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The Legality of Humanitarian Intervention under Traditional International Law

Abstract. The necessity and usefulness of a thorough examination of the legality of humanitarian intervention under traditional international law is obvious. Following the analysis of customary law, the teachings of contemporary international lawyers, the relevant treaty stipulations, the doctrine of *bellum iustum*, the general principles of international law, and the *ius ad bellum* one may come to realize that a definitive conclusion on the issue simply cannot be derived, as both *pro* and *contra* views are verifiable, but neither is absolutely correct.

Keywords: history of international law, humanitarian intervention

I.

In order to be able to examine the topic set down in the title, a definition of humanitarian intervention valid for the period of traditional international law—that is to say, the era between the 17th century¹ and the adoption of the Charter of the United Nations (UN) in 1945—has to be constructed. Since such definition does not stand, and has never stood at disposal in positive international law, it has to be assembled with taking into account the contemporary body of opinion concerning humanitarian intervention, with special regard to the common or at least repeatedly emerging elements of various descriptions. It may be observed that the opening remark speaks of a definition “valid for the period of traditional international law”. It is because I am deeply convinced that

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¹ “International Law as a law between Sovereign and equal States based on the common consent of these States is a product of modern Christian civilisation, and may be said to be hardly four hundred years old.” Oppenheim, L.: *International Law: A Treatise*. Vol. 1, London–New York–Bombay, 1905. 44.

humanitarian intervention cannot be *accurately* described by one single definition with respect to both the traditional and the current era of public international law.² This is attributable to a number of factors. For instance the legal environment surrounding intervention on grounds of humanity was substantially altered following the adoption of the UN Charter, as a consequence of which it—being a forceful measure—almost entirely left the domain of the principle of non-intervention and entered that of the prohibition of the use of force. Furthermore, the legal terminology meant to describe it has also changed, not to mention a number of modifications in the very content of the phrase, such as the widening of the group of potential subjects of intervention with certain international organizations, or the broadening of its possible grounds with the fundamental guarantees of international humanitarian law applicable to armed conflicts not of an international character.

Having considered the relevant literature of those days,³ the definition of intervention on grounds of humanity applicable to the pre-Charter period can be formulated as follows: humanitarian intervention was a dictatorial interference involving the use of force, but not qualifying as war, carried out as a last resort and free from selfish motives by one or more civilized states against another state in absence of the consent or request thereof, with a view to coerce it to cease the grave and widespread violations of fundamental freedoms and human rights of its own nationals.

A few supplementary remarks are nevertheless necessary to shed more light on the special features of humanitarian intervention, and to make the content of the definition perfectly clear. First of all, the use of force for humanitarian purposes was generally considered a last resort, which could be utilized only after all other, non-violent measures had failed. Other requirements or obligations, however, did not really emerge *vis-à-vis* the intervening states. Thus the norms of the law of war restricting the right of belligerents to freely choose the means and methods of warfare reached a level of development on which one can perceive them as a substantial constraining factor only after 1899, near the end of the period under consideration. Let us not forget either that these norms governed situations of *de iure* war,⁴ but—as it will be thoroughly dis-

² The creation of a definition of humanitarian intervention embracing both major periods of international law is, of course, not impossible. I am merely saying that it would inevitably be either inaccurate, or too vague.

³ It would be excessive to enumerate here all of the sources consulted. Nevertheless, they can be found in the footnotes below. See especially *infra*, notes 12–13, 16.

⁴ Cf. Convention with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899, Article 2; Convention for the Adaptation to Maritime Warfare of the

cussed later on—intervention was a category distinct from war. In relation to the means and methods of forceful measures short of war only the inherently limited nature of these actions, some arguably surviving remnants of the natural doctrine of just war as well as rationality and expediency could pose actual boundaries.

Notwithstanding the fact that some of the authors of the period adopted this method,⁵ I do not see any reason for the independent treatment of intervention on grounds of humanity and intervention on grounds of religion, provided that the latter was not carried out as a manifestation of religious intolerance, but to suppress religious persecution. Even though these two kinds of intervention should not be discussed separately, they were not totally identical either, that is to say, the scope of humanitarian intervention must not be restricted to the enforcement of the freedom of religion. The relationship between them was a relation of a part (intervention on grounds of religion) to a whole (humanitarian intervention), as the blatant denial of the freedom of religion regularly brought along a violation of other human rights, as well.

It may be observed that the definition above speaks of “civilized states” as the sole subjects of international law having been able to carry out a humanitarian intervention in the past. Despite that the distinction of civilized and uncivilized nations appeared fairly seldom in the relevant works,⁶ I consider the inclusion of this condition well founded for three reasons. Firstly, the “civilized-semi-civilized-uncivilized” partition was an axiomatic principle of traditional international law that academics may not necessarily have wished to reaffirm repeatedly. Secondly, the genuine subjects of international law were civilized states, so its rules could not have granted a right of intervention to semi-civilized or uncivilized nations. Thirdly, the attribute “civilized” is used exclusively in connection with states carrying out the intervention; *a contrario* a target state could have belonged to any of these three categories. It would be

Principles of the Geneva Convention of August 22, 1864, The Hague, 29 July 1899, Article 11; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 6 July 1906, Article 24; Convention Relative to the Opening of Hostilities, The Hague, 18 October 1907, Article 3.

⁵ See e.g. Bonfils, H.: *Manuel de droit international public*. 7th edition (P. Fauchille ed.), Paris, 1914. 203; Phillimore, R. J.: *Commentaries upon International Law*. 3rd edition, Vol. 1, London, 1879. 618.

⁶ See e.g. Martens, F. F.: *Völkerrecht. Das internationale Recht der civilisirten Nationen*. (C. Bergbohm ed.) Vol. 1, Berlin, 1883. 301–302; Werner, R.: *A természetjog, vagy bölcséleti jogtudomány kézikönyve. Összehasonlító tekintettel a tétéles jog intézkedéseire* [Manual of Natural Law, or of Philosophical Legal Science. With Comparative Regard to Measures of Positive Law]. Vol. 2, Pest, 1869. 338.

a mistake to restrict the circle of target states to the group of semi-civilized and uncivilized countries, since the theoretical possibility of a humanitarian intervention against a civilized state was equally present although such action was almost certainly not carried out in practice. (Civilized states usually resorted to “humanitarian representations” in their relations with one another.) In addition, international lawyers of the period would not have devoted so much attention to the question of the legality of humanitarian intervention if it had been applicable only against semi-civilized or uncivilized nations, which could not fully enjoy the protection afforded by international law, particularly the principle of non-intervention.

It may be noticed that the definition contains nothing regarding issue of legality, because I believe that the classification of an intervention as humanitarian did not automatically bring about its lawfulness. In other words, humanitarian intervention was not a legal title of absolute value. The following sections are meant to elaborate on this particular issue.

II.

Customary law was undoubtedly the dominant source of public international law in the pre-Charter period. It is therefore obvious that the legality of past humanitarian interventions has to be examined in the framework of contemporaneous customary law in the first place. As commonly known, this source of international law is composed of two segments. The objective element of customary law is state practice (*consuetudodesuetudo, diuturnitas, usus*),⁷ in addition to the subjective element, the so-called *opinio iuris sive necessitatis*.⁸

⁷ “State practice means any act or statement by a State from which views about customary law can be inferred; it includes physical acts, claims, declarations *in abstracto* [...], national laws, national judgments and omissions.” Akehurst, M.: Custom as a Source of International Law. *British Yearbook of International Law* 47 (1974–1975), 53. Several authors, however, challenge the practical importance of *in abstracto* declarations. Cf. e.g. Thirlway, H. W. A.: *International Customary Law and Codification*. Leiden, 1972, 58.

⁸ For an examination of traditional international law, one obviously needs the “traditional” concept of *opinio iuris*: “Traditionally, *opinio iuris* was discussed not from the point of view of law-creation but from that of law-application. Its primary function was to draw a distinction between legally binding customary norms, on the one hand, and other social norms, particularly moral norms and comity, on the other, in the process of ascertaining and applying international law. The traditional interpretation of *opinio iuris* was also developed under the strong influence of various natural law theories according to which practice does not create legal obligations but simply reflects the already existing

One can speak of an existing norm of customary law exclusively in case of a parallel coexistence of these two segments, both with respect to the past and the present. Consequently, a proof of relevant practice is not at all equivalent to an evidence of customary law. If a right of humanitarian intervention had ever been a part of customary law, a sufficient state practice as well as the adjacent *opinio iuris* can and should be revealed.

The state practice appears to be provable, although it may well be subject to debate how many of the most frequently cited instances qualified as a genuine humanitarian intervention. (This is to a great extent due to the absence of consensus on the notion of humanitarian intervention.) Diplomatic representations in connection with the actual recourses to force further render the existence of relevant state practice possible, since the *usus* is established not only by physical actions but also by other conducts. It cannot be denied, however, that the 19th century state practice comprised of a handful of instances, and even less can be said about the first half of the 20th century. Instances of humanitarian intervention during the 19th century were carried out almost exclusively by the European Great Powers against the Ottoman Empire—the sole, yet rather questionable, exception being the action of the United States in Cuba in 1898.⁹ There is therefore a great deal of subjectivity in determining if this seemingly sporadic practice suffices as *usus*. On the other hand, the international community of states was extremely small at that time, thus one may find that, in fact, a relatively large number of its members participated in these interventions. As for concerns relating to the alleged infrequency of

ones. In the framework of this approach, *opinio iuris* was defined as a feeling or belief that practice corresponds to an already existing legal obligation.” Danilenko, G.: *Law-Making in the International Community*. Dordrecht–Boston–London, 1993. 99. The International Court of Justice perceived *opinio iuris* in a similar manner in the Case concerning the North Sea Continental Shelf. See North Sea Continental Shelf (Federal Republic of Germany v. Denmark) (Federal Republic of Germany v. Netherlands), Judgement of 20 February 1969, I.C.J. Reports 1969, para. 77, at 44.

⁹ The most frequently mentioned occurrences are the following: Greece (1827–1830), Syria (1860–1861), Bosnia and Herzegovina, and Bulgaria (1877–1878), Cuba (1898), Macedonia (1912–1913). The Cuban action was perhaps the only humanitarian intervention, if seen as such, which was carried out by one civilized state against another. Admittedly, Article VII of the 1856 Peace Treaty of Paris permitted the Sublime Porte “to participate in the advantages of the Public Law and System (Concert) of Europe”, but the practical significance of this solemn declaration proved even at that time rather negligible. Cf. e.g. Phillimore: *op. cit.*, 635. This list, however, can be considerably extended, if one includes non-violent interventions, as well. See e.g. Grewe, W. G.: *Epocher der Völkerrechtsgeschichte*. 2nd edition, Baden-Baden, 1988. 577–579; Stowell, E. C.: *Intervention in International Law*. Washington D.C., 1921. 63–277.

actions, they might be considerably resolved with referral to an opinion, according to which “[t]he number of States taking part in a practice is much more important than the number of separate acts of which the practice is composed, or the time over which it is spread”.¹⁰ For that reason, it is not impossible that an adequate state practice of humanitarian intervention existed—the real question is whether or not international law permitted it.

The question of *opinio iuris*—although not resulting in a direct and coherent debate—set scholars of international law against one another even in the period under deliberation. Certain statements of politicians, which might serve as an evidence of legal belief, could provide a guideline for the determination whether a state perceived its action as an exercise of a right, but it would be unwise to draw conclusions of universal validity solely from such pronouncements. I am convinced that the analysis of the legal literature of that time “as subsidiary means for the determination of rules of law” is perhaps the most expedient method. The technique to be applied for this purpose is relatively simple, and is basically the same as the one adopted earlier for the construction of the definition of humanitarian intervention. In case the overwhelming majority of eminent authorities of “civilized nations”, who were most probably in knowledge of state practice and *opinio iuris*, supported a right of intervention on grounds of humanity, then we have reason to believe that this category was indeed in line with the norms of customary international law, and *vice versa*. The summary of opinions derived from the most influential works on international law leads, however, to a somewhat astonishing result: teachings of international lawyers do not give a definitive answer to the question. It can be observed that nearly as many outstanding figures considered humanitarian intervention lawful as those who expressly rejected it; not to mention the significant group of authors, who—due to the cautiousness or vagueness of their opinions—stood somewhere between the two extremes.¹¹

Within the framework of a brief enumeration, one may mention, *inter alia*, the following international lawyers—including, for the sake of interest, a few representatives of Hungarian legal doctrine—among those who considered humanitarian intervention lawful: Johann C. Bluntschli, Edwin M. Borchard, László Buza, Carlos Calvo, Charles G. Fenwick, István Kiss, Fjodor F. Martens,

¹⁰ Akehurst: *op. cit.*, 14.

¹¹ For an opposing statement, according to which “a majority of writers accepted the idea of a lawful humanitarian intervention”, and only a “substantial minority of scholars” rejected this view (although its legality under customary law is still debatable), see Beyerlin, U.: Humanitarian Intervention, in Bernhardt, R. (ed.): *Encyclopedia of Public International Law*. Vol. 3, New York–London, 1982. 212.

Antoine Rougier, Ellery C. Stowell, Pál Tassy, László Vincze Weninger, Rudolf Werner, John Westlake, Henry Wheaton and Theodore Woolsey.¹² Naturally, all of them defined the notion of humanitarian intervention in a more or less divergent manner. Nevertheless, I believe that it does not deprive their consensus of its value, because in spite of the differences, the basic conception remained the same. The lawfulness of humanitarian intervention was clearly ruled out, for instance, by István Apáthy, Henry Bonfils, János Csarada, August W. Heffter, Albert Irk, Franz von Liszt, Karl Melczer, Paul L. E. Pradier-Fodéré, Leo Strisower, Karl Strupp and Gyula Thegze.¹³ Manouchehr Ganji also added the famous philosopher, Immanuel Kant to this group,¹⁴ but

¹² See Bluntschli, J. C.: *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt*. Nördlingen, 1868. 268; Borchard, E. M.: *The Diplomatic Protection of Citizens Abroad*. New York, 1922. 14; Buza, L.: *Szabadság és beavatkozás a nemzetközi jogban* [Freedom and Intervention in International Law] Szeged, 1936. 5; Calvo, C.: *Le droit international théorique et pratique, précédé d'un exposé historique des progrès de la science du droit des gens*. 4th edition, Vol. 1, Paris–Berlin, 1887. 302–303; Fenwick, C. G.: *International Law*. London, 1924. 154; Kiss, I.: *Európai nemzetközi jog* [European International Law]. Eger, 1876. 94–95; Martens: *op. cit.*, 301–302; Rougier, A.: La théorie de l'intervention humanité. *Revue Générale de Droit International Public* 17 (1910), 472; Stowell: *Intervention in International Law*, 53; Tassy, P.: *Az európai nemzetközi jog vezérfonala* [The Guiding Principle of European International Law]. Kecskemét, 1887. 46; Weninger, L. V.: *Az új nemzetközi jog* [The New International Law]. Budapest, 1927. 101 (although he might be inserted in the third group, as well); Werner: *op. cit.* 338; Westlake, J.: *International Law*. 2nd edition, Vol. 1, Cambridge, 1910. 319–320; Wheaton, H.: *Elements of International Law*. 8th edition (R. H. Dana ed.), London–Boston, 1866. 113; Woolsey, T. D.: *Introduction to the Study of International Law, Designed as an Aid in Teaching, and in Historical Studies*. Boston–Cambridge, 1860. 91.

¹³ See Apáthy, I.: *Tételes európai nemzetközi jog* [Positive European International Law]. Budapest, 1878. 112; Bonfils: *op. cit.*, 203, 205; Csarada, J.: *A tételes nemzetközi jog rendszere* [The System of Positive International Law]. Budapest, 1901. 179; Heffter, A. W.: *Das europäische Völkerrecht der Gegenwart*. 3rd edition, Berlin, 1855. 92; Irk, A.: *Bevezetés az új nemzetközi jogba* [Introduction to New International Law]. 2nd edition, 1929. 111; Liszt, F., von: *Das Völkerrecht systematisch dargestellt*. 7th edition, Berlin, 1911. 66; Melczer, K.: *Grundzüge des Völkerrechts*. Wien–Leipzig, 1922. 35–36; Pradier-Fodéré, P. L. E.: *Traité de droit international public européen & américain*. Vol. 1, Paris, 1887. 632; Strisower, L.: *Der Krieg und die Völkerrechtsordnung*. Wien, 1919. 121–122, 125.; Strupp, K.: *Éléments du droit international public universel, européen et américain*. 2nd edition, Paris, 1930. 124; Thegze, Gy.: *Nemzetközi jog* [International Law] Debrecen, 1930. 205.

¹⁴ Cf. Ganji, M.: *International Protection of Human Rights*. Genève–Paris, 1962. 41. Cf. furthermore Kant, I.: *Zum ewigen Frieden: Ein philosophischer Entwurf*. Königsberg, 1796. 11–12.

to tell the truth, John Stuart Mill can likewise be included, although some of his thoughts approximated the interventionist approach.¹⁵ For various reasons, views expressed by the following authors can be inserted in neither of the categories above: William E. Hall, Thomas J. Lawrence, Lassa Oppenheim, Pitman B. Potter, Robert J. Phillimore and Percy H. Winfield.¹⁶

For the previously applied method of revealing the 19th century *opinio iuris* regarding humanitarian intervention has led to a controversial outcome, one might make an alternative attempt to derive legality from the natural doctrine of *bellum iustum*, because the phrase “*iustum*” had referred not only to a war having been just, but also to the fact that it had been in conformity with the “necessary law of nature”. The phenomenon qualified today as a grave and widespread violation of human rights was once, under the doctrine of just war, one of the just causes of war. It appeared in works of such classics as Francisco de Vitoria, Francisco Suárez, Alberico Gentili and Hugo Grotius.¹⁷ We may reasonably believe that—parallel to the development of the “voluntary law of nations”—this *iusta causa* seceded from the gradually eclipsing natural doctrine of *bellum iustum* and ultimately gained independence within positive international law as intervention on grounds of humanity. Based upon this assumption, it may be concluded that the lawfulness of humanitarian intervention under customary international law was a result of the outlasting of one of the segments of just war. This train of thoughts seems *prima facie* plausible. However, it should not be overlooked that approximately at the turn of the 18th and 19th centuries, simultaneously to a presumed recognition of such

¹⁵ Cf. Mill, J. S.: A Few Words on Non-Intervention, in Mill, J. S. (ed.): *Dissertations and Discussions, Political, Philosophical, and Historical*. Vol. 3, London, 1867. 172–173, 176.

¹⁶ See Hall, W. E.: *A Treatise on International Law*. 8th edition (A. P. Higgins ed.), Oxford, 1924. 342; Lawrence, T. J.: *The Principles of International Law*. 3rd edition, Boston, 1905. 120–121; Oppenheim: *op. cit.*, 186–187; Potter, P. B.: L’intervention en droit international moderne. *Recueil des Cours* 32 (1930-II), 652–653; Phillimore: *op. cit.*, 560, 623, 638; Winfield, P. H.: The Grounds of Intervention in International Law, *British Yearbook of International Law* (1924), 161–162.

¹⁷ See Gentili, A.: *De iure belli libri tres* [Three Books on the Law of War] (J. C. Rolfe transl.), Vol. 2, Oxford–London, 1933. I. XXIII. 186, at 115, I. XXV. 198, at 122; Grotius, H.: *A háború és a béke jogáról* [On the Law of War and Peace]. Vol. 2, Budapest, 1999. II. XXV. VIII. 4, at 159; Suárez, F.: De triplici virtute theologica, fide, spe et charitate [A Work on the Three Theological Virtues: Faith, Hope and Charity], in Williams, G. L.–Brown, A.–Waldron, J. (prep.)–Davis, H. (rev.): *Selections from Three Works of Francisco Suárez*. Vol. 2, Oxford–London, 1944. XIII. IV. 3, at 817; Vitoria, F., de: De Indis recenter inventis [On the Indians Lately Discovered] (J. P. Bate transl.), in Scott, J. B.: *The Spanish Origin of International Law*. Vol. 1, Oxford–London, 1934. III. 13, 15, at xliii–xliv.

actions by positive law, the principle of non-intervention emerged as a cornerstone of international law. In light of this, the survival of legality of a just war for altruistic purposes in the form of a right of humanitarian intervention appears extremely dubious.¹⁸

The principle of non-intervention could not affect the outlasting lawfulness of humanitarian intervention only if the latter possessed the quality of a right of intervention, in other words, if it was an exception to the major rule of prohibiting nature. The list of these rights of intervention can be drawn up on the basis of the legal literature of the period, whereas state practice offers only but a few certain and helpful pieces of information in this regard. Acceptable rights of intervention, however, differed from author to author, not to mention those scholars who automatically denied the very existence thereof.¹⁹ To sum up, in order to derive a customary right of humanitarian intervention from the survival of the above-mentioned element of *bellum iustum*, it has to be proven primarily that the prohibition of intervention—one of the most fundamental norms of the post-Westphalia world order—did not affect this continuity. To facilitate that, the fairly controversial coexisting legal literature has to be consulted, with the intention of illustrating whether or not the indispensable *opinio iuris* was present concerning the actual existence of this particular right of intervention. In other words, one inevitably has to face our starting, yet definitely unanswerable question at the end of an analysis focusing on the survival of *bellum iustum*, as well.

It is inappropriate to restrict the scope of examination to customary law, and to the *communis opinio doctorum*. A limited number of international treaties providing for a state party to respect specific human rights—mainly the freedom of religion—of its own subjects might also be of interest. Merely upon the basis of state practice it may appear that in case of a violation of these human rights by the obliged state, the other parties enjoyed some sort of a right of intervention, sometimes even a right of armed intervention, the principal function of which was to enforce the fulfilment of obligations undertaken in the treaty.²⁰ This right of armed intervention seemingly manifested itself as a

¹⁸ The restrained tone of Emeric de Vattel, for example, reflects this uncertainty. Cf. Vattel, E., de: *Le droit de gens ou principes de la loi naturelle. Appliqués à la conduite et aux affaires des nations et souverains* [Law of Nations; or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns]. (C. G. Fenwick transl.), Vol. 3, Washington D. C., 1916. Introd. 22–23, at 8, II. IV. 54–55, at 131.

¹⁹ Cf. Martens: *op. cit.*, 299.

²⁰ The most important treaty stipulations with regard to the relevant 19th century state practice were perhaps the following: Treaty of Peace and Friendship between Turkey and Russia, Kutchuk-Kainardji, 21 July 1774, Articles VII–VIII, XIV, XVI–XVIII; Peace

sanction or a treaty guarantee, and was a particularly “popular” and often invoked ground in the practical implementation of instruments envisaging a free exercise of religion for Christian minorities living under the rule of the Sublime Porte. Unquestionable is the fact that states parties to such agreements indeed intervened militarily on some occasions, but the humanitarian nature and legality of their action did not follow automatically. Especially not in light of the fact that the treaties incorporating human rights provisions did not contain explicit clauses for a right of *armed* intervention, should a breach of the instrument occur. Notwithstanding, I consider the problem worthy of thorough deliberation, chiefly in view of Manouchehr Ganji’s well-known theory on the common features of past humanitarian interventions, which directly linked these actions to treaty stipulations containing the obligation to respect the freedom of religion.²¹

Traditional international law recognized several rights of intervention in connection with international treaties. The first group of these rights—formulated *in abstracto* or for a specific event—originated directly from the text of a treaty, thus any action in invocation thereof was to be seen as a lawful exception to the principle of non-intervention, due to the consensual nature of the agreement.²² Nevertheless, the majority of authors discussed these *expressis verbis* stipulated rights of intervention either in the context of the restoration of a sovereign, a government or of constitutional order, or—in more general terms—emphasized only the requirement of consent by the target state. With such special content, this set of rights is obviously inadequate for the demonstration of the lawfulness of intervention on grounds of humanity. This is, however, not the sole argument to hamper the successful continuation of the examination. Any right of intervention provided for in a treaty carries with itself an inherent contradiction. The essence of intervention—including humanitarian intervention—is coercion, whereas the most important feature of a treaty, at least in this regard, is consensus: an intervention based upon a treaty provision is, therefore, a paradox.

Treaty between Great Britain, France, the Ottoman Empire, Sardinia, and Russia, Paris, 30 March 1856, Articles VIII–IX; Treaty between Great Britain, Austria-Hungary, France, Germany, Italy, Russia and Turkey, Berlin, 13 July 1878, Articles XXIII, LXI–LXII.

²¹ See Ganji: *op. cit.*, 37.

²² See e.g. Apáthy: *op. cit.*, 109; Buza: *Szabadság és beavatkozás a nemzetközi jogban. op. cit.* 2; Bluntschli: *op. cit.*, 267; Csarada: *op. cit.*, 178; Lawrence: *op. cit.*, 118; Liszt: *op. cit.*, 66; Oppenheim: *op. cit.*, 184; Strisower: *op. cit.*, 114; Strupp, K.: *Theorie und Praxis des Völkerrechts. Ein Grundriß zum akademischen Gebrauch und zum Selbststudium.* Berlin, 1925. 29. For a critical evaluation, see Stowell: *Intervention in International Law*, 438–446.

A further right of intervention relating to international treaties served as a sanction beyond the texts of treaties, but likewise served the fulfilment of violated treaty obligations. As Oppenheim stated:

“Thus, thirdly, if a State which is restricted by an international treaty in its internal independence or its territorial or personal supremacy, does not comply with the restrictions concerned, the other party or parties have a right to intervene.”²³

Disturbing as it may sound, most of the contemporaneous experts did not even mention this right of intervention: perhaps they deemed its existence self-evident, or examined it under a different heading, for instance that of reprisal. The quotation above does not offer a definitive answer as to the relationship between the right at issue and the category of reprisal. It seems that Oppenheim simply treated a reprisal applicable in the wake of a breach of a treaty as a separate right of intervention. If this assumption is correct, it may be concluded that an intervention sanctioning a violation of a treaty obligation to respect human rights was almost certainly lawful; in addition, it could be classified simultaneously as humanitarian intervention. It has to be kept in mind, however, that the international legality of the resort to force in this particular case was a result of an accidental overlapping of the normally distinct categories of humanitarian intervention and armed reprisal, but not a clear evidence of the lawfulness of the former under customary law.

This statement begs the explanation why humanitarian intervention could not be equalized with armed reprisal and categorized as a permissible measure under traditional international law. Since a reprisal presupposes a violation of a norm of international law, one must first answer the question, whether or not such violation occurred, if a state trod the fundamental rights of its nationals under foot during the period concerned. In order to be able to answer this question, a brief preliminary examination of a standard legal relation in the field of human rights has to be carried out, which mainly focuses on the following problem: Towards whom did states undertake the obligation to respect human rights already in existence? Towards their nationals only (*per se* obligation), or—besides them—towards other states, as well (*inter se* obligation)?²⁴ In the

²³ Oppenheim: *op. cit.*, 183. See also Phillimore: *op. cit.*, 568.

²⁴ According to András Bragyova, the undertaking of human rights obligations establishes a *per se* obligation, not an *inter se* one, because “the state obliges itself towards itself”. (Translation mine.) He further adds that the lack of a substantive international right or obligation does not rule out the existence of certain procedural rights or obligations on

latter case, a violation of human rights inevitably would have injured not only the individuals but also the other states; consequently each and every humanitarian intervention would have been an armed reprisal. This is, as the conditional voice suggests, a less tenable assertion. It seems more defensible that in absence of an express stipulation, other states did not receive any rights from the undertaking of an obligation to respect human rights. Therefore, a violation of these rights could not have injured subjects other than the individuals—in other words: an intervention on grounds of humanity in favour of them could not be characterized as a reprisal. There is only one exception imaginable to this major rule. If states concluded a treaty in which they established an *inter se* human rights obligation—that is to say, they undertook the observance of human rights towards one another, as well—, the atrocities injured both the individuals and the other parties. Should the treaties previously mentioned be seen as such instruments, any breach of them produced an unintentional overlapping of humanitarian intervention and armed reprisal. The correctness of this allegation is also supported by the fact that human rights were within the domestic jurisdiction of states during the pre-Charter era, and became of international concern solely by insertion into international agreements.

Given the extreme, sometimes even chaotic diversity of the pre-Charter science of international law, it is not surprising that there was a third position, as well. According to this view, the treaties referred to above directly provided for a right of intervention for other parties even in absence of specific stipulations and independently from customary law, should a breach take place. As Percy H. Winfield wrote:

“The provision for a future intervention is either express or, more commonly, implied, and in either case must take effect as the secondary or sanctioning right necessary to secure the maintenance of the rights and duties conferred or imposed by the treaty.”²⁵

the side of other states, in case of a violation of these rights. See Bragyova, A.: Alapozhatók-e az emberi jogok a nemzetközi jogra? [Can Human Rights Be Based upon International Law?], *Állam- és Jogtudomány* 32 (1990), 100–101, 103–104.

²⁵ Winfield: *op. cit.*, 158. Winfield mentioned, among others, Articles LXI and LXII of the 1878 Treaty of Berlin, although none of these stipulations provided for a right of armed intervention. On the contrary, Article LXI only contained the verb “superintend”, whereas Article LXII merely recognized a right of Powers to “official protection” by diplomatic or consular agents. Evidently, none of these guarantees can be identified as a right of armed intervention. It is true that diplomatic protection often took a violent form during the 19th century, but its beneficiaries were the nationals of the intervening state. The group of

Furthermore, Winfield believed that if an intervention was “not otherwise righteous”, then an agreement to carry it out could neither be considered to be in conformity with international law, similarly to the provisions of municipal law.²⁶ (The phrase “not otherwise righteous” was presumably a referral to customary law.) Disregarding the previous conclusions, one therefore has to examine a further hypothesis in which a treaty could incorporate a right of intervention even in an *implicit* manner.

I feel it necessary to state at the very beginning that—at least in my opinion—even the starting point suffers from serious legal and logical defects; beyond the fact that the concept of a right of intervention originating from a treaty, *per se*, appears to be a paradox. The recognition of “implicit” or “inherent” treaty provisions in general (irrespective of the subsequent theory of inherent powers in the law of international organizations) is based upon the blurring of boundaries between customary and treaty law. Had the parties really wished to secure this “sanctioning right”, they most likely would have done it explicitly. If states did not include such possibility, it was because they either did not want to provide for it, or it was superfluous to do so, as it had been present and applicable under customary law anyway. It is a scarcely acceptable submission that, even though a treaty stipulates nothing in this regard, a right of intervention exists, moreover, it stems from the document itself.

Should one nevertheless adopt the idea of a right of humanitarian intervention emerging somehow from a treaty, there are two ways to derive its lawfulness under customary law. On the one hand, it might be possible that the provisions of relevant treaties merely reflected coexisting customary law. On the other hand, it cannot be ruled out either that it was the norm of customary law, which came into existence as a result of treaty provisions. The latter presumption is as reasonable as the first one, given that the majority of international agreements being discussed was concluded between the Great Powers of that time—influential states, whose actual interventions might have had an immense impact on the evolution of customary law. The thought of a treaty provision to become a norm of customary law is widely accepted even nowadays (although it cannot be presumed in general):

individuals entitled to protection by diplomatic or consular agents under Article LXII of the Treaty of Berlin, however, encompassed all natural persons—irrespective of their nationality—on the territory of the Ottoman Empire.

²⁶ See *ibid.*, 159. For a different view, see Strisower: *op. cit.*, 114–115.

“Just as a series of bilateral treaties concluded over a period of time by various States, all consistently adopting the same solution to the same problem of the relationships between them, may give rise to a new rule of customary international law, so the general ratification of a treaty laying down general rules to govern the future relationships of States in a given field has a similar effect.”²⁷

Humphrey Waldock, however, added an important remark, according to which the norms created this way “acquired their authority as general rules of international law... from the State practice, not from the treaties themselves”.²⁸ This pattern of establishment of customary law is not always unambiguous and possible. The Permanent Court of International Justice, for example, referred to it in the case of the *S. S. Lotus*: “Finally, as regards conventions expressly reserving jurisdiction exclusively to the State whose flag is flown, it is not absolutely certain that this stipulation is to be regarded as expressing a general principle of law...”²⁹ Both of the theoretical ways mentioned above seem rational, but—and my concluding observation in this connection is as follows—they necessarily turn out to be of no use, as none of them by-passes the problem of customary law, particularly the difficulties concerning the demonstration of *opinio iuris*.

For the sake of completeness, it should also be examined whether or not humanitarian intervention had ever belonged to the “general principles of international law recognized by civilized nations”,³⁰ and was thus a lawful measure. Firstly, it has to be noted that several problems emerge in relation to this task owing to the actual character of general principles of law not being unequivocal. Do they originate from the common principles of domestic law, or are they special principles of international nature meant to fill the gaps in international law? It can also be a subject of debate whether these principles of law represent surviving segments of natural law, or their content has to be sought for and

²⁷ Thirlway: *op. cit.*, 59. See also Brownlie, I.: *Principles of Public International Law*. 6th edition, Oxford, 2003. 12–13; International Law Association: Report of the Sixty-Ninth Conference. London, 2000. 753–765.

²⁸ Waldock, C. H. M.: General Course on Public International Law. *Recueil des Cours* 106 (1962-II), 41.

²⁹ The *S.S. Lotus* (France v. Turkey), Judgement No. 9, 7 September 1927, in Hudson, M. O. (ed.): *World Court Reports. A Collection of the Judgements, Orders and Opinions of the Permanent Court of International Justice*. Reprint of the edition of 1935, Vol. 2, Buffalo, 2000. 41–42.

³⁰ For a detailed analysis of this topic, see Herczegh, G.: *General Principles of Law and the International Legal Order*. Budapest, 1969.

interpreted only in the framework of positive law. Not to mention the question pertaining to the identity of those actors empowered or bound by the general principles of law: is it the states generally, or the courts that apply them? (It needs to be underlined that in the period under deliberation the recognition of a general principle of law by “civilized nations” was an essential condition, not an anachronistic phrase, as it is held to be nowadays.)

Supposing that the general principles of international law directly empower or bind states—and they did so in the past, as well—it has to be examined first, if there was a gap in law concerning the problem of humanitarian intervention, which could have left room for an invocation of these principles.³¹ In my view, the result can only be a negative one: the fact that an indisputable conclusion can be drawn neither from treaty law, nor from customary law is not equal to the existence of a gap in law.

It is fair to say that, according to the dominant position in the science of international law, a referral to the general principles of law is in fact an application of certain domestic legal principles by way of analogy on the international level. Bearing this circumstance in mind, and recalling that 19th century European and American legal literature in essence adopted a positivist approach, one can readily derive that the general principles of international law could hardly ever serve as a basis for the lawfulness of interventions on grounds of humanity. Naturally, an adequately backed up judgement could be made only after a thorough study of domestic laws of one-time civilized nations; nevertheless I strongly doubt that there have ever been common, well-established legal principles in the legal systems of the countries concerned which could provide a proper ground for even a distant analogy. Since this task goes far beyond the scope of the present study, we should confine ourselves to the application of indirect arguments.

The best imaginable theoretical combination for the lawfulness of humanitarian intervention would be the one according to which the general principles of law are and were specific international principles with a content taken from natural law. Thus, the principles of natural law, including the requirement of

³¹ The following opinion is worth recalling at this point: “Es gibt ferner auch negatives Völkergewohnheitsrecht. Negatives Völkergewohnheitsrecht entsteht, wenn die übereinstimmende, von Rechtsüberzeugung getragene Staatenpraxis davon ausgeht, daß ein bestimmter abstrakter Rechtssatz des Völkergewohnheitsrechts nicht besteht. Ein solcher Rechtssatz des Völkergewohnheitsrechts hat insbesondere die Funktion, den Rückgriff auf die Analogie, auf allgemeine Rechtsgrundsätze und sonstige subsidiäre Rechtsquellen des Völkerrechts auszuschließen.” Bleckmann, A.: Zur Feststellung und Auslegung von Völkergewohnheitsrecht. *Zeitschrift für ausländisches Öffentliches Recht und Völkerrecht* 37 (1977), 511.

justice, invoked by authors in the 17th and 18th centuries could have been applied to legalize humanitarian intervention. The positivist literature, however, did not support this assumption, and therefore it is futile to deal with it in detail. Such ideas have never been common in past and present legal literature, which also undermines the applicability of the general principles of law in this case. In the knowledge of heated debates regarding the lawfulness of humanitarian intervention, any truly applicable general principle is most likely to have received much more attention by international lawyers.

Finally, it is advisable to take a look at the so-called *ius ad bellum*, that is to say, the “sacred” right to resort to war. *Ius ad bellum* was one of the most fundamental attributes of state sovereignty in the pre-Charter era, providing a right for states to engage in war for nearly any reason.³² Nonetheless, this is an oversimplified formulation of the true meaning of *ius ad bellum*. In reality, this right was subject to a number of limitations: for instance, it was to be exercised always as a last resort and required an appropriate *casus belli*—be that genuine or alleged. The catalogue of causes of war was extremely subjective, but it typically embraced the right of self-preservation, which on the other hand, usually included the category of intervention. Let us not forget that in this period the latter involved interventions carried out by force of arms, as well, which could barely be distinguished from a war at first sight. For this reason, one may easily come to the conclusion that humanitarian intervention, being an exercise of *ius ad bellum*, was lawful. This statement, however, hardly corresponds to the truth. As commonly known, war and intervention were actually two distinct and independently treated categories, even though they occasionally overlapped in literature.³³ Intervention, including its armed manifestation, was dealt with under the rubric of the law of peace and was seen as a measure short of war, unlike war, which was discussed within a different framework and was defined as follows:

³² “War, as a means of law-making and law-enforcement, is therefore a necessary institution of current international law.” Buza, L.: *Háború és nemzetközi jog* [War and International Law]. 1943. 3. (Translation mine.) “The recognition of war as an international legal relation, however, does not at all depend on its legality or illegality. The group of persons that chooses it as means is determining the legality or illegality of war. (This is the most interesting feature of self-help.)” Weninger: *op. cit.*, 298. (Italics omitted. Translation mine.)

³³ The following remark by Lawrence clearly illustrates both the reason for this overlapping and the two categories being separate from one another: „Further, the cause which justifies intervention must be important enough to justify war.” Lawrence: *op. cit.*, 118.

“Der Krieg als Erscheinung des internationalen Lebens, ist ein Zustand, der von Seite mehrerer einander gegenüberstehender Staaten darauf gerichtet ist, daß jede Partei die andere durch allgemeinen wechselseitigen Eingriff in ihre Güter behufs Durchsetzung eines gewissen Zweckes überwinde. [...] Der Zweck des Krieges ist gewiß nicht in den Kriegsakten beschlossen. Aber der eigentümliche, rechtliche Gegensatz des Krieges gegenüber dem Friedenszustande, dem Zustande ohne Krieg, liegt in den Kriegsakten, in dem dem Kriegszustande entsprechenden Verhalten, darin, daß solche Akte vorgenommen werden, um den Zweck des Krieges zu erreichen.”³⁴

War was therefore a peculiar “state”, or in other words, a special legal relation, in the framework of which each belligerent as well as the neutral states acquired certain rights and duties.³⁵ War was neither an objective category, nor synonymous with the use of force. It could be established exclusively with a special intent (*animus belligerendi*), therefore the existence of a *de iure* war was dependent on a subjective decision of the belligerents.³⁶ This will was as a rule reflected in the declaration of a state of war, and it could not be deduced simply from objective circumstances reminiscent of war, such as the application of armed force by states against one another, the widescale loss of human life, or significant damage to property. Consequently, several forceful measures not requiring such intent—for example armed reprisal, embargo, pacific blockade, self-defence, and armed intervention—could not be properly classified as war.³⁷ Furthermore, under *ius ad bellum*, the waging of war was entirely lawful (moreover, war occasionally appeared as an extra-legal phenomenon in some of the treaties), whereas intervention, irrespective of a few exceptions known as rights of intervention, was generally prohibited. Finally, war was comprehensive and unlimited with regard to both its goals and its means, whereas intervention was more of a limited nature in all respects. As a result, the lawfulness of intervention on grounds of humanity cannot be drawn from the *ius ad bellum*.

³⁴ Strisower: *op. cit.*, 4–5.

³⁵ Cf. Liszt: *op. cit.*, 282.

³⁶ Cf. Meng, W.: War, in Bernhardt, R. (ed.): *Encyclopedia of Public International Law*. Vol. 4, New York–London, 1982. 284.

³⁷ Cf. Westlake, J.: *International Law*. Vol. 2, Cambridge, 1907. 2. See also Farer, T. J.: Law and War, in Black, C. E.–Falk, R. A. (eds.): *The Future of International Legal Order*. Vol. 3, Princeton, 1971. 15, 23–24; Strisower: *op. cit.*, 6–7.

III.

The legality of past humanitarian interventions has to be examined in the context of the principle of non-intervention rather than under the heading of war. This statement brings us to yet another field worthy of examination: the lawfulness of humanitarian intervention in the light of international treaties concluded during the first half of the 20th century adversely affecting the previous legality of war, namely the Covenant of the League of Nations, the Pact of Locarno and the Kellogg-Briand Pact.

The overwhelming majority of articles in the Covenant of the League of Nations contain the word “war”. There is no particular reason to believe that the content of this *terminus technicus* fundamentally changed during the years of World War I in a way that it came to encompass hostile measures short of war, including armed intervention. Arguing *a maiori ad minus*, one might claim that the gradual outlawing of war had an impact on the lesser category of intervention, which thus became totally illegal. However, the relationship between war and intervention was not a relation of a whole to a part, since they were, as it has already been noted, separate categories.

The principle of efficiency may also seem to strengthen the idea of a comprehensive ban on the use of force: it might be argued that the interpretation of “war” in the Covenant in accordance with its strict legal sense would have hampered the most important aim of the League, namely “to promote international co-operation and to achieve international peace and security”.³⁸ The rightness of this opinion is being contested by two circumstances. Firstly, “war” has always been a technical term that must be interpreted and applied in observance of this nature, regardless to the international instrument in which it appears. Secondly, as Hersch Lauterpacht mentioned, the early draft of the Covenant had originally contained the word “force”, but it was subsequently replaced by “war” in the final version of the text.³⁹ This change, unless it was motivated by stylistic considerations, presumably veils the effort of states to preserve a substantial segment of their freedom of action by resorting to an expression bearing a much more restricted meaning.

³⁸ Covenant of the League of Nations, preamble. For the text of Covenant, see Treaty of Peace between the Allied and Associated Powers and Germany, Versailles, 28 June 1919, Part I, in Grenville, J. A. S.–Wasserstein, B. (eds.): *The Major International Treaties of the Twentieth Century. A History and Guide with Texts*. Vol. 1, London–New York, 2001. 100–105.

³⁹ See Lauterpacht, H.: “Resort to War” and the Interpretation of the Covenant During the Manchurian Dispute. *American Journal of International Law* 28 (1934), 49.

The provisions of the Covenant concerning war apparently had divergent interpretations even in those days: many were convinced that the effects of the partial renunciation of war comprised all forms of the use of force. Interestingly enough, some organs of the League also adopted this position,⁴⁰ although the states themselves were clearly hesitant to construe “war” in a broad sense.⁴¹ Lauterpacht maintained that this phrase could be interpreted in three ways: broadly, to include “all measures of armed force”; narrowly, as a description of a state of war; and in line with a “specific meaning”, positioned somewhere between the two extremes. He further stated that:

“Resort to war” may be deduced constructively from the recourse to armed force, but it is not synonymous with the use of armed force. [...] It merely means that the Covenant does not indiscriminately and automatically render illegal all acts of armed force. But it means also that it *authorizes* the finding and treatment as illegal of such acts of force as members of the League may wish to treat as such, having regard to the nature of the case, to general political considerations, and to their attitude toward the idea of collective enforcement of peace.”⁴²

This renowned expert of international law seemingly did not think that the Covenant outlawed all forms of the use of force: due to its vague wording, the determination and sanctioning of war was basically dependent on the actual political will of states. Article 10 of the Covenant was the sole provision, which arguably reflected an intention to prohibit every forceful measure:

“The Members of the League undertake to respect and preserve as against *external aggression* the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of

⁴⁰ For instance, the Assembly of the League adopted a resolution in its sixth session in 1925, which stated that all aggressive wars were and remained prohibited. Since this resolution was not a formal amendment to the Covenant, its significance was merely of moral and political nature. Cf. Wehberg, H.: *Die Völkerbundsatzung*. 3rd edition, Berlin, 1929. 95. Furthermore, in August 1921, the International Blockade Committee of the Assembly interpreted the expression “resort to war” in the Covenant as “undertaking of armed action”. See Stone, J.: *Aggression and World Order. A Critique of United Nations Theories of Aggression*. London, 1958. 29.

⁴¹ On the related debate, see Lauterpacht: *op. cit.*, 47–51.

⁴² *Ibid.*, 58–59.

any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.”⁴³

Humanitarian intervention, *prima facie*, appears to fit in the notion of an “external aggression” against the “existing political independence” of a state, even though a violation of “territorial integrity” is incompatible with the humanitarian nature thereof. (Noteworthy is the fact that the expressions “territorial integrity” and “existing political independence” stood in a conjunctive relation (and), not in a disjunctive one (or) as in Article 2, paragraph 4, of the UN Charter. It may allow an interpretation, according to which Article 10 was applicable only in case of an aggression against both the political independence and the territorial integrity of a member, which would obviously shove humanitarian intervention out of the scope of the provision.) A generally recognized and legally binding definition of aggression did not come into being in the period between the two World Wars. Drafts as well as bi- or multilateral treaties were nevertheless adopted containing elements of the notion of aggression, according to which all forms of armed intervention was to be seen as an act of aggression. Among these instruments a draft prepared by the Soviet Union in 1933 was of outstanding importance, which, in spite of its subsequent failure, served as a basis for several bilateral agreements.⁴⁴ This draft overtly renounced acts of aggression, including the use of force in cases of “alleged maladministration”, “possible danger to life or property of foreign residents”, “revolutionary or counter-revolutionary movements, civil war, disorders or strikes”, and as “religious or anti-religious measures”.⁴⁵

If the term “external aggression” bore a similar meaning in the context of the Covenant, then interventions on grounds of humanity were presumably unlawful, although Article 10 did not state it explicitly. However, this reasoning is extremely speculative, as the drafts and treaties referred to above were concluded well after the entry into force of the Covenant, and carried the

⁴³ Covenant of the League of Nations, Article 10. (Emphasis added.)

⁴⁴ In the period between 1926 and 1937, the Soviet Union concluded a series of treaties on non-aggression in order to prevent its isolation. For instance, the Soviet-Finnish agreement provided as follows: “Any act of violence attacking the integrity and inviolability of the territory or the political independence of the other High Contracting Party shall be regarded as an act of aggression, even if it is committed without declaration of war and avoids warlike manifestations.” Treaty of Non-Aggression between the Soviet Union and Finland, Helsinki, 21 January 1932, Article I, paragraph 2. For an English translation of the document, see Grenville–Wasserstein: *op. cit.*, 191–192.

⁴⁵ See Stone: *op. cit.*, 34–36.

marks of the ensuing development of international law.⁴⁶ Furthermore, judging from its wording, Article 10 probably laid down only a general rule—in addition to the creation of an obligation of collective defence—, leaving the details to be elaborated on by other articles of the Covenant dealing with collective security. Finally, as Hans Wehberg pointed out, each member state had a right to determine “nach bestem Wissen und Gewissen”,⁴⁷ whether or not an external aggression existed.

The Covenant did not offer a definitive solution to the legality of humanitarian intervention, even if one—groundlessly—perceives such actions as a segment of the category of war. Although it declared war or a threat of war “a matter of concern to the whole League”, the mechanism meant to avert war was reserved exclusively for inter-state disputes “likely to lead to a rupture”. If such controversy occurred, members of the organization were obliged to “submit the matter either to arbitration or judicial settlement or to enquiry by the Council”, with a possibility in the latter case of a referral of the dispute to the Assembly of the League.⁴⁸ Without going into a detailed introduction of the procedure of dispute settlement, one may raise the embarrassing question: Could there be any dispute—in the traditional meaning of this technical term—in the course of events leading to a humanitarian intervention? The answer seems to be negative. The question of human rights as well as the treatment of nationals—with only but a handful of exceptions elevated to the international level by international treaties, such as the protection of minorities or the abolition of slavery—was to be found in the domain of exclusive domestic jurisdiction of states.⁴⁹ Demands were naturally formulated by the intervening

⁴⁶ There existed, however, treaties of non-aggression that significantly deferred from the Soviet draft. See e.g. Anti-War Treaty of Nonaggression and Conciliation, Rio de Janeiro, 10 October 1933, preamble, Articles I–II. The content of “war of aggression” was not detailed in the treaty, but—in the light of a contextual interpretation of Articles I and II—it was closely linked to, although not equalized with, the violent settlement of territorial questions. For an English translation of the text, see Anti-War, Nonaggression and Conciliation, Treaty between the United States of America and Other American Republics. U.S. Treaty Series, No. 906. 14–18.

⁴⁷ Wehberg: *op. cit.*, 75.

⁴⁸ For the process of dispute settlement, see Covenant of the League of Nations, Articles 11–16.

⁴⁹ In support of this view, suffice it to recall the *Bernheim* case, in which the organs of the League adopted the position of the German *Reichsregierung* concerning the Nuremberg Race Laws being within its domestic jurisdiction. See Ermacora, F.: Article 2(7), in Simma, B. (ed.): *The Charter of the United Nations: A Commentary*. Oxford, 1995. 141.

states calling for a respect of human rights prior to the use of force, but—as a result of the above-mentioned status of fundamental rights—these representations could be classified as “soft” interventions rather than disputes. It is also remarkable that the concept of dispute never really became manifest in the relevant literature.

This conclusion will only be partially altered if it is held that a dispute “likely to lead to a rupture” could indeed take place prior to an intervention concerning the respect for human rights, and could have been submitted for settlement to arbitration, to judicial settlement, or to enquiry by the Council. Due to the obligation to respect the exclusive domestic jurisdiction of states, it is doubtful that the Council could have actually dealt with the matter:

“If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.”⁵⁰

It was for the Council to determine what formed part of domestic jurisdiction, but it was not required to examine this issue *ex officio*, therefore any invocation of domestic jurisdiction took the form of an objection on the side of the state concerned. The basis of such decision by the Council was whether international law had a norm prescribing a state to perform a particular behaviour under given circumstances.⁵¹ What is more, the Covenant set a considerably strict condition for the application of the clause cited, as the matter must have been “solely” within the domestic jurisdiction, not “essentially” as under Article 2, paragraph 7, of the UN Charter.⁵²

Resorting to the dispute settlement mechanism envisaged by the Covenant did not guarantee the actual prevention of war. States merely undertook the obligation of averting war in certain cases, so there remained a number of opportunities to wage war lawfully. The most evident reservation of *ius ad bellum* was incorporated in Article 15, paragraph 7, of the Covenant:

⁵⁰ Covenant of the League of Nations, Article 15, paragraph 8. For a similar conclusion, see Murphy, S. D.: *Humanitarian Intervention. The United Nations in an Evolving World Order*. Philadelphia, 1996. 59.

⁵¹ Cf. Buza, L.: *A nemzetközi jog tankönyve* [A Textbook of International Law] Budapest, 1935. 98.

⁵² Cf. Korowitz, M. S.: Some Present Aspects of Sovereignty in International Law. *Recueil des Cours* 102 (1961-I), 66–67.

“If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.”⁵³

This was, however, not the only gap in the system of collective security.⁵⁴ A recourse to war was legal in the following cases, as well: if a dispute was solely within the domestic jurisdiction of states; if the arbitration or the judicial settlement was not concluded within a reasonable time, or the Council failed to present its report within six months after the submission of the dispute; if either of the parties to the dispute did not comply with the award by the arbitrators, the judicial decision or the report of the Council, and the three-month cooling-off period expired; and—although it was not mentioned expressly in the Covenant—in exercise of the customary right of self-defence.⁵⁵ In addition, the Covenant sought to avert war only between members of the League. If non-members were also involved in a debate, they must have been “invited to accept the obligations of Membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just”.⁵⁶

The utmost one can state with certainty regarding the relationship of the Covenant and humanitarian intervention is that such actions were, or rather would have been, unconditionally of interest to the League of Nations:

“It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.”⁵⁷

⁵³ Covenant of the League of Nations, Article 15, paragraph 7.

⁵⁴ The 1924 Geneva Protocol was meant to fill these gaps, thereby making the renunciation of war complete. The effort, however, resulted in failure owing to resistance by the United Kingdom and several other states. See e.g. Faluhelyi, F.: *A párizsi Kellogg-paktum és annak jelentősége* [The Kellogg-Pact of Paris and Its Significance]. Kaposvár, 1929. 5; Harris, H. W.: *The League of Nations*. London, 1929. 29; Wehberg, H.: *Grundprobleme des Völkerbundes*. Berlin–Friedenau, 1926. 46–56.

⁵⁵ See e.g. Dinstein, Y.: *War, Aggression and Self-Defence*. 3rd edition, Cambridge, 2001. 76–77.

⁵⁶ Covenant of the League of Nations, Article 17.

⁵⁷ *Ibid.*, Article 11, paragraph 2.

The Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain, and Italy—Annex A to the Pact of Locarno—is typically considered an important milestone in the process of the total renunciation of war, although its restricted scope and the limited number of parties make it appear less significant for the purposes of an analysis aimed at the drawing of conclusions of universal nature. In Article 2, Belgium and Germany as well as France and Germany mutually undertook that they “they will in no case attack or invade each other or resort to war against each other”. This provision, however, recognized three exceptions: the exercise of the right of legitimate defence; actions in pursuance of Article 16 of the Covenant of the League of Nations; and measures resulting from a decision by the Assembly or by the Council of the League, or in accordance with Article 15, paragraph 7, of the Covenant, provided in the latter case that the resort to force was merely a response to an attack.⁵⁸ The inclusion of “attack” and “invade” rendered the treaty an instrument more progressive than the Covenant in the field of the renunciation of the use of force, and in all probability ruled out the chance of a lawful humanitarian intervention between the states concerned.

For various reasons, neither the Covenant nor the Pact of Locarno strove to impose a comprehensive and universal prohibition on the waging of war, unlike the Treaty on the Renunciation of War as an Instrument of National Policy—commonly known as the Kellogg-Briand Pact—signed in Paris, on August 27, 1928. The treaty is surprisingly short and formulates the general ban on war in one single sentence:

“The High Contracting Parties solemnly declare, in the names of their respective peoples, that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another.”⁵⁹

Similarly to the Covenant of the League of Nations, the Kellogg-Briand Pact did not contain specific provisions concerning armed intervention, including humanitarian intervention. In support of the assumption that the Pact did not affect the lawfulness, if any, of intervention on grounds of humanity, one should simply recall the arguments detailed with respect to the Covenant. The

⁵⁸ See Pact of Locarno, Annex A: Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain, and Italy, Locarno, 16 October 1925, Article 2. For the text of the treaty, see Grenville–Wasserstein: *op. cit.*, 145–147.

⁵⁹ Treaty on the Renunciation of War as an Instrument of National Policy, Paris, 27 August 1928, Article I.

treaty outlawed war, not the use of force. Furthermore, it merely renounced war “as an instrument of national policy”, but a humanitarian intervention, *per definitionem*, had to be free from selfish motives and direct national interests. However, due to the issue of human rights being within the domestic jurisdiction of states, it is dubious if the use of force for humanitarian purposes classified as war could be an instrument of international policy, and as such, a measure arguably not prohibited by the Pact.

As the treaty was meant to achieve a total prohibition of war, it is more likely that the phrase “war” contained therein embraced not only war in a formal sense, but also any use of military force against another state.⁶⁰ It was the conclusion reached, for instance, by Ian Brownlie in the 1960s, who claimed that there had been only two implicit exceptions to the comprehensive renunciation of force: self-defence and measures taken in accordance with Article 16 of the Covenant.⁶¹ At first sight, this assertion is unquestionably convincing, but it does not seem to be unambiguously supported by past and present international lawyers. It has to be acknowledged that the number of contemporaneous authors accepting the lawfulness of humanitarian intervention apparently decreased after World War I, but academics usually refrained from declaring all forms of the use of force illegal under the Kellogg-Briand Pact. For example, as Ferenc Faluhelyi stated a year after the conclusion of the treaty:

“It appears worthy only of a remark that the statement of news articles, which emphasize in connection with the Kellogg Pact the total erasure of war from the dictionary of international law, is false. It is out of question.”⁶²

⁶⁰ Article II of the Pact providing for the peaceful settlement of disputes strengthens this supposition. Being the inverse of the prohibition of the use of force, and inseparable from that, this obligation may be construed as outlawing not only war but also all manifestations of forceful self-help.

⁶¹ See Brownlie, I.: *International Law and the Use of Force by States*. Oxford, 1963. 89.

⁶² Faluhelyi: *op. cit.*, 11. (Translation mine.) For similar conclusions, see e.g. Brown, P. M.: Undeclared Wars. *American Journal of International Law*, 33 (1939), 540; Buza: *A nemzetközi jog tankönyve. op. cit.* 357; Wehberg: *Die Völkerbundsatzung*, 96. Even the address delivered by Aristide Briand before the signing of the Pact was phrased in a cautious manner: “It may now be appropriate to explain what is finally the essential feature of this pact against war. It is this: For the first time in the face of the whole world through a solemn covenant involving the honor of great nations, all of which have behind them a heavy past of political conflict, war is renounced unreservedly as an instrument of national policy, that is to say, in its most specific and dreaded form—selfish and wilful war. Considered of yore as divine right and having remained in international ethics as an

Josef L. Kunz expressed an essentially similar view in 1951, but he also gave the grounds for that:

“But the admitted legality of self-defense and the delegation to each state of the right to be the only judge to determine whether the conditions of self-defense exist, make this Pact practically only a restatement of general international law. [...] Experience had shown that the Covenant and the Kellogg Pact, because of the aura of uncertainty hovering around the legal concept of “war”, made it possible to wage “wars in disguise.”⁶³

Slightly more than two decades after the undertaking of the solemn obligation at issue, Kunz articulated an exceedingly critical opinion on the Pact labelling it as a mere “restatement” of general international law. His point can only be understood if one treats the current regulation of self-defence independent from its status under traditional international law. In the pre-Charter period, self-defence was far from being the category with strict limitations as we know it today. On the contrary, its content was broad and vague, as a result of which it was often barely separable from self-preservation, self-help or other lesser categories, such as reprisal, necessity, and even intervention. In addition, it could afford a legal basis even for an offensive action, provided that the danger triggering the measure was “instant, overwhelming, leaving no choice of means, and no moment for deliberation”, and the state exercising this right “did nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity and kept clearly within it”.⁶⁴ Under such circumstances, it is no wonder that in some of the

attribute of sovereignty, that form of war becomes at last juridically devoid of what constituted its most serious danger—its legitimacy. [...] Thus shall war as a means of arbitrary and selfish action no longer be deemed lawful.” Extracts from the speech of Aristide Briand, French Minister of Foreign Affairs, to the Plenipotentiaries before Signing the Pact for the Renunciation of War, in *The Paris Pact* (Frank B. Kellogg pref.), 1934. 13–14.

⁶³ Kunz, J. L.: *Bellum Justum and Bellum Legale. American Journal of International Law*, 45 (1951), 532–533. For concurring views in works published after 1945, see e.g. Dinstein: *op. cit.*, 80; Jiménez de Aréchaga, E.: *International Law in the Past Third of the Century. Recueil des Cours*, 159 (1978-I), 87; Schwarzenberger, G.: *The Fundamental Principles of International Law. Recueil des Cours*, 87 (1955-I), 329; Stone: *op. cit.*, 32; Waldock, C. H. M.: *The Regulation of the Use of Force by States in International Law. Recueil des Cours*, 81 (1952-II), 473–474.

⁶⁴ Parts of the diplomatic correspondence following the *Caroline* incident are quoted in Hall: *op. cit.*, 324.

contemporary treatises humanitarian intervention and self-defence seem to have overlapped.

If the Kellogg-Briand Pact nevertheless outlawed humanitarian intervention, a dual regime was established—supposing, of course, that such interventions had been legal beforehand. As a consequence, this measure became unlawful for parties in their subsequent relations with one another, whereas in the relations of parties and non-parties as well as between non-parties, the customary law remained in force, whatever its exact content was.

Conclusion

Based on the pre-Charter literature, the definition of humanitarian intervention valid for the period of traditional international law can be worded as follows: dictatorial interference involving the use of force, but not qualifying as war, carried out as a last resort and free from selfish motives by one or more civilized states against another state in absence of the consent or request thereof, with a view to coerce it to cease the grave and widespread violations of fundamental freedoms and human rights of its own nationals. Surprising as it may seem, but the submitted definition does not contain any referral to the question of legality. The reason for that is fairly simple—humanitarian intervention was not a generally accepted legal title.

To be able to draw a clear picture of the lawfulness of intervention on grounds of humanity in the pre-Charter era, the coexisting customary law has to be examined first. Having taken into account the relevant literature once again, it may be found that the teachings of international lawyers did not provide a definitive answer; moreover, nearly as many outstanding scholars considered humanitarian intervention lawful as those who explicitly rejected it. Similarly ambiguous results are reached following the analysis of rights of intervention based on treaty stipulations, a possible outlast of legality stemming from the doctrine of *bellum iustum*, the general principles of international law recognized by civilized nations, and the so-called *ius ad bellum*. Furthermore, as war and intervention were two separate categories of law, it is also extremely doubtful if the provisions of the Covenant of the League of Nations, or the Kellogg-Briand Pact affected the legality, if any, of humanitarian intervention. The Treaty of Mutual Guarantee annexed to the Pact of Locarno, however, appears to have gone beyond these instruments in this respect, but its restricted scope as well as the limited number of its parties considerably decreases its relevance for the purposes of this study.

In sum, a definitive conclusion pertaining to the lawfulness or unlawfulness of humanitarian intervention can scarcely be drawn. Both extremes are verifiable, but neither is absolutely and undoubtedly correct. If I nevertheless had to make a judgement on this issue, I would say that the *spirit* of 19th century international law stood close rather to the legality than to the illegality of such interventions, but this spirit gradually altered during the first half of the 20th century. Thus humanitarian intervention could well be presumed lawful in the 1800s, but this presumption turned to the opposite in the years between the two World Wars⁶⁵: a conclusion which, if correct, has serious implications on theories striving to demonstrate the present customary lawfulness of humanitarian intervention on the basis of the survival of an alleged traditional right thereof.

⁶⁵ “We must, however, admit that *the presumption is normally against* such action and in support of the rule of non-interference in the internal affairs of another state.” Stowell, E.: Humanitarian intervention. *American Journal of International Law* 33 (1939), 734. (Emphasis added.) On the other hand, several authors of the post-Charter era have stated that humanitarian intervention had been lawful under traditional customary law. Cf. e.g. Glahn, G., von: *Law Among Nations: An Introduction to Public International Law*. 5th edition, New York–London, 1986. 160; International Law Association: Report of the Fifty-Fourth Conference. The Hague, 1970. 598–99, 611; Lillich, R. B.: Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives, in Moore, J. N. (ed.): *Law and Civil War in the Modern World*. Baltimore–London, 1974. 234–35; Reisman, W. M.–McDougal, M. S.: Humanitarian Intervention to Protect the Ibos, in Lillich, R. B. (ed.): *Humanitarian Intervention and the United Nations*. Charlottesville, 1973. 171.