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The Legality of Unilateral Humanitarian Intervention Re-examined

Abstract. This article aims to reconsider the controversial issue of the lawfulness of unauthorised humanitarian intervention. After providing a definition of humanitarian intervention and outlining its legality under contemporary international law, it examines the most common arguments raised in the literature for the purpose of justifying unilateral humanitarian intervention. The analysis covers such topics as the powers of the UN General Assembly to pass resolutions on the use of force, the theories on implicit or *ex post facto* authorisations by the Security Council, the text of the UN Charter, customary international law, as well as an alleged conflict of peremptory norms of international law.

Keywords: humanitarian intervention, UN Charter, unilateral use of force

I.

The prohibition of the use of force has been a fundamental principle of international law since the end of the Second World War. The principle forbids the use or threat of armed force with peremptory character for all subjects of international law. To the prohibition framed under Article 2, paragraph 4, of the Charter of the United Nations (UN)¹—which exists with a similar content in customary law²—only two exceptions prevail.³ Therefore, the use of force in

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¹ Article 2, paragraph 4, of the UN Charter: “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

² Cf., Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement of 27 June 1986, I.C.J. Reports 1986, para. 188, at 99.

³ A former third exception, the “enemy state” clause under Article 107 of the Charter has since become entirely and perpetually inapplicable.

our age is lawful exclusively in two cases: if the UN Security Council gives a prior and express authorisation under Chapter VII thereto, or if it is employed in exercise of the inherent right to individual or collective self-defence.⁴ Evidently, the emergence of the prohibition of the use of force resulted in decisive changes in the direct legal environment of humanitarian intervention, one of the most ancient institutions of international law, as well. Owing to a lack of positive legal sources in this field, it is extremely difficult to define this phenomenon of international relations, and its description can hardly claim general recognition. In my view, the definition of humanitarian intervention valid under contemporary international law can be summarised—on the basis of the relevant literature—within the framework of the following set of criteria:

The subject of humanitarian intervention is one or more “willing” state or international organisation. Other actors—for example, non-governmental organisations—cannot carry out such actions. The intervener acts in a relatively disinterested and unbiased manner. The target of intervention can only be a state, which does not request or consent to the intervention. The beneficiaries of the action are, from the viewpoint of the intervener, foreigners, as they are always nationals of the target state. The ground for intervention is a grave and widespread violation of the most fundamental, first generation human rights of non-political character, or guarantees of international humanitarian law applicable to non-international armed conflicts. Unfortunately, a fairly large number of victims of atrocities or of imperilled persons are also indispensable for the credibility of humanitarian intervention. The target state might be guilty of such violations either as a result of an active or a passive behaviour, but it may also come about that the intervention is necessitated by a state of anarchy developing in the wake of the collapse of state power. Furthermore, humanitarian intervention is of an *ultima ratio* nature, restricted in its goals, and proportional to the violations constituting its ground both with regard to its means and its duration. The relevant norms of international humanitarian law—that is, the norms relative to armed conflicts of an international character—have to be rigorously observed during the action. Last, but not least, the internal right to self-determination of the people of the target state has to be respected in the course of intervention, which—in my opinion—does not automatically rule out the possibility of an overthrow of the oppressive regime.

It can be observed that the definition as outlined above does not contain the legality of the initiation of humanitarian intervention. I think that the legality of commencement cannot constitute a conceptual element, since both the renowned representatives of the science of international law and states consider—besides

⁴ See, Articles 42 and 51 of the UN Charter.

the lawful instances—several conducts of rather questionable legality or of manifest unlawfulness as humanitarian interventions. In other words, an unlawfully launched armed action may also be humanitarian in nature, provided that the essential, conjunctive conditions required for such qualification exist. It might be misleading that—even though the legality of commencement, and therefore the overall lawfulness of the intervention is not an element of the concept—some of the criteria mentioned in connection with the definition of humanitarian intervention valid in the present era of international law bear a legal character and presuppose a law-abiding behaviour. Such elements are, for example, the obligation to respect norms of humanitarian law governing international armed conflicts or the internal right to self-determination of the people of the target state. The existence of these legal conceptual elements, however, does not legalise an unlawfully instigated humanitarian intervention. These are merely preconditions for the qualification of an action as humanitarian, and as such, are eligible to establish maximum its legitimacy. As the quality of humanitarian intervention is *per se* not a legal title, a self-contained analysis of its legality, which, however, does not concern the exact content of this category, appears to be sufficiently justified.

In line with the explanation above, it is obvious that a humanitarian intervention is lawful, if it is commenced in possession of a prior and express authorisation by the Security Council.⁵ The pattern of adoption of these authorisations is basically the same as the general scheme of adoption of other resolutions authorising the use of force, albeit the process carries a few special features at some points. The most important among these is probably that an authorisation to humanitarian intervention—owing to the nature of the ground of the action—is imaginable solely in case of a threat to international peace and security, the existence of which has to be, at least implicitly, by a reference to Chapter VII, determined by the Security Council under Article 39. Since humanitarian intervention is necessitated by events taking place within a state, the two further categories under Article 39—that is, a breach of the peace or acts of aggression—are irrelevant in this regard, in view of the fact that these imply forms of conduct arching over borders of states.⁷ States and

⁵ On the lawfulness of authorisation, see, Blokker, N.: Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by “Coalitions of the Able and Willing.” *European Journal of International Law*, Vol. 11. No. 3. (September 2000), 541–568.

⁷ Since the Charter does not define any of these notions, the Security Council has an extraordinarily broad discretion in the determination of the existence of a threat to the peace, a breach of the peace, or an act of aggression. (Although the definition of aggression

international organisations may likewise be recipients of an authorisation, however they are not obliged to carry it out. Furthermore, the authorisation can assume the form neither of a recommendation, nor of a provisional measure, even though these types of action, along with non-forcible enforcement measures under Article 41, may be able to establish the *ultima ratio* character of humanitarian intervention. Consequently, the direct grounds, on which humanitarian intervention is considered lawful, are Articles 39 and 42 of the Charter. These may be supplemented by a reference to Chapter VIII, in the event of an authorisation to regional arrangements or organisations.

Nonetheless, the Security Council is, by reason of the lack of unanimity of its permanent members, often incapable of taking action for the protection of an oppressed population in a timely and efficient manner. Since humanitarian intervention, which involves the offensive use of force, cannot be classified as self-defence, the chance for lawful action on the part of the states willing to intervene is thereby extinguished. Such states face the alternative of either contemplating the atrocities in inertia or intervening, in knowledge of the fact that, in spite of their noble intentions, they will violate international law. It is therefore not at all surprising that a recurrent question of international law is, whether a so-called unilateral or unauthorised humanitarian intervention can nevertheless be justified, and if so, by what legal arguments. In the following, I shall make an attempt to provide an exhaustive answer to this question.

II.

At first sight, it seems to be possible to derive the legality of unauthorised humanitarian intervention from a recommendation by the General Assembly on the use of force, though it must be noted that this issue, in fact, raises a number of serious legal concerns. Two methods are available for the purpose of justifying that the General Assembly—even if it bypasses the Security Council—can lawfully make a recommendation to states on the use of force, including armed humanitarian intervention. One of these theories is based on

is available in the form of a General Assembly resolution, its content does not bind the Council.) This may be the reason why, according to some views, humanitarian intervention is admissible in the case of a breach of the peace, as well. See, Hilpold, P.: Sezession und humanitäre Intervention — völkerrechtliche Instrumente zur Bewältigung innerstaatlicher Konflikte? *Zeitschrift für Öffentliches Recht*, Band 54. Heft 4. (1999), 591.; Simma, B.—Verdross, A.: *Universelles Völkerrecht. Theorie und Praxis*. Berlin, 1976. 584.

the Charter itself, whereas the other rests upon the procedure envisaged by the controversial “Uniting for Peace” Resolution.

The General Assembly is the most representative principal organ of the UN, given that that all member states of the Organisation are represented in it.⁹ Simultaneously, it is also the organ with the largest scope of powers, although its activity is primarily deliberative and critical.¹⁰ The general description of the powers and functions of the General Assembly is set forth in Article 10 of the Charter.¹¹ As the provision reflects, there is practically no segment of international relations, which the General Assembly is not competent to deal with. It should be added that the powers guaranteed under this article—as a consequence of Article 2, paragraph 6—exist also with respect to non-members. In this regard, the sole substantial limitation is specified under Article 2, paragraph 7, concerning the prohibition of intervention. Therefore, the General Assembly is not competent in issues, “which are essentially within the domestic jurisdiction of any state”. As it is known, neither human rights, nor fundamental guarantees of international humanitarian law qualify as matters being within the scope of domestic jurisdiction, thus the attending to these matters does not manifest itself as an intervention by the Organisation. The demonstration of the legality of humanitarian intervention based upon a recommendation by the General Assembly is, therefore, “half-accomplished”. However, the verification of the remaining “half” is much more difficult, as it needs to be proven that the General Assembly can lawfully make recommendations on the use of force, despite that the Charter attributes the power regarding such enforcement measures to the Security Council in an apparently exclusionary manner.¹²

Article 10 mentions the scope of the Charter, which incorporates such purposes as the maintenance of international peace and security and the taking of “effective collective measures” to that end, as well as the promotion and encouragement of respect for human rights and fundamental freedoms for all.¹³ Furthermore, according to the same article, the General Assembly may

⁹ Cf., Article 9, paragraph 1, of the UN Charter.

¹⁰ Cf., Kelsen, H.: *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems*. London, 1950. 199–200.

¹¹ Article 10 of the UN Charter: “The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.”

¹² Cf., *ibid.*: Article 24, paragraph 2. (The second sentence of this paragraph *expressis verbis* refers to Chapter VII.)

¹³ See, *ibid.*: Article 1, paragraphs 1 and 3.

not only “discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter”, but may also make recommendations on any such questions or matters. The provision contains merely one restriction, which is described under Article 12: “While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”¹⁴

One may easily conclude from the wording of Article 10, that the General Assembly can indeed make a recommendation on humanitarian intervention directly to the members. (Obviously, a recommendation can also be addressed to the Security Council and in the event of its acceptance, the Council will authorise the use of force in a binding resolution.) Merely on the basis of Article 10, it looks as if the General Assembly has to refrain from the making of such a recommendation, only if the Security Council is simultaneously dealing with the same matter. Moreover, the adoption of a recommendation is permitted as a sub-exception even in this case, provided that the Council requests the General Assembly to proceed accordingly.

At this point, the question pertaining to the interpretation of the phrase “exercising ... the functions assigned to it” as contained by Article 12, paragraph 1, arises, since the duration of this activity indicates the beginning and the end of the prohibition for the General Assembly to make recommendations. In the beginning, the exercise of functions by the Council was deemed equivalent to having a specific matter on the agenda, therefore, it is probably not accidental that the last sentence of each substantive resolution usually reads as follows: “Decides to remain seized of the matter”. On the other hand, the view that exercising functions entails “simultaneous, actual, and active consideration” on the part of the Council has gradually gained ground, which, as an interpretation, seems to be justified by the practice of the General Assembly, as well.¹⁵ Consequently, Article 12 contains a provisional procedural limitation that is immediately terminated if the Security Council so requests in a resolution, or convokes a special or an emergency special session of the General Assembly, or ceases or adjourns to deal with the matter.¹⁶

¹⁴ *Ibid.*, Article 12, paragraph 1.

¹⁵ See, Hailbronner, K.—Klein, E.: Article 12, in: *The Charter of the United Nations: A Commentary* (ed.: Simma, B.). Oxford, 1995. 256. Concerning Article 12, paragraph 1, see also, Blum, Y. Z.: *Eroding the United Nations Charter*. Dordrecht–Boston–London, 1993. 103–132.

¹⁶ See, Hailbronner—Klein: Article 12, 259–261.

However, by making a preliminary conclusion from the interpretation of the text of Article 10, we have not found the ultimate answer to the question whether or not the General Assembly can recommend enforcement measures, including the use of force, under the Charter. Even though the answer is *prima facie* in the affirmative, it does not follow that other provisions of the Charter, or other sources of interpretation support it. Our preliminary conclusion seems to be contrary to Article 11, paragraph 2, which specifies the text of Article 10.¹⁷

The well-known second clause of this paragraph leaves no room for doubt that “action”, that is, the taking of enforcement measures,¹⁸ is admissible exclusively by the Security Council; consequently, the General Assembly cannot make such a recommendation. Furthermore, the submission of a dispute or a recommendation to the Council does by no means oblige it to actually take the action deemed necessary by the General Assembly.¹⁹ Nevertheless, Article 11, paragraph 2, is related to Article 10 as the specific to the general. This is indicated by the fact that while Article 10 contains only one limitation (Article 12), Article 11, paragraph 2, specifies not less than three restrictions: the requirement of an adequate request, as a result of which the General Assembly cannot proceed on its own motive under this paragraph; Article 12; and in case action is necessary, the obligation to refer the dispute to the Security Council. But pursuant to Article 11, paragraph 4, “the powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10”. This provision can be interpreted in several ways. One of the interpretations implies that the General Assembly is not bound by the limitations under Article 11, so far as it proceeds and makes a recommendation under Article 10.²⁰ But a contrary interpretation is also acceptable, considering that paragraph 4 refers to

¹⁷ Article 11, paragraph 2, of the UN Charter: “The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided under Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. *Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.*” (Emphasis added.)

¹⁸ See, Kelsen: *op. cit.* 204.

¹⁹ See, Hailbronner, K.—Klein, E.: Article 11, in Simma: *The Charter of the United Nations. op. cit.* 250.

²⁰ See, Kelsen: *op. cit.* 204, 207.

powers defined under Article 11, whereas the obligation to refer the dispute to the Council does not constitute a power, but rather is a procedural norm.²¹

As a further counter-argument, one could mention that the debates in the course of the wording of the Charter likewise reveal that the General Assembly cannot recommend the taking of enforcement measures. This argument corresponds to the position of the International Court of Justice (ICJ) expressed in its famous advisory opinion of July 20, 1962.²² Nevertheless, according to a remarkable point of view, this advisory opinion does not make it absolutely clear whether or not the General Assembly can make such a recommendation. According to this view, the meaning of the second clause of Article 11, paragraph 2, is determined by the term “enforcement”, since the word “action”—as confirmed by the ICJ—refers to enforcement measures. In line with the formal definition of this phrase, “the existence of an ‘enforcement action’ is not determined by the character of the action itself but by the binding nature of the measure taken”. Hence, the clause under deliberation limits the power of the General Assembly to make recommendations exclusively in case, if it considers that a resolution on *mandatory* enforcement measures has to be adopted by the Security Council for the settlement of a situation. Upon these premises one can easily draw the conclusion, supported to some extent by the practice of the General Assembly, that: “Therefore a non-binding recommendation is not to be considered as ‘action’, so that the GA is not prevented by Art. 11(2) cl. 2 from recommending coercive measures. This norm only recalls the fact that the GA shall not take any enforcement measures binding on all member states.”²³ In a certain way, even the ICJ affirmed this position, when it stated that the responsibility conferred upon the Security Council was “primary, not exclusive”, thus, the General Assembly was also to be concerned with international peace and security, what is more, its functions and powers were not merely hortatory.²⁴

²¹ See, Hailbronner—Klein: Article 11, 252.

²² “The word “action” must mean such action as is solely within the province of the Security Council. [...] The “action” which is solely within the province of the Security Council is that which is indicated by the title of Chapter VII of the Charter, namely “Action with respect to threats to the peace, breaches of the peace, and acts of aggression.” Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, 165.

²³ For the theory and the cited opinion, see, Hailbronner, K.—Klein, E.: Article 10, *in* Simma: *The Charter of the United Nations. op. cit.* 233. For a summary of the relevant practice of the General Assembly, see, *ibid.*, 234.

²⁴ See, Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, 163.

Pursuing this train of thought, one arrives at the conclusion that, even though the Security Council bears primary responsibility in the field of the maintenance of international peace and security, as illustrated by Article 12, nothing in the Charter prohibits the General Assembly to recommend the use of force, including the commencement of a humanitarian intervention, in exercise of its “secondary” or “supplementary” responsibility.²⁵ (It is worth noting, however, that according to all indications, not even the Council is entitled to make a *recommendation* on the use of force, since the authorisation must assume the form of a binding resolution.²⁶) At the same time, it also follows from the relevant provisions of the Charter that recommendations under Article 10 can be made directly to the member states, whereas recommendations under Article 11, paragraph 2, are addressed to the states “concerned”, that is, both members and non-members. The General Assembly can make a recommendation to international organisations only indirectly, via states.

The derivation of the legality of humanitarian intervention from the “Uniting for Peace” Resolution is a solution with an equally controversial outcome. According to the central provision of the resolution, the General Assembly:

“Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations.”²⁷

²⁵ On residual powers, see, e.g. Prandler, Á.: *Az ENSZ Biztonsági Tanácsa*. [The UN Security Council] Budapest, 1974. 298–300.

²⁶ Cf., Frowein, J. A.: Article 42, in Simma: *The Charter of the United Nations*. *op. cit.* 614–615.

²⁷ Uniting for Peace. G.A. Res. 377A, 302nd plen. mtg., 3 November 1950, U.N. Doc. A/RES/377A (V), para. A. 1. Since the number of the members of the Security Council has been raised to fifteen, at present nine votes are necessary for the convocation of an emergency special session of the General Assembly.

At first sight, the “Uniting for Peace” Resolution seems to be an appropriate ground of the lawfulness of a humanitarian intervention, and it is frequently reflected by the relevant literature.²⁸ Two factors, however, contradict the unconditional applicability of this resolution. On the one hand, its legality and conformity with the Charter is at least dubious, so its adoption has triggered extremely fierce debates both in practice and in scientific circles. Although the charges brought up against the resolution were to a large extent attributable to the international context of the Cold War, such an extension of the powers of the General Assembly seems somewhat perilous even from a clearly legal point of view. Without providing a detailed presentation of the arguments and counter-arguments raised in the course of these disputes,²⁹ it can be stated that the “Uniting for Peace” Resolution can be taken into consideration with respect to the justification of humanitarian intervention, only if it qualifies as a lawful instrument. To put it briefly, its legality can only be demonstrated, if one proves that the General Assembly is entitled to recommend the use of force

²⁸ See, e.g. Abiew, F. K.: *The Evolution of the Doctrine and Practice of Humanitarian Intervention*. The Hague–London–Boston, 1999. 100. (Footnote 106); Advisory Council of International Affairs—Advisory Committee on Issues of Public International Law: *Humanitarian Intervention*. No. 13. The Hague, 2000. 26.; Arias, I.: *Humanitarian Intervention: Could the Security Council Kill the United Nations?* *Fordham International Law Journal*, Vol. 23. No. 4. (April 2000), 1026.; Independent International Commission on Kosovo: *The Kosovo Report*. New York, 2000. 166, 174.; Nagy, B.: *Hadban állunk?* [Are We at War?] *Élet és Irodalom*, Vol. XLIII. No. 15. (16 April 1999), 3.; Pellet, A.: *Brief Remarks on the Unilateral Use of Force*. *European Journal of International Law*, Vol. 11. No. 2. (2000), 390.; Reisman, W. M.: *Humanitarian Intervention to Protect the Ibos*. (With the collaboration of McDougal, M. S.), in *Humanitarian Intervention and the United Nations* (ed.: Lillich, R. B.). Charlottesville, 1973. 175, 190. For an opposing view, see, Gowlland-Debbas, V.: *The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance*. *European Journal of International Law*, Vol. 11. No. 2. (2000), 374.; Valki, L.: *A koszovói válság és a humanitárius intervenció*. [The Kosovo Crisis and Humanitarian Intervention] *Acta Humana*, No. 46–47. (2002), 157–158. For an intermediary view, according to which it is questionable if the unilateralism manifested in the “Uniting for Peace” Resolution is a legitimate substitute for collective measures, see, Dupuy, P.-M.: *The Place and Role of Unilateralism in Contemporary International Law*. *European Journal of International Law*, Vol. 11. No. 1. (2000), 27.

²⁹ On this issue, see, Andrassy, J.: *Uniting for Peace*. *American Journal of International Law*, Vol. 50. No. 3. (July 1956), 563–582.; Kelsen, H.: *Recent Trends in the Law of the United Nations*. A Supplement to the “The Law of the United Nations”. London, 1951. 953–990.; Prandler: *op. cit.*, 271–276.; Woolsey, L. H.: *The “Uniting for Peace” Resolution of the United Nations*. *American Journal of International Law*, Vol. 45. No. 1. (January 1951), 129–137.

even beyond the scope of this resolution, that is, on the basis of the Charter. Otherwise, the document qualifies as an unlawful amendment to the Charter,³⁰ and its adoption is to be considered an *ultra vires* act. As it follows from the previous part, the Charter allows for both interpretations in the context of such recommendations by the General Assembly, nevertheless, if the permissive interpretation had been absolutely correct, the adoption of the “Uniting for Peace” Resolution probably would not have been necessary. At the same time, one cannot fail to observe that the once so fierce debates have almost entirely diminished, and despite the concerns regarding lawfulness, the resolution has been integrated into the practice of the UN. Although, the instrument had been used to confront an aggression during the Korean War, afterwards it has rather served the purposes of peace-keeping or the convocation of emergency special sessions.³¹ Notwithstanding, it can reasonably be assumed that in case the resolution was applied for the justification of the use of force, the debates would flare up again.

The applicability of the “Uniting for Peace” Resolution for the justification of humanitarian intervention is also undermined by the following phrase of the cited provision: “including in the case of a breach of the peace or act of aggression the use of armed force when necessary”. A recommendation on the use of force is, consequently, permissible exclusively in the gravest situations, in case of a breach of the peace or acts of aggression, whereas in the event of a threat to the peace, which embraces the violations of human rights or humanitarian law necessitating humanitarian intervention, it is inadmissible.³² In view of this conclusion, the “Uniting for Peace” Resolution, regardless of the issue of its legality, seems to be entirely inapplicable. One “escape route” is, nevertheless, conceivable: if the emergency special session is convoked at a time, when the Security Council, due to the lack of the unanimity of its permanent members, is not even able to adopt a resolution on the determination of a situation under Article 39. Owing to the fact that the Security Council has exclusive power to determine the existence of a threat to the peace, a breach of the peace, or an act of aggression in an authentic and binding manner, a decision

³⁰ Cf., Articles 108 and 109 of the UN Charter.

³¹ See, Hailbronner—Klein: Article 10, 235–236.; Higgins, R.: *The Development of International Law Through the Political Organs of the United Nations*. London–New York–Toronto, 1963. 227–228.

³² For a similar position, see, Danish Institute of International Affairs: *Humanitarian Intervention: Legal and Political Aspects*. Copenhagen, 1999. 61.; Murphy, S. D.: *Humanitarian Intervention. The United Nations in an Evolving World Order*. Philadelphia, 1996. 300.

of similar effect cannot be adopted by any other principal organ, not even the General Assembly. In absence of a determination under Article 39, it is after all irrelevant how the Council would qualify the given situation, therefore, the General Assembly can recommend the use of force in the event of a violation of human rights or fundamental guarantees of international humanitarian law. However, if the Council has previously qualified the atrocities as a threat to the peace, the “Uniting for Peace” Resolution cannot establish the legality of humanitarian intervention. It has to be emphasised that this “escape route” is presumably contrary to the requirement of *bona fide* exercise of rights; nevertheless, state practice does not completely refrain from solutions of such nature. Still I believe that if the states willing to intervene cannot obtain the indispensable authorisation from the Security Council, they should resort to the “Uniting for Peace” Resolution before they launch the attack. Despite that a recommendation adopted by a two-thirds majority of the members of the General Assembly will not necessarily secure legality, it would guarantee a great deal of legitimacy for the use of force.

III.

As I already mentioned above, the condition of the lawfulness of use of force is a prior and express authorisation by the Security Council under Chapter VII of the Charter. However, at the end of the 20th century, as a *quasi* abstraction of state practice, the idea according to which the authorisation does not have to be prior and express, but it can also appear in an implicit or an *ex post facto* form, gained ever increasing ground in the relevant literature. It is not astonishing that these “two variants” of Council authorisation not contained by the Charter have acquired great significance in connection with the legality of humanitarian intervention, as well.

Implicit authorisation, as the phrase itself indicates, does not assume an express form and is not issued in a separate resolution, but it does not imply total silence on the part of the Security Council either—its existence can be deduced from certain conclusive facts. But which facts attest that such an authorisation has been granted? First of all, one can infer from the text of earlier resolutions adopted with respect to the crisis concerned that this principal organ has implicitly authorised the use of force. An extremely important precondition is that the crisis, as expressly determined by the Council under Article 39, qualifies as a threat to international peace and security. Without such determination, furnishing evidence for an implicit authorisation is an

attempt committed to failure, since the bottom line for the adoption of measures under Chapter VII is the existence of a threat to the peace. Thus, despite the fact that on the basis of the theory of implicit authorisation, the “real” authorisation for the use of force is tacit, the determination under Article 39 has to be explicit.

The determination of a threat to the peace by itself obviously constitutes an insufficient basis for proving that the Security Council has implicitly authorised the use of force. The chance of a successful argumentation is, consequently, greater in case the Council—following the determination—has taken provisional measures or non-forcible enforcement measures, as well. If recourse to Article 41 has been inadequate, one may reasonably assume that the next logical step to be taken by the Council would be the application of Article 42. Sometimes even the Council itself stresses that it will consider “additional measures”, if non-forcible actions turn out to be inefficient.³³ There is rational ground to believe that these “additional measures” refer to action pursuant to Article 42, although it cannot be excluded either, that by this phrase the Council speaks of other, more intensive coercive measures under Article 41, which—of course—do not involve the use of force.

It can be seen that the resolutions of the Council leave room for divergent interpretations in this respect. For this reason, it can be useful to support the argument concerning the existence of an implicit authorisation with other sources, such as the statements of leading politicians of great powers, and acts of other organs of the UN, including the statements of the Secretary-General. As such, the demonstration of an implicit authorisation implies the enumeration and systematisation of a complex network of arguments. As a consequence, the argumentation can easily diverge into “arbitrary interpretation” and the construction of far-fetched theories. It needs to be admitted that the theory of implicit authorisation cannot be considered as being particularly persuasive, and accordingly, it receives little theoretical and practical support.³⁴

The theory of *ex post facto* authorisation, according to which the authorisation by the Security Council to use force is not secured prior, but rather subsequent to the commencement of the military action, seems to be more

³³ For instance, regarding the Kosovo crisis, see, S.C. Res. 1199, 3930th mtg., 23 September 1998, U.N. Doc. S/RES/1199 (1998), para. 16.

³⁴ For a rejecting view, see, Chinkin, C. M.: Kosovo: A “Good” or “Bad” War? *American Journal of International Law*, Vol. 93. No. 4. (1999), 842–843.; Gray, C.: After the Ceasefire: Iraq, the Security Council and the Use of Force. *British Yearbook of International Law* (1994), 149.; Independent International Commission on Kosovo, *op. cit.*, 173.

plausible. It must be noted that an alleged *ex post facto* authorisation also takes an implicit form, as if it were express, it would be considered as a “standard” authorisation. (As a result, these two “forms” of authorisation are sometimes treated in the literature as closely correlated,³⁵ although, in my view, they can be distinguished theoretically on a temporal basis.) An *ex post facto* authorisation does not imply absolute idleness either; just as in the case of an implicit authorisation, its existence can be derived from conclusive facts or circumstances. Such facts are, for example, the absence of a resolution by the Council condemning the unauthorised use of force,³⁶ possibly its express acceptance,³⁷ or the recognition of a situation arising in the wake of the use of force.³⁸

The last one might be the most significant argument, as it is endowed with special authority by a fundamental norm of international law, according to which no territorial acquisition or special advantage resulting from aggression is or shall be recognised as lawful.³⁹ Therefore, it cannot be disregarded if the Security Council—the sole organ capable of authentically determining that an act of aggression occurred—in a way recognises a situation created by an unauthorised use of force, that is, a *prima facie* act of aggression as lawful. This is closely related to the following provision of the General Assembly resolution on the Definition of Aggression:

“The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be

³⁵ Cf., Simma, B.: NATO, the UN and the Use of Force: Legal Aspects. *European Journal of International Law*, Vol. 10. No. 1. (1999), 10.; Wedgwood, R.: NATO’s Campaign in Yugoslavia. *American Journal of International Law*, Vol. 93. No. 4. (October 1999), 832.

³⁶ See, e.g. Security Council: Belarus, India and the Russian Federation: Draft Resolution, 26 March 1999, U.N. Doc. S/1999/328. The draft resolution condemning the NATO intervention in Kosovo was dismissed by the Security Council by a 12:3 majority.

³⁷ Concerning Liberia, see, e.g. Note by the President of the Security Council, 22 January 1991, U.N. Doc. S/22133 (1991); Note by the President of the Security Council, 7 May 1992, U.N. Doc. S/23886; S.C. Res. 788, 3138th mtg., 19 November 1992, U.N. Doc. S/RES/788 (1992), preamble.

³⁸ Concerning Kosovo, see, S.C. Res. 1244, 4011th mtg., 10 June 1999, U.N. Doc. S/RES/1244 (1999).

³⁹ Cf., Definition of Aggression. G.A. Res. 3314, 2319th plen. mtg., 14 December 1974, U.N. Doc. A/RES/3314 (XXIX), Annex, Article 5(3).

justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.”⁴⁰ In other words, the Security Council may qualify a unilateral humanitarian intervention both as an act of aggression and as its opposite. Since the Definition of Aggression does not specify what form this determination should take, one might as well conclude that it could be implicit and *ex post facto*. It should be borne in mind that it is only the determination of the existence of an act of aggression that Article 39 of the Charter binds to the form of a resolution, whereas it does not provide for the determination of the absence thereof. Framing the absence of an act of aggression in a separate resolution is not only an unnecessary, but also a hazardous step. Hazardous, since the adoption of such resolution—in view of the fact that it is a substantive resolution—presupposes the unanimity of the five permanent members. It is easy to predict what would happen, if a permanent member vetoed—or at least nine members of the Council, including the permanent members did not approve of—the draft resolution concerned. Such result could easily be interpreted in a way that the rejection of the draft resolution equals the determination of an act of aggression, although this distorted interpretation would scarcely be in compliance with the content of Article 27, paragraph 3, or with Article 39.

The determination of the absence of an act of aggression by the Council probably implies “constructive” silence, or recognition of the situation thus arisen in a resolution. It does not imply, however, that the unilateral use of force was lawful. The Security Council may also qualify lawful actions as threats to the peace, breaches of the peace, or acts of aggression, therefore, its position does not necessarily reflect—albeit strongly indicates—the unlawfulness of a conduct. Reversing this statement, one arrives at the conclusion that stillness on the part of the Council is not equal to the recognition of the legality of an action.⁴¹ This, to some extent, limits the plausibility of both the implicit and the express forms of *ex post facto* authorisation as means of subsequent acceptance of a unilateral action. This might be one of the reasons why the idea of *ex post facto* authorisation is not widely supported in the science of international law either.⁴²

⁴⁰ *Ibid.*, Article 2.

⁴¹ Cf., Gray: *op. cit.*, 163.

⁴² See, e.g. Charney, J. I.: Anticipatory Humanitarian Intervention in Kosovo. *American Journal of International Law*, Vol. 93. No. 4. (October 1999), 835.; Gray: *op. cit.*, 163.; McWhinney, E.: *The United Nations and a New World Order for a New Millennium. Self-determination, State Succession, and Humanitarian Intervention*. The Hague–London–

IV.

In the literature concerning humanitarian intervention we often encounter the view that the Charter does not forbid, on the contrary, it generally allows for such interventions even in absence of an authorisation by the Security Council. W. Michael Reisman expressly submitted that “the advent of the United Nations neither terminated nor weakened the customary institution of humanitarian intervention”, what is more, “the Charter strengthened and extended it”.⁴³

The derivation of a right of humanitarian intervention from the Charter is primarily based on the restrictive interpretation of Article 2, paragraph 4, according to which this provision does not ban each and every form of the use or threat of force, as opposed to the generally accepted construction implying a comprehensive prohibition.⁴⁴ The restrictive interpretation is, on the one hand, supported by the idea that Article 2, paragraph 4, “was never an independent ethical imperative of pacifism” and it gained its cogency “in the context of the Organization envisaged by the Charter and not as a moral postulate”,⁴⁵ and on the other hand, by the circumstance that this particular section constitutes merely one of the elements of a complex collective security system, so it must be interpreted accordingly. For that reason, both the text of the article and the spirit of the Charter have to be taken into consideration in the course of interpretation.⁴⁶

According to the restrictive interpretation, references to territorial integrity, political independence and the purposes of the United Nations in Article 2, paragraph 4, are not meant to secure the comprehensive nature of the prohibition, but to qualify and define the manifestations of force outlawed under the provision.⁴⁷ Namely, these references can barely have a different function, assuming that the concerned parts of the text are not superfluous. Therefore, the three phrases cover three restrictions, as a consequence of which Article 2,

Boston, 2000. 74.; Ress, G.: Article 53, in Simma: *The Charter of the United Nations. op. cit.* 733–734.

⁴³ Reisman: Humanitarian Intervention to Protect the Ibos. *op. cit.* 171.

⁴⁴ See, e.g. Abiew: *op. cit.*, 93–95.; Brenfors, M.—Petersen, M. M.: The Legality of Unilateral Humanitarian Intervention—A Defence. *Nordic Journal of International Law*, Vol. 69. No. 4. (2000), 466–468.; Reisman: Humanitarian Intervention to Protect the Ibos, 177.; Tesón, F. R.: *Humanitarian Intervention: An Inquiry into Law and Morality*. Second Edition. Irvington-On-Hudson, 1997. 149–151.

⁴⁵ Reisman, W. M.: Coercion and Self-Determination: Construing Charter Article 2(4). *American Journal of International Law*, Vol. 78. No. 3. (July 1984), 642.

⁴⁶ See, *ibid.*, 645.

⁴⁷ Cf., Stone, J.: *Aggression and World Order. A Critique of United Nations Theories of Aggression*. London, 1958. 95.

paragraph 4, qualifies “the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations” as unlawful, but it does not encompass the forms of force beyond that scope. The argument would sound as follows: since humanitarian intervention is designed to stop grave and massive violations of human rights, it is conceptually excluded that it is directed against the territorial integrity or the political independence of the target state. If an intervention forcefully modifies the borders, or it is obviously directed at the destruction of the prevailing political order, it does not qualify as humanitarian intervention. The exemption of an intervention from the “political independence” clause can also be derived in another way. As human rights issues are no longer within the domestic jurisdictions of states as pursuant to Article 2, paragraph 7, the treatment of individuals by a state does not constitute a segment of “political independence” under Article 2, paragraph 4. Because both provisions are parts of the same whole, that is, the Charter, the modification of one notion obviously affects the other, as well.⁴⁸ On that basis, humanitarian intervention does not fall within the effect of the first two qualifying phrases of Article 2, paragraph 4.

A similar conclusion can be reached upon the examination of the third phrase. The commitment to the “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”⁴⁹ is mentioned among the purposes of the United Nations spelled out in Article 1 of the Charter. This commitment is also framed under Article 55(c) and Article 56, as well as in the Universal Declaration of Human Rights, especially, if it is construed as an authentic interpretation of the Charter. The British Prime Minister, Mr. Clement Attlee, likewise affirmed the importance of this undertaking while opening the first plenary meeting of the General Assembly on January 10, 1946.⁵⁰

The conclusion, therefore, that humanitarian intervention does not contradict the third phrase of Article 2, paragraph 4, seems believable, although the maintenance of international peace and security and the peaceful adjustment or settlement of international disputes or situations which might lead to a breach

⁴⁸ Cf., Reisman, W. M.: Kosovo’s Antinomies. *American Journal of International Law*, Vol. 93. No. 4. (October 1999), 861.

⁴⁹ See, Article 1, paragraph 3, of the UN Charter.

⁵⁰ See, Verbatim Record of the First Plenary Meeting, 10 January 1946, U.N. Doc. A/PV.1, 41. In a similar manner, see, Annan, K. A.: Standing Up for Human Rights. Address to the United Nations Commission on Human Rights, Geneva, 7 April 1999, in Annan, K. A.: *The Question of Intervention. Statements by the Secretary-General*. New York, 1999. 19.

of the peace are equally included among the purposes of the Organisation.⁵¹ As a matter of fact, humanitarian interventions explicitly promote the effective implementation of the purpose concerned, because they may prevent future acts of aggression.⁵² Finally, there exists a further, but less convincing theoretical way to prove that the use of force does not contradict the purposes of the United Nations. As Julius Stone submitted, Article 1 of the Charter does not necessarily establish additional legal obligations for the member states, but merely sets forth the purposes of the Organisation itself.⁵³

A further interesting point is that the restrictive interpretation of Article 2, paragraph 4, has emerged not only in literature, but also in practice. Belgium, for instance, made the following statement in the proceedings before the ICJ with regard to NATO air operations against the Federal Republic of Yugoslavia in 1999: “The purpose of NATO’s intervention is to rescue a people in peril, in deep distress. For this reason the Kingdom of Belgium takes the view that this is an armed humanitarian intervention, compatible with Article 2, paragraph 4, of the Charter, which covers only intervention against the territorial integrity or political independence of a State.”⁵⁴

As I have already indicated, such interpretation of Article 2, paragraph 4, is an isolated view in the science of international law, and is not really supported by state practice either. Furthermore it is equally incommensurate with the *travaux préparatoires*, and the spirit and letter of the Charter. The most serious deficiency of the argument is that it identifies the territorial integrity of a state with the obligation to respect its borders. The reference to territorial integrity, however, must be interpreted as non-violability of the territory; consequently, an act of aggression, which transgresses the borders of a state, is in no case consistent with Article 2, paragraph 4.⁵⁵ In view of such content, the whole theory is practically refuted—at least with respect to humanitarian inter-

⁵¹ See, Article 1, paragraph 1, of the UN Charter.

⁵² Cf., Murphy: *op. cit.*, 292–293.

⁵³ See, Stone: *op. cit.*, 96.

⁵⁴ Case concerning Legality of Use of Force (Yugoslavia v. Belgium), Public sitting held on Monday, 10 May 1999 at 3 p.m. at the Peace Palace, Verbatim Record, CR 99/15 (translation, uncorrected).

⁵⁵ See, Randelzhofer, A.: Article 2(4), in Simma: *The Charter of the United Nations*. *op. cit.* 117–118. This is confirmed by Article 3(b) of the General Assembly resolution on the Definition of Aggression, according to which aggression is, *inter alia*: “Bombardment by the armed forces of a State *against the territory* of another State or the use of any weapons by a State *against the territory* of another State.” Definition of Aggression. G. A. Res. 3314, 2319th plen. mtg., 14 December 1974, U.N. Doc. A/RES/3314 (XXIX), Annex, Article 3(b) (Emphasis added.)

vention. (Even though the violation of territorial integrity does not occur in the hypothetical case of an intervention carried out in a *res communis omnius usus* territory, the injury arising from the coercion employed against the political independence of the target state, the attack against its armed forces, or a potential violation of the *res communis omnium usus* status all entail the unlawfulness of the action.)

Although, the restrictive interpretation of Article 2, paragraph 4, can be sufficiently challenged by the aforementioned counter-arguments concerning territorial integrity, the two other segments—that is political independence and the purposes of the UN—has to be briefly dwelled upon, as well. Whether or not political independence is violated by an intervention, depends on the meaning one attributes to this notion. If political independence is construed as the freedom of a government from external pressure or interference, all forms of humanitarian intervention will violate it, since it coerces the government into such behaviour, which contradicts its will. But if the concept is interpreted as the right of a people to freely determine the political system and the form of government, one is likely to arrive at a divergent conclusion.⁵⁶ Faced with such a dilemma, an adequate answer is subject to the following, partly morally, partly legally implicated question: Is the despotic government satisfactory to the population and, primarily, to the victims of atrocities? In exercise of their right to a free choice of government, do they wish to sustain the oppressive regime? If the answer is positive, the intervention will violate political independence; if the answer is negative, it will not. (In the latter case, humanitarian intervention can with good reason be seen as “an extension of the domestic right to revolution”.⁵⁷) Finally, if political independence is interpreted generally, as the existing political system of a state, the conclusion will, once again, be ambivalent. Although, humanitarian intervention is not meant to reshape the political system, and it merely wishes to impose certain behaviour on the target state, this objective cannot always be achieved without the overthrow of the government. It is worth noting that assuming the violation of political independence in a so-called “failed state”—that is, a state sunk into total anarchy—is senseless, since in such an entity no state power or political system, which could be violated by the use of force, exists. (Nevertheless, the territorial integrity of the target state and, therefore, Article 2, paragraph 4, of the Charter, still remain violable. The reason is that “territorial integrity” and “political independence” stand in a disjunctive relation in the text of the article.)

⁵⁶ For these two alternative interpretations of “political independence”, see, Fawcett, J. E. S.: *Intervention in International Law. Recueil des Cours*, Tome 103 (1961-II), 354.

⁵⁷ See, Tesón: *op. cit.*, 91.

By a logically constructed hierarchy among the purposes of the UN, one can effortlessly challenge the reasoning, according to which humanitarian intervention is compatible with these purposes. As Eduardo Jiménez de Aréchaga wrote: “The context of the Charter demonstrates however that in the field of security, and with regard to the use of force, all other purposes of the United Nations are to be subordinated to the dominant one stated in Article 1, paragraph 1, which is “to maintain international peace and security.”⁵⁸

Peace in a broader sense is certainly not equal to the absence of the use of armed force, as it also requires, *inter alia*, the observance of human rights. Nevertheless, it would be extremely risky to interpret this relationship in a way that the use of force for humanitarian purposes promotes peace, and thereby, the purposes of the UN *in all cases*. A mechanical presumption of this relation is admissible exclusively with respect to interventions authorised by the Security Council.

The contradictions residing in such reference to the purposes of the UN are excellently illustrated by the argument, according to which, if a deviation from Article 2, paragraph 4, is admissible in order to promote the protection of human rights as provided for under Article 1, paragraph 3, along the same logic, armed interventions for economic, social or cultural purposes would likewise qualify as lawful, since these potential grounds are also listed among the purposes of the Organisation and, in fact, set forth in the same section.⁵⁹ The sole deficiency of this counter-argument is that economic, social and cultural matters, as opposed to human rights, have remained predominantly a part of *domaine réservé*.

The Preamble of the Charter is also frequently invoked for the justification of humanitarian intervention. The second sentence of the Preamble states that “the peoples of the United Nations” are determined “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women”. In the subsequent paragraphs, the intention to prevent the use of armed force is also framed, but with an important exception: “save in the common interest”. To ensure respect for fundamental human rights, primarily by reason of their connection to international peace and security, is probably a legitimate “common interest”. Since the Preamble contains the general purposes of the Charter, a number of authors think that the legality of the use of force for humanitarian purposes can be derived from its formu-

⁵⁸ Jiménez de Aréchaga, E.: *International Law in the Past Third of the Century. Recueil des Cours*, Tome 159 (1978-I), 91.

⁵⁹ See, Danish Institute of International Affairs. *op. cit.*, 82. For an opposing view, see, Österdahl, I.: *Threat to the Peace. The Interpretation by the Security Council of Article 39 of the UN Charter*. Uppsala, 1998. 26–27.

lation.⁶⁰ Such actions, as a result of the connection referred to above, seem to simultaneously promote the enforcement of the purposes of the UN, both in terms of the maintenance and restoration of international peace and security, and of the promotion and encouragement of respect for human rights.

The opinion, according to which the lawfulness of intervention can be grounded on the Preamble, is very poorly supported, thus, it chiefly serves as a supplementary argument, for instance, to the restrictive interpretation of Article 2, paragraph 4. Despite that the Preamble is an integral part of the Charter, it does not stipulate independent obligations for the members, but enumerates the reasons, motives and general ends necessitating the adoption thereof. Accordingly, the practical relevance of the Preamble is extremely insignificant; so far it has barely been referred to.⁶¹ The theory also fails to answer the question: Who or what is entitled to establish that a case of “common interest” exists with respect to the use of force? In view of the spirit and letter of the Charter, this power seems to be assigned to the Security Council. Therefore, recourse to the use of force on grounds of “common interest” is permissible only in possession of a prior and express authorisation by the Council.

Since Article 106 of the Charter⁶² frequently appears in analyses concerning the legality of the use of force,⁶³ I think it also needs to be investigated, if this provision can justify humanitarian intervention in the absence of an authorisation by the Security Council. In spite of the fact that its deletion has also

⁶⁰ See, Reisman: Humanitarian Intervention to Protect the Ibos. *op. cit.* 172.

⁶¹ See, Wolfrum, R.: Preamble, in Simma: *The Charter of the United Nations. op. cit.* 48. According to Kelsen, the Preamble constitutes an integral part of the Charter, so it virtually has “the same legal validity” as other provisions of the Charter. However, by reason of its content, the Preamble does not establish obligations, and “has rather an ideological than a legal importance”. See, Kelsen: *The Law of the United Nations. op. cit.* 9.

⁶² Article 106 of the UN Charter: “Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration, signed at Moscow, October 30, 1943, and France, shall, in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security.”

⁶³ Cf., e.g. Schachter, O.: Authorized Uses of Force by the United Nations and Regional Organizations, in Damrosch, L. F.—Scheffer, D. J. (ed.): *Law and Force in the New International Order*. Boulder—San Francisco—Oxford, Westview Press, 1991. 65.; Scheffer, D. J.: Commentary on Collective Security, in Damrosch—Scheffer: *op. cit.*, 108.

arisen as a demand,⁶⁴ under certain circumstances, Article 106 could ground the lawfulness of humanitarian intervention. Though it merely establishes an obligation for the permanent members of the Security Council to consult, it can theoretically lead to the taking of a “joint action”. As both the context of the article and references to Articles 42 and 43 therein reflect, joint action implies military action.⁶⁵

The permissibility of the use of force under Article 106, however, has several conditions. In the first place, one should mention the time factor, because the stipulation, as a result of the conditions incorporated therein, is of provisional nature: it expires as soon as the Security Council, after the conclusion of agreements envisaged in Article 43, has sufficient armed force—both in quantity and in quality—at its disposal to take enforcement measures under Article 42. The determination of this circumstance presupposes a resolution by the Security Council, and at least one agreement concluded under Article 43. Since such agreements have not been concluded so far, Article 106 has been in force since 1945, although, it barely has practical relevance.

The next, implicit condition, which is the most difficult to comply with, is the unanimity of the five permanent members. The use of force under this article can take place only in case of a consensus among the permanent members of the Security Council; thus Article 106 does not prevent veto. This conclusion can be drawn from the fact that such actions would be implemented “on behalf of the Organization”. The requirement of unanimity, however, does not entail that the five states would be bound to actively participate in a joint action.⁶⁶ Again, it has to be emphasised that Article 106 only establishes an obligation for the permanent members to consult, not “to agree” or “to act”. A further implicit condition is that the use of force necessitates a determination by the Security Council under Article 39, and a conviction that the maintenance or restoration of international peace and security requires such an extreme measure. Therefore, joint action, despite its *prima facie* self-authorising character, does not constitute an independent exception to the prohibition of the use of force. Nevertheless, Article 106 is inapplicable if the Council authorises the members or international organisations to use force.⁶⁷

⁶⁴ See, Geiger, R.: Article 106, in Simma: *The Charter of the United Nations. op. cit.* 1151.

⁶⁵ See, *ibid.*, 1150, According to Kelsen, the text of Article 106 does not confine joint actions to military actions. See, Kelsen: *The Law of the United Nations. op. cit.* 760.

⁶⁶ See, Kelsen: *The Law of the United Nations. op. cit.* 759.

⁶⁷ Cf., Geiger: Article 106, 1150–1151.

V.

The demonstration or refusal of customary lawfulness is a permanent element of scientific disputes concerning humanitarian intervention. It is not at all accidental that this issue has gained outstanding relevance. In view of a possible veto in the Security Council, as well as the challengeable nature of other methods or theories aimed at the demonstration of the legality of humanitarian intervention, customary law can be considered the sole source of international law, from which the derivation of a right of humanitarian intervention seems to be feasible. The scientific significance of views based on customary law is remarkably enhanced by references to traditional international law, that is, by arguing that such right had existed in customary law for centuries. So far as an author resolves to prove the customary lawfulness of humanitarian intervention in the post-Second World War period, the most evident solution is to derive it from the variously explicable and extremely vague traditional law. If he also manages to prove that the entry into force of the UN Charter has not affected the continued existence of this customary right, his endeavours are likely to end in success. If, however, someone wishes to demonstrate that a customary right of humanitarian intervention no longer prevails in the present era of international law, he should claim that it either never constituted a segment of international law, or, even if it did, its relevance and *raison d'être* completely vanished as a result of the development of law in the first half of the 20th century. As such, the customary law of the past can barely be construed as a mere curiosity of legal science in this respect.

Naturally, both extremes are represented in the literature. Several eminent scholars claim that the customary right of humanitarian intervention has "survived" the beginning of the new era marked by the adoption of the Charter, and it still exists. Therefore, humanitarian intervention is lawful, even if it is carried out in absence of a prior and express authorisation. But the overwhelming majority of international lawyers believe that such right does not exist, and if it had ever existed, the Charter ultimately terminated it. In my view, a definitive conclusion pertaining to the lawfulness of humanitarian intervention under traditional customary law can scarcely be drawn, because the essential *opinio iuris* cannot be unequivocally demonstrated. The *spirit* of 19th century international law suggests the legality of humanitarian intervention; however, this spirit is most likely to have gradually altered at the beginning of the 20th century. Thus, one cannot exclude the possibility that a customary right of humanitarian intervention, which had prevailed for over a century, ceased to exist in the period between the two World Wars. By reason of the uncertainties concerning traditional international law, I do not consider

the derivation of a contemporary customary right of intervention from the past as an expedient solution. Furthermore, I think that even if such right had been in existence prior to 1945, it could by no means “survive” the entry into force of the Charter.

However, it is not only traditional international law from which a contemporary customary right of humanitarian intervention might be drawn. Given that one encounters such interventions even in the UN-era, it has to be contemplated, whether the practice of states and international organisations could have created a new customary right of humanitarian intervention, either “from nothing” or by reviving the relevant norm of traditional international law.⁶⁸ (It has to be noted that in the latter case the continued existence of an alleged past customary right of humanitarian intervention cannot be conceived, since the present hypothesis implies that lawfulness, if it had existed, was disrupted after the Second World War. Accordingly, there must have been a period, in which humanitarian intervention qualified as an unlawful action, even if one assumes that previously it had been a lawful conduct.)

Naturally, the simultaneous coexistence of the two constitutive elements of customary law—notably, state practice and *opinio iuris*—is indispensable for the evolution of an old-new customary right of intervention. The demonstration of the existence of state practice seems less problematic, since the use of force for humanitarian purposes has occurred several times since 1945 (e.g., in East Pakistan, Cambodia, Uganda, the Central African Empire, Liberia, Northern and Southern Iraq, Bosnia-Herzegovina, Somalia, Rwanda, the Federal Republic of Yugoslavia). Yet, the question here is how we assess these actions. Obviously, the practice of humanitarian intervention exists only if it is constituted by *such* interventions. Due to the absence of a generally accepted definition of humanitarian intervention, opinions vary regarding the humanitarian quality of particular interventions. It is always easier to prove that a military operation has “dishonest”—for example, political or economic—goals, than to show that its commencement was indeed dictated by humanitarian considerations. So it appears that the presumption is against the altruistic nature of the use of force, so far as unauthorised actions are concerned. It is,

⁶⁸ Cf., e.g. Glahn, G., von: *Law Among Nations. An Introduction to Public International Law*. Fifth Edition. New York–London, 1986. 160.; International Law Association: *Report of the Fifty-Fourth Conference* (The Hague, 1970), 598–599, 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. 234–235.; Reisman: Humanitarian Intervention to Protect the Ibos, 171.

therefore, not accidental that states apparently refrain from the designation of their unilateral actions as humanitarian interventions, even if these could be qualified as such. On the other hand, in the context of undoubtedly humanitarian and lawful interventions, the issue of differentiation may be a source of significant problems. A large segment of the practice of humanitarian intervention can be effortlessly disregarded, if one does not classify the given actions as such, but consider them as enforcement measures under Chapter VII of the Charter, or as peace-keeping—more precisely, peace-enforcement—missions. The classification is appropriate even in this case, however, these broader categories are able to dissolve the category of authorised humanitarian interventions, which relates to them as a part to a whole, and thereby to reduce the number of such actions. Last, but not least, the demonstration of state practice is impeded by the selectivity and the sporadic nature of interventions, as well. The latter circumstance can be attributed not only to the reluctance of the states to act, but also to the infrequent occurrences of exceptionally blatant human rights violations necessitating the use of force.

One has to take a negative position concerning the existence of *opinio iuris*.⁶⁹ This is the only conclusion that can be drawn from the peremptory character of the prohibition of the use of force, and from the fact that the content of this principle is essentially equivalent to the content of Article 2, paragraph 4, of the Charter. Furthermore, both the behaviour of members of the international community and the declarations made by various international bodies indicate the absence of *opinio iuris*.⁷⁰ Consequently, it is more likely—as opposed to what I have submitted above—that the reason why states are reluctant to qualify their unilateral actions as humanitarian interventions is that they are convinced that such quality, by itself, is not a legal title, and cannot establish lawfulness.

The evolution of customary law is, however, a fairly long process. The fact that *no* customary right of humanitarian intervention exists today does not

⁶⁹ Cf., e.g. Joyner, D. H.: The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm. *European Journal of International Law*, Vol. 13. No. 3. (June 2002), 602–603.

⁷⁰ The UN General Assembly declared in 1981 that states must refrain from “the exploitation and the distortion of human rights issues as a means of interference in the internal affairs of States”. See, Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States. G.A. Res. 36/103, 91st plen. mtg., 9 December 1981, U.N. Doc. A/RES/36/103, Annex, para. 2(II)(1). Five years later, the ICJ also held that “the use of force could not be the appropriate method to monitor or ensure [respect for human rights]”. Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement of 27 June 1986, I.C.J. Reports 1986, para. 268, at 134. (Insertion mine.)

imply that it may not develop in the future. If respect for human rights received such distinguished attention in the future as nowadays and, according to all indications, it will, I would not venture to state that a right of humanitarian intervention will never constitute an exception to the prohibition of the use of force. However, I would not declare it with absolute certainty either. On the one hand, the direction of future development of international law is uncertain, but state sovereignty will always be a determining element. On the other hand, humanitarian intervention can arise as an exception to the prohibition of the use of force only on condition that it acquires a cogent nature, as peremptory norms of general international law can be modified only by a subsequent norm having the same character—but this is an extremely unlikely possibility for the time being. Thirdly, and I think, this is the main counter-argument, *no such exception* is necessary. Today, there are more or less adequately operating mechanisms applicable to remedy “common” violation of human rights. But a similar statement surprisingly seems valid even with respect to extremely grave and widespread violations: according to my opinion, Chapter VII of the Charter contains the solution. The legal framework is given; its utilisation is merely a question of political will. Besides, it is a mistake to assume that the emergence of a customary right of humanitarian intervention would solve the problem once for all. Firstly, it would establish merely a right, but not an obligation to enforce respect for human rights by the use of force, so it would be unable to eliminate selectivity. Secondly, it would inescapably create several opportunities for abuse.

At the same time, it cannot be excluded that a customary right of humanitarian intervention has entered the first phase of its evolution. Antonio Cassese was presumably referring to that, when he stated that the *opinio necessitatis* concerning the NATO intervention in the Kosovo crisis—typically considered as a humanitarian intervention—“has been widespread and seems to be in the process of crystallizing; however this has not gone unopposed”.⁷¹ It is noteworthy that Cassese does not imply either that a customary right of humanitarian intervention has emerged (he emphasises that international law, outside the framework of the Charter, does not authorise such actions), however, there is general agreement concerning the necessity of the institution. The UN Secretary-General, Kofi Annan, similarly expressed himself rather cautiously, when he said: “Emerging slowly, but I believe surely, is an international norm against the violent repression of minorities that will and must

⁷¹ Cassese, A.: A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*. *European Journal of International Law*, Vol. 10. No. 4. (1999), 791.

take precedence over concerns of State sovereignty.”⁷² But the Secretary-General did not say either that this norm would grant states *carte blanche* for the use of force for humanitarian purposes. On the contrary, in his speeches, he consistently argues for the indispensable role of the United Nations, and particularly, the Security Council.⁷³

VI.

With the acquisition of a cogent character by a few human rights and by the fundamental guarantees of international humanitarian law, such peremptory norms of international law have come into existence, the significance of which can reasonably be compared to that of the “traditional” norms of *ius cogens*, including the prohibition of the use of force and the principle of non-intervention.⁷⁴ Therefore, it is understandable that the idea of a conflict of cogent norms has also emerged with respect to the lawfulness of humanitarian intervention. Namely, the possibility that, at the core of the problems related to unilateral humanitarian intervention, there is a conflict between the cogent obligation to respect human rights and fundamental guarantees of humanitarian law and the equally cogent prohibition of the use of force. So far as this alleged conflict is resolved in favour of the obligation to respect human rights, it seems that the prohibition of the use of force cannot prevent the commencement of unilateral military actions for humanitarian purposes.

Prima facie, the theory is undoubtedly pleasing and, in view of the statements in literature and in practice concerning the primacy of human rights over state sovereignty, it might appear to be sufficiently grounded. In fact, such conflict does not exist, and cannot even come into existence. The principal reason is that the groups of subjects respectively obliged by the peremptory norms concerned are different in the case of humanitarian intervention. The obligation to respect human rights and guarantees of international humanitarian law binds the potential target state, whereas the prohibition of the use of force

⁷² Annan: Standing Up for Human Rights, in Annan: *op. cit.*, 24.

⁷³ See, e.g. Annan, K. A.: Unifying the Security Council in Defence of Human Rights. Address delivered at the centennial of the First International Peace Conference, The Hague, 18 May 1999, in Annan: *op. cit.*, 29–34.

⁷⁴ It is necessary to note that I refer here only to specific human rights and fundamental guarantees of international humanitarian law, not to the overall cogency of human rights or humanitarian law. Although the cogency of the latter field of law can hardly be debated, respect for human rights—although I use this broad term for the sake of simplicity above—as a comprehensive category does not bear a peremptory character.

binds the states or international organisations willing to intervene in absence of an authorisation by the Security Council. Furthermore, a conflict is also ruled out by the fact that these peremptory norms similarly prescribe an obligation to refrain from a certain conduct, so they cannot interfere with one another. The first norm obliges subjects of international law to refrain from the infringement of human rights or international humanitarian law, whereas the second norm obliges them to refrain from the unauthorised use of force, with the exception of self-defence. One could speak of a conflict of norms only if an obligation to *enforce* respect for human rights and fundamental guarantees of humanitarian law—that is to say, an active conduct—appeared instead of the obligation to respect these rights and guarantees. (In this case, even the groups of subjects obliged would be the same.) However, none of the peremptory norms of international law oblige states or international organisations to secure respect for these rights and guarantees in another state by the use of force. Neither does a norm of *ius cogens* providing a right for that exist.

But a conflict of norms would not be likely, even if such a rule existed. If a cogent obligation to enforce respect for human rights and fundamental guarantees of international humanitarian law emerged, the content of the prohibition of the use of force, rather than the obligation to respect these rights and guarantees would change. In other words: a new and independent peremptory norm would not come into existence, but an already existing norm would be modified. The modification would occur within the framework of one single norm, that is, the prohibition of the use of force, thereby excluding the possibility of a conflict of different norms. The normative effect of the prohibition of the use of force is not affected in any way by the obligation to respect human rights and fundamental guarantees of international humanitarian law applicable to non-international armed conflicts. As a result, the argument under deliberation cannot ground the lawfulness of unilateral humanitarian intervention.⁷⁵

⁷⁵ Among arguments aimed at the demonstration of the legality of humanitarian intervention, the 1948 Genocide Convention and the doctrine of necessity are also frequently raised, however, by reason of the lack of scope, I cannot engage in their detailed examination. For similar reasons, I do not have the opportunity to analyse three further and relatively rarely appearing theories (i.e., the erosion of the Charter, the so-called *link theory*, and the application of collective self-defence by analogy), which can be also applied for the justification of humanitarian intervention. Nevertheless, it can be stated that *none* of these arguments or theories can establish the lawfulness of an unauthorised humanitarian intervention.

Conclusions

As a short summary of the present analysis, it can be stated that an adequate recommendation by the General Assembly might be suitable to ground the lawfulness of an unauthorised humanitarian intervention, although this presumption is far from being unchallengeable, as the Charter also allows for an interpretation, which categorically excludes this alternative. The applicability of the “Uniting for Peace” Resolution is equally dubious, partly by reason of the debates concerning its legality, partly due to the criteria set for the adoption of a recommendation on the use of force. Furthermore, neither an alleged implicit, nor an *ex post facto* Security Council authorisation can legalise a unilateral humanitarian intervention, because both lacks sufficient basis in the Charter. Comparing these two theoretical constructions, *ex post facto* authorisation seems more convincing, since it is more or less firmly justifiable, as opposed to an implicit authorisation. Nevertheless, it would be a daring statement that either of these could substitute a prior and express authorisation, and ground the legality of humanitarian intervention.

A similarly negative conclusion can be drawn upon the examination of the text of the Charter. A thorough study of the document reveals that a right to unilateral humanitarian intervention cannot be derived from any of the provisions of the Charter—the only possible exception being Article 106 concerning “joint actions”, although its relevance is rather theoretical, than practical. It explains why the proponents of intervention on the grounds of humanity, who generally resort to all possible instruments and arguments to support their case, remarkably ignore this article. Finally, the lawfulness of unilateral humanitarian intervention can neither be justified on the basis of present customary law, nor by a hypothetical conflict of peremptory norms of international law.

Hence humanitarian intervention by no means constitutes a “third” exception to the prohibition of the use of force, and is not to be classified as an autonomous legal title. It is undoubtedly lawful in only one case: if it is commenced in possession of a prior and express authorisation by the Security Council. In the rest of the cases, however, the presumption is in favour of illegality. Given the sometimes unsatisfactory activity of the Council and the constant risk of a veto, this “orthodox” conclusion may appear to be disillusioning and insufficient. From another point of view, however, both the necessary legal framework—that is, Chapter VII of the Charter—and the required state and organisational capacity seem to be present for the use of force by the international community against governments, which tread upon human rights. An effective utilisation of these means, nevertheless, depends on

the actual political will of states, therefore it would be unwise to attribute anomalies thus emerging exclusively to a fault of legal regulation, but it would be an even greater error to seek a solution in its fundamental and irresponsible modification.