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## **Part III Military Operations within the Context of the Right of Self-Defence and other Possible Legal Bases for the Use of Force, Ch.13 Humanitarian Intervention**

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## (p. 244) Chapter 13 Humanitarian Intervention

**13.01** In cases of large-scale, systematic, and acute violations of fundamental human rights, especially of the right to life, which result either from a government deliberately targeting (a significant part of) its population, or through a general breakdown in governmental authority, the Security Council should take all necessary and feasible measures, including whenever necessary, the authorization of military enforcement measures with the purpose of ending the ongoing violations and preventing further violations, and restoring a secure and stable environment. In the event the Security Council issues a mandate under Chapter VII of the Charter to halt the violations, the operation undertaken will have a recognized legal basis and will constitute a (peace) enforcement operation within the context of the UN Collective Security System (see Chapter 5, above).

**1.** The Security Council, as the organ of the international community entrusted with the primary responsibility for the maintenance of peace and security, has both the legal authority and the responsibility to undertake any necessary measures to halt and prevent large-scale violations of fundamental human rights, including the undertaking of enforcement measures of a military character, either under its own auspices, or through the authorization of Member States or a regional organization under Chapter VII, with the purpose of ending such violations and restoring a stable and secure environment. Experience has shown on numerous occasions that such large-scale and systematic human rights violations very often lead to regional and even wider destabilization and aggravation of international tension, in addition to constituting violations of fundamental *jus cogens* norms and qualifying as international crimes in their own right.<sup>1</sup> The Security Council's powers and functions under the Charter provide it with the necessary authority and responsibility to either undertake or to authorize enforcement measures, including military enforcement measures aimed at halting widespread and systematic human rights violations as part of a wider effort to restore a stable and secure environment and maintain

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(p. 245) international peace and security. This is the case irrespective of whether such violations are the result of deliberate governmental policy and actions, or are caused by a breakdown of governmental authority or inability to prevent such violations.<sup>2</sup>

**2.** While a State's sovereignty and territorial inviolability are fundamental rights under the UN Charter and under general international law, they are not wholly unconditional. Article 2(7) of the Charter, which provides for the duty of the UN organization to refrain from intervening in the domestic affairs of Member States, explicitly does not preclude the Council from taking enforcement measures of either a non-military or of a military nature in response to any situation which it deems as posing a threat to international peace and security and the practice of the Council over many years has demonstrated that it has viewed such large-scale violations of human rights as a threat to the peace on repeated occasions.<sup>3</sup>

**3.** The concept of 'Responsibility to Protect', which has emerged in recent years, has underlined and reinforced the Council's and the wider international community's responsibility to undertake and support measures of protection, including where necessary and feasible, military enforcement measures of a coercive nature in response to large-scale and systematic human rights violations as part of a wider effort to protect populations from violations of their fundamental human rights, and promote stability and the creation of conditions aimed at preventing further such violations.<sup>4</sup> The notion of 'Responsibility to Protect', although not in any way amending the existing legal rights and obligations of States or of UN organs under the Charter or under general international law, reinforces and emphasizes the political, moral, and legal authority of the Security Council and competent international organizations acting in conjunction with the Council, to address such

violations and to take the measures necessary aimed at ending ongoing violations and preventing their recurrence. It also serves as a clear indication that a State cannot use its sovereignty as a cover for the perpetration of atrocities against its citizens, and that such acts cannot be seen as a wholly internal matter falling outside the scope of international law or the concern of the international community. It also places some pressure on the Members of the Security Council and upon the

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(p. 246) international community in general to support, or at least not to frustrate, efforts aimed at addressing and halting such violations. This principle was explicitly referred to in the case of Libya in 2011 and in that situation, the Council was able to adopt measures constituting a collectively authorized intervention for the purpose of ending large-scale indiscriminate violence directed against the civilian population. Nevertheless, there is no guarantee that the Council will invariably be able to come to a decision to undertake measures which are likely to end such violations. The necessity of a two-thirds majority and the possibility of a veto by a Permanent Member of the Council can still impede or even preclude the taking of effective collective measures and has done so on a number of occasions, even when those were clearly called for and probably feasible under the circumstances.<sup>5</sup> However, it is also not always possible or desirable to undertake military action in response to human rights violations, when it is likely that such action would be unsuccessful, or would result in a significant aggravation of international tension, or even threaten more serious international consequences.<sup>6</sup>

**4.** To the extent the Security Council is able and willing to undertake or authorize enforcement measures aimed at halting or preventing large-scale and systematic human rights violations within the legal framework of its enforcement powers, it will have a clearly recognized and established legal basis under international law to take any measures it deems necessary, including military enforcement measures of a coercive nature, to halt such violations and prevent their recurrence. Such measures would qualify as 'enforcement action' under Articles 39 and 42 of the UN Charter and would not require any additional legal basis under the guise of humanitarian intervention. However, such measures are often referred to as 'collective humanitarian intervention' in policy statements and legal literature to distinguish them from military action undertaken by individual States, coalitions of States, or regional organizations which have not been authorized under Chapter VII of the Charter.<sup>7</sup> To the extent military intervention is undertaken by an individual State, a group of States acting in conjunction, or by a regional organization or arrangement

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(p. 247) *without* the authorization of the Security Council, such intervention cannot be considered as 'enforcement action' within the framework of the UN Collective Security System. Military intervention aimed at halting or preventing a large-scale violation of human rights of the inhabitants of a State who are not nationals of the intervening State(s) and which has not received the authorization of the Security Council is generally referred to as 'humanitarian intervention' in policy statements and in legal literature and this definition will be utilized in this Handbook to denote military intervention which is aimed at halting large-scale human rights violations of non-nationals and which is carried out without the authorization of the UN Security Council.<sup>8</sup>

**13.02** Humanitarian intervention defined as military intervention, which is undertaken without the authorization of the UN Security Council by one or more States, or by a regional organization, with the purpose of halting or preventing large-scale systematic and acute violations of fundamental human rights of persons who are not nationals of the intervening State(s), falls outside of either of the two generally recognized exceptions to the prohibition on the use of force contained in the UN Charter and in customary international law. As

such, it is in contravention of the prohibition on the use of force and the closely related principle of non-intervention and is *prima facie* illegal under contemporary international law. Nevertheless, such intervention can be legitimized and wholly or partially justified under strict legal, moral, and policy conditions, provided it meets certain requirements which have increasingly come to be recognized by a wide segment of the international community, by the public conscience, and by leading authorities and publicists. While this has not yet resulted in creating a new generally recognized exception to the prohibition on the use of force of a customary or conventional nature, it can be seen as grounds for partial or complete mitigation of responsibility for otherwise illegal conduct on the part of the intervening State(s).

**13.03** To qualify for legitimization resulting in complete or partial mitigation of responsibility under international law humanitarian intervention must meet the requirements of necessity, proportionality, and immediacy governing the use of force and must additionally fully comply with relevant humanitarian and human rights rules and principles. It must, additionally, not pose a greater threat to international peace and security than the situation it purports to address. Legitimization and mitigation of responsibility in no way affect the

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(p. 248) legal status of the prohibition on the use of force under international law, or the primacy of the UN Security Council in the maintenance and restoration of international peace and security.

- 1.** The criteria for undertaking a humanitarian intervention have been frequently discussed in legal literature and policy statements.<sup>9</sup> The starting point is that humanitarian intervention may only be undertaken in response to an acute, large-scale violation of fundamental human rights, in particular the right to life, of a significant portion of a State's inhabitants, which result either from deliberate governmental action aimed at the persons who are affected, or which are the result of a government's inaction or inability to prevent such violations.
- 2.** Humanitarian intervention may only be undertaken when it has become abundantly clear that the Security Council has failed to reach a decision or is unwilling to authorize the necessary enforcement action under Chapter VII of the Charter to prevent or halt the violations of fundamental human rights in the State where they are occurring. Such inaction on the part of the Security Council will not affect its primacy in the maintenance of international peace and security, or its legal authority to take such action as it may deem necessary and is capable of agreeing upon to restore and maintain international peace and security and preventing a further aggravation of the situation. No humanitarian intervention should be undertaken whenever it is likely that this would result in a threat to international peace and security which would exceed the threat posed by the situation it is intended to address.
- 3.** Humanitarian intervention must conform to the general requirements governing the use of force under international law of necessity, proportionality, and immediacy. Within this context, these principles require that any forceful measures undertaken must be in response to an immediate and ongoing violation of fundamental human rights on a significant scale or a grave and impending threat of such violations, must be primarily directed at halting their occurrence and preventing

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(p. 249) their recurrence, should not exceed what is strictly required to achieve that objective, and should provide the greatest possible degree of protection and security to the affected population.

- 4.** In addition to the abovementioned criteria relating to the use of force which are of an *ad bellum* character, the use of force and treatment of persons must additionally and fully conform to any and

all relevant rules and principles of the humanitarian law of armed conflict and with human rights standards relating to the conduct of any hostilities and to the treatment of any persons who find themselves in the custody, or under the control, of the intervening State(s).

**5.** The humanitarian intervention must not last longer than is necessary to halt the violations and should provide the groundwork for the creation of as stable and secure an environment as is possible under the relevant circumstances. The government(s) and armed forces of the intervening State(s) must cooperate fully with the United Nations Security Council and all other authorized organs and agencies of the UN in providing a full account of its/their actions and transferring responsibility to the UN or its designated representatives and bodies as soon as this can be carried out in an orderly fashion. If the UN is unwilling or unable to assume responsibility for the situation, the intervening State(s) should remain in the State where the intervention took place for as long as is necessary to prevent further outbreaks of violence, until such time as the UN or another designated authority is able to assume responsibility for the situation and for the security of the affected population, or the situation clearly no longer warrants their presence.

**13.04** To the extent a humanitarian intervention fully conforms to the abovementioned criteria laid down in Section 13.03 and the commentary thereto, it should qualify for far-reaching mitigation of responsibility and legitimization. To the extent it falls short of meeting these criteria, the intervention will not (fully) qualify for mitigation of responsibility and the intervention will incur any consequences determined by the Security Council, by other competent organs of the United Nations, and by the international community at large.

**1.** Mitigation of responsibility is a recognized general principle of (international) law<sup>10</sup> and is relevant to humanitarian intervention since such intervention, when carried out without the authorization of the Security Council, neither fits into one (p. 250) of the recognized exceptions to the prohibition of the use of force and the related principle of non-intervention, nor falls within the scope of any of the circumstances precluding wrongfulness under the law of State responsibility.<sup>11</sup> It is based on the consideration that there are degrees of wrongfulness relating to an illegal act and that the actions and motivations of the party committing a violation of any legal rule or principle should be taken into account in determining the consequences of such unlawful conduct. Such actions and motivations relating to unlawful conduct can either aggravate or mitigate the degree of unlawfulness and the consequences, if any, which attach to the unlawful conduct. The concept of mitigation of responsibility is common to all legal systems, and relates both to public or private acts and is further related to notions of fairness, equity, and reasonableness.

**2.** The notion that there are degrees of unlawfulness attached to a violation of a legal rule or norm and the principle of mitigation of responsibility are generally recognized in legal literature and in case law and have been widely recognized as being relevant to humanitarian interventions, in particular by a significant body of legal opinion. While there is not complete unanimity of views relating to the legality of humanitarian intervention, there is widespread support for the proposition that military intervention which is undertaken in conformity with the criteria set out in the previous section and commentary thereto (or similar criteria) should not be equated with aggression or other serious violations of the Charter *jus ad bellum* and that any consequences of such formally unlawful conduct should be limited or even nominal.<sup>12</sup>

**3.** However, it is equally clear that such interventions have not as yet gained the widespread consistent and representative support in the form of *opinio juris* which is required to establish a new rule of customary international law as a third exception to the prohibition of the use of force. As such, humanitarian intervention (outside

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(p. 251) the context of the UN Collective Security System) remains controversial and constitutes *prima facie* illegal conduct which must be assessed on a case-by-case basis and in light of all

relevant circumstances, including in particular the degree of conformity by the intervening State(s) with the criteria set out previously and elsewhere in legal literature and policy statements such as the doctrine of 'Responsibility to Protect'.

## Footnotes:

<sup>1</sup> The examples of the former Yugoslavia, Somalia, and Rwanda are but several which illustrate the long-term spill-over effects of gross human rights violations in the region where they occurred. Such human rights violations can constitute genocide, crimes against humanity, or war crimes, depending upon the context in which they occurred and these are punishable as international crimes under the Rome Statute of the International Criminal Court. See e.g. 'Lessons from Rwanda: The United Nations and the Prevention of Genocide' adopted in UN GA Res. A/RES/60/225 of 22 March 2006.

<sup>2</sup> On the discretion of the Security Council to determine the existence of a 'threat to the peace' see Section 5.02. For further literature see Y. Dinstein, *War Aggression and Self-Defence*, 4th edn (Cambridge: Cambridge University Press, 2005), 85–97.

<sup>3</sup> E.g. in relation to Somalia, SC Res. 733 (1992), Rwanda, SC Res. 1556 (2004).

<sup>4</sup> The Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (December 2001), <<http://www.responsibilitytoprotect.org/>>, put forward what was termed as a 'new approach to sovereignty' specifically in relation to human rights violations. The UN Secretary General at the time adopted and approved this approach in his report relating to reform of the UN entitled 'In Larger Freedom' A/59/2005 of 21 March 2005. The concept was also elaborated upon in relation to the UN Collective Security System in the Report of the High Level Panel on Threats, Challenges and Change entitled 'A More Secure World: Our Shared Responsibility' as GA Res. A/59/565 of 2 December 2004. It should be stressed that these reports and documents do not constitute binding interpretations of, or amendments to, the UN Charter or any other international instrument, but are rather authoritative policy statements by the UN Secretary General and by experts in the form of recommendations to the UN Member States.

<sup>5</sup> A clear example of this was the failure of the international community, and the Security Council in particular, to respond to the genocide in Rwanda, despite it being a case where action could have probably resulted in preventing or at least reducing the scale of the atrocities. See OAU Report, 'The Preventable Genocide' reproduced in 40 *ILM* (2001), 141. The Security Council has since then equally been unable to achieve agreement concerning the taking of effective measures to halt the humanitarian crisis in Syria. For a discussion of the Responsibility to Protect principle and its relationship to humanitarian intervention in the Libyan and Syrian crises see T.D. Gill, 'The Responsibility to Protect and the Security Council' in G. Zyberi (ed.), *An Institutional Approach to the Responsibility to Protect* (Cambridge: Cambridge University Press, 2013), 83.

<sup>6</sup> The consideration that humanitarian intervention must not result in 'more harm than good' is expressed by a variety of authors and reflects what one authority refers to as 'tactical realism', see e.g. T.M. Franck, *Recourse to Force* (Cambridge: Cambridge University Press, 2002), 189.

<sup>7</sup> *Ibid.* 136–7. For comprehensive treatment and analysis of UN Security Council action and authorization to Member States in response to large-scale violations of human rights see S. Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2001), 112 *et seq.*

<sup>8</sup> This is a definition used by, *inter alia*, W. Verwey, 'Humanitarian Intervention', in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force* (Dordrecht: Nijhoff, 1986), 57 *et seq.* at 59.

<sup>9</sup> The legal status of humanitarian intervention has triggered a very large number of books and articles on the topic, far too many to attempt to name here. Essentially, the opinions of practically all authors can be categorized as follows. A minority of authors take the position that humanitarian intervention does not violate Article 2(4) of the Charter, or alternatively, that it is part of customary

law. Writers from a legal perspective adhering to this view include, *inter alia*, F. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edn (Dobbs Ferry, NY: Transnational, 1997) and R.B. Lillich, 'Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives', in J.N. Moore (ed.), *Law and Civil War in the Modern World* (London and Baltimore: Johns Hopkins University Press, 1974), 229 *et seq.* However, the majority view among publicists is that humanitarian intervention conflicts with the Art. 2(4) prohibition on the use of force, but can be morally and/or politically justified and condoned or excused from a legal perspective, provided it meets criteria similar to those set out earlier in the chapter. Among this group of writers are, *inter alia*, I. Brownlie, 'Thoughts on a Kind-hearted Gunmen' in Moore, *Law and Civil War*, 139 *et seq.*; O. Schachter, *International Law in Theory and Practice* (The Hague, Boston, London: Nijhoff, 1991), 123–6; Franck, *Recourse to Force*, 189 *et seq.*, and J.L. Holzgrefe and R.O. Keohane (eds), *Humanitarian Intervention, Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003).

**10** Franck, *Recourse to Force*, makes out a coherent case for the existence of mitigation of responsibility as a principle of law and its applicability to humanitarian intervention. The present author expressed a similar approach in an article published in 2001; T.D. Gill, 'Humanitaire Interventie: Rechtmatigheid, Rechtvaardigheid en Legitimiteit', in 94 *Militair Rechtelijk Tijdschrift* 6 (2001), 221–41, which was translated and updated as 'Humanitarian Intervention: Legality, Justice and Legitimacy', in I *The Global Community Yearbook of International Law and Jurisprudence* (2005), 51–76.

**11** The application of the doctrine of necessity in relation to humanitarian intervention was expressly excluded by the International Law Commission: see J. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press, 2002), 185 and accompanying note 434. It is self-evident that none of the other circumstances precluding wrongfulness contained in the ILC Article would be relevant to a case of humanitarian intervention.

**12** See para. 1 above. An example of how mitigating circumstances were applied by an international tribunal can be found in the decision of the International Court of Justice in the *Corfu Channel* case, where the Court determined by a large majority that the UK's conduct in violating Albania's sovereignty in the context of a minesweeping operation was a violation of the principle of non-intervention, and while reaffirming that principle, went on to determine that Albania's conduct in allowing the mines to be deployed was a violation of the elementary principle of humanity and determined that Albania was liable to pay compensation for its illegal conduct and limited the consequences of the UK's action to a purely verbal reaffirmation of the law. While this did not concern a question of humanitarian intervention, it is analogous to it in several important respects; not least of which are the reaffirmation of non-intervention as a cardinal principle of international law, while taking the relevant circumstances fully into account and mitigating the UK's unlawful, but under the circumstances, at least to some extent, excusable conduct. This not only illustrates that degrees of unlawful conduct and mitigation of responsibility are part of international law, but that it is perfectly possible to apply these concepts in an objective way which distinguishes between degrees of unlawfulness and is at the same time supportive of the underlying norm. See ICJ Reports, 1949, 4, at 35.