibid., p. 515.

10 Ibid., p. 517.

11 Ibid., pp. 518-521.

12 Ibid., pp. 521-523.

13 Elisa Perez-Vera, “La protection d'humanité en droit international”, *Revue belge de droit international*, 1969, Volume 2, p. 418.

For most of the theoreticians, the persons to be protected are the entire population without distinction of race, culture, sex, religion etc. However, from this time onward, some of the Anglo-Saxon theoreticians seemed to consider that an intervention was justified only for persons from “friendly” countries, to wit mainly those who are culturally “similar”.<sup>14</sup>

As a third element, one must ask which entities are likely to be able to stop the violations. At the time, the theoreticians designated those states endowed with “the greatest authority”, in other words the great European colonial powers and the United States.<sup>15</sup> However, a state intervention always raises doubts about its humanitarian motives, less admissible motives often being the real cause of recurring to armed force against another state. The disinterested nature of the intervention is thus of paramount importance for the action to be considered legitimate. But the search for criteria, or, at least, indications, demonstrating the disinterested nature, has always proven elusive. The most commonly cited indicator is the collective character of the intervention, considered by some to be an indispensable criterion for the legality of the intervention. However, it is not uncommon for several states with coincident interests to reach an understanding and recur to armed force against another state. Thus, “*it may happen that the collective element contributes only a quantitative difference and not a qualitative one in contrast to the most unjust individual intervention.*”<sup>16</sup>

E. Perez-Vera also emphasizes the great importance, already at the time, of public opinion as a means of pressure on states, pushing them to intervene, all while demonstrating how relative the independence of such opinion is as well as the role played by the major media in shaping it.<sup>17</sup>

Finally, it is essential that this intervention correspond to certain requirements. Thus, it must be a last resort, after exhaustion of other means of pressure. Then, the intervention must be circumscribed in time, space and means. In other words, the intervention must not surpass what is strictly necessary for the protection of the civilian population, under pain of constituting a real violation of territorial integrity of a state.<sup>18</sup>

#### **4. Theoretical Limits**

The main theoretical limit to the concept of an “intervention based on humanity” arises from the impossibility of proving the totally disinterested nature of one or the several states in intervening. In fact, the collective character of the intervention will never be sufficient to guarantee its disinterested nature, as mentioned above. It is highly unusual for a state to intervene in the affairs of another – at the risk of destabilizing the international equilibrium of which it is a part – for other motivations than the satisfaction of its own interests.

A. Rougier recognizes this weakness, stating that the humanitarian concept “will never be the only motive” of intervention for, “as soon as the intervening powers are judges of the opportuneness of their action, they reckon this opportunity from the subjective point of view of their interests at the time.”<sup>19</sup>

The other weakness inherent in this theory is that it does not protect any right of the populations to be defended but only a right of states to interfere militarily in the affairs of another. Thus, it is a right invoked at the discretion of states, not a guarantee of effective protection of the populations'

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14 Ibid., p. 411.

15 Ibid., p. 416.

16 Ibid., p. 417.

17 Ibid., p. 413.

18 Ibid., pp. 419-421.

19 Antoine Rougier, op. cit., p. 525.

human rights.<sup>20</sup>

The “intervention based on humanity” theory has never been invoked as such by any state. However, it is certain that its development in legal doctrine has greatly influenced the European states in the practice of interference in the affairs of other states. Thus, there developed a new practice of armed intervention, situated in the “gray zone” between non-intervention and open warfare set in motion by an official declaration of war.<sup>21</sup> Yet even the partisans of this “intervention based on humanity” admit that only a few rare cases actually correspond to this middle way.

These “interventions based on humanity” all had in common that they were directed only at the Ottoman Empire for the protection of Christian populations. Further, most of these interventions led either to independence (e.g. Greece in 1827) or to granting autonomy to a province (e.g. Mount-Lebanon in 1860, Bulgaria in 1878) or to annexation by another empire (e.g. Bosnia and Herzegovina by Austria-Hungary in 1878), thus impugning the disinterested nature of the intervention claimed by the intervening European powers (most of the time France, the United Kingdom and Russia). Certainly, these interventions sometimes had the effect of stopping massacres (however often belatedly). But this begs the question of inaction on the part of the European powers, in particular in the cases of the massacres of Bulgarian Christian populations in 1876 and the “hamadian massacre” (from the name of the Ottoman sultan) of Armenian populations during the last decade of the nineteenth century.<sup>22</sup>

In an article that sheds essential historical light on humanitarian interventions, David Rodogno posits that the main motivation of the European interventions against the Ottoman Empire was the maintenance of European international public order. If an operation seemed too dangerous or risked triggering open warfare with the Empire, it had little chance of being carried out.<sup>23</sup> This writer also recalls, rightly, that all the states carrying out humanitarian interventions readily violated human rights on both their national territory and on the territories where they exercised colonial rule, some governments, notably that of the United Kingdom, even considering the extinction of local populations<sup>24</sup> to be “normal”, as these populations were “incapable of adapting to a 'superior' civilization”.<sup>25</sup>

This brings us to the conception of the international order of the European states of the time. States and peoples were classified according to a scale of advancement in “civilization”, the Europeans being at the top of the scale. Thus, the European political system was considered superior, and their many interventions in the Ottoman Empire, as well as the pressure to which they subjected it so that it modify its domestic judicial order, had as its objective to bring “civilization” to this “barbaric” country.<sup>26</sup> Finally, we might cite Rodogno when he states that “*the European powers thus did not have to justify their actions toward a 'barbarous' entity such as the Ottoman Empire. The principle of non-intervention in the domestic affairs of a sovereign state was not applied to 'inferior', 'barbaric' or 'savage' countries.*”<sup>27</sup>

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20 E. Perez-Vera, op.cit., p. 421.

21 David Rodogno, “Réflexions liminaires à propos des interventions humanitaires des Puissances européennes au XIXe siècle”, *Relations internationales*, 3/2007 (N° 131), p. 11.

22 Not to be confused with the 1915 and 1916 massacres of the Armenian populations on Turkish territory, today considered a genocide.

23 D. Rodogno, op. cit., pp. 22-23.

24 Notably the Amerindians and the Aborigines of Tasmania.

25 D. Rodogno, op.cit., p. 11.

26 Ibid., pp. 23-24

27 Ibid., p. 23.

Thus, the ancestor of the “right to humanitarian interference” and of the “responsibility to protect” suffers from many deficiencies in both theory and practice. The theoretical impossibility of proving the disinterested nature of a state and the absence in practice of any manifestation of this disinterested nature are difficulties that the principle of humanitarian interference and the “responsibility to protect” have also come up against (see below). Although the racist and arbitrary classification of states and peoples on a scale ranging from “barbaric” to “civilized” as well as the exporting of the system and its imposition on the rest of the world, considered as a sacred mission, are now in the past (or at least no longer openly avowed), the practice of the Western states leaves one wondering when one is confronted with the taking hostage of the Bolivian president in Vienna, making a mockery of diplomatic norms currently in force.<sup>28</sup> Notwithstanding the absence of this obnoxious vocabulary today, it remains indispensable to reflect on modern extensions of this conception, notably the willingness to impose a political system and (above all) a neo-liberal market economy on the entire planet.<sup>29</sup>

If the concept of “intervention based on humanity” disappeared with peace among the countries of Europe, the advent of the *Charter of the United Nations* in 1945 should have relegated such a consideration to history. Yet, the period covering 1980 to 1990 saw the birth, with vigor, of a new wave of pleading in favor of armed interference with the purpose of protecting civilian populations, through the supposedly innovative concept of “humanitarian interference” (see below). Before discussing this, it is appropriate to briefly mention the innovative aspect of the *Charter of the United Nations*, which revolutionized the vision of international relations.

## **B. The Creation of the United Nations and the Principles of Its *Charter***

The United Nations Organization was founded in 1945 by the victorious powers at the end of the second World War, in order to prevent humanity from falling again into barbarism as it had done during the previous war (60+ million dead, not to mention unspeakable destruction and suffering). This intention is clearly reflected in its *charter*, which remains the central and innovating text regulating the relations among the member states of the United Nations,<sup>30</sup> aiming to: maintain international peace and security; develop among the nations amicable relations founded on respect of the principle of equality of peoples' rights and their right to self-determination; promote international cooperation by resolving international problems on the economic, social and humanitarian level, by developing and encouraging respect for human rights and fundamental freedoms for all, without distinction of race, sex, language or religion (Article 1).

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28 See the article by Evo Morales, “Moi, Président de la Bolivie, séquestré en Europe”, *Le Monde diplomatique*, August 2013, <http://www.monde-diplomatique.fr/2013/08/MORALES/49552>

29 See in particular “The National Security Strategy of the United States of America”, September 2002, available at: [www.state.gov/documents/organization/63562.pdf](http://www.state.gov/documents/organization/63562.pdf)? p.4: “America will encourage the advancement of democracy and economic openness (...), because these are the best foundations for domestic stability and international order. We will strongly resist aggression from other great powers—even as we welcome their peaceful pursuit of prosperity, trade, and cultural advancement. Finally, the United States will use this moment of opportunity to extend the benefits of freedom across the globe. We will actively work to bring the hope of democracy, development, free markets, and free trade to every corner of the world.”

30 For further information and analysis, see the CETIM's publications on the United Nations: Samir, Amin, Robert Charvin and Jean Ziegler et al., *Droits pour tous ou loi du plus fort? Regards militants sur les Nations unies*, 2005: [http://www.cetim.ch/fr/publications\\_ouvrages/115/ONU-droits-pour-tous-ou-loi-du-plus-fort-regards-militants-sur-les-nations-unies](http://www.cetim.ch/fr/publications_ouvrages/115/ONU-droits-pour-tous-ou-loi-du-plus-fort-regards-militants-sur-les-nations-unies); Monique and Roland Weyl, *Sortir le Droit international du placard*, 2008: [http://www.cetim.ch/fr/publications\\_ouvrages/162/sortir-le-droit-international-du-placard](http://www.cetim.ch/fr/publications_ouvrages/162/sortir-le-droit-international-du-placard); Robert Charvin, *Le droit international et les puissances occidentales: Tentatives de liquidation*, 2013: [http://www.cetim.ch/fr/publications\\_ouvrages/182/le-droit-international-et-les-puissances-occidentales-tentatives-de-liquidation](http://www.cetim.ch/fr/publications_ouvrages/182/le-droit-international-et-les-puissances-occidentales-tentatives-de-liquidation)

It should be emphasized that the right of peoples to self-determination, enshrined in the *Charter*, constituted the legal and political basis of the process of decolonization which witnessed the birth of more than 60 new states in the second half of the twentieth century. This was a historic victory of colonized peoples, even if it coincided with the willingness of certain international powers to break open the “preserves” of the colonial empires (primarily European) of the time. The arrival of these new states allowed for the founding of the Non-Aligned Movement and reinforced the right to self-determination, proclaimed within the United Nations General Assembly, which stipulated, inter alia: “*The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.*”<sup>31</sup> This recalls that the principles of sovereign equality of states and of non-interference are of particular importance for peoples who have known colonial domination and exploitation in all its forms.

### **1. Sovereign Equality of States**

The *Charter* validated the concept of sovereignty as an essential attribute of the state, but it went further by recognizing particularly the sovereign equality of each United Nations member state in its Article 2.1: “*The Organization is based on the principle of the sovereign equality of all its Members.*” Sovereign equality thus having become the foundation of international relations, the former racist pyramidal conception of civilizations was eliminated, formally excluding the possibility of an “intervention based on humanity”. Moreover, sovereign equality confirms the two essential principles correlative to state sovereignty: the principle of **non-interference** and that of **non-intervention** in the domestic affairs of another state.

### **2. The Principle of Non-Interference**

The principle of non-interference can be defined as the prohibition for any entity (state or international organization) to interfere in the domestic politics of a state. This principle is distinguished from non-intervention by its broader character, an interference having the potential to take other forms than an armed intervention. Thus, financial support to armed resistance, economic sabotage, acts of terrorism are forms of interference prohibited in international law.

The principle of non-interference is proclaimed in several United Nations General Assembly declarations, in particular in the *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*,<sup>32</sup> but also and especially in the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, which states notably: “*No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.*”<sup>33</sup> Moreover, the International Court of Justice (ICJ), in the case of military and paramilitary activities in and against Nicaragua, established that the principle of non-intervention was a principle in customary law and involves the right of every sovereign State to conduct its affairs without outside interference.<sup>34</sup>

### **3. The Principle of Non-Intervention**

The principle of non-intervention is perfectly defined in the *Charter of the United Nations*,

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31 General Assembly Resolution 1514 (XV) 14 December 1960, § 1:  
<http://www.un.org/en/decolonization/declaration.shtml>.

32 A/RES/2131(XX), 21 December 1965: [http://legal.un.org/avl/pdf/ha/ga\\_2131-xx/ga\\_2131-xx\\_e.pdf](http://legal.un.org/avl/pdf/ha/ga_2131-xx/ga_2131-xx_e.pdf).

33 A/RES/2625(XXV), 24 October 1970, § 1: <http://www.un-documents.net/a25r2625.htm>

34 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, *Judgment of 27 June 1986*, § 202: “The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law.”

stipulating 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.” The establishment of the United Nations thus prohibited not only the use, but also the threat of the use, of armed force, both of which are prohibited in international law. This principle is recalled on many occasions, most notably in the above mentioned *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*.

In the same way, the ICJ, in 1949 in its ruling on the Corfu Channel, strongly criticized past interventions:

“The Court cannot accept such a line of defense. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law.”<sup>35</sup>

In other words, as it is not possible to make war by invoking the *United Nations Charter*, only the **peaceful** resolution of international conflicts is thus admitted (Chapter VI: Pacific Settlement of Disputes.). Thus, the provisions of the *Charter* deliberately bury the old idea of international relations and, by the same token, all theories of humanitarian interference.

It is, however, appropriate to recall here two exceptions in the *Charter* allowing recourse to force: legitimate defense and collective actions carried out under the aegis of the Security Council (Chapter VII), discussed below.

#### **4. Legitimate Defense**

Legitimate defense figures in Article 51 of the *Charter of the United Nations*: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” The only armed intervention, unilateral or collective, authorized by international law outside an action authorized by the Security Council is reaction to aggression. The only difficulty here is that armed aggression is not clearly defined by international law, thus leaving it open to the interpretation of the member states.

The main exception to principles of non-interference and non-intervention is thus an action under the aegis of the Security Council. This United Nations body is the one mainly responsible for maintaining peace (Article 24). The *Charter of the United Nations* gives it full latitude to deal with a situation that threatens the peace, breaks the peace or constitutes an act of aggression. (Chapter VII). The means to remedy this situation are also at the entire discretion of the Security Council members, ranging from simple recommendations to the imposition by Council member states of measures to be taken, these, too, varied. Chapter VII of the *Charter* contains a non-exhaustive list of measures that are temporary, gradual and non-military (Article 41), and it is not for lack of them (real or supposed) that the Security Council can recur to force (Article 42).

In conclusion, the United Nations Security Council has at its disposal an exclusive power regarding the use of armed force, but this power must be used “in accordance with the Purposes and Principles of the United Nations” (Article 24.2). This said, the Council has had a tendency, since the end of the Cold War, to interpret Chapter VII of the *Charter* at its own discretion (Afghanistan, the former Yugoslavia, Iraq, Libya...). Thus, given its composition and the possibility of a veto by permanent

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35 ICJ, *The Corfu Channel Case (Merits) Judgment of April 9th, 1949*, p. 35.



members, it is possible that conflicts that enter into the sphere of interests of one of the permanent member states may never be examined by the Council, or at least not be the object of condemnation or intervention. Of course, the considerable power accorded it in the *Charter*, in particular to its five permanent members, can be criticized and contradicts the principle of equality among the United Nations member states. As already stressed above, the structures of this institution were conceived by the victors of the second World War and correspond to the power configurations of the time and the perceived need to maintain a balance of forces in a bipolar world between the period's two great powers (the United States and the Soviet Union). These structures also had as their purpose to prevent those powers from engaging in an instrumentation of the organization in their own interest. But, as iniquitous as it may appear, one must also realize that the “right of veto” can be welcome in avoiding further instrumentation of the United Nations by certain powers that unilaterally proclaim themselves representatives of the “international community”.

Intervention in the affairs of a state is thus, legally, strictly controlled. Out of a concern to maintain peaceful international relations, it is thus, theoretically, impossible, without Security Council authorization, for a member state to confer upon itself the right to intervene militarily to protect a population that is victim of wide-scale violations of human rights by another state. However, arcane readings of the *United Nations Charter* and of the decisions of the International Court of Justice have allowed some authorities to consider that intervention in the name of the protection of human rights is authorized by the *Charter* (see below).

### C. The Theory of the “Right of Humanitarian Interference”

The “right” or the “obligation” to interfere is a slightly different theory from the one expounded above. In fact, it is not only one of military intervention but also of humanitarian intervention in the strict meaning of the term, to wit of access of humanitarian aid to populations that are victims of natural disasters or armed conflicts. This can involve military interventions in two situations: the protection of humanitarian convoys and the protection of victims faced with their persecutors. This latter particular case corresponds to the theory of humanitarian intervention examined above.

The birth of the “right of interference” is often attributed to the work of Mario Bettati and Bernard Kouchner.<sup>36</sup> Nonetheless, many are those who attribute its paternity to the French philosopher Jean-François Revel who expounded it in an article in *l'Express* in June 1979. Beyond these discussions, any study of the theory of the “obligation to interfere” must be undertaken with the utmost caution, for many and varied interpretations of this principle have been elaborated.

Mario Bettati, for his part, claims that the “right of interference” (“humanitarian interference”) supposes several elements:

- “1. a principle of free access to victims of natural or political disasters for the agencies bringing help;
2. a possible use of force to protect humanitarian convoys;
3. possible armed intervention to protect victims from their persecutors;
4. in the last two cases, only a United Nations Security Council resolution can decide or authorize an operation of military force;
5. finally, international legal action for purposes of prevention and repression must be progressively organized for those responsible for the most serious crimes.”<sup>37</sup>

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<sup>36</sup> *Le devoir d'ingérence: peut-on les laisser mourir?*, (Paris: Denoël Publishers, 1987).

<sup>37</sup> Mario Bettati, “Du droit d'ingérence à la responsabilité de protéger”, *Outre-Terre*, 2007/3, N° 20, pp. 281-282.

However, there has never been a consensus on the precise definition of the “right of interference”.<sup>38</sup> On the other hand, two resolutions on humanitarian assistance, from 1988 and 1990, adopted by the General Assembly,<sup>39</sup> were used by the Security Council to intervene militarily, in Iraq (1991), in Somalia (1992) and in the former Yugoslavia (1992).

Moreover, even the term used to identify this concept has led to controversy, some persons preferring to it the “obligation to interfere” or even the “right of humanitarian assistance”. This has been reinforced by the great diversity of cases gathered under the category of humanitarian interference. Thus, humanitarian aid operations by relief agencies, a military protection for humanitarian convoys and populations by peace-keeping operations authorized by the Security Council, and also military interventions carried out by a coalition of states in the name of the protection of civilian populations have all been indiscriminately grouped under the label of “right to humanitarian interference”. However, each of these cases is radically different from every other, most notably because they fall under different legal frameworks. This adds to the confusion surrounding the principle of humanitarian interference. It is thus important to differentiate among these cases, for they were frequently encountered during the 1990s.

### ***1. Humanitarian Aid Operations by Relief Agencies***

Humanitarian aid can be defined as the supplying of essential goods such as medicines, food, clothes, blankets etc. as well as medical care to populations in an emergency situation, especially during natural disasters and armed conflicts. This report focuses in particular on theories dealing with the protection of civilian populations during armed conflicts. Three legal sources deal with aid to populations in situations of emergency. They are international humanitarian law, Security Council resolutions and General Assembly resolutions.

#### International humanitarian Law

International humanitarian law “is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare.”<sup>40</sup> *The Geneva Conventions of August 12, 1949* and their *Additional Protocols* contain most of the rules to be observed during armed conflict, especially regarding humanitarian aid to civilians. The main weakness of international humanitarian law is the distinction made in the texts between international armed conflicts (in most cases, conflict occurs between at least two states) and non-international armed conflicts (often a central authority fighting one or several groups of armed opposition on its territory). In the event of non-international armed conflict only Common Article 3 of the *Geneva Conventions* and *Protocol II additional to the Geneva Conventions, 1977* apply, which entails a limited protection.

#### Security Council Resolutions

More and more, when it seems that a situation threatens international peace and security, the Security Council in its resolutions calls upon the parties to the conflict to facilitate the actions undertaken by humanitarian aid operations to the affected populations.<sup>41</sup>

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38 Juanita Westmoreland-Traoré, “Droit humanitaire et droit d’intervention”, op.cit., p. 165.

39 Resolutions 43/131, 8 December 1988, <http://www.un.org/documents/ga/res/43/a43r131.htm>, and 45/100, 14 December 1990, <http://www.un.org/documents/ga/res/45/a45r100.htm>

40 <http://www.icrc.org/eng/war-and-law/>

41 For example, Resolution S/RES/775, 28 August 1992 on the situation in Somalia, “urges all parties, movements and factions in Somalia to facilitate the efforts of the United Nations, its specialized agencies and humanitarian organizations to provide urgent humanitarian assistance to the affect population in Somalia” (§ 7): <http://www.un.org/en/sc/documents/resolutions/1992.shtml>

In the same way, the Security Council considers that obstacles to humanitarian aid operations can underpin its decision to be seized of a situation, as it recalls in its Resolution 1894 by declaring “*its willingness to respond to situations of armed conflict where civilians are being targeted or humanitarian assistance to civilians is being deliberately obstructed, including through the consideration of appropriate measures at the Security Council’s disposal in accordance with the Charter of the United Nations*”.<sup>42</sup> Security Council resolutions are binding. However, in cases of their non-observance, the Council may decide to put in place operations protecting humanitarian aid (see below).

### General Assembly Resolutions

Two General Assembly resolutions with identical titles, *Humanitarian assistance to victims of natural disasters and similar emergency situations*,<sup>43</sup> provide a principle of free access to populations. These two resolutions have a broader scope of implementation than the two sources cited above, applying to any emergency situation. However, this positive point is counterbalanced by a legal weight that is inferior to international humanitarian law and to Security Council resolutions.

Thus, the legal sources applicable to the protection of populations in emergency situations differ according to the cause of the emergency: international armed conflict, non-international armed conflict and natural disaster. Yet they all have in common the principle of the first responsibility of the state to bring humanitarian aid as well as the necessity for the parties to the conflict to facilitate bringing of humanitarian aid by relief organizations. Recourse to force is excluded to impose upon the state in question access to the victimized population by the relief agencies.

### ***2. Protection of Humanitarian Convoys and Populations Authorized by the Security Council***

As already discussed, the Security Council may be seized of a situation when humanitarian aid is impeded and invite the parties to facilitate international aid. However, in the beginning of the 1990s, in the context of the conflicts then occurring in Somalia and the former Yugoslavia, the Security Council went much further, entrusting to peace-keeping operations the mandate to protect humanitarian convoys and populations by virtue of Chapter VII of the *United Nations Charter*, which amounted to authorizing the use of armed force. In fact, in the context of the conflict in Bosnia-Herzegovina, the Security Council authorized “the UNPROFOR [United Nations Protection Force] ... acting in self defense, to take the necessary measures, including the use of force ... in the event of any deliberate obstruction ... to the freedom of movement of UNPROFOR or of protected humanitarian convoys”.<sup>44</sup>

In the same way, the Security Council had authorized in Somalia the setting up of a peace-keeping operation in order to protect humanitarian convoys.<sup>45</sup> Later, the Security Council even authorized a coalition of states to intervene militarily in order to re-establish security conditions for bringing humanitarian aid.<sup>46</sup>

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42 S/RES/1894, 11 November 2009, *Protection of Civilians in Armed Conflict*:  
<http://www.un.org/en/sc/documents/resolutions/2009.shtml>

43 See note 39.

44 S/RES/836, 4 June 1993, § 9: <http://www.un.org/en/sc/documents/resolutions/1993.shtml>

45 Resolution S/RES/751, 24 April 1992.

46 Resolution S/RES/794, 3 December 1992, in which the Security Council, “acting under Chapter VII of the *Charter of the United Nations*, authorizes the Secretary-General and Member States cooperating to implement the offer referred to in paragraph 8 above, to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia” (§ 10).

### ***3. Unilateral Armed Interventions Not Authorized by the Security Council***

A last case, often listed under “right to interfere”, concerns military operations not authorized by the Security Council, whose declared purpose is the protection of populations and the improvement of the humanitarian situation.

The example closest to the theory of “humanitarian intervention” is doubtless the bombing of the Serbian capital Belgrade from 23 March to 10 June 1999. This operation had no legal basis, the Security Council not having given its approval for such an intervention. It was thus a flagrant violation Article 2.4 of the *United Nations Charter* prohibiting recourse to armed force among states.

The NATO member states that intervened justified this military operation in the name of humanitarian imperatives. The Security Council, in several resolutions, cited the risk of a humanitarian disaster in Kosovo, but the refusal of China and Russia to take coercive measures was claimed to have led to this unilateral intervention.<sup>47</sup>

This intervention, triggered by the stalemate in the Security Council, led, according to some, to a recognition in customary law of “intervention based on humanity”. It is worth recalling here that, by the very admission of members of NATO, this situation was exceptional and was not to set a precedent (see below the speech of the former German foreign minister J. Fischer). This, however, rings hollow, recalling the adage, “Do as I say, not as I do.”

This brief overview of legal developments and actions that, according to certain legal doctrines, come under the category of “right to interfere”, shows that it is anything but a homogenous category. Rather, the situations are different, driven by different legal regimes, indeed, at times, illegal under international law. What is more, outside the last, illegal case, no element pleads in favor of a customary principle authorizing states (alone or in coalition) to intervene militarily and unilaterally.

## **II. THE RESPONSIBILITY TO PROTECT**

Heir to the “right to interfere”,<sup>48</sup> the theory of the “responsibility to protect” was elaborated by an international commission called the International Commission on Intervention and State Sovereignty (ICISS), mandated by the Canadian government. Set up in 2000 and presided by Gareth Evans and Mohamed Sahnoun,<sup>49</sup> this commission in December 2001 published its report, “The Responsibility to Protect”.<sup>50</sup>

It is this concept which was encompassed in the final declaration of the United Nations 2005 World Summit (see below) and used, starting in 2006, by the Security Council in its resolutions. But it was only in 2011 that this concept was really implemented for the first time, against Libya (see below).

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47 For further information: <http://www.icrc.org/fre/resources/documents/misc/5fzg3n.htm>

48 <http://www.franceonu.org/la-france-a-l-onu/dossiers-thematiques/droits-de-l-homme-État-de-droit/la-responsabilite-de-protoger/la-france-a-l-onu/dossiers-thematiques/droits-de-l-homme-État-de-droit/la-responsabilite-de-protoger/article/la-responsabilite-de-protoger>

49 The other members of the ICISS are: Gisèle Côté-Harper, Lee Hamilton, Michael Ignatieff, Vladimir Lukin, Klaus Naumann, Cyril Ramaphosa, Fidel Ramos, Cornelio Sommaruga, Eduardo Stein et Ramesh Thakur.

50 *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, Ottawa: International Development Research Center, 2001: <http://responsibilitytoprotect.org/ICISS%20Report.pdf>

## A. The Context in Which It was Drafted

The end of the Cold War was marked by the collapse of the Soviet Union (1991) and the weakening of the Movement of Non-Aligned Countries<sup>51</sup> most of whose members were “crushed” under the constraints of structural adjustment programs imposed by the Bretton Woods institutions for repayment of foreign debt. The United States was then affirmed as the world's single superpower. “The end of history” having been proclaimed, the United States, with the support of its allies (European in particular), then endeavored to free itself from the constraints of the *United Nations Charter* in order to be able to intervene “legally” wherever it wished. The outbreak of many murderous conflicts beyond their control that plunged some countries into chaos also necessitated a response not only political but also legal given that any power needs legitimacy to govern and to assure its authority. This is all the more important if the power in question is a world power that has proclaimed itself the model for government and development (economic, social and cultural) and does not hesitate to impose its model on other peoples, including by force.

The increase of military interventions in the 1990s, based on humanitarian discourse but targeted according to the interests of those intervening, had largely discredited the theory of the “right” or the “obligation” of “humanitarian interference”. Thus, it was necessary to avoid the linguistic and conceptual trap of this theory.<sup>52</sup> This was also noted by the authors of the ICISS report:

*“The expression 'humanitarian intervention' did not help to carry the debate forward, so too, do we believe that the language of the past debates arguing for or against 'a right to intervene' by one state on the territory of another state is outdated and unhelpful. We prefer to talk not of a 'right to intervene' but of a “responsibility to protect”.”*<sup>53</sup>

These elements were supported by the willingness of Kofi Annan, former United Nations Secretary-General (1997-2006), who watched impotently the Rwanda genocide (1994) while he was Deputy Secretary-General for peace-keeping operations (including the United Nations Mission for Aid to Rwanda, set up six months before the beginning of the genocide)<sup>54</sup>, a willingness to push the United Nations member states to react whatever the cost in the face of such events. In fact, his appeal to the General Assembly in 1999 and 2000 summarizes well his state of mind:

*“...if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?”*<sup>55</sup>

In the end, K. Annan sought “a broadened interpretation of Article 51 (Chapter VII), *Charter of the United Nations*”<sup>56</sup> to allow the Security Council to “legally” carry on military interventions.

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51 Created at the initiative of the leaders of formerly colonized countries, such as Jawaharlal Nehru (India), Ahmed Soekarno (Indonesia), Zhou Enlai (China), Abdel Gamal Nasser (Egypt) and Josip Broz Tito (Yougoslavia), this movement was formally set up after the Conference of Bandung (Indonesia, April 1955), which, condemning all colonialism and imperialism, drafted ten principles among which are “the respect of human rights, equality among all peoples, the respect of the *Charter of the United Nations* regarding defense and the peaceful settlement of conflicts. See also Tamara Kunanayakam et al., *Quel développement? Quelle coopération internationale?*, (Geneva: CETIM, 2007), [http://www.cetim.ch/en/publications\\_ouvrages.php](http://www.cetim.ch/en/publications_ouvrages.php)

52 Cited by Nils Andersson in “Entre droit d'ingérence et devoir de protéger, où passe la frontière?”, *Responsabilité de protéger et guerres 'humanitaires: Le cas de la Libye*, (Paris: L'Harmattan Publishers, 2012), p. 55.

53 *Report of the ICISS*, § 2.4.

54 See, inter alia, [http://rwandadelaguerreaugenocide.univ-paris1.fr/wp-content/uploads/2010/01/Annexe\\_48.pdf](http://rwandadelaguerreaugenocide.univ-paris1.fr/wp-content/uploads/2010/01/Annexe_48.pdf)

55 *Report of the ICISS*, Cited in the Forward, p. VII.

56 See Hans-Christof von Sponeck [former United Nations Humanitarian Coordinator for Iraq and professor at the University of Marburg, Center for Conflict Studies], “Responsibility to protect: Introduction and implementation, distrust and misuse”, *Current Concerns*, N° 18/19, 8 May 2012: <http://www.currentconcerns.ch/index.php?id=1742>

## B. The Concept

Building on the “right of humanitarian intervention”,<sup>57</sup> the theory of the “responsibility to protect” aims to conceptualize and “legalize” military intervention, against a given state, to protect threatened populations on its territory. The two basic principles of this theory are formulated as follows.

*“1. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself; 2. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.”<sup>58</sup>*

The authors of this concept further clarify that:

*“The kind of intervention with which we are concerned in this report is action taken against a state or its leaders, with or without its or their consent for purposes which are claimed to be humanitarian or protective.”<sup>59</sup>*

### 1. The Targeted Crimes

According to those who conceived of it, the “responsibility to protect” applies only to war crimes, crimes against humanity, ethnic cleansing or genocide. However, there is no universal definition of these crimes, and it is worth noting that most of the statutes of the international tribunals (on Yugoslavia, Rwanda etc.) have their own definition of these crimes, definitions to which one must refer according to the situation in question. Nonetheless, in order to have a better idea of what these four crimes involve, it is worth mentioning here the definition given by the International Criminal Court under whose purview comes judging three of them, only ethnic cleansing being excluded.<sup>60</sup>

Used mainly in the media during the armed conflicts in the former Yugoslavia, ethnic cleansing has no exact definition in international law. However, the current United Nations Secretary-General, Ban Ki-moon, has proposed the following interpretation: *“Ethnic cleansing is not a crime in its own right under international law, but acts of ethnic cleansing may constitute one of the other three*

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57 *Report of the ICISS*, Forward, p. VII.

58 *Ibid.*, p. XI.

59 *Ibid.*, § 1.38.

60 Entered into force 1 July 2002, *The Statute of Rome* establishing the International Criminal Court, in Article 6 defines the **crime of genocide** as follows: “genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.” Article 7 defines **crimes against humanity** as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

**War crimes** are defined in Article 8. Given the length of this article (five pages!), it is better to refer to reader directly to it to know what acts can constitute war crimes. We might just clarify that a war crime constitutes a serious violation of the *Geneva Conventions* and of the laws and customs of war “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes”.

crimes.”<sup>61</sup>

## **2. Conditions of Intervention**

According to the ICISS, only exceptional circumstances, similar to those justifying “humanitarian intervention”, warrant a military intervention, for example: “cases of violence which so genuinely ‘shock the conscience of mankind’ or which present such a clear and present danger to international security”.<sup>62</sup> It sets forth six criteria necessary for such an intervention: appropriate authority, just cause, good intention, last resort, proportionality of means, and reasonable prospects.<sup>63</sup> Two of these, highly questionable, merit examination: just cause and reasonable perspectives.

### Just cause

For the ICISS “the ‘just cause’ component of the decision to intervene is amply satisfied” if one of the two following conditions is met: “large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product of either deliberate state action, or state neglect or inability to act, or a failed state situation; or large scale ‘ethnic cleansing’ actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape”.<sup>64</sup>

The risk factor is thus sufficient to intervene militarily in a given country. Although it is aware of manipulations at the level of information flow, the ICISS does not pose as a condition a mission in the field to verify the allegations, but satisfies itself with recommending it when “time allows”!<sup>65</sup> This brings us right back to the theory of preventive war so dear to the United States...<sup>66</sup>

### Reasonable Prospects

By reasonable prospects, the ICISS means the success of the military intervention. On this point, the ICISS demonstrates a “disconcerting” realism when it affirms that it excludes any military action against one of the five permanent members of the Security Council “even if all the other conditions for intervention described here were met”.<sup>67</sup> And it justifies its position in these terms: “The reality that interventions may not be able to be mounted in every case where there is justification for doing so, is no reason for them not to be mounted in any case.”<sup>68</sup>

The ICISS omits, however, to add to this list the “friendly” states and/or allies of these great powers against which a military intervention is unthinkable. Thus, the number of states that are potential targets is limited to those “rogue” or “failed” states, to use the United States’ terminology.

## **3. Instrumentation of Human Rights**

Although the ICISS report insists on the protection of civilian populations and insists also that human rights are a major consideration,<sup>69</sup> the “responsibility to protect”, like the two theories discussed above, aims to protect only the right to life, and even then only on the condition that there is genocide, ethnic cleansing, war crimes or crimes against humanity. Moreover, the report’s authors

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61 *Implementing the responsibility to protect: Report of the Secretary-General*, A/63/677, 12 January 2009, § 3.

62 *Report of the ICISS*, § 4.13.

63 *Ibid.*, § 4.16.

64 *Ibid.*, § 4.19.

65 *Ibid.*, § 4.31.

66 Concept launched by the former president of the United States Georges W. Bush, following the attacks of 11 September 2001, under the pretext of combating terrorism (see, inter alia, the article by Paul-Marie de La Gorce, in *Le Monde Diplomatique*, September 2002, [http://www.monde-diplomatique.fr/2002/09/LA\\_GORCE/16840](http://www.monde-diplomatique.fr/2002/09/LA_GORCE/16840) and [http://www.irenees.net/bdf\\_fiche-notions-175\\_fr.html](http://www.irenees.net/bdf_fiche-notions-175_fr.html)

67 *Report of the ICISS*, § 4.42.

68 *Ibid.*

69 See, inter alia, §§ 1.25 to 1.28.

are quite explicit in this regard: “*human rights falling short of killing or outright ethnic cleansing, for example systematic racial discrimination or the systematic imprisonment or other repression of political opponents*” do not constitute a motive for military intervention.<sup>70</sup>

Beyond the obvious hypocrisy of all this, the message to states, which have the obligation to respect human rights and assure that they are respected, is, for the least, unsettling.

#### ***4. The Responsibility to Protect is Not Limited to the Possibility of Armed Intervention***

For the authors of the ICISS report, the three pillars of the “responsibility to protect” are prevention, reaction (armed intervention) and reconstruction, which are described as follows:

*“1. The Responsibility to prevent: to address both the root causes and direct causes of internal crises and man-made crises putting populations at risk. 2. The responsibility to react: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention. 3. Responsibility to rebuild: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.”*<sup>71</sup>

The ICISS report details, step by step, the approach to military intervention and the post-intervention phase, up to and including... relations of the intervening states with the media (!), which it is not necessary to analyze here point by point. The essential is to know if a military intervention is authorized by the international law in force and/or desired within the relations between the states, and, if yes, under what conditions (see below). This justifies a brief remark on the notion of prevention, which is presented as one of the pillars of the “responsibility to protect”.

In fact, **prevention** is presented by the ICISS, but also by the United Nations Secretary-General, as the most important aspect of the “responsibility to protect”: numerous exactions and serious crimes could be avoided if multiple means were mobilized sufficiently early. According to the ICISS, the best way to assure that extreme cases, such as the committing of serious crimes, never happen is the creation of a stable and harmonious climate within society.

Although it avoids making explicit reference to the many reports on the state of the world published every year by the United Nations agencies, the ICISS mentions certain profound causes of conflicts (poverty, political repression and inequality in the distribution of resources).<sup>72</sup> The ICISS further deplores the burden of the foreign debt, the shrinking of aid to development and the trade policies that penalize the countries of the Global South.<sup>73</sup> But all this appears cosmetic given that the ICISS emphasizes, for prevention, sanctions (economic, legal etc.) and their operational aspects.<sup>74</sup> Worse, it offers no specific proposal for dealing with the problems evoked above. It limits itself to mentioning Article 55 of the *Charter* (international social and economic cooperation) without saying who will effectively implement it concretely, how and with what means. And it passes the matter back to the national governments, which are held responsible for “good governance”, human rights protection, promotion of socio-economic development and an equitable sharing of wealth,<sup>75</sup> without saying anything on the unfavorable international environment for most of them (regarding trade and financial rules, in particular), not to mention the loss of their economic and political sovereignty from all this nor the corruption of the political leaders by the agents of the great powers

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70 Ibid., § 4.25.

71 Ibid., p. XI.

72 Ibid., § 3.19.

73 Ibid., § 3.8.

74 Ibid., pp. 21 à 31.

75 Ibid., § 3.1.



and transnational corporations.

### **C. Arguments in Favor of Military Interventions**

The two main arguments set forth by the ICISS are: the *Charter of the United Nations* is obsolete, and the conditions in which sovereignty is exercised have changed since the end of the second World War.

#### **1. The United Nations Charter Is No Longer Relevant**

For the authors of the ICISS report, the *Charter of the United Nations* is obsolete, for they figure that “*U.N. peacekeeping strategies, crafted for an era of war between states and designed to monitor and reinforce ceasefires agreed between belligerents may no longer be suitable to protect civilians caught in the middle of bloody struggles between states and insurgents. The challenge in this context is to find tactics and strategies of military intervention that fill the gulf between outdated concepts of peacekeeping and full-scale military operation that may have deleterious effects on civilians.*”<sup>76</sup>

#### **2. The Conditions for the Exercise of Sovereignty Have Changed**

The authors of the report reckon also that “*the conditions under which sovereignty is exercised and intervention is practiced have changed dramatically since 1945. Many new states have emerged and are still in the process of consolidating their identity. Evolving international law has set many constraints on what states can do, and not only in the realm of human rights. The emerging concept of human security has created additional demands and expectations in the ways states treat their own people. And many new actors are playing international roles that previously were more or less the exclusive preserve of states.*”<sup>77</sup>

One might agree that the sovereignty of states is effectively limited by the international conventions, not always to good effect, moreover. For example the WTO agreements and free-trade treaties (multilateral or bilateral), legally binding for these states, confer advantage on private interests (especially transnational corporations) to the detriment of the general welfare. It is the same when a state renounces the jurisdiction of its own courts by submitting to the jurisdiction of the International Center for the Settlement of Investment Disputes (ICSID)<sup>78</sup> in its conflicts with transnational corporations on its own territory. On the other hand, while international human rights treaties allow United Nations bodies (Human Rights Council and the treaty oversight bodies, in particular) to monitor the human rights situation in a given country, these bodies do not have the same coercive power as the WTO and the ICSID. These matters are not at all dealt with in the ICISS. The authors of the ICISS report have nothing to offer, for example, to sanction the serious human rights violations (the rights to life, to health, to a healthy environment and to be free from forced displacement) committed by transnational corporations.

It is true that sovereignty, such as it is defended by certain states, is questionable, but who has the authority to decree if a given state treats its citizens properly or not? Certainly not the powerful states, which have become defenders more of private interests (transnational corporations) than of their citizens.

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76 Ibid., § 1.23.

77 Ibid., § 1.33.

78 See in this regard Critical Report N° 7, *International, Regional, Subregional and Bilateral Free Trade Agreements*, p.14: [http://www.cetim.ch/en/publications\\_cahiers.php#traites](http://www.cetim.ch/en/publications_cahiers.php#traites)

In its report, the ICISS gives a definition of human security that appears valid: “*Human security means the security of people – their physical safety, their economic and social well-being, respect for their dignity and worth as human beings, and the protection of their human rights and fundamental freedoms.*”<sup>79</sup> However, it focuses above all on the physical protection of people (when this is possible), referring the aspect of their economic and social well-being to the *Charter's* Chapter IX (International Economic and Social Cooperation) and to the national governments, without making any specific proposals and without any concern about the ability of these governments nor about the unfavorable international environment that is undermining the efforts of those who want to really act in the interest of their populations.

#### **D. Circumventing the *Charter of the United Nations***

The founders of the “responsibility to protect” are well aware that, in the present circumstances, it is very difficult, indeed impossible, to amend the *Charter of the United Nations*, which enshrines the sovereign equality of its member states and explicitly prohibits any recourse to force in settling disputes in international relations (see above).<sup>80</sup> They use double language: on the one hand they claim that the *Charter* is obsolete within the current context, as discussed above, and on the other hand, they try to “interpret” it in favor of military interventions thus exploiting the founding principles of the United Nations, as others have done before them. They will try to interpret legitimate defense and collective actions under the aegis of the Security Council (Chapter VII of the *Charter*), the only exceptions to the principles of non-interference and non-intervention contained in the *Charter* (see above), going so far as to suggest that the Security Council and/or intervening states do without the *Charter* if necessary (see below).

##### ***1. Circumventing the Charter of the United Nations in Order to Legitimate Military Interventions***

The greatest attempt to undermine the *Charter of the United Nations* concerns its Article 2.4, which stipulates:

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

The partisans of a “humanitarian” intervention consider that such an intervention would harm neither the territorial integrity nor the political independence of the state on whose territory the intervention takes place, owing to the limits of time, space and means devoted to the action.<sup>81</sup> Moreover, it would not be incompatible with the purposes of the United Nations, for they include development and the encouragement of the “*respect of human rights and fundamental freedoms for all, without discrimination of race, sex, language or religion*”.<sup>82</sup>

The argument consisting of affirming that a “humanitarian” intervention would not be contrary to the purposes proclaimed by the United Nations since among these is the respect of human rights is biased reasoning and does not take into account the overall provisions of the *Charter*. As already emphasized, the first article of the *Charter* stipulates clearly the main purpose of the United Nations, which specifically is:

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<sup>79</sup> *Report of the ICISS*, § 2.21.

<sup>80</sup> For an amendment to be adopted, a two-thirds majority is required, including all members of the Security Council, during a duly convened Assembly. (See Articles 108 and 109 of the *Charter*).

<sup>81</sup> This is also the opinion of those who devised the “responsibility to protect”. See « responsabilité de protéger ». See *Report of the ICISS*, § 5.26.

<sup>82</sup> E. Perez-Vera, op.cit., p. 415.

*“to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principle of justice and international law, adjustment or settlement of international disputes of situations which might lead to a breach of the peace; ... Develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”*

Further, how can one affirm that a military intervention does not constitute a violation of the territorial integrity of a state, be it even temporarily? And what about the right of peoples to self-determination, enshrined in the two international human rights covenants, if their state is under occupation or foreign administration? In such circumstances, could the individual exercise civil, political, economic, social and cultural rights?

Even powerful states practicing military interventionism are careful not to acknowledge formally this international practice in order to maintain the possibility of exploiting Chapter VII of the *Charter* according to the circumstances and their interests. For example, during the fifty-fourth session of the United Nations General Assembly in 1999, many NATO member states intervening in Serbia for the protection of Kosovo were very clear about this. Thus, the German Foreign Minister at the time, J. Fischer stated in his speech: *“'Humanitarian interventions' could appear in practice on the outside of the United Nations system. This would be very problematic. The intervention in Kosovo has taken place in a situation where the Security Council had its hands tied, all the efforts deployed in favor of a peaceful solution having failed. ... This action, which this particular situation alone justifies, must, however, not create a precedent which might weaken the monopoly held by the Security Council for authorizing the legal use of force at the international level, and a fortiori, give a blank check for the use of force on the pretext of furnishing humanitarian aid. That would open the door to arbitrariness and anarchy, and we would plunge back into the nineteenth century.”*<sup>83</sup>

In other contexts, the United States and France have been even more categorical, even if they are currently ferociously in favor of the “responsibility to protect”. In fact, the United States had condemned the “limited sovereignty” doctrine in 1968, following upon the invasion of Czechoslovakia by the Soviet Union and its use of this principle to justify it.<sup>84</sup> On 12 January 1979, France took an unequivocal position in the Security Council on the subject of Vietnamese intervention in Cambodia:

*“The idea according to which the existence of a loathsome regime could furnish a basis for a foreign intervention and legitimate its overthrow by force is extremely dangerous, for it would result, at the least, in calling into question the very existence of an international order by making the maintenance of any regime dependent on a judgment of its neighbors.”*<sup>85</sup>

Finally, one should emphasize that most of the legal doctrine is clearly on the side of an interpretation of Article 2.4 of the *Charter of the United Nations* according to which this article creates a general prohibition on the recourse to force – or the threat of a recourse to force – in

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83 Speech by J. Fischer, German Foreign Minister, at the 54th session of the United Nations General Assembly, 22 September 1999, quoted by Par Olivier Corton and François Dubuisson, “L’hypothèse d’une règle émergente fondant une intervention militaire sur une ‘autorisation implicite’ du Conseil de sécurité”, *Revue général de droit international public*, 2000, Volume 4, Tome 104, p.890.

84 Quoted by Robert Charvin, in *Le droit international et les puissances occidentales: Tentatives de liquidation*, (Geneva: CETIM Publishers, 2013), p. 15.

85 Security Council, S/PV 2019, 12/1/1979, § 36. Quoted by Robert Charvin in “La guerre en Libye et la légalité internationale”, in *Responsabilité de protéger et guerres 'humanitaires': Le cas de la Libye*, (Paris: L'Harmattan Publishers, 2012), p. 72.

international relations outside the two exceptions already mentioned.

## **2. The Geneva Conventions**

The *Charter of the United Nations* is not the only text subject to attacks aiming to legitimate humanitarian intervention. In fact, the *Geneva Conventions of August 12, 1949* and their *Additional Protocols* (international humanitarian law) have also been read as allowing such an interpretation. The first common article to these conventions stipulates that “the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”. The term “ensure respect” has been interpreted as also authorizing the use of force.<sup>86</sup> This reading, however, is directly contradicted by other provisions of the *Conventions*, in particular Article 3 of the second *Protocol Additional*, clearly entitled “Non-intervention”, which states: “*Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.*”

Thus, it is imperative to be clear on this point: **no international convention legitimizes the use of force**, including in order to stop human rights violations, except, obviously, interventions decided by the Security Council.

## **3. Unlimited Powers for the Security Council**

In spite of this, the originators of the “responsibility to protect” are undaunted, attributing an unlimited power to the Security Council, indeed, pushing it to violate the *Charter*! The ICISS affirms that: “*Because the prohibitions and presumptions against intervention are so explicitly spelled out in the Charter, and since no 'humanitarian exception' to these prohibitions is explicitly provided for, the role of the Security Council becomes of paramount importance.*”<sup>87</sup> It also affirms: “*It is the Security Council which should be making the hard decisions in the hard cases about overriding state sovereignty.*”<sup>88</sup> Building on the claim that the compatibility of the decisions of the Security Council with the *Charter* is not subject to any control, which is true, the ICISS suggests that the Council interpret at its discretion what constitutes a threat to international peace and security: “*... since there is no provision for judicial review of Security Council resolutions, and therefore no way that a dispute over Charter interpretation can be resolved, It appears that the Council will continue to have considerable latitude to define the scope of what constitutes a threat to international peace and security.*”<sup>89</sup>

Apparently, the acknowledged incompatibility of the decisions of the Security Council with the *Charter* does not disturb the ICISS, which refrains from making any proposals that might remedy this. That the Security Council from time to time fails to do its duty in making its decision is one thing. Offering it an intellectual and moral justification enabling it to continue to do so is quite another.

## **4. Unauthorized Interventions (Collective or Unilateral) Legitimated**

The “good advice” to the powerful of this world from those at the origin of the “responsibility to protect” does not stop there. As it is a matter of “saving lives”, they recommend that those intervening obtain “authorization after the facts” or *ex post facto*!<sup>90</sup> This message was well received by the United States, which has intervened unilaterally in Afghanistan (October 2001) and in Iraq

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86 Katia Boustany, “Intervention humanitaire et intervention d'humanité, évolution ou mutation en Droit International?”, *Revue québécoise de droit international*, Volume 8 N°1 (1993-1994), p. 106.

87 *Report of the ICISS*, § 6.13.

88 *Ibid.*, § 6.14.

89 *Ibid.*, § 6.18.

90 *Ibid.*, § 6.36.

(March 2003), obtaining the approval of the United Nations only afterward. Worse, the ICISS encourages unilateral interventions, provided that it is “*a conscience-shocking situation crying out for action*”, and if the Security Council and the General Assembly are stalemated: “*As a matter of political reality it would be impossible to find consensus in the Commission's view, around any set of proposals for military intervention which acknowledged the validity of any intervention not authorized by the Security Council or the General Assembly.*”<sup>91</sup>

## **E. The United Nations 2005 World Summit**

The fundamental principles of the “responsibility to protect” were encompassed in the Final Declaration of the 2005 World Summit devoted, in theory, to the implementation of the Millennium Goals.<sup>92</sup> In paragraphs 138 and 139 of the Declaration, they are formulated as follows:

*“138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.*

*139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.”*<sup>93</sup>

A substantial chapter in the *Final Declaration* was devoted to the creation of a commission for the consolidation of peace, to be set up in 2006,<sup>94</sup> which would facilitate the work of post-intervention “reconstruction”. The Secretary-General was to appoint, in 2008 a “Special Representative on the Responsibility to Protect” in order that he refine this concept.<sup>95</sup> Thus, the bulk of the proposal of the ICISS would be “approved”, and the wishes of Kofi Annan would be fulfilled.

Nonetheless that the “responsibility to protect” is mentioned in an official United Nations

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91 Ibid., § 6.37.

92 See also the critical article of the CETIM on the results of this summit, published in its *Bulletin* N° 24, October 2005.

93 General Assembly Resolution 60/1, 24 October 2005: [http://www.un.org/fr/documents/view\\_doc.asp?symbol=A/RES/60/1&TYPE=&referer=/fr/&Lang=E](http://www.un.org/fr/documents/view_doc.asp?symbol=A/RES/60/1&TYPE=&referer=/fr/&Lang=E)

94 <http://www.un.org/fr/peacebuilding/>

95 <http://www.un.org/fr/preventgenocide/adviser/responsibility.shtml>

document, that the Security Council refers to it in its resolutions<sup>96</sup> and that the two most recent United Nations Secretaries-General (Kofi Annan and Ban Ki-moon) militate in favor of it<sup>97</sup> are not sufficient to *legalize* it, much less make it legally binding, given that it contradicts the *Charter* (see below). If the partisans of this concept wish to make it legally binding, they must amend the *Charter*, which, in this case, would mean the effective end of the United Nations and a return to the nineteenth century.

## F. Implementation of the “Responsibility to Protect”

The concept of the “responsibility to protect” was implemented for the first time in the military intervention against Libya in 2011, ruled at the time by Moammar Qaddafi. In the wake of the “Arab spring”, this country was overtaken by street demonstrations (fast transformed into armed protest) which resulted in violence. Contrary to its practices, the Security Council acted quickly, adopting first Resolution N° 1970<sup>98</sup>. This resolution, besides seizing the International Criminal Court, set up a series of measures (arms embargo, travel prohibition for some Libyans and members of the Qaddafi family as well as freezing this family's overseas assets), while also setting up a committee for monitoring the implementation of the sanctions. Barely three weeks later, (17 March 2011), the Security Council reckoned that “the Libyan authorities are not observing Resolution 1970” and adopted a new resolution (1973). In this second resolution, the tone was clearly threatening: since the Libyan government was not fulfilling its “responsibility to protect the Libyan population”, and since the situation in the country constituted “a threat to international peace and security”, the Security Council decided to authorize members states “*acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory*” (§ 4). A no-fly zone was declared, the arms embargo was reinforced (systematic inspections of ports, customs facilities etc.) the assets freeze was broadened to “*all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the Libyan authorities, as designated by the Committee, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, as designated by the Committee*” (§ 19).

On the basis of this resolution, NATO (especially those member states also permanent members of the Security Council<sup>99</sup>), supported by three Arab countries,<sup>100</sup> intervened militarily in Libya starting 19 March 2011. The terms of this resolution would be observed in a partisan manner by NATO and its allies, for the real objective was to provoke a change of regime: The NATO mission “*was meant to be about protecting the Libyan population, but aimed at a regime change. The arms embargo affected the government army. The opposition militias were armed with weapons. The government mercenaries were forbidden, and members of special military forces (in civilian clothes) from*

96 See, among other resolutions, N° 1706, 31 August 2006 (Darfour) and N° 1975, 30 March 2011 and 2000, 27 July 2011 (Ivory Coast).

97 Dans son rapport portant sur ce sujet, le Secrétaire général énonce que « *lorsqu'un État refuse d'accepter une aide internationale aux fins de prévention et de protection, commet des crimes et des violations particulièrement choquants contre lesquels les populations devraient être protégées et ne répond pas à des mesures moins coercitives, il met en fait la communauté internationale au défi d'assumer les responsabilités qui lui incombent en propre.* », voir « La mise en oeuvre de la responsabilité de protéger », A/63/677, § 56, 12 January 2009.

98 Adopted 26 February 2011, <http://www.un.org/en/sc/documents/resolutions/2011.shtml>

99 The United States, France, and the United Kingdom. Other NATO member states such as Italy, la Turkey, Denmark, Canada, the Netherlands etc. also contributed.

100 United Arab Emirates, Jordan and Qatar.

*NATO and other countries were allowed in and took part in some of the opposition forces. NATO aircraft fought government forces and supported the resistance. The foreign accounts of the government were frozen, funds flowed to opposition forces from abroad.*”<sup>101</sup>

The result was disaster, even if those intervening speak of success. Without being exhaustive, the following elements give an idea of how this intervention took place.

The humanitarian organizations estimate the number of dead at between 100 and 400 before the NATO intervention in Libya. At the end of the intervention, the Libyan authorities estimated the number of dead to be between 25,000 and 50,000, not counting the hundreds of thousands of displaced persons and/or refugees. Several cities as well as the country's infrastructure were totally or partially destroyed by the intensive bombardments by the NATO forces.<sup>102</sup> The Libyan leader, Moammar Qaddafi, and several members of his family were murdered. A change of government was carried out, and chaos reigned throughout the country. In these conditions and even before the capture (alive) and then the murder of Qaddafi, the Security Council hastened to lift most of the sanctions against Libya, including the arms embargo.<sup>103</sup>

As for the real motives of those who intervened, the following elements shed some further light and require no comment.

In a document published in France after the collapse of the Qaddafi regime, the National Transitional Council of Libya (supported by NATO) committed itself to reserving to France 35% of its oil production in return for the “total and permanent support of our council”. At the same time, the French defense minister announced that France had been responsible for 35% of the air strikes on the Qaddafi forces, a curious coincidence of figures.<sup>104</sup>

In his speech of 28 March 2011, the United States President, Barak Obama, gave his view of the situation: “For generations, the United States of America has played a unique role as an anchor of global security and as an advocate for human freedom. Mindful of the risks and costs of military action, we are naturally reluctant to use force to solve the world’s many challenges. But when our interests and values are at stake, we have a responsibility to act.”<sup>105</sup>

As noted above, even with “good intentions”, it is difficult to defend the concept of “responsibility to protect”, given that it is not possible – as in the case of “intervention based on humanity” – to guarantee the disinterested character of the intervention. Moreover, although, in favor of the concept of “responsibility to protect”, Hans-Christof von Sponeck, the former United Nations Humanitarian Coordinator in Iraq, does not mince his words regarding the Libyan experience and is very critical of the Security Council: “By authorizing member states 'to take all necessary means' in the Libyan crisis, the UN Security Council discharged itself from the responsibility to ensure that the resolution conditions were met. Such irresponsible actions by the UN Security Council have so far not been encountered in the history of the United Nations. The R2P [right to protect] test in Libya failed miserably.”<sup>106</sup>

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101 Hans-Christof von Sponeck, “Responsibility to protect: Introduction and implementation, distrust and misuse”, *Current Concerns*, N° 18/19, 8 May 2012: <http://www.currentconcerns.ch/index.php?id=1742>

102 During the 200 days of the intervention, they carried out 26,323 sorties of which 9,658 were war sorties (bombardments and missile firings)! See also Nils Andersson “Entre droit d'ingérence et devoir de protéger, où passe la frontière?”, *Responsabilité de protéger et guerres humanitaires: Le cas de la Libye*, (Paris: L'Harmattan Publishers, 2012), p. 55.

103 Resolution S/RES/2009, 16 September 2011.

104 See the article by Tzvetan Todorov “Responsabilité de protéger et la guerre en Libye” in *Responsabilité de protéger et guerres humanitaires: Le cas de la Libye*, (Paris: L'Harmattan Publishers, 2012), p. 148.

105 *Remarks by the President in Address to the Nation on Libya*: <http://www.whitehouse.gov/photos-and-video/video/2011/03/28/president-obama-s-speech-libya#transcript>

106 Hans-Christof von Sponeck, “Responsibility to protect: Introduction and implementation, distrust and misuse”, *Current Concerns*, N° 18/19, 8 May 2012: <http://www.currentconcerns.ch/index.php?id=1742>

## CONCLUSION

Whatever the vocabulary used, the three theories examined in this report are similar in many ways and have the same purpose: provide a legal and moral justification to military interventions. The “responsibility to protect” suffers from the same deficiencies as the first two: it is not legal, nor applicable in practice, and, as formulated, its application is not even desirable. That it has the favor of the majority of the Security Council and that it may be encompassed in a United Nations document changes nothing of its statute and is not sufficient to legalize it. This is why, moreover, its promoters have chosen to deviate from the *Charter of the United Nations* in order to justify unjustifiable wars. Except that, as this report has pointed out, the arguments advanced are unacceptable given that the *Charter* prohibits explicitly any recourse to force in settling disputes in international relations and that no international convention legitimizes the use of force. And the two exceptions provided for in the *Charter* are carefully structured (see above Chapter I.B.4), even if the Security Council occasionally abuses them.

Beyond the legal debate, how can the “responsibility to protect” be applied without falling into total arbitrariness? It provides for the protection of civilian populations but, in conformity with Realpolitik, in only some countries (“rogue” and “failed” states?), and provided that the cause is “just” (but who decides?), that the powerful states intervene (but if possible disinterestedly!), that the success of the intervention is guaranteed (but who can guarantee it?) and that sufficient media pressure is created to sway public opinion in favor of it!

Further, the “responsibility to protect” comes up against the same major problem as the preceding theories but without supplying any response: the impossibility of proving the total disinterest of the intervening powers. Moreover, the practices of powerful states during the past three decades furnish sufficient proof in this regard, several of which have been mentioned in this report.

Worse, the partisans of intervention theories pay little attention to the sovereignty of states and the right of peoples to self-determination when they want to intervene with guns blazing. They have no concern for the question of knowing within what framework the peoples and citizens will exercise their civil, economic, social and cultural rights if their country is under military occupation or foreign control! And they grant to the powerful of the moment the legitimacy, as in the nineteenth century, to decree which states have “failed” or, more precisely, which states “fail to protect their population”.

In a world where emotion created by imagery in order to prepare public opinion, indeed to manipulate it, is more and more invasive, we are not free from abuses, all of which is extremely dangerous for international peace and security, in the fullest sense of the term. We must give credit to France, in spite of its usual positions in favor of military interventionism, for having on occasion forcefully denounced this danger, as it did before the Security Council regarding the Vietnamese intervention in Cambodia in 1979:

*“The idea according to which the existence of a despicable regime could provide a basis for outside intervention and legitimate its overthrow by force is extremely dangerous, for it will result, in the end, in impugning the very existence of an international order by making every regime dependent upon the judgment of its neighbors.”*<sup>107</sup>

Of course, nobody wants to be the witness of massacres. But discredited theories from a bygone era

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107 Security Council, S/PV 2019, 12/1/1979, § 36. Quoted by Robert Charvin in “La guerre en Libye et la légalité internationale”, in *Responsabilité de protéger et guerres 'humanitaires': Le cas de la Libye*, (Paris: L'Harmattan Publishers, 2012), p. 72.



are of no use. On the contrary, they support the powers of the moment in their arbitrary practices, which see international law currently in force as a ball at their feet ready to be played with. Whatever the inadequacies of the United Nations in practice, its *charter*, today, still remains revolutionary. It is that *charter* that enshrines sovereign equality among states and equality of the right of peoples to self-determination, thus putting an end to the classification of peoples as “civilized” and “barbaric”. It is that *charter* that prohibits wars, be they “just” or not, and enshrines maintaining international peace and security through peaceful means. It is that *charter* that also enshrines international cooperation in all areas and respect for human rights. Finally, it is that *charter* that protects, at the legal level, the small and the weak against the arbitrariness of the powerful. These arguments are largely sufficient as a basis for opposing any war theory, even presented under the name of “responsibility to protect”.

**Acknowledgement**

*This report received support from the Swiss Agency for Development and Cooperation (DDC), the state (canton) and the City of Geneva, the municipalities of Carouge, Confignon, Chêne-Bougeries, Lancy, Onex, Meyrin, Plan-les-Ouates, Vernier and Loterie Romande. It is part of the CETIM Human Rights Programme 2011-2013.*

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