

10^{ème} Commission*

L'intervention d'humanité

Humanitarian Intervention

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I. Introduction

As will be recalled, the *Institut*, at its reunion in Santiago, deferred consideration of the question of the possible lawfulness of Humanitarian Interventions undertaken without Security Council authorization. As discussed in the previous report, the normative implications, if any, of the then recent state practice with respect to unilateral military action in Liberia, Iraq, and Kosovo were indistinct and it was deemed premature to infer from them the beginning of the emergence in customary international law of a regime that might allow unilateral Humanitarian Intervention in some circumstances.

At the invitation of the Bureau, the 10th Commission reconvened in 2015 to assess whether state practice since Santiago, especially in the light of the “Responsibility to Protect,” warranted a reconsideration of the *Institut*’s decision. Accordingly, the Commission reviewed more recent relevant practice.

The incidents which were examined are considered below.

Somalia (2005-2007)

After the collapse of the Siad Barre regime in 1991, Somalia was described as “the worst humanitarian crisis in the world.”¹ In 2004, the international community looked to the Transitional Federal Government (TFG) to restore peace and stability to the country, the capital of which was still controlled by the Union of Islamic Courts (UIC). Between 2005 to 2007, the Intergovernmental Authority on Development (IGAD), the African Union (AU), and Ethiopia all attempted to intervene in Somalia in support of the TFG.

In January 2005, IGAD requested a mandate from the AU to deploy an IGAD Peace Support Mission in Somalia (IGASOM);² one week later, the AU Peace and Security Council (PSC) issued an authorization.³ Although neither IGAD nor the AU ever formally sought U.N. Security

¹ U.S. Congress, Hearing, *Humanitarian Tragedy in Somalia: Hearing Before the House Select Committee on Hunger*, 102nd Congress 5 (1992) (statement of Andrew S. Natsios, Assistant Administrator, Bureau for Food and Humanitarian Assistance, U.S. Agency for International Development).

² IGAD, *Communiqué of the IGAD Heads of State and Government on Somalia*, ¶ vi (Jan. 31, 2005). On the same day, the AU Assembly requested the AU PSC to issue the mandate. AU, *Decision on Somalia*, ¶ 5, AU Doc. Assembly/AU/Dc.65(IV) (Jan. 31, 2005).

³ AU, *Communiqué of the Twenty-Fourth Meeting of the Peace and Security Council*, ¶ A(3), AU Doc. PSC/PR/COMM(XXIV) (Feb 7, 2005).

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Council authorization to intervene,⁴ the President of the Security Council issued a statement “commend[ing]” IGAD and the AU for their support for the TFG.⁵ It was never clear, however, whether IGASOM would have been deemed internationally lawful, had it been undertaken without Security Council authorization, as a multiplicity of obstacles prevented IGASOM from ever deploying.⁶ That question became moot when the Security Council authorized the deployment of IGASOM in December 2006.⁷

After the failure of the IGASOM initiative, Ethiopia undertook unilateral action. When the UIC made strategic advances towards the TFG in mid-December, Ethiopia launched a large-scale offensive into Somalia against the UIC.⁸ The Ethiopian Prime Minister invoked self-defense and the consent of the host government, the TFG, to justify its intervention,⁹ but key international actors condemned it. Secretary-

⁴ IGAD and the AU did not disregard the United Nations entirely. In its request for the AU mandate, IGAD had “expressed [its] hope that ultimately the mandate will be endorsed by the United Nations.” IGAD, *Communiqué of the IGAD Heads of State and Government on Somalia*, ¶ vi (Jan. 31, 2005). In authorizing IGASOM, the AU PSC had called upon the United Nations to “provide support” for IGASOM. AU, *Communiqué of the Twenty-Fourth Meeting of the Peace and Security Council*, ¶ A(3), AU Doc. PSC/PR/COMM(XXIV) (Feb. 7, 2005). And in May, the AU PSC began requesting the U.N. Security Council to exempt IGASOM from the Somali arms embargo. AU, *Communiqué of the Twenty-Ninth Meeting of the Peace and Security Council*, ¶ 8, AU Doc. PSC/PR/COMM(XXIX) (May 12, 2005). Nevertheless, neither IGAD nor the AU ever expressly requested U.N. Security Council authorization for intervention.

⁵ U.N. Security Council Presidential Statement 2005/32, p. 2, U.N. Doc. S/PRST/2005/32 (July 14, 2005).

⁶ CECILIA HULL & EMMA SVENSSON, FOI, SWEDISH DEFENSE RESEARCH AGENCY, FOI-R--2596--SE, AFRICAN UNION MISSION IN SOMALIA (AMISOM): EXEMPLIFYING AFRICAN UNION PEACEKEEPING CHALLENGES 23-25 (2008); Tim Murithi, *The African Union's Foray into Peacekeeping: Lessons from the Hybrid Mission in Darfur*, J. PEACE, CONFLICT & DEV. 7-8, Issue 14 (July 2009); Allehone Mulugeta, *Promises and Challenges of a Sub-Regional Force for the Horn of Africa*, 15 INT'L PEACEKEEPING 171, 177-78 (2008).

⁷ U.N. Security Council Resolution 1725, ¶ 3, U.N. Doc. S/RES/1725 (Dec. 6, 2006). The Security Council took almost two years to authorize the deployment because it required IGAD and the AU to develop a “detailed mission plan” before it was willing to grant an exemption to the embargo. U.N. Security Council Presidential Statement 2005/32, p. 2, U.N. Doc. S/PRST/2005/32 (July 14, 2005).

⁸ Smaller numbers of Ethiopian troops had begun entering Somalia in mid-2006. U.N. Monitoring Group on Somalia, *Final Report of the Monitoring Group on Somalia Submitted in Accordance With Resolution 1676 (2006)*, ¶ 61, U.N. Doc. S/2006/913 (Nov. 22, 2006).

⁹ Awol K. Allo, *Ethiopia's Armed Intervention in Somalia: The Legality of Self-Defense in Response to the Threat of Terrorism*, 39 DENV. J. INT'L L. & POL'Y 139, 139 (2010);

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General Annan, the AU, the League of Arab States, and IGAD all called on Ethiopia to withdraw its troops,¹⁰ and the U.N. Security Council “[w]elcom[ed]” the withdrawal once it began.¹¹ The implication was that, notwithstanding the humanitarian crisis, the invitation of one, albeit internationally supported internal political faction was not, of itself, sufficient to justify armed intervention without Security Council authorization.

A few weeks after Ethiopia’s incursion, the AU PSC authorized the deployment of the African Union Mission in Somalia (AMISOM).¹² The AU PSC never specifically requested Security Council authorization, though it did request the Security Council to “provide all the support necessary” for AMISOM.¹³ One month later, the U.N. Security Council authorized the AU to take “all necessary measures” to protect the TFG.¹⁴ Only after this authorization was AMISOM deployed.¹⁵ The authorization of a regional organization, by itself, appeared insufficient to render an armed intervention internationally lawful.

Libya (2011)

In February 2011, the Muammar Qaddafi government began committing “gross and systematic violations of human rights” against its own civilians.¹⁶ In response, the U.N. Security Council—with China, Russia, Brazil, Germany, and India abstaining—adopted Resolution 1973; it authorized U.N. Member States to take “all necessary measures” to “protect civilians” and enforce a no-fly zone to “help

Interview by Andrew Simmons, Al-Jazeera, with Meles Zenawi, Prime Minister, Ethiopia in Addis Ababa, Ethiopia (Mar. 18, 2007), available at <http://www.aljazeera.com/NEWS/AFRICA/2007/03/2008525185515617907.html>.

¹⁰ U.N. News Centre, *Neighbouring Countries Must Stay Out of Somalia Fighting, Annan Says* (Dec. 27, 2006) (calling on “neighbouring countries to stay out of the crisis in Somalia”); AU, League of Arab States & IGAD, *Joint Communiqué of the African Union, League of Arab States and the Inter-Governmental Authority on Development on the Current Situation in Somalia* (Dec. 27, 2006) (“call[ing] for the withdrawal of Ethiopian troops from Somalia”).

¹¹ U.N. Security Council Resolution 1744, preamble, U.N. Doc. S/RES/1744 (Feb. 20, 2007).

¹² AU, *Communiqué of the Sixty-Ninth Meeting of the Peace and Security Council*, ¶¶ 8-9, AU Doc. PSC/PR/COMM(LXIX) (Jan. 19, 2007).

¹³ *Id.* ¶ 13.

¹⁴ U.N. Security Council Resolution 1744, ¶ 4, U.N. Doc. S/RES/1744 (Feb 20, 2007).

¹⁵ Tim Murithi, *The African Union’s Foray into Peacekeeping: Lessons from the Hybrid Mission in Darfur*, J. PEACE, CONFLICT & DEV. 8, Issue 14 (July 2009).

¹⁶ U.N. Human Rights Council, *Situation of Human Rights in the Libyan Arab Jamahiriya*, U.N. Doc. A/HRC/S-15/2 (Feb. 25, 2011).

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protect civilians.”¹⁷ Two days later, the United States, the United Kingdom, and France commenced military operations, which NATO took over soon after.¹⁸

Just days after the intervention began, Brazil, China, India, Russia, South Africa, the Arab League, and the African Union began criticizing the Western powers for allegedly overstepping the U.N. mandate;¹⁹ many non-governmental organizations later added their voices to the chorus of criticism.²⁰ As against this, NATO Secretary-General Anders Rasmussen and U.N. Secretary-General Ban Ki moon contended that NATO operations had remained *infra legem* the Resolution.²¹ By the end of the military operations in November, the principal criticisms were that NATO had indiscriminately killed civilians and had effected regime change,²² which fell outside the scope of Resolution 1973.²³

¹⁷ U.N. Security Council Resolution 1973, ¶¶ 4, 8, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

¹⁸ JEREMIAH GERTLER, CONG. RESEARCH SERV., R41725, OPERATION ODYSSEY DAWN (LIBYA): BACKGROUND AND ISSUES FOR CONGRESS, at summary, 7, 17, 18 (2011).

¹⁹ Oliver Stuenkel, *The BRICS and the Future of R2P: Was Syria or Libya the Exception?*, 6 GLOBAL RESP. TO PROTECT 3, 17-18 (2014); *No Obama Support from Brazil, Russia, China on Libya Front*, FORBES (Mar. 25, 2011), available at <http://www.forbes.com/sites/kenrapoza/2011/03/25/no-obama-support-from-brazil-russia-china-on-libya-front/>; Chris Buckley, *China Intensifies Condemnation of Libya Air Strikes*, REUTERS (Mar. 21, 2011), available at <http://www.reuters.com/article/2011/03/21/us-china-libya-idUSTRE72K0LX20110321>; Martin Beckford, *Libya Attacks Criticised by Arab League, China, Russia and India*, THE TELEGRAPH (Mar. 21, 2011), available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8393950/Libya-attacks-criticised-by-Arab-League-China-Russia-and-India.html>; *Libya: AU Opposes Foreign Military Intervention in Libya*, ALLAFRICA (Mar. 20, 2011), available at <http://allafrica.com/stories/201103200012.html>.

²⁰ AMNESTY INTERNATIONAL, LIBYA: THE FORGOTTEN VICTIMS OF NATO STRIKES (2012); HUMAN RIGHTS WATCH, UNACKNOWLEDGED DEATHS: CIVILIAN CASUALTIES IN NATO'S AIR CAMPAIGN IN LIBYA (2012); NATO Watch, Press Release, *Call for Independent 'Lessons Learnt' Inquiry into NATO Libyan Campaign* (Oct. 28, 2011).

²¹ NATO, *Questions and Answers at the Press Conference by NATO Secretary-General Anders Fogh Rasmussen* (Apr. 15, 2011); Louis Charbonneau, *U.N. Chief Defends NATO from Critics of Libya War*, REUTERS (Dec. 14, 2011).

²² The United States, United Kingdom, and France were aware that regime change was not a part of the mandate. On 14 April 2011, President Obama, Prime Minister Cameron, and President Sarkozy published a joint op-ed stating that “our duty and our mandate ... is to protect civilians, ... not to remove Qaddafi by force.” Office of the Press Secretary, *Joint Op-ed by President Obama, Prime Minister Cameron and President Sarkozy: 'Libya's Pathway to Peace'*, THE WHITE HOUSE (Apr. 14, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/04/14/joint-op-ed-president-obama-prime-minister-cameron-and-president-sarkozy>.

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What had commenced as a Security Council-authorized Responsibility to Protect action had transformed into a unilateral Humanitarian Intervention which, in turn, provoked the familiar criticisms of Humanitarian Intervention. In a concept note sent to the U.N. Security Council in November 2011, Brazil stated that “there is a growing perception that the concept of the responsibility to protect might be misused for purposes other than protecting civilians, such as regime change.”²⁴ More recently, Russia cited the Libyan incident in part to justify its veto of a Security Council Resolution on Syria.²⁵

Ivory Coast (2011)

Another intervention that, in its execution, may have exceeded the Security Council Resolution that mandated it occurred in the Ivory Coast in 2011. A dispute over the results of presidential elections in 2010 led to a humanitarian crisis: supporters of the incumbent, Laurent Gbagbo, and supporters of the opposition candidate, Alassane Ouattara, engaged in violent clashes and widespread human rights abuses were committed.²⁶

In response, the U.N. Security Council, in March 2011, unanimously adopted Resolution 1975. It reiterated the Security Council’s authorization for the U.N. Operation in the Ivory Coast (UNOCI) to “use all necessary means ... to protect civilians under imminent threat of physical violence.”²⁷ Although key sectors of the international community had recognized Mr. Ouattara as the victor of the elections,²⁸ the Resolution did not authorize the use of military force to ensure his

²³ Critics also argued that air strikes on Qaddafi’s ground forces went beyond the Security Council mandate. JEREMIAH GERTLER, CONG. RESEARCH SERV., R41725, OPERATION ODYSSEY DAWN (LIBYA): BACKGROUND AND ISSUES FOR CONGRESS 17 (2011).

²⁴ Concept Note from Brazil to the U.N. Security Council, *Responsibility While Protecting: Elements for the Development and Promotion of a Concept* (Nov. 9, 2011).

²⁵ U.N. Security Council 6627th Meeting, p. 4, U.N. Doc. S/PV.6627 (Oct. 4, 2011). And see *infra* at 397.

²⁶ U.N. Secretary-General, *Twenty-seventh Progress Report of the Secretary-General on the United Nations Operation in Côte d’Ivoire*, ¶¶ 53, 61, U.N. Doc. S/2011/211 (Mar. 30, 2011).

²⁷ U.N. Security Council Resolution 1975, ¶ 6, U.N. Doc. S/RES/1975 (Mar. 30, 2011).

²⁸ The United Nations, the African Union, the Economic Community of West African States (ECOWAS), the European Union, the United States, France, and other states recognized Mr. Ouattara as the victor. U.N. Secretary-General, *Twenty-seventh Progress Report of the Secretary-General on the United Nations Operation in Côte d’Ivoire*, ¶¶ 22-24, U.N. Doc. S/2011/211 (Mar. 30, 2011); NICOLAS COOK, CONG. RESEARCH SERV., RS21989, CÔTE D’IVOIRE POST-GBAGBO: CRISIS RECOVERY 1 (2011).

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accession to power.²⁹ Nevertheless, UNOCI—with the help of hundreds of French peacekeepers—laid siege to Mr. Gbagbo's residence and facilitated his arrest. Despite the Secretary-General's report to the contrary,³⁰ this final assault against Mr. Gbagbo could only with difficulty be assimilated specifically to the authorized aim of protecting civilians under imminent threat of physical violence.³¹ Still, the international community's strong support for Mr. Ouattara prevented UNOCI's operations from becoming embroiled in the level of controversy that had attended NATO's operations in Libya.

Somalia (2011)

Kenya had been the target of terrorist attacks originating in Somalia. Kidnappings alleged to have been committed by Somali terrorists in September and October 2011 led Kenya to send thousands of troops into Somalia to attack Al Shabaab.³² To justify its intervention, Kenya expressly invoked both self-defense and, impliedly, the consent of the host state government (TFG).³³

The Secretary-General's subsequent regular report on Somalia neither condemned nor endorsed the Kenyan operation.³⁴ Both IGAD and the AU supported the incursion³⁵ and ultimately facilitated the integration of the Kenyan troops into AMISOM.

²⁹ The Resolution did, however, "[u]rg[e] all ... parties ... to respect ... the election of Alassane Dramane Ouattara as President." U.N. Security Council Resolution 1975, ¶ 1, U.N. Doc. S/RES/1975 (Mar. 30, 2011).

³⁰ U.N. Secretary-General, *Twenty-eighth Report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, ¶¶ 5-9, U.N. Doc. S/2011/387 (June 24, 2011).

³¹ Thabo Mbeki, *What the World Got Wrong in Cote d'Ivoire*, FOREIGN POLICY (Apr. 29, 2011); *Russia Lashes Out at UN Military Action in Cote d'Ivoire*, RUSSIA TODAY (Apr. 5, 2011).

³² U.N. Secretary-General, *Report of the Secretary-General on Somalia*, ¶ 4, U.N. Doc. S/2011/759 (Dec. 9, 2011); INTERNATIONAL CRISIS GROUP, *THE KENYAN MILITARY INTERVENTION IN SOMALIA 2* (2012).

³³ *Joint Kenya-Somali Communiqué on War in Somalia* (Oct. 31, 2011).

³⁴ U.N. Secretary-General, *Report of the Secretary-General on Somalia*, ¶¶ 4-5, U.N. Doc. S/2011/759 (Dec. 9, 2011).

³⁵ IGAD, *Communiqué of the 19th Extra-Ordinary Session of the IGAD Assembly of Heads of State and Government on the Situation in Somalia and a Briefing on the Outstanding Issues of the Sudan Comprehensive Peace Agreement* (Nov. 25, 2011); IGAD, *Communiqué of the 41st Extra-Ordinary Session of the IGAD Council of Ministers*, ¶¶ 3-4 (Oct. 21, 2011); AU, *Communiqué of the 302nd Meeting of the Peace and Security Council*, ¶¶ 5-6, AU Doc. PSC/PR/COMM(CCCII) (Dec. 2, 2011); AU, *Press Statement of the 298th Meeting of the Peace and Security Council* (Nov. 17, 2011).

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Mali (2013)

After a coup d'état in early 2012, Mali became the scene of grave human rights violations, committed by both the Transitional Government and the armed rebels based in the north of the country.³⁶ In response, ECOWAS adopted a Concept of Operations for the deployment of an African-led International Support Mission in Mali (AFISMA), requested the AU PSC to endorse it, and “urge[d] the Security Council to examine the Concept with a view to authorizing the deployment of the international military force in Mali.”³⁷ In endorsing the Concept, the AU PSC, in turn, “urge[d] the UN Security Council ... to authorize ... the planned deployment of AFISMA.”³⁸ In December 2012, the U.N. Security Council unanimously adopted Resolution 2085, which authorized the African-led International Support Mission in Mali (AFISMA) to take “all necessary measures,” *inter alia*, to recover the northern territories of Mali from the rebels.³⁹

For logistical reasons, AFISMA would not be deployed for almost another year. Yet within a few weeks of the Resolution, Islamist rebels began significant advances against government forces.⁴⁰ On 10 January 2013, the U.N. Security Council issued a press statement “reiterat[ing] their call to Member States to ... provide assistance to the Malian Defence and Security Forces in order to reduce the threat posed by terrorist organizations and associated groups.”⁴¹ Security Council Resolution 2085 had “[u]rge[d] Member States ... to provide coordinated support ... and any necessary assistance [to AFISMA] in efforts to reduce the threats posed by terrorist organizations.”⁴² But it had expressly “authorized” only AFISMA to take “all necessary measures.”⁴³

³⁶ See U.N. Human Rights Council, *Report of the Independent Expert on the Situation of Human Rights in Mali, Suliman Baldo*, U.N. Doc. A/HRC/25/72 (Jan. 10, 2014); U.N. Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Mali*, U.N. Doc. A/HRC/23/57 (June 26, 2013).

³⁷ ECOWAS, *Final Communiqué of the Extraordinary Session of the Authority of ECOWAS Heads of State and Government*, ¶ 9 (Nov. 11, 2012).

³⁸ AU, *Communiqué of the 341st Meeting of the Peace and Security Council*, ¶ 9 (Nov. 13, 2012).

³⁹ U.N. Security Council Resolution 2085, ¶ 9, U.N. Doc. S/RES/2085 (Dec. 20, 2012).

⁴⁰ U.N. Secretary-General, *Report of the Secretary-General on the Situation in Mali*, 3, U.N. Doc. S/2013/189 (Mar. 26, 2013).

⁴¹ U.N. Security Council Press Statement on Mali, U.N. Press Release SC/10878 (Jan. 10, 2013).

⁴² U.N. Security Council Resolution 2085, ¶ 14, U.N. Doc. S/RES/2085 (Dec. 20, 2012).

⁴³ *Id.* ¶ 9.

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Nevertheless, the day following the Press Statement, France launched military operations against the rebels, citing Security Council authorization, consent, and self-defense as justifications for the intervention.⁴⁴ And in case there had been any doubt within the region, the next day the ECOWAS Commission “welcome[d]” the Security Council press statement “authorising immediate intervention in Mali to stabilise the situation.”⁴⁵ The U.N. Security Council and the U.N. Secretary-General later expressed support for the French intervention.⁴⁶ Although the international authorization was ambiguous and incremental rather than direct, the incident was not one of unilateral military intervention for humanitarian purposes.

Syria (2013)

Like Libya, Syria in 2011 also became the site of “widespread, systematic and gross violations of human rights” committed by government officials.⁴⁷ After the Syrian government allegedly used chemical weapons against civilians on 21 August 2013, states started seriously considering military intervention. A week after the chemical attacks, the United Kingdom circulated a Security Council Resolution authorizing “all necessary measures” to protect Syrian civilians from chemical weapons,⁴⁸ and published its legal position which was that even if a decision by the Security Council were blocked, “the legal basis for military action would be humanitarian intervention.”⁴⁹ Two days later, President Obama announced that “the United States should take military

⁴⁴ Embassy of France in Washington, D.C., *Mali: Press Conference Given by M. Laurent Fabius, Minister of Foreign Affairs* (Jan. 11, 2013), available at <http://ambafrance-us.org/spip.php?article4216>; Embassy of France in Washington, D.C., *Mali: Statement by M. François Hollande, President of the Republic* (Jan. 12, 2013), available at <http://ambafrance-us.org/spip.php?article4217>.

⁴⁵ ECOWAS, *Statement of the President of the ECOWAS Commission on the Situation in Mali* (Jan. 12, 2013).

⁴⁶ U.N. News Centre, *Mali: Ban Welcomes Bilateral Assistance to Stop Southward Onslaught of Insurgents* (Jan. 14, 2013); Mark Doyle, *Mali Conflict: UN Backs France’s Military Intervention*, BBC NEWS (Jan. 14, 2013).

⁴⁷ U.N. Human Rights Council, Res. S-18/1, ¶ 2(a), U.N. Doc. A/HRC/RES/S-18/1 (Dec. 2, 2011).

⁴⁸ U.K. Prime Minister’s Office, News Story, *Syria: UK to Put Forward United Nations Security Council Resolution* (Aug. 28, 2013), available at <https://www.gov.uk/government/news/syria-uk-to-put-forward-united-nations-security-council-resolution>.

⁴⁹ U.K. Prime Minister’s Office, Guidance, *Chemical Weapon Use by Syrian Regime: UK Government Legal Position*, ¶¶ 2, 4 (Aug. 29, 2013), available at <https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version>.

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action” even “without the approval of [the] United Nations Security Council,”⁵⁰ but the White House never expressly explained the legal basis for doing so.⁵¹ At the time, nine other states had expressed support for U.S. military action.⁵² Nevertheless, the Joint Special Representative of the United Nations and the League of Arab States for Syria Lakhdar Brahimi insisted that Security Council authorization was absolutely necessary.⁵³

The talk of intervention abated after the United States and Russia concluded the Framework for Elimination of Syrian Chemical Weapons in mid-September 2013.⁵⁴ Since 2011, Russia and China have vetoed four Security Council Draft Resolutions on Syria, none of which went so far as to authorize military intervention.⁵⁵ As of this writing, Security Council authorization for military intervention seems very unlikely, even as the scale of the humanitarian crisis increases.

⁵⁰ Office of the Press Secretary, Statement by the President on Syria, THE WHITE HOUSE (Aug. 31, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria>.

⁵¹ One week later, White House counsel Kathryn Ruemmler acknowledged that armed intervention “may not fit under a traditionally recognized legal basis under international law,” but it would nonetheless be “justified and legitimate under international law.” She did not identify the legal basis for intervention. Charlie Savage, *Obama Tests Limits of Power in Syrian Conflict*, N.Y. TIMES, Sept. 8, 2013, at A1.

⁵² Those nine states were Australia, Albania, Canada, Denmark, France, Kosovo, Poland, Romania, and Turkey. Office of Press Relations, *Daily Press Briefing*, U.S. DEPARTMENT OF STATE (Sept. 5, 2013), available at <http://www.state.gov/r/pa/prs/dpb/2013/09/213851.htm>.

⁵³ Office of Secretary-General Ban Ki moon, *Transcript of Press Conference by the Special Envoy for Syria, Lakhdar Brahimi*, UNITED NATIONS (Aug. 28, 2013), available at <http://www.un.org/sg/offthecuff/index.asp?nid=2953>.

⁵⁴ CHRISTOPHER M. BLANCHARD ET AL., CONG. RESEARCH SERV., RL33487, ARMED CONFLICT IN SYRIA: OVERVIEW AND U.S RESPONSE 18 (2014); JAMES E. CRONIN, GLOBAL RULES: AMERICA, BRITAIN AND A DISORDERED WORLD 307-08 (2014); Executive Council, *Framework for Elimination of Syrian Chemical Weapons*, ORGANISATION FOR THE PROHIBITION OF CHEMICAL WEAPONS, OPCW Doc. EC-M-33/NAT.1 (Sept. 17, 2013).

⁵⁵ U.N. Doc. S/2011/612 (Oct. 4, 2011) (“[s]trongly condemn[ing] the continued grave and systematic human rights violations and the use of force against civilians by the Syrian authorities”); U.N. Doc. S/2012/77 (Feb. 4, 2012) (“[c]ondemn[ing] the continued widespread and gross violations of human rights and fundamental freedoms by the Syrian authorities”); U.N. Doc. S/2012/538 (Jul. 19, 2012) (imposing sanctions on Syria if it did not cease using heavy weapons); U.N. Doc. S/2014/348 (May 22, 2014) (referring the situation in Syria to the International Criminal Court).

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Central African Republic (2014)

In March 2013, the Muslim rebel coalition, Séléka, overthrew the government of the Central African Republic (CAR), sparking ethno-religious conflict between the Christian majority and the Muslim minority. In the ensuing months, the U.N. Human Rights Council and the Secretary-General reported grave violations of human rights committed by both Christians and Muslims.⁵⁶

In July, the AU PSC authorized the deployment of the African-led International Support Mission in the CAR (MISCA).⁵⁷ Then in November, the AU PSC “urge[d] the Security Council ... to quickly adopt a resolution endorsing and authorizing the deployment of [MISCA].”⁵⁸ Less than a month later, the Security Council adopted Resolution 2127, which authorized MISCA and France to take “all necessary measures” to, *inter alia*, protect civilians and stabilize the country.⁵⁹ By contrast to the normative ambiguity of the Mali incident, in this instance, the Security Council expressly authorized France to take “all necessary measures.”

Iraq (2014)

The Islamic State of Iraq and the Levant (ISIL) came to international attention in 2013, and has since committed a “staggering array” of gross human rights violations.⁶⁰ In early August 2014, a humanitarian disaster was imminent when tens of thousands of Yazidis fled to Mount Sinjar, where they were besieged by ISIL forces.⁶¹ On 7 August 2014, the Security Council issued a press statement “call[ing] on the international community to support the Government and people of Iraq and to do all it

⁵⁶ U.N. Secretary-General, *Report of the Secretary-General on the Central African Republic Submitted Pursuant to Paragraph 22 of Security Council Resolution 2121 (2013)*, U.N. Doc. S/2013/677 (Nov. 15, 2013); U.N. Secretary-General, *Report of the Secretary-General on the Situation in the Central African Republic*, U.N. Doc. S/2013/787, (Dec. 31, 2013); U.N. High Commissioner for Human Rights, *Situation of Human Rights in the Central African Republic*, U.N. Doc. A/HRC/24/59 (Sep. 12, 2013).

⁵⁷ AU, *Communiqué of the 386th Meeting of the Peace and Security Council*, ¶ 6, AU Doc. PSC/PR/COMM.2(CCCLXXXV) (July 19, 2013).

⁵⁸ AU, *Communiqué of the 406th Meeting of the Peace and Security Council*, ¶ 9, AU Doc. PSC/PR/COMM.2(CDVI) (Nov. 13, 2013).

⁵⁹ U.N. Security Council Resolution 2127, ¶¶ 28, 50, U.N. Doc. S/RES/2127 (Dec. 5, 2013).

⁶⁰ U.N. News Centre, *‘Staggering Array’ of Gross Human Rights Abuses in Iraq – UN Report* (Oct. 2, 2014); U.N. Security Council Resolution 2170, ¶¶ 1-2, U.N. Doc. S/RES/2170 (Aug. 15, 2014).

⁶¹ KENNETH KATZMAN, CONG. RESEARCH SERV., RS21968, IRAQ: POLITICS, SECURITY, AND U.S. POLICY 17 (2015).

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can to help alleviate the suffering of the population affected by the current conflict in Iraq.”⁶² That day, President Obama authorized airstrikes “to break the siege of Mount Sinjar.”⁶³ The next day, a senior administration official justified the attacks as lawful under international law because of Iraqi consent.⁶⁴ Although the situation was undoubtedly a humanitarian crisis, the United States invoked the consent of the host state rather than Humanitarian Intervention as its legal justification.

Syria (2014-2015)

Similarly, the following month, the U.S. avoided invoking Humanitarian Intervention to justify its airstrikes on ISIL targets in Syria. On 10 September 2014, President Obama announced that the United States and its allies would “degrade and ultimately destroy” ISIL not only in Iraq, but also in Syria.⁶⁵ The airstrikes in Syria began on 22 September,⁶⁶ and the following day Ambassador Power sent a letter to Secretary-General Ban Ki-moon justifying the attacks. Rather than calling the operation a Humanitarian Intervention, however, she expressly invoked individual and collective self-defense under Article 51 of the U.N. Charter to justify the “necessary and proportionate military actions in Syria.”⁶⁷ Elaborating on collective self-defense, Ambassador Power noted that Iraq was subject to “continuing attacks from ISIL coming out of safe havens in Syria,”⁶⁸ and referenced a letter from the Minister of Foreign Affairs of Iraq to the President of the Security Council three days earlier expressly “request[ing] the United States of America to lead international efforts to strike ISIL sites” outside of Iraq’s borders.⁶⁹

⁶² U.N. Security Council Press Statement on Iraq, U.N. Press Release SC/11515 (Aug. 7, 2014).

⁶³ Office of the Press Secretary, *Statement by the President*, THE WHITE HOUSE (Aug. 7, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/08/07/statement-president>.

⁶⁴ Office of the Press Secretary, *Background Briefing by Senior Administration Officials on Iraq*, THE WHITE HOUSE (Aug. 8, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/08/08/background-briefing-senior-administration-officials-iraq>.

⁶⁵ Office of the Press Secretary, *Statement by the President on ISIL*, THE WHITE HOUSE (Sept. 10, 2014), available at <https://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1>.

⁶⁶ KENNETH KATZMAN ET AL., CONG. RESEARCH SERV., R43612, THE “ISLAMIC STATE” CRISIS AND U.S. POLICY, at 12 (2015).

⁶⁷ Letter from Samantha Power, Ambassador, to Ban Ki-moon, Secretary-General (Sept. 23, 2014).

⁶⁸ *Id.*

⁶⁹ Letter from Ibrahim al-Ushayqir al-Ja‘fari, Minister of Foreign Affairs of Iraq, to President of the Security Council (Sept. 20, 2014). Ambassador Power furthermore emphasized in her letter that Syria was “unwilling or unable” to prevent the use of its

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Neither Ambassador Power's letter nor the Iraqi Foreign Minister's letter mentioned Humanitarian Intervention.

II. Discussion

Humanitarian Intervention generally refers to the unilateral military intervention of one state into a second state to end human rights violations perpetrated by its government. While all of the incidents reviewed involved humanitarian crises of varying degrees of severity, many were interventions which were also motivated to counter terrorist groups or political factions responsible for human rights violations. In addition to those that were conducted for a mix of political and humanitarian purposes, some were at the invitation of another political faction or a nominal government. Only one incident, the action to save the Yazidis, was clearly and entirely humanitarian but it was conducted with the permission of the recognized government.

For all their differences, these nine cases are informative inasmuch as they show the continuing demand on the part of significant parts of the international community for Security Council authorization for uses of force by one state in the territory of another, even when they are ostensibly, if not substantially for humanitarian purposes. A number of points may be tentatively derived from them.

First, practice reviewed does not indicate a disposition to recognize the lawfulness of "mission-creeping" interventions, i.e., those that "creep" beyond express Security Council authorizations. In Libya, not only did many states and international organizations accuse NATO of exceeding its mandate, but NATO itself attempted to justify its actions by asserting that it had stayed within the mandate and not acted on the basis of a norm of Humanitarian Intervention. By contrast, in Ivory Coast, the final assault on Mr. Gbagbo's residence was ultimately accepted by the international community, even though its motivation was primarily political. It is significant that the Secretary-General still argued (not with the greatest plausibility) that the attack on Mr. Gbagbo was done to "protect civilians under imminent threat of physical violence." Finally, in Mali, the French intervention may have been accepted by the international community as lawful, but it was not based on Humanitarian Intervention. The French government justified its action by citing

territory for terrorist attacks. Secretary-General Ban Ki-moon implicitly accepted this argument by noting that "the strikes took place in areas no longer under the effective control of [the Syrian] Government." U.N. News Centre, *Remarks at the Climate Summit Press Conference (Including Comments on Syria)* (Sept. 23, 2014).

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Security Council authorization, the consent of the host government, and self-defense.

Second, the international community takes account of the views of regional organizations but does not accept authorization by a regional organization as per se sufficient for Humanitarian Intervention without some endorsement by the Security Council. In Somalia, it is true that IGAD and the AU never officially requested Security Council authorization for the deployment of IGASOM or AMISOM, but, in fact, neither mission was deployed before the Security Council had authorized it. Moreover, subsequent practice in the Central African Republic and Mali reveals a modern tendency for the AU and ECOWAS to expressly “urge” the Security Council to authorize armed missions before their deployment.

This tendency reflects a retreat from the notion of post hoc Security Council authorization that had gained traction following interventions in Liberia, Sierra Leone, and Kosovo. In its 2004 report, the Secretary-General’s High-level Panel had opined that “[a]uthorization from the Security Council should in all cases be sought for regional peace operations, recognizing that in some urgent situations that authorization may be sought after such operations have commenced.”⁷⁰ A few months later, the AU in a consensus document had agreed with the Panel, noting that “[Security Council] approval could be granted ‘after the fact’ in circumstances requiring urgent action.”⁷¹ Nevertheless, recent practice in Somalia, the Central African Republic, and Mali reveal an unwillingness to intervene without ex-ante Security Council authorization. Indeed, the AU has clarified that it “will seek UN Security Council authorisation of its enforcements actions” and “the [Regional Economic Communities] will seek AU authorisation of their interventions.”⁷² This policy, moreover, conforms with the U.N. Charter, which expressly states that “no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.”⁷³ Therefore, although the AU Constitutive Act and the AU PSC Protocol grant the AU Assembly and the AU PSC the power to authorize

⁷⁰ Secretary-General’s High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 272(a), U.N. Doc. A/59/565 (Dec. 2, 2004).

⁷¹ AU, *The Common African Position on the Proposed Reform of the United Nations: “The Ezulwini Consensus”*, p. 6, AU Doc. Ext/EX.CL/2(VII) (Mar. 7-8, 2005).

⁷² AU, *Roadmap for the Operationalization of the African Standby Force*, p. 5, AU Doc. EXP/AU-RECs/ASF/4(I) (Mar. 22-23, 2005).

⁷³ U.N. Charter art. 53(1). The U.N. Charter furthermore states that a state’s Charter obligations prevail over obligations under any other international agreement. *Id.* art. 103.

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interventions without expressly requiring Security Council authorization,⁷⁴ recent practice suggests that seeking ex-ante Security Council authorization is the *modus operandi*.

Third, the fact that states have attempted to justify their interventions by citing the consent of a political faction within the host state or self-defense may indicate doubts as to the lawfulness of a Humanitarian Intervention conducted without Security Council authorization. Not only did Ethiopia and Kenya not base their incursions into Somalia on Humanitarian Intervention, but the United States avoided invoking Humanitarian Intervention as well when conducting airstrikes in Iraq and Syria. It is particularly telling that the U.S.—pursuing what seems to have been a clear humanitarian objective in Iraq—chose to rely on the argument of consent rather than an argument based on the lawfulness under international law of a Humanitarian Intervention.

Interventions based on alleged consent are not without their own problems: although international law allows armed intervention upon the consent of the government of the host state,⁷⁵ the question is often whether the political faction issuing the invitation has the internal legal authority and/or popular support to do so.⁷⁶ The TFG in Somalia and the government in Iraq had far from full authority and control over the territory of their respective countries. Similarly, the right to self-defense under Article 51 of the U.N. Charter also contains many ambiguities.⁷⁷

⁷⁴ Constitutive Act of the African Union art. 4(h), July 11, 2000, 2158 U.N.T.S. 3; Protocol Relating to the Establishment of the Peace and Security Council of the African Union art. 7(1)(c), July 9, 2002. AU legal advisers have explained that language requiring Security Council authorization was intentionally omitted from the Constitutive Act and the Protocol. Ben Kioko, *The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention*, 85 INT'L REV. RED CROSS 807, 821 (2003); Jeremy I. Levitt, *The Peace and Security Council of the African Union: The Known Unknowns*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 109, 125-126 (2003).

⁷⁵ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 246 (June 27) (holding that “intervention ... is allowable at the request of the government of a State”); MALCOLM N. SHAW, INTERNATIONAL LAW 834 (7th ed. 2014) (“It would appear that in general outside aid to the government authorities to repress a revolt is perfectly legitimate”); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 317 (1963) (“[States] may ... give *ad hoc* consent to the entry of foreign forces on their territory.”).

⁷⁶ MALCOLM N. SHAW, INTERNATIONAL LAW 834 (7th ed. 2014); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 317 (1963); Report by Gerhard Hafner, 10th Commission of the Institut de Droit International, Sub-Group on Intervention by Invitation (Rhodes, 2011), ¶¶ 97-109.

⁷⁷ Report by Emmanuel Roucouas, 10th Commission of the Institut de Droit International, Sub-Group on Self-Defense (Santiago, 2007).

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Some would disagree that U.S. air strikes in Syria were an exercise of collective self-defense.⁷⁸ Yet the fact that Ethiopia, Kenya, and the United States chose to rest the lawfulness of their actions on consent and self-defense rather than Humanitarian Intervention suggests that they entertained doubts about the solidity of the latter's position in international law.

The past decade has not witnessed any cases of Humanitarian Intervention without any international authorization. Although the rhetoric of the United Kingdom and, possibly, the United States over Syria in August 2013 seemed to intimate their belief in the availability of a norm in support of Humanitarian Intervention in the face of a humanitarian crisis and Security Council deadlock, military action was never taken. And although Kenya's intervention into Somalia and the United States' airstrikes in Iraq and Syria occurred without prior international authorization, the Kenyan and U.S. governments justified their actions through consent from the host state and self-defense, not on humanitarian grounds.

III. Conclusion

State practice over the past decade has not evinced a clear move away from the requirement of Security Council authorization prior to intervention for humanitarian purposes. As discouraging as have been the human rights crises of the past decade, the international demand for action to remedy the situation is encouraging. Some unilateral actions have been approved post hoc. However, in the few instances in which states could have invoked Humanitarian Intervention to justify their actions, they have instead tried to argue that the host state had consented to the intervention, that they were acting in individual or collective self-defense, or that the relevant Security Council authorization encompassed their actions.

The Commission has concluded that state practice over the past decade has not witnessed enough clear movement away from the traditional requirement of Security Council authorization for a putative Humanitarian Intervention; while some unilateral actions may have received a degree of informal or post hoc approval, practice indicates that the international community continues to view unilateral Humanitarian Interventions undertaken without the authorization of the United Nations

⁷⁸ In particular, a spokesperson for the Russian Ministry of Foreign Affairs and the Syrian National Reconciliation Minister argued that the airstrikes required Syrian consent. *Russia Warns US Against Strikes on Islamic State in Syria*, BBC News (Sept. 11, 2014), <http://www.bbc.com/news/world-middle-east-29154481>.

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Security Council as presumptively unlawful, though sometimes subject to retroactive validation. Accordingly, the 10th Commission does not recommend any change in the final section of its Report in Santiago.

IV. Letter from Benedetto Conforti

Naples, May 1, 2015

Dear Michael,

I entirely share the conclusions you reached in your draft dated April 1, 2015. Perhaps, as far as the survey of the practice is concerned, the 10th Commission should focus its attention on the case of the airstrikes launched in Syria from September 2014 to date by the United States, Bahrain, Jordan, Qatar, Saudi Arabia and the United Arab Emirates against the Islamist extremist militant groups, guilty of heinous crimes against humanity (for details, see Wikipedia entry: *American-led intervention in Syria, 2014-present*; see also “US Department of Defense, DoD news ([http://www_defense.gov/news/articles.aspx](http://www.defense.gov/news/articles.aspx)). As far as I know, the consent of the Assad Government was not officially sought in this case, the protest by that Government, based on its lack of consent, was very weak, and the international community remained almost silent.

In my opinion, although one swallow does not make a summer, the Syria case might well provide the basis for a draft resolution whereby the *Institut*, from the standpoint of the progressive development of international law, could advocate the lawfulness of humanitarian intervention by States, coalitions of States and regional organisations whenever barbaric crimes similar to those committed in Syria, Iraq and other countries occur. It might be possible, entering into detail, to study the conditions that must be satisfied before humanitarian intervention may be lawful, especially with regard to the relationship between those who intervene and the Security Council of the United Nations (in any case the SC should be periodically informed about how the operation are going on)..

For the rest, I agree that, strictly speaking, the state of international law has not changed since the time of the Report presented to the Santiago session. Therefore, as far as I am concerned, I have nothing to add to the considerations I have already set out and reproduced at the end of the Report, especially those concerning economic sanctions. If I may, I would also refer to my speech in Santiago, in the general debate which took place in plenary session, where I evoked the so-called Radbruch formula relating to Nazi crimes (see *Annuaire de l'Institut*, Session de Santiago, vol. 72, p. 305).

Friendly regards.

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II. DELIBERATIONS DE L'INSTITUT

Troisième séance plénière Mardi 25 août 2015 (matin)

La séance est ouverte à 9 h 15 sous la présidence de M. *Müllerson*.

The *President* observed that the *Institut* had a particularly busy programme scheduled for that day. He welcomed new Associate Members of the *Institut*, elected on 23 August 2015, namely: Sir Christopher Greenwood of the United Kingdom, Mr Lauri Mälksoo of Estonia and Mr August Reinisch of Austria. He recalled that the Rapporteur of the 10th Commission had circulated a Report to the Members prior to the Tallinn Session, which was now before the plenary. He invited the Rapporteur to present the Report.

The *Rapporteur* recalled that this particular topic had had a long and tumultuous history at the *Institut*. He considered that this was the opportunity to close the issue, at least for the purposes of future deliberations by the *Institut*. He recalled that in 2007 a report had been prepared on humanitarian intervention at the invitation of the Bureau, which stemmed from a decision made in Berlin. Consequently, he reminded the Members that six points had been resolved by the plenary, which read as follows:

- I. International law embodies the right to the protection of human life and human dignity against genocide, crimes against humanity and war crimes. Every State is under an obligation to prevent or promptly put an end to genocide, crimes against humanity and war crimes, occurring within its jurisdiction or control.*
- II. Genocide, large-scale crimes against humanity or large-scale war crimes should be considered as a threat to international peace and security pursuant to Article 39 of the Charter of the United Nations.*
- III. The competent organs of the United Nations should use all statutory powers at their disposal to take prompt action to put an end to genocide, large-scale crimes against humanity or large-scale war crimes which have not been suppressed by the State within whose jurisdiction or control they are occurring.*
- IV. Actions to put an end to genocide, large-scale crimes against humanity, or large-scale war crimes shall be conducted in accordance with international law.*

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V. If military action is taken, the sole objective of such action shall be to put an end to genocide, large-scale crimes against humanity, or large-scale war crimes. International humanitarian law shall be strictly observed during and after the operations, so as to secure in particular maximum protection of the civilian population. This paragraph is without prejudice to any obligation with regard to the repression of international crimes.

VI. This Resolution does not address the question of the lawfulness of military actions which have not been authorised by the United Nations but which purport to have been taken to end genocide, large-scale crimes against humanity, or large-scale war crimes.”

He underscored that the first five points had been inspired by the fairly new Responsibility to Protect notion, which had been advanced in different iterations by the United Nations Secretary-General. He added that the sixth point went beyond the first five. He pointed out that the President of the Santiago Session, Mr Orrego Vicuña, had issued a Resolution to indicate that the matter which the Resolution did not address might be taken up by another group. The Rapporteur mentioned that there had been an open discussion of the substantive issue at the Tokyo Session, on which he could not comment given his absence in Tokyo. He confirmed that he had been subsequently approached by the Secretary-General and Mr Owada to reconvene the 10th Commission in order to decide whether it would proceed to take up the sixth point of the Santiago Resolution.

He explained that the Commission had been asked whether State practice since the Santiago Session, especially in light of the Responsibility to Protect, warranted a reconsideration of the *Institut's* decision. He recounted that a meeting of the Commission had been convened in Paris, at which it was agreed that he should prepare a draft report providing a granular examination of relevant incidents since 2007, some even starting as early as 2005, in order better to assess whether recent state practice supported the proposition that military actions which have not been authorised by the United Nations but which purport to have been taken to end genocide, large-scale crimes against humanity, or large-scale war crimes might be lawful.

The Rapporteur summarised the nine incidents examined in the Report as follows: whilst all incidents reviewed involved humanitarian crises of varying degrees of severity, many interventions were motivated by terrorist groups or political factions responsible for human rights

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violations. He highlighted that only one intervention, the action to save the Yazidis, was clearly and entirely humanitarian but was of scant evidentiary value for the inquiry inasmuch as it was conducted with the permission of the recognised government. He concluded that the practice reviewed did not clearly indicate a disposition to recognise the lawfulness of unilaterally taken humanitarian interventions.

He emphasised that cases of authorised action by the Security Council, which crept into humanitarian action, i.e. kinds of “mission creep”, were not supported. In that regard, he provided the example of the Security Council resolution concerning Libya at the time of the overthrow of the Qaddafi Government. By way of counter-example, he invoked the Ivory Coast precedent, where the action taken to expel former President Laurent Gbagbo went beyond the Security Council Resolution ostensibly as a way of achieving a political solution. He interpreted that precedent as failing to provide greater support for unilateral humanitarian action.

The Rapporteur underlined that the record reviewed showed that the international community took account of views of regional organisations, but did not accept authorisation of such organisations as per se sufficient for humanitarian intervention without some endorsement by the Security Council. He observed that African Union practice varied slightly given that its consensus document confirmed that Security Council authorisation could be secured after the fact, in circumstances requiring urgent action.

Finally, the Rapporteur dwelled on the fact that States had attempted to justify intervention by citing the consent of a political faction within the host State, or on the basis of self-defence. He opined that those approaches might cast doubt as to the validity of humanitarian intervention being conducted without Security Council authorisation. In conclusion, he indicated that no cases of intervention without international authorisation had been witnessed in the past decade. He further added that State practice had not evinced a clear move away from the requirement of Security Council authorisation prior to intervention for humanitarian purposes. Consequently, he declared that the Commission proposed not to recommend any change to the sixth section of the 2007 Report prepared at the Santiago Session. The Rapporteur indicated that he was available for further discussion and welcomed comments.

The *President* thanked the Rapporteur for his excellent work and concise presentation. He recalled that the 10th Commission had met in Paris in January 2015 to discuss the matter addressed in the report, and had tasked the Rapporteur with preparing the document under study. The President remarked that the subject matter of the report had been

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discussed at length at the Tokyo Session, which had resulted in an exchange of diverse views. He expressed the wish that the work of the 10th Commission be concluded at the Tallinn Session, which also coincided with the Commission's own inclination. He invited the Members to comment on the Rapporteur's presentation, stressing that they should, to the extent possible, focus on procedural questions rather than substance. He submitted one proposal as to next steps, namely to adopt the Report prepared by the Rapporteur, particularly the final paragraph of its conclusions, which, in his view, delivered an accurate summary of the current state of the law.

Mr *Rao* expressed his gratitude to the Rapporteur and Commission for their excellent work on a fundamental international legal question. As a matter of procedure, he suggested that the Rapporteur indicate the manner in which he wished to have the decision reported to the plenary. He observed that such clarification would be illuminating given that even though reference had been made to the work carried out at the Santiago Session, some Members had not attended it.

The *Rapporteur* pointed out that his recommendation, which was the consensus within the 10th Commission, was to acknowledge that the Commission had fulfilled the recommendation made by the President at the 2007 Santiago Session. He opined that it was satisfactory for the plenary to take note that an additional report had been prepared and placed on record. He maintained that there were no grounds to adopt a further Resolution.

M. *Conforti* félicite le Rapporteur et la Commission pour son précieux rapport. Il s'interroge sur la possibilité de conduire des interventions d'humanité en l'absence d'une autorisation du Conseil de sécurité. Il estime que l'Institut pourrait faire avancer ce débat puisqu'il est fort probable que les sentiments de la communauté internationale en cette matière changeront dans les années à venir. Il s'appuie sur les événements se rapportant aux interventions en Iraq et en Syrie, menées par les Etats-Unis et une coalition d'Etats majoritairement arabes dans le cadre de la lutte contre le terrorisme. Il souligne que les interventions en Iraq et en Syrie n'ont pas fait l'objet d'une autorisation du Conseil de sécurité. Il insiste sur le fait que les interventions en Syrie n'ont suscité aucune réaction négative de la part de la communauté internationale. Il rappelle que le gouvernement syrien de M. Bachar el-Assad ne s'y était pas opposé catégoriquement, quoiqu'il ait précisé que son consentement était nécessaire au début sans toutefois avoir insisté à ce propos par la suite.

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Par souci épistémologique, il estime qu'une étude pourrait être menée afin de déterminer le caractère juridique d'un Etat barbare qui commet de sérieux crimes, tel l'Etat Islamique en Syrie. Il considère que dans l'éventualité où une intervention d'humanité était conduite dans cet Etat, pareil scénario pourrait permettre d'arriver à une autre conclusion que celle qui a été présentée par la 10^{ème} Commission. Il souhaite que l'Institut reconnaisse que dans ce cas extrême, une intervention d'humanité pourrait être conduite sans autorisation des Nations Unies. Il pense que la pratique des Etats deviendra un jour favorable à cette éventualité.

The *President* urged the Members to focus on deciding what to do with the paper submitted by the 10th Commission and the Report adopted at the Santiago Session. He declined to reopen the discussion on matters of substance, stressing that the plenary had to decide on the procedural questions before it, in particular as to whether a new commission had to be created to take the matter forward.

M. *Momtaz* félicite le Rapporteur pour son dévouement et sa perspicacité, reconnaissant que le sujet à l'examen est extrêmement difficile à traiter en raison des controverses qui existent en la matière. Il estime que l'Institut ne pourrait aller au-delà de ce qui a été proposé par le Rapporteur, surtout lorsque l'on se réfère à son rapport qui fait état, de manière approfondie, des cas qui se sont présentés en la matière depuis 2007. En revanche, il considère que cette étude de cas permet de constater qu'une certaine tendance se dégage sans pour autant confirmer que des opérations d'intervention d'humanité avec recours à la force puissent être menées sans autorisation du Conseil de sécurité. Il propose que l'Institut s'en tienne au projet de résolution préparé à la Session de Santiago, document qu'il faut lire en prenant pour appui le rapport présenté par le Rapporteur dans le cadre de la Session de Tallinn.

Mr *Frowein* called into question the Rapporteur's conclusion that self-defence and consent were perceived as the main justifications for humanitarian intervention. He cautioned that this might suggest that States entertained doubts as to the solidity of possible justifications for humanitarian intervention. He observed that both self-defence and consent were clearly regulated justifications under international law. He further recommended that reference be made to the conclusion of the United Nations Secretary-General's High-level Panel on Threats, Challenges and Change that, in some urgent situations, Security Council authorisation could be sought after a humanitarian operation had commenced. He contended that this conclusion, combined with various

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other statements including those made by the United Nations on the massacre at Srebrenica, should be highlighted.

Le *Secrétaire général*, s'exprimant en sa qualité de Membre de l'Institut, rappelle que cette question a été discutée à la session de Tokyo. Il précise que M. Owada, alors Président, sans prendre position, était très attaché à cette question. Sur cette base, le Secrétaire général a soumis un projet qui portait de l'idée et qu'il est du devoir des Etats de collaborer pour faire respecter les droits fondamentaux et qu'il ne saurait être reproché à celui qui intervient de les avoir fait respecter lorsque leur violation, particulièrement grave, est constitutive d'un crime « de droit international ». Il estime qu'on ne peut parler en l'occurrence d'un « droit » à l'intervention, au sens propre du terme. C'est un devoir qui est fondamentalement en cause, dont les enjeux transcendent la souveraineté immédiate de l'Etat concerné.

Le Secrétaire général souligne qu'aucun projet de résolution n'a été présenté à la session de Tokyo et que l'Institut n'a pas tranché entre l'approche préconisée par le Rapporteur et la sienne. Cela dit, il ne tient pas ces deux approches pour incompatibles. Sans doute, un droit d'intervention ainsi entendu n'a-t-il pas de support coutumier très explicite. Il n'empêche que la cohérence du droit paraît devoir faire admettre qu'il puisse être dérogé à l'interdiction du recours unilatéral à la force lorsque des droits humains fondamentaux sont gravement et systématiquement violés. Ce n'est d'ailleurs pas seulement un droit, cela peut le cas échéant être un devoir. Dans les droits nationaux, la non-assistance à personne en danger est d'ailleurs, qu'il sache, pénalement sanctionnée au titre de crime ou du moins de délit. On ne voit dès lors pas très bien pourquoi il devrait être nécessairement reproché à un Etat de recourir à la force pour faire respecter des droits fondamentaux humains lorsqu'ils sont clairement et gravement violés. Ou du moins ne voit-on pas qui pourrait le lui reprocher sérieusement en l'absence d'une décision prise par les Nations Unies. C'est un peu d'ailleurs ce qu'a laissé entendre notre confrère Conforti. Cela dit, il reste que l'exercice du devoir fondamental des Etats de s'entraider pour faire respecter ces droits ne peut pas être disproportionné, ni conférer à celui qui intervient, sur le plan territorial par exemple, un bénéfice quelconque. Dans de telles circonstances, le Secrétaire général estime donc qu'il ne saurait être reproché à celui qui intervient d'être intervenu, et ce même s'il recourt à la force armée alors même qu'aucune règle explicite ne la valide par une règle spécifiquement.

Cela dit, le Secrétaire général souligne que celui qui intervient doit accepter que sa responsabilité puisse être mise en cause ; s'il s'y refuse

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par principe, la légalité de son intervention est assurément douteuse. Comme le Rapporteur mais d'une manière assurément différente, il cherche le moyen juridique qui permettrait de « justifier » l'intervention d'humanité quand le Conseil de sécurité ne s'en est pas explicitement saisi. Il aurait certes été préférable que la question fût explicitement réglée. Elle ne l'a pas été. On voit mal dès lors qu'une telle approche doive être nécessairement rejetée, du moins tant que les autorités collectives ne fonctionneront pas mieux qu'elles le font aujourd'hui.

The *President* recognised that many views had been voiced within the plenary and urged the Members to focus their attention on the report that had been submitted to them.

The *Rapporteur* responded to the concerns raised by the Secretary-General and recalled that the 2007 discussions in Santiago had generated lively and passionate exchanges. He emphasised that the overwhelming view in the plenary had been against humanitarian intervention. He underlined the tension that existed between the protection of human rights in the 21st century and the sovereignty and autonomy of States. He reminded the plenary that no agreement had been able to be reached at the Santiago Session, that, as a matter of policy (his own view) there might be exceptional circumstances in which unilaterally initiated military action for ostensibly humanitarian purposes could be justifiable. He stressed that all operative paragraphs of the Resolution adopted at the Santiago Session related to action taken by authorization of the Security Council.

The Rapporteur concluded that the initiative proposed by the Secretary-General, which was similar to the approach originally espoused by the 10th Commission, had been rejected. He underscored that it was precisely the lack of will to adopt a Resolution that had prompted the Commission to examine State practice in order to identify the trend suggested by the Secretary-General. He concluded that the facts simply did not support the existence of such a trend. In response to Mr Frowein, the Rapporteur called attention to the fact that States that had taken unilateral action did not mention humanitarian intervention; the sole exception was the United Kingdom, which mentioned it briefly in connection with the intervention in Syria but did not follow through with any action. He interpreted those precedents as confirmation that a trend towards greater toleration for unilateral humanitarian intervention had not emerged. He confessed that, in his personal view, the ensuing Resolution was unsatisfactory but was consistent with the reality on the ground.

The *President* thanked the Rapporteur and commended him for his wonderful work both as a scholar but also as part of a collective effort.

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He lauded the fact that the Rapporteur had repressed his own personal views on humanitarian intervention to recognise the actual state of the practice under international law, as opposed to espousing *de lege ferenda* inclinations. He encouraged the Members to read the Report prepared by the Rapporteur, particularly the concluding paragraph, which he characterised as very nuanced.

M. *Ranjeva* exprime ses profonds remerciements au Professeur Reisman au vu de son très brillant rapport. Il rappelle les combats homériques qui ont eu lieu à Santiago sur le sujet, tout en se félicitant du fait qu'ils aient illustré la loyauté des membres de l'Institut. Depuis Tokyo, il relève que les idées ont progressé et considère que les termes du problème ont évolué, car les interventions humanitaires menées ont été un échec. Dès lors, il estime que l'institution de l'intervention humanitaire requiert des approfondissements. Il suggère que le rapport soit amélioré et qu'il fasse preuve de davantage de dialectique, c'est-à-dire qu'il ne se contente pas d'analyser les actions de manière descriptive. Il se demande pourquoi les termes apparaissent si critiques et il n'est, de son point de vue, peut-être pas nécessaire d'insister autant sur les échecs des interventions. Deux problèmes le préoccupent particulièrement. Celui du consentement, de sa réalité, ainsi que celui de la distinction entre la décision, la portée de la décision, et les effets de la décision.

The *President* recalled that the question of consent had been examined in detail in Mr Hafner's previous report on *Military Assistance on Request*, and that the Members had now to decide on a different matter.

M. *Kohen* exprime ses remerciements au Rapporteur et à la 10^{ème} Commission pour tous les efforts accomplis pour surmonter les difficultés énormes du sujet. Il relève qu'il est délicat de trouver un point d'accord, et que la question divise profondément l'Institut, ce qui ne favorise pas son image. L'Institut doit, de son point de vue, faire avancer le droit international dans le sens de la justice et de la paix. L'adoption d'une résolution lui semble délicate, tant les avis divergent dans la salle. Il serait en outre difficile d'entrer dans le contenu du rapport, mais il souhaite tout de même soulever deux questions. La première, relative au fait que le rapport finit sur un constat, selon lequel il est impossible d'affirmer qu'il existe une possibilité d'agir de manière licite sans autorisation du Conseil de sécurité. Mais dans le même temps, le rapport fait référence à des autorisations informelles – M. Kohen considère qu'elles devraient être exclues sur une question aussi importante – ou rétroactives – ce qu'il ne conçoit pas non plus. Il revient sur l'exemple de l'Union africaine, qui avait décidé d'intervenir mais n'avait pas agi tant que le Conseil de sécurité n'avait pas donné son autorisation. Il n'y a

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donc là aucune rétroactivité du consentement, intervenu avant l'action. Deuxièmement, il n'existe selon lui aucune tension entre droits de l'homme et souveraineté des Etats. M. Kohen relève que l'ensemble de ses consœurs et confrères souhaiterait aller dans le sens de la protection des droits fondamentaux et de la fin de crimes internationaux tels que le génocide. Mais la tension qui existe se trouve en réalité exclusivement entre le respect du système multilatéral de sécurité collective et l'unilatéralisme. C'est sur cette idée que M. Kohen préfère s'arrêter.

Le *Président* attire l'attention sur le fait que le texte ne parle que de validation rétroactive, ce qui doit être distingué d'une autorisation rétroactive.

Mr *Abi-Saab* expressed his warm appreciation for what the Rapporteur had done, even against his own inclination. He wondered about the next step, noting the only three options. First, the Members could take note of this additional report, and consider it as a final point. Second, the conclusions of this report could be integrated into the existing resolution. Third, the matter could be reopened, according to the Secretary-General's proposal, following which, in certain exempting circumstances, military action could be considered as lawful.

Mme *Infante Caffi* tient à féliciter M. Reisman pour son rapport très équilibré, dans lequel les différentes positions sont prises en compte. Elle souhaite relever deux points lui semblant importants. Elle remarque tout d'abord que la régulation de l'emploi de la force n'est pas le seul moyen de lutte contre la commission de crimes graves en droit international. Le contrôle des moyens militaires lui semble en outre déterminant, en ce qu'il permet une prévention de ces crimes. Ce contrôle comprend nécessairement une obligation corrélative de coopération des Etats avec les organisations internationales en charge de cette surveillance. Elle remarque que cette question de droit international ne relève pas du droit de l'intervention armée. En outre, elle met l'accent sur l'aspect de coopération des Etats avec les organisations chargées de la protection des droits de l'homme, lesquelles ne peuvent prendre de décisions fondées que si toutes les informations pertinentes sur l'Etat en question leur ont été fournies. Bien que Mme Infante Caffi n'entende pas aller au-delà de la résolution de Santiago, elle désire simplement attirer l'attention sur ces points.

M. *Kirsch* considère qu'il s'agit là d'un excellent rapport. Il rappelle que le Rapporteur ne souhaite pas aller au-delà de l'affirmation selon laquelle il n'existe aucune intervention humanitaire licite sans autorisation. A son sens cependant, si une évolution pouvait être constatée depuis Santiago, elle serait négative. Le précédent libyen joue

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en ce sens, et a conduit depuis à une sensibilité extrême des Etats sur la question de l'utilisation de la force armée au-delà de l'intention initialement exprimée. De son point de vue, la répétition du sixième paragraphe de la résolution de Santiago serait une perte de temps, qui conduirait simplement à éviter de parler de l'essentiel.

Mr *Subedi* thanked the Rapporteur. He mentioned that he had not been present in Santiago during the discussion, and wondered whether the 2005 United Nations World Summit Outcome Document, dealing with the Responsibility to Protect, with or without authorisation, had been discussed and taken into account.

Mr *Yusuf*, even if a member of the 10th Commission, wanted to thank Mr Reisman for his enlightened report. He expressed the opinion that the Members should not go beyond the facts presented, so as not to invent the law but take only reality into account. He remarked that a long way had been made in the last twenty years. Particularly, in the context of the African Union, a remarkably large number of States had ratified a treaty which authorised an organisation to intervene on their own territory. This constituted, to his mind, major progress. He also took note of the Report, and noted that its conclusion appeared much clearer than what was in the Santiago Resolution. Consequently, Mr Yusuf opined that this Report should be adopted, and the matter left at this point.

Mr *Meron* voiced that he was not going to quarrel with his colleagues about *lex lata*. He indicated that he would feel unhappy, though, if the *Institut* closed the book on this matter here. He remarked that there was currently a period of retrogression in respect of humanitarian law and human rights in general, as illustrated by recent horrors. He concluded that this excellent Report was insufficient, since it stuck to the Security Council's competence, and found that there had been no development on this problem over the past years. He wondered whether the *Institut* could not make some recommendations about interventions without Security Council authorisation. Speaking about territory on which interventions might occur and the territorial State's consent, he noticed that, recently, ISIS actions occurred in failed States. Situations such as those in Syria and Iraq could then be carefully considered. He queried whether the Security Council could be encouraged to act if the international community demonstrated its will when facing some unacceptable situations.

The *President* expressed his regret, as he had to put an end to the discussion.

Le *Secrétaire général*, s'exprimant à titre personnel, fait remarquer qu'en droit interne, la non-assistance à personne en danger constitue un

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délict ou un crime. Il serait difficilement compréhensible qu'en droit international, ce soit l'assistance à personne en danger qui le devienne.

The *President* urged the Members to finish the matter on this Report, which he considered a most excellent one.

The *Rapporteur* considered that the diversity of views expressed demonstrated that no affirmative decision could be taken. In the absence of a broad consensus, a *de lege ferenda* report was not desirable. While respecting the views of his colleagues and, indeed, sharing some of them, he doubted the wisdom of opening the discussion to matters such as unilateral actions, given the manifest absence of consensus.

Mr *Tomka* sought clarification on a point, wondering whether there was a formal text on which they would have to vote, since they could not be asked to vote on a report.

The *President* proposed to take note of the text as it stood, and close the matter.

Mr *Koroma* called into question the language used in the last paragraph of the report, since the mention of retroactive validation could allow for a unilateral intervention, expecting a future validation. The African Union precedents showed this danger. As a consequence, he requested that the Commission check this formulation.

The *Rapporteur* raised the point that any formulation might be subject to objections, additional reason for not changing the Santiago Resolution. With all due respect to the African Union references, he did not agree with the proposal that the Commission engage in further deliberation.

Mr *Koroma* insisted on his point, urging the *Rapporteur* to look once again at the terms used. He also took the opportunity to underscore that the Yemen precedent would have been worthy of consideration in the Commission's study on humanitarian intervention.

The *President* recalled that no further debate should arise unless it pertained to procedural matters.

M. *Salmon* rebondit sur les propos de M. Tomka, et considère qu'il faut achever le travail de cette façon. Ce n'est pas la première fois que l'Institut « prend note » d'un rapport. Il est toutefois utile d'avoir un texte afin de prendre note du rapport, féliciter le *Rapporteur*, et dire ce que l'Institut choisit de faire – vraisemblablement clore la question. Ces trois points doivent, à son sens, faire l'objet d'une résolution à part entière.

The *President* agreed.

Mr *Bucher* suggested that the matter be reserved, which was better than closing it, so as not to predict the future.

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The *President* specified that the matter was only completed for the *Institut*, not as a whole. He referred to a text prepared by the Rapporteur and Mr Salmon that was distributed to the Members for their consideration. He indicated that whilst the plenary would read the text, the new Commission des Travaux had to be put urgently into place so that it could begin its work at the Tallinn Session. He invited the Chairman of that Commission, Mr Treves, to make his way to the podium. In the interim, the President congratulated and welcomed newly elected Member, Mrs Laurence Boisson de Chazournes, highlighting that she had been in Tallinn before and had garnered the highest amount of possible votes in the election of 23 August 2015.

Mr *Treves* drew attention to the fact that five vacancies had to be filled on the Commission des Travaux. He reminded the plenary that Messrs Hafner and Audit, Mrs Borrás, Messrs Vinuesa and Wildhaber and Mrs Xue would continue to serve on the Commission. He confirmed that he had consulted with both the Secretary-General and Secretary-General-elect, along with several Members, in order to establish the final list of candidates. He announced the composition of the final list for membership to the Commission, which included Mr Kazazi, Mrs Damrosch, and Messrs Murase, Basedow and Sicilianos. He observed that the final list met with the approval of the plenary. He stressed that the Commission in its full composition had an intensive programme of work ahead, recalling that it had not convened at the Tokyo Session or prior to the Tallinn Session. He hoped that a meeting of the Commission could be scheduled the next day.

The *President* declared that all efforts would be expended to accommodate the Commission, and suggested that it meet immediately after the plenary session. The President reverted to the text prepared by the Rapporteur of the 10th Commission and Mr Salmon, with a view to completing the work of that Commission. He invited comments from the Members on the text.

Mr *Koroma* proposed that the second paragraph read “and decides that the work of the Tenth Commission has been concluded [or completed]” as opposed to “and decides ... has been accomplished”.

M. *Ranjeva* estime que le dernier membre de la phrase devrait se lire « et constate que les travaux de la Dixième Commission sont ainsi arrivés à leur terme » plutôt que « et constate ... arrivés à leur fin ».

Le *Président* signale à l'assemblée plénière que M. Salmon est d'accord avec la proposition de M. Ranjeva.

Dame *Rosalyn Higgins* opined that the first limb of the sentence should be moved to the end, so that the *Institut* took note of the report of

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the 10th Commission after thanking its Rapporteur and confirming that its work had been concluded. She supported the proposals advanced by Mr Koroma.

The *President* shared an amendment submitted by Mr Gaja that modified the second limb of the sentence to read “expresses its gratitude to the Rapporteur, Michael Reisman, and the Members of the Commission for their excellent work”, as opposed to “thanks the Rapporteur ...”. The President underscored that the amendment introduced by Mr Gaja also revised the third limb to read “that the work of the Tenth Commission has come to an end”, as opposed to “that the work of the Tenth Commission has been accomplished”.

Mr *Abi-Saab* opined that the text would read better by first stating that the *Institut* took note of the Commission’s Report, then indicating that it considered with that Report that the work of the Commission had been concluded, and finally expressing its gratitude to the Rapporteur and the Commission.

The *President* confirmed the final wording of the text adopted by the plenary:

“The *Institut* takes note of the report of the Tenth Commission, expresses its gratitude to the Rapporteur, Michael Reisman, and the members of the Commission for their excellent work, and notes that the work of the Tenth Commission has been concluded.”

He confirmed that the French version of the third limb should read as follows: « *et constate que les travaux de la Dixième Commission sont ainsi arrivés à leur terme.* » He congratulated the Rapporteur for his excellent work and teamwork within the Commission, stressing that although the Rapporteur might have had different personal views on humanitarian intervention, he had attempted to accommodate different viewpoints and, most importantly, state the existing law with all its attendant controversies and deficiencies. The President confirmed that the afternoon plenary session would be devoted to the Report prepared by the Rapporteur of the 14th Commission.

The President confirmed that a special session on sanctions was scheduled, which would feature short presentations by Mrs Damrosch and Mr Pellet.

La séance est levée à 11 h 40.

