Responsibility to protect and human rights based intervention

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The present text puts forward the thesis according to which there is a customary rule on human rights based intervention (I.). This thesis is demonstrated by an analysis of the United Nations practice (a), the state practice (b) and the opinio iuris (c). In the light of this rule, the text asseses the obligations of the States (II.) and of the international community (III.) when confronted with grave human rights violations as a threat to international peace and security, including the commission, preparation and incitement thereto, of genocide, war crimes, ethnic cleansing and crimes against humanity. A particular attention is given to the case of secession, when the seceding population alleges grave breaches of their human rights committed by the parent State.

I. Formation of the customary rule on human rights based intervention

(a) United Nations practice

1. Article 2 § 4 of the United Nations Charter on prohibition of the use of force is a *jus cogens* rule, which applies in both inter-State and intra-State cases. This rule may be restricted only by another rule of a similar nature (see Article 53 of the Vienna Convention on the Law of Treaties). The targeting of a population by their own government, which perpetrates, seeks to perpetrate or allows the perpetration of genocide, crimes against humanity or war crimes, directly or through private agents acting under its direction or with its connivance, constitutes criminal conduct under treaty and customary law. The prevention and punishment of such crimes is a *jus cogens* obligation of a non-derogable,

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imperative nature, in times of both peace and war. In case of the deliberate selection of a part of the population on the basis of a racial, ethnic, religious or other identity-based criterion as a target of a systematic attack, the unlawfulness of the conduct is compounded by the discriminatory intent, which also calls for mandatory prevention and punishment.[1] Thus, the *jus cogens* prohibition of the use of force may be restricted for reasons of protecting a population from the commission of *jus cogens* crimes, the application of Article 103 of the UN Charter being excluded in this conflict of norms.

2. Shortly after the end of the Second World War, the UN General Assembly expressed the view that "it [was] in the higher interests of humanity to put an immediate end to religious and so-called racial persecution and discrimination", and that therefore governments should "take the most prompt and energetic steps to that end".[2] In the context of the fight against colonialism, bolder statements were made expressing the same principle. In paragraph 3 (2) of the Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, approved by General Assembly Resolution 2621 (XXV) (12 October 1970, A/RES/2621 (XXV), see also A/8086), it was affirmed that States "shall render all necessary moral and material assistance" to the oppressed population of another State "in their struggle to attain freedom and independence".[3] The Basic Principles of the legal status of the combatants struggling against colonial and alien domi-

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1 Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide and Article 89 of the Protocol additional I to the Geneva Conventions. See also on *jus cogens* crimes, Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11 (2001), § 11 ("States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence"); International Law Commission (ILC) Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Article 26, p. 85 ("Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination"); and Rules 156 to 161 in the ICRC Study on Rules of customary international humanitarian law, in J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, volume I, Geneva, 2005.

2 UN General Assembly Resolution 103 (I), on Persecution and Discrimination, 19 November 1946.

3 A notable example is General Assembly Resolution ES-8/2 on the question of Namibia (14 September 1981, A/RES/ES-8/2), which "calls upon Member States, specialized agencies and other international organizations to render increased and sustained support and material, financial, military and other assistance to the South West Africa People's Organization to enable it to intensify its struggle for the liberation of Namibia".

nation and racist regimes, approved by General Assembly Resolution 3103 (12 December 1973, A/RES/3103 (XXVIII)), even declared that

> "[t]he struggle of peoples under colonial and alien domination and racist régimes for the implementation of their right to self-determination and independence [was] legitimate and in full accordance with the principles of international law"

stating that

> "[a]ny attempt to suppress the struggle against colonial and alien domination and racist régimes [was] incompatible with the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the Universal Declaration of Human Rights and the Declaration on the Granting of Independence to Colonial Countries and Peoples and constitute[d] a threat to international peace and security".

More recently, the "right" of peoples forcibly deprived of the right to self-determination, freedom and independence, "particularly peoples under colonial and racist regimes or other forms of alien domination", to struggle to that end and to seek and receive support was reiterated in paragraph 3 of the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, approved by General Assembly Resolution 42/22 (18 November 1987, A/RES/42/22).

Step by step, the Security Council has enshrined this same "right" to use force in a non-colonial context as well. On the one hand, it referred to grave human rights violations as a threat to international peace and security, since the seminal Resolution 688 (1991), 5 April 1991, S/RES/688 (1991), later confirmed by many others, such as Resolutions 733 (1992), 23 January 1992, S/RES/733 (1992), 794 (1992) on the situation in Somalia, 3 December 1992, S/RES/794 (1992), and 1199 (1998) on the situation in Kosovo, 23 September 1998, S/RES/1199 (1998). On the other hand, it authorised the use of "all necessary means" or the taking of "all necessary measures", including military measures, to put an end to human rights violations, ensure humanitarian aid and restore peace, for example in Resolutions 678 (1990), 29 November 1990, S/RES/678 (1990); 770 (1992), 13 August 1992, S/RES/770 (1992); 794 (1992), 3 December

1992, S/RES/794 (1992); 940 (1994), 31 July 1994, S/RES/940 (1994); and 1529 (2004), 29 February 2004, S/RES/1529 (2004).

General Assembly Resolution 43/131 (8 December 1988, A/RES/43/131), considering that "the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitute[d] a threat to human life and an offence to human dignity", Resolution 45/100 (14 December 1990, A/RES/45/100), with the first reference to "humanitarian corridors", and Resolution 46/182 (19 December 1991, A/RES/46/182), approving the "guiding principles" on humanitarian assistance, and stating that "[e]ach State ha[d] the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory", reinforced that trend.

3. In other words, a government's treatment of the population living under its authority is no longer an issue which lies within the reserved domain of States. As the Abbé Grégoire also wrote, in his lesser-known Article 15 of the *Déclaration du droit des gens* (1795), "*Les entreprises contre la liberté d'un peuple sont un attentat contre tous les autres*" (an assault on the freedom of one people is an attack against all peoples). States cannot remain indifferent in the face of situations of systematic discrimination and human rights violations. Having been introduced by the International Commission on Intervention and State Sovereignty (ICISS),[4] advocated in the SecretaryGeneral's note presenting the report of the High-level Panel on Threats, Challenges and Change[5] and adopted in the 2005 World Summit Outcome Document, the rule concerning the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity was formally enshrined in General Assembly Resolution 60/1 of 24 October 2005, which adopted the Outcome Document (A/RES/60/1), and Security Council Resolution 1674 on the protection of civilians in armed conflict (28 April 2006, S/RES/1674 (2006)), which

4 ICISS, "The Responsibility to Protect", cited above, 2001, §§ 2.24, 4.19-4.36 ("emerging guiding principle"). In the Commission's view, military intervention for human protection purposes is justified in order to halt or avert "large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large scale 'ethnic cleansing', actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape" (§ 4.1).

5 "A more secure world: our shared responsibility", 2 December 2004, A/59/565, §§ 201-08 ("the emerging norm of collective international responsibility to protect"). In the High-level Panel's view, "[t]here is a growing recognition that the issue is not the 'right to intervene' of any State, but the 'responsibility to protect' of every State when it comes to people suffering from avoidable catastrophe – mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease" (§ 201).

endorsed paragraphs 138 and 139 of the World Summit Outcome Document.[6] In undertaking to provide a "timely and decisive" response, the world political leaders affirmed their determination to act not only when the crimes in question were already occurring but also when they were imminent, by using all the permissible and necessary means, including those of a military nature, to avert their occurrence. Conceptually and practically, this responsibility entailed the prevention of such crimes, including the incitement to commit them, as the normative statement of paragraph 138 clarified, reinforced by the statement of political support to the Special Adviser of the Secretary-General on the Prevention of Genocide in paragraph 140. The nature of the requisite response was not left indefinite, since it must be all-inclusive in order to be "decisive", and obviously to encompass the full range of coercive and noncoercive enforcement actions available to the Security Council, as shown by the express reference to Chapters VI, VII and VIII of the Charter. Needless to say, the requirements of proportionality were applicable to the international community's response.

With this degree of specificity, the Outcome Document established not only an unambiguous political commitment to use those powers, but set a universally binding obligation to protect populations from the most atrocious human rights violations. This protection extended to all "populations" within the territory of the State, including refugees, migrants, displaced persons and minori-

6 It should be noted that Resolution 1674 contains the first official reference by the Security Council to the responsibility to protect and that this reference is made in connection with the protection of civilians in armed conflict. Thus, the responsibility to protect and the protection of civilians have mutually reinforced their respective legal dimensions. The protection of civilians in armed conflict was first promoted by the Security Council under a comprehensive package of measures approved by Resolutions 1265 (1999), 17 September 1999, S/RES/1265 (1999), and 1296 (2000), 19 April 2000, S/RES/1296 (2000). This latter Resolution emphasised, for the first time, the Security Council's responsibility to take "appropriate steps" for the protection of civilians during armed conflict, since "the deliberate targeting of civilian populations or other protected persons and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security". The same position of principle was affirmed in Resolution 1894 (2009) (11 November 2009, S/RES/1894 (2009)), which reiterated the Security Council's "willingness to respond to situations of armed conflict where civilians are being targeted or humanitarian assistance to civilians is being deliberately obstructed, including through the consideration of appropriate measures".

ties, and not only to "groups", "civilians" or "citizens".[7] The indissoluble link between international human rights law, the rule of law and the responsibility to protect was confirmed by placing the latter issue under the heading "IV. Human rights and the rule of law" in the Outcome Document. The apparent casuistic approach ("on a case-by-case basis") referred to the individual assessment of the adequate and necessary means of addressing each specific situation, and evidently not to the legal rule set out in the Outcome Document, whose normative language ("responsibility") reflected that of Article 24 of the UN Charter. After imposing an affirmative duty on the Security Council to react to the catalogued international crimes, the Outcome Document omitted to mention the consequences of any Security Council failure to respond. But that omission is highly significant in legal terms. Having regard to the preparatory materials for the Vienna meeting, namely the ICISS and High-level Panel reports, as well as the previous practice of international organisations in Africa, the silence of the Outcome Document left the door open to the possibility of regional or individual enforcement alternatives if the Security Council failed to act. Such regional or individual enforcement measures could, in any event, not be excluded in view of the cogent nature of the international crimes at stake. Finally, by stressing the need for the General Assembly to continue its consideration of the responsibility to protect populations, the Outcome Document enhanced its subsidiary role in this field in the light of the Charter principles and, more broadly, of the general principles of international law and customary international law.

The Security Council's reaffirmation of paragraphs 138 and 139 of the Outcome Document, in the operative part of Resolution 1674, reinforced the binding nature of the legal obligations resulting therefrom and the obligations of member States of the United Nations to implement decisions taken in accordance with the Outcome Document (under Article 25 of the UN Charter). The later statement by the UN Secretary-General that "the provisions of paragraphs 138 and 139 of the Summit Outcome [were] firmly anchored in well-es-

7 These less inclusive expressions were used in the ICISS Report ("The Responsibility to Protect"), cited above, "A more secure world", cited above, and "In Larger Freedom: Towards Development, Security and Human Rights for All", Report of the Secretary-General, 21 March 2005, A/59/2005. The word "populations" avoided the exclusion of non-civilians from the ambit of beneficiaries of the responsibility to protect. The emphasis on "its populations" envisaged the inclusion of all permanent or temporary residents within the national territory and the territories over which the State had effective control.

tablished principles of international law" served only to acknowledge their intrinsic legal strength.[8]

Subsequently, the Security Council,[9] the General Assembly[10] and the Secretary-General[11] applied the rule of responsibility to protect profusely in binding and non-binding documents. In 2007 the Secretary-General appointed a Special Adviser on the Responsibility to Protect, whose office was recently merged with the office of the Special Adviser on the Prevention of Genocide, paving the way for a more comprehensive and coordinated approach to the core problem faced by these offices. In his landmark report, "Implementing the responsibility to protect" (12 January 2009, A/63/677), the Secretary-General interpreted the Outcome Document, acknowledging the role of the General Assembly under the "Uniting for peace" procedure to resolve the impasse of the Security Council (paragraphs 11, 57 and 63).[12] By its Resolution 63/308 (2009) (7 October 2009, A/RES/63/308), the General Assembly took note of the SecretaryGeneral's report, accepting it tacitly.

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8 "Implementing the responsibility to protect": Report of the Secretary-General, 12 January 2009, A/63/677, § 3. As to the legal nature of the obligation of the international community, see ICISS Report, cited above, § 2.31; "A more secure world", cited above, §§ 201-02; and General Assembly Resolution 60/1, cited above.

9 For example, Resolution 1706 on the situation in Darfur, 31 August 2006, S/RES/1706 (2006); Resolution 2014 on the situation in Yemen, 21 October 2011, S/RES/2014 (2011); Resolution 1970, 26 February 2011, S/RES/1970 (2011), Resolution 1973, 17 March 2011, S/RES/1973 (2011), Resolution 2016, 27 October 2011, S/RES/2016 (2011), and Resolution 2040, 12 March 2012, S/RES/2040 (2012) on the situation in Libya; Resolution 1975 on the situation in Côte d'Ivoire, 30 March 2011, S/RES/1975 (2011); and Resolution 2085 on the situation in Mali, 20 December 2011, S/RES/2085 (2011).

10 For example, Resolution 66/176, of 23 February 2011 (A/RES/66/176), and Resolution 66/253, of 21 February 2012 (A/RES/66/253).

11 In "Larger Freedom: Towards Development, Security and Human Rights for All", cited above, § 132; "Implementing the responsibility to protect": Report of the SecretaryGeneral, cited above; "Early Warning, Assessment and the Responsibility to Protect": Report of the Secretary-General, 14 July 2010, A/64/864; "The role of regional and sub-regional arrangements in implementing the responsibility to protect": Report of the Secretary-General, 28 June 2011, A/65/877-S/2011/393; "Responsibility to protect: timely and decisive response": Report of the SecretaryGeneral, 25 July 2012, A/66/874-S/2012/578; "Responsibility to protect: State responsibility and prevention": Report of the Secretary-General, 9 July 2013, A/67/929-S/2013/399; "Fulfilling our collective responsibility: international assistance and the responsibility to protect": Report of the Secretary-General, 11 July 2014, A/68/947-S/2014/449.

12 In addition, two references make it clear that, according to the Secretary-General, the UN system concurs with regional and individual enforcement initiatives: "In a rapidly unfolding emergency situation, the United Nations, regional, subregional and national decision makers must remain focused on saving lives through 'timely and decisive' action" (§ 50), and "this will make it more difficult for States or groups of States to claim that they need to act unilaterally or outside of United Nations channels, rules and procedures to respond to emergencies relating to the responsibility to protect." (§ 66).

4. The United Nations practice teachings are clear: if human rights have prevailed over sovereignty and territorial integrity in order to liberate colonised populations from oppression and tyranny, the same applies with regard to non-colonised populations faced with governments that do not represent them and carry out a policy of discrimination and human rights abuses against them. The principle of equality warrants such a conclusion. In both situations, human rights protection comes first, the dignity of the women and men who are the victims of such a policy trumping the interest of the State. Although peace is the primary concern of the international community and the United Nations, which seeks "to save succeeding generations from the scourge of war", this must not be a rotten peace, established and maintained on the basis of the systematic sacrifice of the human rights of the population of a State, or part of it, at the hands of its own government. In these cases, the international community has a responsibility to protect, with all strictly necessary means, the victims.

(b) State practice

5. Less recent international practice of military intervention in favour of non-colonised populations by third States includes such examples as the military intervention of Great Britain, France and Russia to protect the Greek nationalists in 1827, the French military intervention in Syria in favour of the Maronite Christians in 1860-61, the intervention of the United States of America in Cuba in 1898, and the joint military intervention of Austria, France, Great Britain, Italy and Russia in the Balkans in favour of Macedonian Christians in 1905. More recent practice includes the examples of the military intervention of Vietnam in Kampuchea in 1978-79, that of Tanzania in Uganda in 1979, or that of the United States of America, the United Kingdom, France and others in favour of the Kurdish population in Iraq in 1991.

In the context of secession, the military intervention of India in the conflict with Pakistan is the most cited example, since Pakistan had not only denied the right of internal self-determination of the East Bengali population, but had also abused their human rights.[13] Neither Security Council Resolution 307 (1971) (21 December 1971, S/RES/307 (1971)), nor General Assembly Resolution 2793 (XXVI) (7 December 1971, A/RES/2793 (XXVI)), considered India as

13 On this particular situation, see International Commission of Jurists, *The events in East Pakistan, 1971*, Geneva, 1972.

an "aggressor" or "occupant", nor did they ask for the immediate withdrawal of troops.[14]

6. The paradigm shift at the end of the twentieth century is remarkable, most notably in Africa. With the vivid memory of the Rwanda genocide and of the uncoordinated response of the international community to tragedy, African leaders decided to take action, by creating mechanisms for humanitarian intervention and military enforcement operations in intra-State conflicts, including genocide, crimes against humanity, ethnic cleansing, gross violations of human rights and military coups, as follows.

(a) As regards the Economic Community of West African States, see Articles 3 (d) and (h) and 22 of the 1999 ECOWAS Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security:

> "ECOMOG [ECOWAS Cease-Fire Monitoring Group] is charged, among others, with the following missions:
> ...
> b) Peace-keeping and restoration of peace;
> c) Humanitarian intervention in support of humanitarian disaster;
> d) Enforcement of sanctions, including embargo;
> e) Preventive deployment;
> f) Peace-building, disarmament and demobilisation;"

(b) As to the Economic Community of Central African States, see Article 5 (b) of the 2000 Protocol relating to the Establishment of a Mutual Security Pact in Central Africa:

> "*Aux fins enoncés ci-dessus, le COPAX :*
> *...*
> *b.peut également engager toute action civile et militaire de prévention, gestion et de reglement de conflits ;*"

14 At this juncture, it is important to note that a modern conception of customary international law, especially in such domains where there is a lack of State practice, like those of State secession, admits the relevance of non-binding resolutions like those of the General Assembly, for the formation of a customary rule (*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, §§ 70-73).

(c) As regards the Southern African Development Community (SADC), see Articles 3 § 2 (e) and (f) and 11 § 2 (a) of the 2001 Protocol on Politics, Defence and Security Co-operation:

> "The Organ may seek to resolve any significant intra-state conflict within the territory of a State Party and a 'significant intra-state conflict' shall include:
> (i) largescale violence between sections of the population or between the state and sections of the population, including genocide, ethnic cleansing and gross violation of human rights;
> (ii) a military coup or other threat to the legitimate authority of a State;
> (iii) a condition of civil war or insurgency;
> (iv) a conflict which threatens peace and security in the Region or in the territory of another State Party."

(d) For the Organisation of African Unity, see Article 4 (h) of the Constitutive Act of the African Union and Articles 4 (j) and 7 § 1 (f) of the 2002 Protocol relating to the Establishment of the Peace and Security Council of the African Union:

> "The Peace and Security Council shall be guided by the principles enshrined in the Constitutive Act, the Charter of the United Nations and the Universal Declaration of Human Rights. It shall, in particular, be guided by the following principles:
> ...
> j. the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, in accordance with Article 4 (h) of the Constitutive Act."

According to the so-called Ezulwini Consensus, approval by the Security Council can be granted "after the fact" in circumstances requiring "urgent action" and, thus, Article 53 § 1 of the UN Charter is not always applicable.[15] By lending its institutional authority to the Ezulwini Consensus, the African Commission on Human and Peoples' Rights Resolution ACHPR/

15 African Union, Common African Position on the Proposed Reform of the United Nations (The Ezulwini Consensus), Executive Council, 7th Extraordinary Session, 78 March 2005 (Ext./EX.CL./2(VII)).

Res.117 (XLII) 07 on Strengthening the Responsibility to Protect in Africa, 28 November 2007, further enhanced the lawfulness of this interpretation.

Central to these initiatives is the decisive political will to avoid the tragic inaction of the United Nations in the past, if necessary by replacing its universal peace and security mechanism by regional multilateral action.[16] The Security Council reacted positively, and has even approved *ex post facto* military interventions implemented within the framework of these regional and sub-regional mechanisms. For example, it did so explicitly with the ECOWAS intervention in Sierra Leone and in Liberia[17] and the African Union intervention in Burundi,[18] as well as implicitly with the SADC intervention in the Democratic Republic of the Congo.[19] This coherent and consistent practice embodies a positive belief that such intervention is required by international law.

(c) Opinio juris

7. Having in mind the genocide of the Armenian population by the Ottoman Empire, Fenwick once stated that lawyers generally believed that there should be a right to stop such massacres, but were unable to determine who had the responsibility to intervene.[20] Sir Hersch Lauterpacht gave the correct answer.[21] Recalling Grotius's lesson, he admitted that intervention by any State was lawful when a ruler "inflict[ed] upon his subjects such treatment as no one [was] warranted in inflicting", adding:

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16 On the United Nations reaction to the Rwanda events, see the UN Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda (Carlsson Report), 15 December 1999, S/1999/1257.

17 Security Council Resolution 788 (1992), 19 November 1992, S/RES/788 (1992), and Resolution 1497 (2003), 1 August 2003, S/RES/1497 (2003), both on the situation in Liberia, and Resolution 1132 (1997), of 8 October 1997 (S/RES/1132/1997 (1997)), and Resolution 1315 (2000) on the situation in Sierra Leone, 14 August 2000, S/RES/1315 (2000).

18 Security Council Resolution 1545 (2004), S/RES/1545 (2004), which paid tribute to the African Union intervention, encouraged it to "maintain a strong presence in Burundi to accompany the efforts of the Burundian parties" and authorised the deployment of the United Nations Operation in Burundi (ONUB) for an initial period of six months.

19 Security Council Resolution 1234 (1999), 9 April 1999, S/RES/1234 (1999), which neither endorses nor condemns the operation.

20 C.G. Fenwick, "Intervention: Individual and Collective", *American Journal of International Law*, vol. 39 (1945), pp. 650-51. That question had already been addressed by the founding fathers of international law: H. Grotius, *De jure belli ac pacis, libri tres*, 2.2.25; F. de Vitoria, *De jure belli*, qt. 3, Article 5, § 15; and M. de Vattel, *Le droit des gens ou les principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, book II, chapter IV, § 56.

21 H. Lauterpacht, "The Grotian Tradition in International Law", *The British Year Book of International Law*, vol. 23, (1946), p. 46.

> "This is, on the face of it, a somewhat startling rule, for it may not be easy to see why he (Grotius) permits a foreign state to intervene, through war, on behalf of the oppressed while he denies to the persecuted themselves the right of resistance. Part of the answer is, perhaps, that he held such wars of intervention to be permitted only in extreme cases which coincide largely with those in which the king reveals himself as an enemy of his people and in which resistance is permitted."

In the year of the fall of communism in eastern Europe, the question resurfaced again with much ado on the agenda of the international community. With the Institute of International Law (IIL) approving Article 2 of the 1989 Resolution on The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States, it was admitted that States, acting individually or collectively, were entitled to take diplomatic, economic and other measures *vis-à-vis* any other State which had committed grave violations of human rights, notably large-scale or systematic violations, as well as those infringing rights that could not be derogated from in any circumstances, provided such measures were permitted under international law and did not involve the use of armed force in violation of the UN Charter. *A contrario*, any initiative in accordance with the UN Charter for the purpose of ensuring human rights in another State can be taken by States acting individually or collectively, and should not be considered an intrusion in its internal affairs. Some years later, quite restrictively, Article VIII of the 2003 IIL Resolution on Humanitarian Assistance reformulated the rule, with much caution, as follows: in the event that a refusal to accept a *bona fide* offer of humanitarian assistance or to allow access to the victims leads to a threat to international peace and security, the Security Council may take the necessary measures under Chapter VII of the

Charter of the United Nations. Meanwhile, both humanitarian intervention[22] and the responsibility to protect doctrine[23] have received attention and support from reputed scholars and experienced practitioners.

8. In view of the practice and *opinio* mentioned above, the rule of the responsibility to protect shows some important differences with regard to the "right to humanitarian intervention": firstly, responsibility to protect presup-

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22 In the twentieth century, most notably: A. Rougier, "La théorie de l'intervention d'humanité", *Revue générale de droit international public*, 17 (1910), pp. 468-526; E.C. Stowell, *Intervention in International Law*, Washington, 1921; T.M. Franck and N.S. Rodley, "After Bangladesh: the Law of Humanitarian Intervention by Military Force", *American Journal of International Law*, vol. 67 (1973), pp. 275-303; J.-P.L. Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the UN Charter", *California Western International Law Journal*, vol. 4 (1974), pp. 203-70; G. Klintworth, *Vietnam's Intervention in Cambodia in International Law*, Canberra, 1989; B.M. Benjamin, "Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities", *Fordham International Law Journal*, vol. 16 (1992), pp. 120-58; Torrelli, "De l'assistance à l'ingerence humanitaires", *International Review of the Red Cross*, vol. 74 (1992), pp. 238-58; I. Forbes and M. Hoffman (eds), *Political Theory, International Relations and the Ethics of Intervention*, London, 1993; F.R. Téson, *Humanitarian intervention: an inquiry into law and morality*, second edition, IrvingtonOnHudson, 1997; A. Cassesse, "*Ex inuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in World Community", *European Journal of International Law*, vol. 10 (1999), pp. 23-30; Independent International Commission on Kosovo, *The Kosovo Report*, Oxford University Press, 2000, pp. 167-75; N.J. Wheeler, "Legitimating Humanitarian Intervention: Principles and Procedures", *Melbourne Journal of International Law*, vol. 2 (2001), pp. 550-67; *Saving Strangers: Humanitarian Intervention in International Society*, Oxford, 2002; F. Terry, *Condemned to Repeat? The Paradox of Humanitarian Action*, New York, 2002; B.D. Lepard, *Rethinking Humanitarian Intervention*, Penn State University Press, 2002; J.M. Welsh, *Humanitarian Intervention and International Relations*, Oxford, 2006; and R. Thakur, "Humanitarian Intervention", in T.G. Weiss and S. Daws (eds), *The Oxford Handbook on the United Nations*, Oxford, 2007, pp. 387-403.

23 Among others: F.M. Deng et al., *Sovereignty as Responsibility: Conflict Management in Africa*, Washington, 1996; T.G. Weiss, *Military-Civilian Interactions: Humanitarian Crises and the Responsibility to Protect*, Lanham, 2005; O. Jütersonke and K. Krause (eds), *From Rights to Responsibilities: Rethinking Interventions for Humanitarian Purposes*, Geneva, 2006; Société Française pour le Droit International (ed.), *La Responsabilité de Protéger*, Paris, 2008; G. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Washington, 2008; L. Arbour, "The responsibility to protect as a duty of care in international law and practice", *Review of International Studies*, vol. 34, pp. 445-58; A.J. Bellami, *Responsibility to Protect*, London, 2009, and *Global Politics and the Responsibility to Protect: From Words to Deeds*, New York, 2010; D. Kuwali, *The Responsibility to Protect, Implementation of Article 4 (h) Intervention*, Leiden, 2011; E.G. Ferris, *The Politics of Protection: The Limits of Humanitarian Action*, Washington, 2011; J. Hoffmann and A. Nollkaemper (eds), *Responsibility to Protect From Principle to Practice*, Amsterdam, 2012; W.A. Knight and F. Egerton (eds), *The Routledge Handbook of the Responsibility to Protect*, New York, 2012; A. Francis et al. (eds), *Norms of Protection, Responsibility to Protect, Protection of Civilians and their Interaction*, Paris, 2012; J. Genser and I. Cotler (eds), *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in our Time*, Oxford, 2012; G. Zyberi (ed.), *An Institutional Approach to the Responsibility to Protect*, Cambridge, 2013; N. Hajjami, *La Responsabilité de Protéger*, Brussels, 2013; and the Sphere Project, *Humanitarian Charter and Minimum Standards in Humanitarian Response*, 2011, and the *Core Humanitarian Standard on Quality and Accountability*, 2014.

poses the primary State's obligation to respect and protect the human rights of its population, which emphasises the subsidiary preventive and protective role of the international community; secondly, responsibility to protect departs from the concept of the "right" of each State to intervene in another State's internal affairs, by establishing the specific conditions for intervention and hence limiting the discretion of a State to take action against another State; thirdly, responsibility to protect shifts the focus from the "right" of the target State to territorial integrity to the rights of the victims in peril; and, fourthly, and most importantly, sovereignty becomes instrumental to the welfare of the population, and is not an end in itself, the use of force constituting the last-resort instrument to safeguard the fundamental rights and freedoms of the victimised population in the target State.

9. Hence, responsibility to protect corresponds to a customary norm which has benefited from three different but converging lines of development of international law: firstly, human rights do not belong to the reserved domain of sovereignty of States (Article 2 § 7 of the UN Charter),[24] which excludes from this domain "the outlawing of acts of aggression, and of genocide" and "principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination", respect for which constitutes an *erga omnes* obligation of States,[25] and where disrespect may constitute a threat to international peace; secondly, State officials have a personal responsibility to protect the population under their political authority, on pain of international criminal responsibility for the *delicta juris gentium*: genocide, crimes against humanity and war crimes (Articles I, IV, V, VI and VIII of the Convention on the Prevention and Punishment of the Crime of Genocide and Articles 6 to 8 of the Rome Statute of the International Criminal Court), whose

24 The reserved domain is an evolving concept, defined negatively by the lack of international norms regulating a certain issue and not positively by its inclusion in a closed catalogue of issues (*Aegean Sea Continental Shelf*, Judgment, *ICJ Reports* 1978, § 59; and Institute of International Law, 1954 Resolution on *La détermination du domaine réservé et ses effets*).

25 See *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, *ICJ Reports* 1970, §§ 33-34; and Institute of International Law, Article 1 of the 1989 Resolution on The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States.

prevention and prosecution is also an *erga omnes* obligation;[26] thirdly, the protection of civilians in armed conflicts is a responsibility of the international community, requiring States to take action jointly or individually to suppress serious violations of the Geneva Conventions or Protocol I thereto (Article 89 of Protocol I additional), as well as any other serious violations of international humanitarian law embodying elementary considerations of humanity, with *erga omnes* effect, including in non-international armed conflicts between the government of a State and "dissident armed forces or other organized armed forces" (Article 1 § 1 of Protocol II additional to the four Geneva Conventions) and between the government and non-organised forces, and even in civil strife outside of armed conflict (common Article III of the Geneva Conventions).[27] This customary rule applies both to action by a State in foreign territories under its effective control and to the conduct of private persons, in national or foreign territories, when they act under the control of the State.[28]

10. In international law, States have a duty to cooperate to bring to an end, through lawful means, any serious breach by a State of an obligation arising under a peremptory norm of general international law (see Article 41 § 1 of the Draft articles on Responsibility of States for Internationally Wrongful Acts of

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26 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *ICJ Reports* 2007, § 430 ("the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible"); *Barcelona Traction, Light and Power Company, Limited*, cited above, § 34; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, *ICJ Reports* 1951; and Resolution ICC-ASP/5/Res.3, adopted at the 7th plenary meeting on 1 December 2006, by consensus. As the International Court of Justice (ICJ) put it, when referring to genocide, States must cooperate "in order to liberate mankind from such an odious scourge". The obligation to prevent and prosecute war crimes resulted already from the Geneva treaty and customary law. The obligation to do likewise regarding crimes against humanity is a direct consequence of the Rome Statute. Ethnic cleansing may be criminally punished both as a war crime or a crime against humanity.

27 See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports* 2004, §§ 155-58, and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *ICJ Reports* 2005, § 178. Most of the universally ratified Geneva treaty law codifies customary law, which means that every State, whether or not it is party to the specific conflict, is obliged to ensure respect for these rules and to take action, jointly or individually, in order to protect civilians in armed conflict. Admittedly, this obligation requires States to ensure that no other State commits genocide, war crimes or crimes against humanity. The action undertaken must evidently be in accordance with the State's obligations under the UN Charter (Article 109).

28 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States of America)* (Merits), Judgment, *ICJ Reports* 1986, §§ 109-10; *Democratic Republic of the Congo v. Uganda*, cited above, §§ 178-80; and *Bosnia and Herzegovina* v. *Serbia and Montenegro*, cited above, *§§ 399-406; see also Article 8 of International Law Commission's Draft articles* on Responsibility of States for Internationally Wrongful Acts. The extent of the effective-control test will not be dealt with in this opinion.

the International Law Commission (ILC)). Any State other than the injured State may invoke the responsibility of the perpetrator State when "[t]he obligation breached is owed to the international community as a whole" and claim from the responsible State the cessation of the internationally wrongful act (ibid., Article 48 § 1 (b)).[29]

Mass atrocities committed or condoned by a government against their own population entail such legal consequences in view of the *jus cogens* nature of these crimes and the *erga omnes* nature of the corresponding human rights protection obligation. In this context, the legal status of both the collective State responsibility and the extraterritorial individual State responsibility for preventing and stopping *jus cogens* crimes is unambiguous. As a matter of principle, all States are to be considered as the "injured State" in the case of the *delicta juris gentium*, whose perpetrators are deemed to be *hostis human generis*.[30] In the words of Lauterpacht, "the exclusiveness of domestic jurisdiction stops where outrage upon humanity begins".[31]

11. International human rights law, international criminal law and international humanitarian law have evolved in such a way that they converge into acknowledging the legal obligation to take, collectively or individually, preventive and coercive action against a State which systematically attacks, or

29 As the ILC explained, Article 48 § 1 (b) "intends to give effect to the statement by ICJ in the *Barcelona Traction* case, where the Court drew 'an essential distinction' between obligations owed to particular States and those owed 'towards the international community as a whole'. With regard to the latter, the Court went on to state that '[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*'" (see ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, p. 127). These Draft articles apply to breaches of inter-State obligations of a bilateral character, as well as to international responsibility for breaches of State obligations owed to an individual, groups of individuals or the international community as a whole.

30 Both General Assembly Resolution 2840 (1971) on the question of the punishment of war criminals and of persons who have committed crimes against humanity, 18 December 1971, A/RES/2840 (XXVI), and its Resolution 3074 (1973) on Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, 3 December 1973, A/RES/3074 (XXVIII), underscore the States' obligation to take steps for the arrest, extradition, trial and punishment of these criminals.

31 H. Lauterpacht, cited above, p. 46.

condones an attack on, all or part of its population.[32] The human rights based intervention is strictly limited to preventing or stopping mass atrocities in the form of genocide, crimes against humanity, war crimes and ethnic cleansing, and does not purport to change the constitutional system of the target State.[33]

As an *ultimum remedium* mechanism, human rights based intervention presupposes that where human rights are protected by international conventions, that protection does not take the regular form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the international conventions themselves. The use of force by the international community is thus limited by a double subsidiarity, in view of the failure of both the national human rights protection mechanisms and the common international human rights treaty mechanisms.

The international community's subsidiary reaction may take place, in decreasing order of authority, by way of a Security Council resolution,[34] a General

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32 This should not be confused with a right to a State-building, pro-democracy intervention, aimed at expanding a certain model of political governance (see *Nicaragua v. the United States of America*, cited above, § 209). The ICJ admitted humanitarian intervention to "prevent and alleviate human suffering, and to protect life and health and to ensure respect for the human being without discrimination to all in need" in Nicaragua, and not merely to the contras and their dependants (§ 243). Nevertheless, it is obviously unrealistic to suppose that it will be possible to eradicate a policy of systematic human rights abuse without some change in terms of the political regime of the target State.

33 This should also not be confused with a right to intervention based on a general negative assessment of the human rights situation in a particular country (contrast with *Nicaragua v. the United States of America*, cited above, § 268).There must be an element of systematicity in the infringement of human rights (see on this systematic element, my separate opinion in *Mocanu and Others*, cited above). Such an element is present in the types of crimes which trigger the responsibility to protect.

34 The 2005 World Summit Outcome Document, § 139. The clause urging the five permanent members of the Security Council not to veto action aimed at preventing or stopping genocide or ethnic cleansing was not included in the final version. The ICISS report ("The Responsibility to Protect", cited above, § 6.21), the High-level Panel report ("A more secure world", cited above, § 256) and the Secretary-General ("Implementing the responsibility to protect", cited above, § 61) have voiced their agreement with that restriction of the veto power.

Assembly recommendation,[35] an action by a regional organisation whether or not authorised beforehand under Article 53 of the UN Charter, both *ad intra* or *ad extra,*[36] and an action by a group of like-minded States or an individual State.[37] Whenever the more authoritative means of response is deadlocked, or it seriously appears that this will be the case, a less authoritative means may be used. Inaction is not an option in the face of a looming or actual tragedy, putting at risk the lives of untold numbers of victims. Not only does the UN Charter not cover the whole area of the regulation of the use of force,[38] the Charter itself also pursues other aims such as the protection of human rights

35 General Assembly Resolution 377 (V) A, 3 November 1950, or the "Uniting for Peace" Resolution (A/RES/377 (V), see also A/1775 (1951)). On the role of this Resolution, see ICISS, "The Responsibility to Protect", cited above, § 6.30, Independent International Commission on Kosovo, "The Kosovo Report", cited above, p. 166, and the Secretary-General's report, "Implementing the responsibility to protect", cited above, § 56. In fact, the General Assembly has already made significant use of this Resolution, such as by calling upon all States and authorities "to continue to lend assistance to the United Nations action in Korea", which meant military assistance (Resolution 498 (V), 5 November 1951, A/RES/498 (V)), "establishing" peacekeeping operations in Egypt (Resolution 1000 (ES-I), 5 November 1956, A/RES/1000 (ES-I)), "requesting" the Secretary-General "to take vigorous action … to assist the Central Government of the Congo in the restoration and maintenance of law and order throughout the territory of the Republic of Congo", thus confirming the mandate of the UN Operation in the Congo (Resolution 1474 (ES-IV), 16 September 1960, A/RES/1474 (ES-IV)), and condemning South Africa for the occupation of Namibia and calling for foreign military assistance to the liberation struggle (Resolution ES-8/2, cited above). The so-called "Chapter VI ½ measures" relied on the target State's consent, but neither the text nor the spirit of Resolution 377 excludes its use in order to recommend the use of force in situations of breach of the peace even where consent is lacking.

36 ICISS, "The Responsibility to Protect", cited above, §§ 6.31-6.35 ("there are recent cases when approval has been sought *ex post facto*, or after the event (Liberia and Sierra Leone), and there may be certain leeway for future action in this regard"), "A more secure world", cited above, § 272, Report of the Security Council *Ad Hoc* Working Group on conflict prevention and resolution in Africa, of 30 December 2005 (S/2005/833), § 10, and "Fourth report on responsibility of international organizations" by the Special Rapporteur Giorgio Gaja, § 48 (A/CN.4/564). The Secretary-General's report, "Implementing the responsibility to protect", cited above, § 56, referred to the use of force by regional or subregional arrangements "with the prior authorization of the Security Council". The World Summit Outcome Document envisages cooperation between the Security Council and the "appropriate" regional organisation, meaning one from within the geographical area of the conflict. But practice has shown that the Security Council may pick another choice. For example, Resolution 1484 (2003), of 30 May 2003, (S/RES/1484/2003), authorised the European Union-led Operation Artemis in the Democratic Republic of the Congo during the Ituri conflict.

37 The World Summit Outcome Document did not exclude these possibilities. As explained above, they derive not only from the *jus cogens* nature of the crimes at stake, but also from the *erga omnes* nature of the human rights protection obligation.

38 *Nicaragua v. the United States of America*, cited above, § 176, and ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, p. 85: "But in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose. Determining in which circumstances consent has been validly given is again a matter for other rules of international law and not for the secondary rules of State responsibility."

(Articles 1 § 2, 1 § 3 and 55), and the systematic flouting of these rights by a State within its own borders jeopardises international peace and security as well. In such circumstances, States must take joint and separate action to secure the observance of the violated human rights of the victimised population (Article 56 of the UN Charter).

II. Responsibility of the States to protect

12. Sovereign States are entitled to defend their national territory and protect their populations. This is not only their right, but their obligation as well. Each government has the obligation to maintain or re-establish law and order in the State or to defend its national unity and territorial integrity by "all legitimate means".[39] While fulfilling these obligations, "all reasonable precautions" are due to avoid any losses of civilian lives and damage to civilian objects.[40] When absolutely necessary, civilian property may be destroyed for military purposes.[41] Civilians should not be arbitrarily displaced from their homes or places of habitual residence, imperative military reasons being necessary to justify such displacement.[42] In the case of forced displacement of civilians, their rights to return to and enjoy their homes and property should be implemented as soon as the reasons for their displacement cease to exist.[43]

13. In the context of secession, military action by the parent State against the seceding movement and intervening third States is, in principle, justified. The obligation to defend territorial integrity applies unless the secession complies with the following requirements: (1) the seceding population fulfil the Monte-

39 Article 3 § 1 of the 1977 Protocol additional II to the Geneva Conventions.

40 Article 13 of the 1977 Protocol additional II to the Geneva Conventions and Article 57 of the 1977 Protocol additional I to the Geneva Conventions, and Rules 1 to 10 and 15 of the ICRC Study on Rules of customary international humanitarian law (cited above).

41 Article 52 of the 1977 Protocol additional I to the Geneva Conventions, Article 14 of the 1977 Protocol additional II to the Geneva Conventions, Article 53 of the 1949 Fourth Geneva Convention relative to the protection of civilian persons in time of war, Article 6 (b) of the Charter of the International Military Tribunal, Articles 46 and 56 of the Hague Regulations Respecting the Laws and Customs of War on Land, and Rules 51 and 52 of the ICRC Study on Rules of customary international humanitarian law (cited above).

42 Article 17 of the 1977 Protocol additional II to the Geneva Conventions, Rules 129 and 130 of the ICRC Study on Rules of customary international humanitarian law, and Principle 6 of the Guiding principles on internal displacement (E/CN.4/1/1998/53/Add.2), 11 February 1998.

43 Article 49 of the Fourth Geneva Convention and Rule 132 of the ICRC Study on Rules of customary international humanitarian law (cited above).

video criteria[44] for statehood, namely they constitute a permanent population and have a defined territory, a government and the capacity to enter into relations with other States; (2) prior to secession the seceding population were not allowed fair participation in a government that represented the whole population of the former State; and (3) the seceding population were systematically treated by the government, or by a part of the population of the parent State whose action was condoned by the government, in a discriminatory manner or in a manner disrespectful of their human rights.[45]

When secession complies with these requirements, military action of the government of the parent State against the seceding population and intervening third States is no longer lawful. A State forfeits the right to defend its territory when it systematically breaches the human rights of a part of its population, or condones such breaches by private agents.

III. Responsibility of the international community to protect

14. Sovereignty, equality of all States and prohibition of the threat or use of force against another State are the founding principles of the UN Charter of the United Nations. These principles have a practical consequence, already set out in the well-known Article 7 of *La Déclaration du Droit des Gens* (1795): "*Un peuple n'a pas le droit de s'immiscer dans le gouvernement des autres*" (no people has the right to interfere in the government of others). An allegation of human rights violations in another State may evidently provide a convenient pretext for intrusion into its internal politics and, even worse, for the overthrow of legitimate governments, as the "manifestation of a policy of force, such as has,

44 Article 1 of the Montevideo Convention on the Rights and Duties of States ("the Montevideo Convention"), 26 December 1933, 165 LNTS 19.

45 See my separate opinion appended to *Chiragov and Others v. Armenia* [GC], no. 13216/05, 16 June 2015.

in the past, given rise to most serious abuses".[46] Nevertheless, the mere circumstance that the right to intervene may be abused is not *per se* decisive of its existence or otherwise in international law. One should remember the wisdom of Grotius:

> "We know, it is true, from both ancient and modern history, that the desire for what is another's seeks such pretexts as this for its own ends; but a right does not cease to exist in case it is to some extent abused by evil men."[47]

During the first decade of the twenty-first century, the following rule of customary international law crystallised:

States have the legal obligation to prevent and stop the commission, preparation and incitement thereto, of genocide, war crimes, ethnic cleansing and crimes against humanity. When a State commits these crimes, condones the commission of these crimes or is manifestly unable to oppose their commission in the national territory or the territories under its effective control, the international community has a legal obligation to react with all adequate and necessary means, including the use of military means, in order to protect the targeted populations. The reaction must be timely, effective and proportionate. By order of precedence, the power to take action is vested in the following authorities: the UN Security Council under Chapters VI and VII of the UN Charter, the UN General Assembly under the "Uniting for Peace" Resolution and regional or sub-regional organisations in accordance with their respective statutory framework, whether *ad intra* or *ad extra*. When the primary authorities are deadlocked, or it seriously appears that this will be the case, any State or group of States will be competent to take action.

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46 On the principle of non-intervention, see Article 15 § 8 of the Covenant of the League of Nations, Article 8 of the 1933 Montevideo Convention on Rights and Duties of States, Article 1 of its 1936 Additional Protocol on Non-Intervention, and Article 3 § 2 of Protocol II additional to the Geneva Conventions. In the UN practice, United Nations General Assembly Resolution 36/103, 9 December 1981, A/RES/36/103, approving the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, Resolution 2625 (XXV), 24 October 1970, A/8082 (1970), containing the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the UN Charter, and Resolution 2131 (XX), 21 December 1965, which adopted the Declaration on the Inadmissibility of Intervention and Interference in the Domestic Affairs of States, and Article 4 of the 1949 ILC Draft Declaration on Rights and Duties of States. In the ICJ caselaw, see *Nicaragua v. the United States of America,* cited above, § 246, and *Corfu Channel case*, Judgment, *ICJ Reports* 1949, from where the citation in the text is taken.

47 H. Grotius, op. cit., 2.2.25.

15. In the context of secession, third States are prohibited from taking military action against the parent State on the pretext that the seceding population is entitled to self-determination. Thus, the territory of a State cannot be the object of acquisition by another State resulting from the threat or use of force, no territorial acquisition resulting from the threat or use of force shall be recognised as legal, and every State has the duty to refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another State.[48]

The rule of non-interference in favour of a seceding population has an exception, namely the situation where the government of the parent State is not representative of the seceding population and systematically abuses its human rights or condones a systematic attack by private agents against them. In this situation, strictly necessary military action taken by third States in favour of the seceding population is lawful after the latter have established control of their territory and declared their secession. Military action by third States prior to that time constitutes prohibited intervention in the internal affairs of another State.[49]

If, in addition to the above-mentioned requirements, the interference envisages the protection of a seceding population which is ethnically the same as that of the third-party State, the lawfulness of the interference is even less questionable, because it closely equates to a situation of selfdefence. In any event, as to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct of the intervening third State.[50]

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48 Article 11 of the Montevideo Convention, op. cit., paragraph 5 of the Declaration on the Strengthening of International Security adopted by the General Assembly Resolution 2734 (XXV), 16 December 1970, A/RES/25/2734, and Article 5 (3) of the General Assembly Resolution 3314 (XXIX) on the definition of the crime of aggression, 14 December 1974, A/RES/3314 (XXIX).

49 For the prohibition on recognising as a State a secessionist territory which is the result of the use of unlawful force by a third State, see the case of the "Turkish Republic of Northern Cyprus" after Turkey's invasion of Cyprus (Security Council Resolutions 541 (1983), 18 November 1983, S/RES/541 (1983), and 550 (1984), 11 May 1984, S/RES/550 (1984).

50 ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, p. 74.