# HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW

A.P.V. ROGERS*

Nothing seems to have divided international lawyers as much in recent years as the question of humanitarian intervention. Discussions on the subject seem to produce an explosive mixture of ethics, politics, and law; and it is not always clear where scholars are drawing the dividing lines among the three, if at all.

## I. USE OF FORCE

The United Nations Charter envisages lawful use of force in only two cases: (i) in individual or collective self-defense;[1] or (ii) as a result of a mandate from the United Nations Security Council ("Security Council") acting under Chapter VII of the Charter.[2] Some international lawyers have claimed that a state may also use force to rescue or evacuate its nationals who are in danger abroad.[3] Further, a

* Yorke Distinguished Visiting Fellow of the Faculty of Law and Fellow of the Lauterpacht Research Centre for International Law, University of Cambridge; Fellow of the Human Rights Centre, University of Essex; and author of the prize-winning book, LAW ON THE BATTLEFIELD (2d ed. 2004).

1. The right of self-defense is subject to conditions of necessity and proportionality. *See* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 245 (July 8). According to Bruno Simma, the concept of self-defense is not broad enough to encompass actions in defense of victims of human rights violations. *See* Bruno Simma, *NATO, the UN, and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 1-3 (1999). The United States and United Kingdom's intervention in Afghanistan following the attacks on the World Trade Center and Pentagon in September, 2001, however, was justified as self-defense, according to United Kingdom Defense Minister Geoff Hoon, *see* Kim Sengupta & Andrew Buncombe, *Air Strikes on Afghanistan: Another Night, Another Relentless Wave of Bombs*, INDEP. (London), Oct. 9, 2001, at 3, and charge d'affaires to the United Nations, Stewart Eldon, *see* Judy Dempsey & Carola Hoyos, *U.S. Warns It May Attack Other States*, FIN. TIMES, Oct. 9, 2001, at 9.

2. The author has not come across any opposition to the principle that the Security Council may authorize the use of force for humanitarian purposes in appropriate cases.

3. One such lawyer is Judge Rosalyn Higgins. *See* Ian Brownlie & C. J. Apperley, *Kosovo Crisis Inquiry: Memorandum on the International Law Aspects*, 49 INT'L & COMP. L.Q. 878, 892-93 (2000). For example, many commentators seemed to regard as self-defense the actions of the Israeli military in rescuing the occupants of a hijacked aircraft at Entebbe in 1976. *See, e.g.*, MALCOLM SHAW, INTERNATIONAL LAW 1032-34 (2003); ANTONIO CASSESE, INTERNATIONAL LAW 313-16 (2001); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 203-37 (2001).

standard textbook on international law advocates that international use of force without Security Council mandate may be justified: (i) in self-defense (which includes collective self-defense, protection of a state's nationals abroad under certain conditions, and possibly anticipatory self-defense)[4], (ii) with the genuine consent of the territorial state,[5] or (iii) in necessary and proportionate response to an unlawful but small-scale armed action by another state.[6] The author in question, however, does not consider legally permissible the use of force to stop atrocities within other states.[7]

It has, nevertheless, been argued by some that interfering by force in the internal affairs of another state to prevent an overwhelming humanitarian catastrophe is justified.[8] According to this argument, international law is not set in concrete and must adapt to meet new situations. The U.N. Charter cannot cover every eventuality that occurs and individual states must have the legal power to intervene to prevent genocide or widespread crimes against humanity until such time as the Security Council takes control. The North Atlantic Treaty Organization (NATO) intervention in Kosovo in 1999 was said to be justified on the grounds of such a humanitarian crisis coupled with non-compliance by the parties with Security Council Resolutions.[9]

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4. The United Nations Charter speaks of "the inherent right of individual or collective self-defense if an armed attack occurs ...." U.N. CHARTER art. 51. In the author's opinion, this clause does not require a state to wait until an armed attack is actually launched before it can use force in self-defense; that might be too late. A state must be able to act in anticipation of an imminent attack. "[T]he practice of a majority of states (including the United Kingdom) and considerations of common sense strongly suggest that a limited right of anticipatory self-defense exists." Christopher Greenwood, *International Law and the NATO Intervention in Kosovo: Memorandum Submitted to the Foreign Affairs Committee of the House of Commons*, 49 INT'L & COMP. L.Q. 926, 930 (2000).

5. Collective self-defense requires a request by the state that regards itself as a victim of an armed attack. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 105 (June 27).

6. CASSESE, *supra* note 3, at 305-20.

7. *Id.* at 321. The same author argues that three sets of values—peace, human rights, and self-determination—underpin international relations, but that in the event of a clash, peace must prevail. *See* Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?* 10 EUR. J. INT'L L. 23, 24 (1999).

8. For a useful, analytical article regarding this issue that was written before the NATO intervention in Kosovo, see Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 MICH. J. INT'L L. 1005 (1998). *See also* Marc Weller, *Armed Samaritans*, COUNSEL, Aug. 1999, at 20; Christopher Greenwood, *Yes, but Is the War Legal?* OBSERVER, Mar. 28, 1999, at 22. *But see* Michael Byers, *Kosovo: an Illegal Intervention*, COUNSEL, Aug. 1999, at 16.

9. On March 2, 1999, the NATO Assistant Secretary General for Political Affairs declared: "The Allies came to the conclusion that due to the exceptional circumstances and the unbelievable danger of a humanitarian catastrophe, the non-compliance of both sides of the conflicts with existing U.N. Security Council Resolutions were sufficient legal basis

Other scholars are more skeptical. They maintain that the U.N. Charter allows for no exceptional cases. Further, they claim that because the "enforcers" of the law have a right of veto in the Security Council, international law is controlled by the whim of the few. That procedure is said to amount to a new form of imperial colonialism.[10] Regardless of these viewpoints, the peace agreement secured between the NATO states and Yugoslavia following the Kosovo intervention was later ratified by the Security Council in Resolution 1244 of June 10, 1999.

Admittedly, the concepts of self-defense, consent of the territorial state, and "atrocities" can be very subjectively interpreted and thus used as a pretext for intervention for other reasons. Such conduct would be an abuse of law. The potential for abuse, however, is not a reason to say that the right does not exist as a matter of law.

## II. UNITED NATIONS CHARTER

Article 2, paragraph 4, of the Charter provides: "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."[11] Does this provision mean that one can threaten or use force for other purposes?[12] The International Court of Justice has answered this question in the negative. It held that the United Kingdom's forcible intervention in Albanian waters violated Article 2, paragraph 4, rejecting the United Kingdom's argument that its actions did not threaten the territorial integrity or political independence of Albania.[13]

Article 2, paragraph 7, goes on to provide: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any

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for NATO action." Klaus-Peter Klaiber, The Alliance on the Eve of the Accession of Three New Members, Address to the Supreme Headquarters Allied Powers Europe (SHAPE) Officer's Association (Mar. 2, 1999), *in* S.O.A. NEWSLETTER' April 1999, http://www.nato.int/shape/community/soa/nl109.htm.

10. Paul Edwards, *Rich Man's War*, INDEP. (London), April 12, 1999, The Monday Review, at 2.

11. U.N. CHARTER art. 2, para. 4.

12. Some commentators have hinted at this concept. *See, e.g.*, Rosalyn Higgins, *International Law and the Avoidance, Containment, and Resolution of Disputes*, 230 RECUEIL DES COURS 9, 313-16 (1991). Michael Byers, however, has dismissed this idea as an Orwellian construction contrary to the clear intentions behind the U.N. CHARTER art. 51, cl. 4. *See* Byers, *supra* note 8, at 17.

13. Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 35 (April 9).

State ... but this principle is without prejudice to the application of enforcement measures under Chapter VII."[14] Chapter VII enables the Security Council in the event of any threat to the peace, breach of the peace, or act of aggression, to take measures to maintain or restore international peace and security. These measures may include the use of armed force, if necessary. Article 51, however, specifically declares "[n]othing in the present Chapter 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."[15] It is to be noted that Article 51 says nothing about any right of self-defense of a province in a member state or an oppressed minority in a member state.[16]

## III. POST-UNITED NATIONS CHARTER PRACTICE

The problem with the United Nations Charter in the realm of humanitarian intervention is that it was drawn up to regulate inter-state dealings. It does not really address serious humanitarian problems within a state or the international response to such problems. The lack of emphasis on the human rights question may be somewhat justified since even the proponents of humanitarian intervention do not claim the right to intervene to protect all human rights. These proponents do, however, claim a right of intervention in severe cases, such as genocide, crimes against humanity, and other serious infringements of the right to life. A number of commentators have pointed out that protection of human rights has become a matter of international, not merely domestic, concern. Indeed, one of the purposes of the United Nations is to promote and encourage respect for human rights.[17]

In recent years, the Security Council has in several cases decided

14. U.N. CHARTER art. 2, para. 7.

15. *Id.* art. 51. Other commentators have questioned whether the use of force in defense of human rights would be inconsistent with the purposes of the United Nations. *See, e.g.*, Arthur Paecht, *Kosovo as a Precedent: Towards a Reform of the Security Council? International Law and Humanitarian Intervention*, 13(1) HUMANITÄRES VÖLKERRECHT 34, 34-44 (2000).

16. NATO did not consider that the Kosovar Albanians had their own right of self-defense. *See* Byers, *supra* note 8. Indeed, the International Court of Justice has suggested that the principle of non-intervention would be worthless if there were a right to intervene at the request of an opposition party. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 126 (June 27).

17. U.N. CHARTER art. 1, para. 3; *see also* U.N. CHARTER pmbl.; U.N. CHARTER art. 55.

that problems within a state do represent a threat to international peace and security and has taken appropriate measures to remedy these problems. There is not, however, unanimity among the five permanent members on this issue. China and Russia, in particular, support the principle of non-intervention. Many states have therefore often had to deal with these situations without a United Nations mandate. India's U.N. representative explained its annexation of the Portuguese colony of Goa in 1961 as terminating an illegal occupation by the Portuguese. Although the United States representative condemned the Indian action, the Soviet Union vetoed a draft Security Council resolution calling for the withdrawal of Indian forces. In the case of the United States intervention in Grenada in 1987, the Governor-General of Grenada had invited international action.[18] The interventions of India in what was East Pakistan in 1971,[19] Vietnam in Cambodia in 1978, Tanzania in Uganda in 1979, and the Israeli operation at Entebbe in 1976 were claimed by the states concerned to be in self-defense. According to the United Kingdom representative at the United Nations, United Kingdom operations in the Falkland Islands in 1982 were an exercise of the inherent right of self-defense. It is of interest here that the United Kingdom must have considered the right of self-defense to continue for so long as the occupation of the Falkland Islands continued. The United States attack on Libya in 1986 was said to be on the grounds of self-defense, and the United States and United Kingdom vetoed a United Nations resolution condemning the attack. Interventions on ostensibly humanitarian grounds, though not necessarily invoking a legal right of humanitarian intervention, have taken place in Somalia, somewhat belatedly in Bosnia, and in Rwanda, Haiti, and East Timor. The Economic Community of West African States' intervention in Liberia in 1990-91, the operations in Iraq since 1991 to protect the Kurdish and Shia populations, and the Kosovo intervention of 1999, all without Security Council authorization, seem to have been tolerated by, or at least met with only muted dissent from, the international community.[20]

Although it has been suggested that the United Nations Charter can

18. *See* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 26 (2000).

19. The Indian representative in the Security Council referred also to the motive of rescuing the people of East Bengal from what they were suffering. *See* Adam Roberts, *The So-Called 'Right' of Humanitarian Intervention*, *in* 3 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3, 22 (H. Fischer & Avril McDonald eds., 2000).

20. *See* Steven Wheatley, *Chechnya and Humanitarian Interventions*, 150 NEW L. J. 30 (2000).

be modified "by the congruent practice of the member states crystallizing as a new principle of customary law,"[21] one can also see customary law as existing alongside the U.N. Charter to deal with situations not envisaged, or not adequately dealt with in the Charter.[22]

## IV. WHAT IS MEANT BY HUMANITARIAN INTERVENTION?

Although discussion among international lawyers of the concept of humanitarian intervention started in the context of actions for the protection or rescue of a state's nationals in trouble abroad, this is not humanitarian intervention in the sense that we now discuss it. It is better to regard such actions as self-defense or, perhaps, even as actions that do not involve the use of force against the territorial integrity of another state since they have a very specific and limited purpose.[23]

Currently, we tend to think of humanitarian intervention as use of force without the authorization of the Security Council to protect sections of a state's population from gross and persistent human rights abuses. The classic case of intervention is the NATO intervention in Kosovo in 1999. Is such action lawful?

## V. WHAT DO INTERNATIONAL LAWYERS HAVE TO SAY?

The lawyers seem to fall into six groups. First, there are those who say that humanitarian intervention is unlawful.[24] Second, some lawyers say that while humanitarian intervention is presently unlawful, it may one day become lawful, as an exception to the United Nations Charter system of collective enforcement, in closely defined circumstances.[25] Some in this group argue that states should move towards formulation of a principled code of law regarding humanitarian intervention. Others are keen to develop principles for humanitarian intervention but still within the United Nations Charter

21. Brownlie & Apperley, *supra* note 3, at 892-93.

22. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 94 (June 27).

23. *See* Higgins, *supra* note 12, at 314.

24. *See, e.g.*, SIMON CHESTERMAN, JUST WAR OR JUST PEACE?: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW (2001); Brownlie & Apperley, *supra* note 3, at 886-94; Byers, *supra* note 8.

25. Antonio Cassese suggests the following conditions: gross and egregious breaches of human rights, inability of the authorities to end them, inability of the Security Council to take coercive action, exhaustion of peaceful solutions, action by a group of states, with support (or at least non-opposition) of a majority of United Nations members, and with the limited purpose of stopping the atrocities. Cassese, *Ex Iniuria*, *supra* note 7. These are much the conditions that applied to the NATO intervention in Kosovo.

system. This would involve acceptance by the international community of a duty to protect human beings from large-scale loss of life or large-scale "ethnic cleansing." In such cases the principle of non-intervention would yield to the duty to protect, and the five permanent members of the Security Council would not apply their veto power.[26]

Third, another group expresses lukewarm acceptance of the fact that there might not be international condemnation of humanitarian intervention where a large number of lives (not necessarily those of nationals of the intervening state) have been saved as a result. They condemn, however, intervention to "restore democracy."[27]

Fourth, some argue that intervention is justified in cases of "collapsed states" where there is a genuine, immediate, and dire emergency, and where the action taken to protect lives is short and results in fewer casualties than would result from non-intervention.[28]

Other experts speak of a grey zone, which goes beyond strict ideas of legality to incorporate more flexible views of legitimacy.[29] While noting the strong views of non-Western countries suspicious of endowing powerful countries with discretionary powers in this regard and recognizing that the existing international law on the matter is not settled, they argue that a legal basis for humanitarian intervention ought to be made possible in certain clearly defined cases and make suggestions for amendments to the U.N. Charter to facilitate such intervention. There are two situations where such an intervention ought to be valid: (i) in cases of severe violations of international human rights or humanitarian law on a sustained basis, or (ii) when civil society is subjected to great suffering and risk owing to the

26. *See* INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), *available at* http://www.dfait-maeci.gc.ca/iciss-ciise/pdf/Commission-Report.pdf.

27. *See* M. N. SHAW, INTERNATIONAL LAW 1045-48 (5th ed. 2003); Simma, *supra* note 1, at 6 (stating that only a thin red line separates NATO's action on Kosovo from legality and there may be hard cases where there may be no choice but to act outside the law).

28. Brownlie & Apperley, *supra* note 3, at 891 (quoting T. M. Franck).

29. *See* DANISH INST. OF INT'L AFF., HUMANITARIAN INTERVENTION 122-30 (1999) (suggesting an *ad hoc* strategy of justifying humanitarian intervention, in extreme cases when the Security Council is blocked on moral and political, rather than legal, grounds). The authors of the report conclude that there is no legal right of humanitarian intervention without Security Council authorization but regret the asymmetry in the law between the means of enforcement and the potential for violations of international legal norms. *See also* Simma, *supra* note 1, at 12 (stating that the "NATO threat of force continued and backed the thrust of Security Council Resolutions 1160 and 1199 and can with all due caution thus be regarded as legitimately, if not legally, following the direction of these UN decisions"). This notion of the enforcement of Security Council resolutions by outside bodies was to be echoed in the prelude to the war against Iraq in 2003.

'failure' of their state. Even then, the right to intervene would be subject to a set of important pre-conditions.[30] Perhaps in the same category are those who consider that there is an ethical imperative for the law to permit humanitarian intervention in certain limited circumstances, even though there is no legal justification for such intervention in international law as it presently stands.

Fifth, there are those who consider that a right of humanitarian intervention is emerging, though still in its infancy.[31]

Sixth, there are those who go so far as to say that there is already a legal right of humanitarian intervention as a matter of last resort in extreme cases. Such a right arises where: (i) there exists—or there is an immediate threat of—the most serious humanitarian emergency involving large-scale loss of life, and (ii) military intervention is necessary as the only practicable means for ending or preventing such loss of life.[32] Even according to this group, several conditions apply to the exercise of the right of humanitarian intervention.

It should go without saying that if armed force is used, the rules of international humanitarian law should be observed. Some in this last group qualify their arguments by saying that the right only exists when a humanitarian crisis has reached a point of such seriousness and magnitude that it is recognized by the United Nations as constituting a threat to peace and security and the Security Council is unwilling or unable to act.[33] The first of these qualifications seems a

30. *See* INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED (2000), *abstracted in* 14 HUMANITÄRES VÖLKERRECHT 44, 44-54 (2001). The report suffers, at least in the version printed in the *Humanitäres Völkerrecht*, from an incorrect reference to Protocol I to the Geneva Conventions as pertaining to civil wars and also from an unrealistic, and possibly undesirable, recommendation that a humanitarian war should be subject to more stringent rules of international humanitarian law than other wars. The author, however, would concede that the force used should be limited to that necessary to achieve the humanitarian purpose, not necessarily the force necessary to defeat the opposing armed forces.

31. *See* Paecht, *supra* note 15, at 44. Paecht's proposed set of conditions is similar to Cassese's, adding, perhaps as a gloss on Cassese, that the situation must have been put on the agenda of the Security Council, action should be the only way of warding off an imminent danger, the force used should be in proportion to the objective pursued, and action should be in close co-ordination with the United Nations. He also suggests that in considering proportionality, there should be "a more precise adjustment of resources to ends than in classic warfare." *Id.* This relates not only to the degree of force used but also to the methods of warfare employed.

32. *See* C. J. Greenwood, *International Law and NATO Intervention in Kosovo Memorandum submitted to the Foreign Affairs Committee of the House of Commons, reprinted in* 49 INT'L & COMP. L.Q. 926, 931 (2000). *See also* P. Dreist, *Humanitäre Intervention—Zur Rechtsmässigkeit der NATO Operation Allied Force, in* 15 HUMANITÄRES VÖLKERRECHT 68, 73-34 (2002).

33. *See* Wheatley, *supra* note 20 (considering that an intervention in Chechnya would not have been permissible because there was no United Nations determination that the

desirable, although not essential, requirement. There may be cases where it is imperative to act quickly and without awaiting such recognition.

In addition, there is a completely unique and distinct legal argument put forward that posits that authority to govern must be based on the will of the people, and not on a right of humanitarian intervention. According to this argument, when a government does not have the support of the population or loses control over significant parts of its territory, such government has no power to represent that population or area. For example, the breakaway states of the former Yugoslavia, the military *junta* in Haiti, and the disenfranchising of the Albanian population of Kosovo support this argument.[34]

## VI. WHAT HAS BEEN THE PRACTICE OF STATES?

Generally, states are reluctant to allow any outside interference in what they consider to be their internal affairs. Until recently, that position has been respected even where serious human rights violations have occurred. Opponents of the doctrine of humanitarian intervention point out that the history of the last fifty years has been one of non-intervention for humanitarian purposes and that many of the so-called precedents for humanitarian intervention were based on United Nations mandates.[35] Large states such as China, India, and Russia have opposed the principle of humanitarian intervention, as have numerous members of the non-aligned movement.[36]

Nevertheless, an opposite trend has at least begun in the past ten years.[37] The failure to intervene to prevent massacres in the former Yugoslavia—where United Nations forces initially had a very narrow mandate concerned with the delivery of relief supplies—and in Rwanda led to much criticism and a reappraisal of the non-interventionist approach. In light of what appeared to be widespread

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situation amounted to a threat international peace and security).

34. *See* Weller, *supra* note 8, at 21 (noting that United Nations Security Council Resolution 1244 endorses the view that that the Belgrade regime cannot claim to act as the principal representative of the people of Kosovo).

35. Byers, *supra* note 8, at 16; *see also* Roberts, *supra* note 19, at 16 (listing nine such cases in the 1990s: Northern Iraq, Bosnia, Somalia, Rwanda, Haiti, Albania, Kosovo, East Timor, and Sierra Leone). Of the cases cited, the consent of the home government was obtained in five cases and two others had explicit Security Council authorization. Only two were carried out without consent or authorization: Northern Iraq and Kosovo.

36. Roberts, *supra* note 19, at 32.

37. Even one proponent of humanitarian interventions says that the operation in Northern Iraq in 1991 was the "fountainhead of state practice confirming the existence of a new right to humanitarian intervention." Weller, *supra* note 8, at 20.

and systematic crimes against humanity in Kosovo, some states were prepared to intervene, even without specific authorization from the Security Council.

There has been reluctance, however, on the part of the states that supported the Kosovo action to set out precisely the legal grounds upon which action was taken. Only the United Kingdom referred to averting a humanitarian catastrophe. It seems that the United States considered that the violation of the United Nations Security Council Resolutions 1160 and 1199 under Chapter VII of the United Nations Charter was a sufficient legal basis.[38] The United Kingdom's position[39] was that:

> a limited use of force was justifiable in support of purposes laid down by the Security Council but without the council's express authorization when that was the only means to avert an immediate and overwhelming humanitarian catastrophe. Such cases are in the nature of things exceptional and depend on an objective assessment of the factual circumstances at the time and on the terms of relevant decisions of the Security Council bearing on the situation in question.[40]

In a note circulated by the United Kingdom to NATO partners in October 1998, an additional criterion was mentioned: the proposed use of force should be necessary and proportionate to the aim of the relief of humanitarian need and strictly limited in time and scope to this aim.[41] This would also have an impact on the rules of international humanitarian law applied in such a case.

The German, French, Italian and Dutch governments were less specific but all placed emphasis on the need to prevent gross violations of human rights. The Chinese and Russian authorities, however, opposed any use of force without U.N. Security Council

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38. See Paecht, *supra* note 15, at 36 (pointing out that an alleged violation of Security Council Resolutions was to be put forward again in connection with the Iraq crisis in 2003).

39. This new position of the United Kingdom was a departure from that set out in *Foreign Policy Document No. 148* para. II.22 (1986), *reprinted in* THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 619 (1986), which stated that although the right of humanitarian intervention could not be said to be unambiguously illegal, the overwhelming majority of contemporary legal opinion was opposed to the existence of such a right. *See also* Roberts, *supra* note 19, at 14 (describing the triple negative above as a triumph of British officialdom).

40. 594 PARL. DEB., H.L. (5th ser.) (1998) 140 (written response of Baroness Symons of Vernham Dean to Lord Kennet).

41. Adam Roberts, *NATO's 'Humanitarian War' Over Kosovo*, SURVIVAL, Autumn 1999, at 3, 106.

authorization.[42]

## VII. HAVE THERE BEEN ANY JUDICIAL PRONOUNCEMENTS?

The International Court of Justice has said the respect for territorial integrity is an essential foundation of international relations and it holds out little hope for creative interpretations of Article 2, paragraph 4, of the U.N. Charter.[43] The court was also skeptical about the use of force as an appropriate method to monitor or ensure respect for human rights.[44]

The Federal Republic of Yugoslavia brought a case on 29 April 1999 in the International Court of Justice against the United Kingdom and other NATO states alleging a "violation of the obligation not to use force" and asking the court to order a cessation of acts of force. The court rejected the request for interim measures against the NATO states but ordered the filing of memorials. The case is still pending, so it will be some time before there is any decision.[45]

## VIII. LIMITATIONS OF HUMANITARIAN INTERVENTION AND IMPACT ON LOAC

The legal position thus remains controversial. One expert concludes that humanitarian intervention is not absolutely excluded.[46] In the opinion of the author, states cannot, on moral and policy grounds, simply sit back and watch the commission of genocide or persistent crimes against humanity. It is to be hoped that in the future the Security Council will act decisively. If it does not, and international law is found to be inadequate, he would agree with Thomas Franck who, speaking of the Kosovo operation, said that "the unlawfulness of the act was mitigated, to the point of exoneration, in the circumstances in which it occurred."[47]

Whether the right of humanitarian intervention currently exists, or is in development, or is simply to be tolerated by the international

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42. *See* Paecht, *supra* note 15, at 36-38.

43. *See* Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4 (April 9).

44. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 134-35 (June 27). It must be noted, however, that the court did not think humanitarian need was the central concern leading to the use of force.

45. See International Court of Justice Homepage, *at* http://www.icj-cij.org, for developments.

46. *See* Roberts, *supra* note 19, at 50.

47. T. M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention, in* HUMANITARIAN INTERVENTION: ETHICS, LEGAL, AND POLITICAL DILEMMAS 226 (J.L. Holzgrefe & R.O. Keohane eds., 2003).

community—it is clear from governmental statements and from the literature that such intervention must be subject to certain limitations. These may be summarized as follows:

> (1) There must be the existence, or imminence, of a serious humanitarian situation—variously described as an overwhelming humanitarian catastrophe/gross and egregious human rights violations/an exceptional and most serious situation of emergency.
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> (2) The territorial state must fail to deal with the situation.
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> (3) The Security Council must fail to deal with the situation.
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> (4) Use of force is the last resort/ the only practicable solution and peaceful solutions have been exhausted.
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> (5) Action must be collective.
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> (6) The purpose of the action must be limited to dealing with the humanitarian situation and those intervening must be disinterested.[48]
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> (7) There must be a realistic prospect of achieving the desired result.
>
> (8) The action must be reported to the Security Council.
>
> (9) The action must be proportionate; it must not cause more harm than the harm to be alleviated.
>
> (10) Any use of force must comply with international humanitarian law.

48. Prime Minister Tony Blair was once reported as saying, "One state should not feel it has the right to change the political system of another or foment subversion or seize pieces of territory to which it feels it should have some claim. But ... acts of genocide can never be a purely internal matter." Colin Brown & Mary Dejevsky, *'We Bomb Now, We Invade Later,'* COUNSEL (London), April 23, 1999, at 1.